REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES.

FEBRUARY TERM 1819.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. IV.

FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

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AUTHOR OF THE "FEDERAL DIGEST," ETC.

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
No. 144 NASSAU STREET.
ALBANY: 475 BROADWAY.
1883.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,
" WILLIAM JOHNSON,
" BROCKHOLST LIVINGSTON,
" THOMAS TODD,[1]
" GABRIEL DUVALL,
" JOSEPH STORY,

} Associate Justices.

WILLIAM WIRT, Esq., Attorney-General.

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[1] Mr. Justice TODD was absent the whole of this Term, on account of indisposition.

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OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1819.

TRUSTEES OF THE PHILADELPHIA BAPTIST ASSOCIATION *et al. v.* HART'S EXECUTORS.[1]

Charitable uses.

In the year 1790, S. H., a citizen of Virginia, made his last will, containing the following bequest: "Item, what shall remain of my military certificates, at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia, annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792, the legislature of Virginia, passed an act repealing all English statutes; in 1795, the testator died. The Baptist Association in question had existed as a regularly organized body for many years before the date of his will; and in 1797, was incorporated by the legislature of Pennsylvania, by the name of "The Trustees of the Philadelphia Baptist Association."

Held, that the Association, not being incorporated at the testator's decease, could not take this trust, as a society.

*2] *That the bequest could not be taken by the individuals who composed the Association at the death of the testator.

That there were no persons to whom this legacy, were it not a charity, could be decreed.

And that it could not be sustained, in this court, as a charity.

Charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was extended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute 43 Eliz.

If, in England, the prerogative of the king, as *parens patriæ*, would, independent of the statute of Elizabeth, extend to charitable bequests of this description: *Quære?* How far this principle would govern in the courts of the United States?

Held, that it was unnecesssry to enter into this inquiry, because it could only arise where the attorney-general is made a party.

IN the year 1790, Silas Hart, a citizen and resident of Virginia, made his last will in writing, which contains the following bequest: "Item, what shall remain of my military certificates, at the time of my decease, both

[1] This case was practically overruled in Vidal *v.* Girard's Executors, 2 How. 127; for though it is there stated to have been decided upon the local law of Virginia, where the English statute of 43 Eliz., ch. 4, was not in force, yet the court came to the conclusion, in the latter case, that

principal and interest, I give and bequeath to the Baptist Association that, for ordinary, meets at Philadelphia, annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family."

In 1792, the legislature of Virginia passed an act, repealing all English statutes, including that of the 43 Eliz., c. 4. In the year 1795, the testator died. The Baptist Association which met annually at Philadelphia, had existed as a regularly organized body, for many years before the date of this will, and was composed of the clergy of several Baptist churches, of different states, and of an annual deputation of laymen from *the same churches. *3] It was not incorporated, until the year 1797, when it received a charter from the legislature of Pennsylvania, incorporating it by the name of "The Trustees of the Philadelphia Baptist Association." The executors having refused to pay the legacy, this suit was instituted in the circuit court for the district of Virginia, by the corporation, and by those individuals who were members of the association at the death of the testator. On the trial of the cause, the judges of that court were divided in opinion, on the question, whether the plaintiffs were capable of taking under this will? Which point was, therefore, certified to this court.

The *Attorney-General*, for the plaintiffs, argued, that the peculiar law of charitable bequests did not originate in the statute of the 43 Eliz., which was repealed in Virginia, before the death of the testator. If lands had been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise would have been held good at law; and consequently, the court of chancery would have enforced the trust, in virtue of its general equity powers, independent of that statute. The statute does not profess to give any validity to devises or legacies of any description, not before valid; but only furnishes a new and more convenient mode for discovering and enforcing them; but the case before the court is such as requires the interposition only of the ordinary powers of a court of equity. Devises equally vague and indefinite, have been sustained in courts of common law, before the statute of Elizabeth, *and would, *à fortiori*, *4] have been supported in courts of equity. *Porter's Case*, 1 Co. 22 *b*; Plowd. 522. And the court of chancery, exercising the prerogative of the king as *parens patriæ*, has been constantly in the habit of establishing charitable bequests of this nature. "In like manner," says Lord Chancellor

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the jurisdiction of the chancery over charitable uses was not derived from the statute, it appearing from the publication of the ancient English records, to have been exercised, in many cases, long before the statute was passed; and, of course, the argument derived from the repeal of all English statutes by the legislature of Virginia, fell to the ground. See Fontain *v.* Ravenel, 17 How. 394. In Perin *v.* Carey, 24 Ibid, 501, the court admitted, that whatever doubts on that subject had been expressed in the Baptist Association *v.* Hart's Executors, they had been removed by later and more satisfactory sources of information. So also in Kain *v.* Gibboney, 101 U. S. 367, Mr. Justice STRONG, says, that "trusts for charitable uses are not dependent for their support upon that statute; before its enactment, they had been sustained by the English chancellors, in virtue of their general equity powers, in numerous cases, and generally, in this country, it has been settled, that courts of equity have an original and inherent jurisdiction over charities, though the English statute is not in force, and independent of it." This, however, is not the law of Virginia. Ibid.

MACCLESFIELD, "in the case of charity, the king, *pro bono publico*, has an original right to superintend the case thereof, so that, abstracted from the statute of Eliz., relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice, to file informations in chancery, in the attorney-general's name, for the establishment of charities." *Eyre* v. *Countess of Shaftsbury*, 2 P. Wms. 119. So also, Lord Keeper HENLEY says, "and I take the uniform rule of this court, before, at, and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void under the statute Hen. VIII., yet they were always considered as good in equity, if given to charitable uses." *Case of Christ's College, Cambridge*, 1 W. Black. 91. The powers of the court of chancery over these subjects, are derived from, and exercised according to the civil law. 3 Bl. Com. 476; *White* v. *White*, 1 Bro. C. C. 15; *Moggridge* v. *Thackwell*, 7 Ves. 36. Lord THURLOW says, "the cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses, not ascertained, shall be applied to some *proper object." [*5
White v. *White*, 1 Bro. C. C. 15. By that law, bequests for charitable purposes, *ad pios usos*, are not void for uncertainty. Swinb. pt. 1, § 16; pt. 7, § 8. But even supposing all the powers of the English court of chancery over charities to have been originally derived from the statute of Elizabeth, still it does not follow, that the courts of the United States have not all the powers which the English courts of equity possessed, when this country was separated from the British empire. The chancery system originated in various sources; in the peculiar jurisprudence of the court, which may be denominated its common law; in statutes; and in the authority of the chancellor, as keeper of the king's conscience. It is difficult to find any chancery decisions wholly purified from the influence of statutory provisions. The grant of equity powers in the constitution, to the national judiciary, extends "to all cases in equity." It is not limited to those cases which arise under the ordinary jurisdiction of the court of chancery. This is not a question of local law, nor can the equity jurisdiction of the United States courts depend upon the enactment or repeal of local statutes. This court has already determined, that the remedies in the court of the United States, in equity, are to be, not according to the practice of state courts, but according to the principles of equity as known and practised in that country from which we derive a knowledge of those principles. *Robinson* v. *Campbell*, 3 Wheat. 212. In England, this bequest would, unquestionably, be sustained. The association, which was *the object of the [*6
testator's bounty, though unincorporated at the time, was certainly as definite a body as the "sixty pious ejected ministers," in one case (*Attorney-General* v. *Baxter*, 1 Vern. 248; *Attorney-General* v. *Hughes*, 2 Ibid. 105), or, "the charitable collections for poor dissenting ministers living in any county in England," in another. *Waller* v. *Childs*, Amb. 524. Nor was it necessary that they should be incorporated, in order to take. A devise by an impropriator, directly "to one who served the cure, and all who should serve it after him," &c., has been carried into effect. *Anon.*, 2 Vent. 349. So, if the devise be to a charitable use, though the object be not *in esse*, and though it depend on the will of the crown, whether it shall ever be called

into existence, equity will establish it. *Lady Downing's case*, Ambl. 592 ; *Aylet* v. *Dodd*, 2 Atk. 238 ; *Attorney-General* v. *Oglander*, 3 Bro. C. C. 166 ; *Attorney-General* v. *Bowyer*, 3 Ves. jr. 725.

Leigh, contrà, contended, that the association could not take the bequest, either in their individual or in their collective capacity. Not as individuals ; because the persons composing the association were continually fluctuating, and were not designated, nor indeed known, at the time of the bequest. No personal benefit was intended to them. The testator's intent was, to constitute the association, in its collective capacity, trustee of the fund, for this charitable purpose ; and whether the trust can be carried into
*7] effect or not, they cannot take individually *to their own use. *Morice* v. *Bishop of Durham*, 9 Ves. 399 ; s. c. 10 Ibid. 522. Nor can they so take in their collective capacity, because not incorporated at the time : and the subsequent incorporation does not help their case. 8 Vin. Abr. tit. Devise H. pl. 1 ; *Widmore* v. *Woodroffe*, Ambl. 636. Therefore, this is to be regarded as a bequest to charitable uses, without the intervention of trustees to take the legal estate and fulfil the uses. According to the law of Virginia, which must govern in this case, such a trust cannot be carried into effect by any court in any mode. Had such a case occurred in England, it is admitted, that the court of chancery would carry the trust into effect, by supplying legal and capable trustees, to take and hold the fund for the objects of the testator's charity ; or, if those objects were not designated in the testator's will with sufficient certainty, would execute it, upon the doctrine of *cy pres*, for objects *ejusdem generis*, according to a scheme digested by the master. But the court of chancery in England exercises such powers solely in virtue of the statute of the 43 Eliz.

All ancient precedents of the exercise of such powers, to effect such charitable uses, are expressly stated to be founded on that statute. *Attorney-General* v. *Rye*, 2 Vern. 453 ; *Rivett's case*, Moor 890 ; *Pigot* v. *Penrice*, 2 Eq. Cas. Abr. 191, pl. 6 ; *Attorney-General* v. *Hickman*, Ibid. 193, pl. 14. As all the early decisions are founded on the statute, so the more modern cases are founded on the authority of the ancient ; with this only extension
*8] of their principle, that although the statute merely provides that *charitable donations shall be applied to such of the charitable uses therein expressed, for which they were appointed by the donors or founders, the court of chancery has gone a step farther, and held, upon the equity of the statute, that where objects of charity are in any way pointed out, however vaguely and indefinitely, the court will apply the fund to charitable uses of the same kind with those intended by the donor, according to a scheme digested by the master. *Baylis* v. *Attorney-General*, 2 Atk. 239 ; *White* v. *White*, 1 Bro. C. C. 12 ; *Moggridge* v. *Thackwell*, 3 Ibid. 517, s. c. 1 Ves. jr. 464 ; s. c. 7 Ibid. 36. All the elementary writers and compilers concur in deducing the jurisdiction of the English court of chancery over charitable bequests from the statute of Eliz. ; tracing all the powers of the court, as a court of equity, over this subject, to that source ; its liberality and favor toward charitable donations ; its practice of supplying all the defects of conveyances to charitable uses ; of substituting trustees where those named by the donor fail, before the vesting of the legal estate ; and of taking on itself the execution of the trust, where incapable, or no trustees

are appointed by the donors. 2 Bl. Com. 376 ; 2 Fonbl. Eq. 213 ; Roberts on Wills 213, 214 ; 1 Bac. Abr., tit. Ch. Uses ; 5 Vin. Abr. same tit. ; 1 Burn's Eccles. Law, same tit. Indeed, no donation is considered in England as a donation to charitable uses, unless for such uses as are enumerated in he statute of Eliz., or such as are analogous. *Attorney-General* v. *Hewer*, 2 Vern. 387 ; *Brown* v. *Yeale*, 7 Ves. 50, note c ; *Morice* v. *Bishop of Durham*, 9 Ibid. 399 ; s. c. 10 Ibid. 540. The very signification of *the words charity and charitable use are derived from that statute. In [*9 the case last cited, Sir W. GRANT said, "In this court, the signification of charity is derived prircipally from the statute of Elizabeth. Those purposes are considered charitable which that statute enumerates, or which, by analogies, are deemed within its spirit and intendment." *Morice* v. *Bishop of Durham*, 9 Ves. 399. Lord ELDON, in rehearing the same case, confirms the doctrine. "I say, with the master of the rolls, a case has not yet been decided, in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general." s. c. 10 Ves. 540. In a previous case, Lord LOUGHBOROUGH had said, "It does not appear that the court, before that period (the 43 Eliz.), had cognisance of informations for the establishment of charities. Prior to the time of Lord ELLESMERE, so far as tradition in times immediately following goes, there were no such informations, but they made out the case as well as they could at law." *Attorney-General* v. *Bowyer*, 3 Ves. 726.

The repeal of the English statute of charitable uses by the legislature of Virginia, must be considered as almost, if not entirely, repealing that whole head of equity. The effect of this repeal may be estimated, by recurring to the history of the system of equitable jurisprudence. Every part of that system has been built up since the 43d year of Elizabeth, and there is not a single chancery case, touching charitable bequests, prior to the *statute of that year. The court is then driven to ascertain, either the [*10 common-law method of effecting charitable uses, or the jurisdiction of the English chancery, independent of the statute. Lord LOUGHBOROUGH says, that it had no jurisdiction whatever of the matter, before the statute, and that they made out the case as well as they could at law ; and he instances certain cases. *Porter's Case*, 1 Co. 23 ; *Sutton Hospital Case*, 10 Ibid. 1. The jurisdiction of the court of chancery, in England, abstracted from, and independent of, the statute of the 43 Eliz., may be inferred from the course of the court, in cases where the donors of charities, failing to point out any object of charity, or designating improper, impolitic or illegal objects, the statute gives the court no authority to direct the charity to any definite purpose. In all such cases, the disposition of the funds belongs to the king, as *parens patriæ*, and is made by him under his sign manual. In *Moggridge* v. *Thackwell*, 7 Ves. 36, Lord ELDON, after reviewing all the cases (acknowledging that they conflicted with each other, and that his own mind was perplexed with doubts), came to this general conclusion, which he deemed the most reconcilable to authorities ; that when the execution of the trust for a charity is to be by a trustee, with general, or some, objects pointed out, there the court will take upon itself the execution of the trust : but where there is a general indefinite purpose, not fixing itself on any object, the disposition is to be made by the king's sign manual. A due attention to

*the cases there collected by Lord ELDON, will show that the first class of cases are those over which the statute of the 43 Eliz. gives the court a jurisdiction, and which it will consequently exercise; and that the second class consists of those which belong to its jurisdiction, abstracted and independent of the statute, and in which the disposition belongs to the king. *Attorney-General* v. *Syderfen*, 1 Vern. 224; *Frier* v. *Peacock*, there cited; *Attorney-General* v. *Herrick*, Ambl. 712. So, if the donation be to a charitable use, but one which is deemed unlawful or impolitic, the disposition belongs to the king. *Attorney-General* v. *Baxter*, 1 Vern. 248; *De Costa* v. *De Pas*, Ambl. 228; *Cary* v. *Abbott*, 7 Ves. 490. And were it not for the statute, all charitable donations, whatever, would be subject to the disposition of the king, as *parens patriæ*.

It is true, there are some *dicta*, which, at first sight, seem to support a different doctrine. Such is that of Lord Keeper HENLEY, in the case of *Christ's College*, 1 W. Black. 91. But this *dictum* is directly contradicted by Lord LOUGHBOROUGH, in the *Attorney-General* v. *Bowyer*, 3 Ves. 726. Lord Keeper HENLEY cites no authority for this *dictum;* but Lord Chief Justice WILMOT having, in the case of *Downing College* (Wilm. Notes 1), said something of the same kind, cites the authority which, doubtless, Lord Keeper HENLEY had in his mind, which is what fell from Lord MACCLESFIELD, in *Eyre* v. *The Countess of Shaftsbury*. "And in like manner, in case of
*12] charity, the king, *pro bono publico*, has an original *right to superintend the care thereof; so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file an information in chancery, in the name of the attorney general, for the establishment of charities." 2 P. Wms. 118–19. Whence it appears, that the information which might be filed in the attorney-general's name, for the establishment of charities, abstracted from, and independent of, the statute, related to such as depended on the disposition of the king as *parens patriæ*. This explanation is corroborated by what is said by Lord SOMERS, in the case of *Lord Falkland* v. *Bertie*, 2 Vern. 342. Lord THURLOW's *dictum*, in *White* v. *White* (1 Bro. C. C. 15), that "the cases had proceeded on notions derived from the Roman and civil law," cannot be construed to extend to the entire adoption of the civil law on charities. By the civil law, if a man make a will containing a charitable bequest, and afterwards cancel the will, the bequest to charity is not thereby revoked. It is otherwise by the law of England. So, in case of a deficiency of assets, the civil law gave a preference to charitable legacies; but in the English court of chancery, they abate in proportion. *Attorney-General* v. *Hudson*, 1 Coxe's P. Wms. 675, and note.

The conclusion, then, is, that in every case of charity, wherein the English court of chancery has not jurisdiction to direct the application of the
*13] *charity, either by the words or the equity of the statute 43 Eliz., the disposition belongs to the king, as *parens patriæ*, and the court of chancery is only resorted to, in order to enforce his disposition. That statute being repealed in Virginia, and no similar one enacted in that state, the disposition of all charitable donations is in the *parens patriæ* of Virginia. The courts of the United States cannot direct this charity, or carry it into effect. It is the government of Virginia which is the *parens patriæ* of that state. At the revolution, all the rights of the crown devolved on the common-

wealth ; and still remain in the commonwealth, except such as are delegated to the United States by the national constitution. But none of the rights that appertain to the state government, as *parens patriæ*, are delegated to the United States. Can this, or any other court of the United States, pretend to the care or guardianship of infants, lunatics and idiots? If not, neither can they undertake the direction of a charity, which stands on the same footing as belonging to that government which is *parens patriæ*. Even, therefore, if it were admitted, that the court of chancery of Virginia could carry this bequest to charitable uses into effect, the courts of the United States cannot.

Another objection to the jurisdiction of those courts is, that the attorney-general (that is, of Virginia) representing the *parens patriæ*, must be made a party. Mitf. Plead. 7, 93 ; Cooper's Plead. 219 ; *Anon.*, 3 Atk. 277 ; 2 Ibid. 87 ; *Monell* v. *Lawson*, 1 Eq. Cas. Abr. 167 ; *Attorney-General* v. *Hewett*, 9 Ves. 432. But *to make the attorney-general of Virginia, that is, the state of Virginia, a party defendant, would be contrary to [*14 the constitution of the United States. There is a further, and an insurmountable objection to the jurisdiction of the United States courts in cases of charity, where there is no trustee appointed, or (which is the same thing) unascertainable and incapable trustees are appointed. If not the whole jurisdiction of the English court of chancery, at least so much of it as is abstracted from, and independent of, the statute 43 Eliz., belongs neither to its ordinary nor extraordinary jurisdiction, but to the Lord Chancellor personally, as delegate to the king. But by the constitution and laws of the United States, the only branch of the English chancery jurisdiction which is vested in the courts of the United States, is the ordinary or equity jurisdiction of the court of chancery in England.

Finally, it is impossible to give effect to this charity in any mode. Not only are the trustees uncertain and unascertainable, but the objects of the charity are also uncertain, and not ascertainable by this court. The very idea of the court attempting to execute the trust, *cy pres*, and referring it to the master to digest a scheme for that purpose, is absurd and impracticable.

The *Attorney-General*, in reply, insisted, that if it were necessary to show the capacity of the plaintiffs as trustees, it could be done. *Id certum est quod certum reddi potest :* and the court might direct the money to be paid to those who constituted the association at *the time of the be- [*15 quest. But this association was incorporated shortly after the death of the testator ; and it is sufficient to support the charity, that its objects may be *in esse*. The first of the two cases, cited to show that the devise must take effect at the time, or not at all, was a devise of lands to the priests of a chantry or college in the church of A.; and there were none such, neither chantry, college nor priests. 8 Vin. Abr. tit. Devise, H. But suppose there had been, as in the case now before the court, would their want of a corporate character have defeated the devise? But this case is entirely inapplicable. The objects designated did not exist, even under the description which the testator used. Nor did they exist, at the time of the decision, so as to present the question as to the efficacy of the devise in that respect ; and all that the court said upon this subject, must be regarded as extra-judicial. The whole question was on a devise of lands, on the rigid rules

of the common law. The case of *Widmore* v. *Woodroffe*, Ambl. 636, was a bequest of money to the corporation of Queen Anne's Bounty to augment poor vicarages, which was held to be void by the statute of mortmain, as the corporation were bound by their rules to lay out their donations in lands. It does not touch the question, whether a devise of a charity must take effect at the death of the testator, or not at all. But if the court should think, that the Baptist Association were incapable of taking, as trustees, at the death of the testator, and that there must be some person then *in esse*, to
*16] hold the legal estate, the *executors will be considered, by a court of equity, as trustees, whether so named or not. 1 Bridg. Index 761. So also, the court will regard the heir as a trustee for the same purpose. 2 Ibid. 607. The case of the *Attorney-General* v. *Bowyer*, was decided on this very principle. The law had thrown the legal title on the heir, but he was held responsible for the intermediate profits, in the imputed character of a trustee. 3 Ves. 726.

The position, that the English court of chancery derives the jurisdiction now in question from the statute of Eliz., is denied. The title of the act is, "Commissioners authorized to inquire of misemployment of lands or goods, given to hospitals, &c., which, by their orders, shall be reformed." The preamble recites, that whereas, lands, &c., had been theretofore given, limited, appointed and assigned, to various objects which are specified, which lands, &c., had not been employed "according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same." It is clear, from this preamble, that no new validity was intended to be given to these donations. Their previous validity is admitted ; and the mischief was, that they had been defeated by the frauds, breaches of trust, and negligence of those who should have paid them. Frauds and breaches of trust were, at this time, known heads of the equitable jurisdiction of the court of chan-
*17] cery ; but the statute proceeds to provide a new remedy for *the mischief announced in the preamble. This is the appointment of commissioners, with powers to institute an inquisition to detect the frauds which had been practised ; authorizing the commissioners, conformable to the title of the act, to make orders to carry the intention of the donor into effect ; and allowing the party injured by such orders, to complain to the chancellor for an alteration or reversal of such orders. Even supposing the statute did profess to confer on the court of chancery a new jurisdiction, it is merely an appellate jurisdiction from the decrees of the commissioners ; and this appeal is given to one party only, he who is charged with the fraud. So that, it is neither an original jurisdiction, nor is it a jurisdiction to enforce a charitable trust. The eighth and ninth sections of the act direct the commissioners to certify their decrees into the high court of chancery of England, and the chancery of the Palatinate of Lancaster, and direct the chancellors to take such order for the due execution of the decrees (of the commissioners) as to them shall seem fit and convenient. This is not a power to make a decree, but to execute the decrees made by the commissioners. The 10th section reiterates the appellate power of the chancellor, recognised by the 1st section. The only principles the 10th section prescribes for the regulation of the chancellor on these appeals, are so far from being new to

the court, that they have existed ever since its equitable jurisdiction commenced.

If, then, the jurisdiction of the court of chancery over charitable bequests cannot be derived from the letter of the statute of Eliz., can it be supported *from ancient adjudged cases, interpretative of that statute? Even if it could, this would be but a frail support; because the court of [*18 chancery was then in the infancy of its existence, and grasping at everything to enlarge that jurisdiction, which time and usage have since consecrated; and because, if its jurisdiction to enforce a charity by original bill, is to depend upon the statute, it has been shown from the statute itself, that it cannot be sustained. But the adjudged cases do not support the position, that the jurisdiction of the court over charities is derived from the statute. It is necessary, however, to distinguish between the two questions, whether a particular charity is within the statute? and whether the original jurisdiction of the court of chancery is derived from the statute? The first question properly arises, where the commissioners have acted, and the court is reviewing their decree in its appellate character. As the commissioners derive their whole authority from the statute, and are, therefore, confined to the cases enumerated in it, the first question, upon the threshold of the appeal, is, whether the case on which they have acted, be within the statute. Of this description are the cases cited on the other side, as being the ancient cases upon the authority of which the modern cases have been decided. The cases of the *Attorney-General* v. *Rye*, 2 Vern. 453, and *Rivett's Case*, Moor 890, are expressly stated by the reporters to have come before the chancellor on exceptions to the orders of the *commissioners. *Piggot* v. *Penrice*, 2 Eq. Cas. Abr. 191, is given by the editor on the authority of [*19 another reporter. Gilb. Eq. Rep. 137. On looking into the original report, it will be seen, that the question of the statute was not involved in case as it stood before the Chancellor. The only questions before him were, 1st. Whether any estate in lands passed to an executor by the words, "I made my niece Gore, since married to Sir Henry Penrice, executrix of all my goods, lands and chattels"? and 2d. What writing would amount to a revocation of a will? At the end of the report, there is a note in these words: "Note, the testatrix, by her second will, gave part of these lands to charitable uses, and they were decreed, at the rolls, to be good, as an appointment upon the act of parliament, notwithstanding there was no revocation; but that point was not now in question." (Ibid.) How this question came before the Master of the Rolls does not appear; but all that is, decided is, that the charity is within the statute, which leaves the question of the original jurisdiction of the court over charities untouched.

The last ancient case cited is that of the *Attorney-General* v. *Hickman*, 2 Eq. Cas. Abr. 193. A testator gave his estate to B. and his heirs, &c., by a will duly executed; and by a codicil, not attested by three witnesses, declared the use in these words: "I would have the same employed for the encouraging such non-conformist ministers as preach God's word, and in places where the people are not able to allow them a sufficient maintenance; and for encouraging the *bringing up some to the work of the ministry who are designed to labor in God's vineyard among the dissenters. [*20 The particular method how to dispose of it, I prescribe not, but leave to their discretion, designing you (B.) to take advice of C. and D." This

bequest, analogous to that now before the court, though much more vague and general, was confirmed, and the money decreed to be distributed immediately, and not made a perpetual charity. But nothing is said of the statute of Elizabeth, either in the argument, or in the opinion of the court. The question was, whether B., and his testamentary advisers, C. and D., having all died before the testatator, the court could supply trustees. The counsel who contended for this power in the court, supported it, not by the statute, but by the general authority of the court; instancing a legacy bequeathed in trust, and the death of the trustee, which, in equity, would not defeat the bequest. The court sustained its authority, without assigning any particular ground; and it may, therefore, be fairly inferred, that the court adopted the ground assumed in the argument. The case is cited from a manuscript report, and another note of the case, in the margin, goes no further than to say, that it was considered as being within the description of the statute of Elizabeth, but does not profess to found the power of the court over the case upon that statute.

Nor do the cases cited to show that the power of the court to give effect to a vague devise, by the rule of *cy pres*, is founded upon the statute, support that position. In the case of *Baylis* v. **The Attorney-General* (2 Atk. 239), 200*l.* were given under the will of Mr. Church, "to the ward of Bread street, according to Mr. ——, his will." Lord HARDWICKE, after rejecting testimony to fill the blank, proceeds thus: "Though the alderman and inhabitants of a ward are not, in point of law, a corporation, yet, as they have made the attorney-general a party, in order to support and sustain the charity, I can make a decree that the money may, from time to time, be disposed of in such charities as the alderman, for the time being, and the principal inhabitants, shall think the most beneficial to the ward." Nothing is said of the statute; and the circumstance of making the attorney-general a party points rather to the exercise of the king's prerogative, as *parens patriæ*, which is independent of the statute. In *White* v. *White*, 1 Bro. C. C. 12, the testator bequeathed one moiety of the residue of his personal estate to the Foundling, and the other to the Lying-in-Hospital, and if there should be more than one of the latter, then to such of them as his executors should appoint. The testator struck out the name of his executor, and never appointed another. Lord THURLOW held, that this was no revocation of the legacy, and referred it to a master, to which of the lying-in-hospitals it should be paid; but he does not countenance the idea of the power thus exercised by him being derived from the statute of Eliz. On the contrary, he refers it to notions derived from the Roman and civil law. *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517, was a gift of a residue to I. Vaston, *to such charitable uses as he should appoint, but recommending poor clergymen with large families and good characters; I. V. died in the testator's lifetime. The charity was sustained and executed by the court; but there is no allusion to the statute in the opinion of Lord ELDON. He says: "Vaston, if alive, could not claim this property for his own use. All the rules, both of the civil and common law, would repel him from taking the property in that way. This reduces it to the common case of the death of a trustee, which cannot defeat the effect of a legacy." The second report of the same case does not vary the ground taken by the court. 1 Ves. jr. 464. In the report of the case, on the rehearing, all the cases are

*21] *22]

collated, yet nothing is delivered at the bar, or from the bench, referring the power of the court to the statute of Eliz. 7 Ves. 36. Lord ELDON, speaking of former decisions, says: "In what the doctrine (of *cy pres*) originated, whether as supposed by Lord THURLOW, in *White* and *White*, in the principles of the civil law as applied to charities, or in the religious notions entertained in this country, I know not." Ibid. 69. A strange doubt, if the doctrine originated in the statute! Nor are the elementary writers and compilers understood as deducing the jurisdiction from the statute. Blackstone, who is cited for this purpose, is treating of a different subject in the passage of his commentaries referred to. 2 Bl. Com. 376. Having stated in a preceding page, that corporations were excepted from the statutes of wills of 32 Hen. VIII., c. 1., and 34 Hen. VIII., c. 5, he says, in the page cited, that the statute *of 43 Eliz., c. 4, is considered as having repealed that of Hen. VIII., so far as to admit a devise to a corporation for a charitable use; he then speaks of the liberal construction which had been given to devises under this statute, by force of the word appointment; but does not even insinuate that it was the origin of the chancery jurisdiction. All the other elementary writers and compilers cited are equally remote from proving the position assumed. Their remarks are directed to the liberal construction put upon the word appoint, under the statute of Eliz.; but the principles to be extracted from all the cases cited by them are the principles of the civil law, by which the court had been guided, antecedent to, and independent of, the statute. [*23

The *Attorney-General* v. *Hever*, 2 Vern. 387, which is cited to prove that no donation is considered in England as a charitable donation, unless for the uses enumerated in the statute, or for analagous uses, was a devise to a school; and the lord keeper decided, that not being a free school, the charity was not within the statute, and consequently the inhabitants had not a right to sue in the name of the attorney-general. This is a very different position from that which the case was cited to prove; and it is an unfounded position: for the statute authorizes no proceeding in the name of the attorney-general; and it is admitted, that the attorney-general might, and had, informed in the name of the king as *parens patriæ* previous to, and independent of, the statute. *Brown* v. *Yeale* is merely stated in a note, and settles nothing. 7 Ves. 50, note *a*. It is true, the *statute of Eliz., having enumerated charities, gave a new technical name to a portion of the uses and trusts recognised by the civil law. It is this idea which the master of the rolls pursues in *Morice* v. *The Bishop of Durham*, 9 Ves. 399. The trust before the court was for such objects of benevolence and liberality, as her executor, in his own discretion, should most approve of. Sir W. GRANT determined, that this was not within the description of charitable trusts under the statute: that purposes of liberality and benevolence do not necessarily mean the same as objects of charity. With regard to charities, he says, that it had been settled upon authorities which it was too late to controvert, that they should not fail on account of their generality, but that in some cases, their particular application should be directed by the king, and in others by the court. But he does not say that the king or the court derived this power of direction from the statute. The statute is looked at, to see if the bequest be a charity within it; but the powers of control and direction in the king and the court are derived [*24

from the original respective authority of the one, as *parens patriæ*, and of the other, as a court of equity. It is admitted, by the clearest implication, that although the bequest was not a charity within the statute, yet if any definite object had been indicated by the will for which the money could have been decreed, it would have been so decreed. On the rehearing of the same case, Lord ELDON merely confirms the same principles. 10 Ves. 522.

*25] But Lord LOUGHBOROUGH is supposed to have *attributed the jurisdiction to the statute, in express terms, in the case of the *Attorney-General* v. *Bowyer*, 3 Ves. 726. But to understand his words correctly, it is necessary to observe, that the 43d of Elizabeth's reign, was the year 1601, and that Lord ELLESMERE received the seals in 1603, the epoch of her decease, and of the accession of James I. The point under Lord LOUGHBOROUGH's consideration was the title to intermediate rents and profits, in the case of a trust to take effect *in futuro*. He first considers the question as to the legal right, and introduces *Porter's case* (1 Co. 226), and that of the *Sutton Hospital*, 10 Co. 1. The case of *Porter*, he says, was upon a devise before the statute of wills (32 Hen. VIII., c. 1), and before the statute of uses (27 Hen. VIII., c. 10), and consequently, before the statute of Eliz. "It does not appear, that the court, before that period, had cognisance of informations for the establishment of charities." At what period? Not the 43d Eliz., as has been contended; but either the period of the devise, which was in the 32d of Hen. VIII., or of the decision, which was in the 34th of Elizabeth. The chancellor proceeds, "prior to the time of Lord ELLESMERE, as far as the tradition in times immediately following goes, there was no such information as that upon which I am now sitting, but they made out the case as well as they could at law." The phrase, "prior to the time of Lord ELLESMERE," cannot be considered as equivalent to prior to the 43d of Eliz.; for there is no coincidence in point of time. The idea is

*26] singularly expressed, if he meant to deduce the practice and authority *of informations from the statute of the 43d of Elizabeth. All that he really meant was, to affirm, that the practice of proceeding on informations by the attorney-general grew up in the time of Lord ELLESMERE. But this position is contradicted by Lord Keeper HENLEY (1 W. Bl. 91), by Lord MACCLESFIELD (2 P. Wms. 119), by Lord SOMERS (2 Vern. 342), by Lord THURLOW (1 Bro. C. C. 15); and finally, by the admission on the opposite side, that the proceeding of the attorney-general, was as representing the king in his character of *parens patriæ*. The chancellor next proceeds to establish the validity of these devises at common law, and consequently, independent of the statute; and coming to the exercise of the equitable jurisdiction, he expressly founds it on the general power of the court over trusts. It results, then, that by the civil law, devises to pious and public uses were liberally expounded, and not suffered to fail by their uncertainty; that the ecclesiastical courts, and courts of equity, acting on ecclesiastical subjects, when called upon to take cognisance of a devise to pious or public uses, exercised all the powers, before the statute, which have been since exercised; that the statute of Eliz. came, and following up the principle of the civil law, made an enumeration of those gifts to pious and public uses, under the new name of charitable uses; not to give them new validity, but to discover them by inquisition, and to effectuate them upon civil-law principles. After the statute, the new name of charitable uses, became the fashion of the

court; and the word appointment *was extended, to produce the same effect which Swinburne had ascribed to the civil law before. It became unnecessary to look back beyond the statute, for the exercise of power over a charitable use: the case was brought within the statutory description, and if found within it, the constructive power of the word appointment was brought to bear upon it.

Whatever be the origin of the powers of the court of chancery, in England, whether derived from the peculiar law of the court itself, from statutes, or from the extraordinary jurisdiction of the chancellor, they are all vested in the courts of the United States, by the constitution giving to them jurisdiction of all suits in equity between citizens of different states. There is no necessity that the attorney-general of Virginia should be made a party, because that is only required where the objects of the charity contravene the policy of the law; nor is it necessary that the court should superintend the execution of the trust, since the trustees are appointed by the testator; nor that the court should refer it to a master to digest a scheme for its application, as the objects are clearly designated in the will.

Marshall, Ch. J., delivered the opinion of the court.—It was obviously the intention of the testator, that the Association should take in its character as an association; and should, in that character, perform the trust created by the will. The members composing it must be perpetually changing; but however they might change, it is "The Baptist Association that, *for ordinary, meets at Philadelphia annually," which is to take and manage the "perpetual fund," intended to be created by this [*28 will. This association is described with sufficient accuracy to be clearly understood; but not being incorporated, is incapable of taking this trust as a society. Can the bequest be taken by the individuals who composed the association at the death of the testator? The court is decidedly of opinion, that it cannot. No private advantage is intended for them. Nothing was intended to pass to them but the trust; and that they are not authorized to execute as individuals. It is the association for ever, not the individuals, who, at the time of his death, might compose the association, and their representatives, who are to manage this "perpetual fund."

At the death of the testator, then, there were no persons in existence who were capable of taking this bequest. Does the subsequent incorporation of the association give it this capacity? The rules of law compel the court to answer this question in the negative. The bequest was intended for a society which was not, at the time, and might never be, capable of taking it. Accccording to law, it is gone for ever. The legacy is void; and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate, afterwards created, had it even fitted the description of the will, cannot divest this interest, and claim it for their corporation.

There being no persons who can claim the right to execute this trust, are there any who, upon the *general principles of equity, can entitle [*29 themselves to its benefits? Are there any to whom this legacy, were it not a charity, could be decreed? This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended, are to be designated and selected by the trustees. It could not be intended for the education of all the youths of the Baptist denomination, who were designed

for the ministry; nor for those who were the descendants of his father, unless, in the opinion of the trustees, they should appear promising. These trustees being incapable of executing this trust, or even of taking it on themselves, the selection can never be made, nor the persons designated who might take beneficially.

Though this question be answered in the negative, we must still inquire, whether the character of this legacy, as a charity, will entitle it to the protection of this court? That such a legacy would be sustained in England, is admitted. But it is contended, for the executors, that it would be sustained in virtue of the statute of the 43 of Elizabeth, or of the prerogative of the crown, or of both; and not in virtue of those rules by which a court of equity, exercising its ordinary powers, is governed. Should these propositions be true, it is further contended, that the statute of Elizabeth does not extend to the case, and that the equitable jurisdiction of the courts of the Union does not extend to cases not within the ordinary powers of a court of equity.

*30] *On the part of the plaintiffs, it is contended, that the peculiar law of charities does not originate in the statute of Elizabeth. Had lands been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise, it is said, would have been good at law; and, of consequence, a court of chancery would have enforced the trust, in virtue of its general powers. In support of this proposition, it has been said, that the statute of Elizabeth does not even profess to give any validity to devises or legacies, of any description, not before good, but only furnishes a new and more convenient mode for discovering and enforcing them; and that the royal prerogative applies to those cases only, where the objects of the trust are entirely indefinite; as a bequest generally to charity, or to the poor.

It is certainly true, that the statute does not, in terms, profess to give validity to bequests, acknowledged not before to have been valid. It is also true, that it seems to proceed on the idea, that the trusts it is intended to enforce, ought, in conscience, independent of the statute, to be carried into execution. It is, however, not to be denied, that if, at the time, no remedy existed in any of the cases described, the statute gives one. A brief analysis of the act will support this proposition. It authorizes the chancellor to appoint commissioners to inquire of all gifts, &c., recited in the act, of the abuses, &c., of such gifts, &c.; and upon such inquiry, to make such order as that the articles given, &c., may be duly and faithfully employed, to and

*31] for the charitable uses and intents, before rehearsed *respectively, for which they were given, &c. The statute then proceeds, "which orders, judgments and decrees, not being contrary or repugnant to the orders, statutes or decrees of the donors or founders, shall, by the authority of this present parliament, stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the Lord Chancellor of England," &c. Subsequent sections of the act direct these decrees, &c., to be certified to the chancellor, who is to take such order for their execution as to him shall seem proper; and also give to any person aggrieved the right to apply to chancery for redress.

It is not to be denied, that if any gifts are enumerated in this statute, which were not previously valid, or for which no previous remedy existed, the

statute makes them valid, and furnishes a remedy. That there were such gifts, and that the statute has given them validity, has been repeatedly determined. The books are full of cases, where conveyances to charitable uses, which were void by the statute of mortmain, or were, in other respects, so defective, that, on general principles, nothing passed, have been sustained under this statute. If this statute restores to its original capacity, a conveyance rendered void by an act of the legislature, it will, of course, operate with equal effect on any legal objection to the gift, which originates in any other manner, and which a statute can remove.

The authorities to this point are numerous. In the case of the *Attorney-General, on behalf of St. John's* *College, *in Cambridge*, v. *Platt* (Cas. temp. Finch 221), the name of the corporate body was not fully [*32 expressed. This case was referred by the chancellor to the judges, who certified, that though, according to the general principles of law, the devise was void; yet it was good under the statute of Elizabeth. This case is also reported in Cases of Chancery 267, where it is said, the judges certified the devise to be void at law, but the chancellor decreed it good under the statute. So, in Chancery Cases 134, it was decided, that a bequest to the parish of Great Creaton was good, under the statute. Though this case was not fully nor clearly reported, enough appears, to show that this bequest was sustained only under the statute of Elizabeth. The objections to it were, that it was void on general principles, the parish not being incorporated; and that it would not be decreed, under the statute, the proceedings not being before commissioners, but by original bill. The Master of the Rolls ordered precedents to be produced; and on finding one in which four judges had certified that a party might, under the statute, proceed in chancery, by original bill, he directed the legacy to be paid. Could this bequest have been sustained, on doctrines applicable to charities, independent of the statute, no question could have arisen concerning the rights to proceed by original bill. In *Collison's case*, Hob. 136, the will made John Bruet and others, "feoffees of a home, to keep it in reparation, and to bestow the rest of the profits on reparation of *certain highways." On a reference by the chancellor, [*33 the judges declared, that "this case was within the relief of the 43d of Elizabeth; for though the devise were utterly void, yet it was, within the words, limited and appointed for charitable uses."

In these cases, it is expressly decided, that the bequests are void, independent of the statute, and good under it. It furnishes no inconsiderable additional argument, that many of the gifts recited in the 43 Eliz., would not, in themselves, be considered as charitable; yet they are all governed by the same rule. No *dictum* has been found, indicating an opinion that the statute has no other effect than to enable the chancellor to inquire, by commission, into cases before cognisable in this court by original bill. It may, then, with confidence be stated, that whatever doubts may exist in other points which have been made in the cause, there is none in this: The statute of the 43 Eliz. certainly gave validity to some devises to charitable uses, which were not valid, independent of that statute. Whether this legacy be of that description, is a question of more difficulty.

The objection is, that the trust is void; and the description of the *cestui que trust* so vague, that no person can be found whose interest can be sustained. The counsel for the plaintiff insists, that cases equally vague have

been sustained in courts of common law, before the statute ; and would *à fortiori*, have been sustained in courts of equity. He relies on *Porter's case*, 1 Co. 226, and on Plowd. 522. *Porter's case* is this : Nicholas Gibson, in the
*34] 32 *Hen. VIII., devised a wharf and house to his wife, upon condition, that she should, on advice of learned counsel, in all convenient speed, after his decease, assure, give and grant the said lands and tenements, for the maintenance for ever of a free school the testator had erected, and of alms-men and alms-women attached to it. The wife entered into the property, and instead of performing the condition, conveyed it, in the 3 Edw. VI., by a lease for forty years. Afterwards, in the 34 Eliz., the heir-at-law entered for a condition broken, and conveyed to the queen. On the validity of this entry and conveyance, the cause depended. On the part of Porter, who claimed under the lease, it was contended, that the use was against the act of the 22 Hen. VIII., c. 10, and therefore, void, on which the estate of the wife became absolute. On the part of the queen, it was argued, 1st. That the statute of Hen. VIII. avoided superstitious, and not charitable uses. But if it extended to this, still, that it made the use, and not the conveyance, void. The devisee, there being no consideration, would stand seised to the use of the heir. 2. That in case the devise is to the wife, on condition that she would, by the advice of learned counsel, assure his lands for the maintenance of the said free-school, and alms-men and alms-women, this might be done lawfully, by procuring the king's letters-patent incorporating them, and afterwards, a letter of license to assure the lands to
*35] them. Upon these reasons, the court was of opinion, that *the condition was broken, and that the entry of the heir was lawful.

In this case, no question arose concerning the possibility of enforcing the execution of the trust. It was not forbidden by law ; and therefore, the trustee might execute it. On failing so to do, the condition on which the estate was given was broken, and the heir might enter ; but it is not suggested that the *cestui que trust* had any remedy. An estate may be granted on any condition which is not against law, as that the grantee shall go to Rome ; and for breach of that condition, the heir may enter, but there are no means of compelling the journey to Rome. In the argument of *Porter's case*, the only mode suggested for assuring to the school the benefit intended, is by an act of incorporation, and a letter of license. In considering this case, it seems impossible to resist the conviction, that chancery could, then, afford no remedy to the *cestui que trust*. It is not probable, that those claiming the beneficial interest would have waited, without an effort, from the 32 Hen. VIII., when the testator died, or, at any rate from the 3 Edw. VI., when the condition was conclusively broken, by the execution of the lease, until the 34 Eliz., and then have resorted to the circuitous mode of making an arrangement with the heir-at-law, and procuring a conveyance from him to the queen, on whose will the charity would still depend, if a plain and certain remedy had existed, by a direct application to the chancellor.

If, as there is much reason to believe from this, and from many other
*36] cases of the same character *which were decided at law, anterior to the statute of Eliz., the remedy in chancery was not then afforded, it would go far in deciding the present question ; it would give much countenance to the opinion, that the original interference of chancery in charities, where the *cestui que trust* had not a vested equitable interest which might

be asserted in a court of equity, was founded on that statute, and still depends on it. These cases, and the idea they suggest, that at the time chancery afforded no remedy for the aggrieved, account for the passage of the statute of the 43 Elizabeth, and for its language, more satisfactorily than any other cause which can be assigned.

If, as has been contended, charitable trusts, however vague, could then, as now, have been enforced in chancery, why pass an act to enable the chancellor to appoint commissioners to inquire concerning them, and to make orders for their due execution, which orders were to be revised, established, altered, or set aside, by him? If the chancellor could accomplish this, and was in the practice of accomplishing it, in virtue of the acknowledged powers and duties of his office, to what purpose pass the act? Those who might suppose themselves interested in these donations, would be the persons to bring the case before the commissioners; and the same persons would have brought it before the chancellor, had the law afforded them the means of doing so. The idea, that the commissions were substituted for the court, as the means of obtaining intelligence not otherwise attainable, or of removing inconveniences in prosecuting claims by original bill, which had been found so *great as to obstruct the course of justice, is not war- [*37
ranted by the language of the act, and is disproved by the efforts which were soon made, and which soon prevailed, to proceed by way of original.

The statute recites, that whereas, lands, money, &c., had been heretofore given, &c., some for the relief of aged, impotent and poor people, &c., which lands, &c., "nevertheless, have not been employed according to the charitable intent of the givers and founders thereof, by reason of"—what? of the difficulty of discovering that such trusts had been created? or of the expensiveness and inconvenience of the existing remedy? No. "By reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same:" that is, by reason of fraud, breach of trust and negligence of the trustees. The statute then proceeds to give a remedy for these frauds, breaches of trust and negligences. Their existence was known, when the act passed, and was the motive for passing it. No negligence or fraud is charged on the court, its officers, or the objects of the charity; only on the trustees. Had there been an existing remedy for their frauds and negligences, they could not, when known, have escaped that remedy.

There seem to have been two motives, and they were adequate motives, for enacting this statute: The first and greatest was, to give a direct remedy to the party aggrieved, who, where the trust was vague, had no certain and safe remedy for the injury sustained; who might have been completely defeated by any compromise between the heir of the feoffer *and the [*38
trustee, and who had no means of compelling the heir to perform the trust, should he enter for the condition broken. The second, to remove the doubts which existed, whether these charitable donations were included within the previous prohibitory statutes. We have no trace, in any book, of an attempt in the court of chancery, at any time, anterior to the statute, to enforce one of these vague bequests to charitable uses. If we have no reports of decisions in chancery at that early period, we have reports of decisions at common law, which notice points referred by the chancellor to the judges. Immediately after the passage of the statute, we find, that ques-

tions on the validity of wills containing charitable bequests, were propounded to, and decided by, the law judges. *Collison's case* was decided in the 15 James I., only seventeen years after the passage of the act, and the devise was declared to be void at law, but good under the statute. Two years prior to this, *Griffith Flood's case*, reported in Hobart, was propounded by the court of wards to the judges ; and, in that case too, it was decided, that the will was void at law, but good under the statute. Had the court of chancery taken cognisance, before the statute, of devises and bequests to charitable uses, which were void at law, similar questions must have arisen, and would have been referred to the courts of law, whose decisions on them would be found in the old reporters. Had it been settled, before the statute that such devises were good, because the use was charitable, these
*39] questions could not have arisen *afterwards ; or had they arisen, would have been differently treated.

Although the earliest decisions we have, trace the peculiar law of charities to the statute of Elizabeth, and although nothing is to be found in our books to justify the opinion, that courts of chancery, in the exercise of their ordinary jurisdiction, sustained, anterior to that statute, bequests for charitable uses, which would have been void on principles applicable to other trusts, there are some modern *dicta*, in cases respecting prerogative, and where the proceedings are on the part of the king, acting as *parens patriæ*, which have been much relied on at the bar, and ought not to be overlooked by the court.

In 2 P. Wms. 119, the Chancellor says, "In like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof ; so that, abstracted from the statute of Elizabeth, relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in chancery, in the attorney-general's name, for the establishment of charities." "This original right," of the crown, "to superintend the care" of charities, is no more than that right of visitation, which is an acknowledged branch of the prerogative, and is certainly not given by statute." The practice of filing an information in the name of the attorney-general, if, indeed, such a practice existed in those early times, might very well grow out of this prerogative, and would by no means prove, that, prior to the statute, the law respecting charities was what it has been
*40] since. These *words were uttered for the purpose of illustrating the original power of the crown over the persons and estates of infants, not with a view to any legal distinction between a legacy to charitable and other objects.

Lord Keeper Henley, in 1 W. Black. 91, says, "I take the uniform rule of this court before, at, and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, the devises to corporations were void under the statute of Hen. VIII.; yet they were always considered as good in equity, if given to charitable uses." We think, we cannot be mistaken, when we say, that no case was decided between the statute of mortmain, passed in the reign of Hen. VIII., and the statute of Elizabeth, in which a devise to a corporation was held good. Such a decision would have overturned principles uniformly acknowledged in that court. The cases of devises in mortmain, which have been held

good, were decided since the statute of Elizabeth, on the principle, that the latter statute repeals the former so far as relates to charities. The statute of Geo. II. has been uniformly construed to repeal, in part, the statute of Elizabeth, and charitable devises comprehended in that act have, ever since its passage, been declared void. On the same reason, similar devises must, subsequent to the statute of Henry VIII., and anterior to that of Elizabeth, have been also declared void. It is remarkable *that, in this very case, the Lord Keeper declares one of the charities to be void, because it is [*41 contrary to the statute of mortmain, passed in the reign of Geo. II. All the respect we entertain for the reporter of this case, cannot prevent the opinion, that the words of the Lord Keeper have been inaccurately reported. If not, they were inconsiderately uttered.

The principles decided in this case are worthy of attention: "Two questions," says the report, "arose, 1st. Whether this was a conveyance to charitable uses, under the statute of Elizabeth, and therefore, to be aided by this court? 2d. Whether it fell within the purview of the statute of mortmain, 9 Geo. II., and was, therefore, a void disposition?" It is not even suggested, that the defect of the conveyance could be remedied, otherwise than by the statute of Elizabeth. The Lord Keeper says, "the conveyance of the 22d of June 1721, is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body; and therefore, there is a want of persons to take in perpetual succession." (The very defect in the conveyance under the consideration of this court.) "The only doubt," continues the Lord Keeper, "is, whether the court should supply this defect, for the benefit of the charity, under the statute of Elizabeth." It is impossible, we think, to understand this declaration, otherwise than as an express admission, that a conveyance to officers, who compose the corporate body, instead of the corporate body itself, or in other words, a conveyance to any persons not incorporated *to take in succession, [*42 although for charitable purposes, would be void, if not supported by the statute of Elizabeth. After declaring the conveyance to be good, the Lord Keeper proceeds: "The conveyance, therefore, being established under the statute of Elizabeth, we are next to consider how it is affected under the statute of the 9 Geo. II."

The whole opinion of the judge in this case, turns upon the statute of Elizabeth. He expressly declares the conveyance to be sustained by that statute, and in terms, admits it to be defective, without its aid. The *dictum*, therefore, that before that statute, courts were in the habit of aiding defective conveyances to charitable uses, either contradicts his whole opinion on the point before him, or is misreported. The probability is, that the judge applied this *dictum* to cases which occurred, not to cases which were decided before the statute. This application of it would be supported by the authorities, and would accord with his whole opinion in the case. In the case of the *Attorney-General* v. *Bowyer*, 3 Ves. 725, the chancellor, speaking of a case which occurred before the passage of the statute of wills, says, "It does not appear that this court, at that period, had cognisance upon information for the establishment of charities. Prior to the time of Lord Ellesmere, as far as tradition in times immediately following goes, there were no such informations as this on which I am now sitting, but they made out the case as well as they could by law."

*Without attempting to reconcile these seemingly contradictory *dicta*, the court will proceed to inquire, whether charities, where no legal interest is vested, and which are too vague to be claimed by those to whom the beneficial interest was intended, could be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the King as *parens patriæ*, before the 43 Elizabeth?

The general principle, that a vague legacy, the object of which is indefinite, cannot be established in a court of equity, is admitted. It follows, that he who contends that charities formed originally an exception to the rule, must prove the proposition. There being no reported cases on the point, anterior to the statute, recourse is had to elementary writers, or to the opinions given by judges of modern times. No elementary writers sustain this exception as a part of the law of England. It may be considered as a part of the civil code, on which our proceedings in chancery are said to be founded; but that code is not otherwise a part of the law of England than as it has been adopted and incorporated by a long course of decisions. The whole doctrine of the civil law, respecting charities, has certainly not been adopted. For example, by the civil law, a legacy to a charity, if there be a deficiency of assets, does not abate; by the English law, it does abate. It is not, therefore, enough to show that, by the civil law, this legacy would be valid. It is necessary to go further, and to show that this principle of
*44] the civil law has been engrafted *into the jurisprudence of England, and been transplanted into the United States.

In *White* v. *White*, 1 Bro. C. C. 15, the testator had given a legacy to the Lying-in-Hospital which his executor should appoint, and afterwards struck out the name of the executor. The legacy was established, and it was referred to a master to say to which Lying-in-Hospital it should be paid. In giving this opinion, Lord THURLOW said, "the cases have proceeded upon notions adopted from the Roman and civil law, which are very favorable to charities, that legacies given to public uses not ascertained, shall be applied to some proper object." These expressions, apply perhaps exclusively, to that class of cases in which legacies given to one charity have, since the statute of Elizabeth, been applied to another; or, in which legacies given so vaguely as that the object cannot be precisely defined, have been applied by the crown, or by the court, acting in behalf of the crown, to some charitable object of the same kind. *White* v. *White* was itself of that description; and the words "legacies given to public uses not ascertained," "applied to some proper object," seem to justify this construction. If this be correct, the sentiment advanced by Lord THURLOW, would amount to nothing more than that the cases in which this extended construction was given to the statute of Elizabeth, proceed upon notions adopted from the Roman and civil law.

*45] But if Lord THURLOW used this language, under the *impression that the whole doctrine of the English chancery, relative to charities, was derived from the civil law, it will not be denied, that his opinions, even when not on the very point decided, are entitled to great respect. Something like the same idea escaped Lord ELDON, in the case of *Moggridge* v. *Thackwell*, 7 Ves. 36. Yet, upon other occasions, different opinions have been advanced, with an explicitness, which supports the idea, that the court of chancery in England does not understand these *dicta* as they have been

understood by the counsel for the plaintiff. In the case of *Morice* v. *The Bishop of Durham*, 9 Ves. 399, where the devise was to the bishop, in trust, to dispose of the residue "to such objects of benevolence and liberality as he, in his own discretion, should most approve," the bequest was determined to be void, and the legacy decreed to the next of kin. The master of the rolls said, "In this court, the signification of charity is derived principally from the statute of Elizabeth. Those purposes are considered charitable, which that statute enumerates, or which, by analogies, are deemed within its spirit and intendment." This case afterwards came before the chancellor, who affirmed the decree, and said, "I say, with the master of the rolls, a case has not yet been decided, in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general." 10 Ves. 540.

The reference made by the chancellor to the words of the master of the rolls, whose language he adopts, *proves that he used the term "law" as synonymous with "the statute of Elizabeth." Afterwards, in the [*46 same case, speaking of a devise to charity, generally, the chancellor says, "it is the duty of the trustees, or of the crown, to apply the money to charity, in the sense which the determinations have affixed to the word in this court: viz., either such charitable purposes as are expressed in the statute, or to purposes analogous to those." He adds, "charitable purposes, as used in this court, have been ascribed to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is, by the statute, given to all the purposes described." It has been also said, that a devise to a charity generally is good, because the statute of Elizabeth uses that term.

These quotations show that Lord Eldon, whatever may have been the inclination of his mind, when he determined the case of *Moggridge* v. *Thackwell*, was, on more mature consideration, decidedly of opinion, that the doctrines of the court of chancery, peculiar to charities, originated not in the civil law, but in the statute of Elizabeth. This opinion is entitled to the more respect, because it was given, after an idea, which might be supposed to conflict with it, had been insinuated by Lord Thurlow, and in some degree followed by himself; it was given in a case which required an investigation of the question; it was given, too, without any allusion to the *dicta* uttered by Lord Thurlow and himself; a circumstance which would *scarcely have occurred, had he understood those *dicta* as advancing [*47 opinions he was then denying. It is the more to be respected, because it is sustained by all the decisions which took place, and all the opinions expressed by the judges soon after the passing of the statute of Elizabeth. In 1 Ch. Cas. 134, a devise to the Parish of Great Creaton, the parish not being a corporation, was held to be void, independent of the statute, but good under it. So, in the same book, p. 267, on a devise to a corporation, which was misnamed, the Lord Keeper decreed the charity, under the statute, though, before the statute, no such devise could have been sustained. The same point is decreed in the same book, p. 195, and in many other of the early cases. These decisions are totally incompatible with the idea, that the principles on which they turned were derived from the civil law.

There can be no doubt, that the power of the crown to superintend and enforce charities existed in very early times; and there is much difficulty in marking the extent of this branch of the royal prerogative, before the statute. That it is a branch of the prerogative, and not a part of the ordinary power of the chancellor, is sufficiently certain. Blackstone, in vol. 3, p. 47, closes a long enumeration of the extraordinary powers of the chancellor, with saying, "he is the general guardian of all infants, idiots, lunatics; and has the general superintendence of all charitable uses in the kingdom; and all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery." In the
*48] same volume, p. 487, he says, "the king, as *parens *patriæ*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and therefore, whenever it is necessary, the attorney-general, at the relation of some informant, files, *ex officio*, an information in the court of chancery, to have the charity properly established."

The author of "A Treatise of Equity" says, "so, anciently, in this realm, there were several things that belonged to the king as *parens patriæ*, and fell under the care and direction of this court: as, charities, infants, idiots, lunatics, &c." Cooper, in his chapter on the jurisdiction of the court, says, "the jurisdiction, however, in the three cases of infants, idiots or lunatics, and charities, does not belong to the court of chancery as a court of equity, but as administering the prerogative and duties of the crown." Cooper's Eq. Pl. 27. It would be waste of time, to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject, without perceiving and admitting it. Its extent may be less obvious.

We now find this prerogative employed in enforcing donations to charitable uses, which would not be valid, if made to other uses; in applying them to different objects than those designated by the donor; and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered. It is not to be admitted, that legacies, not
*49] valid in themselves, can be made so by force of prerogative, *in violation of private rights. This superintending power of the crown, therefore, over charities, must be confined to those which are valid in law. If, before the statute of Elizabeth, legacies like that under consideration would have been established, on information filed in the name of the attorney-general, it would furnish a strong argument for the opinion, that some principle was recognised, prior to that statute, which gave validity to such legacies. But although we find *dicta* of judges, asserting, that it was usual, before the statute of Elizabeth, to establish charities, by means of an information filed by the attorney-general; we find no *dictum*, that charities could be established on such information, where the conveyance was defective, or the donation was so vaguely expressed, that the donee, if not a charity, would be incapable of taking; and the thing given would vest in the heir or next of kin. All the cases which have been cited, where charities have been established, under the statute, that were deemed invalid independent of it, contradict this position.

In construing that statute, in a preceding part of this opinion, it was shown, that its enactments are sufficient to establish charities not previously

valid. It affords, then, a broad foundation for the superstructure which has been erected on it. And although many of the cases go, perhaps, too far; yet, on a review of the authorties, we think, they are to be considered as constructions of the statute, not entirely to be justified, rather than as proving the existence of some other principle, concealed in a dark and remote *antiquity, and giving a rule in cases of charity, which forms an exception to the general principles of our law. [*50

But even if, in England, the power of the king as *parens patriæ* would, independent of the statute, extend to a case of this description, the inquiry would still remain, how far this principle would govern in the courts of the United States? Into this inquiry, however, it is unnecessary to enter, because it can arise only where the attorney-general is made a party.

The court has taken, perhaps, a more extensive view of this subject than the particular case, and the question propounded on it, might be thought to require. Those who are to take this legacy beneficially, are not before the court, unless they are represented by the surviving members of the Baptist Association, or by the present corporation. It was, perhaps, sufficient to show, that they are not represented by either. This being the case, it may be impossible, that a party plaintiff can be made, to sue the executor, otherwise than on the information of the attorney-general. No person exists who can assert any interest in himself. The *cestui que trust* can be brought into being, only by the selection of those who are named in the will to take the legacy in trust, and those who are so named, are incapable of taking it. It is, perhaps, decisive of the question propounded to this court to say, that the plaintiffs cannot take. But the rights of those who claim the beneficial interest, have been argued at great length, and with great ability; and there would have *been some difficulty in explaining satisfactorily, the reasons why the plaintiffs cannot take, without discussing also, the rights of those for whom they claim. The court has, therefore, indicated its opinion on the whole case, as argued and understood at the bar. [*51

Story, Justice.[1]—Charitable donations were of great consideration in the civil law, and bequests to pious uses were deemed privileged testaments. Swinburne, pt. 1, § 16, p. 103; Ibid. pt. 7, § 8, pt. 908; 2 Domat 160, 161, 163. There can be little doubt, that the authority of the Roman code, combining with the religious notions of former times, contributed in no small decree to engraft the principles of that law respecting charities into the common law. This was manifestly the opinion of Lord Thurlow (*White* v. *White*, 1 Bro. C. C. 12); and Lord Eldon, in assenting to it, has added, that as, at an early period, the ordinary had authority to apply a portion of every man's estate to charity, when afterwards the statute compelled a distribution, it is not impossible, that the same favor should have been extended to charity in the construction of wills, by their own force, purporting to authorise such a dis-

[1] This opinion was prepared, at the time, by Justice Story, but not delivered. It was published in the appendix to the first edition of 3 Peters' reports; but omitted in the subsequent editions, most probably, because Judge Story had then changed his opinion as to the origin of the jurisdiction of the court of chancery over charitable bequests. It is, however, worth preserving, as a part of the history of the case, and as containing much learning upon a very interesting legal question.

tribution. *Moggridge* v. *Thackwell*, 7 Ves. 36, 69; *Mills* v. *Farmer*, 1 Merivale 55, 94. Be this as it may, it cannot be denied, that many of the privileges given to charitable testaments by the civil law have been, for ages, incorporated into the common law. For instance, one privilege was, that no such testament was void for uncertainty, either as to persons or objects. Hence, if a testator gave his goods to be distributed among the poor, or made the poor his executors, the legacy was not void; although it would have been otherwise, if charity had not been the legatee. Swinburne, pt. 1, § 16, p. 104, 59; 2 Domat, lib. 4, tit. 2, § 6, p. 161, 162, 163. And the same rule has been adopted into the common law, at least, ever since the statute of charitable uses. 43 Eliz., ch. 4. Indeed, at one period, the constructions in respect to charitable bequests were pushed to a most extravagant length; and the good sense of succeeding times has lamented, and so far as it consistently could, has endeavored to abridge the ancient doctrine to something like a rational system.(*a*)

It is now too late to contend, that a disposition in favor of charity can be construed according to the rules which are applicable to individuals. In the first place, the same words in a will, when applied to individuals, may require a very different construction, if applied to the case of a charity. If a testator give his property to such person as he shall hereafter name to be his executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in his lifetime, and no other is appointed in his place; in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favor of charity, chancery will, in both instances, supply the place of an executor, and carry into effect that which in the case of individuals must have failed altogether. *Mills* v. *Farmer*, 1 Merivale 55, 94; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Jackson*, 11 Ibid. 365, 367. Again, in the case of an individual, if an estate is devised to such person as the executor shall name, and no executor is appointed, or one being appointed dies in the testator's lifetime, and no one is appointed in his place, the bequest amounts to nothing. Yet such a bequest to charity would be good, and the court of chancery would in such case assume the office of executor. *Mills* v. *Farmer*, 1 Merivale 55, 96; *Moggridge* v. *Thackwell*, 7 Ves. 36. So, if a legacy be given to trustees, to distribute in charity, and they die in the testator's lifetime, although the legacy is lapsed at law (and if they had taken to their own use it would have been gone for ever), yet, in equity, it will be enforced. *Attorney-General* v. *Hickman*, 2 Eq. Cas. Abr. 193; *Moggridge* v. *Thackwell*, 3 Bro. C. C. 517; s. c. 1 Ves. jr. 464; 7 Ibid. 36; *Mills* v. *Farmer*, 1 Merivale 55, 100; *White* v. *White*, 1 Bro. C. C. 12.

Again, although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy, yet where charity is the legatee, the court will consider it as the whole substance of the bequest; and in such cases only, if the mode fail, will

(*a*) See what is said on this subject in Moggridge *v.* Thackwell, 1 Ves. jr. 464; s. c. 7 Ves. 36; Mills *v.* Farmer, 1 Merivale 55; Corbyn *v.* French, 4 Ves. 418; Attorney-General *v.* Minshull, Ibid. 11; Attorney-General *v.* Boultbee, 2 Ibid. 380; Attorney-General *v.* Whitchurch, 3 Ibid. 141; Cary *v.* Abbot, 7 Ibid. 490; Attorney-General *v.* Bains, Prec. Ch. 270.

provide a mode by which that legatee shall take, but by which no other than charitable legatees can take. *Mills* v. *Farmer*, 1 Merivale 55, 100; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Berryman*, 1 Dick. 168; 2 Roper on Legacies 130. A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, there, the court of chancery, if no mode is pointed out, will of itself supply the defect, and enforce the charity. *Mills* v. *Farmer*, 1 Merivale 55, 95; *Moggridge* v. *Thackwell*, 7 Ves. 36; *White* v. *White*, 1 Bro. C. C. 12. Therefore, it has been held, that if a man devises a sum of money to such charitable uses as he shall direct, by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction by note or codicil, the court of chancery hath power to dispose of it to such charitable uses as it shall think fit. *Attorney-General* v. *Syderfen*, 1 Vern. 224; s. c. 2 Freem. 261, recognised as law in *Mills* v. *Farmer*, 1 Merivale 55, and *Moggridge* v. *Thackwell*, 7 Ves. 36, 70, &c. So, if a testator bequeath a sum for such a school as he should appoint, and he appoints none, the court may apply it for what school it pleases. 2 Freem. 261; *Moggridge* v. *Thackwell*, 7 Ves. 36, 73, 74. The doctrine has gone yet further, and established, that if the bequest denote a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it for the purpose of some charity, agreeable to the law, in the room of that contrary to it. *Da Costa* v. *De Pas*, Ambl. 228; *Moggridge* v. *Thackwell*, 7 Ves. 36, 73, 75; *Cary* v. *Abbot*, Ibid. 490; *Attorney-General* v. *Guise*, 2 Vern. 266. Thus, a sum of money bequeathed to found a Jew's synagogue, has been taken by the court, according to this principle, and transferred to the benefit of a foundling hospital. Ibid., and *Mills* v. *Farmer*, 1 Merivale 55, 100. And a bequest for the education of poor children in the Roman Catholic faith, has been decreed to be disposed of according to the pleasure of the king, under his sign manual. *Cary* v. *Abbot*, 7 Ves. 490.

Another principle, equally well established, is, that if the bequest be for charity, it matters not how uncertain the objects or persons may be; or whether the bequest can be carried into exact execution or not; or whether the persons who are to take be *in esse* or not; or whether the legatee be a corporation capable in law to take or not; in all these and the like cases, the court will sustain the legacy, and give it effect, according to its own principles, and where a literal execution becomes inexpedient or impracticable, will execute it by *cy pres*. *Attorney-General* v. *Oglander*, 3 Bro. C. C. 166; *Attorney-General* v. *Green*, 2 Ibid. 492; *Frier* v. *Peacock*, Rep. temp. Finch 245; *Attoney-General* v. *Boultbee*, 2 Ves. jr. 380; Duke 108–113. Thus, a devise of lands to the church-wardens of a parish (who are not a corporation capable of taking lands), for a charitable purpose, though void at law, will be sustained in equity. 1 Burn's Eccles. Law 226; Duke 33, 115; Com. Dig. Chancery, 2, N, 2; *Rivett's Case*, Moore 890; *Mills* v. *Farmer*, 1 Meriv. 55; *Attorney-General* v. *Bowyer*, 3 Ves. 714; *West* v. *Knight*, 1 Ch. Cas. 135; *Moggridge* v. *Thackwell*, 7 Ves. 36. So, if the corporation for whose use it is designed, is not *in esse*, and cannot come into existence, but by some future act of the crown, as for instance, a gift to found a new college, which requires an incorporation, the gift is valid, and the court will execute it.

White v. *White*, 1 Bro. C. C. 12 ; *Attorney-General* v. *Downing*, Ambl. 550, 571 ; *Attorney-General* v. *Bowyer*, 3 Ves. 714, 727. So, if a devise be an existing corporation, by a misnomer, which makes it void at law. *Anon.*, 1 Ch. Cas. 267 ; *Attorney-General* v. *Platt*, Rep. temp. Finch 221. So where a devise was to the poor generally, the court decreed it to be executed in favor of three public hospitals in London. *Attorney-General* v. *Peacock*, Rep. temp. Finch 45 ; *Owen* v. *Bean*, Ibid. 395 ; *Attorney-General* v. *Syderfen*, 1 Vern. 224 ; *Clifford* v. *Francis*, 1 Freem. 330. So, a legacy towards establishing a bishop in America was held good, though none was yet appointed. *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444. And where a charity is so given, that there can be no objects, the court will order a different scheme of the charity; but it is otherwise, if objects may, though they do not at present, exist (*Attorney-General* v. *Oglander*, 3 Bro. C. C. 166) ; and when objects cease to exist, the court will new model the charity. *Attorney-General* v. *City of London*, 3 Bro. C. C. 171 ; s. c. 1 Ves. jr. 243. And in aid of these principles, the court will, in all cases of charities, supply all defects in the conveyances, where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute. *Case of Christ's College*, 1 W. Bl. 90 ; s. c. Ambl. 351 ; *Attorney-General* v. *Rye*, 2 Vern. 453 ; *Rivett's Case*, Moore 890 ; *Attorney-General* v. *Burdet*, 2 Vern. 755 ; *Attorney-General* v. *Bowyer*, 3 Ves. jr. 714; *Mills* v. *Farmer*, 15 Merivale 55 ; *Collison's Case*, Hob. 136 ; Moore 822.

Some of these doctrines may seem strange to us, as they have also seemed to Lord ELDON ; but he considered the cases too stubborn to be shaken, without doing that in effect, which no judge will in terms take upon himself, to reverse decisions that have been acted upon for centuries. *Moggridge* v. *Thackwell*, 7 Ves. 36, 87.

If, therefore, the present case had arisen in England, since the statute of charitable uses, 43 Eliz., ch. 4, there can be no doubt, that it would have been established as a valid bequest, notwithstanding it is given to an unincorporated society.(*a*) The only question would have been, whether it ought to be administered by a scheme under the direction of the court of chancery, or by the king himself, as *parens patriæ*, under his sign-manual. As to this, the rule which has been drawn by Lord ELDON, from a most learned and critical examination of all the authorities is, that where there is a bequest to trustees for charitable purposes, the disposition must be in chancery, under a scheme to be approved by a master ; but where the object is charity, and no trust is interposed, it must be by the king, under his sign-manual ; for in such cases, the king, as *parens patriæ*, is deemed the constitutional trustee. *Moggridge* v. *Thackwell*, 7 Ves. 36, 86 ; *Paice* v. *Archbishop of Canterbury*, 14 Ibid. 372 ; *Attorney-General* v. *Herrick*, Ambl. 712; *Morice* v. *Bishop of Durham*, 9 Ves. 399 ; s. c. 10 Ibid. 522, 541 ; *Clifford* v. *Francis*, 1 Freem. 330 ; *Attorney-General* v. *Syderfen*, 2 Ibid. 261 ; s. c. 1 Vern. 224 ; 7 Ves. 69, 70 ; 2 Maddock's Ch. 63 ; Highmore on

(*a*) See also, Baylis and Church *v.* Attorney-General, 2 Atk. 239; Owen *v.* Bean, Rep. temp. Finch 395 ; s. c. 2 Ventris 349; Anon., 1 Ch. Cas. 267; West *v.* Knight, Ibid. 135; Mayor, &c., of Reading *v.* Lane, Duke 81. And see Bridgman's Duke 361, 486.

Mortm. 250 ; 1 Bac. Abr., Charitable Uses, E ; *Attorney-General* v. *Mathews*, 2 Lev. 167.

But the statute of Elizabeth not being in force in Virginia, at the time when the present will took effect (it having been repealed by the legislature between the making of the will and the death of the testator), it becomes a material inquiry, how far the jurisdiction and doctrines of the court of chancery respecting charitable uses depends upon that statute, and whether, independent of it, the present donation can be upheld.

It is not easy to arrive at any satisfactory conclusion on this head. Few traces remain of the exercise of this jurisdiction, in any shape, prior to the statute of Elizabeth. The principal, if not the only cases now to be found, were decided in the courts of common law, and turned upon the question, whether the uses were void or not, within the statutes against superstitious uses. One of the earliest cases is *Porter's Case*, 1 Co. 22 *b*, in 34 & 35 Elizabeth. See also, a like decision in *Partridge* v. *Walker*, cited 4 Co. 116 *b* ; *Martindale* v. *Martin*, Cro. Eliz. 288 ; *Thetford School*, 8 Co. 130, which was a devise of lands devisable by custom, to the testators's wife in fee, upon condition, that she should assure the lands devised for the maintenance and continuance of a free school and certain alms-men and alms-women ; and it appeared, that the heir had entered for condition broken, and conveyed the same lands to the queen. It was held, that the use being for charity, was a good and lawful use, and not void by the statutes against superstitious uses, and that the queen might well hold the land for the charitable uses. Lord Eldon, in commenting on this case, has observed, "it does not appear that this court (*i. e.*, chancery), at that period, had cognisance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere,(*a*) so far as the tradition of times immediately following goes, there were no such informations as that upon which I am now sitting (*i. e.*, an information to establish a charity); but they made out their case as well as they could by law." *Attorney-General* v. *Bowyer*, 3 Ves. 714, 726. So that the result of Lord Eldon's researches on this point is, that until about the period of enacting the statute of Elizabeth, bills were not filed in chancery to establish charities ; and it is remarkable, that Sir Thomas Egerton and Lord Coke, who argued *Porter's case* for the queen, though they cited many antecedent cases, refer to none which were not decided at law. And the doctrine established by *Porter's case* is, that if a feoffment be made to a general legal use, not superstitious, though indefinite, though no person is *in esse*, who could be the *cestui que use*, yet the feoffment is good ; and if the use was bad, the heir of the feoffor would be entitled to enter, the legal estate remaining in him. 3 Ves. jr. 726. The absence, therefore, of all authority derived from equity decisions, on an occasion when they would probably have been used, if existing, certainly does very much favor the conclusion of Lord Eldon ; and if we might hazard a conjecture, it would be that *Porter's case* having established charitable uses, not superstitious, to be good at law, chancery, in analogy to other cases of trusts, immediately held the feoffees to such uses accountable in equity for the due execution of them ; and that the inconveniences felt in resorting to

(*a*) Sir Thomas Egerton was made lord chancellor in 39 Elizabeth, 1596, and was created Lord Ellesmere in 1 James I., 1603.

this new and anomolous proceeding, from the indefinite nature of some of the uses, gave rise within a very few years to the statute of 43 Elizabeth.(a) This view would have a great tendency to reconcile the language used on other occasions by other chancellors, in reference to the jurisdiction of chancery over charities, with that of Lord ELDON; as it would show, that cases of feoffments to charitable uses, bills to establish those uses might in fact have been introduced by Lord ELLESMERE, about five years before the statute of Elizabeth; which might be quite consistent with the fact, that such bills were not sustained, where the donation was to charity generally, and no trust was interposed, or legal estate devised, to support the uses, and it is very certain, that at law, a devise to charitable uses, generally, without interposing a trustee, or a devise to a non-existing corporation, or to an unincorporated society, would have been, and, in fact, was held, utterly void, for want of a person having a sufficient capacity to take as devisee. *Anon.*, 1 Chan. Cas. 267; *Attorney-General* v. *Tancred*, 1 W. Bl. 90; s. c. Ambl. 351; *Collinson's Case*, Hob. 136; s. c. Moore 888; *Widmore* v. *Woodroffe*, Ambl. 636, 640; Com. Dig. Devise, K. The statute of Elizabeth in favor of charitable uses cured this defect, Com. Dig. Charitable Uses, N, 11; Ibid. Chancery, 2, N, 10; and provided (as we shall hereafter have occasion more immediately to consider), a new mode of enforcing such uses, by a commission, under the direction of the court of chancery. Shortly after this statute, it became a matter of doubt, whether the court could grant relief by original bill, in cases within that statute, or was not confined to the remedy by commission. That doubt remained, until the reign of Charles II., when it was settled in favor of the jurisdiction by original bill. *Attorney-General* v. *Newman*, 1 Ch. Cas. 157; s. c. 1 Lev. 284; *West* v. *Knight*, 1 Ch. Cas. 134; *Anon.*, Ibid. 267; 2 Fonb. Eq. b. 3, pl. 2, ch. 1, § 1; *Parish of St. Dunstan* v. *Beauchamp*, 1 Ch. Cas. 193. But on one occasion, in which this very question was argued before him, Lord Keeper BRIDGMAN declared, "that the king, as *pater patriæ*, may inform for any public benefit for charitable uses, before the statute of 39 of Elizabeth, for charitable uses; but it was doubted, the court not, by bill, take notice of that statute, so as to grant a relief, according to that statute, upon a bill." *Attorney-General* v. *Newman*, 1 Ch. Cas. 157. On another occasion, soon afterwards, where the devise was to a college, and held void at law by the judges, for a misnomer, and on a bill to establish the devise as a charity, the same question was argued; Lord Keeper FINCH (afterwards Lord NOTTINGHAM) held the devise good, as an appointment under the statute of Elizabeth, and "decreed the charity, though before the statute, no such decree could have been made." *Anon.*, 1 Ch. Cas. 267.

It would seem, therefore, to have been the opinion of Lord NOTTINGHAM, that an original bill would not, before the statute of Elizabeth, lie, to establish a charity, where the estate did not pass at law, to which the charitable uses attached. In *Eyre* v. *Shaftesbury*, 2 P. Wms. 103, 118 (cited also, 7 Ves. jr. 63, 87), Sir JOSEPH JEKYLL said, in the course of his reasoning on another point, "in like manner, in the case of charity, the king, *pro bono publico*, has an original right to superintend the care thereof, so that, ab-

(a) There was, in fact, an act passed respecting charitable uses in 39 Elizabeth, ch. 9; but it was repealed by the act of 43 Eliz., ch. 4. Com. Dig. Charitable Uses, N, 14.

stracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice, to file informations in chancery, in the attorney-general's name, for the establishment of charities." In the *Bailiffs, &c. of Burford* v. *Lenthall*, 2 Atk. 550 (1743), Lord HARDWICKE is reported to have said, "the courts have mixed the jurisdiction of bringing informations in the name of the attorney-general, with the jurisdiction given them under the statute of Elizabeth, and proceed either way, according to their discretion." In a subsequent case, *Attorney-General* v. *Middleton* (1751), 2 Ves. 327, which was an information filed by the attorney-general against the master and governors of a school, calling them to account in chancery, as having the general superintendency of all charitable donations, the same learned chancellor, in discussing the general jurisdiction of chancery on this head, and distinguishing the case before him from others, because the trustees or governors were invested with the visitatorial power, said, "consider the nature of the foundation; it is at the petition of two private persons, by charter of the crown, which distinguishes this case from cases of the statute of Elizabeth on charitable uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. But there may be a bill by information in this court, founded on its general jurisdiction; and that is from necessity, because there is no charter to regulate it, and the king has a general jurisdiction of this kind. There must be somewhere a power to regulate, but where there is a charter, with proper powers, there is no ground to come into this court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rules of law. Therefore, though I have often heard it said in this court, if an information is brought to establish a charity, and praying a particular relief and mode of regulation, and the party fails in that particular relief, yet that information is not to be dismissed, but there must be a decree for the establishment; that is, always with this distinction, where it is a charity at large, or in its nature before the statute of charitable uses; but not in the case of charities incorporated and established by the king's charter, under the great seal, which are established by proper authority allowed." And again, "it is true, that an information in the name of the attorney-general, as an officer of the crown, was not a head of the statute of charitable uses, because that original jurisdiction was exercised in this court before, but that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown."

It was manifestly, therefore, the opinion of Lord HARDWICKE, that, independently of the statute of Elizabeth, the court of chancery did exercise original jurisdiction, in cases of charities at large, which he explains to mean, charities not regulated by charter; but it does not appear, that his attention was called to discriminate between such as could take effect at law, by reason of the interposition of a feoffee or devisee capable of taking, and those where the purpose was general charity, without the interposition of any trust to carry it into effect; and the same remark applies to the

dictum by Sir JOSEPH JEKYLL. In a still later case, *Attorney-General* v. *Tancred*, 1 W. Bl. 90 ; s. c. Ambl. 351 ; 1 Eden 10, which was an information to establish a charity, and aid a conveyance in remainder, to certain officers of Christ's college, to certain charitable uses, Lord Keeper HENLEY (afterwards Lord NORTHINGTON) is reported to have said, "the conveyance is admitted to be defective, the use being limited to certain officers of the corporation, and not to the corporate body ; and therefore, there is a want of proper persons to take in perpetual succession. The only doubt is, whether the court shall supply this defect, for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court, before, at and after the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Thus, though devises to corporations were void, under the statute of Henry VIII., yet they were always considered as good, in equity, if given to charitable uses." And he then proceeds to declare, that he is obliged, by the uniform course of precedents, to assist this conveyance, and therefore, establishes the conveyance, expressly under the statute of Elizabeth.

There is some reason to question, if the language here imputed to Lord NORTHINGTON be minutely accurate. His Lordship manifestly aids the conveyance, as a charity, in virtue of the statute of Elizabeth ; and there is no doubt, that it has been the constant practice of the court, since that statute, to aid defects in conveyances to charitable uses. But there is no case in which such defects were aided, before that statute. The old cases, though arising before, were deemed to be within the reach of that statute, by its retrospective language, and expressly decided on that ground. *Collinson's Case*, Hob. 136 ; s. c. Moore 888 ; Ibid. 822 ; *Sir Thomas Middleton's Case*, Ibid. 889 ; *Rivett's Case*, Ibid. 890, and the cases cited in Raithby's note to *Attorney-General* v. *Rye*, 2 Vern. 453 ; Duke 74, 77, 83, 84 ; Bridg. Charit. 366, 379, 380, 370 ; Duke 105 to 113. And the very case put, of devises to corporations, which are void under the statute of Henry VIII., and are held good, solely by the statute of Elizabeth, shows that his Lordship was looking to that statute ; for it is plain, that a devise, void by statute, cannot be made good, upon any principles of general law. What, therefore, is supposed to have been stated by him, as being the practice before the statute, is probably founded in the mistake of the reporter. The same case is reported in Ambler 351, where the language is, "the constant rule of the court has always been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment ; as, in Jesus' college, *Collinson's case*, in Hobart 136." Now *Collinson's case* was expressly held to be sustainable, only as an appointment under the statute of Elizabeth ; and this shows that the language is limited to cases governed by that statute.

In a very recent charity case, Sir Arthur Piggott, in argument, said, "the difference between the case of individuals and that of charities, is founded on a principle which has been established ever since the statute of charitable uses, in the reign of Elizabeth, and has been constantly acted upon from those days to the present ;" and Lord ELDON adopted the remark, and said, "I am fully satisfied as to all the principles laid down in the course of this argument, and accede to them all." His Lordship then proceeds to

discuss the most material of the principles and cases from the time of Elizabeth, and builds his reasoning, as, indeed, he had built it before, upon the supposition, that the doctrine in chancery, as now established, rested mainly on that statute. *Mills* v. *Farmer*, 1 Merivale 55, 86, 94, 100; *Moggridge* v. *Thackwell*, 7 Ves. 36; *Attorney-General* v. *Bowyer*, 3 Ibid. 714, 726. And his Lordship's opinion, in the case alluded to, *Attorney-General* v. *Bowyer*, 3 Ves. 714, 726, when commenting on *Porter's case*, is entitled to the more weight, because it seems to have been given after a very careful examination of the whole judicial history of charities.

These are all the cases which the researches of the court and of counsel have enabled them to find, where the jurisdiction of chancery over charities, antecedent to the statute of Elizabeth, has been directly or incidentally discussed. The circumstance that no cases prior to that time can be found in equity; the tradition that has passed down to our own times, that original bills to establish charities were first entertained in the time of Lord Ellesmere; and the fact that the cases immediately succeeding that statute, where devises, void at law, were held good as charities, might have been argued and sustained, upon the general jurisdiction of the court, if it existed, and yet were exclusively argued and decreed upon the footing of that statute; do certainly afford a very strong presumption, that the jurisdiction of the court to enforce charities, where no trust was interposed, and where no devisee was *in esse*, or where the charity was general and indefinite both as to persons and objects, mainly rests upon constructions (whether ill or well founded, is now of no consequence) of that statute.

It is very certain also, that since the statute of Elizabeth, no bequests are deemed within the authority of chancery to establish and regulate, except bequests for those purposes which that statute enumerates as charitable, or which, by analogies are deemed within its spirit and intendment. A bequest may be, in an enlarged sense, charitable, and yet not within the purview of the statute. Charity, as the master of the rolls has justly observed, in its widest sense, denotes all the good affection men ought to bear towards each other; in its more restricted and common sense, relief to the poor. In neither of these senses, is it employed in the court of chancery. *Morice* v. *Bishop of Durham*, 9 Ves. 399; s. c. 10 Ibid. 522; *Brown* v. *Yeall*, 7 Ibid. 59, note *a*; *Moggridge* v. *Thackwell*, Ibid. 36; *Attorney-General* v. *Bowyer*, 3 Ibid. 714, 726; *Cox* v. *Basset*, Ibid. 155. In that court, it means such only as are within the letter and the spirit of the statute of Elizabeth; and therefore, where a testatrix bequeathed the residue of her personal estate to the bishop of D., to dispose of the same "to such objects of benevolence and liberality as the bishop, in his own discretion, shall most approve of," and appointed the bishop her executor; on a bill to establish the will and declare the residuary bequest void, the court held the bequest void, upon the ground, that objects of benevolence and liberality were not necessarily charitable, within the statute of Elizabeth, and were, therefore, too indefinite to be executed. The court further declared, that no case had yet been decided, in which the court had executed a charitable purpose, unless the will contained a description of that which the law acknowledges a charitable purpose, or devoted the property to purposes of charity, in general, in the sense in which that word is used in the court. That the case was, therefore, the case of a trust of so indefinite a nature,

that it could not be under the control of the court, so that the administration of it could be reviewed by the court, or if the trustee died, the court itself could execute the trust. That it fell, therefore, within the rule of the court, that where a trust is ineffectually declared, or fails, or becomes incapable of taking effect, the party taken shall be a trustee, if not for those who were to take by the will, for those who take under the disposition of the law; and the residue was accordingly decreed to the next of kin.

So that it appears, since the statute of Elizabeth, the court of chancery will not establish any trusts for indefinite purposes of a benovelent nature not charitable within the purview of that statute, although there be an existing trustee in whom it is vested; but will declare the trust void, and distribute the property among the next of kin: and yet, if there was an original jurisdiction in chancery over all bequests, charitable in their own nature, and not superstitious, to establish and regulate them, independent of the statute, it is not easy to perceive, why an original bill might not be sustained in such court, to establish such bequest, especially, where a trustee is interposed to effectuate it; for the statute does not contain any prohibition of such bequests. An argument may, therefore, be fairly drawn from this source, against a general jurisdiction in chancery over charities of an indefinite nature, prior to the statute.

And the statute itself may be resorted to, as affording an additional argument in corroboration of the opinion already expressed. It begins, by a recital, that lands, goods, money, &c., had been given, &c., heretofore, to certain purposes, which it enumerates in detail, which lands, &c., had not been employed according to the charitable intent of the givers and founders, by reason of frauds, breaches of trusts, and negligence in those that should pay, deliver and employ the same. It then enacts, that it shall be lawful for the lord chancellor, &c., to award commissions, under the great seal, to proper persons, to inquire, by juries, of all and singular such gifts, &c., breaches of trusts, &c., in respect to such gifts, &c., heretofore given, &c., or which shall hereafter be given, &c., "to or for any the charitable and godly uses before rehearsed;" and upon such inquiry, to set down such orders, judgments and decrees, as the lands, &c., may be duly and faithfully employed to and for such charitable uses before rehearsed, for which they were given "which orders, judgments and decrees, not being contrary to the orders, statutes or decrees of the donors or founders, shall stand firm and good, according to the tenor and purpose thereof, and shall be executed accordingly, until the same shall be undone and altered by the lord chancellor, &c., upon complaint by any party grieved, to be made to them." Then follow several provisions, excepting certain cases from the operation of the statute, which are not now material to be considered. The statute then directs the orders, &c., of the commissioners to be returned under seal, into the court of chancery, &c., and declares, that the lord chancellor, &c., shall and may "take such order for the due execution of all or any of the said judgments, orders and decrees, as to them shall seem fit and convenient;" and lastly, the statute enacts, that any person aggrieved with any such orders, &c., may complain to the lord chancellor, &c., for redress therein; and upon such complaint, the lord chancellor, &c., may, by such course as to their wisdom shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof;

"and upon hearing thereof, shall and may annul, diminish, alter or enlarge the said orders, judgments and decrees of the said commissioners, as to them shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof;" and may tax and award costs against the person complaining, with just and sufficient cause, of the orders, judgments and decrees before mentioned.(*a*)

From this summary statement of the contents of the statute, it is apparent, that the authority conferred on the court of chancery, in relation to charitable uses, is very extensive; and it is not at all wonderful, considering the religious notions of the times, that the statute should have received the most liberal, not to say, in some instances, the most extravagant, interpretation. And it is very easy to perceive, how it came to pass, that as power was given to the court, in the most unlimited terms, to annul, diminish, alter or enlarge the orders and decrees of the commissioners, and to sustain an original bill in favor of any party grieved by such order or decree, the court arrived at the conclusion, that it might, by original bill, do that, in the first instance, which it certainly could do circuitously upon the commission.(*b*) And as in some cases, where the trust was for a definite object, and the trustee living, the court might, upon its ordinary jurisdiction over trusts, compel an execution of it, by an original bill, independent of the statute (*Attorney-General* v. *Dixie*, 13 Ves. 519; *Kirkby Ravensworth Hospital*, 15 Ibid. 305; *Green* v. *Rutherforth*, 1 Ibid. 462; *Attorney-General* v. *Earl of Clarendon*, 17 Ibid. 491, 499; 2 Fonb. Eq. b. 63, pt. 2, ch. 1, § 1, note *a*; Cooper's Eq. Pl. 292), we are at once let into the origin of the practice of mixing up the jurisdiction by original bill, with the jurisdiction under the statute, which Lord HARDWICKE alluded to in the passage already quoted, *Bailiffs, &c., of Burford* v. *Lenthall*, 2 Atk. 550; and which, at that time, was inveterately established. And this mixture of the jurisdictions serves also to illustrate the remark of Lord NOTTINGHAM in the case already cited; *Anon.*, 1 Ch. Cas. 267, where, upon an original bill, he decreed a devise to charity, void at law, to be good in equity, as an appointment, though before the statute of Elizabeth, no such decree could have been made.

Upon the whole, it seems to me, that the jurisdiction of the court of chancery over charities, where no trust is interposed, or there is no person *in esse* capable of taking, or where the charity is of an indefinite nature, is not to be referred to the general jurisdiction of that court, but sprung up, after the statute of Elizabeth, and rests mainly on its provisions. See Cooper Eq. Pl. 102, 103. This opinion is supported by the weight of authorities speaking to the point, and particularly, by those of a very recent date, which appear to have been most thoroughly considered. The language, too, of the statute lends a confirmation to the opinion, and enables us to trace what would otherwise seem a strange anomaly, to a legitimate origin. If so, there is no pretence, that by the law of Virginia, at the period when this will took effect, the statute of Elizabeth was then in force; or that any court of equity of that state could sustain the bequest, in equity, as a charity, if it

(*a*) See the statute 43 Eliz., ch. 4, at large, 2 Inst. 707; Bridg. on Duke Char., ch. 1, pl. 1.

(*b*) See the Poor of St. Dunstan *v.* Beauchamp, 1 Ch. Cas. 193; 2 Inst. 711; Bailiffs, &c., of Burford *v.* Lenthall, 2 Atk. 551; 15 Ves. 305.

was void at law. And that it was void at law, cannot be seriously doubted; for the legatees were not then a corporate society, capable of taking it. Com. Dig., Devise, K; 1 Roll. Abr. 609; Com. Dig., Chancery, 2, N, 1, &c. And it is a maxim, that the legacy must take effect at the death of the testator, or be void at that time, and the right vest in another. *Per* Lord HARDWICKE, *Widmore* v. *Woodroffe*, Ambl. 636, 640. And if a court of chancery could not, in virtue of its general jurisdiction, take cognisance of, or sustain the bequest in this suit, neither can the circuit court of the United States.

If we could surmount the objection already considered, that this bequest is, under the present law of Virginia, deemed void, both in law and equity, and therefore, incapable of being decreed by this court, we might entertain the other questions which have been made in this court. One of these questions is, whether this court, as a court of equity, has a right to administer any charities, the administration of which would properly belong to the government of Virginia as *parens patriæ*. It is certainly stated in books of authority, that the king, as *parens patriæ*, has the general superintendence of all charities, not regulated by charter (3 Bl. Com. 427; 2 Fonb. Eq. b. 2, pt. 2, ch. 1, § 1, and note *a*), which he exercises by the keeper of his conscience, the chancellor; and therefore, the attorney-general, at the relation of some informant, when it is necessary, files, *ex officio*, an information in the court of chancery, to have the charity properly established. And it is added, that the jurisdiction thus exercised does not belong to the court of chancery, as a court of equity, but as administering the prerogative and duties of the crown. Cooper's Eq. Pl. xxvii.; 2 Fonb. Eq. b. 2, ch. 1, § 1; *Lord Falkland* v. *Bertie*, 2 Vern. 342; Mitf. Eq. Pl. 29; *Bailiffs, &c., of Burford* v. *Lenthall*, 2 Atk. 551. It may safely be admitted, that the government of a state, as *parens patriæ*, has a right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it; and it seems also to be held, that the jurisdiction vested by the statute of Elizabeth over charitable uses, is personal to the lord chancellor, and not in his ordinary or extraordinary jurisdiction in chancery, like that, in short, which he exercises as to lunatics and idiots. *Bailiffs of Burford* v. *Lenthall*, 2 Atk. 551; 2 Fonb. Eq. b. 3, pt. 2, ch. 1, § 1, and note *a*.

It may also be admitted, that where money is given to charity, generally and indefinitely, without trustees or objects selected, the king, as *parens patriæ*, is the constitutional trustee, and may apply it as he pleases, under his sign-manual, and not under a decree of chancery. *Moggridge* v. *Thackwell*, 7 Ves. 36, 83, 85, 86; *Mills* v. *Farmer*, 1 Merivale 55; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *Attorney-General* v. *Matthews*, 2 Lev. 167. Where, however, the execution is to be by a trustee, with general, or some, objects pointed out, or to a trustee for indefinite and general charity, the court of chancery will take the administration of the trust. *Moggridge* v. *Thackwell*, 7 Ves. 36, 86; *Mills* v. *Farmer*, 1 Merivale 55. Whether, in such a case, upon *an original bill* to establish the charity, the lord chancellor acts as the personal delegate of the crown, administering its prerogative in analogy to the authority *personally* given to him by the statute of charitable uses, under a commission; or whether, as a court of equity, in virtue of its general powers, may, perhaps, upon the authorities, admit of some ques-

tion : though my opinion is, that it belongs to the court, as a court of equity, exercising jurisdiction to enforce a *trust* recognised and enforced by the law of the land ; and I think this opinion is corroborated by the better authorities. Ibid.; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364 ; *Attorney-General* v. *Wansay*, 15 Ibid. 231 ; *Attorney-General* v. *Price*, 17 Ibid. 371 ; *Waldo* v. *Caley*, 16 Ibid. 206. Be this as it may, where there is a *trust* for a *definite* object, and the trust is, in point of law sustainable, there seems no reason why a court of equity, as such, may not take cognisance of such trust at the suit of any competent party, whether the attorney-general, or a private interested relator, as well as of any other trust whose execution is sought. 2 Fonb. Eq. b. 3, pt. 2, ch. 1, § 1, note *a*, § 2, § 3, note *i ; Moggridge* v. *Thackwell*, 7 Ves. 36 ; *Attorney-General* v. *Brewer's Company*, 1 Merivale 495 ; *Attorney-General* v. *Bowyer*, 3 Ves. 714 ; 2 Vern. 387 ; *Attorney-General* v. *Newcombe*, 14 Ves. 1, 7 ; *White* v. *White*, 7 Ibid. 423. If, therefore, by the law of Virginia, the bequest in this case had been valid in law or equity, the trustees being marked out, and the objects being definite, there does not seem any reason why, at their instance, it might not have been executed in this as well as in any other court of equity. The court, in such a case, would carry into effect the intention of the testator ; nothing would be left to its discretion; and it would, therefore, do precisely what a state court of chancery must do, acting as such, or administering the prerogative of the government as *parens patriæ*.

In respect to another question, whether the attorney-general be not a a necessary party to a bill in equity to establish a charity, or carry it into effect, that must depend upon circumstances. If the charity be indefinite, or there be no trustees, or no persons competent to take, or the objects be of a general and public nature, it would clearly be proper, that the government to whom the superintendency of such charities belongs, should be made a party to the bill by their attorney-general. This seems to have been the general course established by the authorities. Cooper's Eq. Plead. 21, 22, 102, 163 ; *Monell* v. *Lawson*, 2 Eq. Cas. Abr. 167, pl. 13 ; 4 Vin. 500, pl. 11; *Attorney-General* v. *Pearce*, 2 Atk. 87. But where the charity is definite in its nature, and trustees are appointed to take or execute it, it is not perceived, why a suit at the instance of such trustees may not properly be maintained, without the government being a party. *Monell* v. *Lawson*, 2 Eq. Cas. Abr. 167, pl. 13 ; 4 Vin. 500, pl. 11 ; Bridg. Duke, Charit. 385, 386 ; *Chitty* v. *Parker*, 4 Bro. C. C. 38 ; *Anon.*, 3 Atk. 276 ; *Attorney-General* v. *Newcombe*, 14 Ves. 1, 7 ; *Waldo* v. *Caley*, 16 Ibid. 206.

Another question which has been discussed in the argument is, whether a court of court of equity, sitting within one jurisdiction, can execute any charitable bequests for foreign objects, in another jurisdiction ; and it is said, in a technical sense, to be against the public policy of Virginia, to sustain or execute such bequests. There is no statute of Virginia making such bequests void; and therefore, if against her policy, it can be only because it would be against the general policy of all states governed by the common law. The case of the *Attorney-General* v. *The City of London*, 3 Bro. C. C. 171 ; s. c. 1 Ves. jr. 243 (*Provost, &c., of Edinburgh* v. *Aubery*, Ambl. 236 ; *Oliphant* v. *Hendrie*, 1 Bro. C. C. 571), is relied on to establish the general proposition. It was an information to establish a new scheme for a charity of Mr. Boyle, who by his will, in 1691, gave the resi-

due of his fortune to be laid out by his executors for charitable and other pious and good uses, at their discretion, but recommended that the greater part should be laid out for the advancement of the Christian religion among infidels. The charity had been established under a decree of the court, and the property conveyed to the City of London, upon trust to lay out the rents and profits, in the advancement of the Christian religion, as the bishop of London, for the time being, and Lord Burlington should appoint. The trustees appointed the rents and profits to be paid to an agent in London, for the college of William and Mary, in Virginia, for this purpose, that the college should maintain and educate in the Christian religion so many Indian children, as far as the fund would go, and that the president, &c., thereof, should transmit accounts, and *should be subject to rules given them, until altered.* This arrangement was ratified by the court. After the revolution, the present bill was filed for the purpose of taking away the charity from the college, because emancipated from the control of the court, and to have it disposed of by a new scheme. Upon hearing the cause, a decree was made accordingly, upon the ground, that the trusts to the college to convert neighboring infidels, ceasing for want of objects (there being now, as the court said, no neighboring infidels), the charity must be applied anew. 3 Bro. C. C. 171, 177. There was also an intimation, at the argument, that the corporation was not now an existing corporation, and at all events, was not within the control of the court. But the ground of the decision was as above stated. It is observable in this case, that the charity of Mr. Boyle was not, in terms or substance, limited to foreign countries or objects ; but the application to foreign objects was originally under the decree of the court. It certainly then furnishes no argument against, but an argument in favor, of the power of a court of equity, to apply even a *general* charity to *foreign* objects.

But we need not rest here. There are other cases directly in point, in which bequests for foreign charitable objects have been sustained in equity. In the *Provost, &c., of Edinburgh* v. *Aubery*, Ambl. 236, there was a devise of 3500*l.* south-sea annuities, to the plaintiffs, to be applied to the maintenance of poor laborers, residing in Edinburgh and the towns adjacent. Lord Hardwicke was of opinion, that he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland ; and therefore, directed that the annuities should be transferred to such person as the plaintiffs shall appoint, to be applied to the trusts in the will. So, in *Oliphant* v. *Hendrie*, 1 Bro. C. C. 571, where A., by will, gave 300*l.* to a religious society in Scotland, to be laid out in the purchase of heritable securities, in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest. That case approaches very near to the case now at bar. In *Campbell* v. *Radnor*, 1 Bro. C. C. 271, the court held a bequest of 7000*l.*, to be laid out in the purchase of lands in Ireland, and the rents and profits distributed among poor persons in Ireland, &c., to be good and valid in law. In *Curtis* v. *Hutton*, 14 Ves. 537, the court held a bequest of personal estate for the maintenance of a charity (a college) in Scotland, to be a valid bequest. In a still more recent case, a bequest of 10,000*l.* in trust, with the magistrates of Inverness, in Scotland, to apply the interest and income for the education of certain boys, was held a valid bequest. *Mack-*

intosh v. *Townsend*, 16 Ves. 330. There is also another case, *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444, in which it was held, that a legacy given towards establishing a bishop in America was held good, notwithstanding none was yet appointed; and the court directed the money to remain in court, until it should be seen whether any appointment should take place. Nor is the uniformity of the current of the authorities broken in upon, by the doctrine in *De Garcin* v. *Lawson*, 4 Ves. jr. 433, note There, the bequests were to Roman Catholic establishments, or for the benefit of Roman Catholic priests, and were considered void, because they were illegal, and contrary to the policy of England, evinced by the express enactments of statutes on this subject. *Cary* v. *Abbot*, 7 Ves. jr. 490; Highmore on Mortmain (1809), p. 34, &c. It does not strike me, therefore, that there is any solid objection to the bequest, in the case at bar, founded on the persons or objects being foreign to the state of Virginia.

But for the reasons already stated, the bequest being void, I am of opinion, that the court ought to certify that opinion to the circuit court of Virginia.

Certificate.—This cause came on to be heard on the transcript of the record of the court of the United States, for the fifth circuit, and the district of Virginia, and on the question therein stated, on which the judges of that court were divided in opinion, and which was adjourned to this court, and was argued by counsel: On consideration whereof, this court is of opinion, that the plaintiffs are incapable of taking the legacy for which this suit was instituted; which opinion is ordered to be certified to the said circuit court.(*a*)

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*The Divina Pastora: The Spanish Consul, Claimant. [*52

Civil war.

The government of the United States having recognised the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new governments in South America may direct against their enemy.

Unless the neutral right of the United States (as ascertained by the law of nations, the acts of congress and treaties) are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country.[1]

Where the pleadings in a prize, or other admiralty cause, are too informal and defective to pronounce a final decree upon the merits, the cause will be remanded to the circuit court, with directions to permit the pleadings to be amended, and for further proceedings.

Appeal from the Circuit Court of Massachusetts. The petition or libel, in this cause, by the consul of his Catholic Majesty at Boston, alleges and propounds: 1. That there lately arrived at the port of New Bedford, in this district, and is now lying in the said port of New Bedford, a Spanish vessel, called the Esperanza, otherwise called the Divina Pastora, having on board a cargo, consisting of cocoa, cotton, indigo, hides and horns, of great value, to wit, of the value of $10,000; that the said vessel is navigated by seven persons,

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(*a*) See Appendix, Note 1, on Charitable Bequests.

[1] The Neustra Senora de la Caridad, *post*, p. 497.

who are all American citizens, as he is informed and believes ; and that there
*53] are no *other persons on board of said vessel, and none other were on board when the said vessel arrived at said port. That the aforesaid persons say, that the said vessel was bound on a voyage from Laguayra to Cadiz, in Spain, and that she was captured by a privateer, or armed vessel, sailing under a flag, which they denominate the flag of La Plata ; and that they did intend to carry said vessel to some port in the West Indies, but, afterwards, came into the port of New Bedford. 2. That the said vessel and cargo purport to have been consigned to Antonio Seris, a merchant at Cadiz. 3. That the said consul verily believes, that the said vessel has been captured and brought into the aforesaid port, contrary to the law of nations, and in violation of the rights of the said Antonia Seris, and that the said Antonio is justly and lawfully entitled to the possession of the said vessel and her cargo : concluding with a prayer, that the process of the court may issue, directed to the marshal of this district, or his deputy, requiring of them, respectively, to take the said vessel and cargo into custody, to the end, that due inquiry may be made into the facts pertaining to this case, and that the property may be adjudged, decreed and restored, according to the just rights of whomsoever may be therein interested, and according to law and the comity which the United States have always manifested towards foreign nations.

The plea and answer of "Don Daniel Utley, a citizen of the free and independent United Provinces of Rio de la Plata, &c., in behalf of himself
*54] and all concerned, in the capture ot the Spanish polacre brig *Divina Pastora and her cargo, to the libel and petition exhibited by Don Juan Stoughton, consul of his Catholic Majesty, &c.," sets forth, that the said Utley, by protestation, and not confessing or acknowledging any of the matters and things in the libellant's petition and libel contained, to be true, in such manner and form as the same are therein and thereby alleged, for plea to the said libel and petition, says, that the United Provinces of Rio de la Plata, in South America, are free and independent states, and as such, have the power to levy war and make peace, raise armies and navies, &c. And that the Supreme Provisional Director of said provinces, at the fort of Buenos Ayres, on the 25th day of October 1815, commissioned a certain schooner, called the Mangoree, to cruize against the vessels and effects of the kingdom of Spain, and the subjects thereof, excepting only the Spanish Americans who defend their liberty, and authorized one James Barnes to act as commander of said schooner, and to seize and capture the vessels and effects of European Spaniards, and bring them within the government of the United Provinces, for adjudication, according to the law of nations, Ferdinand VII., king of Spain, then being at war with said provinces, and general reprisals having been granted by said provisional government against the European subjects of the said king. That said schooner Mangoree, bearing the flag of the said independent provinces, sailed on a cruise from the harbor of Buenos Ayres, within the said provinces, on or about the first day
*55] of January 1816, by virtue of said commission. And having touched *at Port-au-Prince, in the island of Hispaniola, sailed again on said cruise, and on the 31st of October 1816, on the high seas, &c., captured the polacre brig Divina Pastora, belonging to the said king, or to his European subjects, on board of which brig said Utley was put as prize-master. And

The Divina Pastora.

the original crew of said prize was taken out by the said Barnes, &c., and put on board of said schooner Mangoree, and a prize-crew sent on board the Pastora. And the said Barnes, &c., then appointed said Utley to the command of the said prize, and delivered to him a copy of his commission, &c., which the said Utley now brings with him, and respectfully submits to the inspection of this honorable court. And thereupon, the said Utley proceeded to navigate the said prize from the place where she was captured to Port-au-Prince, in the island of Hispaniola, for the purpose of there procuring supplies and provisions, and thence proceeding to the port of Buenos Ayres. The plea then proceeds to state, that in the prosecution of the voyage, the prize-vessel was compelled, by stress of weather, and want of provisions and water, to put into the port of New Bedford; and concludes with alleging, that by the law of nations, and the comity and respect due from one independent nation to another, it doth not pertain to this court, nor is it within its cognisance, at all to interfere, or hold plea respecting said brig or goods on board, so taken as prize of war, and a prayer for restitution, with costs and damages.

The replication of the Spanish consul states, that inasmuch as the said Utley, in his plea, admits that *the said vessel, and the cargo laden [*56
on board, were, on the 31st day of October 1816, the property of a subject or subjects of his majesty Ferdinand VII., the said consul claims the same, as the property of such subject or subjects, the names of whom are to him, at present, unknown; excepting that he verily believes the same to be the lawful property of Antonio Seris, as he, in his petition, hath set forth: and avers, that the same ought to be restored and delivered up for the use of the Spanish owner or owners. The replication then proceeds to aver, that as the said vessel is stated in the plea to have been captured on the high seas, by a certain armed vessel called the Mangoree, commanded by one James Barnes, which armed vessel is stated to have been commissioned under a certain authority called the United Provinces of Rio de La Plata, in South America, the said capture and seizure, &c., were piratical or tortious, and contrary to the lawful and well-known rights of the faithful subjects of his said majesty, to whom the same belonged at the time of such capture, &c., and that no right of property thereby vested in the said Barnes or Utley, or any other person or persons who were navigating and sailing in the said armed vessel called the Mangoree: 1st. Because, at the time when the said pretended capture as prize of war was made, &c., the several provinces, situate in South America, and near to the river called Rio de La Plata, were provinces and colonies of his said majesty Ferdinand VII., and now are provinces and colonies of his said majesty; and that the same had been, for a long course of years, provinces and colonies of the successive *kings [*57
of Spain; and that all the people, persons and inhabitants dwelling therein, were, on the 21st day of October 1815, and for a long time before had been, and now are Spanish subjects, and did at the aforesaid times, and now do owe allegiance and fidelity to his said majesty. 2d. Because the said subjects and persons, dwelling in the said provinces and colonies in South America, had not, on the 25th day of October 1815, nor had any, or either of the said subjects and persons, then, or at any other time, any lawful right, power or authority, to commission any vessel or vessels, or any person or persons whomsoever, to wage war against him, the said Ferdinand

VII., nor against his subjects, or their persons or property, by sea or elsewhere; and that no person or persons whomsoever could lawfully receive and take from any person or persons, in any of the said colonies or provinces, any commission, power or authority, of right, to wage war and make captures of any property on the high seas. 3d. Because all captures made on the high seas, under the pretence of power or authority derived from, or in virtue of any such commission as set forth in said plea, is unlawful and piratical; and that all pretended captures and seizures, as prize of war, of property belonging to the subjects of his said majesty, when made under such commissions as aforesaid, are cognisable by the courts of nations at peace and in amity with his said majesty, which hold pleas of admiralty and maritime jurisdiction, and take cognisance of cases arising under the law of
*58] nations, whenever the property so captured is found within *their respective jurisdictions. And as a further ground for the claim of restitution to the original Spanish owners, the replication recites the 6th, 9th and 14th articles of the treaty of 1795, between the United States and Spain. And as a further ground for the claim, it alleges, that the papers, exhibited with the plea, and by which the capture is pretended to be justified, are false and colorable; that the prize-crew did not speak the Spanish language, and were shipped at Port-au-Prince; that one of the crew stated in his affidavit, that the flag of the privateer was obtained at that place; and that all of them stated, that the Divina Pastora, from the time of her capture, was ordered for, and bound to the same place, all the captured persons having been previously taken out of her, and put on board the privateer. And concludes with renewing the averments of the piratical and tortious capture, and praying that restitution of the property may be decreed to him, the Spanish consul, to be held for the right owners or owner thereof, who are subjects or a subject of the king of Spain.

Upon these pleadings, further proceedings were had in the district court, under which a decree was pronounced of restitution of the vessel and cargo to the libellant, for the benefit of the original Spanish owners. This decree was affirmed, *pro formâ*, in the circuit court, and the cause was brought by appeal to this court.

Winder, for the appellants, argued, that there was nothing stated in the
*59] allegation of the Spanish *consul, or in the other pleadings in the cause, by which a prize court of this country could take jurisdiction of this capture. Nothing was alleged to show that it was made within our neutral territory, or in violation of our neutral rights, by an armament fitted out, or augmented in our ports; the only two cases in which the tribunals of a neutral country can assume jurisdiction of captures made *jure belli*. The present capture was made *jure belli*, because made under a commission from the United Provinces of the Rio de la Plata. The government of the United States recognising the existence of a civil war between Spain and the United Provinces, but remaining neutral, the courts of the United States must consider as legal, those acts of hostility which war authorizes, and which the new government may direct against the parent country. *United States* v. *Palmer*, 3 Wheat. 610, 634. Possession under the capture is *primâ facie* evidence sufficient to maintain that possession, unless it is shown that the libellants have a better right. But that possession is admit-

ted, and nothing is shown by the pleadings, to authorize the courts of this country to divest it from the captors. There is no infraction of the treaty with Spain pleaded, which can give our courts jurisdiction to restore to the former Spanish owners. The 6th and 9th articles of the treaty of 1795 are the only articles which can have any bearing upon the case, and these only provide for restitution, where the capture is made within our territorial limits, or, where it is made by pirates. But it is not pretended, that the present capture *was made within our territorial jurisdiction; and the court has already determined, that a capture under a commission from the revolted provinces is not a piratical capture. [*60

Webster and *D. B. Ogden*, contrà, contended, that the district courts of the United States are courts of the law of nations, and that a general allegation of a marine tort, in violation of the law of nations, is sufficient, *primâ facie*, to give them jurisdiction, where the captured property is brought within our territory. As a general allegation of prize is sufficient (*The Fortuna*, 1 Dods. 284; *The Adeline*, 9 Cr. 244); so is a general allegation of an unlawful capture. It then becomes incumbent upon the captors to show, that the capture was made under a commission from a sovereign power in amity with the United States. A neutral tribunal has a right to inquire, whether the commission was regularly issued by a competent authority, in order to see whether the capture was piratical, or in the exercise of the lawful rights of war. *Talbot* v. *Jansen*, 3 Dall. 159; *L'Invincible*, 1 Wheat. 258; 1 Sir L. Jenkins 727. The general rule, unquestionably, is, that the courts of the captor's country have the exclusive cognisance of all seizures as prize: but to this rule there are exceptions, as ancient, and as firmly established as the rule itself. Among these is the case of a capture made by an armament fitted out or augmented within neutral territory. A capture thus made in violation of the neutral sovereignty, *deprives the courts of the belligerent country of their exclusive jurisdiction, and confers it on the courts of the neutral state, who will exercise it by making restitution to the injured party. *Talbot* v. *Jansen*, 3 Dall. 133, 164; *The Alerta*, 9 Cranch 359, 364. The acts of congress, and the Spanish treaty, prohibiting the equipment of armed vessels in our ports, and imposing the obligation to restore captures made by them, are merely accumulated upon the pre-existent law of nations, which equally prohibited the one, as an injury to friendly powers, and enjoined the other, as a correspondent duty.(*a*) But [*61

(*a*) Vattel, lib. 3, c. 7, §104–5; 2 Rutherforth, c. 9, § 19, p. 553; Martens on Privateers, § 13, p. 42; Burlamaqui, p. 4, c. 3, § 20, 21, 23; 2 Sir L. Jenkins, 727, 728.

"So that upon this whole matter of fact, there do arise two questions: The one, whether the commission whereby this Ostender was taken, is a good commission? The other, whether this capture was not a violence to that protection and safe-guard, which your majesty's authority affords unto strangers, coming upon their lawful occasions towards any of your majesty's harbors or ports? As to the commission, 'tis true, his majesty of Portugal is not obliged, in granting out commissions, to take his measures from the English, or any other foreign style; yet the general law determines all commissions (most especially, such as this is) to be *stricti juris*, and not to be further extended, either by inferences or deductions, than the express words do naturally import. So that, whatever the meaning of that clause be, viz., that De Bills may set out a man-of-war, and what other vessels shall be necessary for him (as if he might

even if this were not the law *of nations, the treaty with Spain and the acts of congress make it the law of this court. "Every treaty," says
*63] Sir W. Scott, "is a part of the private *law of that state which enters into it." *The Eenroom*, 2 Rob. 8. This principle of public law is expressly recognised by our municipal constitution, in which treaties entered into by the United States, are declared to be a part of the supreme law of the land. The Spanish treaty and the acts of congress pronouncing the illegality of captures in violation of our neutrality, the duty to restore the captured property to the original owner follows, as a corollary. Supposing the allegations to be sufficiently pleaded, the proofs will fully authorize the court in decreeing restitution to the original Spanish owners in this case. But if the court should be of opinion, that the pleadings are defective, it will not dismiss the injured party, but will permit him to assert his rights in a new allegation. *The Adeline*, 9 Cranch 284; *The Edward*, 1 Wheat. 261, 269; *The Samuel*, Ibid. 13 n.

Marshall, Ch. J., delivered the opinion of the court.—The decision at the last term, in the case of the *United States* v. *Palmer*, 3 Wheat. 610, establishes the principle, that the government of the United States, having recognised the existence of a civil war between Spain and her colonies, but
*64] remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which *the new govern-

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have several vessels at sea, at one and the same time, and yet, himself and his commission can be but in one of them), it cannot be said, that he hath liberty to substitute or depute another to act in his place, since there is no such power of deputation given him by his commission. Much less can a copy or translation be authentic, when there is no clause providing to that effect in the original; especially, in this case, which is as little favorable as can be in the eye of the law.

"The second question is, as I humbly conceive, best resolved out of a declaration, which your majesty's grandfather, of blessed memory, published in the year 1604, in reference to these hostilities, in these words: 'Our pleasure is, that within our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports or havens, as may be reasonably construed to be within that tidal limits or precinct, there shall be no force, violence, or surprize or offence, suffered to be done, either from man-of-war to man-of-war, or from man-of-war to merchant, &c., but that all of what nation soever, so long as they shall be within those our ports and places of jurisdiction, or where our officers may prohibit violence, shall be understood to be under our protection, and to be ordered by course of justice, &c. And that our officers and subjects shall prohibit, as much as in them lies, all hovering of men-of-war, &c., so near the entry of any of our havens or coasts; and that they shall receive and succor all merchants and others, that shall fall within the danger of any such as shall await our coasts, in so near places to the hindrance of trade to and from our kingdoms.'

"So that, considering this shallop set out of your majesty's port, where it hovered for prey; since it was manned for the most part with your majesty's subjects, contrary to the meaning of the 4th and 6th articles of the treaty with Spain, made in the year 1630; since the surprisal was made in the night, not by force of arms, but by abusing your majesty's name and authority; since the true commission was neither pretended, showed, nor, indeed, on board at the time of the capture; I am of opinion, that the capture was unduly made, and that the Ostender ought to have his ship and goods restored to him, and that the commander in the shallop, and the English on board, deserve to be punished. All which I do, with all humility, submit to your majesty's royal wisdom." L. Jenkins.

ments in South America may direct against their enemy. Unless the neutral rights of the United States, as ascertained by the law of nations, the acts of congress, and treaties with foreign powers, are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country. If, therefore, it appeared in this case, that the capture was made, under a regular commission from the government established at Buenos Ayres, by a vessel which had not committed any violation of our neutrality, the captured property must be restored to the possession of the captors. But if, on the other hand, it was shown, that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners.

But the pleadings in this case are too informal and defective, to pronounce a final decree upon the merits. The proceedings in the admiralty must always contain, at least, a general allegation of such a nature as will apply to the case, as of prize, &c. The court has always endeavored to keep these proceedings within some kind of rule, though not requiring the same technical strictness as at common law. Here, the pleadings present a case which may be consistent with the demand of the former owners for restitution, but which is tied up to such a state of facts as, if proved, will not authorize it; and will not admit the introduction of evidence varying from the facts alleged. The decree of the circuit court must, therefore, *be reversed, and the cause remanded to that court, with directions to permit the pleadings to be amended, and for further proceedings. [*65

Cause remanded.(a)

(a) It is a principle which has been frequently laid down by this court, that it is the exclusive right of governments to acknowledge new states arising in the revolutions of the world, and until such recognition by our government, or by the government of the empire to which such new state previously belonged, courts of justice are bound to consider the ancient state of things as remaining unchanged. Rose *v.* Himely, 4 Cranch 292; Gelston *v.* Hoyt, 3 Wheat. 324. The distinction between the recognition of the independence of a newly-constituted government, which separates itself from an old-established empire, and the recognition of the existence of a civil war between such new government and the parent country, is obvious. In the latter case, the very object of the contest is, what the former supposes to be decided. But in the meantime, all the belligerent rights which belong to anciently-established governments, except so far as they may be restrained by treaty stipulations, belong to both parties. The obligations which neutrality imposes, are also to be fulfilled towards each party. What are those obligations, and how they may be affected by the misconduct of the belligerents, has been frequently made a subject of decision in this court.

Thus, where the commander of a French privateer, called the Citizen Genet, having captured, as prize, on the high seas, the sloop Betsey, sent the vessel into the port of Baltimore; and upon her arrival there, the owners of the sloop and cargo filled a libel in the district court of Maryland, claiming restitution, because the vessel belonged to subjects of Sweden, a neutral power, and the cargo was owned jointly by Swedes, and by citizens of the United States, also neutral; it was held, that the district court of Maryland had jurisdiction competent to inquire, and to decide, whether in such case, restitution ought to be *made to the claimants, or either of them, in whole or in part; that is, whether such restitution could be made consistently with the law of nations, and the treaties and laws of the United States. Glass *v.* The Betsey, 3 Dall. 6, 16. This case has been sometimes criticised, as involving a denial of the [*66

unquestionable principle of public law, that the judicial cognisance of prizes belongs exclusively to the tribunals of the captor's country, with the admitted exceptions of a violation of neutral sovereignty, either in making the capture, or fitting out the armament with which it is made, within the neutral territory. But, as is very justly observed by the court in the case of The Invincible, the only point settled by the case of Glass *v.* The Betsey was, that the courts of the neutral country have jurisdiction of captures made in violation of its neutrality, and the case was sent back with a view that the district court should exercise jurisdiction, subject, however, to the law of nations on this matter, as the rule to govern its decision. 1 Wheat. 257. So also, it was held, in the same case, that no foreign power can, of right, institute or erect any court of judicature, of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties: and that the admiralty jurisdiction which had been exercised in the United States, by the consuls of France, in the beginning of the war of 1793, not being so warranted, was illegal. Glass *v.* The Betsey, 3 Dall. 6, 16.

The district courts of the United States have no jurisdiction on a libel for damages for the capture of a vessel as prize, by the commissioned cruiser of a belligerent power, although the captured vessel is alleged to belong to citizens of the United States, and although the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court; the captured vessel having been captured and carried *infra præsidia* of the captors. United States *v.* Peters, 3 Dall. 121.

The capture of a vessel from a belligerent power, by a citizen of the United States, under a commission from another belligerent power (though the captor sets up an act of
*67] expatriation, not carried into effect by a departure from the United *States, with an intention to settle permanently in another country), is an unlawful capture, and the courts of the United States will decree restitution to the original owner. Talbot *v.* Jansen, 3 Dall. 133, 164. A capture by a citizen of a neutral state, who sets up an act of expatriation to justify it, is unlawful, where the removal from his own country was by sailing, *cum dolo et culpa*, in the capacity of a cruiser against friendly powers. Ibid. 153. *Quære?* Whether a citizen of the United States, expatriating himself according to the law of a particular state of the Union, of which he is also a citizen, can be considered as having lost the character of a citizen of the United States, so as to be authorized to capture under a foreign commission the property of powers in amity with the United States? Ibid. 153. A capture by a vessel, built, owned and fitted out as a vessel of war, in a neutral country, is unlawful, and restitution of the property captured by such vessel, will be decreed by the courts of the neutral country, if brought within its jurisdiction. Ibid. 155, 167. Every illegal act committed on the high seas, does not amount to piracy; a capture, although not piratical, may be illegal, and of such a nature as to induce the court to award restitution. Ibid. 154, 160. A capture made by a lawfully-commissioned cruiser, through the medium and instrumentality of a neutral, who had no right to cruise, is unlawful; and the property captured will be restored by the neutral state, if brought within its jurisdiction. Ibid. 155, 167. The exemption of belligerent captures, on the high seas, from inquiry by neutral courts, belongs only to a belligerent vessel of war, lawfully commissioned; and if a vessel claims that exemption, it is the duty of the court, upon application, to make inquiry, whether she is the vessel she pretends to be. Ibid. 159. If, upon such inquiry, it appears, that the vessel pretending to be a lawful cruiser, is really not such, but uses a colorable commission for the purposes of plunder, she is to be considered, by the law of nations, so far at least, as the title of property or right of possession is concerned, in the same light as having no commission at all. Ibid. *Primâ facie*, all piracies and trespasses com-
*68] mitted against the general law of nations, *are inquirable, and may be proceeded against, in any nation, where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it. Ibid. 160.

Where a vessel belonging to one belligerent was captured by another belligerent, and being abandoned on the high seas by the captors, to avoid the necessity of weakening

their force by manning the prize, was found and taken possession of by citizens of the United States, and brought into a port of this country, and libelled in the district court for salvage; it was held, that the district court had jurisdiction upon the subject of salvage, and consequently, a power of determining to whom the residue of the property, after payment of salvage, ought to be delivered. McDonough *v.* The Mary Ford, 3 Dall. 188, 198. In this case, the captors acquired, immediately on the capture, such a right as no neutral nation could justly impugn or destroy; and it could not be said by the court, that the abandonment of the captured vessel revived the interest of the original proprietors. One-third of the value of the property was, therefore, decreed to the neutral salvors, and the residue restored to the captors. Ibid. This case has been sometimes supposed to involve the inconsistency of a neutral tribunal assuming jurisdiction of the question of prize or no prize, as an incident to that of salvage. But an attentive examination of the case will show, that this is a mistaken supposition. The court do not enter into the question of prize between the belligerents, but decree the residue to the late possessor: thus, making the fact of possession, as between the belligerent parties, the criterion of right. Those points which could be disposed of, without any reference to the legal exercise of the rights of war, the court proceed to decide; but those which necessarily involve the question of prize or no prize, they remit to another tribunal. L'Invincible, 1 Wheat. 259.

Where the vessel which captured the prize in question, had been built in the United States, with the express view of being employed as a privateer, in case the then existing differences between Great Britain and the United States should terminate *in war; some of her equipments were calculated for war, though frequently used by merchant ships; she was subsequently sold to a subject of one of the belligerent powers, and by him carried to a port of his own country, where she was completely armed, equipped and furnished with a commission, and afterwards, sailed on a cruise, and captured the prize: it was held, that this was not an illegal outfit in the United States, so as to invalidate the capture, and give their courts jurisdiction to restore to the original owner the captured property. Moodie *v.* The Alfred, 3 Dall. 307. A mere replacement of the force of a privateer, in a neutral port, is not such an outfit and equipment as will invalidate the captures made by her, and give the courts of the neutral country jurisdiction to restore the captured property to the original owner. Moodie *v.* The Phœbe Anne, 3 Dall. 319. [*69

A vessel and cargo belonging to citizens of the United States was captured as a prize by a cruiser belonging to one of the belligerent powers, on the high seas, and run on shore, within the territory of the United States, by the prize-master, to avoid recapture by the other belligerent, and abandoned by the prize-crew; the vessel and cargo were then attached by the original owner, and an agreement was entered into by the parties, that they should be sold, and the proceeds paid into the district court, to abide the issue of a suit commenced by the owner against the captors for damages: held, that they were responsible for the full value of the property injured or destroyed, and that whatever might originally have been the irregularity in attaching the captured vessel and cargo, it was obviated by the consent of the captors that the prize should be sold, and that the proceeds of the sale should abide the issue of the suit. Del Col *v.* Arnold, 3 Dall. 233. The consistency of the court in this case cannot be vindicated with the same facility as in that of The Mary Ford. "We are, however, induced to believe, from several circumstances, that we have transmitted to us but an imperfect sketch of the decision in that case. The brevity with which a case is reported, which we are informed, had been argued successively at two terms, by men of the first legal talents, necessarily suggests this opinion; and when we refer *to the case of The Cassius (United States *v.* Peters), decided but the term preceding, and observe the correctness with which the law applicable to this case, in principle, is laid down in the recitals to the prohibition, we are confirmed in that opinion. But the case itself (that of Del Col *v.* Arnold) furnishes additional confirmation. There is one view of it in which it is reconcilable to every legal principle. It appears, that when pursued by the Terpsichore, the Grand Sachem was wholly abandoned by the prize-crew, and left in [*70

possession of one of the original American crew, and a passenger; that in their possession, she was driven within our territorial limits, and was actually on shore, when the prize-crew resumed their possession, and plundered and scuttled her. Supposing this to have been a case of total derelict (an opinion, which, if incorrect, was only so on a point of fact, and one in support of which much might have been said, as the prize-crew had no proprietary interest, but only a right founded on the fact of possession), it would follow, that the subsequent resumption of possession was tortious, and subjected the parties to damages. On the propriety of the seizure of the Industry, to satisfy those damages, the court give no opinion, but place the application of the proceeds of the sale of this vessel, on the ground of consent; a principle, on the correctness of the application of which to that case, the report affords no ground to decide." The Invincible, 1 Wheat. 259, 260.

A public vessel of war belonging to a foreign sovereign, at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the courts of the country. The Exchange, 7 Cranch 116. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all other nations with whom it is at peace, and they enter such ports, and remain in them, under the protection of the government of the place. Ibid. 141. Whether the public ships of war enter the ports of another friendly nation, under the license implied by the absence of any prohibition, or under an express stipulation by treaty, they are equally exempt from the local jurisdiction. Ibid. 141. Where the pri-
*71] vate vessels of one nation * enter the ports of another, under a general implied permission only, they are not exempt from the local jurisdiction. Ibid. 143. The sovereign of the place is capable of destroying the implication, under which national ships of war, entering the ports of a friendly power, open for their reception, are considered as exempted by the consent of that power from its jurisdiction. He may claim and exercise jurisdiction over them, either by employing force, or by subjecting such vessels to the ordinary tribunals. Ibid. 146. But until such power be expressly exerted, those general provisions which are descriptive of the ordinary jurisdiction of the judicial tribunals, and give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country where it is found, ought not to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction. Ibid. 146. Upon these grounds, it was determined, in this case, that a public vessel of war, belonging to the Emperor Napoleon, which had before been the property of a citizen of the United States, and, as alleged, wrongfully seized by the French, coming into our ports, and demeaning herself peaceably, could not be reclaimed by the former owner in the tribunals of this country. Ibid.

The general rule as to the prize jurisdiction is, that the trial of captures made on the high seas, *jure belli*, by a duly-commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. The Alerta, 9 Cranch 359, 364. But to this rule there are exceptions as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country, into which the prize is brought, or by a privateer which has been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty, to restore the property so illegally captured to the owner. Ibid. 364; Talbot *v.* Jansen, 3 Dall. 133; Ibid. 288, note. A neutral nation may, if so disposed, without a breach of its neutral character, grant permission to both belligerents to equip their vessels of war within its territory. But without such permission, the subjects of the belligerent powers have no right to equip vessels,
*72] or to augment their force, either *with arms or with men, within the territory of the neutral nation. The Alerta, 9 Cranch 365. All captures made by means of such equipments of vessels, or augmentation of their force, within the neutral territory, are illegal in respect to the neutral nation, and it is competent for its courts to punish the offenders, and in case the prizes taken by them are brought *infra præsidia*, to order them to be restored. Ibid. Even if there were any doubt as to the rule of

the law of nations on the subject, the illegality of equipping a foreign vessel of war within the territory of the United States, is declared by the act of June 5th, 1794, c. 226,(*a*) and the power and duty of the proper court of the United States, to restore the prizes made in violation of that act, is clearly recognised. Ibid. To constitute an illegal equipment or augmentation of the force of a vessel, within the territory of the United States, it is immaterial, whether the persons enlisted are native citizens, or foreigners domiciled within the United States. Neither the law of nations, nor the act of congress, recognises any distinction in this respect, except as to subjects of the foreign state in whose service they are so enlisted, being transiently within the United States. Ibid. 366.

During the late war between the United States and Great Britain, a French privateer, called the Invincible, and duly commissioned, was captured by a British cruiser, afterwards re-captured by a private armed vessel of the United States; again captured by a squadron of British frigates; again re-captured by another United States privateer, and brought into a port of the United States for adjudication. Restitution on payment of salvage was claimed by the French consul, on behalf of the owners of the Invincible. A claim was also interposed by citizens of the United States, who alleged, that their property had been unlawfully taken by the Invincible, before her first capture, on the high seas, and prayed an indemnification from the proceeds. Restitution to the original French owner was decreed by the circuit court, which decree was affirmed in this court; and it was determined, that the tribunals of this country have no jurisdiction to redress any supposed torts committed on the high *seas [*73 upon the property of our citizens, by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality. L'Invincible, 1 Wheat. 233; s. c. 2 Gallis. 29.

See *infra*, the cases of The Estrella, and The Neustra Senora de la Caradid, in which the same principles which are collected in this note were applied to captures of Spanish property by Venezuelian and Carthagenian privateers, and the property was restored to the original owners, or to the captors, according as the capture had, or had not been made in violation of our neutrality. For the different public acts by which the government of the United States has recognised the existence of a civil war betweem Spain and her American colonies, see Appendix, Note II.

(*a*) This act was made perpetual by that of April 24th, 1800, c. 189, which was repealed, and all laws respecting our neutral relations were incorporated into one by the act of the 20th of April 1818, c. 93.

Evans *v.* Phillips.

Error.

A writ of error will not lie on a judgment of nonsuit.

Error to the Circuit Court of New York.

D. B. Ogden moved to dismiss the writ of error in this case, upon the ground, that the plaintiff had submitted to a nonsuit in the court below, upon which no writ of error will lie.

The Court directed the writ of error to be dismissed.

*74] *Judgment.—This cause came on to be heard, on the transcript of the record; on consideration whereof, it is adjudged and ordered, that the writ of error be, and the same is, hereby dismissed, with costs, the plaintiff having submitted to a nonsuit in the circuit court.(*a*)

Van Ness *v.* Buel.

Rights of seizing officer.

A collector of the customs, who makes a seizure of goods for an asserted forfeiture, and before the proceedings *in rem* are consummated by a sentence of condemnation, is removed from office, acquires an inchoate right, by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested right to his share of the forfeiture, under the collection act of the 2d of March 1799.[1]

Error to the Circuit Court of Vermont. This was an action of *assumpsit*, in which the defendant in error, Buel, declared against the plaintiff in error, Van Ness, on the money counts, and gave evidence that the sums of money, for the recovery of which this suit was brought, were the proceeds of a moiety of a certain seizure of goods, as forfeited, which seizure was made in the district of Vermont, on the 6th day of July 1812, while the plaintiff below *75] was collector of the *customs for said district, &c., which goods were libelled, in September, 1812, in the district court, and condemned at the October term of the circuit court, 1813. That the plaintiff below was appointed collector on the 16th of March 1811, and remained in office until the 15th of February 1813, when he was removed from office by the president, and the defendant below appointed to the same office; and received the proceeds of the goods condemned. That various other parcels of goods were seized and libelled, while the plaintiff below was collector, but were condemned after his removal from office, and the proceeds received by the defendant below.

The court below charged the jury, that the defendant in error was entitled to recover a moiety of the seizures so made by him, during his continuance in office, and condemned after his removal. The jury found a verdict, and judgment was rendered for the plaintiff below; and a bill of exceptions having been taken to the charge of the court below, the cause was brought by writ of error to this court. The cause was submitted, without argument.

(*a*) See Box *v.* Bennett, 1 H. Bl. 432; Kempland *v.* Macauley, 4 T. R. 436.

[1] Buel *v.* Van Ness, 8 Wheat. 313.

Williams v. Peyton.

STORY, Justice, delivered the opinion of the court.—This case differs from that of *Jones* v. *Shore's Executors*, in two circumstances; first, that this is the case of a seizure of goods for an asserted forfeiture; and secondly, that before the proceedings *in rem* were consummated by a sentence, the collector who made the seizure was removed from office. In our *judgment, neither of these facts affords any ground to except this case [*76 from the principles which were established in *Jones* v. *Shore's Executors*. It was there expressly held, that the collector acquired an inchoate right by the seizure, which, by the subsequent decree of condemnation, gives him an absolute vested title to his share in the forfeiture.(*a*) Without overturning the doctrine of that case, the present is not susceptible to argument; and we, therefore, unanimously affirm the decision of the circuit court.

Judgment affirmed.

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*WILLIAMS *et al. v.* PEYTON'S Lessee. [*77

Execution of power—Tax sale.

In the case of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it.

The party who sets up a title, must furnish the evidence necessary to support it; if the validity of a deed depend on an act *in pais*, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed might depend.

In the case of lands sold for the non-payment of taxes, the marshal's deed is not even *primâ facie* evidence, that the pre-requisities required by law have been complied with; but the party claiming under it must show positively that they have been complied with.

THIS case was argued by *Jones* and *Talbot*, for the plaintiffs in error, and by *Taylor*, for the defendant in error.

The opinion of the court was delivered by MARSHALL, Ch. J.—This is an ejectment brought in the Circuit Court for the district of Kentucky, by

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(*a*) Under the collection act of the 2d of March 1799, c. 128, and other laws adopting the provisions of that act, the 89th section of which enjoins the collector, within whose district a seizure shall be made or forfeiture incurred, to cause suits for the same to be commenced without delay, and prosecuted to effect; and authorizes him to receive from the court, in which a trial is had, or from the proper officer thereof, the sums so received, after deducting the proper charges, and on receipt thereof, requires him to pay, and distribute the same without delay, according to law, and to transmit, quarterly or yearly, to the treasury, an account of all the moneys received by him for fines, penalties and forfeitures, during such quarter. The 91st section declares, that all fines, penalties and forfeitures, recovered by virtue of the act, and not otherwise appropriated, shall, after deducting all proper costs and charges, be disposed as follows: "one moiety shall be for the use of the United States, &c., paid into the treasury thereof, by the collector receiving the same; the other moiety shall be divided between, and paid in equal proportions, to the collector and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be within the same district; and in districts where only one of the said officers shall have been established, the said moiety shall be given to such officer." Then follow provisions concerning the distribution, where the recovery has been had in pursuance of information given by an informer, or by any officer of a revenue-cutter.

the original patentee, against a purchaser at a sale made for non-payment of
*78] the direct tax, imposed by the act of congress of *the 14th July 1798, c. 92. After the plaintiff in the circuit court had exhibited his title, the defendants gave in evidence the books of the supervisor of the district, showing that the tax on the lands in controversy had been charged to the plaintiffs, and that they had been sold for the non-payment thereof. They also gave in evidence a deed, executed by the marshal of the district, in pursuance of the act of March 3d, 1804, and proved by Christopher Greenup, the agent of the plaintiff, that there were tenants on the land, and that he did not pay the tax, nor redeem the land. Upon this evidence, the court, on the motion of the plaintiff, instructed the jury, "that the purchaser under the sale of lands for the non-payment of the direct tax, to make out title, must show that the collector had advertised the land, and performed the other requisites of the law of congress, in that case provided, otherwise, he made out no title." The defendants then moved the court to instruct the jury, "that the deed and other evidence produced by them, and herein mentioned, was *primâ facie* evidence that the said land had been advertised, and the other requisites of the law of congress, as to the duty of the collector, in that respect, had been complied with:" but the court refused to give the instruction; and, on the contrary, instructed the jury, "that said deed, and other evidence, was not *primâ facie* evidence that the said land had been advertised according to law, nor that the requisites of the law had been complied with." The defendants excepted to this opinion. The jury found
*79] a verdict for the plaintiff, and the judgment *rendered on that verdict is now before this court on writ of error.

As the collector has no general authority to sell lands, at his discretion, for the non-payment of the direct tax, but a special power to sell in the particular cases described in the act, those cases must exist, or his power does not arise. It is a naked power, not coupled with an interest; and in all such cases, the law requires that every pre-requisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it.

This general proposition has not been controverted; but the plaintiffs in error contend, that a deed executed by a public officer, is *primâ facie* evidence, that every act which ought to precede that deed had preceded it. That this conveyance is good, unless the party contesting it can show that the officer failed to perform his duty. It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain, which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him, before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. If this be true,
*80] in the general, is there *anything which will render the principle inapplicable to the case of lands sold for the non-payment of taxes? In the act of congress, there is no declaration that these conveyances shall be deemed *primâ facie* evidence of the validity of the sale. Is the nature of the transaction such, that a court ought to presume in its favor anything

which does not appear, or ought to relieve the party claiming under it from the burden of proving its correctness?

The duties of the public officer are prescribed in the 9th, 10th and 13th sections of the act of the 14th of July 1798, c. 92. (*a*) If these duties be examined, *they will be found to be susceptible of complete proof on the part of the officer, and consequently, on the part of the purchaser, who ought to preserve the evidence of them, at least, for a reasonable time. Their chief object is to give full notice to the proprietor, and furnish him with every facility for the voluntary payment of the tax, before resort should be had to coercive means. In some instances, the proprietor would find it extremely difficult, if not impracticable, to prove that the officer had neglected to give him the notice required by law. It is easy, for example, to show that the collector *has posted up the necessary notifications in four public places in his collection district, as is required by the 9th section, but very difficult to show that he has not. He may readily prove that he has made a personal demand on the person liable for the tax, but the negative, in many cases, would not admit of proof. [*81 [*82

The 13th section permits the collector, when the tax shall have remained unpaid for one year, having first advertised the same for two months in six different public places within the said district, and in two gazettes in the

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(*a*) Which provides, § 9, "That each of the said collectors shall, immediately after receiving his collection-list, advertise, by notifications, to be posted up in at least four public places in each collection district, that the said tax has become due and payable, and the times and places at which he will attend to receive the same; and, in respect to persons who shall not attend according to such notifications, it shall be the duty of each collector to apply once at their respective dwellings, within such district, and there demand the taxes payable by such persons: and if the taxes shall not be then paid, or within twenty days thereafter, it shall be lawful for such collector to proceed to collect the said taxes, by distress and sale of the goods, chattels or effects of the persons delinquent as aforesaid, with a commission of eight per cent. upon the said taxes, to and for the use of such collector: provided, that it shall not be lawful to make distress of the tools or implements of a trade or profession, beasts of the plough necessary for the cultivation of improved lands, arms, or the household utensils, or apparel necessary for a family." And § 13. "That when any tax assessed on lands or houses, shall have remained unpaid for the term of one year, the collector of the collection district, within which such land or houses may be situated, having first advertised the same for two months, in six different public places within the said district, and in the two gazettes in the state, if there be so many, one of which shall be the gazette in which the laws of such state shall be published by authority, if any such there be, shall proceed to sell at public sale, and under the direction of the inspector of the survey, either the dwelling-house, or so much of the tract of land (as the case may be), as may be necessary to satisfy the taxes due thereon, together with costs and charges, not exceeding at the rate of one *per centum*, for each and every month the said tax shall have remained due and unpaid: provided, that in all cases where any lands or tenements shall be sold, as aforesaid, the owner of the said lands or tenements, his heirs, executors or administrators, shall have liberty to redeem the same, at any time within two years from the time of sale, upon payment, or tender of payment, to the collector for the time being, for the use of the purchaser, his heirs or assignees, of the amount of the said taxes, costs and charges, with interest for the same, at the rate of twelve *per centum per annum*; and upon the payment, or tender of payment, as aforesaid, such sale shall be void. And no deed shall be given in pursuance of any such sale, until the time of redemption shall have expired."

state, if there be so many, one of which shall be the gazette in which the laws of such state shall be published by authority, if any such there be, to proceed to sell, &c. The purchaser ought to preserve these gazettes, and the proof that these publications were made. It is imposing no greater hardship on him, to require it, than it is to require him to prove, that a power of attorney, in a case in which his deed has been executed by an attorney, was really given by the principal. But to require from the original proprietor proof that these acts were not performed by the collector, would be to impose on him a task always difficult, and sometimes impossible, to be performed.

Although this question may not have been expressly, and in terms decided in this court, yet decisions have been made which seem to recognise it. In the case of *Stead's Executors* v. *Course*, 4 Cranch 403, in which was drawn into question the validity of a sale made under the tax laws of the state of Georgia, this court said, "it is incumbent on the vendee to prove the author-
*83] ity *to sell." And in *Parker* v. *Rule's Lessee*, 9 Ibid. 64, where a sale was declared to be invalid, because it did not appear in evidence, that the publications required by the 9th section of the act, had been made, the court inferred, that they had not been made, and considered the case as if proof of the negative had been given by the plaintiff in ejectment. The question, whether the deed was *primâ facie* evidence, it is true, was not made in that case; but its existence was too obvious, to have escaped either the court or the bar. It was not made at the bar, because counsel did not rely on it, nor noticed by the judges, because it was not supposed to create any real difficulty.

It has been said in argument, that in cases of sales under the tax laws of Kentucky, a deed is considered by the courts of that state, as *primâ facie* evidence that the sale was legal. Not having seen the case or the law, the court can form no opinion on it. In construing a statute of Kentucky, the decisions of the courts of Kentucky would, unquestionably, give the rule by which this court would be guided; but it is the peculiar province of this court to expound the acts of congress, and to give the rule by which they are to be construed.

Judgment affirmed, with costs.

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*84] *The Experiment.

Evidence in prize causes.

Depositions, taken on further proof, in one prize cause, cannot be invoked into another.

Appeal from the Circuit Court of Massachusetts. This was a question of collusive capture.

The *Attorney-General* moved to invoke into this cause depositions taken, on further proof, in the case of *The George*, reported 1 Wheat. 408.

Marshall, Ch. J.—Original evidence and depositions taken on the standing interrogatories, may be invoked from one prize cause into another.

But depositions taken as further proof in one cause, cannot be used in another.

Motion refused.(*a*)

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*Weightman v. Caldwell. [*85

Statute of frauds.

E. B. C., having an interest in a cargo at sea, agreed with J. W. for the sale of it, and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C. in the cargo of the ship Aristides, W. P. Z., supercargo, say at $2522.83, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration, under the statute of frauds, being set up as a defence, on the ground of the defect of mutuality in the written contract, the court below left it to the jury, to infer from the evidence, an actual performance of the agreement: the jury found a verdict for the plaintiff, and the court below rendered judgment thereon, the judgment was affirmed by this court.

Error to the Circuit Court for the district of Columbia.

This cause was argued by *Jones* and *Key*, for the plaintiff in error,(*b*) and by *Caldwell* and *Swann*, for the defendant in error.(*c*)

*Johnson, Justice, delivered the opinion of the court.—The suit below was instituted on a promissory note by the defendant in error. [*86 Although it is, in fact, an indorsed note, and so declared on, yet it is admitted to have originated in a negotiation between the maker and indorser, and whatever defence would be good as against the promisee, is admitted to be maintainable against this indorser, the indorser standing only on the ground of a security or ordinary collateral undertaker to the maker. The defence set up is the statute of frauds, not under the supposition that a promissory note is a contract within the statute, but on the ground, that this note was given for a consideration which was void under the statute.

The case was this: Caldwell having an interest in a cargo afloat, agrees with Weightman for the sale of it, and Weightman signs the following memorandum, expressive of the terms of their agreement:

(*a*) But in other respects, cases of collusive and joint captures form an exception to the general rules of evidence in prize causes. In cases of this nature, the usual simplicity of the prize proceedings is departed from, because the standing interrogatories are more peculiarly directed to the question of prize or no prize, as between the captor and captured, and are not adapted to the determination of questions of joint or collusive capture. It is, therefore, almost a matter of course, to permit the introduction of further proof in these cases. The George, 1 Wheat. 408. But this further proof must be of such a nature as is admissible by the general rules of prize evidence. Under what circumstances, these rules permit the invocation of papers and depositions, may be seen, 2 Wheat. Appendix, Note I., p. 23.

(*b*) They cited Wain *v.* Warlters, 5 East 10; Champion *v.* Plummer, 4 Bos. & Pul. 252; Symonds *v.* Ball, 8 T. R. 151; Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Bayley and Bogert *v.* Ogdens, 3 Johns. 399; Roberts on Frauds 113, 116.

(*c*) They cited Ballard *v.* Walker, 3 Johns. Cas. 60; Leonard *v.* Vredenburgh, 8 Johns. 29; Slingerland *v.* Morse, 7 Id. 463; Ex parte Minet, 14 Ves. 189; Roberts on Frauds 117, note 58; Id. 121; Stapp *v.* Lill, 1 Camp. 242.

"John Weightman agrees to purchase the share or interest of Elias B. Caldwell, in the cargo of the ship Aristides, W. P. Zantzinger, say $2522.83, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser. JOHN WEIGHTMAN."

"Washington, May 20, 1816."

*87] In compliance with that agreement, Weightman gives his note for the sum agreed upon, which is afterwards renewed, and this note taken, on which this action is instituted. At the trial below, Weightman's counsel moved the court to instruct the jury, that, "If no bargain or agreement for the sale of the plaintiff's share of the said ship Aristides, nor any note or memorandum in writing of the same, was ever signed by the plaintiff, binding him in writing to sell his said share to defendant, and if defendant did never actually receive or accept any part of said cargo, and gave nothing in earnest to bind said bargain, or in part payment, and if plaintiff has never made or tendered any written transfer or bargain of his said share to the defendant; but if the entire obligation, reciprocally binding plaintiff to sell said share, was verbal, and formed the sole consideration for the said note, then there is no adequate consideration for the said note, and plaintiff is not entitled to recover upon said note." This instruction the court refused to give; but instructed the jury, that, if they should be of opinion, from the evidence, that the defendant executed and delivered to the plaintiff the note upon which this action is brought, and that the said note was given in consideration of the purchase of the plaintiff's share or interest in the said cargo of the said ship Aristides, as stated in the aforesaid writing, &c., and that the said cargo was then on the high seas, on its passage from France to the United States, and that the same has since arrived, and has never come to

*88] the possession of the plaintiff; that the *plaintiff had an interest in the said cargo, and that the defendant never demanded of the plaintiff any written assignment of his share of the said cargo, then the statute of frauds is no bar to the plaintiff's recovery, and that the said note is not, by reason of the said statute, void, as being given without consideration.

Taking the charge prayed for, and the charge given, together, they appear to make out the following case: The defendant moved the court to instruct the jury, that the note which was the cause of action, was void for want of consideration; inasmuch as it was given in compliance with an agreement signed by one party, and not the other, and which, being unattended with any actual delivery of the article sold, was, as he contended, void under the statute of frauds. The court, without denying the principles laid down by the defendant, submit the whole case to the jury, and instruct them, that upon that evidence, they were at liberty to infer an actual execution of the agreement by both parties, and thus take the case entirely out of the operation of the statute of frauds. Under this construction of the bill of exceptions, for it must, like all other instruments, be the subject of construction, we are decidedly of opinion, that the judgment below must be affirmed. Whether right or wrong, the defendant had all the benefit of the law that his case admitted of, and therefore, this court is not called upon to express a judgment on its correctness. The court below were clearly right in sub-

mitting the question of execution to the jury. If there had ever been a doubt *entertained on this point, it is now removed by numerous adjudications. [*89

Judgment affirmed.(a)

(a) The 17th section of the statute of frauds, 29 Car. II., c. 3; which has been incorporated into the laws of most of the states, provides, "that no contract for the sale of any goods, wares and merchandises, for the price of ten pounds or upwards, shall be good, except the buyer shall accept part of the goods, and actually receive the same, or give something in earnest, to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain, be made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized."

[*That no contract for the sale, &c.*] It was formerly supposed, that executory contracts (that is, where time is given for the delivery of the goods) were not within this section of the statute; but that it only related to executed contracts, or where the goods were to be delivered immediately after the sale. Towers *v.* Osborne, 1 Str. 506; Clayton *v.* Andrews, 4 Burr. 2101. But this distinction has been since exploded; and it is now settled, that where the goods bargained for are complete, and existing *in solido*, ready for delivery, at the time of the contract, it is within the statute; but that where they are not complete and ready for delivery, but are either to be made, or work and labor is required to be done, and materials found, in order to put them into the state in which they are contracted to be sold, such a contract is out of the statute, and need not be in writing. Rondeau *v.* Wyatt, 2 H. Bl. 63; Bennett *v.* Hull, 10 Johns. 364; Groves *v.* Duck, 3 Maule & Selw. 178; Cooper *v.* Elston, 7 T. R. 14.

[*Of any goods, wares and merchandises, &c.*] *Quære?* Whether shares of a company, or public stock, are comprehended under the words "goods, wares and merchandise?" Pickering *v.* Appleby, Com. 354; Mussell *v.* Cooke, Prec. in Ch. 533; Rob. on Frauds 185; Colt *v.* Netterville, 2 P. Wms. 307. This point appears never to have been decided.

*[*Except the buyer shall accept part of the goods, and actually receive the same, &c.*] A delivery, without an ultimate acceptance, and such as completely affirms the contract, is not sufficient. Kent *v.* Huskinson, 3 Bos. & Pul. 233. Where the goods are ponderous, or, from some other circumstance, incapable of being immediately handed over from one to another, there need not be an actual acceptance of the goods by the vendee, but a symbolical delivery will be sufficient to dispense with a written agreement signed by the parties. Searle *v.* Keeves, 2 Esp. 598; Anderson *v.* Scott, 1 Camp. 235 note; Chaplin *v.* Rogers, 1 East 195; Hinde *v.* Whitehouse, 7 Id. 558; Elmore *v.* Stone, 1 Taunt. 458. See 1 Wheat. 84, note *d*. And in the sale of a ship or goods at sea (like the principal case in the text), the delivery is always by such symbolical means as the circumstances allow. Ex parte Matthews, 2 Ves. 272; Atkinson *v.* Maling, 2 T. R. 462; Ex parte Batson, 3 Bro. C. C. 362. So, if the purchaser deals with the commodity as if it were in his actual possession, it is considered as an acceptance. Chaplin *v.* Rogers, 1 East 192. And it is no objection to a constructive delivery of goods, that it is made by words parcel of the parol contract of sale. If, therefore, a man bargain for the purchase of goods, and desire the vendor to keep them in possession, for a special purpose, for the vendee, and the vendor accept the order, it is a sufficient delivery, within the statute of frauds. Elmore *v.* Stone, 1 Taunt. 458. But the delivery of a sample, if it be considered as no part of the bulk, is not a delivery within the statute. Cooper *v.* Elston, 7 T. R. 14. But if the sample be delivered, as a part of the bulk, it then binds the contract. Talver *v.* West, 1 Holt 178. And *quære?* whether part performance of the agreement will take the case out of the statute at law? There is a *dictum* to that effect by Mr. Justice Buller, in Brodie *v.* St. Paul, 1 Ves. jr. 433; but it is denied by Lord Eldon, in Cooth *v.* Jackson, 6 Ves. 39, and by Mr. Chief Justice (now Chancellor) Kent, in Jackson *v.* Pierce, 2 Johns. 224; and the principle is considered as applicable in a court of equity only. But in the principal case in the text, there was a complete execution of the agreement, so far as *practicable, the goods being at sea, and only capable of a symbolical delivery. [*91

[*Or give something in earnest to bind the bargain, or in part payment.*] Where the defendant, on the purchase of a horse, offered the plaintiff's servant a shilling to bind the bargain, which was returned; this was held not to be a sufficient compliance with the statute. Blenkinsop *v.* Clayton, 1 J. B. Moore 328.

[*Or that some note or memorandum in writing of the bargain be made, &c.*] Under the 4th section of the statute, which provides, that no action shall be brought in certain cases, unless "the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized," it has been held, in a celebrated case, that the term "agreement" includes the consideration upon which the promise is founded, and that, therefore, it is necessary the consideration should be expressed upon the face of the written memorandum. Wain *v.* Warlters, 5 East 10; s. p. Sears *v.* Brink, 3 Johns. 210. But this strictness of construction is not applied to a contract for the sale of goods, under the 17th section, the word "bargain" being there substituted for agreement, and it is thus distinguished from the 4th section. Egerton *v.* Matthews, 6 East 307. Indeed, the case of Wain *v.* Warlters, itself, has been questioned by high judicial authority (*per* Lord Eldon, Ex parte Minet, 14 Ves. 189, and Ex parte Gordon, 15 Ibid. 286), and by very eminent elementary writers. Roberts on Frauds 117, note 58; Fell on Mercantile Guaranties 246, App'x, No. IV. And it manifestly did not meet the approbation of Lord Chief Justice Gibbs, in Minis *v.* Stacey (1 Holt 153), who said, "I do not think it necessary in this case to overrule the decision in Waine *v.* Warlters." It is also doubted by Mr. Chief Justice Parsons, in Hunt v. Adamson, 5 Mass. 358. It has been expressly held, that no engagement need appear on the face of the memorandum in writing, on the part of the person to whom the promise is made, to do that which is the consideration for the other party's promise. In other words, the mutuality of the contract *need not appear on the face of the memo- *92] randum. It is sufficient, that the party to whom the promise is made, in point of fact, does that which is the consideration for the other party's undertaking. Stapp *v.* Lill, 1 Camp. 242; Egerton *v.* Matthews, 6 East 307. And in the principal case in the text (Weightman *v.* Caldwell), the actual performance of that which was the consideration of the other party's undertaking, was properly left by the court to the jury, as a question of fact. Printing or writing with a lead pencil, is a sufficient writing within the statute. Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Clason *v.* Bailey, 14 Johns. 484; Merritt *v.* Classon, 12 Ibid. 102. A letter, by whomsoever written, and to whomsoever addressed, if written by the assent of one party, for the purpose of being communicated, and actually communicated to the other, is a note or memorandum in writing, within the statute. Moore *v.* Hart, 2 Chan. Rep. 147; 1 Vern. 110; Hodgson *v.* Hutchinson, 5 Vin. 522; Coleman *v.* Upcott, Ibid. 527; Wankford *v.* Fottherly, 2 Vern. 322. But a letter, not written to be communicated to the other party, nor actually communicated to him, is not a sufficient note or memorandum. Ayliff *v.* Tracy, 2 P. Wms. 65. If, however, the letter set forth the terms of an agreement, and recognise it as already actually concluded by the party, although not written to the other party, or with a view of being communicated to him, it is sufficient. Welford *v.* Beazeley, 3 Atk. 503. Although the letter itself does not state the terms of the agreement, yet, if it refers to another paper that does, and the letter is signed by the party to be charged, it is sufficient. Saunderson *v.* Jackson, 2 Bos. & Pull. 238; Tawney *v.* Crowther, 3 Bro. C. C. 161, 318; Clinan *v.* Cooke, 1 Sch. & Lef. 22. Nor is it material, whether the party writing the letter intended to recognise the previous written agreement. It is sufficient, if he does in fact recognise it as a past transaction. Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Coles *v.* Trecothick, 9 Ves. 234, 250. But either the letter, or the writing it refers to, must contain the terms of the agreement; and it is not sufficient, that they merely recognise that there was some agreement. Clark *v.* Wright, 1 Atk. 12; Rose *v.* Cunningham, 11 Ves. 550; Parkhurst *v.* *Van Cortlandt, 1 Johns. Ch. 273. And there must be such *93] a reference in the letter, or other paper signed, to the one containing the contract, as to show the letter to be the contract referred to, without the interposition of

parol evidence, except merely as to the identity of the paper. Brodie *v.* St. Paul, 1 Ves. jr. 333; Boydell *v.* Drummond, 11 East 142; Clinan *v.* Cooke, 1 Sch. & Lef. 22. Nor can parol testimony be admitted, to contradict, add to, or substantially vary the note or memorandum of the bargain. Binstead *v.* Coleman, Bunb. 65; Pantericke *v.* Powlet, 2 Atk. 383; Meres *v.* Ansell, 3 Wils. 275; Preston *v.* Merceau, 2 W. Bl. 1249; Wain *v.* Warlters, 5 East 10; Rich *v.* Jackson, 4 Bro. C. C. 514; Brodie *v.* St. Paul, 1 Ves. jr. 333; Powell *v.* Edmunds, 12 East 6; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 273. But parol evidence is admissible, with respect to the time, or other circumstances of delivery, which, though not essential parts of the contract, are frequently expressed in the memorandum, yet may be varied by parol testimony of a subsequent agreement. Warren *v.* Stagg, cited 3 T. R. 591; Cuff *v.* Penn, 1 Maule & Selw. 21; Keating *v.* Price, 1 Johns. Cas. 22. So also, by the French law (which requires a certain contracts to be in writing), it is held, that in a case where it becomes necessary to show the place where the bargain was made, it not being expressed in the written memorandum, parol evidence of that fact is admissible: "*le lieu et le temps auquel un marché est faite n'etat que des circonstances extèrieurs de la convention contenue dans l'acte.*" Pothier, *des Oblig.* No. 761. But Pothier observes, "*Cette decision souffre difficulté.*" Ibid. Where, however, a court of equity is called upon to decree a specific performance, the party sought to be charged may prove, that, by reason of fraud, surprise or mistake, the written instrument does not correctly express the contract; or, that after signing the written instrument, he made a verbal contract, varying the former, provided the variation has been acted upon, so that the original contract can no longer be enforced, without fraud upon the defendant. Clinan *v.* Cooke, 1 Sch. & Lef. 39; Clarke *v.* Grant, 14 Ves. 524; Joynes *v.* Statham, 3 Atk. 388; Marquis of Townsend *v.* Stangroom, 6 Ves. 328; *Woollam *v.* Hearn, 7 Ibid. 211. As, however, the court of chancery, in England, does not, except in some peculiar cases, enforce [*94 the specific performance of agreements relative to personal chattels (see 1 Wheat. 154, note(*a*)), it is conceived, that fraud would not take a case of the sale of goods out of the statute. Fraud will, undoubtedly, vitiate any agreement, whether required by the statute to be in writing or not; but in the case of the sale of goods, there is no instance, either at law or in equity, where fraud has been admitted as a ground for setting up a contract, not in writing, or to vary the terms of a contract as expressed in the written memorandum.

[*And signed, &c.*] The agreement or memorandum need only be signed by that party who is sought to be charged. Hatton *v.* Gray, 2 Johns. Ch. 164; Allen *v.* Bennett, 3 Taunt. 169; Fowler *v.* Freeman, 9 Ves. 351; Seton *v.* Slade, 7 Ibid. 265; Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Cotton *v.* Lee, cited 2 Bro. C. C. 564; Ballard *v.* Walker, 3 Johns. Cas. 60; Lawrenson *v.* Butler, 1 Sch. & Lef. 13. In this last case, Lord REDESDALE expresses doubts as to those cases in equity, where nothing has been done in pursuance of the agreement. But those doubts have not been adopted by other judges of equity. Western *v.* Russell, 3 Ves. & B. 192; Ormond *v.* Anderson, 2 Ball & Beat. 370. Several of these cases arose upon contracts respecting the sale of lands, under the 4th section of the statute, where the words are "signed by the party to be charged therewith;" whereas, the words are in the 17th section, "signed by the parties to be charged therewith." However, no distinction has been taken between the two sections, as to this point; and in several cases on the 17th section, the objection that it was not signed by both parties, has been expressly overruled. Allen *v.* Bennett, 3 Taunt. 169; Egerton *v.* Mathews, 6 East 307; Champion *v.* Plummer, 3 Bos. & Pul. 252; Schneider *v.* Norris, 2 Maule & Selw. 286; Roget *v.* Merrit, 2 Caines 117; Bailey *v.* Ogden, 3 Johns. 399. As to what is a sufficient signing, it is settled, that if the name of the party to be charged appears in the note or memorandum, and is applicable to the whole substance of the writing, and is put there by him, or by his authority, *it is immaterial in what part of the instru- [*95 ment the name appears, whether at the top, in the middle, or at the bottom. It should, however, appear, that it was a complete agreement or instrument, not merely the sketch of one, and unfinished in its terms. Fell on Guarantees, ch. 4, p. 69, pl. 3;

Knight *v.* Crockford, 1 Esp. 190; Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Welford *v.* Beazley, 3 Atk. 503; Stokes *v.* Moore, 1 P. Wms. 771, note; Lemayne *v.* Stanley, 3 Lev. 1; Coles *v.* Trecothick, 9 Ves. 239; Morison *v.* Turnour, 18 Ibid. 175; Clason *v.* Bailey, 14 Johns. 484. Making a mark is signing. Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, Ibid. 504; Wright *v.* Wakeford, 17 Ibid. 454. And *quære?* whether, if a party be in the habit of printing, instead of writing his name, the insertion of his name in print, in a bill of parcels, is not, of itself, a signing within the statute? Saunderson *v.* Jackson, 2 Bos. & Pul. 238. But at all events, if in a bill of parcels, printed with the name of the vendor, he insert the name of the vendee, this is a sufficient signing and recognition of the printed signature, to bind the vendor. Schneider *v.* Norris, 2 Maule & Selw. 286. And *quære*, whether sealing, in the presence of a witness who attests it, is equivalent to a signing within the statute? Lemayne *v.* Stanley, 3 Lev. 1; 1 Roll. Abr. 245, § 25. Sealing, without signing, would certainly not be a good signature, within the statute of wills. Wright *v.* Wakeford, 17 Ves. 454; Ellis *v.* Smith, 1 Ves. jr. 11.

[*By the parties to be charged by the contract, &c.*] The word party or parties to the contract, is not to be construed party, as to a deed, but person in general. Welford *v.* Beazley, 3 Atk. 503; s. c. 1 Ves. 6. Therefore, where a party, or principal, or person to be charged, signs as a witness, he shall be bound. This, however, is true, only where such person is conusant of the contents of the agreement, and it would be a fraud on the other party, not to be bound by it. Ibid.; Coles *v.* Trecothick, 9 Ves. 234. And if a person properly authorized as an agent to sign an agreement, sign it as a witness, it is sufficient to bind his principal, if it appear, that he knew the contents
*96] of the instrument *and signed it, recognising it as an agreement binding on his principal, as if he say, "witness A. B., agent for the sellers;" and the paper be signed by the purchaser or his agent. Coles *v.* Trecothick, 9 Ves. 234. Lord Eldon, indeed, in this case, collects the doctrine to be, that where, either the party himself, or his agent, ascertains the agreement by a signature, not in the body of the instrument, but in the form of an addition to it, that signature, though not a signing as an agreement, yet sufficiently ascertains the agreement, and is sufficient within the statute of frauds. Ibid.

[*Or their agents thereunto lawfully authorized.*] The agent who is authorized to sign, need not be constituted by writing. Rucker *v.* Camayer, 1 Esp. 105; Coles *v.* Trecothick, 9 Ves. 250; Laurenson *v.* Butler, 1 Sch. & Lef. 13; Merritt *v.* Clason, 12 Johns. 102. As to who is an agent lawfully authorized, it has been held, that a broker employed by one person to sell goods, who agrees with another person for the sale of them, and makes out and signs a sale note (containing the substance of the contract), and delivers one to each party, is a sufficient agent for both parties. Rucker *v.* Camayer, 1 Esp. 105. And where a broker had been employed by one party to sell, and by another, to buy goods, and had entered and signed the terms of the contract in his book, it was determined, that such entry and signature was a contract binding upon both parties; although one of them, upon having a bought-note sent to him, which was a copy of the contract, immediately objected to the terms, and returned the note. Hayman *v.* Neale, 2 Camp. 337. An auctioneer, who writes down the name of the purchaser at a public sale, has also been considered the agent of both parties. No doubt ever could be, whether he was the agent of the vendor, for that was quite clear; and the cases turn on the point, whether he is also the agent of the purchaser; and it is settled in the affirmative. Simon *v.* Motivos (or Metivier), 3 Burr. 1921; 1 W. Bl. 599; Bull. N. P. 280; Rondeau *v.* Wyatt, 2 H. Bl. 53; Hinde *v.* Whitehouse, 7 East 558. Independently of the circumstance of the auctioneer being considered as a sufficient agent
*97] of both parties, and his writing down the *name of the purchaser, as a sufficient memorandum and signature, it has been sometimes said, that sales at auction are not within the statute of frauds, on account of the peculiar solemnity of that mode of sale precluding the danger of perjury. Per Lord Mansfield and Mr. Justice Wilmot, in Simon *v.* Motivos, 1 W. Bl. 599. But this idea is repudiated by Lord Ellenborough, in Hinde *v.* Whitehouse (7 East 568), though he does not question the principle, that

the auctioneer is to be considered as the agent of both parties, and his memorandum as a sufficient note in writing; but only denies that auctions, abstractedly considered, are note within the statute. (Ibid. 572.) There is some slight difference in the phraseology of the 4th and 17th sections of the statute, which has been made the ground of a supposed distinction, in this respect, between the sale of lands (which is included in the 4th section), and the sale of goods in the 17th. The *nisi prius* cases, of Symonds *v.* Ball (8 T. R. 151), and Walker *v.* Constable (1 Bos. & Pul. 306) seem to inculcate the doctrine, that the auctioneer writing down the name of the purchaser, is not sufficient to satisfy the statute in a sale of lands (Buckmaster *v.* Harrop, 7 Ves. 341); Lord ELDON, however, has questioned the authority of these cases in Coles *v.* Trecothick (9 Ves. 249); and in White *v.* Proctor (4 Taunt. 208), it was expressly held, that an auctioneer is, by implication, an agent duly authorized to sign a contract for lands on behalf of the highest bidder. (S. P. Emmerson *v.* Heelis, 2 Taunt. 28.) And that his writing down his name in the auction book, is a sufficient signature to satisfy the statute of frauds. (Ibid.) And whether the first-mentioned cases are to be considered as law, or not, in respect to a sale of lands, there can be no doubt, that in a sale of goods, the auctioneer writing down the name of the purchaser, is a signing by an authorized agent of the parties. But the agent must be some third person, and one of the contracting parties cannot be agent for the other. As, where the plaintiff made a note of the bargain, and the defendant overlooking him, while he was writing it, desired him to make an alteration in the price, which he accordingly did. It was contended, that the defendant, who was the party sought to be charged, had made the plaintiff his agent, for the *purpose of signing the memorandum. But Lord ELLENBOROUGH was of [*98
opinion that the agent must be some third person, and could not be either of the contracting parties; and therefore, nonsuited the plaintiff. (Wright *v.* Dannah, 2 Camp. 203. See also Bailey *v.* Ogden, 3 Johns. 399.)

The SYBIL: DANGERFIELD *et al.*, Claimants.

Salvage.

In a case of civil salvage, where, under its peculiar circumstances, the amount of salvage is discretionary, appeals should not be encouraged, upon the ground of minute distinctions of merit, nor will the court reverse the decision of an inferior court, unless it manifestly appears, that some important error has been committed.

The demand of the ship-owners for freight and general average, in such a case, is to be pursued against that portion of the proceeds of the cargo, which is adjudged to the owners of the goods, by a direct libel or petition; and not by a claim interposed in the salvage cause.

APPEAL from the Circuit Court of South Carolina. This was a case of civil salvage, in which the district court decreed a moiety of the net proceeds, as salvage, to be distributed in certain proportions among the salvors; which was reversed by the circuit court, on appeal, and one-fourth decreed as salvage, to be divided among the respective salvors, in proportions somewhat different from those ordered by the district court. The cause was submitted to this court, without argument.

February 15th, 1819. MARSHALL, Ch. J., delivered the opinion *of [*99
the court.—This is a case, in which, under its peculiar circumstances, the amount of salvage is discretionary. In such cases, it is almost impossible, that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed, and the mode of distribution. Appeals should not be encouraged, upon the ground of minute distinctions; nor would this court choose to reverse the decision of a circuit court, in this class of cases, unless it manifestly appeared, that

some important error had been committed. In this particular case, the court is well satisfied, both with the amount of salvage decreed by the circuit court, and with the mode of distribution; and the decree is, therefore, affirmed, with costs.

Decree affirmed.

A question afterwards arose, upon a claim of the ship-owners for freight, &c.

February 26th. JOHNSON, Justice, delivered the opinion of the court.—In this case, the attention of the court has been particularly called to the claim interposed by the ship-owners, for freight and average.

This court, as at present advised, are very well satisfied, that no freight was earned, and that average may have been justly claimed. But in the case then depending, the circuit court could not have awarded either of those demands. The question is *inter alios*. There was no pretext for claiming
*100] either, as against the salvors; and the ship-owners ought to *have pursued their rights by libel, or petition by way of libel, against the portion of the proceeds of the cargo which was adjudged to the shippers. These parties were entitled to be heard upon such a claim, and could only be called upon to answer, in that mode. But the ship-owners are not yet too late to pursue their remedy. The proceeds are still in the possession of the law, and may be subjected to any maritime claim or lien in the court below.

Claim rejected.

The CALEDONIAN: DICKEY, Claimant.

Seizure.

A vessel and cargo, which is liable to capture as enemy's property, or for sailing under the pass or license of the enemy, or for trading with the enemy, may be seized, after her arrival in a port of the United States, and condemned as prize of war; the *delictum* is not purged by the termination of the voyage.

Any citizen may seize any property forfeited to the use of the government, either by the municipal law, or as prize of war, in order to enforce the forfeiture, and it depends upon the government, whether it will act upon the seizure; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure.

February 3d, 1819. APPEAL from the Circuit Court of Rhode Island.
*101] This cause was argued by *D. B. Ogden*, for *the appellant and claimant,(*a*) and by the *Attorney-General*, for the United States.(*b*)

February 16th. STORY, Justice, delivered the opinion of the court.—This is the case of an American ship, which sailed from Charleston, South Carolina, with a cargo of rice, bound to Lisbon, about the 28th of May 1813, under the protection of a British license. In the course of the voyage, the ship was captured by a British frigate, and sent into Bermuda for adjudication. Upon trial, she was acquitted, and her cargo being prohibited from exportation, was afterwards sold by the agent of the claimant, at Bermuda,

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(*a*) He cited The Nelly, note to The Hoop, 1 Rob. 219; The Two Friends, Id. 283; The Thomas Gibbons, 8 Cranch 421, to show, that the vessel could not be seized as prize, after her arrival in port, nor by a non-commissioned seizer.

(*b*) Citing The Ariadne, 2 Wheat. 143.

The Caledonian.

and the proceeds were remitted for his use. The ship sailed from Bermuda for the United States, in November 1813, and upon her arrival at Newport, in Rhode Island, was seized by the collector of that port, as forfeited to the United States. The libel contains four articles propounding the causes of forfeiture; first, for the ship's having on board and using a British license; secondly, for the ship's being engaged in trade with the enemy; and, thirdly and fourthly, for using a British license, contrary to the act of congress of the 2d of August 1813, ch. 56, prohibiting the use of British licenses.

It is unnecessary to consider the last two articles, *which are [*102
founded upon statutable prohibitions, because it is clear, that the two preceding articles, founded on the general law of prize, are sufficient to justify a condemnation *jure belli*, the proof of the facts being most clearly established.

The only questions which can arise in the case, are, whether the ship was liable to seizure for the asserted forfeiture, after her arrival in port; and, if so, whether the collector had authority to make the seizure. And we are clearly of opinion, in favor of the United States, on both points. It is not necessary, to enable the government to enforce condemnation in this case, that there should be a capture on the high seas. By the general law of war, every American ship, sailing under the pass or license of the enemy, or trading with the enemy, is deemed to be an enemy's ship, and forfeited as prize. If captured on the high seas, by a commissioned vessel, the property may be condemned to the captors, as enemy's property; if captured by an uncommissioned ship, the capture is still valid, and the property must be condemned to the United States. But the right of the government to the forfeiture, is not founded on the capture; it arises from its general authority to seize all enemies' property, coming into our ports, during war: and also from its authority to enforce a forfeiture against its own citizens, whenever the property comes within its reach. If, indeed, the mere arrival in port would purge away the forfeiture, it would afford the utmost impunity to persons engaged in illegal traffic, during war, for in most instances, the government *would have no means of ascertaining the offence, until [*103
after such arrival.

In respect to the other point, it is a general rule, that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and comfirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command.

Decree affirmed, with costs.

The Langdon Cheves : Lamb, Claimant.

Seizure.

A question of fact, upon a seizure in port, as a *droit* of admiralty, for trading with the enemy, and using his license. The circumstance of the vessel having been sent into an enemy's port, for adjudication, and afterwards permitted to resume her voyage, held to raise a violent presumption, that she had a license, which the claimant not having repelled by explanatory evidence, condemnation was pronounced.

February 3d, 1819. Appeal from the Circuit Court of Rhode Island.

*104] This cause was argued by *Hunter* and * *Wheaton*, for the appellant and claimant, (*a*) and by the *Attorney-General*, for the United States.

February 16th. Story, Justice, delivered the opinion of the court.—This case differs in no essential respect, from that of the Caledonian. The brig sailed from the United States, on a voyage to Lisbon, with a cargo of provisions, in May 1813, and was captured by a British sloop of war, and sent into Bermuda, where she was either not proceeded against as prize, or was acquitted on trial; and after a detention of about six weeks, was permitted to resume her original voyage; and on the return-voyage from Lisbon, with a cargo of salt, was, on her arrival at Newport, on the 16th of December 1813, seized by the collector of that port, as forfeited to the United States *jure belli*, for using a British license, and trading with the enemy.

There is no positive proof, that the brig had a British license on board; but we think, that under the circumstances, there arises a violent presumption that she had such a license, and that the burden of proof to repel this presumption rests on the claimant. He has not attempted this, in the slightest degree, there being a total absence of all evidence in his favor; and therefore, as the case remains with all its original imperfections, the decree of the circuit court is affirmed, with costs.

Decree affirmed, with costs.[1]

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*105] * The Friendschaft : Moreira, Claimant.

Prize.—Domicil.

The property of a house of trade, established in the enemy's country, is condemnable, as prize, whatever may be the personal domicil of the partners.

Appeal from the Circuit Court of North Carolina. The shipment in this case was made on the 31st of March 1814, at London, by the house of trade of Moreira, Vieira & Machado, of that city, on account and risk of the house, to Mr. Moreira, one of the partners, who was a native of, and domiciled at, Lisbon, in the kingdom of Portugal. The shares of the two partners, Messrs. Vieira and Machado, who were domiciled in London, were condemned as prize of war in the court below, without appeal. The share of Mr. Moreira, the partner domiciled at Lisbon, was condemned in the court below; but the claimant was allowed to make further proof to be offered to

(*a*) They cited The Amina, 3 Rob. 167; The Lisette, 6 Id. 387; The Joseph, 8 Cranch 451, to show, that the *delictum* of contraband, of trading with the enemy, and navigating under his license, are all purged by the termination of the voyage.

[1] For a further decision in this case, see 2 Mason 58.

this court, and to be admitted or rejected in the discretion of the court, as to his proprietary interest and connection with the house of trade in the enemy's country. On the production of the further proof, the proprietary interest of Mr. Moreira in one-third part of the goods was clearly proved, and also the fact of his personal domicil at Lisbon.

Hopkinson, for the claimant, relied upon this evidence, as sufficient to show, that the claimant was entitled to restitution of his share, on account of his personal domicil, notwithstanding his being a partner *in the house of trade established in the enemy's country. [*106

D. B. Ogden and *Wheaton*, contrà, insisted, that the shipment being made by a house of trade, established in the enemy's country, for the account and risk of that house, the neutral domicil of one of the partners would not avail to save his share from condemnation as prize. *The Nancy*, claim of *Mr. Coopman*, cited in *The Vigilantia*, 1 Rob. 14, 15; *The Susa*, 2 Ibid. 255; *The Indiana*, cited in *The Portland*, 3 Ibid. 44. In the British tribunals, this principle is recognised by the highest authority known to the prize law, that of the Lords of Appeal, and if it be material (as it seems to have been intimated by this court, 9 Cranch 198), to distinguish whether the decision was pronounced before, or since our Independence, the *onus* is thrown upon the claimant, to show, that the case of *Mr. Coopman*, decided in 1798, was determined contrary to former practice or former precedents. It does, indeed, appear, that an erroneous notion had been adopted by some persons, that the domicil of the party was all that the prize court had a right to consider. But in *Coopman's case*, that notion was exploded by the Lords, and the true principle on which the cases from which it had been imbibed, were determined, was explained as applying to cases merely at the commencement of a war; whilst the rule, applicable to a neutral partner, entering into a house of trade in the enemy's country, during the war, or continuing that connection, after *a declaration of war, is developed, not as a new rule, then for the first time prescribed, but as the application of an anciently established principle. 1 Rob. 12, 14, 15. [*107

February 25th, 1819. STORY, Justice, delivered the opinion of the court.—The shipment in this case was made by Moreira, Vieira & Machado, a house of trade established in London, on the account of the house, to Moreira, one of the partners in the house, who was a native of, and domiciled in, Lisbon, in the kingdom of Portugal; and the only question is, whether the share of Moreira in the shipment, is exempted from condemnation, by reason of his neutral domicil? It has been long since decided in the courts of admiralty, that the property of a house of trade, established in the enemy's country, is condemnable, as prize, whatever may be the domicil of the partners. The trade of such a house is deemed essentially a hostile trade, and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicil of any of the company. The rule, then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained, if the case were entirely new.

Decree affirmed, with costs.

*United States *v.* Howland and Allen.

Equity jurisdiction.—Priority of the United States.

The circuit court has jurisdiction, on a bill in equity, filed by the United States against the debtor of their debtor, they claiming a priority under the act of 1799, c. 128, § 65, notwithstanding the local law of the state where the suit is brought allows a creditor to proceed against the debtor of his debtor, by a peculiar process of law.

The circuit courts of the Union have chancery jurisdiction in every state; they have the same chancery powers, and the same rules of decision in all the states.[1]

The United States are not entitled to priority over other creditors, under the act of 1799, c. 128, § 65, upon the ground of the debtor having made an assignment for the benefit of creditors, unless it is proved, that the debtor has made an assignment of *all* his property.

Where the deed of assignment conveys only the property mentioned in the schedule annexed, and the schedule does not purport to contain all the property of the party who made it, the *onus probandi* is thrown on the United States, to show that the assignment embraced all the property of the debtor.[2]

Upon a bill filed by the United States, proceeding as ordinary creditors, against the debtor of their debtor, for an account, &c., the original debtor to the United States ought to be a party, and the account taken between him and his debtor.

Appeal from the Circuit Court of Massachusetts. This was a bill in equity, filed in the name of the United States, in the court below, stating, that several judgments had been obtained by the United States on duty bonds, against Shoemaker & Travers, and Jacob Shoemaker, and their sure, ties, amounting to the sum of $5292; which judgments were obtained in the district court of Pennsylvania, at the February term of 1808, and upon
*109] which executions *had issued, which remained in the marshal's hands unsatisfied; that after the execution of the duty bonds, but before they were payable, to wit, on the 6th of December 1806, Shoemaker & Travers became insolvent, within the true intent and meaning of the act "to regulate the collection of duties on imports and tonnage:" that on the first of February 1808, goods, effects, money and credits of Shoemaker & Travers, to the amount of $6000, had come to the hands of Howland & Allen, which, the bill alleged, they refused to subject to the executions of the United States; it prayed, that they might be compelled to account for, and deliver up, these goods, &c., in satisfaction of the claim of the United States, and for an injunction in the meantime to restrain them from disposing of, paying away, or in any manner applying the goods, &c., aforesaid, to any other object. The injunction was, accordingly, awarded.

An amendment to the bill stated, that after the debts to the United States accrued by bond as aforesaid, and after Shoemaker & Travers had become insolvent, to wit, on the 6th day of December 1806, they made a voluntary assignment by deed, of all their property, for the bedefit of their creditors, within the true intent and meaning of the act of congress aforesaid, and an exemplified copy of the deed of assignment was annexed to the amended bill. The deed recited, that the parties being justly indebted to divers persons, whose names are mentioned in a list thereto annexed, and unable at present to pay the said debts, they assign to trustees therein men-

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[1] Dodge *v.* Woolsey, 18 How. 347; Barber *v.* Barber, 21 Id. 583; Payne *v.* Hook, 7 Wall. 425; Cropper *v.* Coburn, 2 Curt. 465; Mayer *v.* Foulkrod, 4 W. C. C. 349; Lawrence *v.* Clarke, 2 McLean 568.

[2] United States *v.* Langton, 5 Mason 280; United States *v.* Clark, 1 Paine 629.

tioned, *all and singular, the estate and effects contained in a schedule annexed, in trust, to pay the debts due the enumerated creditors, and first, that due to the United States. The schedule was entitled "Schedule of property assigned by Shoemaker & Travers, and Jacob Shoemaker, to the creditors of Shoemaker & Travers," and contained many items of property, and among others, the proceeds of the cargo of the brig Deborah, which vessel was then at sea, and belonging to Howland & Allen, but had been chartered by Shoemaker & Travers.

Howland & Allen, by their answer, admitted the receipt, on the 1st of January 1807, of 4000 Spanish dollars, the property of Shoemaker & Travers, and which the master of the Deborah had received in Guadaloupe, for Shoemaker & Travers; but insisted on their right to apply it to an unliquidated debt of greater amount (composed of freight, demurrage, damages, &c., the particulars of which were detailed by the answer), due, as alleged, from Shoemaker & Travers to them, and applied, by an entry in their books, to the credit of Shoemaker & Travers, at the time of the receipt of the money aforesaid. They insisted, therefore, on the right of retaining it. To this answer, there was a general replication, and the depositions of several witnesses were taken.

The court below decreed, that the said Shoemaker & Travers were, and are, indebted to the United States, and that they became insolvent, and made an assignment as alleged in the bill, and that there was an outstanding unsettled demand existing in their favor, at the time of their insolvency, against the *defendants, arising from the voyage of the brigantine [*111
Deborah, and which is still unsettled and unpaid, but the court is not satisfied that the defendants, being merely debtors to said insolvents, are by law liable to this process, and thereupon, decree, that the said bill be dismissed. From this decree, the present appeal was taken.

February 4th. The *Attorney-General*, for the appellants, argued, 1. That the prior right of the United States attached to all the property of Shoemaker & Travers, on the 6th of December 1806, the time of their insolvency, and the date of the deed of assignment from them. It is immaterial, whether the priority of the United States, in any case, be asserted under the act of 1797, c. 368, § 5, or under that of 1799, c. 128, § 65. The decisions, as to this point, under the one statute, are applicable to the other. It is insisted, that this is one of the cases specified by congress, in which the debts due to the United States are to be first satisfied; a case in which the debtor, not having sufficient property to pay all his debts, has made a voluntary assignment thereof, for the benefit of his creditors. This is the allegation of the bill, and it is supported by the deed itself. Although the granting clause does not literally express it to include *all* the property of the debtors, yet the clause, which gives the power to sell, by using the words "all the property of them, the said Shoemaker & Travers, and Jacob Shoemaker," clearly shows, that the assignment was intended to convey all their property. The very object of the deed, as set forth in the recital, *aids this [*112
construction.

2. If, then, the priority of the United States has attached, a court of equity is the proper *forum* in which it should be asserted. A trust exists, and an account is to be taken. The court of chancery is the only tribunal

that can enforce the trnst, and take the account, having also the power of calling all the parties before it. Nor are the chancery powers of the circuit court at all affected by the statute of Massachusetts of 1794, c. 64, giving a peculiar process, in the nature of a foreign attachment, by which the creditor may attach in the hands of the debtor of his debtor. The powers and practice of the circuit courts, in chancery cases, are not to be controlled by the local laws of the states where those courts sit. They are the same throughout the Union.

3. But even supposing that the United States have no priority in this case; they are, on the common footing of ordinary creditors, entitled to an account against Howland & Allen, and to the payment of any sum which, on a settlement of such account, may be found due from them to Shoemaker & Travers.

Jones, contrà, insisted, 1. That the act of congress only extended to executors and administrators, or to assignees, but not to the debtors of the debtors of the United States. A court of equity cannot have power to settle an account in this way, without some statutory provision to authorize the proceeding. The act of congress gives no such authority. Shoemaker & Travers are not made parties to the bill, and a decree between the United
*113] States and the present *defendants, would not bind, in a suit between the defendants and Shoemaker & Travers. Nor is it too late, in the appellate court, to take advantage of the want of parties. *Russell* v. *Clarke's Executors*, 7 Cranch 98.

2. The cases are uniform, that in order to enable the priority of the United States to attach upon this ground, the assignment must be of *all* the debtor's property. *United States* v. *Fisher*, 2 Cranch 358; *United States* v. *Hooe*, 3 Ibid. 73. There is here no evidence, either in the deed or in the depositions, that this assignment embraced all the property of Shoemaker & Travers. The power to sell all the property cannot be construed to enlarge the granting clause, which merely refers to the property mentioned in the schedule annexed to the deed. The defendants claim a balance from Shoemaker & Travers, and the right to apply the money received to the liquidation of that balance. They had acquired a special lien upon the money for the payment of this balance, long before the alleged act of insolvency. The court has repeatedly determined, that if, before the right of preference to the United States has accrued, the debtor has made a *bonâ fide* conveyance of his estate, or has mortgaged it to secure a debt, the property is divested out of the debtor, and cannot be made liable to the claim of the United States. *United States* v. *Fisher*, 2 Cranch 390; *United States* v. *Hooe*, 3 Ibid. 90. The spirit of these decisions is, that any *bonâ fide* lien will be protected, and not merely an actual mortgage or hypothecation. All specific
*114] liens are highly favored *by the law; such as that of a factor, who has advanced his money on the credit of the goods, or a ship-owner who, having let out his ship for their transportation, has a right to the same security. It is true, that the court has said, that the lien of a judgment-creditor shall not be protected as against the prior right of the United States. But that is upon the ground that the judgment is a mere general lien, not affecting the *jus disponendi* of the owner of the property, nor vesting any specific interest in the creditor.

United States v. Howland.

February 17th, 1819. MARSHALL, Ch. J., delivered the opinion of the court.—The bill in this case was filed by the United States in the circuit court of the district of Massachusetts, to recover from the defendants a sum of money in their hands, alleged to be the money of Jacob Shoemaker and Charles R. Travers, merchants and partners, who are stated to be insolvents, and to be indebted to the United States for duties.

It appears, that Shoemaker & Travers, on the 6th day of December 1806, executed an indenture, in which, reciting that they are justly indebted to divers persons, whose names are expressed in a list thereto annexed, and are unable at present to pay the said debts, they assign to trustees therein mentioned, all and singular the estate and effects contained in a schedule annexed, in trust, to pay the debt due to the enumerated creditors, and first that due to the United States. The schedule contains many items of property, and and among others the proceeds of the *cargo of the Deborah, then at sea. The Deborah was the property of Howland & Allen; and on [*115 her coming into port, her master delivered to her owners a sum of money which he had received at Guadaloupe for Shoemaker & Travers, and which is in the schedule annexed to the deed of assignment already mentioned. At the hearing, the circuit court dismissed the bill, on the opinion, that it was not sustainable. From this decree, the United States have appealed to this court, and now insist, 1. That it is a case in which a court of equity has jurisdiction. 2. That the United States are entitled to priority, this being a case within the provisions of the act of congress.

On the first point, no difficulty would be found, had the proper parties been before the court. A trust exists, and an account would be proper, to ascertain the sum due from Howland & Allen to Shoemaker & Travers. The case, even independent of these circumstances, would be proper for a court of chancery, but for the act of Massachusetts, which allows a creditor to sue the debtor of his debtor. Still, the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be, there, in such cases, ascertained with more certainty and facility; and as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states.

*This being a case of which a court of chancery may take jurisdiction, we are next to inquire, whether it is one in which the United [*116 States are entitled to priority. This depends on the fact, whether the deed of assignment executed by Shoemaker & Travers was a conveyance of all their property. The words of the deed, after reciting the motives which led to it, and the consideration, are "have granted, &c., and by these presents, do grant," "all and singular the estate and effects which is contained in the schedule hereunto annexed, marked A." The caption of the schedule is, "schedule of property assigned by Shoemaker & Travers, and Jacob Shoemaker, to the creditors of Shoemaker & Travers." The deed, then, conveys only the property contained in the schedule, and the schedule does not purport to contain all the property of the parties who made it. In such a case, the presumption must be, that there is property not contained in the deed, unless the contrary appears. The *onus probandi* is thrown on the United States.

It is contended for the United States, that the clause which gives the power to sell, by using the words "all the property of them, the said Shoemaker & Travers, and Jacob Shoemaker," indicate clearly that this deed does convey all their property. But these words are explained and limited by those which follow, so as to show, that the word "all" is used in reference to the schedule, and means all the property in the schedule. The depositions do not aid the deed. The question, whether the whole *property is *117] assigned, is still left to conjecture, and this being the fact on which the preference of the United States is founded, ought to be proved. Not being proved, the court is of opinion, this is not a case in which it can be claimed.

But the United States are the creditors of Shoemaker & Travers, and have a right, as creditors, to proceed against their property in the hands of Howland & Allen. They have a right to so much of that property as remains, after the debt due to Howland & Allen shall be satisfied. But to ascertain this amount, an account between Holland & Allen and the debtors to the United States should be taken, and the persons against whom the account is to be taken, should be parties to the suit. Although, if they cannot be found within the district of Massachusetts, the process of the court cannot reach them, still they may appear without coercion. At any rate, an account ought to be taken, since the matter controverted between the parties, is more proper to be stated by a master, than to be decided in court without such report.

The decree is to be reversed, and the cause remanded, with directions to allow the plaintiffs to amend the bill and make new parties. The United States, will, of course, be at liberty to take testimony, showing the assignment to be of all the property of the parties who made it.(*a*)

DECREE.—This cause came on to be heard, on the transcript of the record of the circuit court for the district of Massachusetts, and was argued by counsel: *on consideration whereof, this court is of opinion, that the *118] circuit court erred in dismissing the bill of the plaintiffs, and that their decree ought to be reversed, and it is hereby reversed and annulled: And it is further ordered, that the said cause be remanded to the said circuit court, with directions to allow the plaintiffs to amend their bill and make new parties.(*b*)

(*a*) Mr. Justice STORY did not sit in the court below, in this cause.

(*b*) The act of March 3d, 1797, c. 368, entitled, "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money," declares (§ 5), "That where any revenue-officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

The collection act of March 2d, 1799, c. 128, § 65, provides, that "in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any exec-

utor, administrator or assignee, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied and paid, shall become answerable, in their own person or estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, in the proper court having cognisance thereof:" And "that if the principal in any bond which shall be given to the United States for duties on goods, wares *or merchandise imported, or other penalty, either by himself, his factor, agent, or other person, for him, shall be insolvent, or if such principal being deceased, his or her estate and effects, which shall come to the hands of his or her executors, administrators or assignees, shall be insufficient for the payment of his or her debts, and if in either of the said cases, any surety on the said bond or bonds, or the executors, administrators or assignees of such surety, shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees, shall have and enjoy the like advantage, priority or preference, for the recovery and receipt of said moneys, out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit or suits upon the said bond or bonds, in law or equity, in his, her or their own name or names, for the recovery of all moneys paid thereon. And the cases of insolvency mentioned in this section shall be deemed to extend, as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the estate and effects of an absconding, concealed or absent debtor shall have been attached by process of law, as to cases in which a legal act of bankruptcy shall have been committed." [*119

Under these acts the following points have been determined: 1. That the preference given to the United States by the act of 1797, c. 368, § 5, is not confined to revenue-officers, and persons accountable for public money, but extends to debtors of the United States generally. United States *v.* Fisher, 2 Cranch 358, 391, 395. And that the collection act of 1799, c. 128, § 65, does not repeal the 5th section of the act of 1797, c. 368, though the 65th section of the collection act applies only to bonds taken for those duties on imports and tonnage, which are the objects of the act. Id. 394. The United States are entitled to their preference on a debt due to them by the insolvent as indorser of a bill of exchange, as well as on any other debt. United States *v.* Fisher, 2 Cranch 358.

*2. The acts do not create a lien, nor extend to a *bona fide* conveyance by the debtor to a third person, in the ordinary course of business, or to a mortgage to secure a debt, or to a case where the debtor's property is seized under a *fi. fa.*, before the right of preference has accrued to the United States. United States *v.* Fisher, 2 Cranch 390; United States *v.* Hooe, 3 Id. 73, 90; Thelusson *v.* Smith, 2 Wheat. 396, 424. But the United States are not precluded from asserting their priority, by a voluntary assignment made by the debtor, under such circumstances as would be a fraud on the bankrupt laws. Harrison *v.* Sterry, 5 Cranch 289, 301. A mortgage of part of his property, made by a collector of the customs, to the surety in his official bond, to indemnify the surety therein, and also to secure him from his existing and future indorsements for the mortgagor at the bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts, at the time the mortgage was given, and although the mortgagee knew, at the time of taking the mortgage, the mortgagor was indebted to the United States. United States *v.* Hooe, 3 Cranch 73. The priority of the United States is not affected by an assignment under a commission of bankruptcy. United States *v.* Fisher, 2 Id. 358. [*120

3. A mere state of insolvency or inability in a debtor of the United States, to pay all his debts, gives no right of preference to the United States, unless it is accompanied by a voluntary assignment of his property for the benefit of his creditors; or, unless his estate and effects shall be attached as those of an absent, concealed or absconding debtor; or, unless he has committed some legal act of bankruptcy or insol-

vency. United States *v.* Fisher, 2 Cranch 358; United States *v.* Hooe, 3 Id. 73; Prince *v.* Bartlett, 8 Id. 431; Thelusson *v.* Smith, 2 Wheat. 396, 424. The priority is limited to some one of these particular cases, when the debtor is living; but it takes effect generally, if he is dead. United States *v.* Fisher, 2 Cranch 390. In this last cited case, Mr. Chief Justice MARSHALL intimated his own opinion, that if it did not create a *devastavit* in the administration of effects, and would require *notice, in order to bind the executor, or administrator or assignee. Id. 391, note *a*.

*121]

4. The assignment must be of *all* the debtor's property. United States *v.* Hooe, 3 Cranch 73, 91. If, however, a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be allowed to avail themselves of such a contrivance. But where a *bonâ fide* conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the acts. Id. 91.

5. The priority attaches at the time of the insolvency manifested in any of the modes specified in the acts, whether a suit has been commenced by the United States or not. United States *v.* Fisher, 2 Cranch 395.

6. In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner, in a foreign country, and although the United States had proved their debt under a commission of bankruptcy in this country, and had voted for an assignee. The law of the place where the contract is made, is generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is to be expounded. But the right of priority forms no part of the contract itself; it is extrinsic, and is rather a personal privilege, dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. Harrison *v.* Sterry, 5 Cranch 289, 298.

7. Though a judgment gives to a judgment-creditor a lien on the debtor's lands, and a preference over all subsequent judgement-creditors, yet the acts defeat this preference in favor of the United States, in the cases specified. Thelusson *v.* Smith, 2 Wheat. 396, 423.

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*122] *STURGES *v.* CROWNINSHIELD.

State bankrupt law.

Since the adoption of the constitution of the United States a state has authority to pass a bankrupt law, provided such law do not impair the obligation of contracts, within the meaning of the constitution, art. 1, § 10; and provided they be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law.

The act of the legislature of the state of New York, passed on the 3d of April 1811 (which not not liberates the person of the debtor, but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes), so far as it attempts to discharge the contract, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States, and is not a good plea in bar of an action brought upon such contract.

The obligation of a contract is not satisfied by a *cessio bonorum*; it extends to future acquisitions; but the imprisonment of the debtor is no part of the contract; and he may he released from imprisonment, without impairing its obligation.[1]

THIS was an action of *assumpsit*, brought in the Circuit Court of Massachusetts, against the defendant, as the maker of two promissory notes,

[1] A state insolvent law, which discharges both the person of the debtor, and his future acquisitions, is not unconstitutional, so far as respects subsequent debts contracted with citizens of the same state. Ogden *v.* Saunders, 12 Wheat. 213; Baldwin *v.* Hall, 1 Wall. 223. But a discharge under such law does not bar the rights of citizens of other states. Ibid.; Boyle *v.* Zacharie, 6 Pet. 635; Suydam *v.* Broadnax, 14 Id. 67; Cook *v.* Moffat, 5 How. 295; Baldwin *v.* Bank of Newbury, 1 Wall. 324; Gilman *v.* Lockwood, 4 Id. 409. Unless they come in and make themselves parties, by receiving a dividend. Clay *v.* Smith, 3 Pet. 411.

both dated at New York, on the 22d of March 1811, for the sum of $771.86 each, and payable to the plaintiff, one on the 1st of August, and the other on the 15th of August 1811. The defendant pleaded his discharge under "an act for the benefit of insolvent debtors and their creditors," passed by the legislature of New York, the 3d day of April 1811. After stating the provisions of the said act, the defendant's plea averred his compliance with them, and that he was discharged, and a certificate given to him, the 15th day of February 1812. *To this plea, there was a general demurrer and joinder. At the October term of the circuit court, 1817, the cause [*123 came on to be argued and heard on the said demurrer, and the following questions arose, to wit:

1. Whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the congress of the United States?

2. Whether the act of New York, passed the 3d day of April 1811, and stated in the plea in this case, is a bankrupt act, within the meaning of the constitution of the United States?

3. Whether the act aforesaid is an act or law impairing the obligation of contracts, within the meaning of the constitution of the United States?

4. Whether plea is a good and sufficient bar of the plaintiff's action?

And after hearing counsel upon the questions, the judges of the circuit court were opposed in opinion thereupon; and upon motion of the plaintiff's counsel, the questions were certified to the supreme court, for their final decision.

February 8th. *Daggett*, for the plaintiff, argued: 1. That since the adoption of the constitution, no state has authority to pass a bankrupt law, but that the power is exclusively vested in congress. The 8th section of the 1st article of the constitution is wholly employed in giving powers to congress. Those powers had hitherto been in the state legislatures or in the people; the people now thought fit to vest them in congress. *The effect of thus giving them to congress, may be fairly inferred from the [*124 language of the 10th article of the amendments to the constitution, which declares, that "the powers, not delegated to the United States by the constitution, nor prohibted by it to the states, are reserved to the states respectively, or to the people." The expression is in the disjunctive; not delegated nor prohibited. The inference is, therefore, fair, that if a power is delegated, or prohibited, it is not reserved. Every power given by the constitution, unless limited, is entire, exclusive and supreme. The national authority over subjects placed under its control, is absolutely sovereign; and a sovereign power over the same subject cannot co-exist in two independent legislatures. Uniform laws on the subject of bankruptcies are contemplated in the constitution; the laws of the different states must be, of course, multiform; and therefore, not warranted by the constitution. The same clause which provides for the establishment of uniform laws on the subject of bankruptcies, provides also for "a uniform rule of naturalization." In the first clause of the same section, it is declared, that "duties, imposts and excises shall be uniform throughout the United States;" and in the 9th section, it is further declared, that "no preference shall be given, by any regulation of commerce

or revenue, to the ports of one state over those of another." In the last three cases, it is admitted, that congress alone can legislate; and by the same reasoning, congress only can make laws on the subject of bankruptcies. It is a national subject; and therefore, the power over it is in the national
*125] *government. Before the adoption of the constitution, partial laws were enacted by the states, on the subject of foreign commerce, of the commerce between the states, of the circulating medium, and respecting the collection of debts. These laws had created great embarrassments, and seriously affected public and private credit; one strong reason for a national constitution was, that these alarming evils might be corrected. The constitution provides this remedy; it takes from the states the power of regulating commerce, the power of coining money, and of regulating its value, or the value of foreign coin. It prohibits, in terms, the issuing of paper money, the making anything but gold and silver a tender in the payment of debts. It provides for the establishment of national courts, extends the judicial power to controversies between citizens of different states, and between the citizens of the respective states and foreign subjects or citizens: and yet it is urged, that it leaves in the states the power of making laws on the subject of bankruptcies, whereby contracts may be destroyed. If the convention had intended that congress and the state legislatures might legislate on this subject, we should expect to see the powers of these respective sovereignties expressed, and a definition of them, at least, attempted. We might expect this, because, in several cases in the constitution, it appears that this course had been pursued: § 4, art. 1; § 8, art. 1; compared with § 2, art. 2; § 9, art. 1; § 10, art. 1; § 1, art. 2; § 3, art. 4, and art. 5, furnish
*126] instances of powers of this character. It is said, *that the power in question is not declared to be exclusive in congress. We answer, nor is any power so declared, except that of legislating for the ten miles square, the seat of government. It is said, again, that the exercise of this power is not prohibited to the states. Nor is the power to provide for the punishment of piracy and other crimes committed on the high seas; nor of making a rule of naturalization; nor of the regulating the value of coin; nor of securing to authors and inventors the exclusive right to their writings and discoveries, prohibited. Yet, who doubts that legislation by the states on those subjects is opposed to the spirit of the constitution? It is also objected, that congress are vested with the power of laying and collecting taxes; and yet, this power is rightfully exercised by the states. This is admitted, and we contend, that comparing the 8th and 10th sections of art. 1, there is a strong implication of a reservation of power, in this case, to the states. In the 8th section, granting powers to congress, taxes, duties, imposts and excises are specified; in the 10th section, prohibiting the exercise of powers by the states, the word taxes is omitted, undoubtedly, by design. Besides, there is no incompatibility in the exercise of this power by the two sovereignties; and we concede, that upon the true principles of the constitution, the powers not prohibited to the states, nor in their nature exclusive, still remain in the states. It will be argued, that, if congress declines to exercise the power of making laws on the subject of bankruptcies, the states may exercise it. But we contend, that the whole subject is intrusted
*127] *to the national legislature; and if it declines to establish a law, it is to be considered as a declaration, that it is unfit that such a law

should exist: and much stronger is the inference, if, as in 1805, congress repeal such a law. It will, perhaps, be asked, if this construction of the constitution be correct, how it is, that so many states, since the adoption of the constitution, have passed laws on the subject of bankruptcies. On examination, it will appear, that no acts, properly called bankrupt laws, have been passed in more than four or five of the states. There are, indeed, insolvent laws, by which the bodies of debtors, in one form or another, are exempted from imprisonment, in nearly all the states. Rhode Island had an act in existence, when the constitution was adopted, by which the debtor might, on application to the legislature, be discharged from his debts. In New York, a law of the same character has been in operation, since the year 1755, and also in Maryland, for a long period. In Pennsylvania, a bankrupt law operating only in the city and county of Philadelphia, existed for two or three years; and in Connecticut, the legislature has often granted a special act of bankruptcy, on applications of individuals. But in all the other states, their laws on this subject have been framed with reference to the exemption of the body from imprisonment, and not to the discharge of the contract. In Massachusetts, the idea has prevailed so extensively, that the power of congress is exclusive, that no bankrupt law was ever passed by the legislature of that state. (*a*) It cannot be denied, *that if congress exercise this power, the states are divested of it. But what species [*128
of power is this? Laws made by independent legislatures, expire by their own limitation, or are repealed by the authority which enacted them. Here, however, is a novel method of destroying laws. They are not repealed; do not cease by their own limitation; but are suspended by the interference of another independent legislature. It is difficult, upon this construction, to define this power of the states.

2. The act of the state of New York, pleaded in this cause, is a bankrupt law, within the meaning of the constitution of the United States. By this law, on the application of any person imprisoned or prosecuted for a debt; or, on the application of any creditor of a debtor imprisoned, or against whom an execution against his goods and chattels hath been returned *unsatisfied, he having given sixty days' notice thereof, proceedings [*129
may be had before certain tribunals by the act established, whereby all his property may be taken and divided among his creditors, and he liberated from imprisonment, and discharged from all debts. It will be insisted, in support of the plea, that this law is an insolvent law. What is an insolvent

(*a*) "It has often been observed by those who advocated a bankrupt law, in this commonwealth, with a view to the relief of an unfortunate class of debtors from existing embarrassments, that the object of the framers of the constitution, in this prohibition upon the states, was to prevent tender laws and other expedients of a like nature, which had been resorted to in some of the states, to the great prejudice of creditors; and that this article of the constitution ought to be construed with reference to such intention. But the words are too imperative to be evaded. "No state shall emit bills of credit, make anything but gold and silver a tender in payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." It would be contrary to all rules of construction, to limit this latter clause of the constitution to a subject which is expressly prohibited in a preceding sentence. Full operation ought to be given to the words of an instrument so deliberately and cautiously made as was the constitution of the United States." Blanchard *v.* Russell, 13 Mass. 1.

law? Insolvent laws are derived from the *cessio bonorum* of the Roman law, and discharge the person, and not the future acquisitions of the debtor. A judgment, assignment or cession, under that law, does not extinguish the right of action; it has no other effect than to release from imprisonment. A bankrupt law establishes a system for a complete discharge of insolvent debtors. An insolvent law is an act occasionally passed for the relief of the body of the debtor. A bankrupt law, as distinguished from an insolvent law, is a general law, by which all the property of the debtor is taken and divided among his creditors, and he discharged from his debts, and made, as it is sometimes said, a new man. But if this be not a bankrupt law, then it may remain in force, if congress should exercise its power. Would then the laws on the subject of bankruptcy be uniform? It is impossible to believe, that the convention meditated such an absurdity. On this point the cases are numerous and strong. In *Golden* v. *Prince* (3 W. C. C. 313), the law of Pennsylvania, which was similar to that of New York, was treated, both by the bench and bar, as a bankrupt law. In *Blanchard* v. *Russell*, 13 Mass. 1, the statute now pleaded, was declared by the supreme *130] *court of Massachusetts, to be a bankrupt law. In *Smith* v. *Buchanan*, 1 East 6, the law of Maryland was so considered by the English court of K. B. In *Proctor* v. *Moore*, 1 Mass. 198, a special act of the legislature of Connecticut, is considered as a bankrupt law, by the supreme court of Massachusetts. In the case of *Blanchard* v. *Russell*, Mr. Chief Justice PARKER says, speaking of the statute now in question, "The law under which the debtor claims to be discharged, is a general law, intended to affect all the citizens of the state of New York, at least, and it provides a system by which an insolvent debtor may, upon his own application, or upon petition of any of his creditors, be holden to surrender all his property, and be discharged from all his debts. It is, therefore, a bankrupt law, and to be distinguished from insolvent laws, technically so called." But this is said not to be a bankrupt law, because such laws apply only to traders, and this embraces every debtor. The first English bankrupt statute, that of Hen. VIII., c. 1, makes a general provision; and this is declared to be the foundation of the whole system. It is true, by various subsequent statutes, it was limited; but the construction now given to those statutes embraces various descriptions of persons, who are not merchants or traders. It is not, therefore, an essential feature of a law, on the subject of bankruptcies, that it should extend to traders only. It is further urged, that by the English bankrupt laws, an act of bankruptcy divests the debtor of his property, and the *proceedings always originate with the creditor. By the 16th *131] section of the law under consideration, the creditor may originate proceedings, under certain circumstances; and all grants and dispositions of property, made after a certain time, are declared void. What constitutes this, and other similar laws, bankrupt laws, is, that thereby an absolute discharge of the body of the debtor and his future acquisitions of property is obtained. In this, it differs from insolvent laws.

3. This act is a law impairing the obligation of contracts, and therefore, unconstitutional and void. A contract is an agreement to do, or not to do, a particular thing. Its obligation binds the parties to do, or not to do, the thing agreed to be done, or not done, and in the manner stipulated. Whatever relieves either party from the performance of the contract, in whole or

in part, impairs its obligation. It is, however, said, that if the contract is made in the state where such law exists, the parties have reference to it, and it is a part of their contract. This is a *petitio principii*. If the act be unconstitutional and void, the parties regarded it as such, and of course, did not look to it as binding. A law, declaring that debtors might be discharged on paying half the sum due, or that the creditor might recover double the sum due, are alike void ; or else, all contracts are at the mercy of the legislature. Legislatures act within the limits of their powers, only when they establish laws to enable parties to enforce contracts ; laws to afford redress to the injured against negligence and fraud in not performing engagements : and *courts act within their proper sphere, when they confine themselves to the exposition of those contracts, and giving efficacy to the laws. [*132

4. But even admitting this act to be constitutional, as to all contracts made after it was passed, it was clearly unconstitutional and void as to all contracts then existing, as it was an act or law impairing their obligation. The first impression of any man, learned or unlearned, is, that a law which discharges a contract, without an entire performance of it, impairs its obligation. A law which declares, that a bond given for the payment of $1000 may be cancelled, and the obligor freed from all liability to suit thereon, upon the payment of $500, certainly materially affects the obligation of the contract, and impairs it. It will be urged, however, that though the words in the constitution are broad enough to include the case, yet they are to be construed according to the intent of the framers, and that the prohibition of such laws as that in question, was not intended by the constitution. Surely, language, here, as everywhere else, is to be understood according to its import. If, by a law impairing the obligation of contracts, we are not necessarily to understand a law relieving either of the contracting parties from the performance of any part, or the whole, of the stipulations, into which he has entered, we ask for a definition of such law. In the case before the court, it appears, that the defendant, in March 1811, in New York, gave to the plaintiff his promissory note, payable in August 1811, for $771.86. In April 1811, the law under consideration was *passed, and thereby the legislature of New York declare, virtually, that if the defendant shall deliver up all his property for the benefit of all his creditors, and that property shall be sufficient to pay ever so small a proportion of his debts, the plaintiff shall never thereafter prosecute the defendant for the remaining sum, but that the contract shall be discharged. The language of the constitution expressly forbade the legislature from making such law. The prohibition is plain and unequivocal—needs no comment, and is susceptible of no misinterpretation. And why should we seek to affix any other than their natural meaning to the terms used ? It is certainly a sound rule, not to attempt an interpretation of that which is plain, and requires no interpretation. This is the rule in relation to treaties and public conventions (Vattel, lib. 2, ch. 17, § 263); and surely is applicable to a constitution, where every word and sentence was the subject of critical examination and great deliberation. Nor is it admitted, that the convention, in their prohibition, did not look directly to a law of this nature. It was notorious, that the states had emitted paper money, and made it a tender ; had compelled creditors to receive payment of debts due to them in various articles of property of in- [*133

adequate value; had allowed debts to be paid by instalments, and prohibited a recovery of the interest. All these evils, so destructive of public and private faith, and so embarrassing to commerce, the convention intended, doubtless, to prevent in future. The language employed speaks only of
*134] paper *money and tender laws, by a particular description. Was nothing else intended? Why then add the comprehensive words "or law impairing the obligation of contracts?" Its language, taken in connection with the subject, is equivalent to this declaration: "The state governments have abused their power; they shall no more interfere between debtor and creditor; they shall make no law whatsoever impairing the obligation of contracts." In *Golden* v. *Prince* (3 W. C. C. 313), and *Blanchard* v. *Russell* (13 Mass. 1), already cited, the circuit court in Pennsylvania, and the supreme court of Massachusetts, expressly adopt this construction of the constitution. In the last case, Mr. Chief Justice PARKER says, "a law made after the existence of a contract, which alters the terms of it, by rendering it less beneficial to the creditor, or by defeating any of the terms which the parties had agreed upon, essentially impairs its obligation, and, for aught we see, is a direct violation of the constitution of the United States." The same doctrine is also recognised by the supreme court of Massachusetts, in *Call* v. *Hagger*, 8 Mass. 423; by Mr. Justice (now Chancellor) KENT, in *Holmes* v. *Lansing*, 3 Johns. Cas. 73; and by the supreme court of North Carolina, in *Crittenden* v. *Jones*, 5 Hall's L. J. 520.(*a*)

5. This act is retrospective, and therefore, void. The act was passed after the note was made. *Ex post facto* laws, which regard crimes, are not only declared void by the constitution, but they are opposed to common
*135] right. The same is true of retrospective laws *in civil matters. They are not made to enforce, but to violate contracts; and are, therefore, considered repugnant to natural justice. In the case of the *Society for Propagating the Gospel, &c.* v. *Wheeler*, 2 Gallis. 139, Mr. Justice STORY says, "upon principle, every statute which takes away or impairs a vested right, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." In *Dash* v. *Van Kleeck*, 7 Johns. 477, the supreme court of New York says, "an act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right. It is a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retrospective effect."

Hunter, contrà, stated, that before he proceeded to the discussion of the question before the court, he would relieve himself, if not the court, from the pressure of an authority of the utmost respectability, which, if it stood single and unopposed, would be irresistible. He referred to the case of *Golden* v. *Prince*, decided by Mr. Justice WASHINGTON; but the truth is, that opinion was more conspicuous, because it stood alone; no other judge of this court, or of any state court, had so decided: but, on the contrary, that opinion had been decided against in several instances since its publication. *Hannay* v. *Jacobs*, ruled by Mr. Justice JOHNSTON, in the circuit

(*a*) Also reported in 1 Car. L. Repos. 385.

court of South Carolina; *Adams* v. *Storey*, determined by Mr. Justice LIVINGSTON, in the circuit court of New York, 1 Paine 79; *Blanchard* v. *Russell*, 13 Mass. 1; *Farmers' and Mechanics' Bank* v. *Smith*, 3 S. & R. 63. The counsel *also referred to the earlier opinions on the question; [*136
to the discussion and decisions, which took place in the legislature of
Maryland, soon after the adoption of the constitution, as mentioned by Mr. Chief Justice TILGHMAN, in his opinion in 3 S. & R. 63. To a decision in Connecticut, in 1794, a MS. statement of which had been furnished him by an eminent lawyer of that state, and the accuracy of which would be readily acknowledged. "One Huntington petitioned the general assembly for a special act of insolvency. While the petition was pending, he prayed for a writ of protection. His creditors directed the sheriff to attach his body, and commit him to prison, on the ground, that the assembly had no power of granting his petition, and of course, the writ of protection was void; the sheriff accordingly committed him. Huntington then prayed for a *habeas corpus* from the assembly, which was granted, commanding the sheriff to release him, which was done. The creditors brought an action against the sheriff, before the circuit court, in which it was determined by Mr. Justice CHASE, that a state had the right of passing special insolvent acts, without infringing the constitution." In the circuit court of Rhode Island, several cases had occurred about the same period. In *Murray* v. *Thurber*, a discharge under the insolvent law of Rhode Island was pleaded in *bar; [*137
and upon demurrer, and after argument, principally upon the constitutionality of the law, judgment was given by Mr. Justice WILSON, in favor of the plea. In 1798, the case of *Cock and Townsend* v. *Clarke and Burges*, occurred. This was an action brought by the plaintiffs, citizens of New York, against the defendants, citizens of Rhode Island, on two promissory notes. After several continuances, the defendants pleaded in bar to the action, since the last continuance, their discharge under the insolvent law of Rhode Island; and upon a general demurrer, the constitutionality of the law was elaborately argued. Every leading principle laid down in the decision of *Golden* v. *Prince*, was suggested by the plaintiff's counsel; but they were overruled in an elaborate opinion of Mr. Chief Justice ELLSWORTH. Other cases had occurred in the same state, but the most important was one, the name of which could not be recollected, determined by Mr. Chief Justice JAY, in his first circuit in Rhode Island, very soon after that state had adopted the constitution. The defendant pleaded a license or indulgence, granted him by a law of the legislature of Rhode Island, exempting him, for a certain number of years, from the payment of his debts and suits, &c.[1] The argument principally turned upon the proper construction of that clause in the constitution, which prohibits the state legislatures from passing any law impairing the obligation of contracts. The Chief Justice went fully into the principle; admitted the power of the state to pass insolvent laws, from the power inherent in every community to give relief to distress, *and to protect its citizens from perpetual imprisonment; from the impossibility [*138
of compelling payment where there was no property; from the right of the states to pass insolvent laws as they had always previously done, as they had only granted to the United States the power of passing bankrupt laws,

[1] And see United States Bank *v.* Frederickson, cited in Ingraham on Insolvency 276.

which were very different in his conception from insolvent laws. He stated it as his opinion, that, by an insolvent law, the contract was not, in the sense of the constitution, impaired. But the practice of suspending the collection of debts, of granting licenses and indulgences, against the consent of the creditor, of impairing the obligation of a contract as to the important point of time when a debt by its terms was payable, and denying all remedy by action, merely for the convenience of the debtor, when his ability was confessed, he strongly and severely reprehended, as an infraction of the constitutional injunction. The accuracy of this statement of the case is verified by the effects. The docket of the legistature of Rhode Island was immediately cleared of every petition praying for time, licenses, indulgences, &c.; and no one has ever since been sustained. But they have continued to act, as heretofore, upon their insolvent system.

1. It is, however, admitted, that this question has not been determined by the supreme court, sitting as such; and we are bound to inquire, whether these decisions of its former illustrious members were founded in error, and whether they cannot be supported by reasoning. On the other side, it is said, in the first place, that congress have power to pass uniform laws on the *139] *subject of bankruptcy throughout the United States. That if an unqualified power be granted to a government to do a particular act, the whole of the power is disposed of, and not a part of it; consequently, that no power over the same subject remains with those who made the grant, either to exercise it themselves, or to part with it to any other authority. If the principle were applicable to the subject, and correct in its hypothesis, it would be a truism, which nobody would be disposed to dispute. But if it be not applicable to the subject, and if the hypothesis is not previously proved, it is a *petitio principii;* a gratuitous assumption of that which is to be proved. The test of this principle consists, in the first place, in the inquiry, what was the particular act, to do which, a power, an unqualified power, was granted? It was a power to pass uniform laws on the subject of bankruptcies throughout the Union; not on the subject of insolvencies in the particular states. It is to pass bankrupt, not insolvent laws. No two things are more clearly distinguishable; they mean, and always have meant, in English and American jurisprudence, different things. Undoubtedly, they are analogous subjects; but *nullum simile est idem.* In speaking of the state of suspension or denial of payment, we say, bankrupt; that is, a merchant who, committing certain acts, gives evidence, that he is criminally disinclined to pay, and who may nevertheless not be insolvent: or, we say, an insolvent; any man who is at once poor and in prison; who surrenders all he has; pays as far as he can; and who, from the absolute want of means, is physically *140] incompetent to pay *more. *Hassels* v. *Simpson*, 1 Doug. 92, note. We refer to terms in the English language, that have been contradistinguished in their use, so far as we can trace them, for nearly three centuries. Both the terms, *bankrupt* and *insolvent*, are familiar in the law of England; and it will be conceded, that whenever a term or phrase is introduced, without comment or explanation, into our constitution or our statutes, every question respecting the meaning of that term or phrase, must be decided by a reference to that code from whence it was drawn. In the earliest times, neither bankruptcy nor insolvency were subjects of English jurisprudence. Of the general code of the primordial common law, they formed no part, for

the plain reason, that anciently, imprisonment for debt, which is now the main proof of bankruptcy, and consummation of insolvency, was unknown to the common law. It was even against Magna Charta. Burgess on Insolvency 5 ; Co. Litt. 290 *b*. The nature of the population of England in feudal times, developes the cause. The different counties of England were held by great lords ; the greater part of the population were their villeins ; commerce hardly existed ; contracts were unfrequent. The principal contracts that existed were with the lords and their bailiffs, the leviers of their fines and amercements, receivers of their rents and money, and disbursers of their revenues. In the year 1267, imprisonment for debt was first given against the bailiffs, by the statute of Marlbridge, 52 Hen. III., c. 23; Burgess 18, 19 ; F. N. B. Accompt, 117. The statute of Acton Burnel, 11 Edw. I., gave the *first remedy to foreign merchants, by imprisonment, in 1283. The statute 13 Edw. I., c. 2, gave the same remedy [*141 against servants, bailiffs, chamberlains, and all manner of receivers. Burgess 24, 27. These instances show how imprisonment for debt first commenced, how few were at first included, and accounts for the non-existence of legal insolvency. The statute of 19 Hen. VII., c. 9, which gave like process in actions of the case and debt, as in trespass, is the true basis of the right, or wrong, of general imprisonment. This statute, and the usurpations of the various courts, produced their natural effects. They filled the jails of England with prisoners for debt. This state of things produced, sixty years afterwards, the statute 8 Eliz., c. 2, restricting the right of imprisonment, and guarding against its abuses ; but this was not sufficient. She issued the proclamation of the 20th of April 1585, authorizing certain commissioners, therein mentioned, to order and compound controversies and causes. Rymer's Fœd. tom. 17, fol. 117 ; Burgess 84. This commission continued in force until her death, and, according to the political system of the times, had the force of law. James I., aided by the counsels and the pen of Lord Bacon on the 11th of November 1618, issued a similar, but enlarged, commission, in which the term insolvency is expressly mentioned, and its nature described. Rymer's Fœd. tom. 17, fol. 116; Rot. Parl., 16 Jac. I.; Burgess 88. Charles I., in 1630, issued a similar commission. Burgess 95. *The first insolvent [*142 law, similar in language and design to these ordinances, and meant to supply their place, was passed, after the execution of Charles I., by the republican parliament, in 1660. Scobell's Ordinances 56 ; Burgess 98. In the 23d Charles II., the first great regular insolvent act was made, the model of all that follow ; its provisions and language having been copied by the subsequent parliaments in England, and by our colonial legislatures, with almost unvarying exactness. About forty acts of insolvency have passed from that time to the present, in Great Britain ; until at length a regular system of insolvency is established ; and courts possessing a peculiar jurisdiction, clearly and practically contradistinguished from bankruptcy, decide cases of insolvency, in one room of Guildhall, while commissioners of bankruptcy are deciding cases of bankruptcy in another. Burgess, 176.(*a*) It appears, then, that insolvency is the creature of statute, and has been described, settled and ascertained, in a course of centuries, by plain, positive, parlia-

(*a*) See the report to the British House of Commons on bankruptcies and insolvencies, in 1817.

mentary enactments: and this is likewise true of bankruptcies. In strict chronology, the bankrupt laws existed first. The first statute of bankruptcy was passed in 1542, the 34 Hen. VIII.; but the 13 Eliz. and the 21 James I., are the principal and all-important statutes. These and others, amounting to fourteen or fifteen different acts, continued down to Anne and George III., form the present system of bankruptcy *in England. Thus, while the *143] ordinances of Elizabeth and James, and the various statutes, down to the present times, were passed, expressly on the subject of insolvency, for the benefit of all poor prisoners confined for debt, including all classes in society, the parliament was, at the same time, passing statutes of bankruptcy, maturing and accumulating that peculiar code, confined as it was to merchants and traders only. Burgess 212; 2 Bl. Com. 476, Christian's note; 2 Wils. 172; Cooke's Bank. Law 42; Rees's Encyclop., title Insolvency; 2 Montefiore's Com. and Law Dict. 390.

The distinction between bankrupt and insolvent laws was perfectly well known to our ancestors, who, in their legislation and usages, have always considered insolvent as different from bankrupt laws. All the colonies, in some shape or other, had insolvent laws; few had bankrupt laws. In 1698, Massachusetts passed an insolvent law: that is, a law for the relief of poor prisoners confined for debt. Mass. Laws 130 (Lond. ed. 1724). In 1713, that colony passed an act concerning bankrupts, and for the relief of the creditors of such persons as shall become bankrupts; this was a temporary law, which failed in experiment, and expired in 1716. By this historical deduction, it is intended to prove, that the particular act which the states granted to congress a power to pass, was one having reference to bankruptcies; which meant something contradistinguished from insolvencies. It is not denied, that insolvency, in its most comprehensive sense, is a universal, of which bankruptcy is a particular; but taking it in this sense, it is insisted, that the grant *to congress narrows the universality of the previous *144] power of the states, only by excluding from it the ancient, and well-understood, distinct matter of bankrupt laws. But it is in more exact conformity to the facts, and therefore, more precise language and safer reasoning, to say, that modified as this matter is, and has been, for centuries, in practice, they are different things, expressed by essentially different terms. How has this subject been considered between the two constitutional parties, the congress of the United States, and the individual states? Surely, they knew what the one granted, what the other received. The last have always asserted their power of passing insolvent laws: the former have always assented to the exercise of this power, without the smallest complaint of injury or usurpation. Very soon after the adoption of the constitution, a bankrupt law was introduced into congress; it was postponed, on the ground that the state insolvent laws were sufficient. The whole debate turns on the acknowledged and well understood differences between the two laws. Debates of Congress, vol. 2, p. 204. Congress, when, at last, in the year 1800, it acted on this subject, took care solemnly to enact, that the bankrupt law should not repeal or annul, or be construed to appeal or annul, the laws of any state now in force, or which may be hereafter enacted. Act 4th April 1800, ch. 173, § 51. In all the abortive attempts to pass a new bankrupt law, every committee of the house of representatives and senate introduced the same clause. Thus, it appears, that the two parties,

*whom it is sought to make litigant, essentially and cordially agree, and that upon a point of power. Who have a right to say they disagree? To interfere to make them disagree? Congress, in asserting the claim of the United States to priority of payment over other creditors, exerts this right solely in cases of legal insolvency: and this court has frequently, and after great deliberation in sanctioning this claim, considered and defined legal insolvency. *United States* v. *Fisher*, 2 Cranch 358; *United States* v. *Hooe*, 3 Ibid. 73; *Prince* v. *Bartlett*, 8 Ibid. 431; *Thelusson* v. *Smith*, 2 Wheat. 396. How preposterous this, if no legal insolvency can exist! Congress itself has passed an insolvent law for the district of Columbia. This it has done, because there it had the power of exclusive legislation. It has done for its district of Columbia, what the states can do for themselves: what congress cannot do for them. Again, by the declaration of rights of many of the states, it is asserted, "that the person of the debtor, when there is not strong presumption of fraud, ought not to be continued in prison, after delivering up his estate in such manner as shall be prescribed by law." This supposes a rightful, permanent system of insolvency by state authority.

2. But admitting, for the sake of the argument, that this grant of power to congress includes all that can be comprehended both under insolvencies and bankruptcies, we contend, that from the peculiar nature of the subject, to convert the grant of power into an actual prohibition of its exercise by its former possessors, it must actually be exercised by its *present possessors. This arises from the very nature of the subject; from [*146 the nature and condition of human affairs; from an overruling necessity: for, the duties of humanity are imperative and indispensable, and must be exercised by some one or other of the guardian powers of the community.

The existence of the power of granting relief, in the extremities produced by debt and indigence, is morally necessary, not only to the well-being, but to the existence of civilized and commercial society; and if one authority in a nation divests itself of this, by a grant to another authority, it imposes its exercise as a duty on that other; and if the one does not exercise it, the other, by necessity, must. The power, in this sense, remains concurrent. This principle may be illustrated by an analogous question of international law. Denmark, by its position as to the Baltic and its entrances, owes a duty to the navigating interest of the world, of guarding their ships from peril and from shipwreck. She has, so far as is practicable, by her buoys, her lighthouses, her pilots, performed this duty. Suppose, she were to cede, by treaty, the benefit she derives from this source; grant the right, and impose the duty upon her neighbor and rival, Sweden. Suppose, Sweden was to forbear or neglect to exercise it; could not Denmark exercise it? Would she not be bound to exercise it, by all the obligations of humanity? Are the buoys to be torn up, the pilots to be suppressed, the lights to be extinguished? Are the coasts of both countries to be lined with shipwrecks, her own subjects to suffer, and her great duties to the civilized world to be neglected and violated? *Is this analogy too remote? All the duties [*147 of humanity are associated: *quoddam commune vinculum habent.* Why was this power over bankruptcies granted at all? Undoubtedly, that it might be exercised, being necessary for the good of the community; and if its exercise is suspended, may it not, justly and properly, be re-assumed, until again exercised by that which is conceded to be the paramount

authority. This concurrent power of the states, from a similar, though less imperative necessity, exists in various other cases. Congress has the whole power of regulating commerce with foreign nations. The most important medium of foreign commerce, is foreign bills of exchange, which are, therefore, important subjects of commercial regulation. There can hardly be imagined a duty more incumbent on congress, than this exercise of its admitted power of legislation. Yet it has neglected that duty; and as it is a power that, from the necessity of the thing, must be exercised, the states may and do exercise it, and their rightful use of this power has been sanctioned by this court in innumerable instances. Congress has power to regulate the value of foreign coins; it was long before it exercised this power, as to any foreign coins, and still omits to do it, as to the greater number. Have these foreign coins then no value? So also, congress has power to fix an uniform standard of weights and measures. This has never been done. Is there then no standard, and are all contracts relative to quantity, to weight and measure, destitute of a legal medium of ascertainment? If con-
*148] gress had *neglected to establish post-roads, would not the states have had power to provide for so great a public convenience; a benefit which they always enjoyed, even in colonial times? As to the power of congress to establish an uniform rule of naturalization, it may be necessarily exclusive, because if each state had power to prescribe a distinct rule, there could be no uniform rule on the subject: and naturalization, or the power of making aliens citizens, must have uniformity; since the citizens of each state are entitled to all the privileges and immunities of the citizens of the several states: it is a power that must pervade the Union. But insolvent laws have no extra-territorial force, unless by consent; they are made by the state, for the state; at any rate, a single state has no inherent power of forcing them upon the other state. This depends upon the old question of the *lex loci*. The reasoning adopted by that learned lawyer and accomplished scholar, Mr. Chancellor KENT, in the case of *Livingston* v. *Van Ingen*, 9 Johns. 572, may, with the strictest propriety, be applied to this case. Congress has the power of securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. To the mere importers of foreign inventions, or foreign improvements, congress can grant no patent; are not the states at liberty, in this omitted case, in this different matter, to promote the progress of science and useful arts, by pursuing their own measures, and dispensing their own rewards? Even
*149] supposing they cannot legislate upon *the peculiar and admitted objects of congressional legislation, yet they may on others. If not, this great subject of imported improvements, would be entirely unprovided for and unprotected. Applications to congress on this very subject have been frequently made, and always rejected for want of power. The analogy between our argument and that presented in the case of *Livingston* v. *Van Ingen*, is this: that if congress had exercised all its power, it would not have exhausted the subject. Congress has not the power to pass a general insolvent law; the states have a power to pass state insolvent laws; the objects and spheres of legislation are different; congress has power to pass a bankrupt law, and if it does, that will be paramount. Having safely possessed ourselves of this ground, we may ascend a little higher. We are justified in saying, that the states are not prohibited from passing even bankrupt

laws. They once had the power, and they gave away, in conjunction with the other states, only that of passing uniform laws of bankruptcy throughout the United States. In this sense, the power they have granted, and that they retain, are different. The grant to congress is not incompatible. We have shown, that the mere grant of a power to congress, does not vest it exclusively in that body. There are subjects upon which the united, and the individual, states, must of necessity have concurrent jurisdiction. The fear that the rights and property of the citizens will be worn away in the collision of conflicting jurisdictions, is practically refuted ; and is even theoretically unfounded, because the constitution itself has guarded against this, by providing that *the laws of the United States, which shall be made, [*150 shall be the supreme law of the land, anything in the constitution or the laws of any of the states to the contrary notwithstanding.

3. But the other great point remains : is not this law unconstitutional and void, inasmuch as it impairs the obligation of a contract? As preliminary to this inquiry, it may be suggested, that if it has been proved, that a bankrupt law is not an insolvent law, and that the convention, with a perfect knowledge of the subject, left the states in the full enjoyment of the right they had always possessed, of passing insolvent laws, and subjected them to the domination of uniform bankrupt laws only, whenever congress might pass them, the position is disproved, which alleges that such laws are still void, as impairing the obligation of contracts. From the nature of the subject, it is not supposable, that the convention left a power in the states, which, if exercised, must necessarily violate another part of the constitution. It is not conceivable, that a power was given, directly repugnant and contradictory to a prohibition imposed : as almost all the states have passed insolvent laws, and congress has sanctioned them, and the people assented to, and approved them ; let us find out some other interpretation that will reconcile these opposite powers, and obviate this flagrant inconsistency. The judges of the state courts, and of this court, have confessed that there is in these words, "impairing the obligation of contracts," an inherent obscurity. Surely, then, here, if anywhere, the maxim must apply, *semper in obscuris quod minimum est sequimur.* *They are not taken [*151 from the English common law, or used as a classical or technical term of our jurisprudence, in any book of authority. No one will pretend, that these words are drawn from any English statute, or from the states' statutes, before the adoption of the constitution. Were they, then, furnished from that great treasury and reservoir of rational jurisprudence, the Roman law? We are inclined to believe this. The tradition is, that Mr. Justice Wilson, who was a member of the convention, and a Scottish lawyer, and learned in the civil law, was the author of this phrase.(*a*) If, then, these terms were borrowed from the civil code, that code presents us with a system of insolvency in its *cessio bonorum ;* and yet, as it is said by Gibbon, "the goddess of faith was worshipped, not only in the temples, but in the lives of the Romans." The rights of creditors, we know, were protected by them, with the utmost vigilance and severity. They did not, however, it seems, conceive that a *cessio bonorum* was inconsistent with the rights of creditors, or impaired the obligation of contracts. England also anxiously

(*a*) See Reid's Essay, vol. 4, p. 183.

guards the rights of creditors. On commerce, on the integrity of her merchants and manufacturers, her best reputation and interest depends. And yet, England, more than any other country, has her system of insolvency and bankruptcy. Good sense, in all ages, in all countries, is the same; as in Rome, in England, and in all other commercial countries, so in this, bankrupt and insolvent laws have never been considered as impairing the obligation of a contract. If included in the literal *acceptation of the words
*152] of this clause of the constitution, from the nature of things, they form an implied exception. Insolvent laws are based upon the confessed and physical inability of a party to perform a pecuniary contract, otherwise than by a surrender of all he has. How idle, then, to make a provision in respect to such laws, guarding against the impairing a contract; that is, providing for its strict, adequate and undiminished performance, when the impossibility of any performance is pre-supposed. The total, physical inability of the individual, is his exemption, and this is tacitly and necessarily reserved and implied in every contract. This is the doctrine of Vattel, of a nation, as to a public treaty (Vattel, lib. 3, ch. 6, § 91); and is it not the law of nations, that the obligations of a treaty shall not be impaired? To impair an obligation has reference to the faculty of its being performed. The obligation of a contract, and a remedy for its performance, are different things. Whether a contract shall be fit matter for judicial coercion, is a different question, from its being preserved perfect and undiminished where it is. When the courts do take cognisance, they shall not adjudge less, nor differently, either as to the amount, or other terms and conditions of the contract. The performance of the contract shall be exact; imprisonment is the remedy for enforcing it: but where there is a confessed and adjudicated inability, the society withholds the power to protract indefinitely and miserably, what can never be an effectual remedy, but only a vindictive punishment. *The
*153] moral obligation of a contract may, perhaps, remain for ever, but misfortune and extreme indigence put an end to the legal obligation, as war does to a treaty; as revolution does to a pre-existing government; as death does to personal duties. The impossibility of payment discharges from contracts, as insanity does from crimes: "*Impossibilium*," says even the severe Bynkershoek, "*nulla est obligatio.*" To impair means, as to individuals, you shall not pay less; you shall not have an extension of time in which to pay; you shall not pay in goods, when your contract is cash; you shall not pay in depreciated coin, or even current bank-notes, when your contract binds you to the payment of pure coin; interest shall not be diminished: in fine, there shall be no alleviation of its terms, or mitigation of its conditions. The facts as to which you engage shall remain the same. The insolvent law is something independent of the obligation of the contract, and extraneous to it. It is a matter of peremptory nonsuit to the action; or rather a bar, having reference to nothing inherent in the contract, but to something exterior and posterior to it. The insolvent law, so far from impairing the contract, sets it up, admits its obligation, and endeavors to enforce it, so far as it is possible, consistently with the misfortunes of the debtor, to enforce it. If it was meant, by these words of the constitution, to prohibit the passage of insolvent laws, why not, in plain terms, have said so? It would have been as clearly understood, as the plain prohibition, that no state shall grant any title of nobility. It could not have been meant to bury such a meaning

under such *obscurity. To suppose, that the framers of the constitution were designedly obscure on this delicate and dangerous subject, is an impeachment of their integrity ; to suppose, that they had so little command of appropriate and perspicuous language as to employ such terms to express such a thought, is an unjust imputation upon their acknowledged talents.

Upon the construction contended for, statutes of limitation would be repugnant to the constitution ; statutes of limitation take away the remedy, after six years ; the insolvent law, at once. But suppose, the statute of limitation confined the remedy to sixty days, or six days ; it would be an indiscreet, impolitic and unwise, but not an unconstitutional law. If such statutes be valid, it must be, because they do not impair the obligation of a contract. Yet the one law has the same effect on the contract as the other. They both take away the remedy, and neither annuls the obligation : for a subsequent promise, in both cases, revives the debt. If the contract was annulled, or its obligation impaired, a promise to pay would be void ; because it would be without consideration, and would be contrary to the very law that destroyed it. The writers on the civil law most clearly express the difference between the obligation of a contract, and the legal remedy for its performance.(*a*) Ayliffe, among other instances, refers to the very subject now under discussion : "Neither a civil nor a natural obligation," says he, "is dissolved by a *cessio bonorum ;* though it produces a good exception in law, and suspends the force of an obligation *for a time ; *155] the extinguishment of an obligation being one thing, and the cessation of it another ; for when the cessation of an obligation is once extinct, it never revives again." This is leaving the matter untouched and unregulated, as we contend it is, by the great fundamental law, to be provided for by ordinary legislation. If the states, influenced by the eloquent reasoning of Burke and Johnson, were to abolish imprisonment for debt entirely, could their right be disputed ? And yet this might prevent the creditor from getting his money. The contract would remain to be enforced by other, but perhaps, not equally efficacious, means. This reasoning, as to the distinctness of the remedy from the contract, is applicable to cases even where insolvency does not interfere ; with how much more force, where it does. It would be monstrous, to parade the show, or urge the violence of a nominal remedy, when it could be none in reality. You must submit to necessity. When the sages of the convention inserted this clause in our constitution, they meant no more, or less, than the inviolability of contracts ; and what system of religious faith nor of ethics, or of jurisprudence, ever meant less ? But they likewise meant, that this salutary, but universal principle, should be subjected to the salutary and indispensable exceptions to it, which always had prevailed, and always must prevail. Every contract must be subjected to, limited, and interpreted by, the law of nature, which everywhere forms a part, and the best part, of the municipal code ; and it is the primary canon of that code, that necessity (physical, moral necessity), knows no law, but itself. Laws or *constitutions [*156 cannot create property in the individual ; and in a certain sense, in the absence of all fraud, where there is no property, there can be no injustice ; of course, no violation of a contract. Locke, in endeavoring to prove

(*a*) Ayliffe's Civ. Law. lib. 4, tit. 1 ; Dig. 46, 3, 98, 8.

that the principles of morals are susceptible of as strict demonstration as those of mathematics, says, where there is no property, there can be no injustice; for the idea of property being a right to anything, and that the idea of injustice being an invasion of that right, it is evident, that these ideas being thus established, and these names annexed to them, we can as certainly know these propositions to be true, as nat a triangle has three angles, equal to two right angles. Locke's Works, lib. 4. p. 258 (fol. ed.). And the civil law, perhaps the most exact, consistent and comprehensive code the sagacity of man ever framed and systematised, expressly asserts the same principle: *Nam is videtur nullam actionem habere cui propter inopiam adversarii inanis actio est. Desinit debitor esse is, qui nactus est exceptionem justam, nec ab naturali equitati abhorrentem.* Ayliffe 506; Dig. lib. 4, tit. 3, § 6.

The states, then, in exercising the natural, inherent and indispensable power of discharging poverty, distress, and absolute indigence and inability from payment, have not only conducted themselves lawfully and constitutionally, but the omission to have done it, would have been impiously absurd; and it is an unjust imputation upon the constitution of the United States, to suppose a prohibition against the exercise of such a power somewhere in society. As to insolvencies, congress connot exercise it; as to bankruptcies,
*157] *they refuse; the states, therefore, must exercise this power. The obligations of natural law, and the injunctions of our religion, which religion is a part of our common law, impose it as a duty, that the wants of the poor should be relieved. Strange, indeed, is it, that the laws should, at the same moment, press upon society two duties, so inconsistent and contradictory, as that of exacting for the payment of his debts, what the impoverished and imprisoned debtor has not; and obliging those who have something, to give him a share of what they have, to save him from suffering or death. Although it has been strenuously insisted, that the abstraction of the remedy is a violation of the contract, yet it has also been intimated, that if erroneous in this particular, the substance of the argument on the other side would still remain correct, inasmuch as not only the person of the debtor, but the debt itself, was discharged. It may, perhaps, be doubted, whether, though the person be discharged from the debt, the debt itself be extinguished. At the utmost, the tendency of the doctrine contended for, would be, but to give the creditor a right to the miserable chance of the future acquisitions of the insolvent, by a future action; and that chance, rendered the more desperate by the consideration, that arrest, that is, imprisonment, is almost the only mode of instituting actions in the United States. Grant that the remedy may be given, or withheld or modified, by the legislatures of the states, and the difference between us, in practical result, is not worth contending for. This could not be what the convention
*158] had in view. According to the doctrine on *the other side, you discharge the debtor from prison, to condemn him to work in the mines, and that too, with his chains upon him. You remit the lesser, to inflict the greater punishment. You take him from a life of listless indolence, where you are obliged to maintain him, and doom him to a life of labor, without hope. Nay, worse, you so place him as to have every step watched by a lynx-eye avarice; every morsel he puts into his mouth counted and weighed; every personal indulgence censured; every family sympathy scanned and

reprimanded. Well was it said by a learned judge, that such freedom would be a mockery : nay, worse, it would be aggravated slavery and complicated misery ! It is admitted, that the state has a right to the service of its citizens. It may open its prison-doors even to criminals ; what services can ever be rendered by him who is pressed down to the earth by a poverty that must be hopeless and interminable ? The state wants the services of its citizens, to fight its battles on the land and ocean, to cultivate its fields, to enlarge its industry, to promote its prosperity, to signalize its fame. It does not want a heartless, purposeless, mindless being—but half a man—a worse than slave ; it wants a citizen, with all his worth and all his energies of body, mind and soul. The line of distinction drawn by the opposite counsel, between bankrupt and insolvent laws, is wholly mistaken. So far from the difference between them consisting in the circumstance of the bankrupt law discharging the debt itself, whilst the insolvent law discharges the person of the debtor only, it is an historical *fact, that the early English statutes of bankruptcy did not provide for the discharge either of the debt or of the [*159 person. Discharge is not mentioned, nor in any way provided for, until the 4th or 5th of Anne ; that is, after the system of bankruptcy had been established almost two centuries. But it is expressly provided for, it is the object and intention of the first regular insolvent law of England, in the time of Charles II., and of the act of 1755, which served as a model for colonial legislation. The law of New York of 1755, and that of Rhode Island of 1756, were copied almost *verbatim* from this last. There is, even now, no discharge, in the case of a second bankruptcy, unless the debtor pays seventy-five per cent. of his debt, and in England, none at all, if he has even had the benefit of an act of insolvency. Cullen's Bank. Law 395, *in notis ;* Act of Congress of 1800, ch. 173, § 57. A construction merely technical ought not to be given to such an instrument as a constitution of government. If any instrument ought to receive an equitable and liberal interpretation, affected by the events which preceded, it is that of a great treaty of confederation between various states, who were compressed into union by obvious motives and considerations, of common wrongs sustained, mutual errors committed, and equal advantages to be gained.

Our interpretation of such an instrument ought, at least, to be as liberal as of a remedial statute. We ought to be as unshackled as in the interpretation of a last will and testament, where the intention of the testator is the polar star to direct us ; *where we have a right, if the words are [*160 ambiguous, to seek for illustration from the condition and circumstances of the testator's family. What was the condition of the American family ? What were the evils which this article of the constitution was intended to remedy ? Undoubtedly, those acts of desperation and violence, to which many of the states, in a paroxysm of revolution, resorted, and those acts of impolitic and selfish injustice to which they continued to resort, in that more dangerous moment, after the effect of mighty impulses had ceased, and was succeeded by inevitable relaxation and debility. These plainly indicate what were the evils, and demonstrate for what this remedy was intended. As to the effects of poverty, of indigence, of natural and moral impossibility to perform contracts, neither foreign nations, nor our own citizens complained. These must, and do, from the vicissitudes of human life, and the long catalogue of human ills, exist in all countries and societies.

This provision of the constitution is applicable to those cases which suppose a freedom from imprisonment, and ability of payment, and a fraudulent evasion of it. They suppose the case of a man who would pay all his debts, but that, from the course of events, if his contracts were literally interpreted, and immediately enforced, he would pay too much, if he paid according to its terms. The apology for these laws, which the constitution intended to interdict, was, that he contracted the debt, when society was peaceful and prosperous; when land was high; when coin was in circulation; when
*161] markets for produce were open, and the whole course *of commercial intercourse free and unembarrassed; and he was called upon to pay, when every particular, in this state of things, was reversed. In providing a remedy for this terrible fluctuation of affairs, after a storm, and the subsidence of the agitated ocean of society, into that dangerous calm which always succeeds, the states erred extravagantly: they issued paper money; they set off barren lands, by an arbitrary appraisement, for the payment of debts; they curtailed interest; they made specific articles a tender; they altered the contract as to its facts, its terms, its conditions; they revoked their own grants; they interfered in private concerns—not, as they had a right to do, by the equal pressure of a general and permanent system, granting relief to avowed insolvency and distress, but by extending indulgences in particular cases, and arming debtors with privileges against their creditors. In reviewing the history of the period referred to, it will be seen, that insolvent laws were complained of by no one as the evil of the times, except by Mr. Hammond, the British minister, in his correspondence with Mr. Jefferson, who indignantly and eloquently repelled the imputation that they were a violation of treaty; and yet the words of the treaty of 1783 were, on a similar subject, stronger and plainer, perhaps, than the words of the constitution: British creditors were to "meet with no lawful impediment to the recovery of the full value of their debts in sterling money." Waite's State Papers, vol. 1, p. 287. In the debates of the various conventions, no
*162] supposition *was started, that this clause of the constitution was prohibitory of the accustomed relief to poverty, by insolvent laws; and no amendment was offered for the purpose of avoiding this possibly lurking danger, except in the convention of Rhode Island, the last that acted upon the constitution; and there it was rejected, on the ground, that the passage of insolvent laws was nowhere prohibited in the constitution, and that the contrary apprehension was a dream of distempered jealousy. The practice of passing insolvent laws, which had begun so early in colonial times, which had uninterruptedly continued, and was then in daily unblamed operation, was not even referred to as an evil. This is expressive silence—this is a negative argument of conclusive force. They have since been sanctioned by upwards of thirty years' practice; by the absence of all complaint; by the decisions of state and federal courts; by the acquiescence of congress; and what is more, by the acquiescence of creditors. It has taken upwards of thirty years of curious inspection to discover this occult meaning, covered under the mystical veil of constitutional language. The constitution had reference to those acts which had palpably caused discontent and shame, and were, unfortunately for us, peculiar to our history. To have inserted them in odious detail, would have disfigured the constitution, and have eternized a disgrace upon the most brilliant page of our history. Against paper

money, the convention had provided. They then guarded against the other expedients of wrong. They did not mean the insertion of an abstract dogma, indefinite in its extent, of *sweeping and dangerous generality. They [*163 anticipated, that discreet expositors would arrive at their meaning, from the previous history of the country, and from the consideration of the well-known evils which they intended to remedy. For if we were to give only a technical common-law construction to this article of the constitution, innumerable absurdities would thicken upon us; we should frequently lose the benefit, in the plainest case for which it was intended; and be obliged to apply it in others, from which the instinctive feeling and irresistible common sense of mankind would repel it.

For instance, if we are to be bound in verbal fetters, what shall we do with a judgment? The judges of England have declared that a judgment is no contract. *Bidleson* v. *Whytel*, 3 Burr. 1548. What an inlet this to fraud and evasion! The creditor has merged his contract in a judgment; but arriving at this point, he is unprotected by the constitution. What shall we do with marriage, which is a contract, the most solemn and sacred of all, by its very terms indissoluble and eternal; but yet the states impair it by divorces *à menso et thoro*, and dissolve it, by divorces *à vinculo matrimonii*. If it impairs the obligation of a contract, for a living insolvent not to pay all his debts, why is the case altered when he is dead? Can a different rule take effect with regard to his substitute, his executor or administrator? This would not be more unreasonable, than what is pretended to be done in the case of the living man, whose contract you make to be, that he will, at all events, be able to pay; you *make it an insurance [*164 against accident, against misfortune, against irresistible force, wide-wasting calamity, inevitable necessity; against the decrees and acts of God himself. Let, then, the rule of interpretation, as to insolvent laws, be the common sense of mankind, the universal agreement of those who have been affected, who may be affected by them. A whole nation, on such a subject, cannot be in the wrong. The parties contracted with the full knowledge of these laws, and the practice of the states upon them. Every creditor knows he is liable to be paid only so far forth as the property of a distressed debtor, on a legal and *bonâ fide* surrender, can pay. The universal consent of the nation and its public authorities is strongly shown by the practice of congress itself, whose privileges, it is said, the states are usurping. According to the argument on the other side, congress, in the only bankrupt law it ever passed, impaired the obligation of contracts, since it made the discharge of the debtor referrible to past as well as future contracts. Is it, indeed, to be said, that congress has power to do this, and that the prohibition of this power to the states is an implied permission of it to the United States? Is a different rule of right and ethics to be applied to these different authorities? Certainly not. Where, indeed, mere political power is prohibited to the states, congress may exercise that power exclusively. For instance, congress may emit bills of credit. But the matter is different in a moral prohibition. Congress have no more right to impair the obligation of a contract than the states.[1] It is a preposterous presumption, that congress

[1] But see Evans *v.* Eaton, Pet. C. C. 322; Knox *v.* Lee, 12 Wall. 457; Savage *v.* United States, 8 Ct. of Claims 545; Ex parte Smith, 6 Chicago Leg. News 33, and cases there cited.

*meant, by its bankrupt law, to violate the injunction of the constitution, when they left they payment of debts, according to the undeviating course of the civilized world, to be discharged out of the surrendered estate, rather than by the imprisoned person of the debtor; *communis error facit jus.* In a most important matter in the constitution of this very court, a co-ordinate branch of the government, in giving a construction to its own powers and organization, it has chosen to collect an interpretation of the constitution from acts of congress, from the uninterrupted and unimpeached practice under them, rather than from the bare literal words. The constitution of the United States has said, "there shall be *one* supreme court, and such inferior courts as congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior," &c. Depending solely on the plain signification of the words, one can hardly conceive of language that establishes, with more distinctness, two separate judicial departments. One court, existing in unity and supremacy; other courts, multifarious and inferior. One original, the other appellate; and yet, both congress and this court have decided, that it is, at the same time, one and many; inferior and supreme, original and appellate: nay, more; that with a commission, which, framed in the words of the constitution, has only reference to one appointment, nevertheless, you hold both. But *communis error facit jus;* and all these apparent inconsistencies were reconciled by the propriety of acquiescing in a construc-
*166] tion of *the constitution, which had been fixed by a practice under it; for a period of several years. *Stuart* v. *Laird*, 1 Cranch 299.

D. B. Ogden, on the same side, argued, that, supposing the law of New York in question to be a bankrupt law, there is nothing contained in the constitution of the United States, to prohibit the legislature of that state from passing such a law. There is no express prohibition to be found in the constitution; and if any prohibition exists, it must be sought for either in the clause giving congress power "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States," or in the clause which prohibits the states from passing "any *ex posto facto* law, or law impairing the obligation of contracts."

1. Does the first clause, which has been mentioned, prohibit the states from passing bankrupt laws? The constitution, after giving certain powers to congress, in some cases prohibits, by express words, the states from exercising those powers, and in other cases, it contains no such prohibition. Why should the convention insert express prohibitions as to some powers, and not as to all, if it was intended that all should be prohibited? The mention of one in the prohibition, is the exclusion of all others, not mentioned, from it. The constitution first declares what powers congress shall have; and then, what powers the states shall no longer have. Among the
*167] powers thus taken from the states, this of passing bankrupt *laws is not enumerated. Is it not a fair conclusion from this, that the convention did not intend to take this power from the states? Would they not have expressly done so, as they did in the case of other powers, where such was their intention? And let it be remembered, that this subject of bankruptcies was brought immediately to the view of the convention, in a preceding article, in which the powers of congress are enumerated. The powers

given to congress by the constitution, may be divided into three classes: 1st. Those which are national in their nature, and which are vested in congress, as the sovereign power of the nation or Union. 2d. Those powers which are given to congress, and from the exercise of which the states are expressly excluded. 3d. Those which are given to congress, and from the exercise of which the states are not excluded. Under the first class may be enumerated —the power to borrow money on the credit of the United States; to regulate commerce with foreign nations and among the several states; to provide for the punishment of counterfeiting the securities and current coin of the United States; to constitute tribunals inferior to the supreme court of the United States; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to provide for organizing, arming and disciplining the militia, &c. Most of the powers which have been enumerated, could manifestly never *be exercised by the states, because they apply to the Union, for which [*168
the legislature of no one state ever could legislate. The remainder of them regard our intercourse with foreign nations, and therefore, necessarily concern the whole nation collectively, and no one part of it in particular. There was no necessity for the constitution to prohibit the states from exercising these powers, because, from their very nature, they could only be exercised by the general government. 2d. Those powers, which are given to congress, and from the exercise of which the states are expressly excluded, are, the power to levy and collect duties and imposts; to coin money and regulate the value thereof; and to this class might, perhaps, be also added, the powers to raise armies and maintain a navy, which have been before stated in the first class of powers, but from the exercise of which the states are in terms prohibited, in time of peace. Under the third class of powers, or those which are given to congress, and from the exercise of which the states are not precluded, are the powers to levy and collect taxes and excises; to establish a uniform rule of naturalization, and uniform laws upon the subject of bankruptcies throughout the United States; to regulate the value of foreign coins, and fix the standard of weights and measures; to establish post-offices and post-roads; to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their writings and discoveries. From the exercise of any of these powers, the states are neither expressly, nor by any *fair rule [*169
of construction, excluded. To levy and collect taxes and excises, is a power given to congress. Is it taken from the individual states? If it were, the state governments must have expired at the moment the general government came into existence. Without the power of levying and collecting taxes, no government can exist. If this power to levy and collect taxes and excises, which is given to congress, be not an exclusive power, why should the others be so? Every argument which has been used, applies with equal force to this, as to the other powers. The power is expressly given to congress, and if it be true, as it has been contended, that every power given to congress is necessarily exclusive, this must be so; and if it be not exclusive, there is nothing in the argument of the counsel for the plaintiff. But it may be asked, do, then, the government of the United States, and

of the individual states, both possess these powers? And have they a concurrent right to exercise them? We answer, that they have a concurrent power on the subjects; they may both legislate in any of this class of powers. Congress and the individual states may both tax the same article of property, and both taxes must be paid. Congress has passed laws imposing a land-tax: was it ever supposed, that their exercising that power necessarily took from the state legislatures their right of exercising it? Congress has power to establish a uniform rule of naturalization: is this an exclusive power? The power of admitting foreigners to the rights and privileges of natural-born citizens, was a right which had been exercised by every state in the
*170] *Union, from the date of their independence down to the adoption of the federal constitution. With a large portion of their territory uncultivated and uninhabited, except by savages, the power and right of encouraging the emigration of foreigners had become a sort of common law of the country; it originated with our fathers, when they first settled in the country, and had continued ever since; it formed a prominent feature in the system of laws in every state in the Union. Suppose, congress had never thought proper to exercise the power given to it, of establishing a uniform rule of naturalization; was it intended by the convention, that the states should no longer exercise that power, and that the omission of congress to legislate on the subject, should operate as a bar to the admission of foreigners to the right and privileges of citizens, and thus put an end to emigration? The first act of congress, entitled, "an act to establish a uniform rule of naturalization," was passed in March 1790, and prescribed the mode in which a foreigner might become a citizen of the United States; but it did not declare that the mode therein prescribed should be uniform throughout the United States, and no state should thereafter admit foreigners to the rights of citizenship. After the passage of this law, some of the states, Virginia and Pennsylvania, the former certainly, and it is believed, the latter, continued to exercise this power of naturalization, until January 1795, when congress passed an act, entitled, "an act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject;"
*171] *which act, for the purpose "of carrying into complete effect the power given by the constitution to establish a uniform rule of naturalization throughout the United States," declares, that any alien may be admitted to become a citizen of the United States, or any of them, upon the conditions contained in the said act, "and not otherwise." After congress had thus legislated upon the subject, and had established, what by the constitution it had a right to establish, a uniform system of naturalization, no state could legislate, and none ever attempted to legislate, on the subject. Wherever a power is exercised by congress, and there is nothing incompatible in its exercise by the states, they may both exercise it, and the laws passed by both are binding and constitutional. If congress has a power, and exercises it in such a way that the exercise of the same power by the individual states would be incompatible with its exercise by congress, then the state law must give way; it must yield to the law of congress: not because the law of the state is unconstitutional, and therefore, void, but because the power of congress is supreme, and where the state laws interfere with it, they must yield. The 6th article of the constitution declares, that "this constitution, and the laws of the United States, which shall be made in pur-

suance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." From this clause, the convention evidently *supposed, that the laws of the United States, and of the individual states, might, in some cases, conflict with each [*172 other (which they never could do, if they could never legislate upon the same subject), and meant to provide, when they did conflict, that the state laws should yield, and the laws of the United States be supreme. But until congress does legislate, and in such a way as to preclude the states, the states retain their power to legislate, on the class of cases we are now considering. Congress has power to fix the value of foreign coins. If it had never legislated upon that subject, were the states prohibited from fixing the value of foreign coins? Congress has power to fix a standard of weights and measures. If it should never exercise that power, were the individual states to be left without any standard of weights and measures? But it is said, that an act of legislation is an act of the sovereign authority of the society, and that it would be a strange act of sovereign authority, whose power can be put an end to, whenever congress choose to legislate, and is to revive again, when congress choose no longer to legislate. This is said to be an anomaly in political science, and absurd upon the face of it. But we ask, whether our whole form of government is not new and unheard of, until established here? Is not our constitution an anomaly? Is it, therefore, not to be executed? To a person unacquainted with the nature, power and extent of our political institutions, before and at the time the constitution of the United States was formed and established, many parts of it would be wholly unintelligible, and no proper construction could be given to *it, [*173 without bearing in mind the political condition of the people who ordained and established it. Citizens of separate and independent governments, they adopted this constitution, not because they had no government, but because they had several governments; to secure to themselves those blessings of peace and independence which they had earned by their common sufferings, and which were the reward of their common blood and treasure. Fearing the approaches of those petty jealousies, which are always engendered in petty states, and which might soon array against each other those arms, which had been so lately united against the common enemy, they established this constitution. It is without example; and it is no argument against it, to say, that the powers vested by it in congress, and left by it in the several states, are novelties. If the construction, for which we contend, be given to it, there is perfect harmony in all its parts.

But another argument has been stated, and urged with some earnestness against us, which is founded upon the declaration in the constitution, that the rule of naturalization and the laws of bankruptcy are to be uniform throughout the United States. The argument is this: the constitution says, the system of bankruptcy shall be uniform throughout the United States. If the several states have power to legislate on the subject, the systems would be multiform; it is, therefore, evident, that the convention intended that congress should alone have the power of establishing the system of bankruptcy, and that the states were to be excluded from the exercise of any such power. Now, if there be any solidity in this argument, *it [*174

would prove, that whenever the convention declares that any laws passed by congress shall be uniform throughout the United States, the power of passing such laws is necessarily exclusive. But congress has the power of levying and collecting duties, imposts and excises; and the convention declares, that "all duties, imposts and excises shall be uniform throughout the United States;" and yet it never has been contended, that this power is exclusive. As to excises, many, and it is believed, most of the states, have always exercised, and still do exercise, the power of levying and collecting excises. And so far was the convention from considering the power given to congress to levy and collect duties, imposts and excises, as an exclusive power, because they were to be uniform, that in the next article of the constitution, the states are, in express words, prohibited from levying and collecting imposts and duties. Why was this prohibition inserted, if the states were already prohibited from the exercise of that power? If the power of establishing uniform laws as to duties, imposts and excises, vests no exclusive power in congress, in relation to those subjects, why should the power of establishing uniform laws of bankruptcy and naturalization exclude the states from the exercise of those powers? It has been said, that every power given to congress is necessarily exclusive and unlimited, unless it be expressly limited in the constitution; or unless, from the power itself, it is necessarily a limited power. If this be true, then it follows, that if the constitution had
175] given power to congress to pass a law establishing a rule of naturalization, and a system of bankruptcy, the power would have been exclusive, and the states would have retained no power to legislate on those subjects. Why, then, was it thought necessary by the convention, to declare that the laws upon these subjects should be uniform? Not because the power was to be an exclusive one, but because, as each state retained the power of legislation upon these subjects, a variety of laws and systems might and necessarily would be, introduced, which might, and probably would, have an effect upon the general commerce of the country, and be attended with consequences unfavorable to the general welfare and prosperity; and therefore, power was given to congress, whenever they thought proper, to put an end to these various and discordant systems, by establishing one uniform system, to pervade the whole United States. So far, therefore, from the insertion of the word "uniform," in this clause of the constitution, affording any argument in favor of the exclusive power of congress to make laws upon the subject of bankruptcies and naturalization, it was the existence and probable exercise of the power of the states to legislate upon those subjects, which induced the convention to give power to congress to establish a uniform system throughout the United States. A system of bankruptcy is the creature of commerce; its end and its object are, at once, to give and support commercial credit. Some of the United States are, from their situation, habits and pursuits, commercial: others are agricultural. To the one, a system of bankruptcy may be very convenient, if not essential; to the other, such a
*176] system may not only *be unnecessary, but ruinous. Hence, the difficulty which was foreseen, and is now felt, of establishing any uniform system, to pervade the Union, and hence would have been the manifest impropriety of taking from the states all power of legislating upon the subject, and vesting that power exclusively in congress. It is said, that as congress has the power to legislate upon this subject of bankruptcies, and

omits to exercise it, it is an expression of the opinion of congress, that no such system ought to exist. The omission of congress to legislate, amounts to a declaration, that they do not think a uniform system is necessary; and they, therefore, leave the states to legislate upon the subject, whenever they may think it proper and expedient to do so. That congress considers the states as possessing this power, is evident, from the 61st section of the bankrupt law of 1800.

2. The second question is, whether this law of New York is repugnant to that clause of the constitution which prohibits the states "from passing any *ex post facto* law, or law impairing the obligation of contracts?" We have already endeavored to show, that the individual states have the power of passing bankrupt laws. What is a bankrupt law? It is a statute which, upon a surrender of the property of the bankrupt, discharges both his person and his future-acquired property from the payment of his debts. This discharge from all future liability is one of the principal objects in all bankrupt laws, which, for the benefit of the creditors, provide by heavy penalties, for a fair and full surrender of the debtor's property; and *for the benefit of the unfortunate debtor and his family, leaves him to [*177 the full enjoyment of whatever his talents and industry may enable him to earn for the future advancement of himself and family. If, then, the constitution recognises the right and power of the states to pass bankrupt laws, it seems to follow, that the clause of the constitution, which prohibits the states from passing laws impairing the obligation of contracts, does not include a prohibition to pass bankrupt laws. Whether this law of the state of New York is to be considered as an insolvent law or a bankrupt law, it is unnecessary for us to inquire; because, though great pains have been taken to prove that is a bankrupt law, we do not think it necessary to show that it is not. If it be a bankrupt law, the state had a right to pass it. If it be an insolvent law, it is equally within the scope of our reasoning; because, if an insolvent law, which discharges the person and future property of the insolvent, be a law impairing the obligation of a contract, within the meanning of the constitution, so is a bankrupt law, which does the same thing. But we have shown that the states have the power of passing bankrupt laws. They have, therefore, the power to declare that an unfortunate debtor, upon the compliance with certain conditions, shall be discharged from all liability to the payment of his debts; unless, indeed, it can be supposed that the convention intended to leave to the states the power of passing a bankrupt law, and yet, intended to deprive them of the power of incorporating into that law a provision, without which no system of bankruptcy could exist. Is a bankrupt *law, a law impairing the obligation of contracts, within the meaning of the constitution? We insist, that a bankrupt law, [*178 so far from being considered as a law impairing the obligation of contracts, ought to be regarded as a mode of enforcing the performance of contracts. The first object of a bankrupt system is to enforce and secure the rights of creditors, to save them from the consequences of fraudulent and secret conveyances of the debtors; and to give them the benefit of all the debtor's property, and thus, compelling the debtor, as far as he is able, to pay his debts and perform his contracts. It acknowledges the existence of the contract; and the binding force of the contract is the very ground upon which it proceeds. Insolvent laws, and insolvent laws discharging as well the per-

son as the future acquisitions of a debtor, from the payment of his debts, had been passed by many of the states, both before and after the revolution, and many of them were in force, when the constitution was adopted. The nature and existence of these laws was well known to the convention, in which were some of the greatest lawyers in the country. If they had intended to deprive the states of this power, so long exercised, and so well understood, would they not have expressed that intention in direct terms, instead of leaving it to be inferred from words of doubtful import? or can it be contended, that the convention intended, that the states, by construction, should be deprived of their power, and were afraid to deprive them of it by express words, for fear that if such deprivation was understood by the
*179] states, they would not consent to it? *No such motive can or ought to be attributed to the convention: and if not, then it is inconceivable, that they should not have expressly included insolvent laws in the prohibition, if they had intended they should be included in it. It has already been shown, that congress has acted upon the supposition, that the states were not deprived of the power in question. What then, it will be asked, did the convention mean, by prohibiting the states from passing a law impairing the obligation of contracts? We answer, that they meant to include in their prohibition all those unusual, and perhaps, unwise laws, which the exigencies of the times had originated; which the distress and difficulties of the revolution seemed to have rendered necessary, protecting individuals from the payment of their just debts, either by allowing them to make a deduction from the amount of interest due on them, by protracting the payment, or by permitting them to withhold their property from their creditors. They meant to put a check upon the sovereign authority of the states themselves, by preventing them from breaking their own contracts, from revoking their own grants, and violating the chartered rights of corporations. In short, they meant to suppress all those interferences with private rights, which are not within the proper province of legislation, the evils of which had been felt in an uncommon degree in this country. But they did not mean to repeal all those laws, or to prevent the enactment of other similar laws, which have existed in every civilized age and country, for the protec-
*180] tion of unfortunate debtors, and the punishment of *frauds upon creditors; which do not impair the obligation of contracts, but enforce it in the only mode the nature of things will permit; and which congress itself has the power, though not the exclusive power of passing.

Hopkinson, for the plaintiff, in reply, insisted, that the construction of the constitution contended for by the defendant's counsel was fallacious; and even if sound, would be insufficient for their purpose. That the power of passing uniform laws on the subject of bankruptcies, was, from its very nature, a national power; and must, therefore, even according to the opposite argument, be exclusively vested in the national government. That the power of passing naturalization laws is exclusively vested in congress has already been determined by the court. *Chirac* v. *Chirac*, 2 Wheat. 259. Yet both this, and the power of legislating on the subject of bankruptcies, are contained in the same clause, and expressed in similar terms; and it is argued, on the other side, that the interpretation must be the same as to both. It is also said, that the power of congress to pass uniform laws on

the subject of bankruptcies is consistent with the states passing laws, to operate until congress act upon the same subject. But we give a different interpretation to the word uniform. When the constitution declares, that "congress shall have power to pass uniform laws," it implies, that none but uniform laws shall exist: that congress alone shall establish a bankrupt system, and that this system shall be uniform. *One of the principal motives for adopting the constitution was to raise the credit of the [*181
country, by establishing a national government, with adequate powers to redress the grievances of foreigners, instead of compelling them to rely upon the capricious and contradictory legislation of the several states. The laws on the subject of bankruptcies, from their very nature, ought to be the same throughout the Union. A merchant has seldom all his creditors confined to one place or state; and a discharge, local in its nature, gives rise to various intricate questions of the *lex loci contractûs*, the difficulties of which are all avoided by uniformity in the laws. It is impossible to maintain, that this law of New York, or any other state bankrupt law, can be limited in its operation to the state where it is passed. If it be constitutional, it must operate extra-territorially, so far as it may, consistently with the principles of universal law. Nor is the power of congress confined to the enacting of a bankrupt law between the states. This power, like all the other powers of the national government, operates directly and universally upon all the citizens of the Union. The 61st section of the bankrupt law of 1800, c. 173, gives nothing to the states which they did not before possess. If it intended to recognise in them an authority not reserved by the constitution, it was ineffectual for such a purpose. Congress could not give them what the constitution had not given them; nor does the silence of congress on the subject, since the act of 1800 was repealed, manifest the opinion of that body, that there should be various laws on the subject throughout the *Union: it only shows, that congress has deemed it expedient that [*182
there should be no law on the subject. If such have hitherto been the views of congress, although we may suppose them to be mistaken views, in what other mode could they be made known, but by silence—by omitting to do what, perhaps, wiser views might induce congress to do? The only other mode in which congress could secure the country against the evils of numerous and inconsistent bankrupt laws, would be, by establishing a uniform bankrupt law, against its own opinions and judgment. If the states have the power contended for, when congress does not exercise the authority vested in it, then congress must keep up a continual claim, by maintaining, at all times, a bankrupt system, which it thinks inexpedient, for the purpose of preventing the evils and confusion that spring from various laws on such a subject. But we believe that the convention expected that congress would exercise the power, and in that way a bankrupt system would be produced. But still this is left to the discretion of congress, and to that body must such considerations be addressed, since it is evident, that the individual states cannot produce a uniform system, by their separate laws. That the law of New York in question is a bankrupt law, or a law on the subject of bankruptcies, there can be no doubt. It has the distinguishing feature of a bankrupt law; it discharges the party from the obligation of the debt entirely; whilst an insolvent law discharges only his person from imprisonment. Such is the distinction in England between the permanent bankrupt

system, and *the insolvent laws which are occasionally passed (commonly called the Lords' acts), for the relief of debtors, as to the imprisonment of their persons, upon their making an assignment of all their property for the benefit of their creditors. The same distinction prevails on the continent of Europe, between the bankrupt system, which discharges both the person and future property, and the *cessio bonorum*, which discharges the person only, leaving the future acquisitions of property liable for the debt. If this law of New York were an insolvent law, it might co-exist with a uniform bankrupt code: but the provisions of this law are such that it cannot co-exist with a uniform system of bankruptcy. It, therefore, follows, that it is a bankrupt law, in the sense of the constitution. If the power of making laws on the subject of bankruptcies be exclusive, its nature, as such, was irrevocably fixed, at the establishment of the new constitution. On the other hand, if it be a concurrent power, it has always been, and must always be, concurrent. There is nothing contingent in it; nor can it shift and alternate.

But whether this be a bankrupt or an insolvent law, and whether the power of passing bankrupt laws be exclusive or concurrent, we insist, that this law is repugnamt to the constitution, as being a law impairing the obligation of contracts. It has been urged, that parties contracting in a state where a bankrupt law is in force, make their contract with a view to that law, so that the law makes a part of the contract. But this is assuming the law to be constitutional; for if it be unconstitutional, it is a void law, as
*184] being repugnant *to the supreme law: and parties cannot be presumed to contract with a view to acts of the local legislature, which, though clothed with the forms of law, are nullities, so far as they attempt to impair the obligation of contracts. The idea of a contract made with reference to a law which impairs the obligation of contracts, is absurd and incomprehensible. The constitution was intended to secure the inviolability of contracts, according to the immutable principles of justice. To restrict the operation of the clause of the constitution which prohibits the states from making any law impairing the obligation of contracts, to laws affecting contracts existing at the time the law is passed, would be to confine the operation of this salutary prohibition within very narrow limits. Is it credible, that the convention meant to prohibit the states from making laws impairing the obligation of past contracts, and to leave them free to impair the obligation of future contracts? The prohibition against thus impairing existing rights of property, would have been almost superfluous, since the principles of universal jurisprudence had already prohibited such retrospective, legislation upon vested rights.(*a*) But the terms of the prohibition are adapted to include both prospective and retrospective laws impairing the obligation of contracts. Suppose, a state should enact a law, providing that any debt, which might thereafter be contracted, should be discharged, upon
*185] payment by the debtor of half the amount. This law would be *manifestly repugnant to the constitution: nor could it be said, that the creditor would be bound by this law, because it was in existence, at the time when the contract was made; since the obligation of the contract is guarantied by the constitution, which is the supreme law. Such a state law

(*a*) See *ante*, p. 134.

would not have the binding force of the *lex loci contractûs*, as between citizens of different states; because, being repugnant to the constitution of the United States, it is, in effect, no law. Nor would it be obligatory between citizens of the same state, as a domestic regulation; because all the citizens of the United States are entitled to the benefit of this clause of the constitution, which was not meant merely to protect the citizens of one state from the injustice of the government of another, but to guaranty to the whole people of the Union the inviolability of contracts by the state legislatures. It was not intended to have an internal or federal operation merely, but to act, like all the other sanctions of the constitution, directly upon the whole body of the nation. The operation of this law, and of all laws which discharge the debt as well as the person of the debtor, is to compel the creditor to release his debt, upon receiving a dividend which may be less than his demand, or even without any dividend, if the bankrupt's estate will not yield one. The obligation of the contract is as much impaired, as if the law had provided in terms, that the debtor should be discharged from the debt by paying half, or any other proportion, of the sum due; or that he should be discharged, without paying any part of the debt. The law, in this [*186
*case, not only impairs, but it annuls, the obligation of the contract— *vi legis abolitum est.*

But will it be pretended, that the states have a right to pass laws for the abolition of debts, even if such laws have only a prospective operation? Or can it be supposed, that they have authority to pass instalment or suspension laws (which are contended, by the defendant's counsel, to be the evil meant to be guarded against by the constitutional prohibition), provided such laws are only applied to contracts made subsequent to the passage of the laws? During the pressure of the late war, the legislature of the state of North Carolina passed an act, providing that any court rendering judgment against a debtor for debt or damages, between the 31st of December 1812, and the 1st of February 1814, should stay the execution until the first term of the court after the last-mentioned day, upon the defendant's giving two freeholders as sureties for the debt. The supreme court of North Carolina determined the act to be unconstitutional, upon the ground of its impairing the obligation of contracts. Though it is not of binding authority as a precedent, the principles of this decision are strongly applicable to the present case.(*a*) But we insist, in the case now before the court, that [*187
*even admitting the act now in question to be constitutional, as to all contracts made after it was passed, it is clearly repugnant to the constitution as to all contracts previously made, as it is a law impairing the obligation of those contracts.

It is, however, said, that this law does not impair the obligation of the contract, but merely deprives the creditor of the usual means of enforcing it; since it may be revived by a new promise, for which the moral obligation, which is still left, is a sufficient consideration. But it cannot be con-

(*a*) Crittenden *v.* Jones, 5 Hall's L. J. 520; s. c. 1 Car. L. Repos. 385. In this case the court says, "whatever law relieves one party from any article of a stipulation, voluntarily and legally entered into by him with another, without the direct assent of the latter, impairs its obligation; because the rights of the creditor are thereby destroyed, and these are ever correspondent to, and co-extensive with, the duty of the debtor."

ceived, that the constitution meant to prohibit the passage of laws impairing the moral obligation of contracts, since this obligation can only be enforced, in *foro conscientiæ*, and it depends solely upon the volition of the party whether he will make that new promise which is necessary to revive the debt. The legal obligation being gone for ever, unless the party chooses to revive it, it is not only impaired, but absolutely extinguished and destroyed. It does not require, as in the case of a debt barred by the statute of limitations, a mere slight acknowledgment that the debt has not been paid or satisfied: but an express promise is indispensably necessary, to revive a debt barred by a bankrupt certificate, which does not proceed on the presumption of payment, but, on the contrary, supposes the debt not to have been satisfied, and absolves the debtor expressly from the performance of his contract. The present inability of the debtor to perform his contract, arising from poverty, is, indeed, the motive or ground of the legislative interference to dispense with its performance; but this ground is taken away, when that
*188] inability *ceases; and it can only justify the discharge of his person from arrest and imprisonment, but cannot authorize the discharge of his future acquisitions of property. Such a discharge impairs all that remains of the obligation of the contract. If the right of coercing the debtor by imprisonment is taken away; if his property, assigned for the benefit of his creditors, is not sufficient to pay all his debts; and if the property which he may afterwards acquire, of whatever nature, or by whatever title, is not liable for his debts; surely, the obligation of the contract is impaired. If its terms and conditions are not changed, they remain unperformed; which is the same thing to the creditor. If the time of performance is not enlarged, the obligation of performance is entirely dispensed with; which is a still greater infringement of his rights. It is said, that imprisonment for debt is not a common-law remedy for the non-performance of contracts, and makes no part of their obligation. Be it so: but the responsibility of the debtor as to his property is coeval with the common law, and exists in every other system of jurisprudence. It is the fund to which the creditor has a natural right to resort for payment. The liability of the person of the debtor to arrest and imprisonment may be modified, changed or entirely taken away, according to the discretion of the local legislature. It has been, in all ages and countries, subjected to the sovereign discretion of the legislative will; and has been permitted, in various degrees, from the extreme severity of the Roman jurisprudence, which gave the
*189] creditor an absolute power over the liberty, and even life, *of his debtor, to the mild system which prevails on the continent of Europe, which confines imprisonment for debt to commercial contracts and cases of fraud or breach of trust. It has also been urged, that the same reasoning which tends to establish the position, that the obligation of contracts is impaired by bankrupt laws, would extend to statutes of limitation, which make an essential part of the jurisprudence of every state. We answer, that there is a material distinction between statutes of limitation and bankrupt laws. A law of limitations, or prescription, does not strike at the validity of the contract. It is of the remedy, and not of the essence or obligation of the contract. It is a mere rule of evidence; and is founded on the presumption, arising from the lapse of time, that the debt has been paid or satisfied. This legal presumption may be negatived by positive evidence.

It is not a *presumptio juris et de jure*, which is conclusive, and cannot be contradicted; for it may be repelled by any, the slightest evidence, amounting to an admission that the debt has not been paid, even though that admission be qualified by the declaration of the party that he means to insist upon the statute. The statute may also be prevented from running, and the demand perpetuated, by the act of the creditor himself. It is a rule of evidence, or legal presumption, which is incorporated into every system of jurisprudence, independent of positive institution. It was a part of the civil law, and is still a part of the common law. It is adopted by courts of equity, by analogy from the statute of limitations. The particular length of *time which shall bar the right of action, is indeed prescribed in some cases by the legislature; and if the period of limitation were to be [*190 arbitrarily altered by the legislature, so as to take away vested rights, under contracts existing at the time the law was passed, the law would be so far unconstitutional: not that the constitutional prohibition is in general confined to existing contracts; but because, in this particular case, a new rule of evidence or legal presumption could not justly be applied, to deprive the parties of rights already acquired under the old rule. The same principle applies to laws for altering the rate of interest. They cannot have a retrospective operation. But generally speaking, "the constitution could not have an eye to such details, so long as contracts were submitted, without legislative interference, to the ordinary and regular course of justice, and the existing remedies were preserved in substance, and with integrity." *Per* Mr. Justice (now Chancellor) KENT, in *Holmes* v. *Lansing*, 3 Johns. Cas. 73. But this bankrupt law is not a mere matter of detail, and a part of the *lex fori;* it is a legislative interference with the ordinary and regular course of justice; and the existing remedies, so far from being preserved in substance, and with integrity, are entirely abolished. It is incredible, that the convention intended to provide against such evils as suspension or instalment laws, and to leave untouched the much greater evils of local bankrupt laws of this character. In truth, the framers of the constitution did not mean to limit their prohibition to any particular description of legislative acts. They *meant to incorporate into the constitution a provident principle, which should apply to every possible case that might arise. [*191 The inviolability of contracts from state legislation, is guarantied by the Union to all its citizens.

But it is said, that this prohibition is of a moral, as well as legal nature; and is equally binding upon congress, as upon the state legislatures, though congress is not expressly mentioned in the prohibition: that, consequently, if a bankrupt law be a law impairing the obligation of contracts, congress ought no more to assume the right of passing such a law then the states. The answer to this objection is, that congress is expressly vested with the power of passing bankrupt laws, and is not prohibited from passing laws impairing the obligation of contracts, and may, consequently, pass a bankrupt law which does impair it; whilst the states have not reserved the power of passing bankrupt laws, and are expressly prohibited from passing laws impairing the obligation of contracts.(*a*)

(*a*) This case was elaborately argued in the circuit court, by Mr. Saltonstall, for the plaintiff, upon the same grounds and principles as were maintained in this court.

February 17th, 1819. MARSHALL, Ch. J., delivered the opinion of the court.—This case is adjourned from the court of the United States for the first circuit and the district of Massachusetts, on several points on which the *192] judges of that court were divided, which are stated *in the record for the opinion of this court.

The first is, whether, since the adoption of the constitution of the United States, any state has authority to pass a bankrupt law, or whether the power is exclusively vested in the congress of the United States? This question depends on the following clause, in the 8th section of the first article of the constitution of the United States. "The congress shall have power," &c., to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." The counsel for the plaintiff contend, that the grant of this power to congress, without limitation, takes it entirely from the several states. In support of this proposition, they argue, that every power given to congress is necessarily supreme; and, if, from its nature, or from the words of grant, it is apparently intended to be exclusive, it is as much so, as if the states were expressly forbidden to exercise it. These propositions have been enforced and illustrated by many arguments, drawn from different parts of the constitution. That the power is both unlimited and supreme, is not questioned. That it is exclusive, is denied by the counsel for the defendant.

In considering this question, it must be recollected, that previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but in most respects, sovereign. These states *193] could exercise almost every legislative power, and among others, that of passing bankrupt *laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to congress, did not imply a prohibition on the states to exercise the same power. But it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.[1]

Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description? The peculiar terms of

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The reporter has been favored with the perusal of a note of his instructive and able argument, which, as the case was not decided in the court below, does not appear in Mason's reports.

[1] United States *v.* New Bedford Bridge, 1 W. & M. 401.

the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the *United States. This establishment of uniformity is, perhaps, incompatible with state legislation, on [*194 that part of the subject to which the acts of congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws. But if an act of congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying, that this was an insolvent, not a bankrupt act; and therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying, that the was unconstitutional, and the commission a nullity.

When laws of each description may be passed by the same legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the legislature of the Union possesses the power of enacting bankrupt laws; and those of the states, the power of enacting insolvent laws. If it be determined, that they are not laws of the same character, but are as distinct as bankrupt laws and laws which regulate the course of descents, *a distinct line of separation must be drawn, [*195 and the power of each government marked with precision. But all perceive that this line must be, in a great degree, arbitrary. Although the two systems have existed apart from each other, there is such a connection between them, as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say, who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.

This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious, that much inconvenience would result from that construction of the constitution, which should deny to the state legislatures the power of acting on this subject, in consequence of the grant to congress. It may be thought more convenient, that much of it should be regulated by state legislation, and congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted [*196 to congress may be exercised *or declined, as the wisdom of that

body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.[1]

It has been said, that congress has exercised this power; and by doing so, has extinguished the power of the states, which cannot be revived by repealing the law of congress. We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress. Without entering farther into the delicate inquiry respecting the precise limitations which the several grants of power to congress, contained in the constitution, may impose on the state legislatures, than is necessary for the decision of the question before the court, it is sufficient to say, that until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no prin-
*197] ciple *which violates the 10th section of the first article of the constitution of the United States. This opinion renders it totally unnecessary to consider the question whether the law of New York is, or is not, a bankrupt law.

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes.

In discussing the question, whether a state is prohibited from passing such a law as this, our first inquiry is, into the meaning of words in common use—what is the obligation of a contract? and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those who are to be explained. A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money, on or before a certain day. The contract binds him to pay that money, on that day; and this is its obligation. Any law which releases a part of this obligation, must, in
*198] the literal sense of the word, impair it. Much more must a *law impair it, which makes it totally invalid, and entirely discharges it.

The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man for the payment of money, which has been entered into by these parties.

[1] Adams v. Storey, 1 Paine 79.

Yet, the opinion, that this law is not within the prohibition of the constitution has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered. It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it. But it is not true, that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

It has been argued, that the states are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the states have been in the constant practice of passing insolvent laws, such as that of New York, and if the framers of the constitution had intended to deprive them of this *power, insolvent laws would have been mentioned in the prohibition; [*199 that the prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment, by authorizing distant instalments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The constitution does not grant to the states the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it, as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the states may, until that power shall be exercised by congress, pass laws concerning bankrupts; yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted, that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions.

The argument drawn from the omission in the constitution to prohibit the states from passing insolvent laws, admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the *constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which [*200 the principle they intended to establish should apply. The principle was the inviolability of contracts; this principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no state shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no further.

But a still more satisfactory answer to this argument is, that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency, by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity, which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punish-
*201] ment for not performing *his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation.[1]

No argument can be fairly drawn from the 61st section of the act for establishing a uniform system of bankruptcy, which militates against this reasoning. That section declares, that the act shall not be construed to repeal or annul the laws of any state, then in force, for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview; and in such cases, it affords its sanction to the relief given by the insolvent laws of the state, if the creditor of the prisoner shall not, within three months, proceed against him as a bankrupt. The insertion of this section indicates an opinion in congress, that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by an act for establishing that system, although not within its purview. It was for that reason only, that a provision against this construction could be necessary. The last member of the section adopts the provisions of the state laws so far as they apply to cases within the purview of the act. This section certainly attempts no construction of the constitution, nor does it suppose any provision in the insolvent laws, impairing the obligation of contracts. It leaves them to operate, so far as constitutionally they may, unaf-
*202] fected by the act of congress, *except where that act may apply to individual cases.

The argument which has been pressed most earnestly at the bar, is, that although all legislative acts which discharge the obligation of a contract, without performance, are within the very words of the constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times, that the mind of the convention was directed to other laws which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property, not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to premise, that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly

[1] Mason *v.* Haile, 12 Wheat 370; Beers *v.* Haughton, 9 Pet. 329; s. c. 1 McLean 226; Gray *v.* Monroe, Id. 528; Adams *v.* Storey, 1 Paine 79.

from its words. It would be dangerons in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, *is to be disregarded, because we believe the [*203 framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application. This is certainly not such a case. It is said, the colonial and state legislatures have been in the habit of passing laws of this description for more than a century ; that they have never been the subject of complaint, and, consequently, could not be within the view of the general convention. The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the states, do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.

But were it even true, that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every state in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money ; yet this practice is in terms prohibited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said, that the long exercise of the power to impair the obligation of contracts, should prevent a similiar prohibition. It is not admitted, that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, *because it is not a law by name, but a principle which is to be forbidden ; and this [*204 principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration, to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws? We are told, they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts ; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined. Let this argument be tried by the words of the section under consideration.

Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided, that no state shall "emit bills of credit ;" neither could these words be intended to restrain the states from enabling debtors to discharge their debts by the tender of prop-

erty of no real value to the creditor, because for that subject also particular
*205] provision is made. Nothing but *gold and silver coin can be made a tender in payment of debts. It remains to inquire, whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments? This question will scarcely admit of discussion. If this was the only remaining mischief against which the constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the convention, would have been used. It seems scarcely possible to suppose, that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying "no state shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief, to which no allusion is made.

The fair, and we think, the necessary, construction of the sentence requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention
*206] to this subject. It is probable, that laws such as those which *have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt, otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary, not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution, therefore, declares, that no state shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted, that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence should be done to their plain meaning, by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract, without performance.

By way of analogy, the statutes of limitations, and against usury, have
*207] been referred to in argument; *and it has been supposed, that the construction of the constitution, which this opinion maintains, would apply to them also, and must, therefore, be too extensive to be correct. We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances

shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.[1]

So, with respect to the laws against usury. If the law be, that no person shall take more than six *per centum per annum* for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven *per cent.*, would have no obligation, in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.[2]

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which, the legislature, whose act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the state whose law attempts to absolve a *confined insolvent debtor from his obligation. When such a case arises, it will be considered. [*208

It is the opinion of the court, that the act of the state of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action.

Certificate.—This cause came on to be heard, on the transcript of the record of the circuit court of the United States, for the first circuit, and the district of Massachusetts, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel: on consideration whereof, this court is of opinion, that, since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law. This court is further of opinion, that the act of New York, which is pleaded in this case, so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action. All which is directed to be certified to the said circuit court.

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[1] Webster *v.* Cooper, 14 How. 488; Lewis *v.* Broadwell, 3 McLean 568; Johnson *v.* Bond, Hempst. 633. And see Metz *v.* Hipps, 96 Penn. St. 15.

[2] See Hart *v.* Lamphire, 3 Pet. 280; McElmoyle *v.* Cohen, 13 Id. 312; Bank of Alabama *v.* Dalton, 9 How. 522; Bacon *v.* Howard, 20 Id. 22; Barker *v.* Henry, 1 Paine 559.

*McMillan *v.* McNeill.

State bankrupt law.

A state bankrupt or insolvent law (which not only liberates the person of the debtor, but discharges him from all liability for the debt), so far as it attempts to discharge the contract, is repugnant to the constitution of the United States; and it makes no difference in the application of this principle, whether the law was passed before or after the debt was contracted.

A discharge under a foreign bankrupt law is no bar to an action, in the courts of this country, on a contract made here.[1]

Error to the District Court of Louisiana. This was a suit brought by McNeil, the plaintiff below, against McMillan, the defendant below, to recover a sum of money paid for the defendant's use, under the following circumstances: McMillan, residing in Charleston, South Carolina, transacting business there as a partner of the house of trade of Sloane & McMillan, of Liverpool, on the 8th of October and 9th of November 1811, imported foreign merchandise, on which he gave bonds at the custom-house, with McNeill and one Walton, as sureties. These bonds were payable the 8th of April and 9th of May 1812, and were paid, after suit and judgment, by McNeill, on the 23d of August and 23d of September 1813. Some time afterwards, McMillan removed to New Orleans; where, on the 23d of August 1815, the district court of the first district of the state of Louisiana, *210] having previously taken into *consideration his petition, under a law of the state of Louisiana, passed in 1808, praying for the benefit of the *cessio bonorum*, and a full and entire release and discharge, as well in his person as property, from all debts, dues, claims and obligations, then existing, due or owing by him, the said McMillan, and it having appeared fully and satisfactorily, that the requisite proportion of his creditors, as well in number as amount, had accepted the cession of his goods, and had granted a full entire discharge, as well with respect to his person as to his future effects, it was then and there ordered, adjudged and decreed by the said court, that the proceedings be homologated and confirmed, and that the said McMillan be acquitted, released and discharged, as well his person as his future effects, from the payment of any and all debts, dues and demands, of whatever nature, due and owing by him, previous to the day of the date of the commencement of said proceedings, to wit, previous to the 12th day of August 1815. The house of trade of Sloane & McMillan, of Liverpool, having failed, a commission of bankruptcy issued against both the partners, in England, on the 28th of September 1812, and on the 28th of November 1812, they both obtained certificates of discharge, signed by the commissioners, and sanctioned by the requisite proportion of creditors in number and value, and confirmed by the Lord Chancellor of Great Britain, according to the bankrupt laws of England.

On the 1st of July 1817, the present suit was instituted by McNeill, describing himself as a citizen of South Carolina, against McMillan, described as *211] a citizen of Louisiana, *in the district court of the United States for the district of Louisiana (having circuit court powers), to recover the sum of $700, which McNeill had paid, under the judgments on the custom-house-bonds, in South Carolina. To this suit, McMillan pleaded in bar his

[1] S. P. Green *v.* Sarmiento, Pet. C. C. 74; S. C. 3 W. C. C. 17.

certificates under the Louisiana and English bankrupt laws ; to which plea, the plaintiff below demurred, the defendant joined in demurrer, and the court gave judgment for the plaintiff ; from which judgment, the cause was brought, by writ of error, to this court.

February 18th. This cause was argued by *C. J. Ingersoll*, for the plaintiff in error, no counsel appearing for the defendant in error. He contended, 1. That this case was distinguishable from the preceding case of *Sturges* v. *Crowninshield*, because the state law, under which the insolvent obtained his discharge, was passed long before the contract was made, and therefore, it could not be said to impair the obligation of a contract not then in existence.

2. That although the contract was made in Sonth Carolina, between parties who were at the time citizens of the state, yet the debtor having removed to Louisiana, and become a resident citizen of that state, and the creditor pursuing him thither, the local court had authority, under the local laws, to grant him a discharge, which might be effectual within the limits of the state, even if it had no extra-territorial operation. The discharge, being effectual in the courts of the state where it was obtained, would, of course, be equally effectual in the courts of the United States, sitting [*212 *in that state, the laws of the state being made by the judiciary act of 1789, c. 20, § 34, rules of decision in the courts of the United States, in cases where they apply.

3. That the certificate of discharge under the English bankrupt laws, was a good plea in bar to the action.(*a*)

Marshall, Ch. J., delivered the opinion of the court, that this case was not distinguishable in principle from the preceding case of *Sturges* v. *Crowninshield*. That the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of *the principle. And [*213 that as to the certificate under the English bankrupt laws, it had frequently been determined, and was well settled, that a discharge under a foreign law, was no bar to an action on a contract made in this country.

Judgment affirmed.

(*a*) He cited Ruth. Inst. b. 2, c. 5, § 3, c. 9, § 6 ; Huber. Prælec. lib. 1, tit. 3; Greenough *v.* Amory, 3 Dall. 370, note ; James *v.* Allen, 1 Id. 188 ; Millar *v.* Hall, Id. 229. Thompson *v.* Young, Id. 294 ; Gorgerat *v.* McCarty, Id. 366 ; Donaldson *v.* Chambers, 2 Id. 100 ; Harris *v.* Mandeville, Id. 256 ; Emory *v.* Greenough, 3 Id. 369 ; Smith *v.* Brown, 4 Binn. 201 ; Boggs *v.* Teakle, 5 Id. 332 ; Hilliard *v.* Greenleaf, Id. 336, note ; Van Raugh *v.* Van Arsdaln, 3 Caines 154 ; Smith *v.* Smith, 2 Johns. 235 ; Penniman *v.* Meigs, 9 Id. 325 ; Hicks *v.* Brown, 12 Id. 142 ; Hamersley *v.* Lambert, 2 Johns. Ch. 511 ; Blanchard *v.* Russell, 13 Mass. 1 ; Bradford *v.* Farrand, Id. 18 ; Walsh *v.* Farrand, Id. 19 ; Baker *v.* Wheaton, 5 Id. 509 ; Babcock *v.* Weston, 1 Gallis. 168 ; Van Reimsdyk *v.* Kane, Id. 371 ; Golden *v.* Prince, 3 W. C. C. 313 ; Adams *v.* Storey, 1 Paine 79 ; Farm. & Mech. Bank *v.* Smith, 3 S. & R. 63 ; Burrows *v.* Jemino, 2 Str. 733 ; Ballantine *v.* Golding, Coop. Bank. Law 347 ; Id. 362 ; Smith *v.* Buchanan, 1 East 6 ; Potter *v.* Brown, 5 Id. 124 ; Terasson's case, Coop. Bank Law, App'x, 30.

Barr *v.* Gratz's Heirs.

Estoppel by deed.—Disseisin.—Deed as evidence.—Record evidence.

A patent issued on the 18th November 1784, for 1000 acres of land, in Kentucky, to J. C., who had previously, in July 1784, covenanted to convey the same to M. G., the ancestor of the lessor of the plaintiff, and on the 23d June 1786, M. G. made an agreement with R. B., the defendant in ejectment, to convey to him 750 acres, part of the tract of 1000 acres; under which agreement, R. B. entered into possession of the whole tract, and on the 11th of April 1787, J. C., by direction of M. G., conveyed to R. B., the 750 acres, in fulfilment of said agreement, which were severed by metes and bounds from the tract of 1000 acres. J. C. and his wife, on the 26th of April 1791, made a conveyance in trust of all his property, real and personal, to R. J. and E. C.; on the 12th of February 1813, R. J. as surviving trustee, conveyed to the heirs of M. G., under a decree in equity that part of the 1000 acres not previously conveyed to R. B., and in the part so conveyed, under the decree, was included the land claimed in the ejectment. R. B. (the defendant) claimed the land in controversy, under a patent for 400 acres, issued on the 15th of September 1795, founded on a survey made for B. N., May 12th, 1782; and under a deed of the 13th of December 1796, from one Coburn, who had, in the winter and spring of 1791, entered into and fenced a field, within the bounds of the original patent for 1000 acres,

*214] to J. C., claiming to hold the *same under B. M.'s survey of 400 acres: *Held*, that upon the issuing of the patent to J. C., in November 1784, the possession then being vacant, he became, by operation of law, vested with a constructive actual seisin of the whole tract included in his patent; that his whole title passed by his prior conveyance to M. G. (the ancestor of the lessor of the plaintiff); and that when it became complete at law, by the issuing of the patent, the actual constructive seisin of J. C. passed to M. G., by virtue of that conveyance.[1]

Held, that when, subsequently, in virtue of the agreement made in June 1786, between M. G. and R. B. (the defendant), the latter entered into possession of the whole tract, under this equitable title, his possession, being consistent with the title of M. G., and in common with him, was the possession of M. G. himself, and inured to the benefit of both, according to the nature of the respective titles. And that when, subsequently, in April 1787, by the direction of M. G., J. C. conveyed to the defendant 750 acres, in fulfilment of the agreement between M. G. and the defendant, and the same were severed by metes and bounds, in the deed, from the tract of 1000 acres, the defendant became sole seised in his own right of the 750 acres so conveyed. But as he still remained in the actual possession of the residue of the tract, within the bounds of the patent, which possession was originally acquired under M. G., the character of his tenure was not changed by his own act, and therefore, he was *quasi* tenant to M. G., and as such, continued the actual seisin of the latter, over this residue, at least, up to the deed from Coburn to the defendant, in 1796.

Held, that if Coburn, in 1791, when he entered and fenced a field, &c., had been the legal owner of B. N.'s survey, his actual occupation of a part would not have given him a constructive actual seisin of the residue of the tract included in that survey, that residue being, at the time of his entry and occupation, in the adverse seisin of another person (M. G.) having an older and better title. But there being no evidence that Coburn was the legal owner of B. N.'s survey, his entry must be considered as an entry without title, and consequently, his disseisin was limited to the bounds of his actual occupancy.[2]

The deed of the 16th of July 1784, from J. C. to M. G., being more than thirty years old, and proved to have been in possession of the lessors of the plaintiffs, and actually asserted as the ground of their title in the equity suit, was admissible in evidence, without regular proof of its execution.[1]

The deed from J. C. and wife, to D. J. and E. C., in 1791, was not within the statute of champerty and maintenance of Kentucky; *for as to all the land not in the actual occupancy

*215] of Coburn, the deed was operative, the grantors and those holding under them having at all times had the legal seisin.

In general, judgments and decrees are evidence only in suits between parties and privies; but the doctrine is wholly inapplicable to a case like the present, where the decree in equity was not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a

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[1] S. P. Bush *v.* Marshall, 6 How. 284.

[2] See Clarke *v.* Courtney, 5 Pet. 319; Miller *v.* McIntire, 6 Id. 61; Sicard *v.* Davis, Id. 124.

[2] Hinde *v.* Vattier, 1 McLean 110; S. C. 7 Pet. 252.

link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate.

The deed of 1813, from R. J., surviving trustee, under the decree in equity, was valid, without being approved by the court, and recorded in the court, according to the statute of Kentucky of the 16th of February 1808, c. 453.

ERROR to the Circuit Court of Kentucky. This was an action of ejectment, in which the defendants in error were the lessors of the plaintiffs below, and which was brought to recover the possession of a tract of land in the district of Kentucky, claimed by them, under a patent issued to John Craig, November 18th, 1784, for 1000 acres of land, included in three separate warrants of 320 acres, 480 acres, and 200 acres, surveyed for John Craig, on the 14th of January 1783.

On the 16th of July 1784, John Craig conveyed, by deed, the said tract of land to Michael Gratz, the ancestor of the lessors of the plaintiffs, and covenanted to cause a patent to issue to said Gratz, or if it could not issue in his name, that said Craig would stand seised to the use of Gratz, and make such other conveyances as should be necessary to confirm the title. On the 23d of June 1786, Gratz made an agreement with Robert Barr, the defendant in ejectment, to convey to him 750 acres of land, part of the said 1000 acres; the defendant entered into possession *of the whole [*216
tract, and settled a quarter and farm thereon, and on the 11th day of April 1787, John Craig, by the direction of said Gratz, conveyed to the defendant, Barr, 750 acres, in fulfilment of said agreement, which were severed by metes and bounds from the said tract of 1000 acres. On the 26th of April 1791, John Craig and his wife made a conveyance in trust to Robert Johnson and Elijah Craig of all his property, real and personal. On the 12th of February 1813, Robert Johnson, as surviving trustee, under a decree in equity of the circuit court for the district of Kentucky, conveyed to the lessors of the plaintiffs that part of the 1000 acres not previously conveyed to the defendant Barr, and in the part so conveyed, was included the land claimed in this action.

The defendant, Barr, claimed the tract of land in controversy, under a patent for 400 acres, issued by the state of Kentucky, on the 15th of September 1795, founded on a survey made for Benjamin Netherland, May 12th, 1782.

On the trial of the cause, the plaintiffs read in evidence to the jury, the patent to John Craig for 1000 acres of land; copies of two other surveys for John Craig; the deed of the 16th July 1784, to Michael Gratz, the ancestor of the lessors of the plaintiffs; the deed of trust of the 26th of April 1791, from John Craig and wife to Robert Rohnson and Elijah Craig; the deed of the 12th February 1813, from Rrbert Johnson (as surviving trustee) to the lessors of the plaintiffs; the decree in the chancery suit between Michael Gratz and John Craig and others, *under which that deed [*217
was made; the surveys, plats and reports of the 14th of January 1783, signed by John Price, and the agreement between the said Gratz and Barr. The plaintiffs also introduced parol testimony establishing the boundary of the land patented to John Craig, and proving the defendant's possession of the whole tract.

The defendant gave in evidence a deed from one Coburn to him, dated the 13th of December 1796; the deed from Craig to him of the 11th of

April 1787; the plat and certificate of Netherland's survey; the certificate of its conveyance by Ann Shields to the defendant; and gave parol testimony that, in the winter and spring of 1791, Coburn entered into, and fenced a field, within the boundary of Craig's patent, claiming to hold the same under the title of Netherland, as part of the land included in his survey of 400 acres.

The defendant objected to the admission in evidence of the record and proceedings of the circuit court, in the chancery suit between Michael Gratz and John Craig and others; but the decree was permitted to be read to the jury, to which the defendant excepted. The defendant also excepted to the admission in evidence of the deed from John Craig to Michael Gratz, dated the 16th of July 1784, because the same was not proved by the subscribing witnesses, nor their absence accounted for.

The court instructed the jury as follows: 1. That if they should be of opinion, that neither the defendant, nor John Coburn, under whom he claims, were in actual possession of the land now in dispute, prior *to the 18th
*218] day of November 1784, the date of the patent to John Craig for the land now in dispute, that the emanation of the said grant gave possession to the said John Craig of the whole of the said land; and that the present plaintiffs were entitled to the benefit of that possession.

2. That if the jury should be of opinion, that Robert Barr, the defendant, entered upon, and took possession of the land in contest, under a contract with the ancestor of the plaintiffs, and was so possessed, at the time of the settlement of Coburn, under whom the defendant now pretends title, that the possession of Coburn, when taken, did not extend within the patent lines, under which the lessors of the plaintiffs claim, beyond his actual occupancy.

3. That Coburn's claiming and fencing a part of the land in 1791, or whenever the jury should be of opinion, he took possession and fenced within the patent limits aforesaid, did not give to him a legal possession to any other part of the land within the patent to Craig, than that of which he had the actual occupancy.

4. That the possession of Coburn, attempted to be proved, more than twenty years before the bringing this suit, did not bar the plaintiffs' right to sue, further than he showed an actual possession for twenty years or upwards, next before bringing this suit.

The defendant objected to the instructions so given the jury, and moved that the court should give certain other instructions to the jury, which were refused. A verdict was taken for the plaintiffs, and judgment rendered thereupon. The defendant afterwards moved for a new trial, which was
*219] refused by *the court. The cause was thereupon brought, by writ of error, to this court.

February 11th. This cause was argued by *Trimble*, for the plaintiffs in error, who made the following points: 1. That the court below erred in refusing the motion for a new trial. 2. That the decree in the chancery suit between Michael Gratz and John Craig and others, was not admissible in evidence in this case. 3. That there was error in admitting in evidence the deed from John Craig to Michael Gratz, of the 16th of July 1784, without the regular proof of its execution by the subscribing witnesses. 4. That the

deed of the 13th of February 1813, from Robert Johnson, as surviving trustee, to the lessors of the plaintiff, under the decree in chancery, was not admissible in evidence, without preliminary proof that Elijah Craig was dead. 5. That the said deed was not approved by the court, nor recorded as required by the statute of Kentucky of the 16th of February, c. 453. 6. That the deed of the 26th of April 1791, from John Craig and wife, in trust, to Robert Johnson and Elijah Craig, was void under the statute of champerty and maintenance, the land being at the time in the adverse possession of Coburn. 7. That the court below erred in the instructions it gave to the jury.

Talbot and *Sergeant*, contrà.

February 19th, 1819. Story, Justice, delivered the opinion of the court.—In this case, it is unnecessary to travel *through all the exceptions taken by the defendant in the court below, because, upon the facts [*220
stated in the bill of exceptions, some of the opinions required of the court upon points of law, do not arise from the evidence; and as to others, the opinion of the court, if in any respect erroneous, was so, in favor of the defendant.

The first error assigned is, that the court refused to grant a new trial; but it has been already decided, and is too plain for argument, that such a refusal affords no ground for a writ of error.

Another error alleged is, that the court allowed the decree of the circuit court, in the chancery suit between Michael Gratz and John Craig and others, to be given in evidence to the jury. In our opinion, this record was clearly admissible. It is true, that, in general, judgments and decrees are evidence only in suits between parties and privies. But the doctrine is wholly inapplicable to a case like the present, where the decree is not introduced as *per se* binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting a part of the muniments of his estate; without establishing the existence of the decree, it would be impossible to establish the legal validity of the deed from Robert Johnson to the lessors of the plaintiffs, which was made under the authority of that decree; and under such circumstances, to reject the proof of the decree, would be, in effect, to declare that no title derived under a decree in chancery, was of any validity, except in a suit between parties and privies, so that in *a suit by or against a stranger, it would be a mere nullity. [*221
It might with as much propriety be argued, that the plaintiff was not at liberty to prove any other title deeds in this suit, because they were *res inter alios acta.*

Another error alleged is, the admission in evidence of the deed of John Craig to Michael Gratz, dated the 16th of July 1784, without the regular proof of its execution by the subscribing witnesses. But as that deed was more than thirty years old, and was proved to have been in the possession of the lessors of the plaintiff, and actually asserted by them as the ground of their title in the chancery suit, it was, in the language of the books, sufficiently accounted for; and on this account, as well as because it was a part of the evidence in support of the decree, it was admissible, without the regular proof of its execution.

Another error alleged is, that the deed from Robert Johnson to the plaintiffs, under the decree in chancery, was not admissible in evidence,

without proof that Robert Johnson was the surviving trustee, and that Elijah Craig was dead. But upon examining the bill of exceptions of the defendant, no point of this sort arises; for it is there stated, that the plaintiff gave in evidence "the deed from Robert Johnson the surviving trustee to the lessors of the plaintiff;" and no objection appears to have been made to its admissibility, on this account.

Having disposed of these minor objections, we may advance to the only points of any real importance in the cause, but which, in our opinion, are of no intrinsic difficulty. Upon the issuing of the patent *to John Craig, *222] in November 1784, the possession then being vacant, he became, by operation of law, vested with a constructive actual seisin of the whole tract of land included in his patent. His whole title (such as it was) passed by his prior conveyance, in July 1784, to Michael Gratz, the ancestor of the lessor of the plaintiff, and the moment it became complete at law, by the issuing of the patent, the actual constructive seisin of Craig was transferred to Gratz, in virtue of that conveyance.(*a*) When, subsequently, in virtue of the agreement made in June 1786, between Michael Gratz and the defendant, for the purchase of 750 acres of the tract of 1000 acres, the defendant entered into possession of the whole tract, under this equitable title, his possession being consistent with the title of Gratz, and in common with him, was the possession of Gratz himself, and inured to the benefit of both, according to the nature of their titles. When, subsequently, in April 1787, by the direction of Gratz, Craig conveyed to the defendant a large portion of the land, in fulfilment of the agreement between Gratz and Barr, and the same was severed, by the metes and bounds in the deed, from the tract of 1000 acres, the defendant became sole seised in his own right of the portion so conveyed. But as he still remained in the actual possession of the residue of the tract within the bounds of the patent, and this possession was originally taken under Gratz, the character of his tenure was not changed by his own act, and therefore, *he was *quasi* tenant to Gratz; and as such, *223] continued the actual seisin of the latter over the whole of this residue, at least, up to the period of the deed from Coburn to the defendant, in 1796.

This brings us to the consideration of the period when the evidence first establishes any entry or possession in John Coburn. It appears by the evidence, that in the winter and spring of 1791, Coburn entered into, and fenced, a field within the boundary of Craig's patent, claiming to hold the same under the title of Netherland, as part of the land included in his survey of a tract of 400 acres. If Coburn, at this time, had been the legal owner of Netherland's survey, his actual occupation of a part, would not have given him a constructive actual seisin of the residue of the tract included in that survey, if, at the time of his entry and occupation, that residue was in the adverse seisin of another person, having an older and better title. For where two persons are in possession of land, at the same time, under different titles, the law adjudges him to have the seisin of the estate who has the better title. Both cannot be seised, and therefore, the seisin follows the title. Now it is clear, that the title of Craig, and of

(*a*) See Green *v.* Liter, 8 Cranch 229, 245.

course, of his grantee Gratz, was older and better than Netherland's ; and the possession of Barr, under that title, being the possession of Gratz, the legal seisin of the land which was not sold to Barr, was, by construction of law, in Gratz ; and the disseisin of Coburn under a junior title, did not extend beyond the limits of his actual occupancy.

This reasoning proceeds upon the supposition that Coburn had a good title to Netherland's survey. *But in fact, no such title was shown in evidence, there being no proof that Ann Shields, from whom Coburn derived his title, was the legal owner of the title of Netherland. So that the entry of Coburn must be considered as an entry, without title, and consequently, his disseisin was limited to the bounds of his actual occupancy. This view of the case disposes of the objection to the deed from Craig and wife to Robert Johnson and Elijah Craig, in 1791, upon the ground, that it was within the statutes of champerty and maintenance, the land being at the time in the adverse possession of Coburn ; for as to all the land not in his actual occupancy (and to this alone the charge of the court applied) the deed was, at all events, operative ; the grantors, and persons holding under them, having at all times had the legal seisin.(a) [*224

Another objection taken is, that the deed from Robert Johnson to the lessors of the plaintiff, under the decree in chancery, was not approved by the court, nor recorded in the court, in conformity with the statute of Kentucky of the 16th of February 1818, ch. 453. In our judgment, no such approval was necessary ; and upon examination of the statute in question, it is clear, that it is not imperative in the present case.

Upon the whole, without going more minutely into the case, we are all of opinion, that the judgment of the court below ought to be affirmed. No error has been committed which is injurious to the defendant. *He has had the full benefit of the law, so far as the facts of his case would warrant the court in applying it in his favor. [*225

Judgment affirmed.

(a) See Walden *v.* Gratz's Heirs, 1 Wheat. 292.

Eliason *et al. v.* Henshaw.

Contract of sale.

A. offered to purchase of B. two or three hundred barrels of flour, to be delivered at Georgetown (District of Columbia), by the first water, and to pay for the same $9.50 per barrel; and to the letter, containing this offer, required an answer by the return of the wagon by which the letter was sent: this wagon was, at that time, in the service of B., and employed by him in conveying flour from his mill to Harper's Ferry, near to which place A. then was: his offer was accepted by B., in a letter sent by the first regular mail to Georgetown, and received by A. at that place; but no answer was ever sent to Harper's Ferry: *Held*, that this acceptance, communicated at a place different from that indicated by A., imposed no obligation binding upon him.

An offer of a bargain, by one person to another, imposes no obligation upon the former, unless it is accepted by the latter, according to the terms on which the offer was made; any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the party who made it.[1]

February 17th, 1819. Error to the Circuit Court for the District of Columbia. This cause was argued by *Jones* and *Key*, for the plaintiff in error, and by *Swann*, for the defendant in error.

February 20th. Washington, Justice, delivered the opinion of the *226] court.—This is an action, brought by the defendant *in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour, at a stipulated price. The evidence of this contract, given in the court below, is stated in a bill of exceptions, and is to the following effect:

A letter from the plaintiffs to the defendant, dated the 10th of February 1813, in which they say: "Capt. Conn informs us, that you have a quantity of flour to dispose of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it, when the markets will answer to advantage, or we will purchase at market price, when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you $9.50 per barrel, deliverable the first water, in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postcript, they add, "Please write by return of wagon, whether you accept our offer." This letter was sent from the house at which the writer then was, about two miles from Harper's Ferry, to the defendant, at his mill, at Mill Creek, distant about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant, on the 14th of the same month, to which an answer, dated the succeeding day, was written by the defendant, addressed *227] to the plaintiffs, at Georgetown, *and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says, "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest apportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown, by the first water, at $9.50 per barrel,

[1] Carr *v.* Duval, 14 Pet. 77; Insurance Co. *v.* Lyman, 15 Wall. 664; Decker *v.* Fosdick, 1 Woods 286; Chicago and Great Eastern Railway Co. *v.* Dane, 43 N. Y. 240.

I accept, shall send on the flour, by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the abave, dated at Georgetown, in which they acknowledge the receipt of it, and add, "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly, as we requested an answer by return of wagon, the next day, and as we did not get it, had bought all we wanted." The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not, in fact, return in the defendant's employ. The flour was sent down to Georgetown, some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of *the 300 barrels of flour, at the rate of $9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given. The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought, the judgment, which was in favor of the plaintiff in that court, must be reversed. [*228

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same $9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was employed by this wagon, in travelling from Harper's Ferry to Mill Creek, and back *again with a load of flour, about what time they should receive the desired answer, and therefore, it was entirely unimportant, whether it was sent by that, or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer. [*229

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place ; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument, that an answer was received at Georgetown ; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place, and they
*230] were the only judges of its *importance. There was, therefore, no contract concluded between these parties, and the court ought, therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed, and cause remanded, with directions to award a *venire facias de novo.*

Somerville's Executors *v.* Hamilton.

Adverse possession.

Where the defendant in ejectment, for lands in North Carolina, has been in possession, under title in himself, and those under whom he claimed, for a period of seven years or upwards, such possession is, by the statute of limitations of North Carolina, a conclusive legal bar against the action by an adverse claimant, unless such claimant brings himself, by positive proof, within some of the disabilities provided for by that statute. In the absence of such proof, the title shown by the party in possession is so complete as to prove, in an action upon a covenant against incumbrances, that a recovery obtained by the adverse claimant was not by a paramount legal title.

Quære ? Whether, in a action upon a covenant against incumbrances, the plaintiff is bound to show that the adverse claimant recovered, in the suit by which the plaintiff is evicted, by title paramount, or whether the recovery itself is *primâ facie* evidence of that fact ?

This was an action of covenant, brought in the Circuit Court of North Carolina, by the executors of John Somerville, the younger, against John Hamilton, on the following covenants in a deed of land in North Carolina, from Hamilton to John Somerville, the elder, dated April 15th, 1772.

*231] The grantor covenanted *with the grantee, his heirs and assigns, that the premises "then were, and so for ever thereafter should remain, free and clear of and from all former and other gifts, bargains, sales, dower, right and title of dower, judgments, executions, title, troubles, charges and incumbrances whatsoever, done, committed or suffered by the said John Hamilton, or any other person or persons whatsoever, the quit-rent afterwards to grow due to Earl Grenville, his heirs, &c. only excepted." There was also a covenant for a general warranty.

Hamilton claimed the lands under a deed, dated the 4th of October 1771, from one Stewart, who was then in possession, and who delivered possession to Hamilton. John Somerville, the elder, conveyed the same to his son, John Somerville, the younger, by deed dated the 8th of September 1777 ; and Somerville, the younger, conveyed to one Whitmill Hill, by deed dated the 9th of October 1795. W. Hill died on the 13th of October 1797, having by his last will devised the lands to his son Thomas B. Hill. The latter

having entered under the devise, an action of ejectment was brought against him, in the superior court of the state of North Carolina, for Halifax district, on the 7th of June 1804, for 250 acres, parcel of the said lands, by one Benjamin Sherrod, who, at the April term 1805, of the said court, obtained a verdict and judgment for the possession of the said 250 acres of land, and was put in possession of the same. On the second of September 1804, Hamilton had notice from Somerville, the younger, of the institution of this suit, but did not aid in the defence. From the date of Stewart's deed to Hamilton *(October 4th, 1771) to the commencement of this suit by [*232
Sherrod against Hill, on the 7th of June 1804, the land in controversy was in the possession of Hamilton, and of Somerville and the Hills, claiming under Hamilton. On the 6th of November 1806, Somerville, the younger, died, leaving the plaintiffs executors of his last will and testament. The above facts were found by a special verdict in the circuit court, and the case came before that court upon the special verdict, at November term 1816, when the judges differed in opinion upon the following questions :

1. Whether the plaintiffs were bound to show that Benjamin Sherrod recovered against Thomas B. Hill, by title paramount to that derived from Hamilton; or the recovery itself was *primâ facie* evidence of that fact?

2. Whether the title shown by Thomas B. Hill, under Hamilton, was not so complete as to prove that Sherrod's recovery could not have been by title paramount? Which questions were thereupon certified to this court for decision.

February 6th, 1818. The cause was argued, at the last term, by *Harper*, for the plaintiffs,(*a*) no counsel appearing for the defendant.

*February 20th, 1819. The opinion of the court was delivered, [*233
at the present term, by Story, Justice.—Upon the special verdict in this case, the judges in the court below differed in opinion on two points, which are certified to this court for a final decision :

1. Whether the plaintiffs were bound to show that Benjamin Sherrod recovered against Thomas B. Hill, by title paramount to that derived from Hamilton, or the recovery itself was *primâ facie* evidence of that fact?

2. Whether the title shown by Thomas B. Hill, under Hamilton, was not so complete as to prove that Sherrod's recovery could not be by title paramount?

Upon the first point, this court also is divided in opinion, and therefore, no decision can be certified. But as we are unanimous on the second point, and an opinion on that finally disposes of the cause, it will now be pronounced. From the date of Stewart's deed to Hamilton, in October 1771, until the commencement of the suit by Sherrod against Hill, in June 1804, a period of thirty-three years, the land in controversy was in the exclusive possession of Hamilton, and those deriving title under him. A possession for such a length of time, under title, was, by the statute of limitations of North Carolina, a conclusive bar against any suit by any adverse claimant, unless he was within some one of the exceptions or disabilities pro-

(*a*) He cited Duffield *v.* Scott, 3 T. R. 374; Blasdale *v.* Babcock, 1 Johns. 517; Kip *v.* Bingham, 6 Id. 158; Bender *v.* Fromberger, 4 Dall. 436; Hamilton *v.* Cutts, 4 Mass. 353.

vided for by that statute.(a) The special verdict in this case does *not find either that Sherrod was or was not within those exceptions or disabilities. The case, therefore, stands, in this respect, purely indifferent. By the general principles of law, the party who seeks to recover, upon the ground of his being within some exception of the statute of limitations, is bound to establish such exception by proof, for it will not be presumed by the law. In the suit by Sherrod against Hill, it would have been sufficient for the defendant to have relied upon the length of possession, as a suitable bar to the action ; and the burden of proof would have been upon Sherrod, to show that he was excepted from its operation. By analogy to the rule in that case, the proof of possession under title, for thirty-three years, was presumptive evidence, and in the absence of all conflicting evidence to remove
*235] the bar, conclusive evidence, that the title of Hill, *under Hamilton, was so complete, that Sherrod's recovery could not have been by title paramount.

Certificate accordingly.

Bank of Columbia *v.* Okely.

Summary process.

The act of assembly of Maryland, of 1793, c. 30, incorporating the Bank of Columbia, and giving to the corporation a summary process, by execution in the nature of an attachment, against its debtors who have, by an express consent, in writing, made the bonds, bills or notes, by them drawn or indorsed, negotiable at the bank, is not repugnant to the constitution of the United States or of Maryland.

But the last provision in the act of incorporation, which gives this summary process to the bank, is no part of its corporate franchises, and may be repealed or altered, at pleasure, by the legislative will.

Error to the Circuit Court for the district of Columbia. This was a proceeding in the court below, under the act of assembly of Maryland of 1793, c. 30, incorporating the Bank of Columbia, the 14th section of which is in these words :

" And whereas, it is absolutely necessary, that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them : Be it enacted, that whenever any person or persons are indebted to the said bank
*236] for moneys borrowed by them, or for bonds, bills or notes *given or indorsed by them, with an express consent in writing that they may

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(a) This statute, which was enacted in the year 1715, provides (§ 3), " that no person or persons, or their heirs, which hereafter shall have any right or title to any lands, tenements or hereditaments, shall thereunto enter or make claim, but within seven years after his, her or their right or title shall descend or accrue ; and in default thereof, such person or persons, so not entering, or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made." The 4th section contains the usual saving in favor of infants, &c., who are authorized, within three years after their disabilities shall cease, " to commence his or her suit, or make his or her entry." Persons beyond seas are allowed eight years after their return : " but that all possessions held without suing such claim as aforesaid, shall be perpetual bar against all and every manner of persons whatever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed that no man will know from whom to take or buy land." See Patton's Lessee *v.* Easton, 1 Wheat. 476.

be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same become due, the president shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid; or if not to be found, have the same left at his last place of abode; and if the money so due shall not be paid, within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the president, at his election, to write to the clerk of the general court, or of the county in which the said delinquent or delinquents may reside, or did, at the time he or they contracted the debt reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue *capias ad satisfaciendum*, *fieri facias*, or attachment by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note; and the clerk of the general court, and the clerks of the several county courts, are hereby respectively required to issue such execution or executions, which shall be made returnable to the court whose clerk shall issue the same, which shall first sit after issuing thereof, and shall be as valid and as effectual in law, to all intents and purposes, as if the same had issued on judgments regularly obtained in the ordinary course of proceeding in the said court; and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, *appeal or injunction from the chancellor: Provided always, that before any [*237 execution shall issue as aforesaid, the president of the bank shall make an oath (or affirmation, if he shall be of such religious society as allowed by this state to make affirmation), ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the court from which the execution shall issue; and if the defendant shall dispute the whole, or any part of the said debt, on the return of the execution, the court before whom it is is returned shall and may order an issue to be joined, and trial to be had in the same court at which the return is made; and shall make such other proceedings, that justice may be done in the speediest manner."

A motion was made in the court below to quash an execution, which had been issued against the defendant, under this section, upon the ground, that it was contrary to the constitution of the United States, article 7th of amendments,(*a*) and to the 21st article of the bill of rights of Maryland.(*b*)

*The court below quashed the execution upon these grounds, and [*238 the cause was brought by writ of error to this court.

February 17th. *Key*, for the plaintiff, argued, that the act of congress of the 27th of February 1801, giving effect to the laws of Maryland in that

(*a*) Which declares, that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

(*b*) Which declares, "that no freeman ought to be taken or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land."

part of the district of Columbia, which was ceded to the United States by the state of Maryland, was a re-enactment of those laws, under the exclusive powers of legislation given to congress over the district; and that, consequently, the question of the repugnancy to the local constitution of Maryland could not properly arise. That such summary proceedings, whether of a criminal or civil nature, which were in force, at the time when the constitution of the United States was established, were to be preserved, notwithstanding the 7th article of the amendments to that constitution. That the statute of *Magna Charta*, in England, from which the 21st article of the bill of rights of Maryland is copied, was never supposed to be infringed by the multitude of modern statutes, under which summary convictions for petty offences were had, and the various summary proceedings authorized by the revenue laws, which had also been adopted in this country: but that what was conclusive of the question was, that no person could ever be made liable to the peculiar process given by this act of Maryland, without his own express consent in writing, that the bill or note, drawn or indorsed by him, should be negotiable at the Bank of Columbia; which, taken in connection
*239] with the other provisions of the section, *was equivalent to an agreement, that this summary process should issue against him, in case of non-payment. It was, therefore, a case within the maxim *pro se introducto*. Even after the consent thus given to waive the trial by jury, in the first instance, the party may dispute the demand, on the return of the execution, in which case, in court is to order an issue to be joined, and a trial to be immediately had by jury. So that the whole substantial effect of the provision is, to authorize the commencement of a suit, by an attachment of the person and property of the debtor, instead of the usual common-law process.

Jones, contrà, insisted, that the act of congress of the 29th of February 1801, giving effect to the then existing laws of Maryland, in that part of the district of Columbia which had been ceded to the United States, by the state of Maryland, did not extend to such acts as are repugnant to the state and national constitutions. The bill of rights of Maryland limits the legislative powers of the assembly of Maryland. By the third article of that bill of rights, the right of trial by jury is secured in all cases at common law, and the same right is secured by the seventh amendment to the constitution of the United States, in all cases at common law above the value of twenty dollars. The consent of the party that his paper should be negotiable at the bank, was by no means equivalent to an agreement, that this summary process of execution, before judgment, inverting the
*240] just and natural order of judicial proceedings, *should be issued against him. Nor could the party thus consent, prospectively, to renounce a common-law right. As a stipulation in a policy of insurance, not to sue, but to abide by the award of arbitrators, will not deprive the courts of common law of their ordinary jurisdiction, so neither will the consent of the party thus given, deprive him of his right to a trial by jury. But even supposing the process were in other respects regular, the act under which it is issued does not empower the clerk of the circuit court of the district of Columbia to issue it. It is conferred, by the letter of the statute, upon the clerks of the general court, or the county court, and no provision is made in the act of congress of the 27th of February 1801, for vesting the

same powers in the clerk of the circuit court of the district, and for giving to that court the same jurisdiction over the case which the state court of Maryland previously had.

Martin, contrà, was stopped by the court.

February 22d, 1819. JOHNSON, Justice, delivered the opinion of the court.—In this case, the defendant contended, that his right to a trial by jury, as secured to him by the constitution of the United States, and of the state of Maryland, has been violated. The question is one of the deepest interest; and if the complaint be well founded, the claims of the citizen on the protection of this court are peculiarly strong.

The 7th amendment of the constitution of the United States is in these words: *"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of the trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law." The 21st article of the declaration of rights of the state of Maryland, is in the words of *Magna Charta*. "No freeman ought to be taken or imprisoned, &c., or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land." [*241

The act by which this bank is incorporated, gives a summary remedy for the recovery of notes indorsed to it, provided those notes be made expressly negotiable at the bank, in their creation. This is a note of that description; but it is contended, that the act authorizing the issuing of an execution, either against the body or effects of the debtor, without the judgment of a court, upon the oath and demand of the president of the bank, is so far a violation of the rights intended to be secured to the individual, under the constitution of the United States, and of the state of Maryland. And as the clause in the act of incorporation, under which this execution issued, is express as to the courts in which it is to be executed, it is further contended, that there is no provision in the law of congress for executing it in this district.

We readily admit, that the provisions of this law are in derogation of the ordinary principles of private *rights, and, as such, must be subjected to a strict construction, and under the influence of this admission, will proceed to consider the several questions which the case presents. [*242

The laws of the state of Maryland derive their force, in this district, under the first section of the act of congress of the 27th of February 1801. But we cannot admit, that the section which gives effect to those laws, amounts to a re-enactment of them, so as to sustain them, under the powers of exclusive legislation, given to congress over this district. The words of the act are, "the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States." These words could only give to those laws that force which they previously had in this tract of territory under the laws of Maryland; and if this law was unconstitutional in that state, it was void there, and must be so here. It becomes, then, unnecessary to examine the question, whether the powers of congress be despotic in this district, or whether there are any, and what, restrictions imposed upon it, by natural reason, the principles of the social compact, or constitutional provisions.

Was this act void, as a law of Maryland? If it was, it must have become so, under the restrictions of the constitution of the state, or of the United States. What was the object of those restrictions? It could not have been to protect the citizen from his own acts, for it would then have operated as
*243] a restraint upon his rights; it must have been against the acts *of others. But to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration; such are stipulation bonds, forthcoming bonds, and contracts of service. And it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note negotiable at the Bank of Columbia, the debtor chose his own jurisdiction; in consideration of the credit given him, he voluntarily relinquished his claims to the ordinary administration of justice, and placed himself only in the situation of an hypothecater of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of that court subjects him to personal coercion. It is true, cases may be supposed, in which the policy of a country may set bounds to the relinquishment of private rights.[1] And this court would ponder long, before it would sustain this action, if we could be persuaded, that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection. But a power is reserved to the judges, to make such rules and orders, "as that justice may be done;" and as the possession of judicial power imposes an obligation to exercise it, we flatter ourselves, that in practice, the evils so eloquently dilated on by the counsel do not exist.
*244] And if *the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable, that he cannot dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been, that "the trial by jury shall be preserved," it might have been contended, that they were imperative, and could not be dispensed with. But the words are, that the right of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducto*, and the benefit of it may, therefore, be relinquished.[2] As to the words from *Magna Charta*, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost, he has voluntarily relinquished, and the trial by jury is open to him, either to

[1] A prospective waiver of the benefit of the exemption law, is void. Kneettle *v.* Newcomb, 22 N. Y. 249. So is a prospective waiver of the benefit of a law exempting wages from attachment. Firmstone *v.* Mack, 49 Penn. St. 387. And of the right to recover back usurious interest. Bosler *v.* Rheem, 72 Id. 54.

[2] See Baker *v.* Braman, 6 Hill 47.

arrest the progress of the law, in the first instance, or to obtain redress for oppression, if the power of the bank has been abused. The same answer is equally applicable to the argument founded on the third article of the Maryland constitution.

In giving this opinion, we attach no importance to *the idea of this being a chartered right in the bank. It is the remedy, and not the right; and, as such, we have no doubt of its being subject to the will of congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is inalienable, so as to bind subsequent legislatures. This subject came under consideration in the case of *Young* v. *Bank of Alexandria*, 4 Cranch 384, and it was so decided. [*245

The next question is, whether the courts of this district are empowered to carry into effect the summary remedy given to the bank in this case? The law requires the application for process to be made to the clerk of the general court, or of the county court for the county in which the delinquent resides, and obliges such clerk to issue the execution, returnable to the court to which such clerk is attached. Unless, therefore, the clerk of this district is vested with the same power, and the courts with jurisdiction over the case, the bank would not have the means of resorting to this remedy.

The third section of the act of February 1801, does not vest in the courts that power. It only clothes the courts and judges of this district with the jurisdiction and powers of the circuit courts and judges of the United States. But we are of opinion, that this defect is supplied by the fifth section of the same act, taken in connection with the fifth *section of the act of March 3d, 1801. By the former section, the courts of the district are vested generally with jurisdiction of all causes in law and equity; and, by the latter, the clerks of the circuit court are required to perform all the services then performed by the clerks of the counties of the state of Maryland. Among those services is that of instituting a judicial proceeding in favor of this bank, and the return of that process is required to be to the court with which such clerk is connected. That court has jurisdiction of all cases in law arising in this district, and thus the suit is instituted by the proper officer, by writ returnable to a court having a jurisdiction communicated by terms which admit of no exception. [*246

Upon the whole, we are of opinion, that the law is constitutional, and the jurisdiction vested in the courts of the district; and therefore, that the judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

United States *v.* Rice.

Effect of conquest by enemy.

By the conquest and military occupation of a portion of the territory of the United States, by a public enemy, that portion is to be deemed a foreign country, so far as respects our revenue laws.[1]

Goods imported into it, are not imported into the United States; and are subject to such duties only as the conqueror may impose.

*247] *The subsequent evacuation of the conquered territory by the enemy, and resumption of authority by the United States, cannot change the character of past transactions; the *just postliminii* does not apply to the case; and goods previously imported do not become liable to pay duties to the United States, by the resumption of their sovereignty over the conquered territory.

Error to the Circuit Court of Massachusetts. This was an action of debt, brought by the United States against the defendant, upon a bond for the penal sum of $15,000, dated the 17th of April 1815, with the following condition:

The condition of this obligation is such, that if the above-bounden Henry, Rufus and David, or either of them, or either of their heirs, executors or administrators, shall and do, on or before the 17th day of October next, well and truly pay, or cause to be paid, unto the collector of the customs for the district of Penobscot, for the time being, the sum of $7500, or the amount of the duties to be ascertained as due and arising on certain goods, wares and merchandises, entered by the above-bounden Henry Rice, as imported into Castine, during its occupation by the British troops, as *per* entry, dated this date, then the above obligation to be void, otherwise, to remain in full force and virtue. *Oyer* of the condition being had, the defendant pleaded as follows:

That before the time of the making of the supposed writing obligatory, to wit, on the 18th of June, in the year of our Lord 1812, war was declared by the congress of the United States, to exist between the United Kingdom of Great Britain and Ireland, and the dependencies thereof, and the said

*248] United States and their territories, *and war and open hostilities existed, and were carried on between the said United States and the said United Kingdom of Great Britain and Ireland, and the dependencies thereof, from the said 18th of June, until the 17th of February, in the year of our Lord 1815, on which said last-mentioned day, a treaty of peace and amity between the said United States and the king of the said United Kingdom, was accepted, ratified and confirmed. And the said Henry further says, that during the continuance of such war and hostilities as aforesaid, and before the making of the said supposed writing obligatory, to wit, on the 1st of September, in the year of our Lord 1814, the said king of the said United Kingdom, in prosecution of said war against the said United States, did, with a naval and military force, and in a hostile manner, attack, subdue, capture and take possession of the town and harbor of Castine, situated in the district of Maine, and continued to hold the exclusive and undisturbed possession of the same, by a naval and military force, and in a hostile manner, and secured his said possession by muniments and military works, and

[1] United States *v.* Hayward, 2 Gallis. 485.

had and exercised the exclusive control and government thereof, from the day last aforesaid, continually, until the said ratification of the treaty aforesaid. And immediately after the capture of said town and harbor, and before the importation of the goods and merchandises in the condition of said writing mentioned, the said king of the said United Kingdom caused a custom-house, or excise office, to be established at said Castine, and appointed a collector of the customs there, who thereupon entered *upon the discharge of the duties of his said office, and so continued to exercise [*249 the powers and discharge the duties of said office, during all the time that the said town and harbor were so possessed as aforesaid, by the military and naval forces of the said king. And the said Henry further says, that afterwards, and while the said town and harbor were so held and possessed by the military and naval forces aforesaid, and were under the control and government of the said king, to wit, on the 1st of January, in the year of our Lord 1815, the goods and merchandises in the condition of said supposed writing obligatory mentioned, were purchased by Thomas Adams, Samuel Upton and Greenleaf Porter, who were, then and there, merchants, resident and domiciled in said Castine, and there trading under the name and firm of Upton & Adams, having been citizens of said United States, resident in Castine, and there trading under said firm, before and at the time of said occupation, and still continuing to reside and trade in said Castine, and said goods were imported into the said town of Castine, by them the said Thomas, Samuel and Greenleaf, and were by them duly entered in the custom-house, or excise office, so established as aforesaid in said Castine, and the duties thereon were paid to said collector, so appointed as last aforesaid. And the said Henry further says, that at the time of the purchase and importation aforesaid, and during all the time that the said town and harbor were so held and possessed as aforesaid, the said Thomas, Samuel and Greenleaf were inhabitants of the said town of Castine, and domiciled and carrying on *commerce in said town, under the protection, government and authority of the said king. And the said Henry further avers, that [*250 after the said goods and merchandises were so imported as aforesaid, after the entry thereof with the collector of the district of Penobscot, as hereinafter mentioned, and the making and executing of the said supposed writing obligatory, to wit, on the 27th of April, in the year of our Lord 1815, in pursuance of the said treaty so made and ratified as aforesaid, the said town of Castine was evacuated by the troops and forces of said king, and possession thereof was taken by the said United States. And he further avers, after the ratification of the treaty aforesaid, and after hostilities had ceased between the said United States and the said United Kingdom and its dependencies, to wit, on the 15th day of April, in the year of our Lord 1815, at Castine, to wit, at said Boston, the said Thomas, Samuel and Greenleaf, for a valuable consideration, then and there paid to them by the said Henry, bargained, sold and delivered to him, the said Henry, the goods and merchandises aforesaid, in the condition of said supposed writing obligatory mentioned, the same being then in said Castine. And he further avers, that after the making and ratification of the treaty aforesaid, and after the bargain, sale and delivery aforesaid, to wit, on the 17th of April, in the year last aforesaid, at Castine, to wit, at said Boston, Josiah Hook, then, and ever since, collector of the customs of the said United States for the

district of Penobscot, in which said district the said town of Castine is contained, acting under color of the authority *of the said United States, *251] and of his said office of collector, demanded and required of the said Henry, to enter the said goods and merchandises with him at his office in said Castine, and to pay, or to secure, to the said United States, the same duties thereon, as though they had been imported into the said United States, from a foreign port or place, on the said last-mentioned day, in a ship or vessel not of the United States, and then and there threatened to seize and detain said goods and merchandises, and thereby to deprive the said Henry of all use and benefit thereof, unless he would immediately pay or secure to the United States such duties thereon as aforesaid. Whereupon, to prevent the seizure and detention of said goods and merchandises by said collector, and the losses and damages that would have ensued thereon, and that he, the said Henry, might, without any lawful interruption or molestation by said collector, retain and dispose of said goods and merchandises, for his use and benefit, he, the said Henry, then and there entered the said goods and merchandises with the said collector, in the said custom-house at Castine, and in pursuance of the demand and requirement aforesaid, of said collector, sealed and delivered the said supposed writing obligatory, with said condition annexed, to said collector. And the said Henry avers, that the goods and merchandises mentioned in the said condition are the same which were imported into the said port and town of Castine, while the said port and town were in the possession, and under the control and government of the said king, and which were *entered at the said custom-house *252] there, and not other or different. And that the same goods and merchandises, at the time of the importation aforesaid, and thence continually, until the sale and delivery thereof, in manner aforesaid, to the said Henry, were in the possession, and subject to the control and disposal of the said Thomas, Samuel and Greenleaf, and from the time of the sale and delivery aforesaid, until and at the time of making and executing the said supposed writing obligatory, were in the possession, and subject to the control and disposal of the said Henry, at Castine, to wit, at said Boston. By means whereof, the said goods, wares and merchandises, were not, at the time of entering the same with the said Hook, or at any time before or since, goods, wares or merchandises brought into the said United States from any foreign port or place, nor upon which any sum or sums of money whatsoever, were then and there due and arising, or payable to the said United States for duties, and this he is ready to verify. Wherefore, he prays judgment," &c.

There was a second plea, not varying materially from the first. To these pleas, the attorney for the United States demurred generally, and the defendant joined in demurrer. Judgment was rendered for the defendant in the circuit court, and the cause was brought by writ of error to this court.

February 19th. The cause was argued by the *Attorney-General*, *253] *for the United States, and by *Webster*, for the defendant.(*a*)

(*a*) He cited Grotius, *de Jure Belli ac Pacis*, lib. 2, ch. § 5, *et seq.*; Id. c. 6, § 4; Id. lib. 3, c. 9, § 9, 14; Puffendorf, by Barbeyrac, lib. 7, c. 7, § 5; Id. lib. 8, c. 11, § 8; Bynkershoek, Q. J. Pub. lib. 1, c. 6, 16, Du Ponceau's Trans. 46, 124; Voet, ad Pandect., lib. 39, tit 4, No. 7, *De Vectigalibus;* Id. lib. 19, tit. 2, No. 28; Id. lib. 49, tit. 15,

United States v. Rice.

February 22d, 1819. STORY, Justice, delivered the opinion of the court. —The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February 1815. During this period, the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and among others, admitted the *goods upon which duties are now demanded. These [*254
goods remained at Castine, until after it was evacuted by the enemy; and upon the re-establishment of the American government, the collector of the customs, claiming the right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States.

The subsequent evacuation by the enemy, and resumption of authority by the United States, *did not, and could not, change the character [*255
of the previous transactions. The doctrines respecting the *jus post-liminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable, at the time of importation, is clear, from what has already been stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been, if Castine had been a foreign territory, ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say, that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable.

No. 1; United States *v.* Hayward, 2 Gallis. 501; The Fama, Rob. 186; The Foltina, Dods. 450; 30 Hogsheads of Sugar, 9 Cranch 191; Reeves' Law of Ship, 98 *et seq.*; United States *v.* Vowell, 5 Cranch 368; United States *v.* Arnold, 1 Gallis. 348; s. c. 9 Cranch 106; Empson *v.* Bathurst, Winch 20, 50; Winch, Entries, 334, citing Poph. 176; s. c. Hutton 52; Com. Dig., Officer, H.

The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed, with costs.

Brown *et al.* v. Gilman.

Lien for purchase-money.

The scrip or certificate holders, in the association called the New England Mississippi Land Company, hold their shares under the company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual sub-purchasers, under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; these titles being in fact, now vested in the trustees of the New England Mississippi *Company itself, as part of its common stock, and not in the individual holders.

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The equitable lien of the vendor of land, for unpaid purchase-money, is waived, by any of the parties showing that the lien is not intended to be retained, as by taking separate securities for the purchase-money.[1]

An express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent.

Where the deed itself remains in escrow, until the first payment is made, and is then delivered as the deed of the party, and the vendor consents to rely upon the negotiable notes of the purchaser, indorsed by third persons, for the residue of the purchase-money, this is such a separate security as extinguishes the lien.

Gilman *v.* Brown, 1 Mason 191, affirmed.

Appeal from the Circuit Court of Massachusetts. This cause was by consent heard upon the bill, answer, and exhibits in the case. The material facts were these:

In the month of January 1796, sundry persons, and among them William Wetmore, purchased of the agents of certain persons in Georgia, called the Georgia Mississippi Company, then in Boston, a tract of land, then in the state of Georgia, and now in the Mississippi territory, estimated to contain 11,380,000 acres, at ten cents per acre; which tract the Georgia Mississippi Company had purchased of the state of Georgia, and had received a grant thereof in due form of law. The conditions of the purchase were, that the purchase-money should be paid as follows, viz., two cents thereof on or before the first day of May 1796; one cent more, on or before the first day of October 1796; two and a half cents more, on or before the first day of May 1797; two and a half cents more, on or before the first day of May 1798; and the remaining two *cents, on or before the first day of May 1799. The whole of the purchase-money was to be secured by negotiable notes of the several purchasers, with approved indorsers, to be made payable to Thomas Cumming, president of the Georgia Mississippi Company, or order, payable at the bank of the United States, at Philadelphia, or at the branch bank at Boston, and to be delivered to the agents, upon the execution of the deed of conveyance by them. It was further agreed, that the deed, when executed, should be placed in the hands of George R. Minot, Esq., as an escrow, to be delivered over by him to the grantees, upon the first pay-

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[1] See Bayley *v.* Greenleaf, 7 Wheat. 46.

ment of two cents, payable in May 1796, for which first payment, and for that only, the purchasers agreed to hold themselves jointly responsible.

Accordingly, a deed of conveyance was executed by the agents, dated the 13th day of February 1796, to certain grantees named by the purchasers, to wit, William Wetmore, Leonard Jarvis and Henry Newman, in trust for the purchasers; and the same was duly placed in the hands of Mr. Minot, as an escrow, and negotiable notes, with approved indorsers, were duly delivered to the agents, by all the purchasers, for their respective shares of the purchase-money. And afterwards, the first payment of two cents having been satisfactorily made to the agents, the said deed was, with their consent, delivered over to the grantees, as an absolute deed; and a deed of confirmation thereof was, afterwards, in February 1797, duly executed and delivered to the grantees by the Georgia Mississippi Company.

After the purchase, and before the delivery of the deed, *the purchasers formed themselves into an association by the name of the [*258 New England Mississippi Land Company, and executed sundry articles of agreement, and among other things, therein agreed, that the deed of the purchase should be made to Jarvis, Newman and Wetmore, as grantees as above stated; (art. 2d) that they should execute deeds to the several original purchasers for their proportions in the lands, but should retain these deeds, until the purchasers should sign and execute the articles of association; and should also execute a deed of trust, to certain trustees, as provided for in the articles, of such their respective shares in the purchase; (art. 3d) that the several purchasers should execute a deed of trust to Jarvis, Newman and William Hull, of their respective shares in the purchase to hold to them and the survivor of them in trust, to be disposed of according to the articles; (art. 4th) that the business of the association should be managed by a board of directors, who were to have full power and authority to sell and dispose of the whole, or any part of the property of the company, and to pay over to their respective proprietors their proportions of the money received from any and every sale, &c.; (art. 8, 16, 20) that upon receiving a deed from any purchaser, according to the tenor of the articles, the trustees were to give to each proprietor a certificate, in a prescribed form, stating his interest in the trust, and that he should hold it according to the articles of the association; which certificate was recorded in the company's books, and was to be "complete evidence to such person of his right in said purchase," and was *to be transferrible by indorsement; and upon a record of the transfer in the company's books, the transferree was to be entitled to vote [*259 as a member of the company. The share of Mr. Wetmore in the purchase was 900,000 acres. He paid the two cents per acre in cash; and of the notes given by him for the purchase-money, $40,000 were paid by Mrs. Sarah Waldo, his indorser, and the residue, $45,000, still remained unpaid. Mr. Wetmore received his certificates from the trustees for his whole purchase; and having sold or conveyed 500,000 acres, he afterwards conveyed the remaining 400,000 acres to Robert Williams, to whom certificates for that amount were duly issued by the trustees, three of which certificates, each for 20,000 acres, duly indorsed by said Williams, came into the plaintiff's, Mrs. Gilman's, hands, for a valuable consideration; and the assignment thereof having been duly recorded in the company's books, she was admitted, and had always acted as a member of the company.

From causes well known to the public, the New England Mississippi Land Company never obtained possession of the tract of land so conveyed to them.(*a*) On the 31st of March 1814, congress passed an act, entitled, "an act providing for the indemnification of certain claimants of public lands in the Mississippi territory." By this act, and other subsequent acts amending the same,(*b*) it was provided, that the claimants of the lands
*260] might file in *the office of the secretary of state, a release of all their claims to the United States, and an assignment and transfer to the United States of their claim to any money deposited or paid into the treasury of Georgia, such release and assignment to take effect, on the indemnification of the claimants, according to the provisions of the act. Commissioners were to be, and were, accordingly, appointed under the act, who were authorized to adjudge and determine upon the sufficiency of such releases and assignments, and also to "adjudge and determine upon all controversies arising from such claims so released as aforesaid, which may be found to conflict with, and to be adverse to each other." And the sum of $1,550,000, to be issued in public stock, was appropriated by the act, to indemnify the claimants, claiming in the name of, or under, the Georgia Mississippi Company. The New England Mississippi Land Company duly executed the release and assignment, required by the act of congress; and presented the claims of the whole company before the commissioners. The commissioners awarded the company the sum of $1,083,812 in stock, certificates for which were duly issued, under the act of congress, and received by the treasurer of the company. A further claim was made for the whole amount of the original share of Mr. Wetmore, but the board of commissioners decided, that the Georgia Mississippi Company had a lien in equity on the land sold and conveyed to said Wetmore, for the purchase-money due and unpaid by said Wetmore, and that the indemnity under the act of congress
*261] should follow that lien, and be awarded to said *Georgia Mississippi Company to the amount thereof. And inasmuch as the said Sarah Waldo was the holder of certain certificates issued by said trustees, on account of said Wetmore's original purchase, the commissioners further awarded, that the sum of $40,000 of the purchase-money (which had been paid or satisfied by her for said Wetmore, on her indorsement) should be applied first to make good the scrip or certificates so issued to her; and that if there was any surplus, after making her scrip or certificates good, such surplus could not be applied to the scrip or certificates held under Robert Williams, who did not become the assignee of the said Wetmore, until after the said sum was paid. And the commissioners further decided, that the certificates, issued by the trustees on account of any of the original purchasers, who failed to make payment of the purchase-money to the Georgia Mississippi Company, were bad, and that the parties claiming under them must lose their indemnity under the act of congress. By this award of the commissioners, the claim of the New England Mississippi Land Company, for the amount of the share of the plaintiff, was completely excluded. But the plaintiff claimed her share of the stock actually received, as a proprietor

(*a*) See the history of this case in Fletcher *v.* Peck, 6 Cranch 89, and in the public documents of Congress, 1809.

(*b*) Act of 23d of January 1815, ch. 706; Act of 3d of March 1815, ch. 778.

in the New England Mississippi Land Company, notwithstanding the award of the commissioners, and to establish this claim, the present suit was brought; and in her bill she averred, that she was a *bonâ fide* purchaser, for a valuable consideration, without notice of the non-payment of the purchase-money *by Mr. Wetmore, which averment was not denied by the answer. The court below decreed, that the complainant was entitled to the relief she claimed, and the cause was brought by appeal to this court. [*262

February 13th. *Jones*, for the appellants, argued, that the decision of the commissioners was correct in principle. The property acquired by the New England Company, under their purchase from the Georgia Company, was not a legal, but a mere equitable interest, unassignable at law. Even if the Georgia Company had a legal estate, their deed to the New England Company does not pass such estate, according to the local law of Georgia; it never having been acknowledged, proved and recorded. It amounted only to a covenant to stand seised to uses, an agreement to sell, which a court of equity would enforce. The rescinding act of Georgia has a double effect; one to annul the contract; the other to render all deeds conveying the property incapable of being recorded. It is only as to the first effect that the court has pronounced, or could pronounce, the act to be unconstitutional and void. The states have an unquestionable right to regulate the mode of conveying real property and the rule of evidence as to land titles. Even supposing the trustees to have acquired a legal estate, the *cestuis que trust* have acquired an equitable interest only. The claim of the vendor for unpaid purchase-money is the prior equity, which must be preferred. If the subsequent purchaser acquires a mere equitable interest, *he is entitled to no notice of the vendor's lien. The assignee of a *chose in action*, which is not assignable at law, has a mere equitable interest, and takes subject to the same equity as the assignor. Finch 9, 34; *Davies* v. *Austin*, 1 Ves. jr. 247; *Coles* v. *Jones*, 2 Vern. 692; Ibid. 765; 1 Ves. sen. 123; 1 Bro. C. C. 302; *Mackreth* v. *Symmons*, 15 Ves. 329. But even if notice be necessary, the lien of the vendor is sustainable, because there was notice either actual or constructive, and notice to the trustees of the New England Company, was notice to the individuals whom they represented. Sugd. on Vend. 492, 498; *Mertins* v. *Jolliffe*, Ambl. 311. But all discussion on this point is cut short by the well-established principle, that the purchaser who sets up the want of notice must positively deny the notice in her plea, and swear to it. Sugd. on Vend. 510–13. Here, the pleadings, so far from denying notice, impliedly admit it; and the rule of presumption against the party omitting to deny notice, is to be applied *à fortiori* in a case like the present, where the person insisting on the want of notice is the party plaintiff. Nor has there been in this case any waiver of the equitable lien for the purchase-money. All the facts of the case repel the presumption of a waiver of the lien. The notes, with approved indorsers, taken from the individual purchasers, cannot furnish such a presumption. The case of *Fawell* v. *Heelis*, Ambl. 734; 3 Bro. C. C. 422, n., which will be relied on to support this position, has been repeatedly overruled. Sudg. on Vend. 252, *et infra*. *The taking of personal security is not considered as a waiver of the lien. *Hughes* v. *Kearney*, 1 Sch. & Lef. 132; *Mackreth* v. *Symmons*, 15 Ves. 329; *Grant* v. *Mills*, 2 Ves. & B. 306; *Elliot* v. *Edwards*, 3 Bos. & Pul. 181. It is not [*263 [*264

necessary to prove affirmatively the intent to retain a lien. It is a natural equity ; and he who would repel it must show that the vendor agreed to rely on the personal security, and to abandon the lien. *Frost* v. *Beekman*, 1 Johns. Ch. 288 ; *Garson* v. *Green*, Ibid. 308 ; *Mackreth* v. *Symmons*, and the cases there cited, 15 Ves. 329. As to the *lex loci* of Massachusetts, which does not recognise the equitable lien on land for unpaid purchase-money, it has nothing to do with the question ; for the record does not show that the deed was executed in that state ; and even if it did, the *lex loci rei sitæ* of Georgia must govern the case, according to a well-known rule. But even supposing the award of the commissioners to be erroneous, it is still conclusive upon the parties. The commissioners had jurisdiction of the subject-matter, under the act of congress by which the board was established, to determine upon all controversies arising from adverse claims to these lands. There is no analogy between this claim, and the lien of a judgment. It is a real interest in the land ; an equitable mortgage ; a charge upon it, which descends, and is assigned with it. *Cator* v. *Bolingbrook*, 1 Bro. C. C. 302 ; Ibid. 424 ; *Pollexfen* v. *Moore*, 3 Atk. 272. The decision of the commissioners, then, has the force of *res judicata*.

*265] *Amory*, contrà, insisted, that Mrs. Gilman was not the assignee of Mr. Wetmore, and did not hold his title. She could not be an assignee, without a privity, either in fact or in law, which did not exist in this case. The intention of the associates, from the beginning, was to render the certificates of the trustees the only evidence of the title ; for which purpose, the legal title was vested in the trustees, and a new title, in all the property, was derived from them. The certificate possessed by Mrs. Gilman does not contain the name of Wetmore, nor was the certificate originally issued in his name ; it could not have expressed a trust upon the portion, or title, acquired by him, and conveyed to the trustees ; but such a certificate must have expressed a general interest, or title, pervading the whole land. Inasmuch as the trustees derived their title, not from Wetmore only, but from different sources, it must be presumed and intended, that their certificates were to operate generally on all the right and title which they possessed, without reference to the mode of acquirement. If Mrs. Gilman, or any holder of certificates, was obliged to search into the title, this estate would be attended with all the consequences and incidents of other titles. But that difficulty was expressly intended to be avoided by the 12th art. of association, which declares, that such certificate shall be complete evidence ; thereby announcing to any purchaser, that the common rules of real property were dispensed with. Shall the trustees and associates now be permitted, contrary to their express stipulation, to depart from this rule of
*266] property, which they *themselves created, and thus entrap a *bonâ fide* purchaser, without notice ? This association was not incorporated ; but the parties intended, so far as they could by law, to give it those facilities, and in some decree, to convert this real estate into personal estate. The title at law was to vest in the trustees, until *bonâ fide* sales of the land were actually made. It is the proceeds of such sales only, or money acquired therefrom, that is assured to the holders of the certificates. The trustees and original purchasers undertook to examine each other's title, and precluded all further inquiries in relation to it. Wetmore gave a quit-claim

deed only; the quality of his title, the associates or trustees could judge of, of which they had as much knowledge as he had; and such deed of quit-claim, whether it conveyed a good or a bad title, constituted a good consideration for the compact with the associates and trustees.

If the doctrine of lien for the purchase-money, without mortgage, obtains in Georgia; the contract being made in Massachusetts, where the intention of both parties must be considered as constituting the contract, the laws of Massachusetts ought to construe such a contract, in preference to those of Georgia. We contend, that this doctrine of lien is only a creature of equity, and refers only to such estates or rights of real property as are especially recognised by that tribunal, and which do not derive their support from the ordinary rules of law. The title, in order to be what is commonly denominated equitable, must be such a one as is not recognised by law; such as the assignment of a *chose in action*, *which cannot [*267
be assigned by law; or the title must be equitable, from the inefficient mode adopted for its transfer, such as the conveyance of real estate by an instrument without seal, or by an executory contract. The conveyance of land, in this case, did not pass an equitable title merely; the cases of *Fletcher* v. *Peck*, 6 Cranch 89, and *Green* v. *Liter*, 8 Ibid. 229, show, that, notwithstanding the Indian title be not extinguished, the freehold and seisin may be transferred; and in this case, the most solemn deeds and instruments, duly acknowledged, were adopted for the conveyance of the title; and it is sustained by every legal form.

Even in courts of equity, this lien is only raised by implication; and where other circumstances resist this implication, showing that the parties did not mean to rely on the estate sold for security, the lien is waived. This transaction is filled with circumstances repugnant to such implication. The design of the parties to sell the land, instead of cultivating the same, whereby to pay the notes, expressly excludes the idea of such a lien, as no man would have purchased, who knew that such a note was given for the first purchase, without seeing that his money was appropriated to extinguish the notes; and the strongest circumstance, to repel such a lien for the consideration, consists in this, that the sum of five dollars only is expressed as the pecuniary consideration. Any purchaser, therefore, making inquiry concerning the purchase-money's being paid or not, is at once checked in the pursuit; and no *case of lien for the purchase-money, can be [*268
shown, where the sum is not expressed in the deed of sale. It is also a doctrine in equity, that the vendee has a lien on the land, in case the title be defective, and proper conveyance not made to him; thus making the right reciprocal. But in this deed, express provision is made, that the consideration-money shall not be refunded by the vendor, for any cause whatsoever; thus essentially distinguishing the present case from those in which such lien is maintained.

It is said, that the commissioners, having a right to decide upon adverse titles, here conclusively decided on our claims; but the adverse titles or claims, on which they were to decide, were adverse claims to the stock from the treasury of the United States, and between such persons as released their claims to the United States. Mrs. Gilman did not release any claim to the United States, or demand any money from the treasury; of course, her rights or claims could not be adjudged by the commissioners; her

claim is not on the government, but on her associates and trustees. The commissioners were bound to decide, to whom the money or stock from the treasury should be paid; not the use the receiver should afterwards make of that money, or the obligations he might be under in relation to it. Decrees affect only those who are parties to the suit; and an opinion incidentally given by the commissioners, ought not to control the plaintiff's right.

The *Attorney-General*, on the same side, contended, that no such lien, as
*269] that insisted upon, existed, *even as to Mr. Wetmore's title; much less was Mrs. Gilman's affected by it. The question whether the legal title passed from the Georgia Company to the New England Company, cannot be raised in the appellate court; because, so far from being raised in the court below, the pleadings admit the fact that the legal title did pass, and the cause was argued upon that ground in the court below. But supposing it were otherwise; as a *bonâ fide* purchaser, without notice, Mrs. Gilman cannot be affected with the equitable lien for purchase-money unpaid by the original vendee, because a distinct personal security was taken, and all the other circumstances of the case combine to show, that the original vendors did not mean to rely on the lien.

It is worthy of observation, that this doctrine of lien for unpaid purchase-money, which has grown to its present extravagant height, seems to have originated in the inaccuracies and mistakes of some of the earlier chancery reporters. The first case is that of *Chapman* v. *Tanner*, 1 Vern. 267, which is erroneously reported. According to the reporter, it was the case of a bankrupt, who purchased land, and the purchase-money not being paid, the assignees would have had the vendor come in as a creditor under the commission, for the remainder of his purchase-money: "*Per Cur.*—In this case, there is a natural equity that the land should stand charged with so much of the purchase-money as was not paid; and that without any special
*270] agreement for that purpose." But Lord *Apsley says, "*Chapman* v. *Tanner* (1 Vern. 267), according to the report, is in point; but it appears, by the register's book, that the vendor retained the title deeds till he was paid; the court said, that a natural equity arose, from his having the title deeds in his custody." *Fawell* v. *Heelis*, Ambl. 724. In the case of *Pollexfen* v. *Moore*, 3 Atk. 372 (which is also said, in the last-mentioned case, by Lord Apsley, to be badly reported), the title deeds were also kept back by agreement; and it was impossible for a court of equity to doubt, in either of these cases, that the lien was retained. But it is from them that the doctrine, as now understood, has originated; and even according to the modern cases, it is nothing more than a lien raised by equity on the presumed intention of the parties. Sugd. on Vend. 358.

This presumption, however, may be repelled by evidence of a contrary intention. Among other circumstances to repel this presumption, is the delivering an absolute deed to the purchaser. Although this circumstance may not be considered strong enough to repel the presumption, as between vendor and vendee, it is so, as to a *bonâ fide* purchaser, under the latter, without notice; otherwise, such a deed would be a fraud on the public. In such a case, this circumstance, connected with that of taking a distinct security, must certainly be deemed sufficient to repel the presumed intention to rely on the lien. The rule is accurately laid down by President

PENDLETON. *"The doctrine that the vendor of land not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled, as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land, in the possession of the vendee, or of a purchaser with notice. But if he hath taken a security, or the vendee hath sold to a third person, without notice, the lien is lost." *Cole* v. *Scott*, 2 Wash. 141. It has been much contested in England, whether passing the legal title to the vendee, and taking his bond or note alone, will not defeat the lien. But there has been no case, where, after passing an absolute deed, and taking the security of a third person, the lien has been held still to exist. In *Hughes* v. *Kearney*, 1 Sch. & Lef. 132, the note was that of the vendee merely; and Lord REDESDALE is understood to admit, that taking a distinct security would discharge the lien. *Grant* v. *Mills*, 2 Ves. & B. 306, is also relied on to show that the taking of the security of a third person would not discharge the lien; but the bills of exchange, in that case, were not considered as the security of a third person, but as a mode of payment merely: Sir W. GRANT, distinctly admitting that the security of a third person would repel the lien. In *Elliot* v. *Edwards*, 3 Bos. & Pul. 181, which was a case at law, the point was not decided; and it depended upon its own peculiar circumstances; the surety himself might seem to have stipulated for the lien, by *requiring a covenant against the assignment of the premises, without the joint consent of himself and the vendor. [*272

If further circumstances are necessary, in the present case, to remove the presumtion, that the vendor intended to rely upon the lien, they will be found to exist. Holding back the deed, or what is equivalent, depositing it as an escrow, until after the first payment, has always been considered as indicating the intention to rely upon the lien: and if so, the delivery of the deed, after the first payment was made, equally manifests an intention to relinquish the lien.

The counsel then proceeded to argue, that, from other circumstances and facts in the case, it never could have been the intention of the parties, that the lien should exist. But even supposing the lien did exist, as against Mr. Wetmore, the original purchaser, would it follow the shares, through every variety of modification, into the hands of a remote purchaser, without notice? But it is said, that Mrs. Gilman has not denied notice. Nor could she deny notice in the manner pointed out by the authorities—that is, upon oath, being the party plaintiff. But the same authorities lay down the rule, that if notice is neither alleged by the bill, nor proved, and the defendant by his answer denies notice, the court will not grant an inquiry to affect him with notice. Sugd. on Vend. 512. This rule has more analogy to the present case; for the answer does not charge the plaintiff with notice; and it is denied in the bill. We insist, that where the legal estate has passed from the vendor, a *bonâ fide* purchaser, *without notice, even though he has no deed, will overreach the implied lien for unpaid purchase-money. [*273 Mr. Sugden, after reviewing all the cases, expresses the opinion, that even an equitable mortgage, created by the vendee depositing deeds with a third party, *bonâ fide*, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien for any part of the purchase-money. Sugd. on Vend. 366. Now, a mortgage is a mere

security for a debt, and the same conclusion is much stronger in the case of an absolute purchaser.

But supposing the lien to exist: according to *Frost* v. *Beekman*, 1 Johns. Ch. 288, it only exists to the amount of the consideration expressed on the face of the deed; which, in this case, is only five dollars. And even if it exists to any extent, according to the law of the English court of chancery, that is not the law of this case; the contract being made in Massachusetts, relative to lands in Georgia. It is admitted, that the law of Massachusetts, recognises no such lien; but it is said, that it is not the *lex loci contractûs*, which is to govern, but the *lex loci rei sitæ*; and that the law of Georgia adopts the English principle. We do not deny that the *lex loci rei sitæ* is to govern as to the transfer of real property; but we insist, that the intention of the contracting parties is to be gathered from the law of the place where the contract is made. Admitting, however, that the law of Georgia is to give the rule, it remains to be shown, on the other side, that this peculiar doctrine of the English courts of equity is *adopted in that state. *274]
We insist, we are not concluded by the decision of the commissioners, under the acts of congress, because their power extended only to legal or equitable claims to the lands; such equitable claims as enabled the holder to call for the legal title, and such as conflict with each other; which not being the case here, the commissioners had no jurisdiction to determine this question.

Webster, for the apellants, in reply, insisted, that the title was no better in the plaintiff's hands, than it was in the hands of Mr. Wetmore. The purchaser of an equity must abide by the case of the person from whom he buys. He must take the estate, subject to all incumbrances. Want of notice, or payment of a valuable consideration, will not enable him to raise himself higher than his vendor. Lord Thurlow says, he takes that to be a universal rule. *Davis* v. *Austen*, 1 Ves. jr. 247. See also *Murray* v. *Lilburn*, 2 Johns. Ch. 441; *Redfearn* v. *Ferrier*, 1 Dowl. 50. It is unnecessary to say, whether the commissioners were well-founded in the decision they have pronounced. No fraud or negligence is, at any rate, imputable to the defendants. They have used due diligence, and sought to increase the fund, by obtaining from the commissioners the stock which would have belonged to the original purchase of Wetmore, if his title had been deemed valid. In this they have failed, but without any fault of their own. The commissioners have decreed, that that portion of Wetmore's purchase, which was conveyed to Williams, *through whom the plaintiff derives her title, *275]
is not entitled to any indemnification. They proceed on the ground that the original Georgia vendors had a lien for the purchase-money, and that they, if anybody, the purchase-money not being paid, are entitled to the indemnity provided by the act of congress. That the vendor has in equity a lien for the purchase-money against the vendee, and all purchasers under him with notice, if it be a legal estate; and against all persons purchasing, with or without notice, if it be an equitable estate; could not be denied as a general doctrine. The English cases on this point, are all considered by Lord Eldon in *Mackreth* v. *Symmons*, 15 Ves. 329. There may be a relinquishment of this lien; and the evidence of such relinquishment may result from the nature of the transaction, and the circumstances attending it. How far such evidence existed here, it was the duty of the commissioners to con-

sider. If they have erred in judgment, the consequences of that error ought not to be thrown on the defendants. The stock, which the commissioners were to issue, may be considered as the product of the estate vested in the trustees.

The bill does not complain, that the defendants have injured the plaintiff, by surrendering the estate to the United States. In this, they are admitted to have done precisely what they ought to have done. The complaint is, that a just distribution has not been made of the proceeds. But the plaintiff's estate has produced no proceeds. The *commissioners were empowered by the act to adjudge between adverse claims. They [*276 have decided against the claim of the plaintiff; and it would be manifestly unjust and unreasonable, that, having a bad claim herself, she should partake with others in the benefit of their claims, which are good, unless she clearly proves an agreement to form this sort of partnership. And, indeed, if it were proved, that Wetmore and others agreed to form this partnership, each at the same time covenanting for the title of what he himself brought to the common stock, he could not claim, in equity, a proportionate share of the proceeds of the whole, having broken his own covenant, and the general proceeds being thereby diminished in an amount equal to what he undertook to convey to the trustees. If the plaintiff could recover in this case against the defendants, one of whom is the surviving trustee, that trustee must have his action against Wetmore on the covenants of his deed of trust. But it is not the course in equity, to treat covenants as distinct and independent, but to require of plaintiffs to allege and prove performance, or readiness to perform, on their part. 2 Fonbl. 383. If the land, or its proceeds, have been taken from the trustee by some one, whose title has been adjudged better than that of the *cestui que trust*, is it possible, that the *cestui que trust* can have any claim on the trustee?

The plaintiff relies on the articles of association, which say that the certificate shall be complete evidence of the title. So it may be; but they do not *say what title the holder of the certificate shall be taken to have. [*277 The articles mean no more than that the certificate should be evidence of the transfer. Whatever the vendor could sell, he might assign, by indorsing the certificate. But in this, there is no agreement to assure the title. The certificate itself refers to the articles of association, and the deeds of trust, to show the nature and condition of the property. These articles and deeds prove clearly, that the original purchasers stand on their several distinct purchases, and decline all mutual responsibility. She must, therefore, be taken to have known what she purchased, as the reference in the certificate to the deed and articles, was sufficient to put her on inquiry. Where one has sufficient information to lead him to the knowledge of the fact, he shall be deemed conusant of it. Sugd. on Vend. 498, and cases there cited. Even if her estate had been a legal, and not an equitable interest, this constructive notice would have prevented her from standing in any better condition than those under whom she held.

February 24th, 1819. MARSHALL, Ch. J., delivered the opinion of the court.—The question to be decided is, whether, under all the circumstances of this case, the New England Mississippi Land Company, or Mary Gilman, shall lose the sum awarded by the commissioners to the Georgia Mississippi

Company, in satisfaction for the lien that company was supposed to retain on the lands they sold, for the *non-payment of the notes of Wil- *278] liam Wetmore, given for the purchase-money on his interest in the purchase?

In examining this question, the nature of the contract, the motives of the New England Mississippi Company, and their acts, are all to be considered. The contract was made in January 1796, for 11,380,000 acres of land, lying within the country occupied by the Indians, whose title was not extinguished. The purchase-money, amounting to $1,380,000, was to be divided into five instalments, the first of which, amounting to $113,800, was to be paid on the 1st of May 1796, and the last on the 1st of May 1799. It is obvious, that this purchase could not have been made with a view to hold all the lands. The object of the purchasers must have been to make a profit by reselling a great part of them. Accordingly, we find them making immediate arrangements to effect this object. In February 1796, before the legal title was obtained, the purchasers formed an association, by which it was, among other things, agreed, that the land should conveyed to three of their partners, Leonard Jarvis, Henry Newman and William Wetmore, for the use and benefit of the company. It was also agreed, that seven directors should be appointed, with power to manage their affairs, and after the company should be completely organized, as prescribed in the articles of association, to sell their lands for the common benefit of the proprietors. In addition to this mode of selling the lands themselves, which might be slow in its operation, it was agreed, that each proprietor might transfer his interest, in whole or in part; and to facilitate *this transfer, the whole purchase *279] was divided into 2276 shares, and it was determined, that an assignable certificate should be granted to each proprietor, or to such person as he should appoint, stating the amount of his interest in the company. No certificate was to issue for less than one share.

It is of great importance, to inquire, how far the company pledged itself, to the assignee of this certificate; and how far it was incumbent on him to look beyond the certificate itself, in order to ascertain the interest which it gave him in the property of the company? In pursuing this inquiry, we must look, with some minuteness, into the state of the property, and the articles of association, as well as into the language of the paper which was to evidence the title of the holder. Although the association was formed, before the lands were conveyed, no certificate was to issue, until the legal title in the company should be as complete as it could be made. It was obviously necessary for the purchasers, before they proceeded to sell, to examine well their title, and to use every precaution which prudence could suggest, for its security. This appears to have been done. On the 13th of February 1796, a deed was executed by the Georgia Company, purporting to convey the lands to William Wetmore, Leonard Jarvis and Henry Newman; and afterwards, in February 1797, a deed of confirmation was executed and delivered. By these deeds the Georgia Company certainly intended to *pass, and the New England Company expected to receive, *280] the legal title.

The articles of association direct these trustees to convey the purchased lands to the proprietors, as tenants in common, who are immediately to reconvey them to Leonard Jarvis, Henry Newman and William Hull, in trust, to

be disposed of according to the articles. The certificate granted to each proprietor, for the purpose of enabling him to dispose of his interest, certifies, that he is entitled to the trust and benefit of a certain specified proportion of the property contained in the trust deed, "to hold said proportion or share, to him, his heirs, executors, administrators and assigns, according to the terms, conditions, covenants and exceptions contained in the said deed of trust, and in certain articles of agreement entered into by the persons composing the New England Mississippi Land Company." This certificate purports on its face to be transferrible by indorsement. If it amounted to no more than a declaration, that the holder had a right to sell a specified part of the common property, it would be difficult to maintain, that the company could afterwards charge this part exclusively with a pre-existing incumbrance. But the certificate proceeds further, and declares, that the share or shares, thus transferred, shall be held according to the terms, &c., of the deed of trust, and of the articles of agreement. So far, therefore, as that deed, or those articles, incumber the property, it certainly remains incumbered in the hands of the assignee. To what *extent does either of those instruments affect the case? [*281

The deed from the proprietors to Jarvis, Newman and Hull, recites the grant of the state of Georgia, the conveyance of the grantees to Wetmore, Jarvis and Newman, in trust for the New England Company, the conveyance of those trustees to the members of the company, to hold as tenants in common, according to their respective interests, and adds, that it is found necessary and expedient, that the premises should be conveyed "in trust to Leonard Jarvis, Henry Newman and William Hull, Esquires, to have and to hold the same, subject to all the trusts, provisions, restrictions, covenants and agreements, contained in certain articles of agreement, constituting the New England Mississippi Land Company;" therefore, and in consideration of ten dollars, the parties of the first part, severally "remise, release and for ever quit-claim to the said Jarvis, Newman and Hull, all the interest, &c., which they have, or ever had, or of right ought to have, in the premises, subject, however, to and for the purposes mentioned in the agreement constituting the New England Mississippi Land Company. The parties of the first part, each for himself," and no further, covenant, that the premises are free and clear of all incumbrances, by him made or suffered to be made, and warrant the same against himself and all claiming under him.

A separate conveyance was made by Wetmore, Jarvis and Newman, to John Peck, who conveyed *to Jarvis, Newman and Hull. But these conveyances are not supposed to vary the case. In this deed of trust, each proprietor covenants for his own title, not for that of his copartners. This has been supposed to give notice to the assignee of each certificate issued by the company, that the property conveyed did not constitute a common stock in the hands of the trustees, out of which each holder was to draw in proportion to his interest, as expressed in the face of his title paper; but that the interest of each copartner was limited to the product of his own share, as under the original purchase, and that the holder of every certificate was bound to trace his title through the particular original purchaser under whom he claims, and in whose place he stands. [*282

We do not think the fact will sustain the argument. This deed conveys the estate of each partner to the company, and the covenants it contains

ascertain the extent of each partner's liability for the title it passes. The lands thus conveyed are held by the company, in like manner as if they had been conveyed by persons who were not members of it. The legal title is in the company; the power to sell is in the company; and if it was intended that the right of each individual to dispose of his interest, should depend on the validity of the title he had made, and that the purchaser of such interest took it subject to any incumbrance with which the estate conveyed might have been burdened, previous to its conveyance, it would have been unneces-
*283] sary to make any *provision respecting the sale of such interest. The right of sale is connected with the right of property, and without any regulation whatever, each member would have possessed it, to the extent of his property. The object for granting the certificate seems to have been, to enable each shareholder to sell, unobstructed by those entangling embarrassments which may attend a mere equitable title. This object, in which every member was equally concerned, could not be effected, without giving to each some evidence of his title, which should make it unnecessary for the purchaser to look further, in order to ascertain his interest in the general fund, whatever that fund might be.

The history of the title, as well as the words of the certificate, would confirm this opinion. From its origin, every step of its progress was marked out and controlled by the company. The legal title was, by their order, conveyed to three persons, selected by themselves, and the deed contains no allusion to the interest of other purchasers. By this order also, the title which was then made to the several purchasers, was immediately reconveyed to trustees in whom the company confided, to uses and purposes expressed in certain articles of agreement which the company had formed. They guarded the title against incumbrances from individuals, and this watchfulness was for the double purpose of enabling their agents to sell the lands themselves, for the common benefit, and enabling each member to sell to the best advantage his particular interest in that fund. It was scarcely possible for any individual to have incumbered the title, after it was received by the
*284] first agents *of the company, and against defects in the title conveyed by the Georgia company, the certificate does not profess to engage.

The article of agreement, to which also the certificate refers, explain fully the views of the company. The great object of the association is to sell their lands to advantage; this is too plainly expressed to be mistaken. The words "terms, conditions, covenants and exceptions," contained in the certificate, refer chiefly to provisions respecting the sale of lands, and to others which recognise the absolute control over the property, which each member had ceded to the whole body. It is unnecessary to recite the particular articles which tend to this general result; it is the spirit which pervades the whole association. Only those articles which relate to the certificate need be adverted to. The 11th article divides the whole purchase into 2276 shares. The 12th directs that a transferrible certificate shall be given to each proprietor, prescribes its form, directs it to be recorded, and declares that it shall be complete evidence to such person, of his right in the purchase. No assignee is admitted as a member, to vote in the affairs of the company, until his assignment shall be recorded. The 13th declares, that no certificate shall issue for less than one share, and that the holder of any certificate for a larger quantity, may, at any time, surrender it to the trustees, and

take out others for such quantities as he may choose. The 16th obliges the directors to pay over to the *respective proprietors, their proportions of the moneys received from any and every sale, as soon after [*285 the receipt thereof as may be.

It is not more apparent, that the general object of the association was to promote the sale of their lands, than it is that the particular object of this certificate, and of the articles which relate to it, was to enable every proprietor to avail himself of his individual interest, and to bring it into circulation. On no other principle, can we account for subdividing the stock of the company into such small shares; for issuing the certificate itself; for making it assignable; for declaring that it shall be complete evidence of title to that quantity of interest which is expressed on its face; for enabling every holder, by surrendering his certificate, to divide it as his convenience might suggest; and for declaring that each holder shall receive his proportion of the money arising from the lands which might be sold. All these provisions tend directly to the same object, and are calculated for the single purpose of affording to each member of the company every possible facility in selling his share of the stock. In this operation all were equally interested; every member of the company was alike concerned in removing every obstruction to the free circulation of his own certificate, which could only be done, by making it complete evidence of title; an advantage which, to be acquired by him, must be extended to all. In the particular benefit accruing to each member of the company from this arrangement, a full consideration was received for his joining in it. It is a mutual assurance, in which all the *members pledge themselves for each, that he is really entitled to [*286 sell what he offers for sale.

The articles of agreement, then, strengthen, instead of weakening, the language of the certificate. They prove that the company must have intended to give it all the credit they could bestow on it, and to give to the assignee all the assurance they could give him, that he would stand on the same ground with other members, and was liable to no casualty to which they were not all exposed.

It was scarcely possible, for any member, unless it be one of the original agents, to have eluded the precautions of the company, and have parted with, or incumbered any portion of his estate. But suppose the fact to have happened, and a certificate to have issued, from any accident whatever, to him, for a larger interest than that to which he was really entitled, would an assignee, without notice, have been affected by this error on the part of the company? We think it clear, that he would not. The company has itself undertaken to judge of his title; and for its own purposes, for the advantage of all its members, to certify what that title is. The object and effect of that certificate is to stop inquiry. The company has pledged its faith, that the title under this certificate shall not be questioned. This is not all; the articles require that an assignee shall have his assignment recorded; here is a second confirmation of title.

We find a number of persons associated together for the purpose of purchasing an immense body of land, which they expect to resell upon a profit. *They watch the progress of the title, direct its course, leave no [*287 power to individuals over their individual shares, but keep the whole under the control of the company, until they are perfectly satisfied with the

state in which they have placed it. The legal title is, by their order, vested in three trustees, who are to be controlled by seven directors. Then, in order to enable each proprietor to dispose of any portion of his interest which he may incline to sell, assignable certificates are issued, declaring that the holder is entitled to a specified share of the land. This certificate refers to certain laws of the company, and these laws declare, that such certificate shall be complete evidence of title, that the assignee shall become a member of the company, authorized to vote, on having his assignment recorded in books kept for that purpose. These certificates are offered to the public; confiding to the promise they contain, an individual becomes a purchaser, has his assignment recorded, and is received, without objection, as a member. If any latent defect exists in the title of one of the original purchasers, which was unknown to the company, when the certificate issued, we think the company cannot set up this latent defect against an assignee. The company possessed the means of obtaining full information of all circumstances which could affect the title, so far as information was attainable. They undertook to judge of it, and to assert unconditionally, that the holder of the certificate was entitled to the quantity of interest it specified. However true it may be, that the individual in whose default this defect originated, *might be held accountable for it, we cannot agree that the assignee stands in his place. The company which would set it up against him, has inquired into the title; has, for its own purposes, assured him that it is perfect, and, upon the faith of this assurance, he has purchased. Had he taken an equitable interest in trust, relying upon the faith of the vendor, his equity, it is conceded, would not be better than that of the vendor; but he had relied upon the company. He has mounted up to the source of the equitable title, and is there assured of its goodness. The company can never be permitted to say, that being themselves mistaken, they have imposed innocently upon him; and that, therefore, they will throw the loss from themselves on him.

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If, then, Mr. Wetmore had really, by any act of his, diminished the estate he carried into the common stock, and if the deduction of his share from the sum awarded to the company had been proper, he would have been personally answerable to the company for such diminution; but we do not think this liability passes with the certificate to his assignee without notice. We do not think the company could be permitted to assert against the assignee, the right they might assert against Mr. Wetmore.

But this is not a defect in the title itself, created, voluntarily created, by Mr. Wetmore. It is a still weaker case on the part of the company. A sum of money, equal to the claim of the plaintiff, has been awarded to the Georgia, instead of the New England company, by the commissioners, under the idea, that so much of the original purchase-money *remained unpaid, and that a lien on the lands they sold was still retained by the Georgia company. As this failure was on the part of Mr. Wetmore, the New England company claim the right of subjecting to this loss the shares of Mrs. Gilman, which were derived from certificates issued on the stock of Mr. Wetmore. On the part of Mrs. Gilman it is contended, 1. That this lien did not exist; and if it did, 2. That it affects her only as a member of the company.

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The commissioners determined in favor of the lien, because they consid-

ered the New England company as holding only an equitable estate. The deeds from the Georgia to the New England company certainly purport to pass, and were intended to pass, the legal title. The only objection we have heard to their having the operation intended by the parties, is, that they were not recorded, and that the legislature of Georgia passed an act which forbid their being recorded. But by the laws of Georgia, a deed, though not recorded within the time prescribed by law, remains valid between the parties; and were it even otherwise, it might well be doubted, whether this deed would not retain all the validity it possessed, when executed, since its being recorded is rendered impossible by act of law. Could it even be admitted, that the deeds passed only an equitable estate, it might well be doubted, whether the Georgia company, as plaintiffs in equity, could, under all the circumstances of this case, stand on better ground, than if their deed had operated as they intended it should operate.[1]

*But the court considers the title at law as passing by the deeds [*290
to the New England company, and remaining with them, although those deeds were not recorded. If this opinion be correct, even admitting the law of England respecting the lien of vendors for the purchase-money, after the execution of a deed, to be the law of Georgia, a point which we do not mean to decide, we think it perfectly clear, that no lien was retained, and none intended to be retained, in this case. It must have been well known to the Georgia company, that the purchase was made for the purpose of reselling the lands; and of consequence, that it was of great importance to the purchasers, to have a clear unincumbered title; and the event that the property might pass into other hands, before the whole purchase-money was paid, was not improbable. In the original agreement, an express stipulation is made, that the property shall remain liable for the first payment, but that separate securities shall be taken for the residue of the purchase-money. The deed itself remains an escrow, until the first payment shall be made, and is then to be delivered, as the deed of the parties; after which, the vendors consent to rely on the several notes of the respective purchasers. This is equivalent to a mortgage of the premises, to secure the first payment, and a consent to rely on the separate notes of the purchasers for the residue of the purchase-money. The express contract, that the lien shall be retained to a *specified extent, is equivalent to a waiver of that lien to any [*291
greater extent. The notes, too, for which the vendors stipulated, are to be indorsed by persons approved by themselves. This is a collateral security, on which they relied, and which discharges any implied lien on the land itself for the purchase-money. We think this, on principles of English law, a clear case of exemption from lien.

Could this be doubted, it would not alter the obligation of the New England company to Mrs. Gilman. If they were in the situation of purchasers with notice, it must be with a very ill grace that they set up against her particular interest, after having induced her to perchase, by the assurance that she came into company on equal terms. If they were purchasers without notice, the lien is gone.

We are unanimously of opinion, that the sum deducted from the claim

[1] As the effect of the decision of the board of commissioners, see Brown *v.* Jackson, 7 Wheat. 218.

of the New England company, by the commissioners, is chargeable on the fund generally, not on the share of Mrs. Gilman particularly.

Some doubt was entertained, on the question, whether Mrs. Gilman should recover from the parties to this suit, her proportion of the money received by them, or her proportion, after deducting therefrom, the sum she would be entitled to receive from those members, who obtained an order from the commissioners, by which they received directly, and not through the agents of the company, the sums to which they were entitled, The majority of the
*292] court directs me to say, that in this respect also, the *decree is right, and that the company, or their agents, have the right to proceed against those members for what they have received beyond their just proportion of the whole sum awarded to the company.

Decree affirmed, with costs.(a)

(a) This subject of lien for unpaid purchase-money, is so fully discussed in the opinion of the court below in this case, that the following extract from that opinion, in Mr. Mason's reports, may be useful to the reader.

"The doctrine, that a lien exists on the land for the purchase-money, which lies at the foundation of the decision of the commissioners, as well as of the present defence, deserves a very deliberate consideration. It can hardly be doubted, that this doctrine was borrowed from the text of the civil law;[1] and though it may now be considered as settled, as between the vendor and the vendee, and all claiming under the latter, with notice of the non-payment of the purchase-money, yet its establishment may be referred to a comparatively recent period. Lord ELDON has given us an historical review of all the cases, in Mackreth *v.* Symmons, 15 Ves. 29, from which he deduces the following inferences. 1st. That, generally speaking, there is such a lien. 2d. That in those general cases, in which there would be a lien, as between vendor and vendee, the vendor will have the lien against a third person, who had notice, that the money was not
*293] paid. These two points, he adds, seem to be clearly settled; and the *same conclusion has been adopted by a very learned chancellor of our own country. Garson *v.* Green, 1 Johns. Ch. 308. The rule, however, is manifestly founded on a supposed conformity with the intentions of the parties, upon which the law raises an implied contract; and therefore, it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion. What circumstances shall have such an effect, seems, indeed, to be matter of a good deal of delicacy and difficulty; and the difficulty is by no means lessened, by the subtle doubts and distinctions of recent authorties. It seems, indeed, to be established, that *primâ facie* the purchase-money is a lien on the land; and it lies on the purchaser to show, that the vendor agreed to waive it (Hughes *v.* Kearney, 1 Sch. & Lef. 132; Mackreth *v.* Symmons, 15 Ves. 329; Garson *v.* Green, 1 Johns. Ch. 308); and a receipt for the purchase-money, indorsed upon the conveyance, is not sufficient to repel this presumption of law. But how far the taking a distinct security for the purchase-money shall be held to be a waiver of the implied lien, has been a vexed question.

"There is a pretty strong, if not decisive, current of authority, to lead us to the conclusion, that merely taking the bond, or note, or covenant, of the vendee himself, for

[1] "*Quod vendidi non aliter accipientis quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ulla satisfactione.*" Dig. lib. 18, tit. 1, l. 19. Domat, lib. 1, tit. 2, § 3, l. 1. But this lien was lost, by the civil law, not only by taking a separate security from the purchaser, as a surety or pledge, &c., but also by giving a term of credit to him. For Justinian, after laying down the rule in the Institutes thus, "*Venditæ vero res et traditæ, non aliter emptori acquiruntur, quam si is venditori pretium solverit, vel alio modio ei satisfecerit, veluti expromissore aut pignore dato,*" &c., adds, "*sed si is qui vendidit fidem emptoris sequutus fuerit, dicendum est statim rem emptoris fieri.*" Inst. l. 2, t. 1, *de Rerum Divis.* § 41. Pothier, *De Vente*, No. 322, 323, Pothier's Pandects, tom. 3, p. 107.

the purchase-money, will not repel the lien; for it may be taken to countervail the receipt of the payment usually indorsed on the conveyance. (Hughes *v.* Kearney, 1 Sch. & Lef. 132; Nairn *v.* Prowse, 6 Ves. 752; Mackreth *v.* Symmons, 15 Ibid. 329; Blackburn *v.* Gregson, 1 Bro. C. C. 420; Garson *v.* Green, 1 Johns. Ch. 308; Gibbons *v.* Baddall, 2 Eq. Cas. Abr. 682; Coppin *v.* Coppin, 2 P. Wms. 291; Cases cited in Sugden on Vendors, ch. 12, p. 352, &c.) But where a distinct and independent security is taken, either of property, or of the responsibility of third persons, it certainly admits of a very different consideration. There, the rule may properly apply, that *expressum facit cessare tacitum;* and where the party has carved out his own security, the law will not create another in aid. This was manifestly the opinion of Sir WILLIAM GRANT in a recent case; where he asks, "If the security be totally distinct and independent, will it not then become a case of substitution for the *lien, instead [*294
of a credit given because of the lien?" And he then puts the case of a mortgage on another estate for the purchase-money, which he holds a discharge of the lien, and asserts, that the same rule must hold with regard to any other pledge for the purchase-money. Nairn *v.* Prowse, 6 Ves. 752. And the same doctrine was asserted in a very early case, where a mortgage was taken for a part only of the purchase-money, and a note for the residue. Bond *v.* Kent, 2 Vern. 281. Lord ELDON, with his characteristic inclination to doubt, has hesitated upon the extent of this doctrine. He seems to consider, that whether the taking of a distinct security will have the effect of waiving the implied lien, depends altogether upon the circumstances of each case, and that no rule can be laid down universally; and that, therefore, it is impossible for any purchaser to know, without the judgment of a court, in what cases a lien would, and in what cases it would not, exist. His language is, "If, on the other hand, a rule has prevailed (as it seems to me), that it is to depend, not upon the circumstance of taking a security, but upon the nature of the security, as amounting to evidence (as it is sometimes called), or to declaration plain, or manifest intention (the expression used on other occasions) of a purpose to rely not any longer upon the estate, but upon the personal credit of the individual; it is obvious, that, a purchaser taking a security, unless by evidence, manifest intention, or declaration plain, he shows his purpose, cannot know the situation in which he stands, without the judgment of a court, how far that security does contain the evidence, manifest intention, or declaration plain, upon that point." Mackreth *v.* Symmons, 15 Ves. 329, 342; Austin *v.* Halsey, 6 Ibid. 475.

"If, indeed, this be the state of the law upon this subject, it is reduced to a most distressing uncertainty. But on a careful examination of all the authorities, I do not find a single case, in which it has been held, if the vendor takes a personal collateral security, binding others as well as the vendee, as, for instance, a bond or note, with a surety or an indorser, or a collateral security by way of pledge or mortgage, that under such circumstances, a lien exists on the land itself. The only case, *that [*295
looks that way is Elliot *v.* Edwards, 3 Bos. & Pul. 181; where, as Lord ELDON says, the point was not decided; and it was certainly a case depending upon its own peculiar circumstances, where the surety himself might seem to have stipulated for the lien, by requiring a covenant against an assignment of the premises, without the joint consent of himself and the vendor. Lord REDESDALE, too, has thrown out an intimation (Hughes *v.* Kearney, 1 Sch. & Lef. 132), that it must appear, that the vendor relied on it as security; and he puts the case, "Suppose, bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall the acceptance of such bills discharge the vendor's lien? They are taken, not as a security, but as a mode of payment." In my humble judgment, this is begging the whole question. If, upon the contract of purchase, the money is to be paid in cash, and bills of exchange are afterwards taken in payment, which turn out unproductive, there the receipt of the bills may be considered as a mere mode of payment. But if the original contract is, that the purchase-money shall be paid at a future day, and acceptances of third persons are to be taken for it, payable at such future day, or a bond, with surety, payable at such future day, I do not perceive how it is possible to assert, that the acceptances or bond are not relied on as security. It is sufficient, however, that the

case was not then before his Lordship; and that he admits, that taking a distinct security would be a waiver of the lien. On the other hand, there are several cases in which it is laid down, that if other security be taken, the implied lien on the land is gone. To this effect certainly the case of Farwell *v.* Heelis, Ambl. 724, s. c. 2 Dick. 485, is an authority, however, it may, on its own circumstances, have been shaken; and the doctrine is explicitly asserted and acted upon in Nairn *v.* Prowse, 6 Ves. 752: see also, Bond *v.* Kent, 2 Vern. 381. In our own country, a very venerable judge of equity has reognised the same doctrine. He says, "the doctrine that the vendor of land, not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled, as to be received as a maxim; even if he hath made a conveyance, *296] yet he may pursue the land in the possession of the vendee, or of a *purchaser with notice; but if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost. Cole *v.* Scott, 2 Wash. 141. Looking to the principle, upon which the original doctrine of lien is established, I have no hesitation to declare, that taking the security of a third person for the purchase-money, ought to be held a complete waiver of any lien upon the land; and that, in a case standing upon such a fact, it would be very difficult to bring my mind to a different conclusion. At all events, it is *primâ facie* evidence of a waiver, and the *onus* is on the vendor to prove by the most cogent and irresistible circumstances, that it ought not to have that effect.

"Such was the result of my judgment upon an examination of the authorities, when a very recent case before the Master of the Rolls first came to my knowledge. I have perused it with great attention, and it has not, in any degree, shaken my opinion. The case there was, of acceptances of the vendee, and of his partner in trade, taken for the payment of the purchase-money. It was admitted, that there was no case of a security given by a third person, in which the lien had been held to exist. But the Master of the Rolls, without deciding what would be the effect of a security, properly so denominated, of a third person, held, in conformity to the opinion of Lord Redesdale, that bills of exchange were merely a mode of payment, and not a security. This conclusion he drew from the nature of such bills, considering them as mere orders on the acceptor to pay the money of the drawer to the payee; and that the acceptor was to be considered, not as a surety for the debt of another, but as paying the debt out of the debtor's funds in his hands. Grant *v.* Mills, 2 Ves. & B. 306. With this conclusion of the Master of the Rolls, I confess myself not satisfied, and desire to reserve myself for the case, when it shall arise in judgment. It is founded on very artificial reasoning, and not always supported, in point of fact, by the practice of the commercial world. The distinction, however, on which it proceeds, admits, by a very strong implication, that the security of a third person would repel the lien. If, indeed, the point were new, there *297] would be much reason to contend, that a distinct security *of the party himself would extinguish the lien on the land, as it certainly does the lien upon personal chattels. (Cowell *v.* Simpson, 16 Ves. 276). In applying the doctrine to the facts of the present case, I confess, that I have no difficulty in pronouncing against the existence of a lien for the unpaid part of the purchase-money. The property was a large mass of unsettled and uncultivated lands, to which the Indian title was not as yet extinguished. It was, in the necessary contemplation of all parties, bought on speculation, to be sold out to sub-purchasers, and ultimately to settlers. The great objects of the speculation would be materially impaired and embarrassed, by any latent incumbrance, the nature and extent of which it might not always be easy to ascertain, and which might by a sub-division of the property, be apportioned upon an almost infinite number of purchasers. It is not supposable, that so obvious a consideration should not have been within the view of the parties; and viewing it, it is very difficult to suppose, they could mean to create such an incumbrance. A distinct and independent security was taken, by negotiable notes, payable at a future day. There is no pretence, that the notes were a mere mode of payment, for the indorsers were, by the theory of the law, and in fact, conditional sureties for the payment; and in this respect, the case is distinguishable from that of receiving bills of exchange, where, by the theory of the law, the acceptor is not a surety, but merely pays the money of the drawer in pursuance of

his order. (Hughes *v.* Kearney, 1 Sch. & Lef. 132; Grant *v.* Mills, 2 Ves. & B. 306.) The securities themselves were, from their negotiable nature, capable of being turned immediately into cash, and in their transfer from hand to hand, they could never have been supposed to draw after them, in favor of the holder, a lien on the land for their payment. But I pass over these, and some other peculiar circumstances of this case, and put it upon the broad and general doctrine, that here was the security of a third person, taken as such, and that extinguished any implied lien for the purchase-money." (1 Mason 212.)[1]

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*The Estrella: Hernandez, Claimant.[2] [*298

Revolutionary government.—Neutrality.

The seal to the commission of a new government, not acknowledged by the government of the United States, cannot be permitted to prove itself; but the fact that the vessel cruising under such commission, is employed by such government, may be established by other evidence, without proving the seal.

Where the privateer, cruising under such a commission, was lost, subsequent to the capture in question, the previous existence of the commission on board, was allowed to be proved by parol evidence.

Where restitution of captured property is claimed, upon the ground, that the force of the cruiser making the capture has been augmented within the United States, by enlisting men, the burden of proving such enlistment is thrown upon the claimant; and that fact being proved by him, it is incumbent upon the captors to show, by proof, that the persons so enlisted were subjects or citizens of the prince or state under whose flag the crusier sails, transiently within the United States, in order to bring the case within the proviso of the 2d section of the act of June 5th, 1794, and of the act of the 20th April 1818.[3]

The right of adjudicating on all captures and questions of prize, exclusively belongs to the courts of the captors' country: but it is an exception to the general rule, that where the captured vessel is brought, or voluntarily comes, *infra præsidia* of a neutral power, that power has a right to inquire whether its own neutrality has been violated by the crusier which made the capture; and if such violation has been committed, is in duty bound, to restore to the original owner, property captured by cruisers illegally equipped in its ports.[4]

No part of the act of the 5th of June 1794, is repealed by the act of the 3d of March 1817; the act of 1794 remained in force, until the act of the 20th of April 1818, by which all the provisions respecting our neutral relations were embraced, and all former laws on the same subject were repealed.

In the absence of any act of congress on the subject, the courts of the United States would have authority, under the general law of *nations, to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or [*299 under an armament, or augmentation of the armament, or crew, of the capturing vessel, within the same.

Appeal from the District Court of Louisiana. This vessel and her cargo were libelled in the district court for the Louisiana district, by the alleged former Spanish owner.

The libel stated, that he was owner of the schooner and cargo, which sailed from Havana, for the coast of Africa, on the 23d of April 1817; that on the next day, she was lawlessly and piratically captured on the high seas, and held as prize, by an armed schooner, called the Constitution, of Venezuela, and forcibly brought within the jurisdiction of the United States, when she was re-captured by the United States ketch, the Surprise, and conducted to New Orleans. That the captors had no lawful commission from any sover-

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[1] And see Fish *v.* Howland, 1 Paige 20; Vail *v.* Foster, 4 N. Y. 312.

[2] See The Neustra Senora de la Curidad, *post*, p. 497.

[3] The Santissima Trinidad, 7 Wheat. 283.

[4] The Gran Para, 7 Wheat. 471.

eign state to commit hostilities at sea; but that the said schooner and cargo, until their re-capture, were forcibly withheld from the libellant, in open violation and contempt of the law of nations. That if they had such commission, the same was issued, or delivered, within the waters and jurisdiction of the United States, with intent that the said vessel, the Constitution, should be employed in the service of Venezuela, to commit hostilities at sea against the subjects of the king of Spain, with whom the United States then were, and now are, at peace, in violation of their laws, and of the laws of nations. The libel further stated, that the Constitution had, previously to her cruising, been fitted out and *armed, or increased or augmented in force, within the jurisdiction and waters of the United States; and also, that she had been manned by sundry citizens or residents of the United States, with the intent that she should be employed to commit hostilities, as aforesaid, in violation of the laws aforesaid. For these causes, the libellant prayed a restitution to him of the Estrella and cargo.

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A claim was interposed by J. F. Lamoureux, prize-master of the Estrella, which stated that the Constitution was duly commissioned by the Republic of Venezuela, and authorized to capture all vessels belonging to its enemies, under which authority, she had captured the Estrella, which, with her cargo, belonged to the enemies of the said republic. That before he could receive his prize commission, the Constitution upset, in a gale, and her commission and papers, with the greater part of the crew, were lost. The claimant further represented, that as he was carrying the Estrella into port, to have her condemned before a court of competent jurisdiction, she was captured by the United States ketch Surprise, and conducted to New Orleans: and therefore, claimed, that the Estrella and cargo might be adjudged to be restored to him.

It appeared, from the transcript of the proceedings in this case, that the Estrella was also libelled on the part of the United States, although it was not stated for what cause such libel was filed, but the same was dismissed; from which decree there was no appeal.

*It appeared in evidence, that the Constitution had a commission from the government of Venezuela, at the time the capture was made, which was issued and delivered at Carthagena; but that the same was lost by the sinking of the privateer, immediately after the capture. There was some contradictory testimony as to her having increased her armament in the United States, and it was proved, that she had augmented the number of her crew, in the port of New Orleans.

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On the libel filed by the Spanish owner, decree was made, that the claim of Lamoureux, the prize-master, be dismissed, with costs, and that the Estrella and cargo be delivered up and restored to the libellant; from which sentence, the cause was brought, by appeal, to this court.

February 18th. *C. J. Ingersoll*, for the appellant and captor, argued, that the law of nations gave to the court of the captor's country the exclusive cognisance of questions of prizes made under its authority; and that the only exceptions to this general rule were to be found in the acts of congress for preserving our neutral relations. In the present case, there was no sufficient evidence, that the armament of the capturing vessel had been increased within the United States, so as to give our courts jurisdiction to restore the

captured property, upon this ground; and that the 2d section of the act of the 5th of June 1794, c. 226, which prohibited the enlistment of men within our territory, was impliedly repealed by the act of March 3d, 1817, c. 58, which contained *no such prohibition, and which was the law in force at the time this case occurred. But even if it were otherwise, the [*302 only proof of an increase of the crew was the hearsay of interested witnesses; and supposing their testimony to establish the fact, still the *onus probandi* was upon the claimant, to show that the persons so enlisted were not citizens of Venezuela, transiently within the United States, and so coming within the proviso of the 2d section of the act of 1794, c. 226. The existence of a commission, regularly issued by the government of Venezuela, within its own territory, which was on board the privateer, previous to the capture, was sufficiently proved; and the court has already determined, that the same testimony which would be sufficient to prove that a cruising vessel is in the service of an acknowledged state, is sufficient to prove that it is in the service of a newly-created government, like that of Venezuela. *United States* v. *Palmer*, 3 Wheat. 610, 635.

Sergeant, contrà, argued, upon the facts, that the right of the original Spanish owner to restitution, was established by satisfactory proof, both of the increase of the armament and crew of the privateer within the United States. He insisted, that the act of 1794, c. 226, was not repealed by that of 1817, c. 58; and that, even if it were, the right to restitution depended upon the general law of nations and treaties. 1 Wheat. 244 n.; Sir L. Jenkins' Works, vol. 2, p. 727; Ibid. 780. The claimant having proved the fact of *an increase of the crew in New Orleans, the *onus probandi* [*303 of showing that the persons enlisted were citizens of Venezuela, transiently within the United States, was thrown upon the captors. The commission, under which the capture was professedly made, being that of a new government, not yet acknowledged by the United States, its commission ought to have been produced, and the seal proved; and if actually lost with the privateer, an exemplified copy ought to have been obtained, duly authenticated by the proper officers of that government. All the circumstances of the case combined to show, that this was not a capture in the regular exercise of the rights of war; but a piratical seisure, in breach of our neutrality, aggravated by an intention to violate the revenue laws, which was evinced by the fact of the vessel having been found hovering on the coast of Louisiana, instead of being conducted to the ports of Venezuela for adjudication.

March 2d, 1819. Livingston, Justice, delivered the opinion of the court.—The first allegation of the Spanish owner is, that the Constitution had no lawful commission from any sovereign state, to commit hostilities at sea; and he contends, that the commission, in the present case, if any there was, being that of a government not acknowledged by the United States, ought to have been produced, and its seal proved; or that if the vessel carrying it had been lost, yet an exemplification of it ought to have been obtained from the proper department of the state which issued it.

*The court is satisfied with the proof which has been made, of the [*304 Constitution having had a commission, at the time of making the capture, and that such commission was granted by the government of Vene-

zuela ; and also, that the same was lost with the privateer herself, a very short time after the prize-crew took possession of the Estrella. The fact of the sinking of the Constitution is not disputed ; and that she had, at the time she went down, a commission on board, is also fully made out, which commission there is no reason to believe was any other than the one which the collector of New Orleans says was on board, when she arrived in that port from Carthagena. This was some time in the month of October, in the year 1816 : Mr. Chew then saw the commission, and describes it as a very regular one from the Venezuelan republic, signed, as others were, by Bolivar. Although the court, in another case, has said, that the seal of a government, unacknowledged, cannot be permitted to prove itself ; it has, in the same case, said, that the fact of a vessel being so employed may be established, without proving the seal. *United States* v. *Palmer*, 3 Wheat. 635.

But if the Constitution had a commission on board, it is next alleged, that the same was issued or delivered within the waters of the United States, with intent that she should be employed in the service of Venezuela, to commit hostilities, at sea, against the subjects of the king of Spain, with whom the United States were at peace. This allegation is not supported by any evidence ; *on the contrary, the same witnesses who declare that the Constitution was a commissioned vessel, and whose testimony has already been adverted to, establish, beyond controversy, that the same was obtained abroad, and not issued or delivered within the United States.

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The libel next alleges, that the Constitution, previous to her last cruise, had been fitted out and armed, or that her force had been increased or augmented, within the jurisdiction and waters of the United States, and also, that she had there been manned by sundry citizens or residents of the United States, with the same intent. Whatever doubt there may be as to the augmentation of the armament of the Constitution within the United States, the court is satisfied, that a very considerable addition was made to her crew, at New Orleans, after her arrival at that port ; one of the custom-house officers declares, that at that time, she had only from twenty to twenty-five men ; another of these officers, who went on board, on her first arrival, states the number of her crew at about twenty ; and a witness by the name of Guzman, totally unconnected with this transaction, mentions by name two persons who entered on board, while she was lying there. Several of the original crew of the Estrella have also been examined to this point, who state, that after the capture, they had many conversations with the officers and seamen, who composed the prize-crew, by whom they were informed that the Constitution, when she left Carthagena, had but few hands on board ; that at New *Orleans, she shipped almost the whole of her crew, which, at the time of the Estrella's capture, amounted to sixty or seventy men. This species of testimony has been objected to, as being hearsay, and proceeding from a source entitled to no great credit : although there may be something in this objection, it is no reason for rejecting the evidence altogether. If the testimony be hearsay, it must be recollected, that the declarations proceeded from persons very much interested in giving a different representation of the transaction ; and as to the witnesses themselves, although they formed a part of the Estrella's crew, and may have felt some little interest in the question, they were the only persons who could give any account of the armament or crew of the Constitution, at the time

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of her making the capture. It may be also remarked, that the testimony of these men is, in this respect, corroborated by that of other witnesses, who are liable to no objection, and that their declarations, if untrue, might have been disproved by the claimant, by showing where and when the crew of the Constitution had been entered.

But if any of the crew of the Constitution were enlisted or entered within the jurisdiction of the United States, they may, it is said, have been citizens or subjects of the republic of Venezuela, who were transiently in the United States, at the time of her arrival, and had, therefore, a right, within one of the provisoes of the second section of the act of congress of the 7th of June 1794, c. 226, to enlist or enter themselves on board of her; and it is insisted, that the libellant should have shown, that they were not persons of this *description. The court is not of this opinion. On the libellant, in the first instance, lay the *onus* of showing that the [*307 crew of the Constitution had been increased within the United States; having done this, it became incumbent on the captors, if they wanted to establish their innocence, to show, as was in their power, if the fact was so, that they had done nothing contrary to law, by bringing their case within the proviso that has been mentioned.

The allegation, then, in the libel, being made out, that the Constitution, being a privateer commissioned by the republic of Venezuela, was manned within the United States, previous to the cruise on which she captured the Estrella, by sundry citizens or residents of the United States; it remains to see, whether the libellant has not made out a case for restitution. It has been attempted, but without success, to distinguish this case, in principle, from several which have already been decided in this court. We have been told, as heretofore, that to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize. This is not denied; nor has the court ever felt any disposition to intrench on this rule; but on the contrary, whenever an occasion has occurred, as in the case of *The Invincible*, 1 Wheat. 238, it has been governed by it. Not only is it a rule well established by the customary *and conventional law of [*308 nations, but it is founded in good sense, and is the only one which is salutary and safe in practice. It secures to a belligerent the independence to which every sovereign state is entitled, and which would be somewhat abridged, were he to condescend so far as to permit those who bear his commission to appear before the tribunals of any other country, and submit to their interpretation or control, the orders and instructions under which they have acted. It insures also, not only to the belligerent himself, but to the world at large, a great decree of caution and responsibility, on the part of the agents whom he appoints; who not only give security to him for their good behavior, but will sometimes be checked in a lawless career, by the consideration that their conduct is to be investigated by the courts of their own nation, and under the very eye of the sovereign, under whose sanction they are committing hostilities. In this way, also, is a foundation laid for a claim by other nations, of an indemnity against the belligerent, for the injuries which their subjects may sustain, by the operation of any unjust or improper rules, which he may think proper to prescribe for those who act under his authority.

But general, and firmly established, as this rule is, it is not more so, than some of the exceptions which have grown out of it. A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide, on every question of prize law which
*309] may *arise in the progress of such discussion. But it is no departure from this obligation, if, in a case in which a captured vessel be brought, or voluntarily comes, *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality, by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality towards both parties, it is its duty, as well as right, and its safety, good faith and honor demand of it, to be vigilant in preventing its neutrality from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, so far as it can, against all warlike preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him, by vessels which have been thus illegally fitted out. In the performance of this duty, all the belligerents must be supposed to have an equal interest, and a disregard or neglect of it, would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under any such circumstances, be restored.

The United States, instead of opening their ports to all the contending parties, when at peace themselves (as may be done, if not prevented by antecedent treaties), have always thought it the wisest and safest course, to interdict them all from fitting out or furnishing vessels of war, within their limits, and to punish those who may contribute to such equipments.
*310] *To enforce a general and strict observance of this neutrality, on the part of our own citizens, and of others who reside among us, a law passed, as early as the year 1794, making it penal, among other things, for any one, within the jurisdiction of the United States, to enlist in the service of any foreign prince or state, as a soldier, marine or seaman, on board of any vessel of war, letter of marque or privateer. This law, it is supposed, was not in force at the time when the crew of the Constitution was increased at New Orleans, having been repealed, as is alleged, by the act of the 3d of March 1817, c. 58. But this act contains no repealing clause of this or any other section of the former law; and having made no provision on the subject of enlistment, it must have been the intention of the legislature to leave in full force all those parts of the first law which had undergone no alteration, in the one which was then passing, and we, therefore, find no repeal of the act in question, until the 20th of April 1818, when all the provisions respecting our neutral relations were embraced by one act, and all former laws on the same subject were repealed.

But whether the act of 1794, c. 226, were in force or not, would make no difference; for it did not, in terms, contain, nor did any of the others, which have, from time to time, been passed, contain, a provision for the restitution of property captured on the ocean, by vessels which might be thus illegally fitted out or manned in our ports. It is true, they recognise a right in the

courts of the United States to make restitution, when these laws have been disregarded, and impart *to the courts a power to punish those who [*311
are concerned in such violations. But in the absence of every act of congress in relation to this matter, the court would feel no difficulty in pronouncing the conduct here complained of, an abuse of the neutrality of the United States; and although, in such case, the offender could not be punished, the former owner would, nevertheless, be entitled to restitution. Nor is our opinion confined to the single act of an illegal enlistment of men, which is the only fact proved in this case; for we have no hesitation in saying, that for any of the other violations of our neutrality, alleged in the libel, if they had been proved, the Spanish owner would have been equally entitled to restitution.

Sentence affirmed, with costs.

MILLER, for the use of the UNITED STATES, *v.* NICHOLLS.

Error to state court.—Record.

Where a cause is brought to this court, by writ of error, or appeal, from the highest court of law or equity of a state, under the 25th section of the judiciary act of 1789, upon the ground that the validity of a statute of the United States was drawn in question, and that the decision of the state court was against its validity, &c., or that the validity of a statute of the state was drawn in question, as repugnant to the constitution of the United States, and the decision was in favor of its validity; it must appear from the record, that the act of congress, or the constitutionality of the state law, was drawn into question.

But it is not required, that the record should in terms, state a misconstruction * of the act [*312
of congress, or that it was drawn into question. It is sufficient, to give this court jurisdiction of the cause, that the record should show that an act of congress was applicable to the case.

ERROR to the Supreme Court of the State of Pennsylvania. The case agreed in the court below, stated, that William Nicholls, collector, &c., being indebted to the United States of America, on the 9th of June 1798, executed a mortgage to Henry Miller, for the use of the United States, in the sum of $59,444, conditioned for the payment of $29,271, payable, $9757 on or before the 1st of January 1799; $9757 on or before the 9th of June 1799; and $9757 on or before the 9th of September 1799. A *scire facias* was issued upon the said mortgage, returnable to September term of the said supreme court of Pennsylvania, in the year 1800, and judgment thereupon entered up, in the said supreme court, on the 6th of March 1802, and thereupon, a *levari facias* issued, and was levied upon the property of the said William Nicholls, and the same being sold to the highest bidder, for the sum of $14,530, the same was brought into court, and is now deposited in the hands of the prothonotary of said court, subject to the orders of the same court. That, on the 22d of December 1797, the accounts of the said William Nicholls with the commonwealth of Pennsylvania were settled by the comptroller and register-general of the commonwealth. (*Prout* account and settlement.) That an appeal from said settlement was filed in the office of *the prothonotary of the said supreme court, on the 9th day of [*313
March 1798, and judgment thereupon entered in favor of the commonwealth, against the said William Nicholls, in the said supreme court, on the 6th of September 1798, for the sum of $9987.15.

Upon the preceding statement, the following question is submitted to

the consideration of the court: Whether the said settlement of the said public accounts of the said William Nicholls, as aforesaid, on the 22d of December 1797, was, and is, a lien, from the date thereof, upon the real estate of the said William Nicholls, and which has since been sold as aforesaid.

A. J. DALLAS, for the United States.

J. B. MCKEAN, for the Commonwealth of Pennsylvania.

December 2d, 1803.

The supreme court of Pennsylvania, on the 21st of March 1805, on motion of Mr. McKean, attorney-general of the said commonwealth, made a rule on the plaintiff in error, to show cause why the amount of the debt due to the said commonwealth should not be taken out of court. And on the 22d of March 1805, Alexander James Dallas, the attorney of the United States for the district of Pennsylvania, came into court and suggested, "that the commonwealth of Pennsylvania ought not to be permitted to have and receive the money levied and produced by virtue of the execution in the
*314] suit, because the said *attorney, on behalf of the United States, saith, that as well by virtue of the said execution, as of divers acts of congress, and particularly of an act of congress, entitled 'an act to provide more effectually for the settlement of accounts between the United States and receivers of public moneys,' approved the 3d of March, 1797, the said United States are entitled to have and receive the money aforesaid, and not the said commonwealth of Pennsylvania. A. J. DALLAS."

The record then proceeds as follows: "And now, to wit, this 13th day of September 1805, the motion of the attorney-general, to take the money out of court, was granted by the unanimous opinion of the court." (See 4 Yeates 251.) The proceedings were afterwards brought before this court by writ of error.

March 9th, 1819. *Sergeant*, for the defendant in error, moved to dismiss the writ of error, in this cause, for want of jurisdiction, under the judiciary act of the 24th of September 1789, § 25; it nowhere appearing, upon the face of the record, that any question arose respecting the validity of any treaty or statute of the United States, or of any statute of the state, upon the ground of its repugnancy to the constitution or laws of the United States. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Inglee* v. *Coolidge*, 2 Ibid. 363.

The *Attorney-General*, contrà.

*315] *MARSHALL, Ch. J., delivered the opinion of the court. The question decided in the supreme court for the state of Pennsylvania respected only the construction of a law of that state. It does not appear, from the record, that either the constitutionality of the law of Pennsylvania, or any act of congress was drawn into question.

It would not be required, that the record should, in terms, state a misconstruction of an act of congress or that an act of congress was drawn into question. It would have been sufficient, to give this court jurisdiction of the cause, that the record should show that an act of congress was applicable to the case. That is not shown by this record. The act of congress which is supposed to have been disregarded, and which, probably, was disregarded by the state court, is that which gives the United States priority in cases of

insolvency. Had the fact of insolvency appeared upon the record, that would have enabled this court to revise the judgment of the supreme court of Pennsylvania. But that fact does not appear. No other question is presented than the correctness of the decision of the state court, according to the laws of Pennsylvania, and that is a question over which this court can take no jurisdiction. The writ of error must be dismissed.

Writ of error dismissed.

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*McCulloch *v.* State of Maryland *et al.* [*316

United States Bank.—Implied power.—Taxing power.

Congress has power to incorporate a bank.

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

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

There is nothing in the constitution of the United States, similar to the articles of confederation, which excludes incidental or implied powers.

If the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted that end, and which are not prohibited, may constitutionally be employed to carry it into effect.[1]

The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the constitution to the government of the Union, it may be exercised by that government.

If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the consitution, the degree of its necessity is a question of legislative discretion, not of judicial cognisance.

The act of the 10th April 1816, c. 44, to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution.

The bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

The state, within which such branch may be established, cannot, without violating the constitution, tax that branch.

The state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers.[2]

*The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into [*317 effect the powers vested in the national government.

This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular state, nor to a tax imposed on the proprietary interest which the citizens of that state may hold in this institution, in common with other property of the same description throughout the state.

Error to the Court of Appeals of the State of Maryland. This was an action of debt, brought by the defendant in error, John James, who sued as

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[1] See Hepburn *v.* Griswold, 8 Wall. 603; Knox *v.* Lee, 12 Id. 533.

[2] But it is competent for congress to confer on the state governments the power to tax the shares of the national banks, within certain limitations; the power of taxation under the constitution, is a concurrent one. Van Allen *v.* The Assessors, 3 Wall. 585, Nelson, J. But, says the learned judge, congress may, by reason of its paramount authority, exclude the states from the exercise of such power. Ibid. It is difficult, however, to perceive in what part of the constitution, the power is conferred on congress to erect a multitude of moneyed corporations, in the several states, absorbing $400,000,000 of the capital of the country, and to exempt it from state taxation.

well for himself as for the state of Maryland, in the county court of Baltimore county, in the said state, against the plaintiff in error, McCulloch, to recover certain penalties, under the act of the legislature of Maryland, hereafter mentioned. Judgment being rendered against the plaintiff in error, upon the following statement of facts, agreed and submitted to the court by the parties, was affirmed by the court of appeals of the state of Maryland, the highest court of law of said state, and the cause was brought, by writ of error, to this court.

It is admitted by the parties in this cause, by their counsel, that there was passed, on the 10th day of April 1816, by the congress of the United States, an act, entitled, "an act to incorporate the subscribers to the Bank of the United States;" and that there was passed on the 11th day of February 1818, by the general assembly of Maryland, an act, entitled, "an act to impose a tax on all banks, or branches thereof, in the state of Maryland, not chartered by the legislature," *which said acts are made part of *318] this statement, and it is agreed, may be read from the statute books in which they are respectively printed. It is further admitted, that the president, directors and company of the Bank of the United States, incorporated by the act of congress aforesaid, did organize themselves, and go into full operation, in the city of Philadelphia, in the state of Pennsylvania, in pursuance of the said act, and that they did on the —— day of —— 1817, establish a branch of the said bank, or an office of discount and deposit, in the city of Baltimore, in the state of Maryland, which has, from that time, until the first day of May 1818, ever since transacted and carried on business as a bank, or office of discount and deposit, and as a branch of the said Bank of the United States, by issuing bank-notes and discounting promissory notes, and performing other operations usual and customary for banks to do and perform, under the authority and by the direction of the said president, directors and company of the Bank of the United States, established at Philadelphia as aforesaid. It is further admitted, that the said president, directors and company of the said bank, had no authority to establish the said branch, or office of discount and deposit, at the city of Baltimore, from the state of Maryland, otherwise than the said state having adopted the constitution of the United States and composing one of the states of the Union. It is further admitted, that James William McCulloch, the defendant below, being the cashier of the said branch, or office of discount and *deposit, did, on the several days set forth in the declara- *319] tion in this cause, issue the said respective bank-notes therein described, from the said branch or office, to a certain George Williams, in the city of Baltimore, in part payment of a promissory note of the said Williams, discounted by the said branch or office, which said respective bank-notes were not, nor was either of them, so issued, on stamped paper, in the manner prescribed by the act of assembly aforesaid. It is further admitted, that the said president, directors and company of the Bank of the United States, and the said branch, or office of discount and deposit, have not, nor has either of them, paid in advance, or otherwise, the sum of $15,000, to the treasurer of the Western Shore, for the use of the state of Maryland, before the issuing of the said notes, or any of them, nor since those periods. And it is further admitted, that the treasurer of the Western Shore of Maryland, under the direction of the governor and council of

the said state, was ready, and offered to deliver to the said president, directors and company of the said bank, and to the said branch, or office of discount and deposit, stamped paper of the kind and denomination required and described in the said act of assembly.

The question submitted to the court for their decision in this case, is, as to the validity of the said act of the general assembly of Maryland, on the ground of its being repugnant to the constitution of the United States, and the act of congress aforesaid, or to one of them. Upon the foregoing statement of facts, and the pleadings in this cause (all errors in *which are hereby agreed to be mutually released), if the court should be of [*320 opinion, that the plaintifis are entitled to recover, then judgment, it is agreed, shall be entered for the plaintiffs for $2500, and costs of suit. But if the court should be of opinion, that the plaintiffs are not entitled to recover upon the statement and pleadings aforesaid, then judgment of *non pros* shall be entered, with costs to the defendant.

It is agreed, that either party may appeal from the decision of the county court, to the court of appeals, and from the decision of the court of appeals to the supreme court of the United States, according to the modes and usages of law, and have the same benefit of this statement of facts, in the same manner as could be had, if a jury had been sworn and impannelled in this cause, and a special verdict had been fonnd, or these facts had appeared and been stated in an exception taken to the opinion of the court, and the court's direction to the jury thereon.

Copy of the act of the Legislature of the State of Maryland, referred to in the preceding statement.

An act to impose a tax on all banks or branches thereof, in the state of Maryland, not chartered by the legislature.

Be it enacted by the general assembly of Maryland, that if any bank has established, or shall, without authority from the state first had and obtained, establish any branch, office of discount and *deposit, or office of pay [*321 and receipt in any part of this state, it shall not be lawful for the said branch, office of discount and deposit, or office of pay and receipt, to issue notes, in any manner, of any other denomination than five, ten, twenty, fifty, one hundred, five hundred and one thousand dollars, and no note shall be issued, except upon stamped paper of the following denominations; that is to say, every five dollar note shall be upon a stamp of ten cents; every ten dollar note, upon a stamp of twenty cents; every twenty dollar note, upon a stamp of thirty cents; every fifty dollar note, upon a stamp of fifty cents; every one hundred dollar note, upon a stamp of one dollar; every five hundred dollar note, upon a stamp of ten dollars; and every thousand dollar note, upon a stamp of twenty dollars; which paper shall be furnished by the treasurer of the Western Shore, under the direction of the governor and council, to be paid for upon delivery; provided always, that any institution of the above description may relieve itself from the operation of the provisions aforesaid, by paying annually, in advance, to the treasurer of the Western Shore, for the use of state, the sum of $15,000.

And be it enacted, that the president, cashier, each of the directors and

officers of every institution established, or to be established as aforesaid, offending against the provisions aforesaid, shall forfeit a sum of $500 for each and every offence, and every person having any agency in circulating any note aforesaid, not stamped as aforesaid directed, shall forfeit a sum not
*322] exceeding $100 *every penalty aforesaid, to be recovered by indictment, or action of debt, in the county court of the county where the offence shall be committed, one-half to the informer, and the other half to the use of the state.

And be it enacted, that this act shall be in full force and effect from and after the first day of May next.

February 22d–27th, and March 1st–3d. *Webster*, for the plaintiff in error,(*a*) stated: 1. That the question whether congress constitutionally possesses the power to incorporate a bank, might be raised upon this record; and it was in the discretion of the defendant's counsel to agitate it. But it might have been hoped, that it was not now to be considered as an open question. It is a question of the utmost magnitude, deeply interesting to the government itself, as well as to individuals. The mere discussion of such a question may most essentially affect the value of a vast amount of private property. We are bound to suppose, that the defendant in error is well aware of these consequences, and would not have intimated an intention to agitate such a question, but with a real design to make it a topic of serious discussion, and with a view of demanding upon it the solemn judg-
*323] ment of this court. This *question arose early after the adoption of the constitution, and was discussed and settled, so far as legislative decision could settle it, in the first congress. The arguments drawn from the constitution, in favor of this power, were stated and exhausted in that discussion. They were exhibited, with characteristic perspicuity and force, by the first secretary of the treasury, in his report to the president of the United States. The first congress created and incorporated a bank. Act of 5th February 1791, ch. 84. Nearly each succeeding congress, if not every one, has acted and legislated on the presumption of the legal existence of such a power in the government. Individuals, it is true, have doubted, or thought otherwise; but it cannot be shown, that either branch of the legislature has, at any time, expressed an opinion against the existence of the power. The executive government has acted upon it; and the courts of law have acted upon it. Many of those who doubted or denied the existence of the powers, when first attempted to be exercised, have yielded to the first decision, and acquiesced in it, as a settled question. When all branches of the government have thus been acting on the existence of this power, nearly thirty years, it would seem almost too late to call it in question, unless its repugnancy with the constitution were plain and manifest. Congress, by the constitution, is invested with certain powers; and as to the
*324] objects, and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the constitution, *empowering

(*a*) This case involving a constitutional question of great public importance, and the sovereign rights of the United States and the state of Maryland; and the government of the United States having directed their attorney-general to appear for the plaintiff in error, the court dispensed with its general rule, permitting only two counsel to argue for each party.

congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted. Congress may declare war; it may consequently carry on war, by armies and navies, and other suitable means and methods of warfare. So, it has power to raise a revenue, and to apply it in the support of the government, and defence of the country; it may, of course, use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue. And if, in the progress of society and the arts, new means arise, either of carrying on war, or of raising revenue, these new means doubtless would be properly considered as within the grant. Steam-frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of congress to use them, as means to an authorized end. It is not enough to say, that it does not appear that a bank was not in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words, "necessary and proper," in such an instrument, are probably to be considered as synonymous. Necessarily, powers must here intend such powers as are suitable and *fitted to the object; such as are best and most useful in relation to the end [*325 proposed. If this be not so, and if congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government, in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the states. It is not for this court to decide, whether a bank, or such a bank as this, be the best possible means to aid these purposes of government. Such topics must be left to that discussion which belongs to them, in the two houses of congress. Here, the only question is, whether a bank, in its known and ordinary operations, is capable of being so connected with the finances and revenues of the government, as to be fairly within the discretion of congress, when selecting means and instruments to execute its powers and perform its duties. A bank is not less the proper subject for the choice of congress, nor the less constitutional, because it requires to be executed by granting a charter of incorporation. It is not, of itself, unconstitutional in congress to create a corporation. Corporations are but means. They are not ends and objects of government. No government exists for the purpose of creating corporations as one of the ends of its being. They are institutions established to effect certain beneficial purposes; *and, as means, take their character generally from their [*326 end and object. They are civil or eleemosynary, public or private, according to the object intended by their creation. They are common means, such as all governments use. The state governments create corporations to execute powers confided to their trust, without any specific authority in the state constitutions for that purpose. There is the same reason

that congress should exercise its discretion as to the means by which it must execute the powers conferred upon it. Congress has duties to perform and powers to execute. It has a right to the means by which these duties can be properly and most usefully performed, and these powers executed. Among other means, it has established a bank; and before the act establishing it can be pronounced unconstitutional and void, it must be shown, that a bank has no fair connection with the execution of any power or duty of the national government, and that its creation is consequently a manifest usurpation.

2. The second question is, whether, if the bank be constitutionally created, the state governments have power to tax it? The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. The constitution, *327] therefore, declares, that the *constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. The only inquiry, therefore, in this case is, whether the law of the state of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it? If it be not, then it is void; if it be, then it may be valid. Upon the supposition, that the bank is constitutionally created, this is the only question; and this question seems answered, as soon as it is stated. If the states may tax the bank, to what extent shall they tax it, and where shall they stop? An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the states may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the state governments for its existence. This consequence is inevitable. The object in laying this tax, may have been revenue to the state. In the next case, the object may *328] be to expel the bank from the state; but *how is this object to be ascertained, or who is to judge of the motives of legislative acts? The government of the United States has itself a great pecuniary interest in this corporation. Can the states tax this property? Under the confederation, when the national government, not having the power of direct legislation, could not protect its own property by its own laws, it was expressly stipulated, that "no impositions, duties or restrictions should be laid by any state on the property of the United States." Is it supposed, that property of the United States is now subject to the power of the state governments, in a greater degree than under the confederation? If this power of taxation be admitted, what is to be its limit? The United States have, and

must have, property locally existing in all the states; and may the states impose on this property, whether real or personal, such taxes as they please? Can they tax proceedings in the federal courts? If so, they can expel those judicatures from the states. As Maryland has undertaken to impose a stamp-tax on the notes of this bank, what hinders her from imposing a stamp-tax also on permits, clearances, registers and all other documents connected with imposts and navigation? If, by one, she can suspend the operations of the bank, by the other, she can equally well shut up the custom-house. The law of Maryland, in question, makes a requisition. The sum called for is not assessed on property, nor deducted from profits or income. It is a direct imposition on the power, privilege or franchise of the corporation. The act purports, also, to restrain *the circulation of the paper of the bank to [*329
bills of certain descriptions. It narrows and abridges the powers of the bank in a manner which, it would seem, even congress could not do. This law of Maryland cannot be sustained, but upon principles and reasoning which would subject every important measure of the national government to the revision and control of the state legislatures. By the charter, the bank is authorized to issue bills of any demonination above five dollars. The act of Maryland purports to restrain and limit their powers in this respect. The charter, as well as the laws of the United States, makes it the duty of all collectors and receivers to receive the notes of the bank in payment of all debts due the government. The act of Maryland makes it penal, both on the person paying and the person receiving such bills, until stamped by the authority of Maryland. This is a direct interference with the revenue. The legislature of Maryland might, with as much propriety, tax treasury-notes. This is either an attempt to expel the bank from the state; or it is an attempt to raise a revenue for state purposes, by an imposition on property and franchises holden under the national government, and created by that government, for purposes connected with its own administration. In either view, there cannot be a clearer case of interference. The bank cannot exist, nor can any bank established by congress exist, if this right to tax it exists in the state governments. One or the other must be surrendered; and a surrender on the part of the government of the United States would be a giving *up of those fundamental and essential powers without [*330
which the government cannot be maintained. A bank may not be, and is not, absolutely essential to the existence and preservation of the government. But it is essential to the existence and preservation of the government, that congress should be able to exercise its constitutional powers, at its own discretion, without being subject to the control of state legislation. The question is not, whether a bank be necessary or useful, but whether congress may not constitutionally judge of that necessity or utility; and whether, having so judged and decided, and having adopted measures to carry its decision into effect, the state governments may interfere with that decision, and defeat the operation of its measures. Nothing can be plainer than that, if the law of congress, establishing the bank, be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of state legislation. To hold otherwise, would be to declare, that congress can only exercise its constitutional powers, subject to the controlling discretion, and under the sufferance, of the state governments.

Hopkinson, for the defendants in error, proposed three questions for the consideration of the court. 1. Had congress a constitutional power to incorporate the bank of the United States? 2. Granting this power to congress, has the bank, of its own authority, a right to establish its branches in the several states? 3. Can the bank, and its branches thus established, *331] claim to be exempt from the ordinary *and equal taxation of property, as assessed in the states in which they are placed?

1. The first question has, for many years, divided the opinions of the first men of our country. He did not mean to controvert the arguments by which the bank was maintained, on its original establishment. The power may now be denied, in perfect consistency with those arguments. It is agreed, that no such power is expressly granted by the constitution. It has been obtained by implication; by reasoning from the 8th section of the 1st article of the constitution; and asserted to exist, not of and by itself, but as an appendage to other granted powers, as necessary to carry them into execution. If the bank be not "necessary and proper" for this purpose, it has no foundation in our constitution, and can have no support in this court. But it strikes us, at once, that a power, growing out of a necessity which may not be permanent, may also not be permanent. It has relation to circumstances which change; in a state of things which may exist at one period, and not at another. The argument might have been perfectly good, to show the necessity of a bank, for the operations of the revenue, in 1791, and entirely fail now, when so many facilities for money transactions abound, which were wanting then. That some of the powers of the constitution are of this fluctuating character, existing, or not, according to extraneous circumstances, has been fully recognised by this court at the present term, in the case of *Sturges* v. *Crowninshield* (*ante*, p. 122). Necessity was the *332] plea and justification *of the first Bank of the United States. If the same necessity existed, when the second was established, it will afford the same justification; otherwise, it will stand without justification, as no other is pretended. We cannot, in making this inquiry, take a more fair and liberal test, than the report of General Hamilton, the father and defender of this power. The uses and advantages he states, as making up the necessity required by the constitution, are three. 1st. The augmentation of the active and productive capital of the country, by making gold and silver the basis of a paper circulation. 2d. Affording greater facility to the government, in procuring pecuniary aids; especially, in sudden emergencies; this, he says, is an indisputable advantage of public banks. 3d. The facility of the payment of taxes, in two ways; by loaning to the citizen, and enabling him to be punctual; and by increasing the quantity of circulating medium, and quickening circulation by bank-bills, easily transmitted from place to place. If we admit, that these advantages or conveniences amount to the necessity required by the constitution, for the creation and exercise of powers not expressly given; yet it is obvious, they may be derived from any public banks, and do not call for a Bank of the United States, unless there should be no other public banks, or not a sufficiency of them for these operations. In 1791, when this argument was held to be valid and effectual, there were but three banks in the United States, with limited capitals, and con- *333] tracted spheres of operation. Very different is the case now, when we have a banking capital to a vast amount, vested in *banks of good

credit, and so spread over the country, as to be convenient and competent for all the purposes enumerated in the argument. General Hamilton, conscious that his reasoning must fail, if the state banks were adequate for his objects, proceeds to show they were not. Mr. *Hopkinson* particularly examined all the objections urged by General Hamilton, to the agency of the state banks, then in existence, in the operations required for the revenue; and endeavored to show, that they had no application to the present number, extent and situation of the state banks; relying only on those of a sound and unquestioned credit and permanency. He also contended, that the experience of five years, since the expiration of the old charter of the Bank of the United States, has fully shown the competency of the state banks, to all the purposes and uses alleged as reasons for erecting that bank, in 1791. The loans to the government by the state banks, in the emergencies spoken of; the accommodation to individuals, to enable them to pay their duties and taxes; the creation of a circulating currency; and the facility of transmitting money from place to place, have all been effected, as largely and beneficially, by the state banks, as they could have been done by a bank incorporated by congress. The change in the country, in relation to banks, and an experience that was depended upon, concur in proving, that whatever might have been the truth and force of the bank argument in 1791, they were wholly wanting in 1816.

*2. If this Bank of the United States has been lawfully created and incorporated, we next inquire, whether it may, of its own authority, establish its branches in the several states, without the direction of congress, or the assent of the states? It is true, that the charter contains this power, but this avails nothing, if not warranted by the constitution. This power to establish branches, by the directors of the bank, must be maintained and justified, by the same necessity which supports the bank itself, or it cannot exist. The power derived from a given necessity, must be coextensive with it, and no more. We will inquire, 1st. Does this necessity exist in favor of the branches? 2d. Who should be the judge of the necessity, and direct the manner and extent of the remedy to be applied? Branches are not necessary for any of the enumerated advantages. Not for pecuniary aids to the government; since the ability to afford them must be regulated by the strength of the capital of the parent bank, and cannot be increased by scattering and spreading that capital in the branches. Nor are they necessary to create a circulating medium; for they create nothing; but issue paper on the faith and responsibility of the parent bank, who could issue the same quantity, on the same foundation; the distribution of the notes of the parent bank can as well be done, and in fact, is done, by the state banks. Where, then, is that necessity to be found for the branches, whatever may be allowed to the bank itself? It is undoubtedly true, that these branches are established with a single view to trading, and the profit of the stockholders, and not for the convenience *or use of the government; and therefore, they are located at the will of the directors, who represent and regard the interests of the stockholders, and are such themselves. If this is the case, can it be contended, that the state rights of territory and taxation are to yield for the gains of a money-trading corporation; to be prostrated at the will of a set of men who have no concern, and no duty but to increase their profits? Is this the necessity required by the constitu-

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tion for the creation of undefined powers? It is true, that, by the charter, the government may require a branch in any place it may designate, but if this power is given only for the uses or necessities of the government, then the government only should have the power to order it. In truth, the directors have exercised the power, and they hold it, without any control from the government of the United States; and, as is now contended, without any control of the state governments. A most extravagant power to be vested in a body of men, chosen annually by a very small portion of our citizens, for the purpose of loaning and trading with their money to the best advantage! A state will not suffer its own citizens to erect a bank, without its authority, but the citizens of another state may do so; for it may happen that the state thus used by the bank for one of its branches, does not hold a single share of the stock. 2d. But if these branches are to be supported, on the ground of the constitutional necessity, and they can have no other foundation, the question occurs, who should be the judge of the existence of the necessity, in any proposed case; of the when and the where the power
*336] *shall be exercised, which the necessity requires? Assuredly, the same tribunal which judges of the original necessity on which the bank is created, should also judge of any subsequent necessity requiring the extension of the remedy. Congress is that tribunal; the only one in which it may be safely trusted; the only one in which the states to be affected by the measure, are all fairly represented. If this power belongs to congress, it cannot be delegated to the directors of a bank, any more than any other legislative power may be transferred to any other body of citizens: if this doctrine of necessity is without any known limits, but such as those who defend themselves by it, may choose, for the time, to give it; and if the powers derived from it, are assignable by the congress to the directors of a bank; and by the directors of the bank to anybody else; we have really spent a great deal of labor and learning to very little purpose, in our attempt to establish a form of government in which the powers of those who govern shall be strictly defined and controlled; and the rights of the government secured from the usurpations of unlimited or unknown powers. The establishment of a bank in a state, without its assent; without regard to its interests, its policy or institutions, is a higher exercise of authority, than the creation of the parent bank; which, if confined to the seat of the government, and to the purposes of the government, will interfere less with the rights and policy of the states, than those wide-spreading branches, planted everywhere, and influencing all the business of the community. Such an
*337] exercise of *sovereign power, should, at least, have the sanction of the sovereign legislature, to vouch that the good of the whole requires it, that the necessity exists which justifies it. But will it be tolerated, that twenty directors of a trading corporation, having no object but profit, shall, in the pursuit of it, tread upon the sovereignity of the state; enter it, without condescending to ask its leave; disregard, perhaps, the whole system of its policy; overthrow its institutions, and sacrifice its interests?

3. If, however, the states of this Union have surrendered themselves in this manner, by implication, to the congress of the United States, and to such corporations as the congress, from time to time, may find it "necessary and proper" to create; if a state may no longer decide, whether a trading association, with independent powers and immunities, shall plant itself in its

territory, carry on its business, make a currency and trade on its credit, raising capitals for individuals as fictitious as its own ; if all this must be granted, the third and great question in this cause presents itself for consideration ; that is, shall this association come there with rights of sovereignty, paramount to the sovereignty of the state, and with privileges possessed by no other persons, corporations or property in the state ? in other words, can the bank and its branches, thus established, claim to be exempt from the ordinary and equal taxation of property, as asssessed in the states in which they are placed ? As this overwhelming invasion of state sovereignty is not warranted by any express clause or grant in the constitution, and never was *imagined by any state that adopted and ratified [*338
that constitution, it will be conceded, that it must be found to be necessarily and indissolubly connected with the power to establish the bank, or it must be repelled. The court has always shown a just anxiety to prevent any conflict between the federal and state powers ; to construe both so as to avoid an interference, if possible, and to preserve that harmony of action in both, on which the prosperity and happiness of all depend. If, therefore, the right to incorporate a national bank may exist, and be exercised consistently with the right of the state, to tax the property of such bank within its territory, the court will maintain both rights ; although some inconvenience or diminution of advantage may be the consequence. It is not for the directors of the bank to say, you will lessen our profits by permitting us to be taxed ; if such taxation will not deprive the government of the uses it derives from the agency and operations of the bank. The necessity of the government is the foundation of the charter ; and beyond that necessity, it can claim nothing in derogation of state authority. If the power to erect this corporation were expressly given in the constitution, still, it would not be construed to be an exclusion of any state right, not absolutely incompatible and repugnant. The states need no reservation or acknowledgment of their right ; all remain that are not expressly prohibited, or necessarily excluded ; and this gives our opponents the broadest ground they can ask. The right now assailed by the bank, is the right of taxing property within the territory of *the state. This is the highest [*339
attribute of sovereignty, the right to raise revenue ; in fact, the right to exist ; without which no other right can be held or enjoyed. The general power to tax is not denied to the states, but the bank claims to be exempted from the operation of this power. If this claim is valid, and to be supported by the court, it must be, either, 1. From the nature of the property : 2. Because it is a bank of the United States : 3. From some express provision of the constitution : or 4. Because the exemption is indispensably necessary to the exercise of some power granted by the constitution.

1st. There is nothing in the nature of the property of bank-stock that exonerates it from taxation. It has been taxed, in some form, by every state in which a bank has been incorporated ; either annually and directly, or by a gross sum paid for the charter. The United States have not only taxed the capital or stock of the state banks, but their business also, by imposing a duty on all notes discounted by them. The bank paid a tax for its capital ; and exery man who deals with the bank, by borrowing, paid another tax for the portion of the same capital he borrowed. This species of property, then, so far from having enjoyed any exemption from the calls

of the revenue, has been particularly burdened ; and been thought a fair subject of taxation both by the federal and state governments.

2d. Is it then exempt, as being a bank of the United States ? How is it such ? In name only. Just as the Bank of Pennsylvania, or the Bank of
*340] Maryland, *are banks of those states. The property of the bank, real or personal, does not belong to the United States only, as a stockholder, and as any other stockholders. The United States might have the same interest in any other bank, turnpike or canal company. So far as they hold stock, they have a property in the institution, and no further ; so long, and no longer. Nor is the direction and management of the bank under the control of the United States. They are represented in the board by the directors appointed by them, as the other stockholders are represented by the directors they elect. A director of the government has no more power or right than any other director. As to the control the government may have over the conduct of the bank, by its patronage and deposits, it is precisely the same it might have over any other bank, to which that patronage would be equally important. Strip it of its name, and we find it to be a mere association of individuals, putting their money into a common stock, to be loaned for profit, and to divide the gains. The government is a partner in the firm, for gain also ; for, except a participation of the profits of the business, the government could have every other use of the bank, without owning a dollar in it. It is not, then, a bank of the United States, if by that we mean, an institution belonging to the government, directed by it, or in which it has a permanent, indissoluble interest. The convenience it affords in the collection and distribution of the revenue, is collateral, secondary, and may be transferred at pleasure to any other bank. It forms no
*341] part of the construction *or character of this bank ; which, as to all its rights and powers, would be exactly what it now is, if the government was to seek and obtain all this convenience from some other source ; if the government were to withdraw its patronage, and sell out its stock. How, then, can such an institution claim the immunities of sovereignty ; nay, that sovereignty does not possess ? for a sovereign who places his property in the territory of another sovereign, submits it to the demands of the revenue, which are but justly paid, in return for the protection afforded to the property. General Hamilton, in his report on this subject, so far from considering the bank a public institution, connected with, or controlled by, the government, holds it to be indispensable that it should not be so. It must be, says he, under private, not public, direction ; under the guidance of individual interest, not public policy. Still, he adds, the state may be holder of part of its stock ; and consequently (what? it becomes a public property ? no !), a sharer of the profits. He traces no other consequenee to that circumstance. No rights are founded on it ; no part of its utility or necessity arises from it. Can an institution, then, purely private, and which disclaims any public character, be clothed with the power and rights of the government, and demand subordination from the state government, in virtue of the federal authority, which it undertakes to wield at its own will and pleasure ? Shall it be private, in its direction and interests ; public, in its rights and privileges : a trading money-lender, in its business ; an un-
*342] controlled sovereign, in its powers? If the whole bank, with all its property and business, *belonged to the United States, it would

not, therefore, be exempted from the taxation of the states. To this purpose, the United States and the several states must be considered as sovereign and independent; and the principle is clear, that a sovereign putting his property within the territory and jurisdiction of another sovereign, and of course, under his protection, submits it to the ordinary taxation of the state, and must contribute fairly to the wants of the revenue. In other words, the jurisdiction of the state extends over all its territory, and everything within or upon it, with a few known exceptions. With a view to this principle, the constitution has provided for those cases in which it was deemed necessary and proper to give the United States jurisdiction within a state, in exclusion of the state authority; and even in these cases, it will be seen, it cannot be done, without the assent of the state. For a seat of government, for forts, arsenals, dock-yards, &c., the assent of the state to surrender its jurisdiction is required; but the bank asks no consent, and is paramount to all state authority, to all the rights of territory, and demands of the public revenue. We have not been told, whether the banking-houses of this corporation, and any other real estate it may acquire, for the accommodation of its affairs, are also of this privileged order of property. In principle, it must be the same; for the privilege, if it exists, belongs to the corporation, and must cover equally all its property. It is understood, that a case was lately decided by the supreme court of Pennsylvania, and from which no appeal has been taken, on the part of the United *States, to this court, to show that United States property, as such, has no [*343 exemption from state taxation. A fort, belonging to the federal government, near Pittsburgh, was sold by public auction; the usual auction duty was claimed, and the payment resisted, on the ground, that none could be exacted from the United States. The court decided otherwise. In admitting Louisiana into the Union, and so, it is believed, with all the new states, it is expressly stipulated, "that no taxes shall be imposed on lands, the property of the United States." There can, then, be no pretence, that bank property, even belonging to the United States, is, on that account, exonerated from state taxation.[1]

3d. If, then, neither the nature of the property, nor the interest the United States may have have in the bank, will warrant the exemption claimed, is there anything expressed in the constitution, to limit and control the state right of taxation, as now contended for? We find but one limitation to this essential right, of which the states were naturally and justly most jealous. In the 10th section of the 1st article, it is declared, that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and there is a like prohibition to laying any duty of tonnage. Here, then, is the whole restriction or limitation, attempted to be imposed by the constitution, on the power of the states to raise revenue, drecisely in the same manner, from the same subjects, and to the same extent, that any sovereign and independent *state may do; and it never was [*344 understood by those who made, or those who received, the constitution, that any further restriction ever would, or could, be imposed. This subject did not escape either the assailants or the defenders of our form of

[1] See Roach *v.* Philadelphia County, 2 Am. L. J. 444; United *v.* Weise, 3 Wall. Jr. C. C. 72, 79.

government ; and their arguments and commentaries upon the instrument ought not to be disregarded, in fixing its construction. It was foreseen, and objected by its opponents, that under the general sweeping power given to congress, "to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers," &c., the states might be exposed to great dangers, and the most humiliating and oppressive encroachments, particularly in this very matter of taxation. By referring to the Federalist, the great champion of the constitution, the objections will be found stated, together with the answers to them. It is again and again replied, and most solemnly asserted, to the people of these United States, that the right of taxation in the states is sacred and inviolable, with "the sole exception of duties on imports and exports ;" that "they retain the authority in the most absolute and unqualified sense ; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution." With the exception mentioned, the federal and state powers of taxation are declared to be concurrent ; and if the United States are justified in taxing state banks, the same equal and concurrent authority will justify
*345] the state in taxing the Bank of the United States, or any *other bank.(a) The author begins No. 34, by saying, "I flatter myself it has been clearly shown, in my last number, that the particular states, under the proposed constitution, would have *co-equal* authority with the Union, in the article of revenue, except as to duties on imports." Under such assurances from those who made, who recommended, and carried, the constitution, and who were supposed best to understand it, was it received and adopted by the people of these United States ; and now, after a lapse of nearly thirty years, they are to be informed, that all this is a mistake, all these assurances are unwarranted, and that the federal government does possess most productive and important powers of taxation, neither on imports, exports or tonnage, but strictly internal, which are prohibited to the states. The question then was, whether the United States should have any command of the internal revenue ; the pretension now is, that they shall enjoy exclusively the best portion of it. The question was then quieted, by the acknowledgment of a co-equal right ; it is now to be put at rest, by the prostration of the state power. The federal government is to hold a power by implication, and ingenious inference from general words in the constitution, which it can hardly be believed would have been suffered in an express grant. If, then, the people were not deceived, when they were told that, with the exceptions mentioned, the state right of taxation is sacred and
*346] inviolable ; and it be also true, *that the Bank of the United States cannot exist under the exercise of that right, the consequence ought to be, that the bank must not exist ; for if it can live only by the destruction of such a right—if it can live only by the exercise of a power, which this court solemnly declared to be a "violent assumption of power, unwarranted by any clause in the constitution"—we cannot hesitate to say, let it not live.

But, in truth, this is not the state of the controversy. No such extremes are presented for our choice. We only require, that the bank shall not

(a) Letters of Publius, or The Federalist, Nos. 31-36.

violate state rights, in establishing itself, or its branches; that it shall be submitted to the jurisdiction and laws of the state, in the same manner with other corporations and other property; and all this may be done, without ruining the institution, or destroying its national uses. Its profits will be diminished, by contributing to the revenue of the state; and this is the whole effect that ought, in a fair and liberal spirit of reasoning, to be anticipated. But, at all events, we show, on the part of the state, a clear, general, absolute and unqualified right of taxation (with the exception stated); and protest against such a right being made to yield to implications and obscure constructions of indefinite clauses in the constitution. Such a right must not be defeated, by doubtful pretensions of power, or arguments of convenience or policy to the government; much less to a private corporation. It is not a little alarming, to trace the progress of this argument. 1. The power to raise the bank is founded on no provision of the constitution that has the most distant allusion to such an *institution; there is not a word in [*347
that instrument that would suggest the idea of a bank, to the most fertile imagination; but the bank is created by implication and construction, made out by a very subtle course of reasoning; then, by another implication, raised on the former, the bank, this creature of construction, claims the right to enter the territory of a state, without its assent; to carry on its business, when it pleases, and where it pleases, against the will, and perhaps, in contravention of the policy, of the sovereign owner of the soil. Having such great success in the acquirement of implied rights, the experiment is now pushed further; and not contented with having obtained two rights in this extraordinary way, the fortunate adventurer assails the sovereignty of the state, and would strip from it its most vital and essential power. It is thus with the famous fig tree of India, whose branches shoot from the trunk to a considerable distance; then drop upon the earth, where they take root and become trees, from which also other branches shoot, and plant and propagate and extend themselves in the same way, until gradually a vast surface is covered, and everything perishes in the spreading shade.

What have we opposed to these doctrines, so just and reasonable? Distressing inconveniences, ingeniously contrived; supposed dangers; fearful distrusts; anticipated violence and injustice from the states, and consequent ruin to the bank. A right to tax, is a right to destroy, is the whole amount of the argument, however varied by ingenuity, or embellished by eloquence. It is said, the states will abuse the power; and its exercise will *pro- [*348
duce infinite inconvenience and embarrassment to the bank. Now, if this were true, it cannot help our opponents; because, if the states have the power contended for, this court cannot take it from them, under the fear that they may abuse it; nor, indeed, for its actual abuse; and if they have it not, they may not use it, however moderately and discreetly. Nor is there any more force in the argument, that the bank property will be subjected to double or treble taxation. Each state will tax only the capital really employed in it; and it is always in the power of the bank, to show how its capital is distributed. But it is feared, the capital in a state may be taxed in gross; and the individual stockholders also taxed for the same stock. Is this common case of a double taxation of the same article, to be a cause of alarm now? Our revenue laws abound with similar cases; they arise out of the very nature of our double government. So says the Federalist; and it

is the first time it has been the ground of complaint. Poll taxes are paid to the federal and state governments; licenses to retail spirits; land taxes; and the whole round of internal duties, over which both governments have a concurrent, and, until now, it was supposed, a co-equal right. Were not the state banks taxed by the federal, and also by the state governments; in some, by a *bonus* for the charter; in others, directly and annually? The circumstance, that the taxes go to different governments, in these cases, is wholly immaterial to those who pay; unless it is, that it increases the danger of excess and oppression. It is justly remarked, on this subject, by *the Federalist, that our security from excessive burdens on any source of revenue, must be found in mutual forbearance and discretion in the use of the power; this is the only security, and the authority of this court can add nothing to it. When that fails, there is an end to the confederation, which is founded on a reasonable and honorable confidence in each other.

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It has been most impressively advanced, that the states, under pretence of taxing, may prohibit and expel the banks; that in the full exercise of this power, they may tax munitions of war; ships, about to sail, and armies on their march; nay, the spirit of the court is to be aroused by the fear that judicial proceedings will also come under this all-destroying power. Loans may be delayed for stamps, and the country ruined for the want of the money. But whenever the states shall be in a disposition to uproot the general government, they will take more direct and speedy means; and until they have this disposition, they will not use these. What power may not be abused; and whom or what shall we trust, if we guard ourselves with this extreme caution? The common and daily intercourse between man and man; all our relations in society, depend upon a reasonable confidence in each other. It is peculiarly the basis of our confederation, which lives not a moment, after we shall cease to trust each other. If the two governments are to regard each other as enemies, seeking opportunities of injury and distress, they will not long continue friends. This sort of timid reasoning about the powers of the government, has not escaped the authors so often alluded *to; who, in their 31st number, treat it very properly. Surely, the argument is as strong against giving to the United States the power to incorporate a bank with branches. What may be more easily, or more extensively abused; and what more powerful engine can we imagine to be brought into operation against the revenues and rights of the states? If the federal government must have a bank for the purposes of its revenue, all collision will be avoided, by establishing the parent bank in its own district, where it holds an exclusive jurisdiction; and planting its branches in such states as shall assent to it; and using state banks, where such assent cannot be obtained. Speaking practically, and by our experience, it may be safely asserted, that all the uses of the bank to the government might be thus obtained. Nothing would be wanting but profits and large dividends to the stockholders, which are the real object in this contest. Whatever may be the right of the United States to establish a bank, it cannot be better than that of the states. Their lawful power to incorporate such institutions has never yet been questioned; whatever may be in reserve for them, when it may be found "necessary and proper" for the interests of the national bank to crush the state institutions, and curtail the state authority. Grant-

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ing, that these rights are equal in the two governments; and that the sovereignty of the state, within its territory, over this subject, is but equal to that of the United States; and that all sovereign power remains undiminished in the states, except in those cases in which it has, by the constitution, been *expressly and exclusively transferred to the United States: the sovereign power of taxation (except on foreign commerce) being, in the language of the Federalist, co-equal to the two governments; it follows, as a direct and necessary consequence, that having equal powers to erect banks, and equal powers of taxation on property of that description, being neither imports, exports or tonnage, whatever jurisdiction the federal government may exercise in this respect, over a bank created by a state, any state may exercise over a bank created by the United States. Now, the federal government has assumed the right of taxing the state banks, precisely in the manner in which the state of Maryland has proceeded against the Bank of the United States; and as this right has never been resisted or questioned, it may be taken to be admitted by both parties; and must be equal and common to both parties, or the fundamental principles of our confederation have been strangely mistaken, or are to be violently overthrown. It has also been suggested, that the bank may claim a protection from this tax, under that clause of the constitution, which prohibits the states from passing laws, which shall impair the obligation of contracts. The charter is said to be the contract between the government and the stockholders; and the interests of the latter will be injured by the tax which reduces their profits. Many answers offer themselves to this agreement. In the first place, the United States cannot, either by a direct law, or by a contract with a third party, take away any right from the states, not granted by the constitution; they *cannot do, collaterally and by implication, what cannot be done directly. Their contracts must conform to the constitution, and not the constitution to their contracts. If, therefore, the states have, in some other way, parted with this right of taxation, they cannot be deprived of it, by a contract between other parties. Under this doctrine, the United States might contract away every right of every state; and any attempt to resist it, would be called a violation of the obligations of a contract. Again, the United States have no more right to violate contracts than the states, and surely, they never imagined they were doing so, when they taxed so liberally the stock of the state banks. Again, it might as well be said, that a tax on real estate, imposed after a sale of it, and not then perhaps contemplated, or new duties imposed on merchandise, after it is ordered, violate the contract between the vendor and the purchaser, and diminishes the value of the property. In fact, all contracts in relation to property, subject to taxation, are presumed to have in view the probability or possibility that they will be taxed; and the happening of the event never was imagined to interfere with the contract, or its lawful obligations.

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The *Attorney-General*, for the plaintiff in error, argued: 1. That the power of congress to create a bank ought not now to be questioned, after its exercise ever since the establishment of the constitution, sanctioned by every department of the government: by the legislature, in the charter of the bank, and other laws connected with the incorporation; by the *executive, in its assent to those laws; and by the judiciary, in carry-

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ing them into effect. After a lapse of time, and so many concurrent acts of the public authorities, this exercise of power must be considered as ratified by the voice of the people, and sanctioned by precedent. In the exercise of criminal judicature, the question of constitutionality could not have been overlooked by the courts, who have so often inflicted punishment for acts which would be no crimes, if these laws were repugnant to the fundamental law.

2. The power to establish such a corporation is implied, and involved in the grant of specific powers in the constitution; because the end involves the means necessary to carry it into effect. A power without the means to use it, is a nullity. But we are not driven to seek for this power in implication: because the constitution, after enumerating certain specific powers, expressly gives to congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or or in any department or officer thereof." If, therefore, the act of congress establishing the bank was necessary and proper to carry into execution any one or more of the enumerated powers, the authority to pass it is expressly delegated to congress by the constitution. We contend, that it was necessary and proper to carry into execution several of the enumerated powers, such as the powers of levying and collecting taxes throughout this widely-extended empire; of paying *the public debts, both in the United *354] States and in foreign countries; of borrowing money, at home and abroad; of regulating commerce with foreign nations, and among the several states; of raising and supporting armies and a navy; and of carrying on war. That banks, dispersed throughout the country, are appropriate means of carrying into execution all these powers, cannot be denied. Our history furnishes abundant experience of the utility of a national bank as an instrument of finance. It will be found in the aid derived to the public cause from the Bank of North America, established by congress, during the war of the revolution; in the great utility of the former Bank of the United States; and in the necessity of resorting to the instrumentality of the banks incorporated by the states, during the interval between the expiration of the former charter of the United States Bank, in 1811, and the establishment of the present bank in 1816; a period of war, the calamities of which were greatly aggravated by the want of this convenient instrument of finance. Nor is it required, that the power of establishing such a moneyed corporation should be indispensably necessary to the execution of any of the specified powers of the government. An interpretation of this clause of the constitution, so strict and literal, would render every law which could be passed by congress unconstitutional; for of no particular law can it be predicated, that it is absolutely and indispensably necessary to carry into effect any of the specified powers; since a different law might be imagined, which could be enacted, tending to the same object, though *not equally well *355] adapted to attain it. As the inevitable consequence of giving this very restricted sense to the word "necessary," would be to annihilate the very powers it professes to create; and as so gross an absurdity cannot be imputed to the framers of the constitution, this interpretation must be rejected.

Another not less inadmissible consequence of this construction is, that it

is fatal to the permanency of the constitutional powers; it makes them dependent for their being, on extrinsic circumstances, which, as these are perpetually shifting and changing, must produce correspondent changes in the essence of the powers on which they depend. But surely, the constitutionality of any act of congress cannot depend upon such circumstances. They are the subject of legislative discretion, not of judicial cognisance. Nor does this position conflict with the doctrine of the court in *Sturges* v. *Crowninshield* (*ante*, p. 122). The court has not said, in that case, that the powers of congress are shifting powers, which may or may not be constitutionally exercised, according to extrinsic or temporary circumstances; but it has merely determined, that the power of the state legislatures over the subject of bankruptcies is subordinate to that of congress on the same subject, and cannot be exercised so as to conflict with the uniform laws of bankruptcy throughout the Union which congress may establish. The power, in this instance, resides permanently in congress, whether it chooses to exercise it or not; but its exercise on the part of the states *is precarious, and dependent, in certain respects, upon its actual exercise by congress. [*356
The convention well knew that it was utterly vain and nugatory, to give to congress certain specific powers, without the means of enforcing those powers. The auxiliary means, which are necessary for this purpose, are those which are useful and appropriate to produce the particular end. "Necessary and proper" are, then, equivalent to needful and adapted; such is the popular sense in which the word necessary is sometimes used. That use of it is confirmed by the best authorities among lexicographers; among other definitions of the word "necessary," Johnson gives "needful;" and he defines "need," the root of the latter, by the words, "want, occasion." Is a law, then, wanted, is there occasion for it, in order to carry into execution any of the enumerated powers of the national government; congress has the power of passing it. To make a law constitutional, nothing more is necessary than that it should be fairly adapted to carry into effect some specific power given to congress. This is the only interpretation which can give effect to this vital clause of the constitution; and being consistent with the rules of the language, is not to be rejected, because there is another interpretation, equally consistent with the same rules, but wholly inadequate to convey what must have been the intention of the convention. Among the multitude of means to carry into execution the powers expressly given to the national government, congress is to select, from time to time, such as are most fit for the purpose. It would have been impossible *to enumerate them all in the constitution; and a specification of some, omitting others, would have been wholly useless. The court, in inquiring whether congress had made a selection of constitutional means, is to compare the law in question with the powers it is intended to carry into execution; not in order to ascertain whether other or better means might have been selected, for that is the legislative province, but to see whether those which have been chosen have a natural connection with any specific power; whether they are adapted to give it effect; whether they are appropriate means to an end. It cannot be denied, that this is the character of the Bank of the United States. But it is said, that the government might use private bankers, or the banks incorporated by the states, to carry on their fiscal operations. This, however, presents a mere question of political expediency, which, it is repeated, is [*357

exclusively for legislative consideration ; which has been determined by the legislative wisdom ; and cannot be reviewed by the court.

It is objected, that this act creates a corporation ; which, being an exercise of a fundamental power of sovereignty, can only be claimed by congress, under their grant of specific powers. But to have enumerated the power of establishing corporations, among the specific powers of congress, would have been to change the whole plan of the constitution ; to destroy its simplicity, and load it with all the complex details of a code of private jurisprudence. The power of establishing corporations is not one of the ends of government ; it is only a class of means for accomplishing its ends. An enumeration *of this particular class of means, omitting all others, would *358] have been a useless anomaly in the constitution. It is admitted, that this is an act of sovereignty, and so is any other law ; if the authority of establishing corporations be a sovereign power, the United States are sovereign, as to all the powers specifically given to their government, and as to all others necessary and proper to carry into effect those specified. If the power of chartering a corporation be necessary and proper for this purpose, congress has it to an extent as ample as any other sovereign legislature. Any government of limited sovereignty can create corporations only with reference to the limited powers that government possesses. The inquiry then reverts, whether the power of incorporating a banking company, be a necessary and proper means of executing the specific powers of the national government. The immense powers incontestably given, show that there was a disposition, on the part of the people, to give ample means to carry those powers into effect. A state can create a corporation, in virtue of its sovereignty, without any specific authority for that purpose, conferred in the state constitutions. The United States are sovereign as to certain specific objects, and may, therefore, erect a corporation for the purpose of effecting those objects. If the incorporating power had been expressly granted as an end, it would have conferred a power not intended ; if granted as a means, it would have conferred nothing more than was before given by necessary implication.

Nor does the rule of interpretation we contend for, sanction any usurpation, on the part of the national government ; since, if the argument be, that the *implied powers of the constitution may be assumed and ex- *359] ercised, for purposes not really connected with the powers specifically granted, under color of some imaginary relation between them, the answer is, that this is nothing more than arguing from the abuse of constitutional powers, which would equally apply against the use of those that are confessedly granted to the national government ; that the danger of the abuse will be checked by the judicial department, which, by comparing the means with the proposed end, will decide, whether the connection is real, or assumed as the pretext for the usurpation of powers not belonging to the government ; and that, whatever may be the magnitude of the danger from this quarter, it is not equal to that of annihilating the powers of the government, to which the opposite doctrine would inevitably tend.

3. If, then, the establishment of the parent bank itself be constitutional, the right to establish the branches of that bank in the different states of the Union follows, as an incident of the principal power. The expediency of this ramification, congress is alone to determine. To confine the operation

of the bank to the district of Columbia, where congress has the exclusive power of legislation, would be as absurd as to confine the courts of the United States to this district. Both institutions are wanted, wherever the administration of justice, or of the revenue, is wanted. The right, then, to establish these branches, is a necessary part of the means. This right is not delegated by congress to the parent bank. The act of congress for the establishment of offices of discount *and deposit, leaves the time and place of their establishment to the directors, as a matter of detail. [*360 When established, they rest, not on the authority of the parent bank, but on the authority of congress.

4. The only remaining question is, whether the act of the state of Maryland, for taxing the bank thus incorporated, be repugnant to the constitution of the United States? We insist, that any such tax, by authority of a state, would be unconstitutional, and that this act is so, from its peculiar provisions. But it is objected, that, by the 10th amendment of the constitution, all powers not expressly delegated to the United States, nor prohibited to the states, are reserved to the latter. It is said, that this being neither delegated to the one, nor prohibited to the other, must be reserved : and it is is also said, that the only prohibition on the power of state taxation, which does exist, excludes this case, and thereby leaves it to the original power of the states. The only prohibition is, as to laying any imposts, or duties on imports and exports, or tonnage duty, and this, not being a tax of that character, is said not to be within the terms of the prohibition ; and consequently, it remains under the authority of the states. But we answer, that this does not contain the whole sum of constitutional restrictions on the authority of the states. There is another clause in the constitution, which has the effect of a prohibition on the exercise of their authority, in numerous cases. The 6th article of the constitution of the United States declares, that the laws made in pursuance of it, " shall be the supreme law of the land, anything in the constitution, or laws of *any state to the contrary notwithstanding." By this declaration, the states are prohibited from passing any [*361 acts which shall be repugnant to a law of the United States. The court has already instructed us in the doctrine, that there are certain powers, which, from their nature, are exclusively vested in congress.(*a*) So, we contend here, that the only ground on which the constitutionality of the bank is maintainable, excludes all interference with the exercise of the power by the states. This ground is, that the bank, as ordained by congress, is an instrument to carry into execution its specified powers; and in order to enable this instrument to operate effectually, it must be under the direction of a single head. It cannot be interfered with, or controlled in any manner, by the states, without putting at hazard the accomplishment of the end, of which it is but a means. But the asserted power to tax any of the institutions of the United States, presents directly the question of the supremacy of their laws over the state laws. If this power really exists in the states, its natural and direct tendency is to annihilate any power which belongs to congress, whether express or implied. All the powers of the national government are to be executed in the states, and throughout the states ; and if the state legislatures can tax the instruments by which those powers are

(*a*) See Sturges *v.* Crowninshield, *ante*, p. 122.

executed, they may entirely defeat the execution of the powers. If they may tax an institution of finance, they may tax the proceedings in the courts
*362] of the United States. If they may *tax to one degree, they may tax to any degree; and nothing but their own discretion can impose a limit upon this exercise of their authority. They may tax both the bank and the courts, so as to expel them from the states. But, surely, the framers of the constitution did not intend, that the exercise of all the powers of the national government should depend upon the discretion of the state governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate. It is a direct collision of powers between the two governments. Congress says, there shall be a branch of the bank in the state of Maryland; that state says, there shall not. Which power is supreme? Besides, the charter, which is a contract between the United States and the corporation, is violated by this act of Maryland. A new condition is annexed by a sovereignty which was no party to the contract. The franchise, or corporate capacity, is taxed by a legislature, between whom and the object of taxation there is no political connection.

Jones, for the defendants in error, contended: 1. That this was to be considered as an open question, inasmuch as it had never before been submitted to judicial determination. The practice of the government, however inveterate, could never be considered as sanctioning a manifest usurpation; still less, could the practice, under a constitution of a date so recent, be put in competition with the contemporaneous exposition of its illustrious authors,
*363] as recorded for our instruction, in the "Letters of Publius," *or the Federalist. The interpretation of the constitution, which was contended for by the state of Maryland, would be justified from that text-book, containing a commentary, such as no other age or nation furnishes, upon its public law.

It is insisted, that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective states. To suppose, that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish. It is, therefore, a compact between the states, and all the powers which are not expressly relinquished by it, are reserved to the states. We admit, that the 10th amendment to the constitution is merely declaratory; that it was adopted *ex abundanti cautela;* and that with it, nothing more is reserved, than would have been reserved without it. But it is contended, on the other side, that not only the direct powers, but all incidental powers, partake of the supreme power, which is sovereign. This is an inherent sophism in the opposite argument, which depends on the conversion and ambiguity of terms. What is meant by sovereign power? It is modified by the terms of the grant under which it was given. They do not import sovereign power, generally, but sovereign power, limited to particular cases; and the question again recurs, whether sovereign power was given in this particular case. Is it true, that by conferring sovereign powers on a limited, delegated government, sovereign
*364] means are also granted? Is there no restriction *as to the means of exercising a general power? Sovereignty was vested in the former confederation, as fully as in the present national government. There was

nothing which forbade the old confederation from taxing the people, except that three modes of raising revenue were pointed out, and they could resort to no other. All the powers given to congress, under that system, except taxation, operated as directly on the people, as the powers given to the present government. The constitution does not profess to prescribe the ends merely for which the government was instituted, but also to detail the most important means by which they were to be accomplished. "To levy and collect taxes," "to borrow money," "to pay the public debts," "to raise and support armies," "to provide and maintain a navy," are not the ends for which this or any other just government is established. If a banking corporation can be said to be involved in either of these means, it must be as an instrument to collect taxes, to borrow money, and to pay the public debts. Is it such an instrument? It may, indeed, facilitate the operation of other financial institutions; but in its proper and natural character, it is a commercial institution, a partnership, incorporated for the purpose of carrying on the trade of banking. But we contend, that the government of the United States must confine themselves, in the collection and expenditure of revenue, to the means which are specifically enumerated in the constitution, or such auxiliary means as are naturally connected with the specific means. But what natural connection is there between *the collection of taxes, and the incorporation of a company of bankers? [*365
Can it possibly be said, that because congress is invested with the power of raising and supporting armies, that it may give a charter of monopoly to a trading corporation, as a bounty for enlisting men? Or that, under its more analogous power of regulating commerce, it may establish an East or a West India company, with the exclusive privilege of trading with those parts of the world? Can it establish a corporation of farmers of the revenue, or burden the internal industry of the states with vexatious monopolies of their staple productions? There is an obvious distinction between those means which are incidental to the particular power, which follow as a corollary from it, and those which may be arbitrarily assumed as convenient to the execution of the power, or usurped under the pretext of necessity.

For example, the power of coining money implies the power of establishing a mint. The power of laying and collecting taxes implies the power of regulating the mode of assessment and collection, and of appointing revenue officers; but it does not imply the power of establishing a great banking corporation, branching out into every district of the country, and inundating it with a flood of paper-money. To derive such a tremendous authority from implication, would be to change the subordinate into fundamental powers; to make the implied powers greater than those which are expressly granted; and to change the whole scheme and theory of the government. It is well known, that many of the powers which are expressly [*366
*granted to the national government in the constitution, were most reluctantly conceded by the people, who were lulled into confidence, by the assurances of its advocates, that it contained no latent ambiguity, but was to be limited to the literal terms of the grant: and in order to quiet all alarm, the 10th article of amendments was added, declaring "that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." It would seem, that human language could not furnish words less liable to mis-

construction! But it is contended, that the powers expressly granted to the national government in the constitution, are enlarged to an indefinite extent, by the sweeping clause, authorizing congress to make all laws which shall be necessary and proper for carrying into execution the powers expressly delegated to the national government, or any of its departments or officers. Now, we insist, that this clause shows that the intention of the convention was, to define the powers of the government with the utmost precision and accuracy. The creation of a sovereign legislature, implies an authority to pass laws to execute its given powers. This clause is nothing more than a declaration of the authority of congress to make laws, to execute the powers expressly granted to it, and the other departments of the government. But the laws which they are authorized to make, are to be such as are necessary and proper for this purpose. No terms could be found in the language, *367] more absolutely excluding a general and unlimited discretion than *these. It is not "necessary or proper," but "necessary and proper." The means used must have both these qualities. It must be, not merely convenient—fit—adapted—proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be proper, which are not necessary; because the end may be attained without them. The word "necessary," is said to be a synonyme of "needful." But both these words are defined "indispensably requisite;" and, most certainly, this is the sense in which the word "necessary" is used in the constitution. To give it a more lax sense, would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision. The only question, then, on this branch of the argument, will be, whether the establishment of a banking corporation be indispensably requisite to execute any of the express powers of the government? So far as the interest of the United States is concerned, as partners of this company of bankers, or so far as the corporation may be regarded as an executive officer of the government, acquiring real and personal property in trust for the use of the government, it may be asked, what right the United States have to acquire property of any kind, except that purchased by the consent of the legislature of the state in which such property may be, for the erection of forts, magazines, &c.; and ships or muni- *368] tions *of war, constructed or purchased by the United States, and the public treasure? Their right of acquiring property is absolutely limited to the subjects specified, which were the only means, of the nature of wealth or property, with which the people thought it necessary to invest them. The people never intended they should become bankers or traders of any description. They meant to leave to the states the power of regulating the trade of banking, and every other species of internal industry; subject merely to the power of congress to regulate foreign commerce, and the commerce between the different states, with which it is not pretended, that this asserted power is connected. The trade of banking, within the particular states, would then either be left to regulate itself, and carried on as a branch of private trade, as it is in many countries; or banking companies would be incorporated by the state legislatures to carry it on, as has been the usage of this country. But in either case, congress would have nothing to do with

the subject. The power of creating corporations is a distinct sovereign power, applicable to a great variety of objects, and not being expressly granted to congress for this, or any other object, cannot be assumed by implication. If it might be assumed for this purpose, it might also be exercised to create corporations for the purpose of constructing roads and canals; a power to construct which has been also lately discovered among other secrets of the constitution, developed by this dangerous doctrine of implied powers. Or it might be exercised to establish great trading monopolies, *or to lock up the property of the country in mortmain, by some strained connection between the exercise of such powers, and those [*369 expressly given to the government.

3. Supposing the establishment of such a banking corporation, to be implied as one of the means necessary and proper to execute the powers expressly granted to the national government, it is contended by the counsel opposed to us, that its property is exempted from taxation by the state governments, because they cannot interfere with the exercise of any of the powers, express or implied, with which congress is invested. But the radical vice of this argument is, that the taxing power of the states, as it would exist, independent of the constitution, is in no respect limited or controlled by that supreme law, except in the single case of imposts and tonnage duties, which the states cannot lay, unless for the purpose of executing their inspection laws. But their power of taxation is absolutely unlimited in every other respect. Their power to tax the property of this corporation cannot be denied, without at the same time denying their right to tax any property of the United States. The property of the bank cannot be more highly privileged than that of the government. But they are not forbidden from taxing the property of the government, and therefore, cannot be constructively prohibited from taxing that of the bank. Being prohibited from taxing exports and imports, and tonnage, and left free from any other prohibition, in this respect; they may tax everything else but exports, imports and tonnage. The authority of *"the Federalist" [*370 is express, that the taxing power of congress does not exclude that of the states over any other objects except these. If, then, the exercise of the taxing power of congress does not exclude that of the states, why should the exercise of any other power by congress, exclude the power of taxation by the states? If an express power will not exclude it, shall an inplied power have that effect? If a power of the same kind will not exclude it, shall a power of a different kind? The unlimited power of taxation results from state sovereignty. It is expressly taken away only in the particular instances mentioned. Shall others be added by implication? Will it be pretended, that there are two species of sovereignty in our government? Sovereign power is absolute, as to the objects to which it may be applied. But the sovereign power of taxation in the states may be applied to all other objects, except imposts and tonnage: its exercise cannot, therefore, be limited and controlled by the exercise of another sovereign power in congress. The right of both sovereignties are co-equal and co-extensive. The trade of banking may be taxed by the state of Maryland; the United States may incorporate a company to carry on the trade of banking, which may establish a branch in Maryland; the exercise of the one sovereign power, cannot be controlled by the exercise of the other. It can no more be controlled in this

case, than if it were the power of taxation in congress, which was interfered with by the power of taxation in the state, both being exerted concurrently
*371] on the same object. In both *cases, mutual confidence, discretion and forbearance can alone qualify the exercise of the conflicting powers, and prevent the destruction of either. This is an anomaly, and perhaps an imperfection, in our system of government. But neither congress, nor this court, can correct it. That system was established by reciprocal concessions and compromises between the state and federal governments; its harmony can only be maintained in the same spirit. Even admitting that the property of the United States (such as they have a right to hold), their forts and dock-yards, their ships and military stores, their archives and treasures, public institutions of war, or revenue or justice, are exempt, by necessary implication, from state taxation; does it, therefore, follow, that this corporation, which is a partnership of bankers, is also exempt? They are not collectors of the revenue, any more than any state bank or foreign bankers, whose agency the government may find it convenient to employ as depositaries of its funds. They may be employed to remit those funds from one place to another, or to procure loans, or to buy and sell stock; but it is in a commercial, and not an administrative character, that they are thus employed. The corporate character with which these persons are clothed, does not emempt them from state taxation. It is the nature of their employment, as agents or officers of the government, if anything, which must create the exemption. But the same employment of the state bank or private bankers, would equally entitle them to the same exemption. Nor can the exemption
*372] of the stock of this *corporation from state taxation, be claimed on the ground of the proprietary interest which the United States have in it as stockholders. Their interest is undistinguishably blended with the general capital stock; if they will mix their funds with those of bankers, or engage as partners in any other branch of commerce, their sovereign character and dignity are lost in the mercantile character which they have assumed; and their property thus employed becomes subject to local taxation, like other capital employed in trade.

Martin, Attorney-General of Maryland.—1. Read several extracts from the Federalist, and the debates of the Virginia and New York conventions, to show that the contemporary exposition of the constitution, by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the counsel for the plaintiff in error. That it was then maintained, by the enemies of the constitution, that it contained a vast variety of powers, lurking under the generality of its phraseology, which would prove highly dangerous to the liberties of the people, and the rights of the states, unless controlled by some declaratory amendment, which should negative their existence. This apprehension was treated as a dream of distempered jealousy. The danger was denied to exist; but to provide an assurance against the possibility of its occurrence, the 10th amendment was added to the constitution. This, however, could be considered as nothing more than declaratory of the sense of the people as to the extent of the
*373] powers *conferred on the new government. We are now called upon to apply that theory of interpretation, which was then rejected by the friends of the new constitution, and we are asked to engraft upon it powers

of vast extent, which were disclaimed by them, and which if they had been fairly avowed at the time, would have prevented its adoption. Before we do this, they must, at least, be proved to exist, upon a candid examination of this instrument, as if it were now, for the first time, submitted to interpretation. Although we cannot, perhaps, be allowed to say, that the states have been "deceived in their grant;" yet we may justly claim something like a rigorous demonstration of this power, which nowhere appears upon the face of the constitution, but which is supposed to be tacitly inculcated in its general object and spirit. That the scheme of the framers of the constitution, intended to leave nothing to implication, will be evident, from the consideration, that many of the powers expressly given are only means to accomplish other powers expressly given. For example, the power to declare war involves, by necessary implication, if anything was to be implied, the powers of raising and supporting armies, and providing and maintaining a navy, to prosecute the war then declared. So also, as money is the sinew of war, the powers of laying and collecting taxes, and of borrowing money, are involved in that of declaring war. Yet all these powers are specifically enumerated. If, then, the convention has specified some powers, which being only means to accomplish the ends of government, might have been *taken by implication; by what just rule of construction, are other [*374
sovereign powers, equally vast and important, to be assumed by implication? We insist, that the only safe rule is, the plain letter of the constitution; the rule which the constitutional legislators themselves have prescribed in the 10th amendment, which is merely declaratory; that the powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. The power of establishing corporations is not delegated to the United States, nor prohibited to the individual states. It is, therefore, reserved to the states, or to the people. It is not expressly delegated, either as an end, or a means, of national government. It is not to be taken by implication, as a means of executing any or all of the powers expressly granted; because other means, not more important or more sovereign in their character, are expressly enumerated. We still insist, that the authority of establishing corporations is one of the great sovereign powers of government. It may well exist in the state governments, without being expressly conferred in the state constitutions; because those governments have all the usual powers which belong to every political society, unless expressly forbidden, by the letter of the state constitutions, from exercising them. The power of establishing corporations has been constantly exercised by the state governments, and no portion of it has been ceded by them to the government of the United States.

2. But admitting that congress has a right to incorporate a banking company, as one of the means *necessary and proper to execute the [*375
specific powers of the national government; we insist, that the respective states have the right to tax the property of that corporation, within their territory; that the United States cannot, by such an act of incorporation, withdraw any part of the property within the state from the grasp of taxation. It is not necessary for us to contend, that any part of the public property of the United States, its munitions of war, its ships and treasure, are subject to state taxation. But if the United States hold shares in the stock of a private banking company, or any other trading company,

their property is not exempt from taxation, in common with the other capital stock of the company; still less, can it communicate to the shares belonging to private stockholders, an immunity from local taxation. The right of taxation by the state, is co-extensive with all private property within the state. The interest of the United States in this bank is private property, though belonging to public persons. It is held by the goverment, as an undivided interest with private stockholders. It is employed in the same trade, subject to the same fluctuations of value, and liable to the same contingencies of profit and loss. The shares belonging to the United States, or of any other stockholders, are not subjected to direct taxation by the law of Maryland. The tax imposed, is a stamp tax upon the notes issued by a banking-house within the state of Maryland. Because the United States happen to be partially interested, either as dormant or active partners, in that house, is no reason why the state should refrain from laying a tax which
*376] they have, otherwise, *a constitutional right to impose, any more than if they were to become interested in any other house of trade, which should issue its notes, or bills of exchange, liable to a stamp duty, by a law of the state. But it is said, that a right to tax, in this case, implies a right to destroy; that it is impossible to draw the line of discrimination between a tax fairly laid for the purposes of revenue, and one imposed for the purpose of prohibition. We answer, that the same objection would equally apply to the right of congress to tax the state banks; since the same difficulty of discriminating occurs in the exercise of that right. The whole of this subject of taxation is full of difficulties, which the convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the state and the national government. This being found impracticable or inconvenient, the state governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to congress, but reserving to the states a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the goverument, the evils of which must be endured, or mitigated by discretion and mutual forbearance. The debates in the state conventions show that the power of state taxation was understood to be absolutely unlimited, except as to imports and tonnage duties. The states would not have adopted the constitution, upon any other understanding. As to the judicial proceedings, and
*377] the custom-house papers of the United States, they are *not property, by their very nature; they are not the subjects of taxation; they are the proper instruments of national sovereignty, essential to the exercise of its powers, and in legal contemplation altogether extra-territorial as to state authority.

Pinkney, for the plaintiff in error, in reply, stated: 1. That the cause must first be cleared of a question which ought not to have been forced into the argument—whether the act of congress establishing the bank was consistent with the constitution? This question depended both on authority and on principle. No topics to illustrate it could be drawn from the confederation, since the present constitution was as different from that, as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the states, such as there had been many examples of in

the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new constitution was intended to reform, was legislation upon sovereign states in their corporate capacity. But the constitution acts directly on the people, by means of powers communicated directly from the people. No state, in its corporate capacity, ratified it; but it was proposed for adoption to popular conventions. It springs from the people, precisely as the state constitution springs from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country is divided. The federal powers are just as sovereign as those of the states. The state sovereignties are not the authors *of the constitution of the United States. They are preceding in point of time, to the national sovereignty, but they are postponed to it, in point of supremacy, by the will of the people. The means of giving efficacy to the sovereign authorities vested by the people in the national government, are those adapted to the end; fitted to promote, and having a natural relation and connection with, the objects of that government. The constitution, by which these authorities, and the means of executing them, are given, and the laws made in pursuance of it, are declared to be the supreme law of the land; and they would have been such, without the insertion of this declaratory clause; they must be supreme, or they would be nothing. The constitutionality of the establishment of the bank, as one of the means necessary to carry into effect the authorities vested in the national government, is no longer an open question. It has been long since settled by decisions of the most revered authority, legislative, executive and judicial. A legislative construction, in a doubtful case, persevered in for a course of years, ought to be binding upon the court. This, however, is not a question of construction merely, but of political necessity, on which congress must decide. It is conceded, that a manifest usurpation cannot be maintained in this mode; but, we contend, that this is such a doubtful case, that congress may expound the nature and extent of the authority under which it acts, and that this practical interpretation has become incorporated into the constitution. There are two distinguishing points which entitle it to great respect. The first is, that it was a *contemporaneous construction; the second is, that it was made by the authors of the constitution themselves. The members of the convention who framed the constitution, passed into the first congress, by which the new government was organized; they must have understood their own work. They determined that the constitution gave to congress the power of incorporating a banking company. It was not required, that this power should be expressed in the text of the constitution; it might safely be left to implication. An express authority to erect corporations generally, would have been perilous; since it might have been constructively extended to the creation of corporations entirely unnecessary to carry into effect the other powers granted; we do not claim an authority in this respect, beyond the sphere of the specific powers. The grant of an authority to erect certain corporations, might have been equally dangerous, by omitting to provide for others, which time and experience might show to be equally, and even more necessary. It is a historical fact, of great importance in this discussion, that amendments to the constitution were actually proposed, in order to guard against the establishment of commercial monopolies. But if the general power of incorporating did not exist,

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why seek to qualify it, or to guard against its abuse? The legislative precedent, established in 1791, has been followed up by a series of acts of congress, all confirming the authority. Political considerations alone might have produced the refusal to renew the charter in 1811; at any rate, we know that they mingled themselves in the debate, and the determination.

*380] *In 1815, a bill was passed by the two houses of congress, incorporating a national bank; to which the president refused his assent, upon political considerations only, waiving the question of constitutionality, as being settled by contemporaneous exposition, and repeated subsequent recognitions. In 1816, all branches of the legislature concurred in establishing the corporation, whose chartered rights are now in judgment before the court. None of these measures ever passed *sub silentio;* the proposed incorporation was always discussed, and opposed, and supported, on constitutional grounds, as well as on considerations of political expediency. Congress is *primâ facie* a competent judge of its own constitutional powers. It is not, as in questions of privilege, the exclusive judge; but it must first decide, and that in a proper judicial character, whether a law is constitutional, before it is passed. It had an opportunity of exercising its judgment in this respect, upon the present subject, not only in the principal acts incorporating the former, and the present bank, but in the various incidental statutes subsequently enacted on the same subject; in all of which, the question of constitutionality was equally open to debate, but in none of which was it agitated.

There are, then, in the present case, the repeated determinations of the three branches of the national legislature, confirmed by the constant acquiescence of the state sovereignties, and of the people, for a considerable length of time. Their strength is fortified by judicial authority. The

*381] decisions in the courts, affirming the constitutionality of these *laws, passed, indeed, *sub silentio;* but it was the duty of the judges, especially in criminal cases, to have raised the question; and we are to conclude, from this circumstance, that no doubt was entertained respecting it. And if the question be examined on principle, it will be found not to admit of doubt. Has congress, abstractedly, the authority to erect corporations? This authority is not more a sovereign power, than many other powers which are acknowledged to exist, and which are but means to an end. All the objects of the government are national objects, and the means are, and must be, fitted to accomplish them. These objects are enumerated in the constitution, and have no limits but the constitution itself. A more perfect union is to be formed; justice to be established; domestic tranquillity insured; the common defence provided for; the general welfare promoted; the blessings of liberty secured to the present generation, and to posterity. For the attainment of these vast objects, the government is armed with powers and faculties corresponding in magnitude. Congress has power to lay and collect taxes and duties, imposts and excises; to pay the debts, and provide for the common defence and general welfare of the United States; to borrow money on the credit of the nation; to regulate commerce; to establish uniform naturalization and bankrupt laws; to coin money, and regulate the circulating medium, and the standard of weights and measures; to establish post-offices and post-roads; to promote the progress of science

*382] and the useful arts, by granting patents and copyrights; to constitute tribunals inferior to the supreme court, and to define *and punish

offences against the law of nations; to declare and carry on war; to raise and support armies, and to provide and maintain a navy; to discipline and govern the land and naval forces; to call forth the militia to execute the laws, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia; to exercise exclusive legislation, in all cases, over the district where the seat of government is established, and over such other portions of territory as may be ceded to the Union for the erection of forts, magazines, &c.; to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and to make all laws which shall be necessary and proper for carrying into execution these powers, and all other powers vested in the national government, or any of its departments or officers. The laws thus made are declared to be the supreme law of the land; and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary nothwithstanding. Yet it is doubted, whether a government invested with such immense powers has authority to erect a corporation within the sphere of its general objects, and in order to accomplish some of those objects! The state powers are much less in point of magnitude, though greater in number; yet it is supposed, the states possess the authority of establishing corporations, whilst it is denied to the geveral government. It is conceded to the state legislatures, though not specifically granted, because it is said to be an incident of state sovereignty; but it *is refused to congress, because it is not specifically granted, though it may be [*383 necessary and proper to execute the powers which are specifically granted. But the authority of legislation in the state government is not unlimited; there are several limitations to their legislative authority. First, from the nature of all government, especially, of republican government, in which the residuary powers of sovereignty, not granted specifically, by inevitable implication, are reserved to the people. Secondly, from the express limitations contained in the state constitutions. And thirdly, from the express prohibitions to the states contained in the United States constitution. The power of erecting corporations is nowhere expressly granted to the legislatures of the states in their constitutions; it is taken by necessary implication: but it cannot be exercised to accomplish any of the ends which are beyond the sphere of their constitutional authority. The power of erecting corporations is not an end of any government; it is a necessary means of accomplishing the ends of all governments. It is an authority inherent in, and incident to, all sovereignty.

The history of corporations will illustrate this position. They were transplanted from the Roman law into the common law of England, and all the municipal codes of modern Europe. From England, they were derived to this country. But in the civil law, a corporation could be created by a mere voluntary association of individuals. 1 Bl. Com. 471. And in England, the authority of parliament *is not necessary to create a corpo- [*384 rate body. The king may do it, and may communicate his power to a subject (1 Bl. Com. 474), so little is this regarded as a transcendent power of sovereignty, in the British constitution. So also, in our constitution, it ought to be regarded as but a subordinate power to carry into effect the great objects of government. The state governments cannot establish corporations to carry into effect the national powers given to congress, nor can congress create

corporations to execute the peculiar duties of the state governments. But so much of the power or faculty of incorporation as concerns national objects has passed away from the state legislatures, and is vested in the national government. An act of incorporation is but a law, and laws are but means to promote the legitimate end of all government—the felicity of the people. All powers are given to the national government, as the people will. The reservation in the 10th amendment to the constitution, of "powers not delegated to the United States," is not confined to powers not expressly delegated. Such an amendment was indeed proposed; but it was perceived, that it would strip the government of some of its most essential powers, and it was rejected. Unless a specific means be expressly prohibited to the general government, it has it, within the sphere of its specified powers. Many particular means are, of course, involved in the general means necessary to carry into effect the powers expressly granted, and in that case, the general means become *the end, and the smaller objects the means. *385] It was impossible for the framers of the constitution to specify, prospectively, all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances, in such an unexampled state of political society as ours, for ever changing and for ever improving. How unwise would it have been, to legislate immutably for exigencies which had not then occurred, and which must have been foreseen but dimly and imperfectly! The security against abuse is to be found in the constitution and nature of the government, in its popular character and structure. The statute book of the United States is filled with powers derived from implication. The power to lay and collect taxes will not execute itself. Congress must designate in detail all the means of collection. So also, the power of establishing post-offices and post-roads, involves that of punishing the offence of robbing the mail. But there is no more necessary connection between the punishment of mail-robbers, and the power to establish post-roads, than there is between the institution of a bank, and the collection of the revenue and payment of the public debts and expenses. So, light-houses, beacons, buoys and public piers, have all been established, under the general power to regulate commerce. But they are not indispensably necessary to commerce. It might linger on, without these aids, though exposed to more perils and losses. So, congress has authority to coin money, and to guard the purity of the circulating medium, by providing for the punishment *of counterfeiting the current coin; but laws are also made for pun- *386] ishing the offence of uttering and passing the coin thus counterfeited. It is the duty of the court to construe the constitutional powers of the national government liberally, and to mould them so as to effectuate its great objects. Whence is derived the power to punish smuggling? It does not collect the impost, but it is a means more effectually to prevent the collection from being diminished in amount, by frauds upon the revenue laws. Powers, as means, may then be implied in many cases. And if so, why not in this case as well as any other?

The power of making all needful rules and regulations respecting the territory of the United States, is one of the specified powers of congress. Under this power, it has never been doubted, that congress had authority te establish corporations in the territorial governments. But this power is

derived entirely from implication. It is assumed, as an incident to the principal power. If it may be assumed, in that case, upon the ground, that it is a necessary means of carrying into effect the power expressly granted, why may it not be assumed, in the present case, upon a similar ground? It is readily admitted, there must be a relation, in the nature and fitness of things between the means used and the end to be accomplished. But the question is, whether the necessity which will justify a resort to a certain means, must be an absolute, indispensable, inevitable necessity? The power of passing all laws necessary and proper to carry into effect the other powers specifically granted, is a political power; it *is a matter of legislative discretion, and those who exercise it, have a wide range of choice in [*387
selecting means. In its exercise, the mind must compare means with each other. But absolute necessity excludes all choice; and therefore, it cannot be this species of necessity which is required. Congress alone has the fit means of inquiry and decision. The more or less of necessity never can enter as an ingredient into judicial decision. Even absolute necessity cannot be judged of here; still less, can practical necessity be determined in a judicial *forum*. The judiciary may, indeed, and must, see that what has been done is not a mere evasive pretext, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon state sovereignty, or the rights of the people. For this purpose, it must inquire, whether the means assumed have a connection, in the nature and fitness of things, with the end to be accomplished. The vast variety of possible means, excludes the practicability of judicial determination as to the fitness of a particular means. It is sufficient, that it does not appear to be violently and unnaturally forced into the service, or fraudulently assumed, in order to usurp a new substantive power of sovereignty. A philological analysis of the terms "necessary and proper" will illustrate the argument. Compare these terms as they are used in that part of the constitution now in question, with the qualified manner in which they are used in the 10th section of the same article. In the latter, it is provided that "no state shall, without the consent of congress, lay any imposts or duties on imports *or exports, except what may be absolutely necessary for executing [*388
its inspection laws." In the clause in question, congress is invested with the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," &c. There is here then, no qualification of the necessity; it need not be absolute; it may be taken in its ordinary grammatical sense. The word *necessary*, standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject. This, like many other words, has a primitive sense, and another figurative and more relaxed; it may be qualified by the addition of adverbs of diminution or enlargement, such as very, indispensably, more, less, or absolutely necessary; which last is the sense in which it is used in the 10th section of this article of the constitution. But that it is not always used in this strict and rigorous sense, may be proved, by tracing its definition and etymology in every human language.

If, then, all the powers of the national government are sovereign and supreme; if the power of incorporation is incidental, and involved in the others; if the degree of political necessity which will justify a resort to a particular means, to carry into execution the other powers of the govern-

ment, can never be a criterion of judicial determination, but must be left to legislative discretion, it only remains to inquire, whether a bank has a natural and obvious connection with other express or implied powers, so as to become a necessary and proper means of carrying them into execution. A
*389] bank *might be established as a branch of the public administration, without incorporation. The government might issue paper, upon the credit of the public faith, pledged for its redemption, or upon the credit of its property and funds. Let the office where this paper is issued be made a place of deposit for the money of individuals, and authorize its officers to discount, and a bank is created. It only wants the forms of incorporation. But, surely, it will not be pretended, that clothing it with these forms would make such an establishment unconstitutional. In the bank which is actually established and incorporated, the United States are joint stockholders, and appoint joint directors ; the secretary of the secretary of the treasury has a supervising authority over its affairs ; it is bound, upon his requisition, to transfer the funds of the government wherever they may be wanted ; it performs all the duties of commissioners of the loan-office ; it is bound to loan the government a certain amount of money, on demand ; its notes are receivable in payment for public debts and duties ; it is intimately connected, according to the usage of the whole world, with the power of borrowing money, and with all the financial operations of the government. It has, also, a close connection with the power of regulating foreign commerce, and that between the different states. It provides a circulating medium, by which that commerce can be more conveniently carried on, and exchanges may be facilitated. It is true, there are state banks by which a circulating medium to a certain extent is provided. But that only diminishes the *quantum* of
*390] necessity, *which is no criterion by which to test the constitutionality of a measure. It is also connected with the power of making all needful regulations for the government of the territory, " and other property of the United States." If they may establish a corporation to regulate their territory, they may establish one to regulate their property. Their treasure is their property, and may be invested in this mode. It is put in partnership ; but not for the purpose of carrying on the trade of banking as one of the ends for which the government was established ; but only as an instrument or means for executing its sovereign powers. This instrument could not be rendered effectual for this purpose, but by mixing the property of individuals with that of the public. The bank could not otherwise acquire a credit for its notes. Universal experience shows, that, if, altogether a government bank, it could not acquire, or would soon lose, the confidence of the community.

2. As to the branches, they are identical with the parent bank. The power to establish them is that species of subordinate power, wrapped up in the principal power, which congress may place at its discretion.

3. The last and greatest, and only difficult question in the cause, is that which respects the assumed right of the states to tax this bank, and its branches, thus established by congress? This is a question, comparatively of no importance to the individual states, but of vital importance to the Union. Deny this exemption to the bank as an instrument of government, and
*391] what is the consequence? There is no express provision *in the constitution, which exempts any of the national institutions or prop-

erty from state taxation. It is only by implication that the army and navy, and treasure, and judicature of the Union are exempt from state taxation. Yet they are practically exempt; and they must be, or it would be in the power of any one state to destroy their use. Whatever the United States have a right to do, the individual states have no right to undo. The power of congress to establish a bank, like its other sovereign powers, is supreme, or it would be nothing. Rising out of an exertion of paramount authority, it cannot be subject to any other power. Such a power in the states, as that contended for on the other side, is manifestly repugnant to the power of congress; since a power to establish, implies a power to continue and preserve.

There is a manifest repugnancy between the power of Maryland to tax, and the power of congress to preserve, this institution. A power to build up, what another may pull down at pleasure, is a power which may provoke a smile, but can do nothing else. This law of Maryland acts directly on the operations of the bank, and may destroy it. There is no limit or check in this respect, but in the discretion of the state legislature. That discretion cannot be controlled by the national councils. Whenever the local councils of Maryland will it, the bank must be expelled from that state. A right to tax, without limit or control, is essentially a power to destroy. If one national institution may be destroyed in this manner, all may be destroyed in the same manner. If this power to tax the national property and institutions *exists in the state of Maryland, it is unbounded in extent. [*392
There can be no check upon it, either by congress, or the people of the other states. Is there then any intelligible, fixed, defined bonndary of this taxing power? If any, it must be found in this court. If it does not exist here, it is a nonentity. But the court cannot say what is an abuse, and what is a legitimate use of the power. The legislative intention may be so masked, as to defy the scrutinizing eye of the court. How will the court ascertain, *à priori*, that the given amount of tax will crush the bank? It is essentially a question of political economy, and there are always a vast variety of facts bearing upon it. The facts may be mistaken. Some important considerations belonging to the subject may be kept out of sight; they must all vary with times and circumstances. The result, then, must determine, whether the tax is destructive. But the bank may linger on for some time, and that result cannot be known, until the work of destruction is consummated. A criterion which has been proposed, is to see whether the tax has been laid, impartially, upon the state banks, as well as the Bank of the United States. Even this is an unsafe test; for the state governments may wish, and intend, to destroy their own banks. The existence of any national institution ought not to depend upon so frail a security. But this tax is levelled exclusively at the branch of the United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other. It is a fundamental article of the state *constitution of Maryland, that taxes shall operate [*393
on all the citizens impartially and uniformly, in proportion to their property, with the exception, however, of taxes laid for political purposes. This is a tax laid for a political purpose; for the purpose of destroying a great institution of the national government; and if it were not imposed for that purpose, it would be repugnant to the state constitution, as not being

laid uniformly on all the citizens, in proportion to their property. So that the legislature cannot disavow this to be its object, without, at the same time, confessing a manifest violation of the state constitution. Compare this act of Maryland with that of Kentucky, which is yet to come before the court, and the absolute necessity of repressing such attempts in their infancy, will be evident. Admit the constitutionality of the Maryland tax, and that of Kentucky follows inevitably. How can it be said, that the office of discount and deposit in Kentucky cannot bear a tax of $60,000 *per annum*, payable monthly? Probably, it could not; but judicial certainty is essential; and the court has no means of arriving at that certainty. There is, then, here, an absolute repugnancy of power to power; we are not bound to show, that the particular exercise of the power in the present case is absolutely repugnant. It is sufficient, that the same power may be thus exercised.

There certainly may be some exceptions out of the taxing power of the states, other than those created by the taxing power of congress; because, if there were no implied exceptions, then, the navy, and other *exclu- *394] sive property of the United States, would be liable to state taxation. If some of the powers of congress, other than its taxing power, necessarily involve incompatibility with the taxing power of the states, this may be incompatible. This is incompatible; for a power to impose a tax *ad libitum* upon the notes of the bank, is a power to repeal the law, by which the bank was created. The bank cannot be useful, it cannot act at all, unless it issues notes. If the present tax does not disable the bank from issuing its notes, another may; and it is the authority itself which is questioned, as being entirely repugnant to the power which established and preserves the bank. Two powers thus hostile and incompatible cannot co-exist. There must be, in this case, an implied exception to the general taxing power of the states, because it is a tax upon the legislative faculty of congress, upon the national property, upon the national institutions. Because the taxing powers of the two governments are concurrent in some respects, it does not follow, that there may not be limitations on the taxing power of the states, other than those which are imposed by the taxing power of congress. Judicial proceedings are practically a subject of taxation in many countries, and in some of the states of this Union. The states are not expressly prohibited in the constitution, from taxing the judicial proceedings of the United States. Yet such a prohibition must be implied, or the administration of justice in the national courts might be obstructed by a prohibitory tax. But such a tax is no more a tax on the legislative faculty of congress than this. The branch *bank in Maryland is as much an institution of the sovereign power *395] of the Union, as the circuit court of Maryland. One is established in virtue of an express power; the other by an implied authority; but both are equal, and equally supreme. All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual states, in every respect, and for every purpose, including that of taxation. This immunity must extend to this case, because the power of taxation imports the power of taxation for the purpose of prohibition and destruction. The immunity of foreign public vessels from the local jurisdiction, whether state or national, was established in the case of *The Exchange*, 7 Cranch 116, not upon positive municipal law, nor upon conven-

tional law ; but it was implied, from the usage of nations, and the necessity of the case. If, in favor of foreign governments, such an edifice of exemption has been built up, independent of the letter of the constitution, or of any other written law, shall not a similar edifice be raised on the same foundations, for the security of our own national government? So also, the jurisdiction of a foreign power, holding a temporary possession of a portion of national territory, is nowhere provided for in the constitution ; but is derived from inevitable implication. *United States* v. *Rice* (*ante*, p. 246). These analogies show, that there may be exemptions from state jurisdiction, not detailed in the constitution, but arising out of general considerations. If congress has power to do a particular act, *no state can impede, [*396
retard or burden it. Can there be a stronger ground, to infer a cessation of state jurisdiction?

The Bank of the United States is as much an instrument of the government for fiscal purposes, as the courts are its instruments for judicial purposes. They both proceed from the supreme power, and equally claim its protection. Though every state in the Union may impose a stamp tax, yet no state can lay a stamp tax upon the judicial proceedings or custom-house papers of the United States. But there is no such express exception to the general taxing power of the states contained in the constitution. It arises from the general nature of the government, and from the principle of the supremacy of the national powers, and the laws made to execute them, over the state authorities and state laws.

It is objected, however, that the act of congress, incorporating the bank, withdraws property from taxation by the state, which would be otherwise liable to state taxation. We answer, that it is immaterial, if it does thus withdraw certain property from the grasp of state taxation, if congress had authority to establish the bank, since the power of congress is supreme. But, in fact, it withdraws nothing from the mass of taxable property in Maryland, which that state could tax. The whole capital of the bank, belonging to private stockholders, is drawn from every state in the Union, and the stock belonging to the United States, previously constituted a part of the public treasure. Neither the stock belonging to citizens of other states, nor the privileged treasure *of the United States, mixed up with this [*397
private property, were previously liable to taxation in Maryland ; and as to the stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property, in common with all the other private property in the state. The establishment of the bank, so far from withdrawing anything from taxation by the state, brings something into Maryland which that state may tax. It produces revenue to the citizens of Maryland, which may be taxed equally and uniformly, with all their other private property. The materials of which the ships of war, belonging to the United States, are constructed, were previously liable to state taxation. But the instant they are converted into public property, for the public defence, they cease to be subject to state taxation. So, here, the treasure of the United States, and that of individuals, citizens of Maryland, and of other states, are undistinguishably confounded in the capital stock of this great national institution, which, it has been before shown, could be made useful as an instrument of finance, in no other mode than by thus blending together the property of the government and of private merchants.

This partnership is, therefore, one of necessity, on the part of the United States. Either this tax operates upon the franchise of the bank, or upon its property. If upon the former, then it comes directly in conflict with the exercise of a great sovereign authority of congress; if upon the latter, then it is a tax upon the property of the United States; since the law does not,
*398] and *cannot, in imposing a stamp tax, distinguish their interest from that of private stockholders.

But it is said, that congress possesses and exercises the unlimited authority of taxing the state banks; and therefore, the states ought to have an equal right to tax the Bank of the United States. The answer to this objection is, that, in taxing the state banks, the states in congress exercise their power of taxation. Congress exercises the power of the people; the whole acts on the whole. But the state tax is a part acting on the whole. Even if the two cases were the same, it would rather exempt the state banks from federal taxation, than subject the Bank of the United States to taxation by a particular state. But the state banks are not machines essential to execute the powers of the state sovereignties, and therefore, this is out of the question. The people of the United States, and the sovereignties of the several states, have no control over the taxing power of a particular state. But they have a control over the taxing power of the United States, in the responsibility of the members of the house of representatives to the people of the state which sends them, and of the senators, to the legislature by whom they are chosen. But there is no correspondent responsibility of the local legislature of Maryland, for example, to the people of the other states of the Union. The people of other states are not represented in the legislature of Maryland, and can have no control, directly or indirectly, over its proceedings. The legislature of Maryland is responsible only to
*399] the people of that state. The national *government can withdraw nothing from the taxing power of the states, which is not for the purpose of national benefit and the common welfare, and within its defined powers. But the local interests of the states are in perpetual conflict with the interests of the Union; which shows the danger of adding power to the partial views and local prejudices of the states. If the tax imposed by this law be not a tax on the property of the United States, it is not a tax on any property; and it must, consequently, be a tax on the faculty or franchise. It is, then, a tax on the legislative faculty of the Union, on the charter of the bank. It imposes a stamp duty upon the notes of the bank, and thus stops the very source of its circulation and life. It is as much a direct interference with the legislative faculty of congress, as would be a tax on patents, or copyrights, or custom-house papers or judicial proceedings.

Since, then, the constitutional government of this republican empire cannot be practically enforced, so as to secure the permanent glory, safety and felicity of this great country, but by a fair and liberal interpretation of its powers; since those powers could not all be expressed in the constitution, but many of them must be taken by implication; since the sovereign powers of the Union are supreme, and, wherever they come in direct conflict and repugnancy with those of the state governments, the latter must give way; since it has been proved, that this is the case as to the institution of the bank,
*400] and the general power of taxation by the states; since this power unlimited and unchecked, as it necessarily must be, by the *very

nature of the subject, is absolutely inconsistent with, and repugnant to, the right of the United States to establish a national bank; if the power of taxation be applied to the corporate property, or franchise, or property of the bank, and might be applied in the same manner, to destroy any other of the great institutions and establishments of the Union, and the whole machine of the national government might be arrested in its motions, by the exertion, in other cases, of the same power which is here attempted to be exerted upon the bank: no other alternative remains, but for this court to interpose its authority, and save the nation from the consequences of this dangerous attempt.

March 7th, 1819. MARSHALL, Ch. J., delivered the opinion of the court. —In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of *hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty. [*401

The first question made in the cause is—has congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. *The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first, in the fair and open field of debate, and afterwards, in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being [*402

supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity, to assert that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance. These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone
*403] possess supreme dominion. *It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic
*404] tranquillity, and secure *the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

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

the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then (whatever may be the influence of this fact on the case), is, *emphatically and truly, [*405
a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that 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; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, *"this constitution, and the laws of the United States, [*406
which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only, that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power

which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles *of confederation, and probably omitted it, to *407] avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended, *that these vast powers draw after them others of inferior *408] importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it *409] prohibit the creation of a corporation, *if the existence of such a

being be essential, to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied, that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation. On what foundation does this argument rest? On this alone: the power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects. 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; and those who contend that it may not select any appropriate [*410
means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other. We cannot comprehend that train of reasoning, which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe, that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same, as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the states the whole residuum of power, would it have been asserted, that the government of the Union was not sovereign, with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning *which maintains, that a power appertaining to sovereignty [*411
cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or

used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity, for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted, in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of
*412] powers is added, that of making "all *laws which shall be necessary and proper, for carryinig into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." The counsel for the state of Maryland have urged various arguments, to prove that this clause, though, in terms, a grant of power, is not so, in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained, whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared, that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the president of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allow-
*413] ing each house to prescribe *its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary, to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from that peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers confered on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power

would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to *produce the end, and not as being confined to those single means, without [*414 which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in a their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying "imposts, or duties on imports or exports, except what may be *absolutely* necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction, that the convention understood itself to change materially *the meaning of the word "necessary," by pre- [*415 fixing the word "absolutely." 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.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided

for as they occur. To have declared, that the best means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

*416] *If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied, with the more plausibility, because it is expressly given in some cases.

*417] Congress is empowered "to provide for the punishment *of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The several powers of congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted, in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences, is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of

*418] the government, and the absolute *impracticability of maintaining it, without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and

from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned, in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution, by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law; why is it not equally comprehensive, when required to authorize the use of means which facilitate the execution of the powers of government, without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the state of *Maryland contend, it would be an extraordinary departure from the usual course of the human [*419 mind, as exhibited in composition, to add a word, the only possible effect of which is, to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation, not strained and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the state of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle, than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the state of Maryland, would abridge, and almost annihilate, this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy.

We think so for the following reasons: 1st. The clause is placed among the powers of congress, not among the limitations on those powers. *2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a [*420 restriction on those already granted. No reason has been, or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress

on the mind, another, they would rather have disguised the grant of power, than its limitation. If, then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these. "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to
*421] remove all doubts respecting *the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

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.[1]

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power, as one which should be distinct and independent, to be exercised in any case whatever, it
*422] *would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged, by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carry-

[1] See Montague *v.* Richardson, 24 Conn. 348.

ing into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions *against it had [*423 been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away, when it can be necessary to enter into any discussion, in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the decree of its necessity, as has been very justly observed, is to be discsused in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

*After this declaration, it can scarcely be necessary to say, that [*424 the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution, of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise, to locate them in the charter, and it would be unnecessarily inconvenient, to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself *may, we think, *425] be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire—

2. Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely *repeals *426] that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve: 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve: 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

*The power of congress to create, and of course, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the sovereignty of the state, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

The argument on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their *acknowledged powers upon it, and that the constitution leaves them this right, in the confidence that they will not abuse it. Before we [*428 proceed to examine this argument, and to subject it to test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the states. They are given by all, *for the benefit of all—and upon theory, should be subjected to that government [*429 only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what

source do wo trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable *to every *430] case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amonnt to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised *by the respective states, con- *431] sistently with a fair construction of the constitution? 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. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an

abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is.

*If we apply the principle for which the state of Maryland contends, to the constitution, generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. [*432

Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle, is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend, that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and *other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising control in any shape they may please to give it? Their sovereignty is not confined to taxation; that is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. [*433

In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to

judge of their correctness must be retained ; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fulness and clearness. It is,

*434] "that an indefinite power of taxation in the latter (the government *of the Union) might, and probably would, in time, deprive the former (the government of the states) of the means of providing for their own necessities ; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land ; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it ; the national government might, at any time, abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues ; and thus, all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from state taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions ; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of state taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points

*435] they *mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the states those measures which the government might adopt for the execution of its powers ; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the states, will equally sustain the right of the states to tax banks chartered by the general government. But the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents ; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that

which always exists, and always must exist, between the action of the whole on a *part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. [*436

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the rights of the states to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. 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.

This opinion does not deprive the states of any resources which 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. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government *of the Union to carry its powers into execution. Such a tax must be unconstitutional. [*437

JUDGMENT.—This cause came on to be heard, on the transcript of the record of the court of appeals of the state of Maryland, and was argued by counsel: on consideration whereof, it is the opinion of this court, that the act of the legislature of Maryland is contrary to the constitution of the United States, and void; and therefore, that the said court of appeals of the state of Maryland erred, in affirming the judgment of the Baltimore county court, in which judgment was rendered against James W. McCulloch; but that the said court of appeals of Maryland ought to have reversed the said judgment of the said Baltimore county court, and ought to have given judgment for the said appellant, McCulloch: It is, therefore, adjudged and ordered, that the said judgment of the said court of appeals of the state of Maryland in this case, be, and the same hereby is, reversed and annulled. And this court, proceeding to render such judgment as the said court of appeals should have rendered; it is further adjudged and ordered, that the judgment of the said Baltimore county court be reversed and annulled, and that judgment be entered in the said Baltimore county court for the said James W. McCulloch.

*The General Smith : Hollins *et al.*, Claimants.

Admiralty jurisdiction.—Maritime liens.

The admiralty possesses a general jurisdiction is cases of suits by material-men, *in personam*, and *in rem*.

Where, however, the proceeding is *in rem*, to enforce a specific lien, it is incumbent upon the party to establish the existence of such lien, in the particular case.

Where repairs have been made, or necessities furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law gives the party a lien on the ship itself for his security, and he may maintain a suit *in rem*, in the admiralty, to enforce his right.

But as to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law ; and no lien is implied, unless by that law.

By the common law, material men furnishing repairs to a domestic ship, have no particular lien upon the ship itself for their demand.

A ship-wright who has taken a ship into his possession to repair it, is not bound to part with the possession until he is paid for the repairs ; but if he parts with the possession (of a domestic ship) or has worked upon it, without taking possession, he has no claim upon the ship itself.

The common law being the law of Maryland, on this subject, it was held, that material-men could not maintain a suit *in rem*, in the district court of Maryland, for supplies furnished to a domestic ship, although they might have maintained a suit *in personam*, in that court.

Appeal from the Circuit Court of Maryland. This was a libel, filed on the 4th day of October 1816, in the district court of Maryland, setting forth that James Ramsey, the libellant, had supplied and furnished for the use, accommodation and equipment of the ship General Smith, at Baltimore, in *439] the district *of Maryland, to equip and prepare her for a voyage on the high seas, various articles of cordage, ship-chandlery, and stores, amounting in the whole to the value of $4599.75, for no part of which he had received any compensation, payment or security. That the said ship was then owned by a certain George Stevenson, to whom he had applied for payment of said materials furnished, but without effect. And praying the usual process against the ship, and that she should be sold under the decree of the court, to pay and satisfy the libellant his claim. A claim was given for the ship, by John Hollins and James W. McCulloch, merchants, of Baltimore.

On the hearing of the cause in the court below, it was proved, or admitted by the parties, that the ship was an American vessel, and formerly was the property of George P. Stevenson, a merchant of Baltimore, and a citizen of the United States ; and that whilst the ship so belonged to Stevenson, the libellant, a ship-chandler of Baltimore, furnished for her use various articles of ship-chandlery to equip and furnish her, it being her first equipment, to perform a voyage to a foreign country, to wit, to Rotterdam and Liverpool, and back to Baltimore. That Stevenson was also the owner of several other vessels, for which the libellant, from time to time, furnished articles for their equipment for foreign voyages, and that payments were made by Stevenson to the libellant, at different times, on their general account, without application to any particular part of the account. That *440] the ship soon afterwards sailed, &c. That the ship departed *from Baltimore, on the voyage, without any express assent or permission of the libellant, and also without objection being made on his part, and without his having attempted to detain her, or enforce any lien which he had

against her for the articles furnished. That the ship continued to be the property of said Stevenson, during the said voyage, and after her return, and was not sold or disposed of in any way by him, until the 3d day of October 1816, when, finding himself embarrassed in his pecuniary affairs, and obliged to stop payment, he executed an assignment to the claimants of his property, including the ship General Smith, in trust for the payment of all bonds for duties due by said Stevenson to the United States, and for the payment and satisfaction of his other creditors, &c.

Another libel was filed, on the 11th of November 1816, against the same ship, by Rebecca Cockrill, administratrix of Thomas Cockrill, deceased, alleging that the said Thomas, in his lifetime, at Baltimore, in the said district, did furnish a large amount of iron materials, and bestow much labor and trouble, by himself, and those hired and employed by him, in working up and preparing certain iron materials for building and preparing the said ship for navigating the high seas, all which materials, and work and labor, were in fact applied and used in the construction and fitting said ship, according to a bill of particulars annexed. That the libellant had been informed and believed, that said ship was owned and claimed by various persons in certain proportions, but in what proportions, and who were the several owners, *she did not know, and could not, therefore, state. That neither the said Thomas, in his lifetime, nor the libellant, since his decease, had ever received any part of said account, nor any security or satisfaction for the same. Concluding with the usual prayer for process, &c. [*441

A claim was given for the same parties, and at the hearing, the same proofs and admissions were made as in the suit of James Ramsey ; except that it did not appear, that Thomas Cockrill had furnished any other vessels belonging to Stevenson with materials, nor that any payments on account had been made by said Stevenson to said Cockrill, or to the libellant, as his administratrix.

The district court ordered the ship to be sold, and decreed, that the libellants should be paid out of the proceeds the amount of their demands for materials furnished. In the circuit court, this decree was affirmed, *pro formâ*, by consent, and the cause was brought by appeal to this court.

March 9th. *Pinkney*, for the appellants and claimants, admitted the general jurisdiction of the district court, as an instance court of admiralty, over suits by material-men *in personam* and *in rem*, and over other maritime contracts ; but denied, that a suit *in rem* could be maintained, in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged. In the case of materials furnished or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced by a suit in the admiralty. *But in the case of a domestic ship, it was long since settled by the most solemn adjudications of the common law (which is the law of Maryland on this subject), that mechanics have no lien upon the ship itself for their demands, but must look to the personal security of the owner. Abbott on Ship. p. 2, c. 3, § 9–13, and the cases there cited ; *Woodruff* v. *The Levi Dearborne*, 4 Hall's L. Jour. 97. Had this been a suit *in personam*, in the admiralty, there would have been no doubt, that the district court would have had [*442

jurisdiction: but there being, by the local law, no specific lien to be enforced, there could be no ground to maintain a suit *in rem*.

Winder, contrà, insisted, that the question of jurisdiction and lien were intimately and inseparably connected. In England, the lien has been denied to attach, in the case of domestic ships, because the courts of common law, in their unreasonable jealousy of the admiralty jurisdiction, would not permit the only court, which could enforce the lien, to take cognisance of it. Consequently, the lien has been lost with the jurisdiction. But the universal maritime law, as administered in the European courts of admiralty, recognises the lien, in the case of a domestic, as well as a foreign ship: *Stevens* v. *The Sandwich*, 1 Pet. Adm. 233, note; *De Lovio* v. *Boit*, 2 Gallis. 400, 468, 475; and commercial policy demands that it should be enforced in both cases.

*443] *March 10th, 1819. Story, Justice, delivered the opinion of the court.—No doubt is entertained by this court, that the admiralty rightfully possesses a general jurisdiction in cases of material-men; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the district court. Where, however, the proceeding is *in rem*, to enforce a specific lien, it is incumbent upon those who seek the aid of the court, to establish the existence of such lien in the particular case. Where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem*, in the admiralty, to enforce his right. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognised by that law. Now, it has been long settled, whether originally upon the soundest principles, it is now too late to inquire, that by the common law, which is the law of Maryland, material-men and mechanics furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands. A ship-wright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession, until he is paid for the repairs, any more than any
*444] other artificer. But if he has once parted with the possession, *or has worked upon it, without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself.

Without, therefore, entering into a discussion of the particular circumstances of this case, we are of opinion, that here there was not, by the principles of law, any lien upon the ship; and, consequently, the decree of the circuit court must be reversed.

Decree reversed.(*a*)

(*a*) See The Aurora, 1 Wheat. 96, 103, in which case a lien of material-men on foreign ships was recognised by this court. The common law is the municipal law of most of the states, as to supplies furnished to domestic ships: but the legislature of New York has, by statute, given a lien to ship-wrights, material-men and suppliers of ships, for the amount of their debts, whether the ships are owned within the state or

not. Acts of 22d sess. c. 1, and 40th sess. c. 59. This lien existing by the local law, may consequently be enforced, upon the principle of the above case in the text, by a suit *in rem* in the admiralty.[1]

McIver's Lessee *v.* Walker *et al.*

Land-law of Tennessee.

If there be nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian; but it is a general principle, that the course and distance must yield to natural objects called for in the patent.

All lands are supposed to be actually surveyed, and the intention of the grant is, to convey the land according to the actual survey; *consequently, distances must be lengthened or shortened, and courses varied, so as to conform to the natural objects called for. [*445

If a patent refer to a plat annexed, and if, in that plat, a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as nearly as may be to the plat, although the lines, thus run, do not correspond with the courses and discourses mentioned in the patent; and although neither the certificate of survey nor the patent call for that water-course.

Error to the Circuit Court for the District of East Tennessee. This was an ejectment brought in that court, by the plaintiff in error, against the defendants. Upon the first trial of the cause, a judgment was rendered in the circuit court in favor of the defendants, and upon that judgment a writ of error was taken out, and the judgment reversed by this court, at February term 1815 (9 Cranch 173); and the cause was sent back to be tried according to certain directions prescribed by this court.

As the opinion given by this court upon the reversal of the first judgment contains a statement of the facts given in evidence upon the first trial, it is deemed proper to insert the opinion in this place. It is as follows:

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[1] It was decided in Peyton *v.* Howard, 7 Pet. 324, that when the state law give a lien for supplies furnished to a domestic vessel, in her home port, it may be enforced by a proceeding *in rem* in the court of admiralty; and in 1844, in pursuance of authority conferred upon the supreme court by the acts of 8th May 1792, and of the 23d August 1842, it adopted, what is know as the 12th rule in admiralty, which provided, that "in all suits by material-men for supplies, repairs or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master and owner alone *in personam;* and the like proceeding *in rem* shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs and other necessaries." Under this rule, the jurisdiction *in rem* was always sustained. The state lien, however, was enforced, not as a right which the court was bound to carry into execution, upon the application of the party, but as a discretionary one, which the court might lawfully exercise, for the purposes of justice, where it did not involve controversies beyond the limits of admiralty jurisdiction. The St. Lawrence, 1 Black 530. In many of the states, however, the laws were found not to harmonize with the principles and rules of the maritime code, and embarrassed the federal courts in applying them. And accordingly, in 1859, the last clause of the 12th rule was modified, so as to read as follows: "And the like proceeding *in personam*, but not *in rem*, shall apply to domestic ships for supplies, repairs or other necessaries." This rule, whilst in force, took away the power from the district courts to enforce such claims against domestic vessels by process *in rem*. The Adele, 1 Ben. 309; The Circassian, 11 Bl. C. C. 472. But in 1872, the rule was again amended, so as to provide, that "in *all* suits by material-men for supplies or repairs or other necessaries, the libellant may proceed against the ship and freight *in rem* or against the master or owner alone *in personam*." And this restored the old rule, giving the proceeding *in rem* to enforce liens created by the state law. The Lottawanna, 21 Wall. 558. And see Norton *v.* Switzer, 93 U. S. 366–66; The Mary Gratwick, 2 Sawyer 342; The Lewellen, 4 Biss. 156, 167.

"On the trial of this cause, the plaintiff produced two patents for 5000 acres each, from the state of North Carolina, granting to Stokely Donelson (from whom the plaintiff derived his title), two several tracts of land, lying on Crow creek, the one, No. 12, beginning at a box elder standing on a ridge, corner to No. 11, &c., as by the plat hereunto annexed will appear. The plat and certificate of survey were annexed to the grant. The plaintiff *446] proved that there were eleven other grants of the same date *for 5000 acres each, issued from the state of North Carolina, designated as a chain of surveys joining each other, from No. 1 to No. 11, inclusive, each calling for land on Crow creek as a general call, and the courses and distances of which, as described in the grants, are the same with the grants produced to the jury. It was also proved, that the beginning of the first grant was marked and intended as the beginning corner of No. 1, but no other tree was marked, nor was any survey ever made, but the plat was made out at Raleigh, and does not express on its face that the lines were run by the true meridian. It was also proved, that the beginning corner of No. 1, stood on the north-west side of Crow creek, and the line running thence down the creek, called for in the plat and patent, is south, forty degrees west. It further appeared, that Crow creek runs through a valley of good land, which is on an average about three miles wide, between mountains unfit for cultivation, and which extends from the beginning of survey No. 1, in the said chain of surveys, until it reaches below survey No. 13, in nearly a straight line, the course of which is nearly south, thirty-five degrees west, by the needle, and south, forty degrees west, by the true meridian; that on the face of the plats annexed to the grants, the creek is represented as running through and across each grant. The lines in the certificate of survey do not expressly call for crossing the creek; but each certificate and grant calls generally for land lying on Crow creek. If the lines of the tracts herein before mentioned, No. 12 and 13, in the said chain of surveys, be run *447] according to the course of *the needle and the distances called for, they will not include Crow creek, or any part of it, and will not include the land in possession of the defendants. If they be run according to the true meridian, or so as to include Crow creek, they will include the lands in possession of the defendants. Whereupon, the counsel for the plaintiffs moved the court to instruct the jury, 1st. That the lines of the said lands ought to be run according to the true meridian, and not according to the needle. 2d. That the lines ought to be run so as to include Crow creek, and the lands in possession of the defendants. The court overruled both these motions, and instructed the jury, that the said grant must be run according to the course of the needle, and the distances called for in the said grants, and that the same could not legally be run, so as to include Crow creek, and that the said grants did not include the lands in possession of the defendants. To this opinion, an exception was taken by the plaintiff's counsel. A verdict and judgment were rendered for the defendants, and that judgment is now before this court on a writ of error.

"It is undoubtedly the practice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian.

But it is a general principle, that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, *and the intention of the grant is to convey the land, according to that actual survey; consequently, if marked trees [*448 and marked corners be found, conformable to the calls of the patent, or if water-courses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied, so as to conform to those objects. The reason of the rule is, that it is the intention of the grant to convey the land actually surveyed, and mistakes in courses or distances are more probable, and more frequent, than in marked trees, mountains, rivers, or other natural objects, capable of being clearly designated, and accurately described. Had the survey in this case been actually made, and the lines had called to cross Crow creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner, or other marked trees, and yet the land must have been so surveyed as to include Crow creek. The call in the lines of the patent, to cross Crow creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause. That the lands should not be described as lying on both sides of Crow creek, nor the lines call for crossing that creek, are such extraordinary omissions as to create considerable doubt with the court, in deciding whether there is any other description given in the patent, of sufficient strength to control the call for course and distance. The majority of the court is of opinion, that there is such a description. The *patent closes its description of the land granted, [*449 by a reference in the plat which is annexed. The laws of the state require this annexation. In this plat, thus annexed to the patent, and thus referred to as describing the land granted, Crow creek is laid down as passing through the tract. Every person having knowledge of the grant, would also have knowledge of the plat, and would by that plat be instructed, that the lands lay on both sides the creek. There would be nothing to lead to a different conclusion but a difference of about five degrees in the course, should he run out the whole chain of surveys in order to find the beginning of No. 12; and he would know that such an error in the course would be corrected by such a great natural object as a creek, laid down by the surveyor in the middle of his plat. This would prove, notwithstanding the error in the course, that the lands on both sides of Crow creek were intended to be included in the survey, and intended to be granted by the patent.

"It is the opinion of the majority of this court, that there is error in the opinion of the circuit court for the district of East Tennesee, in this, that the said court instructed the jury, that the grant under which the plaintiff claimed, could not be legally run so as to include Crow creek; instead of directing the jury that the said grant must be so run as to include Crow creek, and to conform, as near as may be, to the plat annexed to the said grant; wherefore, it is considered by this court that the said judgment be reversed and annulled, and the cause be remanded *to the said circuit court, that a new trial may be had according to [*450 law." (9 Cranch 173.)

Upon the cause being remanded to the circuit court for a new trial, the

plaintiff gave, in substance, the same evidence which he gave upon the first trial, and proved, or offered to prove, these additional facts—That it was the express and declared intention of the surveyor to locate the land upon Crow creek; that his field-notes called for crossing Crow creek, and that he supposed the courses inserted in the grants would place the lands upon Crow creek. Upon the former trial, it was proved, and admitted by the parties, that the beginning of lot No. 1, was marked as a corner, but that no survey had ever been made of that lot, or of the lots of land in dispute. Upon the last trial, the witness gave the same testimony, and further stated, that a corner was marked for the beginning of lot No. 1. That the compass was set at this corner, and a chain or two might have been stretched upon the first course of the grant; but of this he was not certain. During the last trial, various objections were made by the defendants to the testimony offered by the plaintiff; especially, to that which tended to prove that it was the intention of the surveyor to locate the land upon Crow creek, and that his field-notes called for crossing Crow creek. These objections were sustained by the court, and the testimony declared inadmissible.

Upon the evidence given in the cause, various instructions were prayed by the plaintiff, all of which the court refused to give; but charged the *451] jury, that *if, from the testimony then adduced, they should find that McCoy, the deputy-surveyor, when he went upon the ground to survey the land, did mark the beginning corner of lot No. 1, upon two poplars, and set his compass a given course, and that the chain-carriers stretched one or two chains upon that course, and that McCoy made his field-notes in conformity thereto, and that those field-notes were transmitted to James W. Lachey, the surveyor, who made out the plats annexed to the grants, and that he made out the said plats in conformity with the said field-notes, and that he marked down Crow creek, by guess, upon the plats, that this was so much of a legal and actual survey, as to show that the surveyor committed no mistake in what he did upon the ground, notwithstanding it might not be according to what he wished or intended in his own mind; and in that case, the lessor of the plaintiff would be barred by the courses and distances called for in the grant.

Under this instruction of the court, a verdict was found for the defendants, and judgment rendered accordingly, upon which the cause was again brought to this court by writ of error.

This cause was argued at the last term, by *Swann* and *Campbell*, for the plaintiff in error, and by *Williams*, for the defendants in error, and was re-argued, at the present term, March 1st, by *Swann*, for the plaintiffs in error, and by *Jones* and *Williams*, for the defendants in error.

March 11th, 1819. Marshall, Ch. J., delivered the opinion of the *452] court.—*The court has re-examined the opinion which it gave, when this cause was formerly before it, and has not perceived any reason for changing that opinion. Nor do the new facts introduced into the cause, in any material degree, vary it. If there had been a settled course of decisions in Tennessee, upon their local laws, different from the judgment pronounced by this court, we should not hesitate to follow those decisions. But upon an examination of the cases cited at the bar, we do not perceive

that such is the fact. The judgment of the circuit court is, therefore, reversed, and the cause remanded for further proceedings.

JUDGMENT.—This cause came on to be heard, on the transcript of the record, and was argued by counsel: on consideration whereof, it is the opinion of this court, that the circuit court erred in the instructions given to the jury: it is, therefore, adjudged and ordered, that the judgment of the circuit court for the district of East Tennessee, in this cause, be, and the same is, hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court for further proceedings to be had therein, according to law.

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*ORR *v.* HODGSON and Wife, *et al.* [*453

Aliens.—British treaty.

Bill for rescinding a contract for the sale of lands, on the ground of defect of title, dismissed with costs.

An alien may take an estate in lands, by the act of the parties, as by purchase; but he cannot take by the act of the law, as by descent.

Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs in law; but the estate descends to the next of kin who have an inheritable blood, in the same manner as if no such alien issue were in existence.

The 6th article of the treaty of peace between the United States and Great Britain, of 1783, completely protected the titles of British subjects to lands in the United States, which would have been liable to forfeiture, by escheat, for the defect of alienage; that article was not meant to be confined to confiscations *jure belli*.[1]

The 9th article of the treaty between the United States and Great Britain, of 1794, applies to the title of the parties, whatever it is, and gives it the same legal validity as if the parties were citizens; it is not necessary that they show an actual possession or seisin, but only that the title was in them, at the time the treaty was made.[2]

The 9th article of the treaty of 1794 did not mean to include any other persons than such as were British subjects or citizens of the United States.

APPEAL from the Circuit Court for the District of Columbia. The appellant filed his bill in equity in the court below, stating, that on the 10th day of January 1816, he purchased of the defendants, William Hodgson and Portia, his wife, and John Hopkins and Cornelia, his wife, a tract of land called Archer's Hope, situate in the county of James' City, in the state of Virginia, for the sum of $5000 and gave his bond to the said Hodgson and Hopkins for *the payment of the said purchase-money. That, at the [*454
time of the purchase, the defendants affirmed to the plaintiff, that they were seised in right of the said Portia and Cornelia, of a good, sure and indefeasible estate of inheritance, in fee-simple, in the said tract of land, and had full power and lawful authority to convey the same, and in consequence of such affirmation, the plaintiff made the purchase, and gave his bond, as aforesaid.

And further stating, that he had since discovered, that the defendants had no title to the said lands, but that the title thereto was either vested in the children of the Countess Barziza, or that the commonwealth of Virginia was entitled to them by escheat. That Colonel Philip Ludwell, a native of

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[1] Shanks *v.* Dupont, 3 Pet. 242.

[2] Blight *v.* Rochester, 7 Wheat. 535; Hughes *v.* Edwards, 9 Id. 489.

the said commonwealth, being seised in fee of the said lands, had two daughters, Hannah and Lucy, born of the same mother, in Virginia. That, some years before the year 1767, he removed with his family, including his said two daughters, to England, where he died, in the year 1767, having, by his last will, devised all his estates to his said two daughters, and appointed as their guardians, Peter Paradise, John Paradise, of the city of London, and William Dampier. That Hannah, one of the said daughters, married William Lee, a native of Virginia, and died, leaving issue, two daughters, the said defendants, Portia Hodgson and Cornelia Hopkins, who are citizens of Virginia, residing in the district of Columbia. That Lucy Ludwell, the other daughter above mentioned, during her infancy, to wit, in May 1769, at the city of London, married the said John Paradise, a British subject, by
*455] *whom she had issue, a daughter, named Lucy, born in England, about the year 1770. That the said Lucy Paradise, daughter of the said John and Lucy Paradise, on the 4th of April 1787, at the said city of London, married Count Barziza, a Venetian subject, by whom she had issue, a son, named John, born in the city of Venice, on the 10th of August 1796. That the said John Paradise, in the year 1787, came to Virginia, with his wife, and returned with her to England, in 1789, where he died, in 1796, having, by his last will, devised all his personal estate, charged with some pecuniary legacies, to his wife, but making no disposition of his real estate, and leaving no issue, but the Countess Barziza. That the said Countess Barziza died intestate, in Venice, on the 1st of August 1800, leaving her said sons, John and Philip, her only issue ; and that neither her sons, nor herself, nor her husband, were ever in the United States. That the said Count Barziza was also dead. That the said Lucy Paradise, after the death of the said John Paradise, her husband, treated the said lands as her own, exercising acts of ownership over the same, and about the year 1805, returned to Virginia, where she died intestate, in 1814, being in possession of said lands at her decease, and leaving no issue but the two sons of Countess Barziza above mentioned, who, at the time of her death, had not become citizens or subjects of any other state or power than Venice and Austria.

That by marriage articles, made before the marriage of John Paradise and Lucy Ludwell, between the said John Paradise, of the first part, the said
*456] Peter Paradise, his father, *of the second part, the said Lucy Ludwell of the third part, the said William Dampier, of the fourth part, and James Lee and Robert Carry, of the fifth part, reciting the said intended marriage, and that the said Peter Paradise had agreed to pay his son 4000*l.* sterling, at the marriage, and that his executors should pay 4000*l.* sterling more to Lee and Carry, upon the trusts thereinafter mentioned. And that the said John Paradise and Lucy had agreed, that all the estates of the said Lucy Ludwell should be settled as thereinafter mentioned, but that, by reason of her infancy, no absolute settlement of the same could then be made. It was witnessed, that in consideration of the marriage, and for making provision for the said Lucy Ludwell, and the issue of the said John Paradise on her body to be begotten, and for the consideration of ten shillings, to the said John Paradise, paid by the said Lee and Carry, and for divers other good causes and valuable considerations, him, the said John Paradise, thereunto moving, he, the said John Paradise, covenanted with said Lee and Carry, that if the marriage took effect, he would make, or cause

to be made, such acts and deeds as would convey all the estates of the said Lucy Ludwell to the said Lee and Carry, upon trust, as to that part of the real property, which was situate in Virginia: 1. To the use of John Paradise for life, remainder to the use of all or any of the children of the marriage, for such estates (not exceeding estates-tail) as John Paradise and the said Lucy Ludwell, by deed, during the coverture, or as the survivor of them, by deed or will, should appoint, and in default *of such appointment, to the use of all the children of the marriage, as [*457 tenants in common in tail, with cross-remainders in tail, remainder to the use of such person as the said Lucy Ludwell should appoint, and in default of such appointment, to the use of the survivor of John Paradise and Lucy Ludwell in fee-simple: 2. With power to the husband and wife, to make leases not exceeding twenty-one years: 3. With power to the trustees to sell any part of the estate, and apply the proceeds to the purchase of other lands in England, subject to the use of the marriage articles. And as to the personal estate of the said Lucy Ludwell, to the use of John Paradise for life, remainder to Lucy Ludwell for life, remainder to the children of the marriage, as the parents should appoint, and in default of such appointment, to the use of all the children of the marriage, share and share alike: but if there should be no children of the marriage, or being such, if all of them should die before the age of twenty-one, or marriage, then to the use of such person as the said Lucy Ludwell should appoint, and in default of such appointment, to the survivor of the said John Paradise and Lucy Ludwell, in absolute property. And as to the second of the said sums of 4000*l.*, to the trustees, upon trust for the use of John Paradise for life, remainder for Lucy Ludwell for life, remainder to the children of the marriage, in the same manner as the personal estate of the said Lucy Ludwell was settled: provided, that if there should be no issue of the marriage, then to the use of John Paradise in absolute property: provided also, that it should and might be *lawful for the trustees, with the consent of the said John [*458 Paradise and Lucy Ludwell, or the survivor of them, and after the death of such survivor, of their or his own authority, to lay out the same in lands in England, to the use of John Paradise for life, remainder to Lucy Ludwell for life, remainder to the children of the marriage in the same manner as the lands of the said Lucy Ludwell were settled. That after the death of the said Peter Paradise, the said John Paradise, as his executor, paid the last mentioned 4000*l.* to the trustees aforesaid, who invested it in the British funds, and by deed dated the 8th of December 1783, and to which the said John Paradise and Lucy Ludwell were parties, they declared the same subject to the uses of the marriage settlement.

The bill further alleged, that the plaintiff, upon discovering the foregoing circumstances, applied to the defendants, and requested them to rescind the contract, and to deliver up the bond to the plaintiff to be cancelled, the same having been obtained by misrepresentation, or through mistake, without any consideration valuable in law, and at the same time, offered to convey back to them any title, interest or estate, which might have been conveyed to him by the defendants. But that the defendants refused, and threatened to bring a suit at common law, upon the said bond, and to enforce payment thereof, contrary to equity. Concluding with the usual prayer for a discovery, &c., and for a decree rescinding the sale of lands, and that the

defendants should be compelled to deliver up the bond to be cancelled, and for further relief, &c. *To which bill the defendant demurred.
*459] The bill was dismissed by the court below, with costs, and the cause was brought by appeal to this court.

February 18th, 1819. The cause was argued by *Jones*, for the defendants and respondents—no counsel appearing for the appellant.

March 11th. Story, Justice, delivered the opinion of the court.—The whole merits of this cause rest upon the question, whether the defendants, Portia Hodgson, and Cornelia Hopkins, took an estate in fee-simple, in one moiety of the land stated in the bill, by descent, as nieces and heirs of Lucy Paradise, widow of John Paradise, upon her death in 1814. If they did, then the contract for the sale of the land to the plaintiff ought to be fulfilled; if not, then the contract ought to be rescinded.

Two objections are urged against the title. First, that Lucy Paradise, at the time of her death, was a British subject, and so not capable of passing the land in question by descent; secondly, if so entitled, yet, upon her death, the land escheated to the commonwealth of Virginia, for want of heirs legally entitled to take the same by descent.

It appears, that Lucy Paradise took her moiety of the estate in question, by devise from her father, Philip Ludwell, who was a native of Virginia, where also, his daughter Lucy was born. Sometime before the year 1767, he removed with his family, including this daughter, to England, where he died in *1767. In 1769, this daughter was married in
*460] England to John Paradise (a British subject), by whom she had issue a daughter, Lucy, who was born in England, about 1770, and who, afterwards, in 1787, in England, married Count Barziza, a Venetian subject, by whom she had two sons, one born in Venice, in February 1789, and the other in Venice, in August 1796, both of whom are now living. The Countess Barziza died in Venice, in August 1800, leaving no other issue except her two sons, and neither she, nor her husband, nor her sons, were ever in the United States. In the year 1787, John Paradise came with his wife to Virginia, and returned with her to England, in the year 1789, where he died, in 1796. After the death of her husband, Lucy Paradise treated the land in controversy as her own, exercising acts of ownership over it; and about the year 1805, returned to Virginia, where she died intestate, in possession of the land, in 1814, leaving no issue but her two grandsons, the children of the Countess Barziza, and the defendants Portia and Cornelia, her nieces, who would be her heirs-at-law, if no such issue were living.

From this summary statement, it is clear, that the two sons of the Countess Barziza are aliens to the commonwealth of Virginia, and of course, cannot take the estate in question, by descent from their grandmother, unless their disability is removed by the treaty of 1794. For though an alien may take an estate, by the act of the parties, as, by purchase; yet he can never take by the act of the law, as, by descent, for he has no inher-
*461] itable blood. But the *objection now supposed to exist, is, that under these circumstances, although the grandsons cannot, as aliens, take by descent; yet they answer in some sort, to the description of "heirs," and therefore, prevent the estate from descending to the nieces, who have a legal capacity to take, because, strictly speaking, they are not heirs. The

law is certainly otherwise. Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs-at-law, for they have no inheritable blood, and the estate descends to the next of kin, who have an inheritable blood, in the same manner as if no such alien issue were in existence. 2 Bl. Com. 249 ; *Duroure* v. *Jones*, 4 T. R. 300 ; Com. Dig. Alien, C, 1. In the present case, therefore, the defendants, the nieces of Lucy Paradise, are her heirs-at-law, entitled to take by descent, whatever estate could rightfully pass to her heirs, unless the British treaty of 1794 enlarged the capacity of her grandsons to take by descent, a point which will be hereafter considered. And this brings us to the other question in the cause, whether Lucy Paradise, under the circumstances of the case, had such an estate in the land, as could by law pass by descent to her heirs ?

There is no question that she took an estate in fee-simple, by devise from her father ; but it is supposed, that although born in Virginia, by her removal to England, with her father, before, and remaining there until long after, the American revolution, she must be considered as electing to remain a *British subject, and thus became, as well by operation of law, as by the statutes of Virginia on this subject, an alien to that common- [*462
wealth. And if she became an alien, then the estate held by her could not pass by descent, but for defect of inheritable blood, escheated to the government. Com. Dig. Alien, C, 2 ; Co. Litt. 2 *b*.

Admitting that Lucy Paradise did so become an alien, it is material to inquire, what effect the treaty of peace of 1783 had upon her case ; and upon the best consideration that we can give to it, we are of opinion that the sixth article of that treaty(*a*) completely protected her estate from forfeiture, by way of escheat for the defect of alienage. That defect was a disability solely occasioned by the war, and the separation of the colony from the mother country ; and under such circumstances, a seizure of the estate by the government, upon an inquest of office, for the supposed forfeiture, would have been a confiscation of the property, in the sense in which that term is used in the treaty. When the 6th article of the treaty declared, "that no future confiscation should be made," it could not mean to confine the operation of the language to confiscations *jure belli ;* for the treaty itself *extinguished the war, and with it, the rights growing out of war ; [*463
and when it further declared, that no person should, on account of the part he had taken in the war, suffer any future loss or damage, either in his person, liberty or property, it must have meant to protect him from all future losses of property, which, but for the war, would have remained inviolable. The fifth article of the treaty also materially illustrates and confirms this construction. It is there agreed, that congress shall recommend to the state legislatures to provide for the restitution of all estates of British subjects, &c., which had been confiscated. Yet, why restore such estates, if, *eo instanti*, they were forfeitable on account of alienage ? This subject

(*a*) Which provides, "that there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for, or by reason of, the part which he or they may have taken in the present war ; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property ; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

has been heretofore before us, and although no opinion was then pronounced, it was most deliberately considered. We do not now profess to go at large into the reasoning upon which our present opinion is founded. It would require more leisure than is consistent with other imperious duties; and we must, therefore, content ourselves with stating, that the doctrine here asserted is the decided judgment of the court.

If the case were not protected by the treaty of 1783, it might become necessary to consider, whether it is aided by the ninth article of the treaty of 1794, which declares, that British subjects, who now hold lands in the United States, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein, and that as to such lands, and the legal remedies incident thereto, neither they, nor their heirs or
*464] assigns, *shall be regarded as aliens. It does not appear, by the bill in this case, that Lucy Paradise was in the actual possession or seisin of the land, at the time of the treaty. Nor is it necessary, because the treaty applies to the title, whatever it is, and gives it the same legal validity as if the parties were citizens. *Harden* v. *Fisher*, 1 Wheat. 300. But although it does not directly appear by the bill, what the title of Lucy Paradise was, at the time of the treaty; yet, as the title is asserted in her, both before and after the treaty, and there is no allegation of any intermediate transfer, it must be presumed, in this suit, that she never parted with her title. It follows, that in this view also, her title was completely confirmed, free from the taint of alienage; and that by the express terms of the treaty, it might lawfully pass to her heirs.

And here it becomes material to ascertain, whether the treaty of 1794, under the description of heirs, meant to include any other persons than such as were British subjects or American citizens, at the time of the descent cast; and it is our opinion, that the intention was not to include any other persons. It cannot be presumed, that the treaty stipulated for benefits to any persons who were aliens to both governments. Such a construction would give to this class of cases, privileges and immunities far beyond those of the natives of either country; and it would also materially interfere with the public policy common to both. We have, therefore, no hesitation to reject any interpretation which would give to persons, aliens to both
*465] *governments, the privileges of both; and in this predicament are the children of the Countess Barziza. The rule, then, of the common law, which gives the estate to the next heirs having inheritable blood, must prevail in this case.

We have not thought it necessary to go into an examination of the articles for a marriage settlement, entered into between Lucy Paradise and John Paradise, on their marriage, for two reasons: first, the articles were merely executory, and being entered into by Mrs. Paradise, when under age, and not afterwards ratified by her, they were not binding upon her; secondly, if they were binding, yet, inasmuch as the only persons in whose favor they could now be executed, are aliens, incapable of holding the estate to their own use, no court of equity would, upon the general policy of the law, feel itself at liberty to decree in their favor.

Decree dismissing the bill affirmed, with costs.(a)

(a) MARSHALL, Chief Justice, did not sit in this cause.

*Astor *v.* Wells *et al.*

Recording act.—Fraudulent conveyance.

Under the registry act of Ohio, which provides that certain deeds "shall be recorded in the county in which the lands, tenements and hereditaments, so conveyed or affected, shall be situate within one year after the day on which such deed or conveyance was executed; and, unless recorded in the manner, and within the time, aforesaid, shall be deemed fraudulent against any subsequent *bonâ fide* purchaser, without knowledge of the existence of such former deed of conveyance," lands lying in Jefferson county were conveyed by deed; and a new county, called Tuscarawas county, was erected, partly from Jefferson, after the execution and before the recording of the deed, in which new county the lands were included; and the deed was recorded in Jefferson: *Held*, that this registry was not sufficient, either to preserve its legal priority, or to give it the equity resulting from constructive notice to a subsequent purchaser.

Notice of a prior incumbrance to an agent, is notice to the principal.

Under the statute of fraudulent conveyances of Ohio, which provides, that "every gift, grant or conveyance of lands, tenements, hereditaments, &c., made or obtained, with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, &c., shall be deemed utterly void, and of no effect:" *Held*, that a *bonâ fide* purchaser, without notice, could not be affected by the intent of the grantor to defraud creditors.

Appeal from the Circuit Court of Ohio. The bill in equity filed in this cause stated, that Arnold Henry Dorhman, in 1806, became indebted to the United States, in the sum of $6515.10, for duties upon the importation of certain goods, payable at the custom-house in the city of New York. The plaintiff, Henry Astor, became *bound with Dorhman for the payment of those duties; and thereupon, Dohrman, to secure Astor, [*467 executed and delivered the mortgage deed of the 14th of August 1806, in the bill mentioned, for the 13th township, in 7th range, then lying in Jefferson county, in the state of Ohio: and Dorhman became further indebted to the plaintiff in the sum of $2700, to secure which, upon said township, he afterwards, on the 25th of August 1807, executed another mortgage deed of the same premises. Both the deeds were recorded in the county of Jefferson, on the 2d of October 1810, and in Tuscarawas, on the 21st of October 1812, which county was erected in part from Jefferson, after the execution, and before the recording therein of said deeds.

On the 26th of August 1807, the plaintiff released to Dorhman one-fourth of said township, by deed, recorded in Tuscarawas county, on the 9th of March 1813. On the 24th of October 1810, Dorhman gave the defendant Wells, a deed of trust of the three-fourths of said township, not released, to secure the payment of $5000, for which the defendant Wells had become liable for Dorhman, by indorsing his paper, at the bank of Steubenville, which was recorded in Tuscarawas, the 13th of January 1811. On the 12th of February 1813, the defendant Wells took another deed from Dorhman, for the quarter sections which had been released, which was recorded in Tuscarawas county on the 10th of March 1813, to secure $3000, for further indorsements by Wells for Dorhman. The bill then charged the defendant Wells with notice of the plaintiff's deeds and *lien upon said lands, [*468 before his deeds, indorsements, or any payments made by him; and that he accepted the deeds, made the indorsements, and payments, if any, with knowledge, &c.; charged a secret understanding, that the released sections, conveyed to Wells, by the last-mentioned deed, were to inure to Dorhman or his family; and that neither transaction between Wells and

Dorhman was *bonâ fide*. Dorhman died on the 21st of February 1813, nine days after his last deed to Wells, who commenced a suit against the heirs of Dorhman, on the 27th of August following; and obtained a decree of sale, under which he purchased the premises; all which was charged to be fraudulent.

The widow and heirs of Dorhman, by their answer, admitted all the deeds, and answered, generally, that they knew nothing of the other transactions. The answer of Wells admitted the plaintiff's deeds; stated his own deeds to be *bonâ fide*, and denied notice and fraud.

Obadiah Jennings, who was examined as a witness in the cause, testified that he prepared the first deed to Wells, and saw it executed, but said that Dorhman employed him, and he considered himself exclusively employed by Dorhman, and not as the agent or attorney of Wells, in that transaction; that it was probable, he had held some conversation with Wells as to his liabilities for Dorhman, and the nature of the security to be given, before Dorhman applied to him to draw the deed; and that Wells sent the deed to him in a letter, to carry to be recorded in Tuscarawas county. Dorhman informed him, that Astor's agent had brought Astor's deeds and put them *469] on *record; and Dorhman wished to give Wells the preference, and consulted him how it could be done. The witness examined the record, and knew of Astor's deeds and lien on those lands. He advised Dorhman to give Wells a deed, which, if recorded in Tuscarawas, would give him the preference; but never gave Wells any information respecting Astor's deeds.

March 6th. *Brush*, for the appellant and plaintiff, argued: 1. That the defendant's (Wells) deed was void, under the second section of the statute of Ohio, entitled an "act for the prevention of frauds," &c., which declares, "that every gift, grant or conveyance of lands, tenements, hereditaments, &c., made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, &c., shall be deemed utterly void, and of no effect." Rev. Laws of Ohio, 321. The bill shows Astor to be a creditor; the answer admits it; and Jennings proves that Dorhman informed him such was the fact. The debt being secured by mortgage upon the lands in controversy, only makes the fraud more palpable. Still, he was and is a creditor; and it is manifest, Dorhman made the deed to Wells to defraud Astor, his creditor.

2. The recording of Astor's deeds in Jefferson county, was notice to the defendant, Wells. During all the time given for recording, the lands lay in that county; it was, therefore, the proper place for recording those deeds, *470] and *the recording afterwards must have relation to the time when and the place where they ought to have been recorded; considering the township as part of the county for that purpose. *Heath* v. *Rose*, 12 Johns. 140; 1 Johns. Cas. 85; Vin. Abr., tit. Relation, 288. And the recording ought to be considered as *nunc pro tunc*, yet not so as to affect any deed made and recorded prior to the making this record: and as to all subsequent, no inconvenience or injustice could be complained of, inasmuch as every purchaser would be bound to search those records for all deeds there recorded prior to the division. Using such diligence as he was bound

to use, knowing the lands originally lay in that county, he would have discovered Astor's deed there recorded, before any deed made to him; and ought, therefore, to be charged with notice. To what time does the act of assembly relate, when it says the deed shall be "recorded in the county in which such lands shall be situate?" Revised Laws of Ohio, 318. To the time of making and delivery of the deed, or to the time of recording? The latter would make the deed take effect from the recording, not from the delivery, as is the law. The case of *Taylor* v. *McDonald's Heirs*, is not analogous, as there the lands did not lie in the county where the deed was recorded; and the question was upon the effect of the deed at law.

3. By accepting the deed prepared by Jennings, the defendant, Wells, has made Jennings his agent, by legal implication; and notice to him is notice to his principal. Jennings acted in the transaction; advised Dorhman how to give Wells the preference; *prepared the deed; saw it executed, and at the request of Wells carried, it to be recorded; and [*471 had some previous conversation with Wells as to his liabilities for Dorhman, and the nature of the security to be given. In *Le Neve* v. *Le Neve*, Ambl. 438, the defendant "denied notice of the first articles and settlement, till six months after the marriage; and denied that Norton was employed as her solicitor, though she put confidence in him, because he was concerned for her husband, and recommended by him, who assured her, he (Norton) would make a handsome provision for her; and Norton assured her, he had taken care to secure her an annuity of £150 a year, and did not then, or any time before, give her any notice of any former settlement." Although the defendant here has not been as candid as the defendant was in that case, yet by his artful taciturnity and scanty pleading upon the most important subject, much is to be inferred against him. In the case of *Jennings* v. *Moore*, 2 Vern. 609, Blincorne acted the very part Jennings has in this transaction, so far as the conduct of either is material to affect the purchaser; and so far as there is any difference, it would seem, the case at bar presents much the strongest ground of equity, to set aside the subsequent incumbrancer or purchaser. Moore had completed his purchase, by paying the money; Wells had not. Blincorne was a *bonâ fide* creditor, and had an interest in the estate of Whitlatch, the vendor, and his object was, to secure an honest debt; but Wells's purchase, and the sale to him, was made to *defraud and defeat a *bonâ fide* creditor. Moore was charged, upon [*472 the naked fact of acceptance; but in this case, strong circumstances and inferences, beside that, implicate Wells. He, most undoubtedly, knew the handwriting of Jennings, his friend, and was bound to inquiry; but Jennings was careful not to mention it to him in any way! So was Blincorne, and so Norton; and the care which all have taken for the purchaser implicates him with their agency, if he will accept, they having notice, and contriving to conceal from him, is the ground of *mala fides*, and the foundation for the charge of notice against the purchaser. *Brotherton* v. *Hatt*, 2 Vern. 574, maintains the same principle, and is called by Lord HARDWICKE "a clear authority." The same scriveners were witnesses, and engrossed all the securities, and were *quasi* agents for all the lenders. Not that the fact of agency was otherwise established, than by the fact of accepting or receiving the securities, engrossed by the same scriveners, who had notice; the concealment of which by them, if the law could tolerate it, would make

frauds practicable, without the means of detection. In the latter case above cited, it does not appear, that Mrs. Hatt, the third mortgagee, had any better knowledge who the scriveners were, than Wells in this case. If such had been the fact, that she knew who engrossed the deed for her, and such fact deemed important, it would have been noticed in the report. And it is not mentioned as a fact, or material, in the case of *Le Neve* v. *Le Neve*, where *473] *the case is cited with approbation by the Lord Chancellor; but in all these cases, they seem to have gone much upon the ground of the fraud of those third persons, and the danger of sanctioning such fraud, by deciding *stricti juris*, upon the mere ground of the *laches* of the first purchaser, in not recording his deed within the time prescribed, or not before the second deed. And although these cases profess to go upon the ground of an agency, yet it is manifest, such agency was presumed in each, and that the decision rested virtually upon the fraud which was established against persons, not concerned in interest, thereby fixing the sting of disability upon the temptation to commit fraud, by whatever motive prompted or encouraged.

4. The defendant, Wells, has not shown the time of his payment, nor denied notice at or before the same, and is, therefore, chargable with notice before his purchase was completed. *Tourville* v. *Nash*, 3 P. Wms. 307; *Story* v. *Ld. Windsor*, 2 Atk. 630. After notice, Wells ought to have compelled Dorhman to make payment, by applying the other quarter township, instead of endorsing more, and securing that also, thereby taking all hope from Astor. His conscience was affected, before the first arrangement was completed, while he had time and opportunity to save himself, and he was bound to that course.

5. The defendant has not denied notice indirectly, by implication, or notice to one whom the law will consider his agent. His answer is stiff and formal, especially, with respect to the first deed to him; careful *474] *not to say how that matter was managed; and, considering all the circumstances of this case, it must be considered as a declaration that he had no actual knowledge of Astor's deeds, not having received positive information that such were in existence.

6. Can the defendant, Wells, maintain a title, or claim the benefit of an interest, derived to him through the fraud of Dorhman and Jennings? If he can, the doctrine and principle of many cases are overturned, and we have a new law upon the subject of frauds. What is said in *Le Neve* v. *Le Neve*, Ambl. 447, is quite applicable. But in a late decision, this doctrine is fully recognised in a case like the present, though with fewer circumstances of fraud to justify its application. *Hildreth* v. *Sands*, 2 Johns, Ch. 35, and cases there cited. The cases cited to the third point are considered as applicable here; the *mala fides* of the actors in those cases was the ground of considering them agents by relation; the purchaser accepting his deed from polluted hands, makes their acts and knowledge his own. Sir Samuel Romilly (*arguendo*), in *Huguenin* v. *Baseley*, 14 Ves. 288, says, "though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case far the strongest that has yet occurred upon this ground alone, from its infinite importance

to community." *And the Chancellor thereupon lays down the doctrine as well established, "that interests gained by the fraud of other persons, cannot be maintained." It would be infinitely mischievous, if they could, and as there said, "would be almost impossible ever to reach a case of fraud." The *genus*, or kind, of fraud, seems not to be so much regarded as that such is the character of the transaction.

Doddridge, contrà.—1. The registry act, and whatever other statutory regulations each sovereign society may adopt for the transfer of titles to real property, are matters of positive institution; the English registry act and statute of enrolments, however, have furnished precedents which, in one way or another, have been followed up in each state; and the decisions upon them have been so uniform, as to have become quite familiar. The attempt here to impeach a deed, innocently obtained, on the ground, that it was fraudulently intended by the grantor, is quite novel, and as dangerous as it is novel. It proceeds on the ground, that the clause in the state law is to be expounded in the disjunctive, and that "or" is not to be expounded so as to mean "and." The first objection to this interpretation is, that it supposes the word "made," can be satisfied by the act of a vendor alone; and the word "obtained," in like manner, by the single act of the vendee, which is impossible. No deed can be *made*, without the assent of two persons, at least. Deeds take effect upon the delivery; which is never effected, without the concurrence of the person who receives. The second objection is, that it puts *to hazard the interest of every purchaser; as every purchaser must depend for his security, not upon his own innocence, but [*476 upon the continual integrity of the vendor; who, if, at any time, and for any reason, he can be brought to confess his own fraudulent intentions, in answer to a bill against him and his vendee, can ruin the latter. A third and decisive objection is, that the statute of frauds, if it be susceptible of the complainant's interpretation, repeals the registry act, which is not pretended. The registry act, then in force in Ohio, provided, that all deeds executed out of the state, "should be recorded in the county in which the lands, tenements and hereditaments, so conveyed or affected, shall be situate, within one year after the day on which such deed or conveyance was executed; and unless recorded in the manner, and within the time aforesaid, shall be deemed fraudulent against any subsequent *bonâ fide* purchaser, without knowledge of the existence of such former deed of conveyance." Now, if the act of Dorhman, in giving his first deed to Wells, is fraudulent, as being made with intent to postpone Astor to him, and for that reason is void, then the registry act is effectually done away; because no man, under any circumstances, can make a second sale, by concealing a former one, without being guilty of as much fraud as Dorhman, at the least. His case was a hard one; he had two creditors, one of whom must suffer, and his wishes were to prefer one of them. He sought no benefit by this act to himself, nor can his conduct be as censurable as if he were selling to put money into his own pocket. If the plaintiff be right, *the parties to [*477 a first and second sale stand as at the common law.

2. The doctrine of constructive notice, is entirely exploded. The term never did convey the true meaning of the courts. There is something almost absurd, in the idea of proceeding upon a question of fraud by con-

struction. The cases upon this subject, only proceed upon two principles: first, actual notice to the party; and second, to the agent of the party. The notice arising from a suit pending; a registry or any public record, is not a matter of construction. The *lis pendens*, the register of record, furnish such irresistible evidence of notice in fact, that the party is not at liberty to urge the contrary; and the relief is granted on the ground of notice in fact. Nor is this an arbitrary rule: all men are parties to the public proceedings of the courts of justice, and presumed to be present at them; and also parties to every legal registry, or other public record; what the laws require to be done, and is done according to those laws, they are, in like manner, parties to, and are supposed to be acquainted with; and because the laws have provided those public documents for the security of every man, it is his fault, if he sees them not, and therefore, he is adjudged to have seen them in fact. But this reason can have no application to the proceedings of a court not of competent jurisdiction, nor to registries and records not made according to law. In respect to proceedings in courts of incompetent jurisdiction, or irregular records, they are only notice, if in fact, they have been heard or seen
*478] by the party, so as to *put him upon inquiry. Sugd. on Vend. 470, and cases there cited. It is believed, that no decisions have been had upon this statute; but the statutes of Kentucky and of Pennsylvania are like that of Ohio: and in the case of *Taylor* v. *McDonald's Heirs*, 2 Bibb 420, the court in Kentucky decide, that a record made, not in the proper county, is not of itself notice. The court say, "the law requires the deed shall be recorded, not only within the limited time, in order to be valid against a subsequent purchaser without notice, but also in the county where the land lies. This provision is obviously intended to enable persons to trace the legal title, with the industry and attention essential to a compliance with the act." That case is stronger than is necessary for our purpose; because in that, the deed was recorded in time, but in the wrong county; and in ours, the party has failed in respect of both time and place. The case of *Heister's Lessee* v. *Fortner*, 2 Binn. 10, is an authority to the same effect; and also, that a record made within the time, and within the proper county, is void, if made upon less proof than the law requires. An illegal registry, then, is not proof of notice. Nor does the doctrine of relation apply. All the cases cited on the subject of relation prove, that the act by which a transaction is completed, has relation to the beginning; as, for instance, the presentation of a copyhold, to the surrender: but that this relation is a legal fiction, operating between the parties only, and without any
*479] effect upon third persons or their *rights. But the use made of this fiction, whereby an illegal registry is made so to relate, either to the date of the execution, or proper time of registering a deed, as to affect the estate of a third person, is an invention of such modern date, as to have acquired, as yet, very little authority in this country. If the obvious policy of the law, and the authority of the decisions referred to, are satisfactory, then the case of Wells is the very strongest that can be imagined. Suppose, he had gone to the registry, to look for the record of any conveyance of the lands in question, who could suppose, he would examine the entries upon it, after the date of the separation of the counties, for a conveyance of lands in Tuscarawas?

3. It is said, that Wells does not show himself to be a complete purchaser,

without notice, because he had not made full payment. The law is admitted to be as stated in respect of a purchase and sale; but the reason given for it has no application here. The reason is, that when the second purchaser receives notice of the first, he should stay his hand—refuse a deed or withhold payment; and because this is in his power, it is his moral duty to do it. But in the case of Wells it was otherwise: he was already accountable to the bank for the whole amount. This point has been determined, in a case of precisely the same nature, as to a bank indorsement. *Lyle* v. *Ducomb*, 5 Binn. 585. The rule, that notice to an agent is notice to his principal, and consequently, his fraud affects his principal, as much as if committed by himself, is not disputed. But the rule is explained and qualified, *in order to give security to the party affected by it. The agent must be employed by the party—in the same transaction. Notice to [*480 the agent is not sufficient, unless acquired by him, in the course of the transaction in which he is employed; notice otherwise acquired, will not affect his principal. A general agency is not sufficient: it must be in the particular case; and the employment must be to purchase, or to make or treat of terms—not merely to draw a deed. If the agent is employed by one of the parties, notice to him shall affect that party only; where both employ him, his fraud shall attach to both. *Lowther* v. *Carlton*, 2 Atk. 139; *Warwick* v. *Warwick*, 3 Ibid. 291, 294. And it is only necessary to deny the agency and all circumstances from which fraud may be inferred, where those matters are charged in the bill. *Newman* v. *Wallace*, 2 Bro. C. C. 143. The propriety of the application of the general rule as to agents, in the cases of *Brotherton* v. *Hatt*, 2 Vern. 574; *Jennings* v. *Moore*, Ibid. 609; *Le Neve* v. *Le Neve*, Ambl. 436, has been questioned. In each of these cases, the fact of agency is charged, with all the circumstances of the transaction, from which that fact could be inferred. As those three cases contain nearly the whole law upon the subject of notice to an agent, it is only necessary to show that neither of them furnish a precedent to affect Wells. In *Le Neve* v. *Le Neve*, the agent was defendant, and he denied his agency, and admitted notice. The other only denied notice to herself; and the ground of decision is, that she admits enough in *her answer to make Norton her agent. [*481 In *Jennings* v. *Moore*, one person was treating of a purchase for himself, and during the transaction received notice; and perfected the contract in the name of a third person, who accepted of it, without notice. The authority of this decision has been doubted, but with very little reason. In *Brotherton* v. *Hatt*, the agents were scriveners; they kept an office, and their profession was to drive bargains, effect loans and perfect securities. The court adjudge them to be agents, and that notice to them was notice to their principals; not because one of the parties had consulted them, and procured them merely to write a deed which another accepted. By the term "scrivener," something more is meant than a conveyancer. The reason for the decision is, that all the loans were effected by them, at their office, and all the securities also; and from the nature of their employment, the court decided them to be the agents of each party, in effecting the loans and the securities; but whether the court decided these facts upon proper testimony or not, is immaterial. The principle is, that notice to him who is employed by both parties to effect a loan, and prepared a security is notice to both parties. The relation of agent and principal cannot exist, without the

consent of the principal. In every case cited, and in all others, the fraud is charged as it happened, either to the principal or his agent, and in the latter case, the agent is made a defendant. Agency or not, is a fact, which if stated and denied, must, like every other fact, be proved. In our case, all that is charged is denied, and no part of it is proved.

*482] *Brush*, in reply, insisted, that the construction of the act of fraudulent conveyances, contended for on the part of the defendants, could not be supported. It was undoubtedly competent for the legislature to say, such instruments should be void for fraud, whether the donee or grantee be party in the fraud or not, and they have so said. Taking the entire section together, it is sensible only as it reads; but by altering "or" to "and" a new meaning is interpolated. The rule upon the subject is, that such construction shall be given, as will give effect to every word, if possible, that none may have been employed to no purpose. The construction, moreover, is arbitrary; contrary to a very plain text; substituting one word for another, in a law which is neither ambiguous nor doubtful; not for the purpose of suppressing fraud, and advancing the remedies, but for the purpose of restraining the operation of a remedial act. A deed, void for fraud, is not protected by the registry act, which relates only to purchasers, and never was intended to affect creditors. It has never received such a construction in the state, or elsewhere, nor will the language warrant it. Speaking of the deed of a prior purchaser, it says, "unless recorded in a manner, and within the time aforesaid, shall be deemed fraudulent against any subsequent *bonâ fide* purchaser, without knowledge of the existence of such former deed of conveyance." There cannot be a *subsequent* purchaser, unless there had been a *former* one. Besides, the registry act was passed in 1805; the staute of frauds and perjuries, protecting creditors against the *483] frauds of their debtors, in 1810, five years afterwards; *and must be considered as repealing so much of the former act as comes within its provisions. If it did affect creditors in any way, *quoad hoc* it is repealed; leaving it to operate as between purchasers, upon a first and second sale, the first not a creditor.

Another pretension set up for Wells is, that he also is, or was, a creditor and that Dorhman might prefer, which he would. If this be so, that provision in favor of creditors in the statute of frauds is defeated, as it would be in the power of a debtor to evade it at pleasure. If it be law, which we feel no disposition to controvert, that in some cases, a debtor may give one creditor a preference over another, yet this privilege no longer remained with Dorhman. He had exercised it; he had made his election to give Astor the preference, by conveying the lands to him, as it was competent for him to do, most assuredly, when it does not appear that, at that time, he owed any one else. This privilege must be exercised fairly, by giving that which is his own, not that which belongs to another, and which he may happen to hold in trust for that other. There is no law which authorizes a trustee thus to give away the trust-estate, by advancing or preferring one creditor to another. But Wells, at that time, did not stand in the relation of creditor to Dorhman. He had indorsed, but it does not appear he had paid any money, or that there would have been any necessity for him to pay, if, after express notice, he had not extended his indorsements, and involved the

whole of Dorhman's estate, as if with the design which Dorhman had already manifested, of cutting Astor off *altogether. As is said in *Tourville* v. *Nash*, 3 P. Wms. 307, he should have filed his bill *quia timet* against Dorhman, and pursued his remedy upon the other quarter township, released by Astor, and whatever other property could be found. There is nothing in the case which shows that Dorhman had received the whole $5000 before notice to Wells, nor what part he had received. It lies upon Wells to make this appear clearly, for if any part remained unpaid, it might have been stopped, and the payment enjoined. [*484

It is said, "if the plaintiff be right, parties to a first and second sale stand as at common law." But this is not a case merely between purchasers at a first and second sale. To this point, the plaintiff is considered a creditor; and it stands as a case between a creditor and purchaser of the debtor. At common law, such a conveyance would be avoided. The statute of Elizabeth is in aid of the common law, extending the remedy to subsequent creditors, superadding the sanction of penalties. It declares "deeds *made* in fraud of creditors void." And although it inflicts penalties, still, in England, it is viewed as remedial, "made against frauds, for the public good, and to be taken by equity." *Gooch's Case*, 5 Co. 60 *a*; 1 Fonbl. Eq. 270, 282. Even if the doctrine of constructive notice were admitted to be no longer a rule of equity, still this admission would only raise a dispute upon an abstract proposition, whether the notice we rely on be actual or constructive? It is, therefore, a disagreement as to the name. *Under what denomination have the law-writers classed it? is the question. If actual, then we say, Wells had actual notice. If constructive, then he had only constructive notice. We have only to show Wells had such notice as the law charges him with, to avoid the danger of sanctioning fraud, and to close the avenues of injustice, and fraudulent speculation. According to the opposite argument, a suit pending, or a registry of a deed, are notice in fact. They are facts of record, and notice to all persons in the same community; but we must be permitted to disbelieve that every person has seen them in fact, and, therefore, knows what they contain. Yet every person is bound by this knowledge, because they are made public, and accessible to all: constructive knowledge or notice, being by the law charged upon the party, because he might have known; the law having done its part by making such public record, and declaring all persons bound by it, whether they know it or not. It is a well-established principle, that the defendant must unequivocally deny all notice, even though it be not charged, and every fact and circumstance from which it can be inferred, in order to be considered a *bonâ fide* purchaser. *Frost* v. *Beekman*, 1 Johns. Ch. 302; s. c. Ibid. 566; *Murray* v. *Finster*, 2 Ibid. 155. This the defendant, Wells, has not done. The case of *Taylor* v. *McDonald's Heirs*, 2 Bibb 420, is not analogous; as there the lands never were included in the county where the deed was recorded; and the question was upon the effect of the deed at law. [*485

*March 10th, 1819. Johnston, Justice, delivered the opinion of the court.—The questions in this case are partly of law, partly of fact. The bill charges the defendant with express notice of the complainant's previous mortgage, and with holding the land purchased under a secret trust for the legal representatives of Dorhman, the mortgagor. Both these facts [*486

the answer denies; and as there is no evidence to sustain them, they must be put out of the case. The bill then proposes to affect the defendant, Wells, with constructive notice; and if it fails there, then to set aside the deed to Wells as absolutely void, under the express provision of a law of the state of Ohio.

Obadiah Jennings, who drew the mortgage from Dorhman to Wells, was fully apprised of the existence of Astor's mortgage, and acted in concert with Dorhman, expressly to defeat Astor's prior lien, and give precedence to Wells. The advantage of which they proposed to avail themselves for this purpose, was a supposed mistake committed by Astor as to the legal office for recording his deed. The land was originally comprised within the limits of Jefferson county. But before the recording of the deed, the county of Tuscarawas was taken off from Jefferson, and the land lay in that part of Jefferson which thus became Tuscarawas county. The law of Ohio requires that the recording shall take place in the county in which the land lies.

The first question is, was this a legal recording, under the laws of Ohio, so as to preserve the priority which dates gave to Astor? The office of
*487] Jefferson *county was the legal office, at the time of executing the deed: did it continue to be so, at the time of recording it? This can only be decided by considering the object of the law. It was to give notice to subsequent purchasers—to place at their command the means of investigation, to which, if they did not resort, they had only to blame their own indolence or folly. But no one in search of such information respecting lands situate in Tuscarawas county, would be expected to search the records of Jefferson, subsequent to the date of the separation. He would naturally refer to the records of the new county, to its origin, and from that time pursue his inquiries among the records of the county in which it was originally comprised. And therefore, we are of opinion, that the recording of Astor's deed was not sufficient, either to preserve its legal priority, or give it the equity resulting from constructive notice.

But it is contended, that Jennings was the mutual agent of both mortgagor and mortgagee, in the creation of Wells's mortgage, and therefore, the notice to Jennings was notice to Wells. Here, again, the complainant's case is unsupported by the evidence. On the law, there could be no doubt, if the facts were such as the complainant contends. But it is positively denied, both by Wells and Jennings; and if Jennings was the agent of Dorhman only, his knowledge could produce no other effect on the rights of Wells, than if it had been concealed in the breast of Dorhman. And this leads to the final question in the case. As the deed really was "made" to defraud Astor, does that circumstance alone, under the laws
*488] *of Ohio, destroy its validity, without reference to the knowledge or connivance of the mortgagee. And this again must be decided, by referring to the object of the law. The words of the statute would literally embrace the case. But who are the objects of the law? Not creditors only, but subsequent purchasers. And to give it such a construction as would expose a *bonâ fide* purchaser, without notice, to imposition, in order to protect creditors, could never comport with the intent of the law.

Upon the whole, we are of opinion, that there is no error in the decree below, and that the same be affirmed, with costs.

Decree affirmed, with costs.

McArthur *v.* Browder.

Land law of Ohio.

The rule which prevails in Kentucky and Ohio as to land titles, is, that, at law, the patent is the foundation of title, and neither party can bring his entry before the court: but a junior patentee, claiming under an elder entry, may, in chancery, support his equitable title.

A description which will identify the land, is all that is necessary to the validity of a grant: but the law requires that an entry should be made with such certainty, that subsequent purchasers may be enabled to locate the adjacent *residuum*.

An entry for 1000 acres of land in Ohio, on Deer creek, "beginning where the upper line of Ralph Morgan's entry crosses the creek, running with Morgan's line, on each side of the creek, 400 poles, *thence up the creek, 400 poles in a direct line, thence from each side of the given line with the upper line, at right angles with the side lines, for quantity:" held to be a valid entry. [*489

Distinction between amending and withdrawing an entry.

Appeal from the Circuit Court of Ohio. The bill in equity filed in this cause, by the appellant, McArthur, stated, that George Mathews, on the 19th of September 1799, made the following entry with the surveyor of the Virginia army lands:

"No. 3717: 1799, September 19th. George Mathews, assignee, enters 1000 acres of land, on part of a military-warrant, No. 4795, on Deer creek, beginning where the upper line of Ralph Morgan's entry, No. 3665, crosses the creek, running with Morgan's line, on each side of the creek, 200 poles; thence up the creek 400 poles, on a direct line, thence from each side of the given line, with the upper line, at right angles with the side lines, for quantity."

That afterwards, the entry of Ralph Morgan was withdrawn; and that, in consequence, George Mathews made the following entry: "No. 3717: 1801, October 26th. George Mathews, assignee, enters 1000 acres of land on part of a military-warrant, No. 4795, on Deer creek, beginning at two elms on the south-west bank of the creek, upper corner to Henry Mossies' survey, No. 3925, running south 45° west, 120 poles, north 65° west, 172 poles, north 17° west, 320 poles, north 76° east, 485 poles, thence south 1° west, 292 poles, thence to the beginning."

The bill charged, that the last entry was not intended as a new one; but only as an amendment or explanation of the first. This last entry was surveyed the 7th of *October, 1807: and upon an assignment to the complainant, the land embraced in the survey was patented to the plaintiff, the 6th of July 1806. [*490

The title of Browder, the respondent, was stated in the bill as follows: That on the 20th of July 1798, Nathaniel Randolph made the following entry:

"No. 3310: July 20th, 1798. Nathaniel Randolph, assignee, enters 300 acres of land on three military-warrants, Nos. 4165, 4250 and 4664, on the lower side of Deer creek, beginning at a walnut and two elms, cornered five poles from the bank of the creek, running south 61° west, 200 poles to two white oaks, and two hickories, thence north 7° west, 234 poles, thence north 61° east, 200 poles, thence to the beginning." That the last entry was surveyed for Randolph, and the oldest patent obtained by him, which he conveyed to Browder, who has recovered upon an ejectment.

By the answer and exhibits, it appeared, that Randolph's survey was made the 1st of August 1798; that a patent was granted to Randolph, the 29th

of September 1800, who conveyed to the respondent. The respondent, Browder, having brought an action of ejectment, recovered the possession of the land in question; and the appellant, McArthur, filed this bill in equity, praying for an injunction; a conveyance of so much of the land claimed by the respondent, as interfered with his claim; and for general relief. The bill was dismissed by the circuit court, and the cause brought by appeal to this court.

*491] March 10th, 1819. This cause was argued by *Scott* and **Brush*, for the appellant, and by the *Attorney-General* and *Doddridge*, for the respondent.

March 12th. MARSHALL, Ch. J., delivered the opinion of the court.—In this case, the appellee claims under the elder grant, founded on the elder entry. Consequently, if his entry be valid, the bill of the appellant cannot be sustained. But the entry is so defective in description, that it was necessarily abandoned; and the appellee relies on his patent; anterior to the emanation of which, the appellant contends, that the land was appropriated by this entry. The validity of this entry also is denied. But before we examine the objections made to it, we must consider those which have been urged against the jurisdiction of this court as a court of equity.

The rule which prevails both in Kentucky and Ohio is, that, at law, the patent is the foundation of title, and that neither party can bring his entry before the court. In consequence of this rule, it has been also well settled, that the junior patentee, claiming under an elder entry, may, in chancery, support his equitable title, and obtain a decree for a conveyance of so much of the land as, under his entry, he may be entitled to. But the general principle is supposed to be inapplicable to this case, because the words of the entry are introduced into the grant; and if they were too vague to appropriate the land, when used in the entry, they must be too vague to *492] appropriate it, when used in the grant, which is a *question triable at law, and which was tried in the ejectment brought by the appellee for the land.

Were the fact precisely as stated, it could not support the argument which is founded on it. When lands are granted, a description which will identify them is all that is necessary to the validity of the grant. But identity is not all that is necessary to the validity of an entry. The law requires that locations should be made with such certainty, that subsequent purchasers may be enabled to locate the adjacent *residuum*. All grants are founded on surveys; they recite the surveys, and all that is required in an ejectment is, to prove that the land claimed is that which was surveyed. But more is required in a contest respecting an entry; nothing is more common than for courts to declare en entry void for uncertainty, notwithstanding the clearest proof that the land claimed, and that located, are the same.

There is then nothing in the resemblance between the words of the grant and of the entry, to distinguish this from other cases, in which the party claiming under the first good entry, comes into chancery to obtain a conveyance of lands held under a senior patent. We proceed, then, to examine the entry under which the appellant claims. That entry is made for 1000 acres of land on Deer creek, "beginning where the upper line of Ralph Morgan's

entry crosses the creek, running with Morgan's line on each side of the creek, 200 poles, thence up the creek 400 poles, on a direct line, thence from each side of the *given line, with the upper line at right angles with the side lines, for quantity." [*493

That entries, which contain such descriptive words as clearly to designate the place where the land lies, shall, with respect to their more particular locative calls, be supported, if they can, on fair construction, be supported, is a principle which pervades the whole of that curious and intricate fabric, which has been erected by the decisions on land titles in Kentucky, and has been taken as a model for those in the military district of Ohio. If a subsequent locator, brought to the spot where the lands lie, with the location in his hand, might, by the application of the rules which the courts have established, know how to place the entry, so as to enable himself to locate the adjacent *residuum*, the entry must be sustained.

In this case, it is admitted, that the beginning is described with sufficient certainty. The place where the upper line of Ralph Morgan's entry crosses Deer creek, is ascertained. From that beginning, the entry calls to run "with Ralph Morgan's line, on each side of the creek, 200 poles." It is said to be entirely uncertain, whether this line is to be 200 poles on each side of the creek, so as to amount to 400 poles, or to be only a line of 200 poles altogether. Did this ambiguity really exist in the words themselves, it is entirely removed by the other parts of the location. The entry is made for 1000 acres of land, and cannot on any construction, be made to exceed 500 acres, unless the base line be 400 poles. We have then a given line of 400 poles. The entry then proceeds, *"thence up the creek 400 poles, on a direct line." The plain meaning of these words is, that the land lies up the creek, so that a direct line of 400 poles will reach its upper boundary. If the location stopped here, adding only "for quantity," the decisions of Kentucky would establish it as a good entry for a square, formed on the upper side of the base line of 400 poles, which would contain 1000 acres of land. But the entry proceeds, "thence from each side of the given line, with the upper line at right angles with the side lines, for quantity." This part of the description has been said to produce uncertainty, because two lines are given, and a subsequent locator could not tell to which reference was made. [*494

If it would make any difference whether the base line, or the line up the creek, was taken as the given line, this might produce some difficulty; but if the entry must cover precisely the same ground, whether the one or the other be taken as the given line, it can make none. Let the base line be considered as the given line. It is plain, that the words "from each side" must mean from each end, because the land is to lie up the creek; whereas, if you proceed from each side, it would lie partly down the creek. The line, too, which is to give the quantity, with the side lines, is the upper line, and that is removed from the base line, the distance necessary to include the quantity of land required. As this quantity is to be inclosed from the whole entry taken together, within lines which form a square, the entry must be understood to require, that the side lines should be drawn from the ends of the base line, *and the inaccuracy of the expression could not mislead. [*495

But the entry is understood to refer, as the given line, to that which is

last mentioned ; that is, to the line of 400 poles, which is perpendicular to the base. You are then carried up the creek 400 poles, in a direct line from the base line. From each side of this line, you are carried " with the upper line at right angles with the side lines," until you get 1000 acres. This construction gives full effect to every word of the entry, and gives a square which will contain 1000 acres. It is, we think, the natural construction. The entry would be so understood by every subsequent locator. On any construction, then, which can be given to the words, the entry must not only have the same form, but must cover precisely the same land.

If, then, the original entry had never been amended, there could be no doubt of the right of the party claiming under it. This leads to the inquiry, whether the amendment affects this right? The distinction between amending and withdrawing an entry is well established, and completely understood. An amended entry retains its original character, so far as it is unchanged by the amendment. So far as it is changed, it is a new entry. The survey, in this case, is understood to conform precisely to the amended entry ; and it contains a part of the land comprehended in the original entry. So far as respects the land within the appellee's patent, which is comprehended by the original entry, the amended entry, and the survey, we think, the *appellant was entitled to a decree, and consequently, the circuit court erred in dismissing his bill. The decree is to be reversed, and the cause remanded to the circuit court, with directions to enter a decree conforming to this opinion.

*496]

DECREE.—This cause came on to be heard, on the transcript of the record of the court of the United States for the seventh circuit, and district of Ohio, and was argued by counsel: on consideration whereof, this court is of opinion, that the plaintiff in the circuit court had a good title in equity to so much of the land contained in the defendant's patent, as is comprehended in the original entry made by George Mathews, in September 1799, and also in his amended entry, and in his survey ; and that the decree of the said circuit court, dismissing the bill, is erroneous and ought to be reversed, and it is, accordingly, reversed ; and this court doth further direct and order, that the said cause be remanded to the said circuit court, with directions to enter a decree, directing the defendant to convey to the plaintiff so much of the land contained in his patent, as is comprehended in the original entry, and also in the amended entry and survey, on which the grant of the plaintiff was founded.

*The Neustra Senora de la Caridad : Bages *et al.*, Claimants.

Capture by revolutionary cruiser.

A cruiser, equipped at the port of Carthagena, in South America, and commissioned under the authority of the province of Carthagena, one of the United Provinces of New Grenada, at war with Spain, sailed from the said port, and captured on the high seas, as prize, a vessel and cargo, belonging to the subjects of the king of Spain, and put a prize-crew on board; and ordered her to proceed to the said port of Carthagena ; the captured vessel was afterwards fallen in with, by a private armed vessel of the United States, and the cargo taken out and brought into the United States for adjudication, as the property of their enemy; the original Spanish owner and the prize-master from the Carthagenian crusier, both claimed the goods: the possession was decreed to be restored to the Carthagenian prize-master.

War having been recognised to exist between Spain and her colonies, by the government of the United States, it is the duty of the courts of the United States, where a capture is made by either of the belligerent parties, without any violation of our neutrality, and the captured prize is brought innocently with our jurisdiction, to leave things in the same state they find them ; or to restore them to the state from which they have been forcibly removed by the act of our own citizens.

The Spanish treaty held not to apply to the above case, as the court could not consider the Carthagenian captors as pirates, and the capture was not made within the jurisdictional limits of the United States—the only two cases in which the treaty enjoins restitution.

Appeal from the Circuit Court of North Carolina. This was a prize allegation against certain goods, taken by a private armed vessel of the United States, the Harrison, during the late war with Great Britain, *out of a ship called the Neustra Senora de la Caridad. [*498

A claim was interposed by Salvador Bages, and others, Spanish subjects, domiciled at St. Iago, in the island of Cuba, alleging that the ship was a Spanish ship, and with the goods, their property, was captured on the high seas, by an armed vessel cruising under the pretended colors of Carthagena, the commander of which produced no commission, nor did the claimants know, or admit, he had one, and who detained the Caridad as prize, and put a prize-crew on board. That having separated from the capturing vessel, they were met with and boarded by the privateer Harrison. That the said privateer captured and took possession of the Caridad, and the captors unladed the cargo from on board of her, into the Harrison, and having brought the same into the port of Wilmington, North Carolina, proceeded against it as prize of war.

A cross-claim was filed by Pedro Brugman, master and commander of the Carthagenian armed schooner Neustra Senora de la Popa, in behalf of himself and others, the owners of said privateer, to the goods thus proceeded against as prize of war, by the commander, officers and crew of the Harrison. This claim pleaded, that the goods were not, at the time of the proceedings, nor at the time of capture by the Harrison, the property of any British subjects, or of any persons domiciled in the dominions of Great Britain, nor of any of the enemies of the United States, but that the same then were, and yet are, the property of the owners, officers and crew of the La Popa, from whose lawful possession the same *had been violently and wrongfully taken, on the high seas, by the Harrison, as before mentioned. That the La Popa, having been duly commissioned by the sovereign authority of the independent state of Carthagena, and furnished with letters of marque and reprisal, authorizing her to capture, on the high seas, the property of the enemies of said state, left the port of Carthagena, [*499

in the month of December 1814, on a cruise. That on the 21st of January 1815, while cruising off St. Iago de Cuba, the said privateer La Popa, commanded by the claimant, seized and captured the ship La Caridad, sailing from Jamaica to Cuba, loaded with dry-goods, and belonging, with the cargo, to the enemies of the said independent state of Carthagena, as the papers on board, and the information of the master and crew, convinced the claimant to be the fact. That the claimant put a prize-master and crew on board the captured vessel, and ordered her to proceed to the said port of Carthagena. That the said prize-master and crew retained the possession for four days, and while they were proceeding to Carthagena, the Caridad was forcibly taken by the Harrison from their possession, the goods taken out, and brought into the port of Wilmington, as aforesaid.

An order was made by the court below, that the claimant, Pedro Brugman, should be allowed to make further proof, that the commission which he produced, and under which he alleged the original capture to have been made, was issued by the authority acting as the sovereign authority of the United Provinces of New Grenada.

*500] * At the hearing, it was proved, by the testimony of witnesses, that the La Popa belonged to and had been actually fitted out in Carthagena, one of the said United Provinces of New Grenada; that the commission produced by the commander, was in the usual form in which letters of marque were issued by the sovereign authority of that province; that the seal affixed to the same was the seal used at the time by those who exercised the sovereign authority of Carthagena to authenticate the commissions by them granted; that the officers of state by whom the same was signed, were at the time, and had been for some time before, respectively, the governor and the secretary of war and the marine of the said province; that the witnesses were acquainted with the handwriting of the said governor and secretary, the witnesses having often seen them write, as well as seen their public and acknowledged writings, and verily believed the same to be their signatures. And the commission was also proved to be genuine, and to have regularly issued by the certificates and declarations of the officers of state of the Province of Carthagena. The original capture by the La Popa, the retaking by the Harrison, and the proprietary interest of the original Spanish owners of the goods, were all fully proved.

The circuit court decreed, at May term 1818, the goods to be restored to the possession of Pedro Brugman; from which sentence an appeal was taken to this court, by the claimant, Salvador Bages, for himself and the original Spanish owners. The cause was submitted, without argument.

*501] *March 12th, 1819. Johnson, Justice, delivered the opinion of the court.—This case arose out of a capture made in the late war. The La Popa, a commissioned cruiser of the Province of Carthagena, had made prize of the Caridad, a Spanish vessel, in a voyage from Jamaica to Cuba. The American private armed vessel Harrison fell in with the Caridad, then in possession of the prize crew of the La Popa, and suspecting her cargo to be British, took possession of it, and transshipped it into their own vessel. On the arrival of the Harrison, in a port of North Carolina, the cargo was claimed both by the Caridad and La Popa, and finally restored to the La Popa. This is an appeal from the decision of the circuit court of North

Carolina, made by the original Spanish owner, and the case has been submitted on the evidence and the grounds, taken in the argument below.

There is no doubt, that the property was Spanish, nor that the privateer La Popa was commissioned as a cruiser, whilst the Province of Carthagena had an organized government; and there is the fullest evidence, that her armament and equipment was unaffected by any charge of having been made in violation of our laws. The only question in the case is, whether an original Spanish owner is entitled to the aid of the courts of this country, to restore to him property of which he has been dispossessed by capture, under a commission derived from the revolted colonies? and this question is considered, by this court, as having *been fully decided by the principles assumed in the case of the *United States* v. *Palmer*, at the last term [*502 (3 Wheat. 610), and by the decisions in the cases of *The Estrella* (*ante*, p. 298), and *The Divina Pastora* (*ante*, p. 52), at the present term.

War notoriously exists, and is recognised by our government to exist, between Spain and her colonies. This is an appeal to the highest of all tribunals on a question of right. No neutral nation can act against either, without taking part with the other in the war. All that the law of nations requires of us, is strict and impartial neutrality. And no friendly nation ought to demand of the courts of this country to do an act which may involve it in a war with the victor. Our duty is, where the property of either is brought innocently within our jurisdiction, to leave things as we find them; much more, to restore them to that state from which they have been forcibly removed by the act of our own citizens. The treaty with Spain can have no bearing upon the case, as this court cannot recognise such captors as pirates, and the capture was not made within our jurisdictional limits. In those two cases only, does the treaty enjoin restitution.

Decree affirmed, with costs.

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*Wheaton *v.* Sexton's Lessee. [*503

Judicial sale.—Fraudulent conveyance.

A sale, under a *fi. fa.*, duly issued, is legal, as respects the purchaser, provided the writ be levied upon the property, before the return-day, although the sale be made after the return-day, and the writ be never actually returned.[1]

A deed made upon a valuable and adequate consideration, which is actually paid, and the change of property is *bonâ fide*, or such as it purports to be, cannot be considered as a conveyance to defraud creditors.[2]

Error to the Circuit Court for the District of Columbia. This was an action of ejectment, brought in the court below, by the defendant in error, Sexton, against the plaintiff in error, Wheaton, to recover the possession of a parcel of ground in the city of Washington, being lot number 17, in square 254, containing 8254¾ square feet, with the buildings thereon.

At the trial, the plaintiff produced and read in evidence to the jury, a deed of bargain and sale of the premises from John P. Van Ness and wife, and C. Stephenson, to Sally Wheaton, the wife of the defendant in ejectment; and a deed from one Watterson to the same, of the same premises;

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[1] S. P. McNitt *v.* Turner, 16 Wall. 365.

[2] Crane *v.* Hardy, 1 Mich. 56.

a writ of *fi. fa.* against the goods, chattels, lands and tenements of the defendant, issued from the court below, upon a judgment obtained by Sexton against Wheaton, with a return thereon by the marshal: "December the *504] 30th, 1815, sold the real property *in square 254, to Francis F. Key, Esq. for three hundred dollars ; sales of real property in square 253, countermanded by said Key ; sold personal property," &c. The writ was never actually returned, but for the first time, produced by the marshal in court, at the trial of this cause. The sale took place after the return-day mentioned in the writ. The plaintiff also produced and read in evidence a deed from the marshal to the plaintiff in ejectment, dated 30th May 1816, he having been the highest bidder, by Key, his attorney.

The defendant's counsel prayed the court to instruct the jury, that the lessor of the plaintiff could not recover. The court refused to give such instruction, but instructed the jury, that if they should be of opinion, from the evidence, that the writ of *fi. fa.* was levied by the marshal, upon the property in question, before the return-day of the writ, it was lawful for him to sell the same, under and by virtue of said writ, and that the facts respecting the said sale might be proved by parol. To which instruction, the defendant excepted.

The defendant, to show the legal title of the premises to be in one E. B. Caldwell, and not in the lessor of the plaintiff, gave in evidence a deed from the defendant in ejectment to said E. B. Caldwell, made and executed on the 23d of December 1811, conveying the premises to the said E. B. Caldwell, reciting the deeds from Van Ness, &c., and that it was understood, at the time of making those deeds, that the property should be absolutely for the sole use of said Sally Wheaton, &c., but it had been apprehended and *505] suggested, that the said Joseph Wheaton might *have a life-estate therein, to carry into effect the original intent of the conveyances, and for the consideration of five dollars, paid to him by E. B. Caldwell, the said Joseph Wheaton conveyed to him all his right, title and interest, in trust for the use of said Sally Wheaton. Whereupon, the court instructed the jury, that if the jury should be of opinion, from the evidence, that the said deed was made by the said Joseph Wheaton, without a valuable consideration therefor, *or* was made by him, with intent to defeat and delay, or defraud his creditor, the said Sexton, of his debt aforesaid, then the said deed was void in law, as to the said Sexton : to which the defendant excepted.

The jury found a verdict, and the court rendered a judgment for the lessor of the plaintiff. The cause was then brought to this court by writ of error. The cause was submitted, without argument.

March 12th, 1819. Johnson, Justice, delivered the opinion of the court. —The suit below was ejectment, and the defendant in this court recovered, under a title derived from a sale by the marshal of this district. The marshal's deed conveys the life-estate of Wheaton in the lands in question. And the plaintiff below proved the title in the defendant's wife, under conveyances executed after marriage. The defence set up was a conveyance executed by Wheaton, to a trustee, for the sole and separate use of his wife and *506] her heirs, and the deed purports to have been executed in consideration of, and to carry into *effect an original intention in the parties,

that the conveyances to his wife should inure to the same uses, although the conveyances in law operate otherwise. But there is no other evidence of this fact than what is contained in the deed, and it was executed but two days before the judgment.

At the trial, two bills of exception were taken ; the first of which brings up the question, whether a sale by the marshal, after the return-day of the writ, was legal. The court charged that it was, provided the levy was made before the return-day. And on this point, the court can only express its surprise that any doubt could be entertained. The court below were unquestionably right in this instruction. The purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells, before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return.

The second bill of exception brings up the question, whether the deed to Caldwell, in trust for Mrs. Wheaton, was not fraudulent and void as against creditors. In ordinary cases, a voluntary conveyance of a man, to the use of his wife, when circumstanced as Wheaton, was, would unquestionably be void. But it is contended, that, in this instance, a court of equity would have decreed Wheaton to make the conveyance he did execute, and therefore, it was not a voluntary conveyance. That there are cases in *which the court would lend its aid to protect the acquisitions of a wife from [*507 the creditors of a husband, may well be admitted ; but on this case, it is enough to observe, that if the husband may, upon his own recital, make out such a case, there would no longer exist any difficulty in evading the rights of creditors.

Yet this court is not satisfied, that the court below has given an instruction that comports with the law of the case. The instruction of the court, given on motion of the plaintiff below, is, that the deed was void in law, " if it was made by the said Joseph Wheaton, without a valuable consideration therefor, *or* was made by him with intent to defeat, delay or defraud his creditors." Had the conjunction *and* been substituted in this instruction for *or*, it would have been entirely unimpeachable ; but as it now reads, it must mean, that even had a valuable consideration been paid, if the deed was made, with intent to defeat creditors, it was void. We know of no law which avoids a deed, where a valuable (by which, to a general intent must also be understood adequate) consideration is paid, and the change of property be *bonâ fide*, or such as it professes to be. Of such a contract, it cannot be predicated, that it is with intent to defeat or defraud creditors, since, although the property itself no longer remains subject to the judgment, a substitute is furnished by which that judgment may be satisfied. Nor is it any impeachment of such a deed, that it is made to the use of the family of the maker. The trustee, in that case, becomes the benefactor, and not the husband. It is *not a provision made by him for his [*508 family, but by another.

Although, from anything that appears in this cause, this court can see no ground on which the jury could have found otherwise than they did, yet if the instruction was erroneous, and to the prejudice of the defendant below,

as this court cannot estimate its influence on the minds of the jury, the judgment must be reversed.

Judgment reversed.

Sergeant's Lessee *v.* Biddle *et al.*

Depositions.

Depositions taken according to the proviso in the 30th section of the judiciary act of 1789, under a *dedimus potestatem*, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are, under no circumstances, to be considered as taken *de bene esse*, whether the witnesses reside beyond the process of the court or within it; the provisions of the act relative to depositions *de bene esse* being confined to those taken under the enacting part of the section.

March 9th, 1819. This cause was argued by *Martin* and *C. J. Ingersoll*, for the plaintiff, and by *Hopkinson* and *Sergeant*, for the defendants. The facts are fully stated in the opinion of the court.

March 12th. Washington, Justice, delivered the opinion of the court.—
*509] *The only question certified by the circuit court for the district of Delaware to this court is, whether certain depositions, taken under a commission issued from that court to Philadelphia, could, under the circumstances of the case, be given in evidence to the jury?

This question arises out of the following facts: On the 25th of October 1817, a consent rule was entered in this case, "for a commission to issue to take depositions on both sides, to be directed to Thomas Bradford, jr., and William J. Duane, of Philadelphia; interrogatories to be filed on ten days' notice." The agreement of the counsel, under which this rule was entered, was filed in court, on the 11th of November, of the same year. On the 27th of October 1817, an *ex parte* rule was entered, on the motion of the defendants' counsel, "for a commission to issue to the city of Philadelphia, on the part of the defendants, to be directed to George Vaux and William Smith, or either of them, commissioners on the part of the defendants, on ten days' notice of filing interrogatories, with liberty to the plaintiff's counsel to name a commissioner or commissioners, if they should choose to do so, at any time before issuing the commission."

After the counsel for the lessor of the plaintiff had opened his case, and gone through his evidence, the counsel for the defendants, having opened his case, offered to give in evidence to the jury sundry depositions of witnesses, taken under a commission to Philadelphia, bearing date the 31st of
*510] October 1817, directed to George Vaux and William Smith, or *either of them, and to George M. Dallas and Richard Bache, or either of them. This evidence was objected to by the plaintiff's counsel, on the ground, that the depositions so taken were to be considered, in point of law, as taken *de bene esse*. In support of this evidence, the defendants stated, and the opposite counsel admitted, that previous to the execution of this commission, an agreement had been entered into, that the same should be executed by George M. Dallas, one of the commissioners on the part of the plaintiff, and George Vaux, another of the commissioners on the part of the defendants; and that it was further agreed, and so indorsed on the commission, that the said George Vaux might be permitted to take a solemn affirmation, instead of an oath, and that the commissioners who should act,

might be qualified by any alderman of Philadelphia, and their clerk, by the commissioners; and which agreements were entered into upon the application of the defendants' counsel. He further gave in evidence, that commissions had heretofore issued to Philadelphia, and other places within 100 miles of the place of trial, from the circuit court for that district, upon motions made for that purpose; and that upon motion, commissions had issued to Philadelphia, and to other places without the state, from the supreme court of the state of Delaware, previous and subsequent to the year 1789. That upon the return of the commission in this case, publication thereof was ordered by the court; and lastly, that all the witnesses examined in the execution of the *said commission, resided in Philadelphia, [*511 distant 33 miles from the place of holding the court.

It is contended by the plaintiff's counsel, that as, by the 6th section of the act of the 2d of March 1793, *subpœnas* for witnesses may run into any other district than that in which the court is holden, provided, that in civil causes, the witnesses do not live at a greater distance than 100 miles from the place of holding the court, the deposition in this case ought not to have been received, unless it had appeared to the court that the witnesses had been duly summoned, and were unable to attend. This argument appears to be founded upon the provision of the 30th section of the judiciary act of 1789, c. 20, to which this case has no relation. That section authorizes the taking of depositions in the specified cases, without the formality of a commission, but declares, that the depositions so taken, shall be *de bene esse;* and to prevent any conclusion from being drawn against the power of the courts to grant commissions for taking depositions, by reason of the above provisions, this section goes on to provide, that nothing in the said section contained shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions, according to common usage, when it may be necessary to prevent a failure or delay of justice, which power it is declared they shall severally possess.

The only question then is, whether depositions taken under a *dedimus potestatem*, according to common usage, are, under any circumstances, to be considered as taken *de bene esse?* And it is the opinion *of this [*512 court, that they cannot be so considered. What might be the effect of the agreement of the parties, or of an order of the court to the contrary, need not be decided in this case, as the rule, as well as the commission which issued under it, was absolute and unqualified. Whenever a commission issues for taking depositions, according to common usage, whether the witness reside beyond the process of the court, or within it, the depositions are absolute, the above section of the act of congress relating to depositions *de bene esse*, being most obviously confined to those taken under the enacting part of that section.

But it is contended by the plaintiff's counsel, that this commission to take depositions of witnesses living within 100 miles from the place at which the court was to sit, although in another district, was improvidently issued, and that the rule under which it issued was erroneously made. Whether this objection ought, or ought not, to have been made, at the time, or during the term when the rule was entered, is a question which does not occur in this case; because, it is most obvious, from the conduct of the plaintiff's counsel in the court below, that if they did not agree to the rule, the com-

mission was issued with their consent. A consent rule was entered, on the 25th of October, differing from the *ex parte* rule, entered two days afterwards, in no other respect, but as to the names of the commissioners. The plaintiff's counsel afterwards joined in the commission, removed every possible objection as to the commissioners, by naming one on the part of the
*513] plaintiff, to act with one of the defendants' *commissioners, and filed his cross-interrogatories, to be propounded to the witnesses. The commission was executed by the commissioners so named, and the witnesses were regularly examined, as well on the cross-interrogatories, as on those in chief. After such unequivocal evidence of consent to the issuing of the commission, it is not competent to the plaintiff's counsel to object, that it issued improvidently, or that the rule was improperly obtained.

It is to be certified to the circuit court for the district of Delaware, that the depositions taken under the commission, referred to in the transcript of the record sent to this court, dated the 31st day of October 1817, ought to be given in evidence to the jury, upon the trial of the cause in which they were taken.

Certificate accordingly.

Boyd's Lessee *v.* Graves *et al.*

Statute of frauds.

An agreement, by parol, between two proprietors of adjoining lands, to employ a surveyor to run the dividing line between them, and that it should be thus ascertained and settled, which was executed, and the line accordingly run, and marked on a plat by the surveyor, in their presence, as the boundary, held to be conclusive, in an action of ejectment, after a correspondent possession of twenty years by the parties, and those claiming under them respectively.

Such an agreement is not within the statute of frauds, as being a contract for the sale of lands, or any interest in or concerning them.

*514] *Duvall, Justice, delivered the opinion of the court.—An action of ejectment was brought by Andrew Boyd against the defendants, in the circuit court for the district of Kentucky, on the 25th of November 1814, for 2000 acres of land in Fayette county, on the waters of Elkhorn creek. The patent bears date on the 3d of December 1789, and was granted to Andrew Boyd, pursuant to a survey made, the 14th of July 1774, on a warrant issued under the royal proclamation of 1763. This tract of land is contained within the courses and distances following: beginning at a buckeye and ash, corner to John Carter's land, and in a line of William Phillips's land, and with the same south-west, 374 poles, crossing a small branch, to a hoopwood and sugar tree, and leaving said line, south-east, 860 poles, crossing a branch to an elm and buckeye, north-east, 374 poles, crossing a branch to a sugar tree and buckeye, thence north-west, 860 poles to the beginning.

The defendants claimed title under a patent granted to Elijah Craig, on the 7th of November 1779, for 2000 acres, on a warrant to John Carter, heir-at-law of Thomas Carter, in consideration of military services. The warrant was assigned to Craig. The courses and distances are the following: beginning at three large hoopwoods growing from one root, corner to William Phillips's land, and with a line thereof, south-west, 374 poles, crossing two branches to a buckeye and ash on the bank, south-east, 860 poles, crossing a small creek to a sugar tree and buckeye, north-east, 374

poles, crossing three branches to an ash, hickory, *mulberry and hoopwood, north-west, 860 poles to the first station.

These two tracts are adjacent to, and bind on each other. It is obvious, that they were intended to present rectangular figures, and to contain equal quantities; but by satisfying the calls, the figures are irregular, and do not contain equal quantities.

The plaintiff in the court below locates his pretensions, on the plat returned in the cause, beginning at A, then to K, to L, to D, and to the beginning. And he locates Craig's patent, beginning at A, then to B, to C, to D, and to the beginning. The defendants locate it, beginning at A, then to B, to C, to E, and to the beginning. The land contained in the triangle A, E, D, is the land in dispute.

The defendants, to support their location, offered evidence to prove, that the dividing line between Boyd and Craig being unascertained, the parties, by agreement, had it surveyed, for the purpose of establishing and settling the line between them; that in the year 1793, it was run, in their presence, from A to E, as distinguished on the plat, and that it was mutually agreed to establish the corner at E, where a boundary was marked, by consent, E C and A B, and that the line from A to E should be the dividing line between them, and that possession had been since held accordingly. They also offered in evidence, a deed from Boyd and wife to William Hanback, bearing date the 14th of December 1793, for 100 acres, part of the land granted to Boyd, beginning at the corner at E, before mentioned, and bounding on the line A E, regarding it as the dividing *line between Boyd and Craig; also a deed from Elijah Craig to John Whitesides, [*516 dated 12th of May 1794, for 72 acres, part of Craig's patent, bounding also on the line A E as the dividing line between Boyd and Craig: and that all the other defendants, as purchasers, under Craig, held to the said line A E.

The defendant's counsel then moved the court to instruct the jury, that if they found, from the evidence, that, owing to the uncertainty of the line of said Boyd and Carter's military surveys, the said Boyd and Elijah Craig, by mutual consent, surveyed and located their respective patents, by making the line from A to E, and marking the corner at E, with the intent (at the time), positively expressed, to settle and ascertain the true boundary and dividing line between the tracts respectively claimed by them, under their patents, and that the said line has been acquiesced in by the said parties, and possession held and taken accordingly, for more than twenty years before the commencement of this action, that they ought to find for the defendants: which instruction the court gave, and to this opinion of the court, the plaintiff, by his counsel, excepted; and the record of the proceedings was removed, by writ of error, to this court, for their decision.

At the trial in the court below, several other questions were propounded, and decided by the court, and to which exceptions were taken, which it is not material to notice here, because, the decision of this court on the question stated, will decide the controversy between the parties.

*It appears, that in the year 1793, more than twenty years before [*517 the commencement of this action of ejectment, Boyd and Craig employed a surveyor to run the dividing line between them, and they mutually agreed, that it should be thus ascertained and settled. It was, accordingly, run as described on the plat, from A to E, and the corner at E was marked

in their presence as the boundary between them. That possession has been held by each, and those claiming under them, respectively, from that time to the present; and that each has sold parcels of land, bounding them on the line A E, thus agreed on, regarding it as the established line between them. Hence, the question arises, whether the agreement made in 1793, although by parol, accompanied by corresponding possession for more than twenty years, is, or is not, conclusive against the plaintiff's right of recovery in this action?

This court cannot consider the agreement of the parties, although by parol, to settle the dividing line between them by a surveyor, mutually employed, as affected by the statute of frauds, as is contended by the counsel for the plaintiff. It is not a contract for the sale or conveyance of lands; it has no ingredient of such a contract. There is no *quid pro quo:* and the court do not consider it as a conveyance of title from one person to another. It was merely a submission of a matter of fact, to ascertain where the line would run, on actual survey, begining at a place admitted and acknowledged by the parties to be a boundary, where the line must begin. The possession
*518] subsequently held, and the acts of the parties, *evidenced by their respective sales of parcels of the land held by each, under his patent, bounding on the agreed line, amount to a full and complete recognition of it; and in the opinion of this court, precludes the plaintiff, after such a lapse of time, from denying it to be the dividing line between him and the defendants; and neither ought now to be permitted to disturb the possession of the other, under a pretence that the line was not correctly run.

Judgment affirmed.

Trustees of Dartmouth College *v.* Woodward.

Constitutional law.—Obligation of contracts.—Charter.

The charter granted by the British crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, is a contract within the meaning of that clause of the constitution of the United States (art. 1, § 10), which declares, that no state shall make any law impairing the obligation of contracts.[1] The charter was not dissolved by the revolution.

An act of the state legislature of New Hampshire, altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void.

Under its charter, Dartmouth College was a private and not a public corporation; that a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature.[2]

Dartmouth College *v.* Woodward, 1 N. H. 111, reversed.

Error to the Superior Court of the State of New-Hampshire. This was an action of trover, brought in the state court, in which the plaintiffs

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[1] Providence Bank *v.* Billings, 4 Pet. 514; State Bank of Ohio *v.* Knoop, 16 How. 369; Dodge *v.* Woolsey, 18 Id. 331; Jefferson Branch Bank *v.* Skelly, 1 Black 436; The Binghamton Bridge, 3 Wall. 51; Home of the Friendless *v.* Rouse, 8 Id. 430; Washington University *v.* Rouse, Id. 439; Davis *v.* Gray, 16 Id. 203; Humphrey *v.* Pegues, Id. 244; Pacific Railroad Co. *v.* Maguire, 20 Id. 36.

[2] Vincennes University *v.* Indiana, 14 How. 269; Allen *v.* McKean, 1 Sumn. 276. In Farrington *v.* Tennessee, 95 U. S. 685, Judge Swayne says, the question decided in the Dartmouth College case has since been con-

in error declared for *two books of records, purporting to contain the records of all the doings and proceedings of the trustees of Dartmouth College, from the establishment of the corporation until the 7th day of October 1816; the original charter or letters-patent, constituting the college; the common seal; and four volumes or books of account, purporting to contain the charges and accounts in favor of the college. The defendant pleaded the general issue, and at the trial, the following special verdict was found:

The said jurors, upon their oath, say, that his Majesty George III., king of Great Britain, &c., issued his letters-patent, under the public seal of the province, now state, of New Hampshire, bearing the 13th day of December, in the 10th year of his reign, and in the year of our Lord 1769, in the words following:

George the Third, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth, To all to whom these presents shall come, *greeting:*

Whereas, it hath been represented to our trusty and well-beloved John Wentworth, Esq., governor and commander-in-chief, in and over our province of New Hampshire, in New England, in America, that the Reverend Eleazar Wheelock, of Lebanon, in the colony of Connecticut, in New England, aforesaid, now doctor in divinity, did, on or about the year of our Lord 1754, *at his own expense, on his own estate and plantation, [*520 set on foot an Indian charity school, and for several years, through the assistance of well-disposed persons in America, clothed, maintained and educated a number of the children of the Indian natives, with a view to their carrying the Gospel, in their own language, and spreading the knowledge of the great Redeemer, among their savage tribes, and hath actually employed a number of them as missionaries and school-masters in the wilderness, for that purpose: and by the blessing of God upon the endeavors of said Wheelock, the design became reputable among the Indians, insomuch that a large number desired the education of their children in said school, and were also disposed to receive missionaries and school-masters, in the wilderness, more than could be supported by the charitable contributions in these American colonies. Whereupon, the said Eleazar Wheelock thought it expedient, that endeavors should be used to raise contributions from well-disposed persons in England, for the carrying on and extending said undertaking; and for that purpose the said Eleazar Wheelock requested the Rev. Nathaniel Whitaker, now doctor in divinity to go over to England for that purpose, and sent over with him the Rev. Samson Occom, an Indian minis-

sidered as finally settled in the jurisprudence of the entire country, and he remarks, that, "perhaps, the genius of Marshall never shone forth in greater power and lustre." So, in Edwards *v.* Kearzey, 96 U. S. 607, the same learned judge says, the point decided in Dartmouth College *v.* Woodward, had not, it is believed, when the constitution was adopted, occurred to any one. There is no trace of it in the Federalist, nor in any other certain contemporaneous publication. It was first made and judicially decided, under the constitution, in that case. Its novelty was admitted by Mr. Chief Justice Marshall, but it was met and conclusively answered in his opinion. And in Stone *v.* Mississippi, 101 U. S. 816, Waite, Ch. J., says, that the doctrines announced by the court in this case have become so imbedded in the jurisprudence of the United States, as to make them, to all intents and purposes, a part of the constitution itself.

ter, who had been educated by the said Wheelock. And to enable the said Whitaker to the more successful performance of said work, on which he was sent, said Wheelock gave him a full power of attorney, by which said Whitaker solicited those worthy and generous contributors to the charity,
*521] viz., *The Right Honorable William, Earl of Dartmouth, the Honorable Sir Sidney Stafford Smythe, Knight, one of the barons of his Majesty's court of exchequer, John Thornton, of Clapham, in the county of Surrey, Esquire, Samuel Roffey, of Lincoln's Inn Fields, in the county of Middlesex, Esquire, Charles Hardy, of the parish of Saint Mary-le-bonne, in said county, Esquire, Daniel West, of Christ's church, Spitalfields, in the county aforesaid, Esquire, Samuel Savage, of the same place, gentleman, Josiah Roberts, of the parish of St. Edmund the King, Lombard Street, London, gentleman, and Robert Keen, of the parish of Saint Botolph, Aldgate, London, gentleman, to receive the several sums of money, which should be contributed, and to be trustees for the contributors to such charity, which they cheerfully agreed to. Whereupon, the said Whitaker did, by virtue of said power of attorney, constitute and appoint the said Earl of Dartmouth, Sir Sidney Stafford Smythe, John Thornton, Samuel Roffey, Charles Hardy and Daniel West, Esquires, and Samuel Savage, Josiah Roberts and Robert Keen, gentlemen, to be trustees of the money which had then been contributed, and which should, by his means, be contributed for said purpose; which trust they have accepted, as by their engrossed declaration of the same, under their hands and seals, well executed, fully appears, and the same has also been ratified, by a deed of trust, well executed by the said Wheelock.

And the said Wheelock further represents, that he has, by power of at-
*522] torney, for many weighty reasons, *given full power to the said trustees, to fix upon and determine the place for said school, most subservient to the great end in view; and to enable them understandingly, to give the preference, the said Wheelock has laid before the said trustees, the several offers which have been generously made in the several governments in America, to encourage and invite the settlement of said school among them, for their own private emolument, and the increase of learning in their respective places, as well as for the furtherance of the general design in view. And whereas, a large number of the proprietors of lands in the western part of this our province of New Hampshire, animated and excited thereto, by the generous example of his excellency, their governor, and by the liberal contributions of many noblemen and gentlemen in England, and especially by the consideration, that such a situation would be as convenient as any for carrying on the great design among the Indians; and also, considering, that without the least impediment to the said design, the same school may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon to be formed in that new country, with a learned and orthodox ministry; they, the said proprietors, have promised large tracts of land, for the uses aforesaid, provided the school shall be settled in the western part of our said province. And they, the said right honorable, honorable and worthy trustees, before mentioned, having maturely con-
*523] sidered the reasons and arguments, in favor of the several places *proposed, have given the preference to the western part of our said

province, lying on Connecticut river, as a situation most convenient for said school.

And the said Wheelock has further represented a necessity of a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same. And the said Wheelock has also represented, that for many weighty reasons, it will be expedient, at least, in the infancy of said institution, or till it can be accommodated in that new country, and he and his friends be able to remove and settle, by and round about it, that the gentlemen, whom he has already nominated in his last will (which he has transmitted to the aforesaid gentlemen of the trust in England), to be trustees in America, should be of the corporation now proposed. And also, as there are already large collections for said school, in the hands of the aforesaid gentlemen of the trust, in England, and all reasons to believe, from their singular wisdom, piety and zeal to promote the Redeemer's cause (which has already procured for them the utmost confidence of the kingdom), we may expect they will appoint successors in time to come, who will be men of the same spirit, whereby great good may and will accrue many ways to the institution, and much be done, by their example and influence, to encourage and facilitate the whole design in view; for which reason, said Wheelock desires, that the trustees aforesaid may be vested with all that power therein, which can consist with their distance from the same.

*KNOW YE, THEREFORE, that We, considering the premises, and being willing to encourage the laudable and charitable design of [*524 spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace, certain knowledge and mere motion, by and with the advice of our counsel for said province, by these presents, will, ordain, grant and constitute, that there be a college erected in our said province of New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes in this land, in reading, writing and all parts of learning, which shall appear necessary and expedient, for civilizing and christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and any others. And the trustees of said college may and shall be one body corporate and politic, in deed, action and name, and shall be called, named and distinguished by the name of the Trustees of Dartmouth College.

And further, we have willed, given, granted, constituted and ordained, and by this our present charter, of our special grace, certain knowledge and mere motion, with the advice aforesaid, do, for us, our heirs and successors for ever, will, give, grant, constitute and ordain, that there shall be in the said Dartmouth College, from henceforth and for ever, a body politic, consisting of trustees of said Dartmouth College. And for the more full and perfect erection of said corporation and body politic, consisting of trustees of Dartmouth College, we, of our special grace, certain *knowledge [*525 and mere motion, do, by these presents, for us, our heirs and successors, make, ordain, constitute and appoint our trusty and well-beloved John Wentworth, Esq., governor of our said province, and the governor of our said province of New Hampshire for the time being, and our trusty and well-

beloved Theodore Atkinson, Esq., now president of our council of our said province, George Jaffrey and Daniel Peirce, Esq'rs, both of our said council, and Peter Gilman, Esq., now speaker of our house of representatives in said province, and William Pitkin, Esq., one of the assistants of our colony of Connecticut, and our said trusty and well-beloved Eleazar Wheelock, of Lebanon, doctor in divinity, Benjamin Pomroy, of Hebron, James Lockwood, of Weathersfield, Timothy Pitkin and John Smalley, of Farmington, and William Patten, of Hartford, all of our said colony of Connecticut, ministers of the gospel (the whole number of said trustees consisting, and hereafter for ever to consist, of twelve and no more) to be trustees of said Dartmouth College, in this our province of New Hampshire.

And we do further, of our special grace, certain knowledge and mere motion, for us, our heirs and successors, will, give, grant and appoint, that the said trustees and their successors shall for ever hereafter be, in deed, act and name, a body corporate and politic, and that they, the said body corporate and politic, shall be known and distinguished, in all deeds, grants, bargains, sales, writings, evidences or otherwise howsoever, and in all courts for ever hereafter, plea and be impleaded by the name of the Trustees of
*526] Dartmouth College; and that the said corporation, *by the name aforesaid, shall be able, and in law capable, for the use of said Dartmouth College, to have, get, acquire, purchase, receive, hold, possess and enjoy, tenements, hereditaments, jurisdictions and franchises, for themselves and their successors, in fee-simple, or otherwise howsoever, and to purchase, receive or build any house or houses, or any other buildings, as they shall think needful and convenient, for the use of said Dartmouth College, and in such town in the western part of our said province of New Hampshire, as shall, by said trustees, or the major part of them, be agreed on; their said agreement to be evidenced by an instrument in writing, under their hands, ascertaining the same: And also to receive and dispose of any lands, goods, chattels and other things, of what nature soever, for the use aforesaid: And also to have, accept and receive any rents, profits, annuities, gifts, legacies, donations or bequests of any kind whatsoever, for the use aforesaid; so, nevertheless, that the yearly value of the premises do not exceed the sum of 6000*l.* sterling; and therewith, or otherwise, to support and pay, as the said trustees, or the major part of such of them as are regularly convened for the purpose, shall agree, the president, tutors and other officers and ministers of said Dartmouth College; and also to pay all such missionaries and school-masters as shall be authorized, appointed and employed by them, for civilizing and christianizing, and instructing the Indian natives of this land, their several allowances; and also their respective annual salaries or allow-
*527] ances, and all such necessary and *contingent charges, as from time to time shall arise and accrue, relating to the said Dartmouth College: And also, to bargain, sell, let or assign, lands, tenements or hereditaments, goods or chattels, and all other things whatsoever, by the name aforesaid in as full and ample a manner, to all intents and purposes, as a natural person, or other body politic or corporate, is able to do, by the laws or our realm of Great Britain, or of said province of New Hampshire.

And further, of our special grace, certain knowledge and mere motion, to the intent that our said corporation and body politic may answer the end of their erection and constitution, and may have perpetual succession and

continuance for ever, we do, for us, our heirs and successors, will, give and grant unto the Trustees of Dartmouth College, and to their successors for ever, that there shall be, once a year, and every year, a meeting of said trustees, held at said Dartmouth College, at such time as by said trustees, or the major part of them, at any legal meeting of said trustees, shall be agreed on; the first meeting to be called by the said Eleazar Wheelock, as soon as conveniently may be, within one year next after the enrolment of these our letters-patent, at such time and place as he shall judge proper. And the said trustees, or the major part of any seven or more of them, shall then determine on the time for holding the annual meeting aforesaid, which may be altered as they shall hereafter find most convenient. And we further order and direct, that the said Eleazar Wheelock shall notify the time for holding said first meeting, to be called as aforesaid, by sending a letter *to each of said trustees, and causing an advertisement thereof to be [*528 printed in the New Hampshire Gazette, and in some public newspaper printed in the colony of Connecticut. But in case of the death or incapacity of the said Wheelock, then such meeting to be notified in manner aforesaid, by the governor or commander-in-chief of our said province for the time being. And we do also, for us, our heirs and successors, hereby will, give and grant unto the said Trustees of Dartmouth College, aforesaid, and to their successors for ever, that when any seven or more of the said trustees, or their successors, are convened and met together, for the service of said Dartmouth College, at any time or times, such seven or more shall be capable to act as fully and amply, to all intents and purposes, as if all the trustees of said college were personally present—and all affairs and actions whatsoever, under the care of said trustees, shall be determined by the majority or greater number of those seven or more trustees so convened and met together.

And we do further will, ordain and direct, that the president, trustees, professors, tutors and all such officers as shall be appointed for the public instruction and government of said college, shall, before they undertake the execution of their offices or trusts, or within one year after, take the oaths and subscribe the declaration provided by an act of parliament made in the grst year of King George the First, entitled "an act for the further security of his majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being *Protestants, and for the extinguishing the hopes of the pretended Prince of Wales, and his [*529 open and secret abettors;" that is to say, the president, before the governor of our said province for the time being, or by one by him empowered to that service, or by the president of our said council, and the trustees, professors, tutors and other officers, before the president of said college for the time being, who is hereby empowered to administer the same; an entry of all which shall be made in the records of said college.

And we do, for us, our heirs, and successors, hereby will, give and grant full power and authority to the president hereafter by us named, and to his successors, or, in case of his failure, to any three or more of the said trustees, to appoint other occasional meetings, from time to time, of the said seven trustees, or any greater number of them, to transact any matter or thing necessary to be done before the next annual meeting, and to order notice to the said seven, or any greater number of them, of the times and

places of meeting for the service aforesaid, by a letter under his or their hands, of the same, one month before said meeting: provided always, that no standing rule or order be made or altered, for the regulation of said college, nor any president or professor be chosen or displaced, nor any other matter or thing transacted or done, which shall continue in force after the then next annual meeting of the said trustees, as aforesaid.

And further, we do, by these presents, for us, our heirs and successors, create, make, constitute, nominate and appoint our trusty and well-beloved Eleazar Wheelock, doctor in divinity, the founder of said *college, to *530] be president of said Dartmouth College, and to have the immediate care of the education and government of such students as shall be admitted into said Dartmouth College for instruction and education; and do will, give and grant to him, in said office, full power, authority and right, to nominate, appoint, constitute and ordain, by his last will, such suitable and meet person or persons as he shall choose to succeed him in the presidency of said Dartmouth College; and the person so appointed, by his last will, to continue in office, vested with all the powers, privileges, jurisdiction and authority of a president of said Dartmouth College; that is to say, so long and until such appointment by said last will shall be disapproved by the trustees of said Dartmouth College.

And we do also, for us, our heirs and successors, will, give and grant to the said trustees of said Dartmouth College, and to their successors for ever, or any seven or more of them, convened as aforesaid, that in the case of the ceasing or failure of a president, by any means whatsoever, that the said trustees do elect, nominate and appoint such qualified person as they, or the major part of any seven or more of them, convened for that purpose as above directed, shall think fit, to be president of said Dartmouth College, and to have the care of the education and government of the students as aforesaid; and in case of the ceasing of a president as aforesaid, the senior professor or tutor, being one of the trustees, shall exercise the office of a president, until the trustees shall make choice of and appoint, a president as *531] aforesaid; *and such professor or tutor, or any three or more of the trustees, shall immediately appoint a meeting of the body of the trustees for the purpose aforesaid. And also we do will, give and grant to the said trustees, convened as aforesaid, that they elect, nominate and appoint so many tutors and professors to assist the president in the education and government of the students belonging thereto, as they the said trustees shall, from time to time, think needful and serviceable to the interests of said Dartmouth College. And also, that the said trustees or their successors, or the major part of any seven or more of them, convened for that purpose as above directed, shall, at any time, displace and discharge from the service of said Dartmouth College, any or all such officers, and elect others in their room and stead, as before directed. And also, that the said trustees, or their successors, or the major part of any seven of them which shall convene for that purpose, as above directed, do, from time to time, as occasion shall require, elect, constitute and appoint a treasurer, a clerk, an usher and a steward for the said Dartmouth College, and appoint to them, and each of them, their respective businesses and trust; and displace and discharge from the service of said college, such treasurer, clerk, usher or steward, and to elect others in their room and stead; which officers so elected, as before

directed, we do for us, our heirs and successors, by these presents, constitute and establish in their respective offices, and do give to each and every of them full power and authority to exercise the same in said Dartmouth College, according to the *directions, and during the pleasure of said trustees, as fully and freely as any like officers in any of our universities, colleges or seminaries of learning in our realm of Great Britain, lawfully may or ought to do. And also, that the said trustees and their successors, or the major part of any seven or more of them, which shall convene for that purpose, as is above directed, as often as one or more of said trustees shall die, or by removal or otherwise shall, according to their judgment, become unfit or incapable to serve the interests of said college, do, as soon as may be after the death, removal or such unfitness or incapacity of such trustee or trustees, elect and appoint such trustee or trustees as shall supply the place of him or them so dying, or becoming incapable to serve the interests of said college; and every trustee so elected and appointed shall, by virtue of these presents, and such election and appointment, be vested with all the powers and privileges which any of the other trustees of said college are hereby vested with. And we do further will, ordain and direct, that from and after the expiration of two years from the enrolment of these presents, such vacancy or vacancies as may or shall happen, by death or otherwise, in the aforesaid number of trustees, shall be filled up by election as aforesaid, so that when such vacancies shall be filled up unto the complete number of twelve trustees, eight of the aforesaid whole number of the body of trustees shall be resident, and respectable freeholders of our said province of New Hampshire, and seven of said whole number shall be laymen. [*532

*And we do further, of our special grace, certain knowledge and mere motion, will, give and grant unto the said trustees of Dartmouth College, that they, and their successors, or the major part of any seven of them, which shall convene for that purpose, as is above directed, may make, and they are hereby fully empowered, from time to time, fully and lawfully to make and establish such ordinances, orders and laws, as may tend to the good and wholesome government of the said college, and all the students and the several officers and ministers thereof, and to the public benefit of the same, not repugnant to the laws and statutes of our realm of Great Britain, or of this our province of New Hampshire, and not excluding any person of any religious denomination whatsoever, from free and equal liberty and advantage of education, or from any of the liberties and privileges or immunities of the said college, on account of his or their speculative sentiments in religion, and of his or their being of a religious profession different from the said trustees of the said Dartmouth College. And such ordinances, orders and laws, which shall as aforesaid be made, we do, for us, our heirs and successors, by these presents, ratify, allow of, and confirm, as good and effectual to oblige and bind all the students, and the several officers and ministers of the said college. And we do hereby authorize and empower the said trustees of Dartmouth College, and the president, tutors and professors by them elected and appointed as aforesaid, to put such ordinances, orders and laws in execution, to all proper intents and purposes. [*533

*And we do further, of our special grace, certain knowledge and mere motion, will, give, and grant unto the said trustees of said Dartmouth College, for the encouragement of learning, and animating the stu- [*534

dents of said college to diligence and industry, and a laudable progress in literature, that they, and their successors, or the major part of any seven or more of them, convened for that purpose, as above directed, do, by the president of said college, for the time being, or any other deputed by them, give and grant any such degree or degrees to any of the students of the said college, or any others by them thought worthy thereof, as are usually granted in either of the universities, or any other college in our realm of Great Britain; and that they sign and seal diplomas or certificates of such graduations, to be kept by the graduates as perpetual memorials and testimonials thereof.

And we do further, of our special grace, certain knowledge and mere motion, by these presents, for us, our heirs and successors, give and grant unto the trustees of said Dartmouth College, and to their successors, that they and their successors shall have a common seal, under which they may pass all diplomas or certificates of degrees, and all other affairs and business of, and concerning the said college; which shall be engraven in such a form and with such an inscription as shall be devised by the said trustees, for the time being, or by the major part of any seven or more of them, convened for the service of the said college, as is above directed.

*535] *And we do further, for us, our heirs and successors, give and grant unto the said trustees of the said Dartmouth College, and their successors, or to the major part of any seven or more of them, convened for the service of the said college, full power and authority, from time to time, to nominate and appoint all other officers and ministers, which they shall think convenient and necessary for the service of the said college, not herein particularly named or mentioned; which officers and ministers we do hereby empower to execute their offices and trusts, as fully and freely as any of the officers and ministers in our universities or colleges in our realm of Great Britain lawfully may or ought to do.

And further, that the generous contributors to the support of this design of spreading the knowledge of the only true God and Saviour among the American savages, may, from time to time, be satisfied that their liberalities are faithfully disposed of, in the best manner, for that purpose, and that others may, in future time, be encouraged in the exercise of the like liberality, for promoting the same pious design, it shall be the duty of the president of said Dartmouth College, and of his successors, annually, or as often as he shall be thereunto desired or required, to transmit to the right honorable, honorable, and worthy gentlemen of the trust, in England, before mentioned, a faithful account of the improvements and disbursements of the several sums he shall receive from the donations and bequests made in England, through the hands of said trustees, and also advise them of the

*536] general plans laid, and prospects exhibited, as well as a faithful *account of all remarkable occurrences, in order, if they shall think expedient, that they may be published. And this to continue so long as they shall perpetuate their board of trust, and there shall be any of the Indian natives remaining to be proper objects of that charity. And lastly, our express will and pleasure is, and we do, by these presents, for us, our heirs and successors, give and grant unto the said trustees of Dartmouth College, and to their successors for ever, that these our letters-patent, on the enrolment thereof in the secretary's office of our province of New Hamp-

shire aforesaid, shall be good and effectual in the law, to all intents and purposes, against us, our heirs and successors, without any other license, grant or confirmation from us, our heirs and successors, hereafter by the said trustees to be had and obtained, notwithstanding the not writing or misrecital, not naming or misnaming the aforesaid offices, franchises, privileges, immunities or other the premises, or any of them, and notwithstanding a writ of *ad quod damnum* hath not issued forth to inquire of the premises, or any of them, before the ensealing hereof, any statute, act, ordinance, or provision, or any other matter or thing, to the contrary notwithstanding. To have and to hold, all and singular the privileges, advantages, liberties, immunities, and all other the premises herein and hereby granted, or which are meant, mentioned or intended to be herein and hereby given and granted, unto them, the said trustees of Dartmouth College, and to their successors for ever. In testimony whereof, we have caused these our letters to be made patent, and the public seal of *our said province of New Hampshire to be hereunto affixed. Witness our trusty and well-beloved [*537 John Wentworth, Esquire, governor and commander-in-chief in and over our said province, &c., this thirteenth day of December, in the tenth year of our reign, and in the year of our Lord 1769.

N.B. The words "and such professor or tutor, or any three or more of the trustees, shall immediately appoint a meeting of the body of the trustees, for the purpose aforesaid," between the first and second lines, also the words "or more," between the 27th and 28th lines, also the words "or more," between the 28th and 29th lines, and also the words "to all intents and purposes," between the 37th and 38th lines of this sheet, were respectively interlined, before signing and sealing.

And the said jurors, upon their oath, further say, that afterwards, upon the 18th day of the same December, the said letters-patent were duly enrolled and recorded in the secretary's office of said province, now state, of New Hampshire; and afterwards, and within one year from the issuing of the same letters-patent, all the persons named as trustees in the same accepted the said letters-patent, and assented thereunto, and the corporation therein and thereby created and erected was duly organized, and has, until the passing of the act of the legislature of the state of New Hampshire, of the 27th of June, A. D. 1816, and ever since (unless prevented by said act [*538 and the *doings under the same) continued to be a corporation.

And the said jurors, upon their oath, further say, that immediately after its erection and organization as aforesaid, the said corporation had, took, acquired and received, by gift, donation, devise and otherwise, lands, goods, chattels and moneys of great value; and from time to time since, have had, taken, received and acquired, in manner aforesaid, and otherwise, lands, goods, chattels and moneys of great value; and on the same 27th day of June, A. D. 1816, the said corporation, erected and organized as aforesaid, had, held and enjoyed, and ever since have had, held and enjoyed, divers lands, tenements, hereditaments, goods, chattels and moneys, acquired in manner aforesaid, the yearly income of the same, not exceeding the sum of $26,666, for the use of said Dartmouth College, as specified in said letters-patent. And the said jurors, upon their oath, further say, that part of the said lands, so acquired and holden by the said trustees as aforesaid, were

granted by (and are situate in) the state of Vermont, A. D. 1785, and are of great value; and other part of said lands, so acquired and holden as aforesaid, were granted by (and are situate in) the state of New Hampshire, in the years 1789 and 1807, and are of great value. And the said jurors, upon their oath, further say, that the said trustees of Dartmouth College, so constituted as aforesaid, on the same 27th day of June, A. D. 1816, were possessed of the goods and chattels in the declaration of the said trustees specified,
*539] *and at the place therein mentioned, as of their own proper goods and chattels, and continued so possessed until, and at the time of the demand and refusal of the same, as hereinafter mentioned, unless divested thereof, and their title thereto defeated and rendered invalid, by the provisions of the act of the state of New Hampshire, made and passed on the same 27th day of June, A. D. 1816, and the doings under the same, as hereinafter mentioned and recited.

And the said jurors, upon their oath, further say, that on the 27th day of June, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain act, entitled, "an act to amend the charter, and enlarge and improve the corporation of Dartmouth College," in the words following:

An act to amend the charter, and enlarge and improve the corporation of Dartmouth College.

Whereas, knowledge and learning generally diffused through a community, are essential to the preservation of a free government, and extending the opportunities and advantages of education is highly conducive to promote this end, and by the constitution it is made the duty of the legislators and magistrates, to cherish the interests of literature, and the sciences, and all seminaries established for their advancement; and as the college of the state may, in the opinion of the legislature, be rendered more extensively useful: therefore—

*540] § 1. Be it enacted, &c., that the *corporation, heretofore called and known by the name of the Trustees of Dartmouth College, shall ever hereafter be called and known by the name of the Trustees of Dartmouth University; and the whole number of said trustees shall be twenty-one, a majority of whom shall form a *quorum* for the transaction of business; and they and their successors in that capacity, as hereby constituted, shall respectively for ever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed, enjoyed and used by the Trustees of Dartmouth College, except so far as the same may be varied or limited by the provisions of this act. And they shall have power to determine the times and places of their meetings, and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof: to appoint such officers as they may deem proper, and determine their duties and compensation, and also to displace them; to delegate the power of supplying vacancies in any of the offices of the university, for any term of time not extending beyond their next meeting: to pass ordinances for the government of the students, with reasonable penalties, not inconsistent with the constitution and laws of this state; to prescribe the course of education, and confer degrees; and to arrange, invest and employ the funds of the university.

§ 2. And be it further enacted, that there shall be a board of overseers, who shall have perpetual succession, and whose number shall be twenty-five, *fifteen of whom shall constitute a *quorum* for the transaction of [*541
business. The president of the senate, and the speaker of the house of representatives of New Hampshire, the governor and lieutenant-governor of Vermont, for the time being, shall be members of said board, *ex officio*. The board of overseers shall have power to determine the times and places of their meetings, and manner of notifying the same; to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new college buildings: provided always, that the said negative shall be expressed within sixty days from the time of said overseers being furnished with copies of such acts: provided also, that all votes and proceedings of the board of trustees shall be valid and effectual, to all intents and purposes, until such negative of the board of overseers be expressed, according to the provisions of this act.

§ 3. Be it further enacted, that there shall be a treasurer of said corporation, who shall be duly sworn, and who, before he enters upon the duties of his office, shall give bonds, with sureties, to the satisfaction of the corporation, for the faithful performance thereof; and also a secretary to each of the boards of trustees and overseers, to be elected by the said boards, respectively, who shall keep a just and true record of the proceedings of the board for *which he was chosen. And it shall furthermore be the [*542
duty of the secretary of the board of trustees to furnish, as soon as may be, to the said board of overseers, copies of the records of such votes and proceedings, as by the provisions of this act are made subject to their revision and control.

§ 4. Be it further enacted, that the president of Dartmouth University, and his successors in office, shall have the superintendence of the government and instruction of the students, and may preside at all meetings of the trustees, and do and execute all the duties devolving by usage on the president of a university. He shall render annually to the governor of this state an account of the number of students, and of the state of the funds of the university; and likewise copies of all important votes and proceedings of the corporation and overseers, which shall be made out by the secretaries of the respective boards.

§ 5. Be it further enacted, that the president and professors of the university shall be nominated by the trustees, and approved by the overseers: and shall be liable to be suspended or removed from office in manner as before provided. And each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

§ 6. Be it further enacted, that the governor and counsel are hereby authorized to fill all vacancies in the board of overseers, whether the same be original vacancies, or are occasioned by the death, resignation or removal of any member. And *the governor and counsel in like manner shall, [*543
by appointments, as soon as may be, complete the present board of trustees to the number of twenty-one, as provided for by this act, and shall

have power also to fill all vacancies that may occur previous to, or during the first meeting of the said board of trustees. But the president of said university for the time being, shall, nevertheless, be a member of said board of trustees, *ex officio*. And the governor and council shall have power to inspect the doings and proceedings of the corporation, and of all the officers of the university, whenever they deem it expedient; and they are hereby required to make such inspection, and report the same to the legislature of this state, as often as once in every five years. And the governor is hereby authorized and requested to summon the first meeting of the said trustees and overseers, to be held at Hanover, on the 26th day of August next.

§ 7. Be it further enacted, that the president and professors of the university, before entering upon the duties of their offices, shall take the oath to support the constitution of the United States and of this state; certificates of which shall be in the office of the secretary of this state, within sixty days from their entering on their offices respectively.

§ 8. Be it further enacted, that perfect freedom of religious opinion shall be enjoyed by all the officers and students of the university; and no officer or student shall be deprived of any honors, privileges or benefits of the institution, on account of his religious creed or belief. The theological
*544] colleges which *may be established in the university shall be founded on the same principles of religious freedom; and any man, or body of men, shall have a right to endow colleges or professorships of any sect of the Protestant Christian religion: and the trustees shall be held and obliged to appoint professors of learning and piety of such sects, according to the will of the donors.

Approved, June 27th, 1816.

And the said jurors, upon their oath, further say, that, at the annual meeting of the trustees of Dartmouth College, constituted agreeably to the letters-patent aforesaid, and in no other way or manner, holden at said college, on the 28th day of August, A. D. 1816, the said trustees voted and resolved, and caused the said vote and resolve to be entered on their records, that they do not accept the provisions of the said act of the legislature of New Hampshire of the 27th of June 1816, above recited, but do, by the said vote and resolve, expressly refuse to accept or act under the same. And the said jurors, upon their oath, further say, that the said trustees of Dartmouth College have never accepted, assented to, or acted under, the said act of the 27th of June, A. D. 1816, or any act passed in addition thereto, or in amendment thereof, but have continued to act, and still claim the right of acting, under the said letters-patent.

And the said jurors, upon their oath, further say, that on the 7th day of October, A. D. 1816, and before the commencement of this suit, the said
*545] trustees of Dartmouth College demanded of the said *William H. Woodward the property, goods and chattels in the said declaration specified, and requested the said William H. Woodward, who then had the same in his hands and possession, to deliver the same to them, which the said William H. Woodward then and there refused to do, and has ever since neglected and refused to do, but converted the same to his own use, if the said trustees of Dartmouth College could, after the passing of the said act

of the 27th day of June, lawfully demand the same, and if the said William H. Woodward was not, by law, authorized to retain the same in his possession after such demand.

And the said jurors, upon their oath, further say, that on the 18th day of December, A. D. 1816, the legislature of the said state of New Hampshire made and passed a certain other act, entitled, "an act in addition to, and in amendment of, an act, entitled, an act to amend the charter, and enlarge and improve the corporation of Dartmouth College," in the words following :

An act in addition to, and in amendment of, an act, entitled, "an act to amend the charter, and enlarge and improve the Corporation of Dartmouth College."

Whereas, the meetings of the trustees and overseers of Dartmouth University, which were summoned agreeably to the provisions of said act, failed of being duly holden, in consequence of a *quorum* of neither said trustees nor overseers attending at the *time and place appointed, [*546
whereby the proceedings of said corporation have hitherto been, and
still are delayed :

§ 1. Be it enacted, &c., that the governor be, and he is hereby authorized and requested to summon a meeting of the trustees of Dartmouth University, at such time and place as he may deem expedient. And the said trustees, at such meeting, may do and transact any matter or thing, within the limits of their jurisdiction and power, as such trustees, to every intent and purpose, and as fully and completely as if the same were transacted at any annual or other meeting. And the governor, with advice of council, is authorized to fill all vacancies that have happened, or may happen in the board of said trustees, previous to their next annual meeting. And the governor is hereby authorized to summon a meeting of the overseers of said university, at such time and place as he may consider proper. And provided, a less number than a *quorum* of said board of overseers convene at the time and place appointed for such meeting of their board, they shall have power to adjourn, from time to time, until a *quorum* shall have convened.

§ 2. And be it further enacted, that so much of the act, to which this is an addition, as makes necessary any particular number of trustees or overseers of said university, to constitute a *quorum* for the transaction of business, be, and the same hereby is repealed ; and that hereafter, nine of said trustees, convened agreeably to the provisions of this act, or *to those [*547
of that to which this is an addition, shall be a *quorum* for transacting
business ; and that in the board of trustees, six votes at least shall be necessary for the passage of any act or resolution. And provided also, that any smaller number than nine of said trustees, convened at the time and place appointed for any meeting of their board, according to the provisions of this act, or that to which this is an addition, shall have power to adjourn from time to time, until a *quorum* shall have convened.

§ 3. And be it further enacted, that each member of said board of trustees, already appointed or chosen, or hereafter to be appointed or chosen, shall, before entering on the duties of his office, make and subscribe an oath for the faithful discharge of the duties aforesaid ; which oath shall be returned to, and filed in the office of the secretary of state, previous to the

next regular meeting of said board, after said member enters on the duties of his office, as aforesaid.

Approved, December 18th, 1816.

And the said jurors, upon their oath, further say, that on the 26th day of December, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain other act, entitled, "an act in addition to an act, entitled, an act in addition to, and in amendment of an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College," in the words following :

*548] *An act in addition to an act, entitled, "an act in addition to, and in amendment of, an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College."

Be it enacted &c., that if any person or persons shall assume the office of president, trustee, professor, secretary, treasurer, librarian or other officer of Dartmouth University ; or by any name, or under any pretext, shall, directly or indirectly, take upon himself or themselves the discharge of any of the duties of either of those offices, except it be pursuant to, and in conformity with, the provisions of an act, entitled, "an act to amend the charter and enlarge and improve the corporation of Dartmouth College," or, of the "act, in addition to and in amendment of an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College," or shall in any way, directly or indirectly, wilfully impede or hinder any such officer or officers already existing, or hereafter to be appointed agreeably to the provisions of the acts aforesaid, in the free and entire discharge of the duties of their respective offices, conformably to the provisions of said acts, the person or persons so offending shall, for each offence, forfeit and pay the sum of five hundred dollars, to be recovered by any person who shall sue therefor, one-half thereof to the use of the prosecutor, and the other half to the use of said university.

*549] And be it further enacted, that the person or persons who sustained the offices of secretary and treasurer *of the trustees of Dartmouth College, next before the passage of the act, entitled, "an act to amend the charter and enlarge and improve the corporation of Dartmouth College," shall continue to hold and discharge the duties of those offices, as secretary and treasurer of the trustees of Dartmouth University, until another person or persons be appointed, in his or their stead, by the trustees of said university. And that the treasurer of said university, so existing, shall, in his office, have the care, management, direction and superintendence of the property of said corporation, whether real or personal, until a *quorum* of said trustees shall have convened in a regular meeting.

Approved, December 26th, 1816.

And the said jurors, upon their oath, further say, that the said William H. Woodward, before the said 27th day of June, had been duly appointed by the said trustees of Dartmouth College, secretary and treasurer of the said corporation, and was duly qualified to exercise, and did exercise the said offices, and perform the duties of the same ; and as such secretary and

treasurer, rightfully had, while he so continued secretary and treasurer as aforesaid, the custody and keeping of the several goods, chattels and property, in said declaration specified.

And the said jurors, upon their oath, further say, that the said William H. Woodward was removed by said trustees of Dartmouth College (if the said trustees could, by law, do the said acts) from said office of secretary, on the 27th day of August, A. D. 1816, and from said office of treasurer, on the 27th day of *September, then next following, of which said removals he, the said William H. Woodward, had due notice on each of said days last mentioned. [*550

And the said jurors, upon their oath, further say, that the corporation called the Trustees of Dartmouth University, was duly organized on the 4th day of February, A. D. 1817, pursuant to, and under, the said recited acts of the 27th day of June, and of the 18th and 26th days of December, A. D. 1816; and the said William H. Woodward was, on the said 4th day of February, A. D. 1817, duly appointed by the said Trustees of Dartmouth University, secretary and treasurer of the said Trustees of Dartmouth University, and then and there accepted both said offices.

And the said jurors, upon their oath, further say, that this suit was commenced on the 8th day of February, A. D. 1817. But whether upon the whole matter aforesaid, by the jurors aforesaid, in manner and form aforesaid found, the said acts of the 27th of June, 18th and 26th of December, A. D. 1816, are valid in law, and binding on the said trustees of Dartmouth College, without acceptance thereof and assent thereunto by them, so as to render the plaintiffs incapable of maintaining this action, or whether the same acts are repugnant to the constitution of the United States, and so void, the said jurors are wholly ignorant, and pray the advice of the court upon the premises. And if, upon the said matter, it shall seem to the court here, that the said acts last mentioned are valid in law, and binding on said trustees of Dartmouth College, *without acceptance thereof, and assent thereto, by them, so as to render the plaintiffs incapable of maintaining this action, and are not repugnant to the constitution of the United States, then the said jurors, upon their oath, say, that the said William H. Woodward is not guilty of the premises above laid to his charge, by the declaration aforesaid, as the said William H. Woodward hath above in pleading alleged. But if, upon the whole matter aforesaid, it shall seem to the court here, that the said acts last mentioned are not valid in law, and are not binding on the said trustees of Dartmouth College, without acceptance thereof, and assent thereto, by them, so as to render them incapable of maintaining this action, and that the said acts are repugnant to the constitution of the United States and void, then the said jurors, upon their oath, say that the said William H. Woodward is guilty of the premises above laid to his charge, by the declaration aforesaid, and in that case, they assess the damages of them, the said trustees of Dartmouth College, by occasion thereof, at $20,000. [*551

Judgment having been afterwards rendered upon the said special verdict, by the superior court of the state of New Hampshire, being the highest court of law or equity of said state, for the plaintiff below, the cause was brought before this court by writ of error.

March 10th and 11th, 1818. *Webster*, for the plaintiffs in error.—The general question is, whether the acts of the 27th of June, and of the 18th
*552] and 26th of December 1816, are *valid and binding on the rights of the plaintiffs, without their acceptance or assent.

The substance of the facts recited in the preamble to the charter, is, that Dr. Wheelock had founded a charity, on funds owned and procured by himself; that he was at that time, the sole dispenser and sole administrator, as well as the legal owner of these funds; that he had made his will devising this property in trust, to continue the existence and uses of the school, and appointed trustees; that, in this state of things, he had been invited to fix his school permanently in New Hampshire, and to extend the design of it to the education of the youth of that province; that before he removed his school, or accepted this invitation, which his friends in England had advised him to accept, he applied for a charter, to be granted, not to whomsoever the king or government of the province should please, but to such persons as he named and appointed, viz., the persons whom he had already appointed to be the future trustees of his charity, by his will. The charter, or letters-patent, then proceed to create such a corporation, and to appoint twelve persons to constitute it, by the name of the "Trustees of Dartmouth College;" to have perpetual existence, as such corportion, and with power to hold and dispose of lands and goods for the use of the college, with all the ordinary powers of corporations. They are, in their discretion, to apply the funds and property of the college to the support of the president, tutors, ministers and other officers of the college, and such missionaries and school-
*553] masters as they may see fit to employ among *the Indians. There are to be twelve trustees for ever, and no more; and they are to have the right of filling vacancies occurring in their own body. The Rev. Mr. Wheelock is declared to be the founder of the college, and is, by the charter, appointed first president, with power to appoint a successor, by his last will. All proper powers of government, superintendence and visitation, are vested in the trustees. They are to appoint and remove all officers, at their discretion; to fix their salaries, and assign their duties; and to make all ordinances, orders and laws, for the government of the students. And to the end that the persons who had acted as depositaries of the contributions in England, and who had also been contributors themselves, might be satisfied of the good use of their contributions, the president was, annually, or when required, to transmit to them an account of the progress of the institution, and the disbursements of its funds, so long as they should continue to act in that trust. These letters-patent are to be good and effectual in law, against the king, his heirs and successors for ever, without further grant or confirmation; and the trustees are to hold all and singular these privileges, advantages, liberties and immunities, to them and to their successors for ever. No funds are given to the college by this charter. A corporate existence and capacity are given to the trustees, with the privileges and immunities which have been mentioned, to enable the founder and his associates the better to manage the funds which they themselves had contributed, and such others as they might afterwards obtain.

*554] *After the institution, thus created and constituted, had existed, uninterruptedly and usefully, nearly fifty years, the legislature of New Hampshire passed the acts in question. The first act makes the twelve

trustees under the charter, and nine other individuals to be appointed by the governor and council, a corporation, by a new name ; and to this new corporation transfers all the property, rights, powers, liberties and privileges of the old corporation ; with further power to establish *new colleges and an institute*, and to apply all or any part of the funds to these purposes, subject to the power and control of a board of twenty-five overseers, to be appointed by the governor and council. The second act makes further provisions for executing the objects of the first, and the last act authorizes the defendant, the treasurer of the plaintiffs, to retain and hold their property, against their will.

If these acts are valid, the old corporation is abolished, and a new one created. The first act does, in fact, if it can have effect, create a new corporation, and transfer to it all the property and franchises of the old. The two corporations are not the same, in anything which essentially belongs to the existence of a corporation. They have different names, and different powers, rights and duties ; their organization is wholly different ; the powers of the corporation are not vested in the same or similar hands. In one, the trustees are twelve, and no more; in the other, they are twenty-one. In one, the power is a single board ; in the other, it is divided between two boards. Although the act professes to *include the old trustees in the new corporation, yet that was without their assent, and against [*555
their remonstrance ; and no person can be compelled to be a member of such a corporation against his will. It was neither expected nor intended, that they should be members of the new corporation. The act itself treats the old corporation as at an end, and going on the ground, that all its functions have ceased, it provides for the first meeting and organization of the new corporation. It expressly provides also, that the new corporation shall have and hold all the property of the old ; a provision which would be quite unnecessary, upon any other ground, than that the old corporation was dissolved. But if it could be contended, that the effect of these acts was not entirely to abolish the old corporation, yet it is manifest, that they impair and invade the rights, property and powers of the trustees, under the charter, as a corporation, and the legal rights, privileges and immunities which belong to them, as individual members of the corporation. The twelve trustees were the sole legal owners of all the property acquired under the charter ; by the acts, others are admitted, against their will, to be joint owners. The twelve individuals, who are trustees, were possessed of all the franchises and immunities conferred by the charter ; by the acts, nine other trustees, and twenty-five overseers, are admitted, against their will, to divide these franchises and immunities with them. If, either as a corporation, or as individuals, they have any legal rights, this forcible intrusion of others violates those rights, as manifestly as an entire and complete ouster *and dispossession. These acts alter the whole constitution of [*556
the corporation ; they affect the rights of the whole body, as a corporation, and the rights of the individuals who compose it ; they revoke corporate powers and franchises ; they alienate and transfer the property of the college to others. By the charter, the trustees had a right to fill vacancies in their own number ; this is now taken away. They were to consist of twelve, and by express provision, of no more ; this is altered. They and their successors, appointed by themselves, were for ever to hold the property;

the legislature has found successors for them, before their seats are vacant. The powers and privileges, which the twelve were to exercise exclusively, are now to be exercised by others. By one of the acts, they are subjected to heavy penalties, if they exercise their offices, or any of those powers and privileges granted them by charter, and which they had exercised for fifty years; they are to be punished for not accepting the new grant, and taking its benefits. This, it must be confessed, is rather a summary mode of settling a question of constitutional right. Not only are new trustees forced into the corporation, but new trusts and uses are created. The college is turned into a university; power is given to create new colleges, and to authorize any diversion of the funds, which may be agreeable to the new boards, sufficient latitude is given, by the undefined power of establishing an institute. To these new colleges, and this institute, the funds contributed by the founder, Dr. Wheelock, and by the original donors, the Earl of
*557] Dartmouth *and others, are to be applied, in plain and manifest disregard of the uses to which they were given. The president, one of the old trustees, had a right to his office, salary and emoluments, subject to the twelve trustees alone; his title to these is now changed, and he is made accountable to new masters; so also, all the professors and tutors. If the legislature can, at pleasure, make these alterations and changes in the rights and privileges of the plaintiffs, it may, with equal propriety, abolish these rights and privileges altogether; the same power which can do any part of this work, can accomplish the whole. And, indeed, the argument, on which these acts have been hitherto defended, goes altogether on the ground, that this is such a corporation as the legislature may abolish at pleasure; and that its members have no rights, liberties, franchises, property or privileges, which the legislature may not revoke, annul, alienate or transfer to others, whenever it sees fit.

It will be contended by the plaintiffs, that these acts are not valid and binding on them without their assent. 1. Because they are against common right, and the constitution of New Hampshire. 2. Because they are repugnant to the constitution of the United States. 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
*558] *for the purpose of limiting the exercise of the legislative power, and which the constitution of New Hampshire expresses with great fullness and accuracy.

It is not too much to assert, that the legislature of New Hampshire would not have been competent to pass the acts in question, and to make them binding on the plaintiffs, without their assent, even if there had been, in the constitution of New Hampshire, or of the United States, no special restriction on their power; because these acts are not the exercise of a power properly legislative. *Calder* v. *Bull*, 3 Dall. 386. Their object and effect is, to take away from one, rights, property and franchises, and to grant them to another. This is not the exercise of a legislative power. To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper province of the judiciary. Attainder and

confiscation are acts of sovereign power, not acts of legislation. The British parliament, among other unlimited powers, claims that of altering and vacating charters; not as an act of ordinary legislation, but of uncontrolled authority. It is, theoretically, omnipotent; yet, in modern times, it has attempted the exercise of this power, very rarely. In a celebrated instance, those who asserted this power in parliament, vindicated its exercise only in a case, in which it could be shown, 1st. That the charter in question was a charter of political power. 2d. That there was a great and overruling state necessity, justifying the *violation of the charter. 3d. That the charter had been abused, and justly forfeited. (Annual Register 1784, p. 160; Parl. Reg. 1783; Mr. Burke's Speech on Mr. Fox's East India Bill, Burke's Works, vol. 3, p. 414, 417, 467, 468, 486.) The bill affecting this charter did not pass; its history is well known. The act which afterwards did pass, passed with the assent of the corporation. Even in the worst times, this power of parliament to repeal and rescind charters has not often been exercised. The illegal proceedings in the reign of Charles II. were under color of law. Judgments of forfeiture were obtained in the courts. Such was the case of the *quo warranto* against the city of London, and the proceedings by which the charter of Massachusetts was vacated. The legislature of New Hampshire has no more power over the rights of the plaintiffs than existed, somewhere, in some department of government, before the revolution. The British parliament could not have annulled or revoked this grant, as an act of ordinary legislation. If it had done it at all, it could only have been, in virtue of that sovereign power, called omnipotent, which does not belong to any legislature in the United States. The legislature of New Hampshire has the same power over this charter, which belonged to the king, who granted it, and no more. By the law of England, the power to create corporations is a part of the royal prerogative. 1 Bl. Com. 472. By the revolution, this power may be considered as having devolved on the legislature of *the state, and it has, accordingly, been exercised by the legislature. But the king cannot abolish a corporation, or new model it, or alter its powers, without its assent. This is the acknowledged and well-known doctrine of the common law. "Whatever might have been the notion in former times," says Lord MANSFIELD, "it is most certain, now, that the corporations of the universities are lay corporations; and that the crown cannot take away from them any rights that have been formerly subsisting in them, under old charters or prescriptive usage." 3 Burr. 1656. After forfeiture duly found, the king may regrant the franchises; but a grant of franchises, already granted, and of which no forfeiture has been found, is void. Corporate franchises can only be forfeited by trial and judgment. *King* v. *Pasmore*, 3 T. R. 244. In case of a new charter or grant to an existing corporation, it may accept or reject it as it pleases. *King* v. *Vice-Chancellor of Cambridge*, 3 Burr. 1656; 3 T. R. 240, *per* Lord KENYON. It may accept such part of the grant as it chooses, and reject the rest. 3 Burr. 1661. In the very nature of things, a charter cannot be forced upon any body; no one can be compelled to accept a grant; and without acceptance, the grant is necessarily void. *Ellis* v. *Marshall*, 2 Mass. 277; Kyd on Corp. 65–6. It cannot be pretended, that the legislature, as successor to the king in this part of his prerogative, has any power to revoke, vacate or alter this charter. If, therefore, the legislature has not this power, by any *spe-

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cific grant contained in the constitution; nor as included in its ordinary legislative powers; nor by reason of its succession to the prerogatives of the crown in this particular; on what ground would the authority to pass these acts rest, even if there were no special prohibitory clauses in the constitution, and the bill of rights?

But there are prohibitions in the constitution and bill of rights of New Hampshire, introduced for the purpose of limiting the legislative power, and of protecting the rights and property of the citizens. One prohibition is, 'that no person shall be deprived of his property, immunities or privileges, put out of the protection of the law, or deprived of his life, liberty or estate, but by judgment of his peers, or the law of the land." In the opinion, however, which was given in the court below, it is denied, that the trustees, under the charter, had any property, immunity, liberty or privilege, in this corporation, within the meaning of this prohibition in the bill of rights. It is said, that it is a public corporation and public property. That the trustees have no greater interest in it than any other individuals. That it is not private property, which they can sell, or transmit to their heirs; and that, therefore, they have no interest in it. That their office is a public trust, like that of the governor, or a judge; and that they have no more concern in the property of the college, than the governor in the property of the state, or than the judges in the fines which they impose on the culprits at their bar. That it is nothing to them, whether their powers shall be extended
*562] or lessened, any more than it is *to the courts, whether their jurisdiction shall be enlarged or diminished. It is necessary, threfore, to inquire into the true nature and character of the corporation which was created by the charter of 1769.

There are divers sorts of corporations; and it may be safely admitted that the legislature has more power over some, than over others. 1 Wooddes. 474; 1 Bl. Com. 467. Some corporations are for government and political arrangement; such, for example, as cities, counties and the towns in New England. These may be changed and modified, as public convenience may require, due regard being always had to the rights of property. Of such corporations, all who live within the limits are, of course, obliged to be members, and to submit to the duties which the law imposes on them as such. Other civil corporations are for the advancement of trade and business, such as banks, insurance companies, and the like. These are created, not by general law, but usually by grant; their constitution is special; it is such as the legislature sees fit to give, and the grantees to accept.

The corporation in question is not a civil, although it is a lay corporation. It is an eleemosynary corporation. It is a private charity, originally founded and endowed by an individual, with a charter obtained for it at his request, for the better administration of his charity. "The eleemosynary sort of corporations are such as are constituted for the perpetual distributions of the free-alms or bounty of the founder of them, to such persons as he has
*563] directed. Of this *are all hospitals for the maintenance of the poor, sick and impotent; and all colleges both in our universities and out of them." 1 Bl. Com. 471. Eleemosynary corporations are for the management of private property, according to the will of the donors; they are private corporations. A college is as much a private corporation as an hospital; especially, a college founded as this was, by private bounty. A col-

lege is a charity. "The establishment of learning," says Lord HARDWICKE, "is a charity, and so considered in the statute of Elizabeth. A devise to a college, for their benefit, is a laudable charity, and deserves encouragement." 1 Ves. 537. The legal signification of a charity is derived chiefly from the statute 43 Eliz., c. 4. "Those purposes," says Sir. W. GRANT, "are considered charitable, which that statute enumerates." 9 Ves. 405. Colleges are enumerated as charities in that statute. The government, in these cases, lends its aid to perpetuate the beneficient intention of the donor, by granting a charter, under which his private charity shall continue to be dispensed, after his death. This is done, either by incorporating the objects of the charity, as, for instance, the scholars in a college, or the poor in a hospital; or by incorporating those who are to be governors or trustees of the charity. 1 Wooddes. 474.

In cases of the first sort, the founder is, by the common law, visitor. In early times, it became a maxim, that he who gave the property might regulate it in future. *Cujus est dare, ejus est disponere.* This right of visitation descended from the founder to his heir, as *a right of property, and [*564
precisely as his other property went to his heir; and in default of heirs, it went to the king, as all other property goes to the king, for the want of heirs. The right of visitation arises from the property; it grows out of the endowment. The founder may, if he please, part with it, at the time when he establishes the charity, and may vest it in others. Therefore, if he chooses that governors, trustees or overseers should be appointed in the charter, he may cause it to be done, and his power of visitation will be transferred to them, instead of descending to his heirs. The persons thus assigned or appointed by the founder will be visitors, with all the powers of the founder, in exclusion of his heir. 1 Bl. Com. 472. The right of visitation then accrues to them, as a matter of property, by the gift, transfer or appointment of the founder. This is a private right, which they can assert in all legal modes, and in which they have the same protection of the law as in all other rights. As visitors, they may make rules, ordinances and statutes, and altar and repeal them, so far as permitted so to do by the charter. 2 T. R. 350–51. Although the charter proceeds from the crown, or the government, it is considered as the will of the donor. It is obtained at his request. He imposes it as the rule which is to prevail in the dispensation of his bounty, in all future times. The king, or government, which grants the charter, is not thereby the founder, but he who furnishes the funds. The gift of the revenues is the foundation. 1 Bl. Com. 480. The leading *case on this subject is *Phillips* v. *Bury.*(*a*) This was an eject- [*565
ment brought to recover the rectory-house, &c., of Exeter college, in Oxford. The question was, whether the plaintiff or defendant was legal rector. Exeter college was founded by an individual, and incorporated by a charter granted by Queen Elizabeth. The controversy turned upon the power of the visitor, and in the discussion of the cause, the nature of college charters and corporations was very fully considered; and it was determined, that the college was a private corporation, and that the founder had a right

(*a*) Reported in 1 Ld. Raym. 5; Comb. 265; Holt 715; 1 Show. 360; 4 Mod. 106; Skin. 447.

to appoint a visitor, and give him such power as he thought fit.(*a*) The learned Bishop Stillingfleet's argument in the same cause, as a member of the House of Lords, when it was there heard, exhibits very clearly the nature of colleges and similiar corporations.(*b*) These opinions received the sanction of the House of Lords, and they seem to be settled and undoubted law. Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds. *Green* v. *Rutherford*, 1 Ves. 472; *Attorney-General* v. *Foundling Hospital*, 2 Ves. jr. 47; Kyd on Corp. 195; Coop. Eq. Pl. 292. *"The foundations of colleges," says Lord MANSFIELD, "are to be considered in two views, viz., as they are corporations, and as they are eleemosynary. As eleemosynary, they are the creatures of the founder; he may delegate his power, either generally or specially; he may prescribe particular modes and manners, as to the exercise of part of it. If he makes a general visitor (as by the general words, *visitator sit*), the person so constituted has all incidental power; but he may be restrained as to particular instances. The founder may appoint a special visitor, for a particular purpose, and no further. The founder may make a general visitor; and yet appoint an inferior particular power, to be executed without going to the visitor in the first instance." *St. John's College, Cambridge* v. *Todington*, 1 Burr. 200. And even if the king be founder, if he grant a charter incorporating trustees and governors, they are visitors, and the king cannot visit. *Attorney-General* v. *Middleton*, 2 Ves. 328. A subsequent donation, or engrafted fellowship, falls under the same general visitatorial power, if not otherwise specially provided. *Green* v. *Rutherford*; *St. John's College* v. *Todington*.

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In New England, and perhaps throughout the United States, eleemosynary corporations have been generally established in the latter mode, that is by incorporating governors or trustees, and vesting in them the right of visitation. Small variations may have been in some instances adopted; as in the case of Harvard College, where some power of inspection is given to the overseers, but *not, strictly speaking, a visitatorial power, which still belongs, it is apprehended, to the fellows or members of the corporation. In general, there are many donors. A charter is obtained, comprising them all, or some of them, and such others as they choose to include, with the right of appointing their successors. They are thus the visitors of their own charity, and appoint others, such as they may see fit, to exercise the same office in time to come. All such corporations are private. The case before the court is clearly that of an eleemosynary corporation. It is, in the strictest legal sense, a private charity. In *King* v. *St. Catharine's Hall*, 4 T. R. 233, that college is called a private, eleemosynary, lay corporation. It was endowed by a private founder, and incorporated by letters-patent. And in the same manner was Dartmouth College founded and incorporated. Dr. Wheelock is declared by the charter to be its founder. It was established by him, on funds contributed and collected by himself. As such

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(*a*) Lord HOLT's judgment, copied from his own manuscript, is in 2 T. R. 346.
(*b*) 1 Burn's Eccl. Law 443.

founder, he had a right of visitation, which he assigned to the trustees, and they received it, by his consent and appointment, and held it under the charter. 1 Bl. Com. *ubi supra.* He appointed these trustees visitors, and in that respect to take place of his heir; as he might have appointed devisees to take his estate, instead of his heir. Little, probably, did he think, at that time, that the legislature would ever take away this property and these privileges, and give them to others; little did he suppose, that this charter secured to him and his successors no legal rights; little did *the other donors think so. If they had, the college would have been, [*568 what the university is now, a thing upon paper, existing only in name. The numerous academies in New England have been established substantially in the same manner. They hold their property by the same tenure, and no other. Nor has Harvard College any surer title than Dartmouth College; it may, to-day, have more friends; but to-morrow, it may have more enemies; its legal rights are the same. So also of Yale College; and indeed of all the others. When the legislature gives to these institutions, it may, and does, accompany its grants with such conditions as it pleases. The grant of lands by the legislature of New Hampshire to Dartmouth College, in 1789, was accompanied with various conditions. When donations are made, by the legislature or others, to a charity, already existing, without any condition, or the specification of any new use, the donation follows the nature of the charity. Hence the doctrine, that all eleemosynary corporations are private bodies. They are founded by private persons, and on private property. The public cannot be charitable in these institutions. It is not the money of the public, but of private persons which is dispensed. It may be public, that is, general, in its uses and advantages; and the state may very laudably add contributions of its own to the funds; but it is still private in the tenure of the property, and in the right of administering the funds.

If the doctrine laid down by Lord HOLT, and the House of Lords, in *Phillips* v. *Bury*, and recognised and established in all the other cases, be correct, *the property of this college was private property; it was [*569 vested in the trustees by the charter, and to be administered by them, according to the will of the founder and donors, as expressed in the charter; they were also visitors of the charity, in the most ample sense. They had, therefore, as they contend, privileges, property and immunities, within the true meaning of the bill of rights. They had rights, and still have them, which they can assert against the legislature, as well as against other wrongdoers. It makes no difference, that the estate is holden for certain trusts; the legal estate is still theirs. They have a right in the property, and they have a right of visiting and superintending the trust; and this is an object of legal protection, as much as any other right. The charter declares that the powers conferred on the trustees, are "privileges, advantages, liberties and immunities;" and that they shall be for ever holden by them and their successors. The New Hampshire bill of rights declares that no one shall be deprived of his "property, privileges or immunities," but by judgment of his peers, or the law of the land.

The argument on the other side is, that although these terms may mean something in the bill of rights, they mean nothing in this charter. But they are terms of legal signification, and very properly used in the charter;

they are equivalent with franchises. Blackstone says, that franchise and liberty are used as synonymous terms. And after enumerating other liberties and franchises, he says, "it is likewise, a franchise, for a number of persons to be incorporated and subsist as a body politic, with a power to maintain *570] *perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom." 2 Bl. Com. 37. Liberties is the term used in *magna charta*, as including franchises, privileges, immunities and all the rights which belong to that class. Professor Sullivan says, the term signifies the "privileges that some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the king; as the chattels of felons or outlaws, and the lands and privilegs of corporations." Sullivan's Lect, 41st Lect. The privilege, then, of being a member of a corporation, under a lawful grant, and of exercising the rights and powers of such member, is such a privilege, liberty or franchise, as has been the object of legal protection, and the subject of a legal interest, from the time of *magna charta* to the present moment. The plaintiffs have such an interest in this corporation, individually, as they could assert and maintain in a court of law, not as agents of the public, but in their own right. Each trustee has a franchise, and if he be disturbed in the enjoyment of it, he would have redress, on appealing to the law, as promptly as for any other injury. If the other trustees should conspire against any one of them, to prevent his equal right and voice in the appointment of a president or professor, or in the passing of any statute or ordinance of the college, he would be entitled to his action, for depriving him of his franchise. It makes no difference, that this property is to be holden and administered, and these franchises exercised, *571] *for the purpose of diffusing learning. No principle and no case establishes any such distinction. The public may be benefited by the use of this property; but this does not change the nature of the property, or the rights of the owners. The object of the charter may be public good; so it is in all other corporations; and this would as well justify the resumption or violation of the grant in any other case as in this. In the case of an advowson, the use is public, and the right cannot be turned to any private benefit or emolument. It is, nevertheless, a legal private right, and the property of the owner, as emphatically as his freehold. The rights and privileges of trustees, visitors or governors of incorporated colleges, stand on the same foundation. They are so considered, both by Lord Holt and Lord Hardwicke. *Phillips* v. *Bury*; *Green* v. *Rutherforth*. See also 2 Bl. Com. 21.

To contend, that the rights of the plaintiffs may be taken away, because they derive from them no pecuniary benefit, or private emolument, or because they cannot be transmitted to their heirs, or would not be assets to pay their debts, is taking an extremely narrow view of the subject. According to this notion, the case would be different, if, in the charter, they had stipulated for a commission on the disbursement of the funds; and they have ceased to have any interest in the property, because they have undertaken to administer it gratuitously. It cannot be necessary to say much in *572] refutation of the idea, that there cannot be a legal interest, or *ownership, in anything which does not yield a pecuniary profit; as if the law regarded no rights but the rights of money, and of visible tangible

property. Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him.

The exercise of this right, directly and very materially affects the public; much more so than the exercise of the privileges of a trustee of this college. Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right or impair it. This notion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the *Aylesbury Case.*(*a*) That was an action against a returning officer, for refusing the plaintiff's vote, in the election of a member of parliament. Three of the judges of the king's bench held, that the action could not be maintained, because, among other objections, "it was not any matter of profit, either *in præsenti* or *in futuro*." It would not enrich the plaintiff, *in præsenti*, nor would it, *in futuro*, go to his heirs, or answer to pay his debts. But Lord Holt and the House of Lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived. Individuals have a right *to use their own property for purposes of benevolence, either towards the public, or towards other individuals. [*573
They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, by contracting to give perpetuity to the stipulated manner of exercising it, to rescind this contract, and seize on the property, is not law, but violence. Whether the state will grant these franchises, and under what conditions it will grant them, it decides for itself. But when once granted, the constitution holds them to be sacred, till forfeited for just cause. That all property, of which the use may be beneficial to the public, belongs, therefore, to the public, is quite a new doctrine. It has no precedent, and is supported by no known principle. Dr. Wheelock might have answered his purposes, in this case, by executing a private deed of trust. He might have conveyed his property to trustees, for precisely such uses as are described in this charter. Indeed, it appears, that he had contemplated the establishment of his school in that manner, and had made his will, and devised the property to the same persons who were afterwards appointed trustees in the charter. Many literary and other charitable institutions are founded in that manner, and the trust is renewed, and conferred on other persons, from time to time, as occasion may require. In such a case, no lawyer would or could say, that the legislature might divest the trustees, constituted by deed or will, seize upon the property, and give it to other persons, for other purposes. And does the granting of a charter, which is only done to perpetuate the trust *in a more convenient manner, make any difference? [*574
Does or can this change the nature of the charity, and turn it into a public, political corporation? Happily, we are not without authority on this point. It has been considered and adjudged.

Lord Hardwicke says, in so many words, "The charter of the crown cannot make a *charity* more or less public, but only more permanent than

(*a*) Ashby *v.* White, 2 Ld. Raym. 938.

it would otherwise be." *Attorney-General* v. *Pearce*, 2 Atk. 87. The granting of the corporation is but making the trust perpetual, and does not alter the nature of the charity. The very object sought in obtaining such charter, and in giving property to such a corporation, is to make and keep it private property, and to clothe it with all the security and inviolability of private property. The intent is, that there shall be a legal private ownership, and that the legal owners shall maintain and protect the property, for the benefit of those for whose use it was designed. Who ever endowed the public? Who ever appointed a legislature to administer his charity? Or who ever heard, before, that a gift to a college, or hospital, or an asylum, was, in reality, nothing but a gift to the state? The state of Vermont is a principal donor to Dartmouth College. The lands given lie in that state. This appears in the special verdict. Is Vermont to be considered as having intended a gift to the state of New Hampshire in this case; as it has been said is to be the reasonable construction of all donations to the college? The legislature of New Hampshire affects to represent the public, and therefore, claims a right to control *all property destined to public use. *575] What hinders Vermont from considering herself equally the representative of the public, and from resuming her grants, at her own pleasure? Her right to do so is less doubtful, than the power of New Hampshire to pass the laws in question. In *University* v. *Foy*, 2 Hayw. 310, the supreme court of North Carolina pronounced unconstitutional and void, a law repealing a grant to the University of North Carolina; although that university was originally erected and endowed by a statute of the state. That case was a grant of lands, and the court decided, that it could not be resumed. This is the grant of a power and capacity to hold lands. Where is the difference of the cases, upon principle? In *Terrett* v. *Taylor*, 9 Cranch 43, this court decided, that a legislative grant or confirmation of lands, for the purposes of moral and religious instruction, could no more be rescinded than other grants. The nature of the use was not holden to make any difference. A grant to a parish or church, for the purposes which have been mentioned, cannot be distinguished, in respect to the title it confers, from a grant to a college for the promotion of piety and learning. To the same purpose may be cited, the case of *Pawlet* v. *Clark*. The state of Vermont, by statute, in 1794, granted to the respective towns in that state, certain glebe lands, lying within those towns, for the sole use and support of religious worship. In 1799, an act was passed, to repeal the act of 1794; but this court declared *576] that the act of 1794, "so far as it *granted the glebes to the towns, could not afterwards be repealed by the legislature, so as to divest the rights of the towns under the grant." 9 Cranch 292. It will be for the other side to show, that the nature of the use decides the question, whether the legislature has power to resume its grants. It will be for those who maintain such a doctrine, to show the principles and cases upon which it rests. It will be for them also, to fix the limits and boundaries of their doctrine, and to show what are, and what are not, such uses as to give the legislature this power of resumption and revocation. And to furnish an answer to the cases cited, it will be for them further to show, that a grant for the use and support of religious worship, stands on other ground than a grant for the promotion of piety and learning.

I hope enough has been said, to show, that the trustees possessed vested

liberties, privileges and immunities, under this charter; and that such liberties, privileges and immunities, being once lawfully obtained and vested, are as inviolable as any vested rights of property whatever. Rights to do certain acts, such, for instance, as the visitation and superintendence of a college, and the appointment of its officers, may surely be vested rights, to all legal intents, as completely as the right to possess property. A late learned judge of this court has said, "when I say, that a right is vested in a citizen, I mean, that he has the power to do certain actions, or to possess certain things, according to the law of the land. 3 Dall. 394.

*If such be the true nature of the plaintiffs' interests under this charter, what are the articles in the New Hampshire bill of rights which these acts infringe? They infringe the second article; which says, that the citizens of the state have a right to hold and possess property. The plaintiffs had a legal property in this charter; and they had acquired property under it. The acts deprive them of both; they impair and take away the charter; and they appropriate the property to new uses, against their consent. The plaintiffs cannot now hold the property acquired by themselves, and which this article says, they have a right to hold. They infringe the twentieth article. By that article it is declared, that in questions of property, there is a right to trial; the plaintiffs are divested, without trial or judgment. They infringe the twenty-third article. It is therein declared, that no retrospective laws shall be passed; the article bears directly on the case; these acts must be deemed retrospective, within the settled construction of that term. What a retrospective law is, has been decided, on the construction of this very article, in the circuit court for the first circuit. The learned judge of that circuit, says, "every statute which takes away or impairs vested rights, acquired under existing laws, must be deemed retrospective." *Society* v. *Wheeler*, 2 Gallis. 103. That all such laws are retrospective, was decided also in the case of *Dash* v. *Van Kleeck*, 7 Johns. 477, where a most learned *judge quotes this article from the constitution of New Hampshire, with manifest approbation, as a plain and clear expression of those fundamental and unalterable principles of justice, which must lie at the foundation of every free and just system of laws. Can any man deny, that the plaintiffs had rights, under the charter, which were legally vested, and that by these acts, those rights are impaired?(a) These [*577 [*578

(a) "It is a principle in the English law, as ancient as the law itself," says Chief Justice KENT, in the case last cited, "that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris formam imponere debet, et non præteritis.* (Bracton, lib. 4, fol. 228; 2 Inst. 292.) The maxim in Bracton was probably taken from the civil law, for we find in that system the same principle, that the law-giver cannot alter his mind, to the prejudice of a vested right. *Nemo potest mutare consilium suum in alterius injuriam.* (Dig. 50, 17, 75.) This maxim of Papinian is general in its terms; but Dr. Taylor (Elements of the Civil Law 168) applies it directly as a restriction upon the law-giver; and a declaration in the code leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari nisi nominatim, et de præterito tempore, et adhuc pendentibus negotiis cautum sit.* (Cod. 1, 14, 7.) This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future, as contradistinguished from past, contracts and vested rights. (Perezii, Prælec. h t.) It is, indeed, admitted, that the prince may enact a retrospective law, provided it be done expressly; for the will of the prince, under the despotism of

*acts infringe also, the thirty-seventh article of the constitution of New Hampshire; which says, that the powers of government shall be kept separate. By these acts, the legislature assumes to exercise a judicial power; it declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars, If it has any meaning, it is, that the legislature shall pass no act, directly and manifestly impairing private property, and private privileges. It shall not judge, by act; it shall not decide, by act; it shall not deprive, by act. But it shall leave all these things to be tried and adjudged by the law of the land.

*580] The fifteenth article has been referred *to before. It declares, that no one shall be "deprived of his property, immunities or privileges, but by the judgment of his peers, or the law of the land." Notwithstanding the light in which the learned judges in New Hampshire viewed the rights of the plaintiffs under the charter, and which has been before adverted to, it is found to be admitted, in their opinion, that those rights are privileges, within the meaning of this fifteenth article of the bill of rights. Having quoted that article, they say, "that the right to manage the affairs of this college is a privilege, within the meaning of this clause of the bill of rights, is not to be doubted." In my humble opinion, this surrenders the point. To resist the effect of this admission, however, the learned judges add, "but 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." This answer goes on the ground, that the acts in question are laws of the land, within the meaning of the constitution. If they be so, the argument drawn from this article is fully answered. If they be not so, it being admitted that the plaintiffs' rights are "privileges," within the meaning of the article, the argument is not answered, and the article is infringed by the acts. Are then these acts of the legislature, which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone: "And first, it (*i. e.*, law) is a rule; not a transient

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the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial, from the legislative, power, was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This was called the *interlocutio principis;* and this, according to Huber's definition, was, *quando principes inter partes loquuntur, et jus dicunt.* (Prælec. Juris. Rom., vol. 2, 545.) No correct civilian, and especially, no proud admirer of the ancient republic (if any such then existed), could have reflected on this interference with private rights, and pending suits, without disgust and indignation; and we are rather surprised to find, that under the violent and irregular genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows, that it must be founded in the clearest justice. Our case is happily very different from that of the subjects of Justinian. With us, the power of the law-giver is limited and defined; the judicial is regarded as a distinct, independent power; private rights have been better understood, and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering, is now to be regarded as sacred."

sudden order from a superior, to or concerning a particular *person; but something permanent, uniform and universal. Therefore, a particular act of the legislature, to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law." 1 Bl. Com. 44. Lord Coke is equally decisive and emphatic. Citing and commenting on the celebrated 29th chap. of *magna charta*, he says, "no man shall be disseised, &c., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), by the due course and process of law." 2 Inst. 46. Have the plaintiffs lost their franchises by "due course and process of law?" On the contrary, are not these acts "particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws?" 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. Such a [*582
strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country. "Is that the law of the land," said Mr. Burke, "upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate, according to the law of the land, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know what the law of the land is? Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?" That the power of electing and appointing the officers of this college is not only a right of the trustees, as a corporation, generally, and in the aggregate, but that each individual trustee has also his own individual franchise in such right of election and appointment, is according to the language of all the authorities. Lord Holt says, "it is agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the *particular members, and [*583
to be enjoyed by them in their private capacity. Where the privilege of election is used by particular persons, it is a particular right, vested in every particular man." 2 Ld. Raym. 952.

It is also to be considered, that the president and professors of this college have rights to be affected by these acts. Their interest is similar to

that of fellows in the English colleges; because they derive their living wholly, or in part, from the founder's bounty. The president is one of the trustees or corporators. The professors are not necessarily members of the corporation; but they are appointed by the trustees, are removable only by them, and have fixed salaries, payable out of the general funds of the college. Both president and professors have freeholds in their offices; subject only to be removed by the trustees, as their legal visitors, for good cause. All the authorities speak of fellowships in colleges as freeholds, notwithstanding the fellows may be liable to be suspended or removed, for misbehavior, by their constituted visitors. Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate, but the only support of literary men, who have devoted their lives to the instruction of youth. The president and professors were appointed by the twelve trustees. They were accountable to nobody else, and could be removed by nobody else. They accepted their offices on this tenure. Yet the
*584] legislature has appointed *other persons, with power to remove these officers, and to deprive them of their livings; and those other persons have exercised that power. No description of private property has been regarded as more sacred than college livings. They are the estates and freeholds of a most deserving class of men; of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature, and the instruction of youth, in the quiet retreats of academic life. Whether to dispossess and oust them; to deprive them of their office, and turn them out of their livings; to do this, not by the power of their legal visitors, or governors, but by acts of the legislature; and to do it, without forfeiture, and without fault; whether all this be not in the highest degree an indefensible and arbitrary proceeding, is a question, of which there would seem to be but one side fit for a lawyer or a scholar to espouse. Of all the attempts of James II. to overturn the law, and the rights of his subjects, none was esteemed more arbitrary or tyrannical, than his attack on Magdalen college, Oxford: and yet, that attempt was nothing but to put out one president and put in another. The president of that college, according to the charter and statutes, is to be chosen by the fellows, who are the corporators. There being a vacancy, the king chose to take the appointment out of the hands of the fellows, the legal electors of a president, into his own hands. He, therefore, sent down his mandate, commanding the fellows to admit, for president, a person of
*585] his nomination; and inasmuch as this was directly against *the charter and constitution of the college, he was pleased to add a *non obstante* clause, of sufficiently comprehensive import. The fellows were commanded to admit the person mentioned in the mandate, "any statute, custom or constitution to the contrary notwithstanding, wherewith we are graciously pleased to dispense, in this behalf." The fellows refused obedience to this mandate, and Dr. Hough, a man of independence and character, was chosen president by the fellows, according to the charter and statutes. The king then assumed the power, in virtue of his prerogative, to send down certain commissioners to turn him out; which was done accordingly; and Parker, a creature suited to the times, put in his place. And because the president, who was rightfully and legally elected, would not deliver the

keys, the doors were broken open. "The nation, as well as the university," says Bishop Burnet,(*a*) "looked on all these proceedings with just indignation. It was thought an open piece of robbery and burglary, when men, authorized by no legal commission, came and forcibly turned men out of their possession and freehold." Mr. Hume, although a man of different temper, and of other sentiments, in some respects, than Dr. Burnet, speaks of this arbitrary attempt of prerogative, in terms not less decisive. "The president, and all the fellows," says he, "except two, who complied, were expelled the college: and Parker was put in possession of the office. This act of violence, of all those which were committed during *the reign of James, is perhaps the most illegal and arbitrary. When [*586 the dispensing power was the most strenuously insisted on by court lawyers, it had still been allowed, that the statutes which regard private property could not legally be infringed by that prorogative. Yet, in this instance, it appeared, that even these were not now secure from invasion. The privileges of a college are attacked; men are illegally dispossessed of their property for adhering to their duty, to their oaths, and to their religion." This measure king James lived to repent, after repentance was too late. When the charter of London was restored, and other measures of violence retracted, to avert the impending revolution, the expelled president and fellows of Magdalen college were permitted to resume their rights. It is evident, that this was regarded as an arbitrary interference with private property. Yet private property was no otherwise attacked, than as a person was appointed to administer and enjoy the revenues of a college, in a manner and by persons not authorized by the constitution of the college. A majority of the members of the corporation would not comply with the king's wishes; a minority would; the object was, therefore, to make this minority, a majority. To this end, the king's commissioners were directed to interfere in the case, and they united with the two complying fellows, and expelled the rest; and thus effected a change in the government of the college. The language in which Mr. Hume, and all other writers, speak of this abortive attempt of oppression, shows, that colleges were esteemed to be, as *they truly are, private corporations, and the property and privileges [*587 which belong to them, private property, and private privileges. Court lawyers were found to justify the king in dispensing with the laws; that is, in assuming and exercising a legislative authority. But no lawyer, not even a court lawyer, in the reign of king James the second, so far as appears, was found to say, that even by this high authority, he could infringe the franchises of the fellows of a college, and take away their livings. Mr. Hume gives the reason; it is, that such franchises were regarded, in a most emphatic sense, as private property.(*b*) If it could be made to appear, that the trustees and the president and professors held their offices and franchises during the pleasure of the legislature, and that the property holden

(*a*) History of his Own Times, vol. 3, p. 119.[1]

(*b*) See a full account of this, in State Trials, 4th ed., vol. 4, p. 262.

[1] Burnet is, notoriously, an unreliable historian. Dr. Johnson said of him, and this work, "I do not believe, that Burnet intentionally lied; but he was so much prejudiced, that he took no pains to find out the truth. He was like a man who resolves to regulate his time by a certain watch; but will not inquire whether the watch is right or not."

belonged to the state, then, indeed, the legislature have done no more than they had a right to do. But this is not so. The charter is a charter of privileges and immunities ; and these are holden by the trustees, expressly against the state, for ever. It is admitted, that the state, by its courts of law, can enforce the will of the donor, and compel a faithful execution of the trust. The plaintiffs claim no exemption from legal responsibility. They hold themselves at all times answerable to the law of the land, for their conduct in the trust committed to them. They ask only to hold the property of which they are owners, and the franchises which belong to them, until they shall be found by due course and process of law to have forfeited
*588] them. It can make no difference, *whether the legislature exercise the power it has assumed, by removing the trustees and the president and professors, directly, and by name, or by appointing others to expel them. The principle is the same, and in point of fact, the result has been the same. If the entire franchise cannot be taken away, neither can it be essentially impaired. If the trustees are legal owners of the property, they are sole owners. If they are visitors, they are sole visitors. No one will be found to say, that if the legislature may do what it has done, it may not do anything and everything which it may choose to do, relative to the property of the corporation, and the privileges of its members and officers.

If the view which has been taken of this question be at all correct, this was an eleemosynary corporation—a private charity. The property was private property. The trustees were visitors, and their right to hold the charter, administer the funds, and visit and govern the college, was a franchise and privilege, solemnly granted to them. The use being public, in no way diminishes their legal estate in the property, or their title to the franchise. There is no principle, nor any case, which declares that a gift to such a corporation is a gift to the public. The acts in question violate property ; they take away privileges, immunities and franchises ; they deny to the trustees the protection of the law ; and they are retrospective in their operation. In all which respects, they are against the constitution of New Hampshire.

2. The plaintiffs contend, in the second place, that the acts in question
*589] are repugnant to the 10th section *of the 1st article of the constitution of the United States. The material words of that section are, "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The object of these most important provisions in the national constitution has often been discussed, both here and elsewhere. It is exhibited with great clearness and force by one of the distinguished persons who framed that instrument. "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights ; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments as the un-

doubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the *community. They have [*590
seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding."(a) It has already been decided in this court, that a grant is a contract, within the meaning of this provision; and that a grant by a state is also a contract, as much as the grant of an individual.(b) *It has also been decided, that a grant by a state before the [*591
revolution, is as much to be protected as a grant since. *New Jersey* v. *Wilson*, 7 Cranch 264. But the case of *Terrett* v. *Taylor*, before cited, is of all others most pertinent to the present argument. Indeed, the judgment of the court in that case seems to leave little to be argued or decided in this.(c) This court, then, does not admit the doctrine, *that a legislature [*592
can repeal statutes creating private corporations. If it cannot repeal

(a) Letters of Publius, or The Federalist (No. 44., by Mr. Madison).

(b) In Fletcher *v.* Peck, 6 Cranch 87, the court says, "a contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition, contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not be disguised, that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves, and their property, from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states, are obviously founded on this sentiment; and the constitution of the United States contains what may be deemed a bill of rights, for the people of each state."

(c) "A private corporation," says the court, "created by the legislature, may lose its franchises by a *misuser* or *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 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 limitations, have a right to change, modify, enlarge

them altogether, of course, it cannot repeal any part of them, or impair them, or essentially alter them, without the consent of the corporators. If, therefore, it has been shown, that this college is to be regarded as a private charity, this case is embraced within the very terms of that decision. A grant of corporate powers and privileges is as much a contract, as a grant of land. What proves all charters of this sort to be contracts, is, that they must be accepted, to give them force and effect. If they are not accepted, they are void. And in the case of an existing corporation, if a new charter is given it, it may even accept part, and reject the rest. In *Rex* v. *Vice-Chancellor of Cambridge*, 3 Burr. 1656, Lord MANSFIELD says, "there is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is given), and a new charter given to a corporation already in being, and acting either under a former charter, or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter *in toto*, and to receive either all or none of it; *593] they may act partly under it, and *partly under their old charter, or prescription. The validity of these new charters must turn upon the acceptance of them." In the same case, Mr. Justice WILMOT says, "it is the concurrence and acceptance of the university, that gives the force to the charter of the crown." In the *King* v. *Pasmore*, 3 T. R. 240, Lord KENYON observes, "some things are clear: when a corporation exists, capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it."(*a*) In all cases relative to charters, the acceptance of them is uniformly alleged in the pleadings. This shows the general understanding of the law, that they are grants, or contracts; and that parties are necessary to give them force and validity. In *King* v. *Dr. Askew*, 4 Burr. 2200, it is said, "the crown cannot oblige a man to be a corporator, without his consent; he shall not be subject to the inconveniences of it, without accepting it and assenting to it." These terms, "acceptance," and "assent," are the very language of contract. In *Ellis* v. *Marshall*, 2 Mass. 279, it was expressly adjudged, that the naming of the defendant, among others, in an act of incorporation, did not, of itself, make him a corporator; and that his assent was necessary to that end. The court speak of the act of incorporation as a grant, and observe, "that a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." But Mr. Justice *594] BULLER, in *King* v. *Pasmore*, *furnishes, if possible, a still more direct and explicit authority. Speaking of a corporation for government, he says, "I do not know how to reason on this point better than in

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or restrain them, securing, however, the property for the use 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 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 letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."

(*a*) See also 1 Kyd on Corp. 65.

the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place."

This language applies, with peculiar propriety and force, to the case before the court. It was in consequence of the "privileges bestowed," that Dr. Wheelock and his associates undertook to exert themselves for the instruction and education of youth in this college; and it was on the same consideration, that the founder endowed it with his property. And because charters of incorporation are of the nature of contracts, they cannot be altered or varied, but by consent of the original parties. If a charter be granted by the king, it may be altered by a new charter, granted by the king, and accepted by the corporators. But if the first charter be granted by parliament, the consent of parliament must be obtained to any alteration. In *King* v. *Miller*, 6 T. R. 277, Lord KENYON says, "where a corporation takes its rise from the king's charter, the king, by granting, and the corporation, by accepting, another charter, may alter it, because it is done with the consent of all the parties who are competent to consent to the alteration."(*a*) There are, in this *case, all the essential constituent parts of a contract. There is something to be contracted about; there are parties, [*595 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 of corporate franchises, and a grant of tangible property? No such difference is recognised in any decided case, nor does it exist in the common apprehension of mankind.

It is, therefore, contended, that this case falls within the true meaning of this provision of the constitution, as expounded in the decisions of this court; that the charter of 1769 is a contract, a stipulation or agreement: mutual in its considerations, express and formal in its terms, and of a most binding and solemn nature. That the acts in question impair this contract, *has [*596 already been sufficiently shown. They repeal and abrogate its most essential parts.

Much has heretofore been said on the necessity of admitting such a power in the legislature as has been assumed in this case. Many cases of possible evil have been imagined, which might otherwise be without remedy. Abuses, it is contended, might arise in the management of such institutions,

(*a*) See Ex parte Bolton School, 2 Bro. C. C. 662.

which the ordinary courts of law would be unable to correct. 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. It would be sufficient to say, in answer, that it is not pretended, that there was here any such case of necessity. But a still more satisfactory answer is, that the apprehension of danger is groundless, and therefore, the whole argument fails. Experience has not taught us, that there is danger of great evils, or of great inconvenience, from this source. Hitherto, neither in our own country nor elsewhere, have such cases of necessity occurred. The judicial establishments of the state are presumed to be competent to prevent abuses and violations of trust, in cases of this kind, as well as in all others. If they be not, they are imperfect, and their amendment would be a most proper subject for legislative wisdom. Under the government and protection of the general laws of the land, those institutions have always been found safe, as well as useful. They go on with the progress of society, accommodating themselves
*597] easily, without sudden change or *violence, to the alterations, which take place in its condition; and in the knowledge, the habits and pursuits of men. The English colleges were founded in Catholic ages. Their religion was reformed with the general reformation of the nation; and they are suited perfectly well to the purpose of educating the Protestant youth of modern times. Dartmouth College was established under a charter granted by the provincial government; but a better constitution for a college, or one more adapted to the condition of things under the present government, in all material respects, could not now be framed. Nothing in it was found to need alteration at the revolution. The wise men of that day saw in it one of the best hopes of future times, and commended it, as it was, with parental care, to the protection and guardianship of the government of the state. A charter of more liberal sentiments, of wiser provisions, drawn with more care, or in a better spirit, could not be expected at any time, or from any source. The college needed no change in its organization or government. That which it did need was the kindness, the patronage, the bounty of the legislature; not a mock elevation to the character of a university, without the solid benefit of a shilling's donation, to sustain the character; not the swelling and empty authority of establishing institutes and other colleges. This unsubstantial pageantry would seem to have been in derision of the scanty endowment and limited means of an unobtrusive, but useful and growing seminary. Least of all, was there a necessity, or pretence of necessity, to infringe its legal rights, violate its franchises
*598] *and privileges, and pour upon it these overwhelming streams of litigation.

But this argument, from necessity, would equally apply in all other cases. If it be well founded, it would prove, that whenever any inconvenience or evil should be experienced from the restrictions imposed on the legislature by the constitution, these restrictions ought to be disregarded. It is enough to say, that the people have thought otherwise. They have, most wisely, chosen to take the risk of occasional inconvenience, from the want of power, in order that there might be a settled limit to its exercise, and a permanent security against its abuse. They have imposed prohibitions and restraints; and they have not rendered these altogether vain and

nugatory, by conferring the power of dispensation. If inconvenience should arise, which the legislature cannot remedy under the power conferred upon it, it is not answerable for such inconvenience. That which it cannot do within the limits prescribed to it, it cannot do at all. No legislature in this country is able, and may the time never come, when it shall be able, to apply to itself the memorable expression of a Roman pontiff : "*Licet hoc de jure non possumus, volumus tamen de plenitudine potestatis.*"

The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the inviolability *of their charters. It will be a dangerous, a most dangerous, experiment, [*599 to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions. If the franchise may be, at any time, taken away or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty ; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics ; party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only ; they are certain and immediate.

When the court in North Carolina declared the law of the state, which repealed a grant to its university, unconstitutional and void, the legislature had the candor and the wisdom to repeal the law. This example, so honorable to the state which exhibited it, is most fit to be followed on this occasion. And there is good reason to hope, that a state which has hitherto been so much distinguished for temperate councils, cautious legislation, and regard to law, will not fail to adopt a course which will accord with her highest and best interest, and in no small degree, elevate her reputation. It was, for many obvious reasons, most anxiously desired, that the question of the power of the legislature over this charter should have been finally decided in the state court. An earnest hope was entertained, *that the judges of that court might have viewed the case in a light favorable [*600 to the rights of the trustees. That hope has failed. It is here that those rights are now to be maintained, or they are prostrated for ever. *Omnia alia perfugia bonorum, subsidia, consilia, auxilia jura ceciderunt. Quem enim alium appellem? quem obtestor? quem implorem? Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quæ spe exigua extremaque pendet, temerimus ; nihil est præterea quo confugere possimus.*

Holmes, for the defendant in error, argued, that the prohibition in the constitution of the United States, which alone gives the court jurisdiction in this case, did not extend to grants of political power ; to contracts concerning the internal government and police of a sovereign state. Nor does it extend to contracts which relate merely to matters of civil institution, even of a private nature. Thus, marriage is a contract, and a private contract ; but relating merely to a matter of civil institution, which every society has an inherent right to regulate as its own wisdom may dictate, it cannot be

considered as within the spirit of this prohibitory clause. Divorces unquestionably impair the obligation of the nuptial contract; they change the relations of the marriage state, without the consent of both the parties, and thus come clearly within the letter of the prohibition. But surely, no one will contend, that there is locked up in this mystical clause of the constitution a prohibition to the states to grant divorces, a power *peculiarly
*601] appropriate to domestic legislation, and which has been exercised in every age and nation where civilization has produced that corruption of manners, which, unfortunately, requires this remedy. Still less can a contract concerning a public office to be exercised, or duty to be performed, be included within this prohibition. The convention who framed the constitution, did not intend to interfere in the exercise of the political powers reserved to the state governments. That was left to be regulated by their own local laws and constitutions; with this exception only, that the Union should guaranty to each state a republican form of government, and defend it against domestic insurrection and rebellion. Beyond this, the authorities of the Union have no right to interfere in the exercise of the powers reserved to the state. They are sovereign and independent in their own sphere. If, for example, the legislature of a particular state should attempt to deprive the judges of its courts (who, by the state constitution, held their places during good behavior) of their offices, without a trial by impeachment; or should arbitrarily and capriciously increase the number of the judges, so as to give the preponderancy in judicature to the prevailing political faction, would it be pretended, that the minority could resist such a law, upon the ground of its impairing the obligation of a contract? Must not the remedy, if anywhere existing, be found in the interposition of some state authority to enforce the provisions of the state constitution?

The education of youth, and the encouragement of the arts and sciences,
*602] is one of the most *important objects of civil government. Vattel, lib. 1, c. 11, § 112–13. By our constitutions, it is left exclusively to the states, with the exception of copyrights and patents. It was in the exercise of this duty of government, that this charter was originally granted to Dartmouth College. Even when first granted, under the colonial government, it was subject to the notorious authority of the British parliament over all charters containing grants of political power. It might have been revoked or modified by act of parliament. 1 Bl. Com. 485. The revolution, which separated the colony from the parent county, dissolved all connection between this corporation and the crown of Great Britain. But it did not destroy that supreme authority which every political society has over its public institutions; that still remained, and was transferred to the people of New Hampshire. They have not relinquished it to the government of the United States, or to any department of that government. Neither does the constitution of New Hampshire confirm the charter of Dartmouth College, so as to give it the immutability of the fundamental law. On the contrary, the constitution of the state admonishes the legislature of the duty of encouraging science and literature, and thus seems to suppose its power of control over the scientific and literary institutions of the state. The legislature had, therefore, a right to modify this trust, the original object of which, was the
*603] education of the Indian and English youth of the province. It is not necessary to contend, that it had the right of wholly diverting *the

fund from the original object of its pious and benevolent founders. Still, it must be insisted, that a regal grant, with a regal and colonial policy, necessarily became subject to the modification of a republican legislature, whose right, and whose duty, it was, to adapt the education of the youth of the country to the change in its political institutions. It is a corollary from the right of self-government. The ordinary remedies which are furnished in the court for a *misuser* of the corporate franchises, are not adapted to the great exigencies of are volution in government. They presuppose a permanently-established order of things, and are intended only to correct occasional deviations and minor mischiefs. But neither a reformation in religion, nor a revolution in government, can be accomplished or confirmed by a writ of *quo warranto* or *mandamus*. We do not say, that the corporation has forfeited its charter for *misuser;* but that it has become unfit for use, by a change of circumstances. Nor does the lapse of time from 1776 to 1816, infer an acquiescence on the part of the legislature, or a renunciation of its right to abolish or reform an institution, which being of a public nature, cannot hold its privileges by prescription. Our argument is, that it is, at all times, liable to be new modelled by the legislative wisdom, instructed by the lights of the age.

The conclusion then is, that this charter is not such a contract as is contemplated by the constitution of the United States; that it is not a contract of a private nature, concerning property or other private interests: but that it is a grant of a public nature, *for public purposes, relative to the internal government and police of a state, and therefore, liable to be revoked or modified by the supreme power of that state. [*604

Supposing, however, this to be a contract such as was meant to be included in the constitutional prohibition, is its obligation impaired by these acts of the legislature of New Hampshire? The title of the acts of the 27th of June, and the 18th of December 1816, shows that the legislative will and intention was to amend the charter, and enlarge and improve the corporation. If, by a technical fiction, the grant of the charter can be considered as a contract between the king (or the state) and the corporators, the obligation of that contract is not impaired; but is rather enforced, by these acts, which continue the same corporation, for the same objects, under a new name. It is well settled, that a mere change of the name of a corporation will not affect its identity. An addition to the number of the colleges, the creation of new fellowships, or an increase of the number of the trustees, do not impair the franchises of the corporate body. Nor is the franchise of any individual corporator impaired. In the words of Mr. Justice Ashhurst, in the case of the *King* v. *Pasmore*, 3 T. R. 244, "the members of the old body have no injury or injustice to complain of, for they are all included in the new charter of incorporation; and if any of them do not become members of the new incorporation, but refuse to accept, it is their own *fault." [*605 What rights, which are secured by this alleged contract, are invaded by the acts of the legislature? Is it the right of property, or of privileges? It is not the former, because the corporate body is not deprived of the least portion of its property. If it be the personal privileges of the corporators that are attacked, these must be either a common and universal privilege, such as the right of suffrage, for interrupting the exercise of which an action would lie; or they must be monopolies and exclusive privileges,

which are always subject to be regulated and modified by the supreme power of the state. Where a private proprietary interest is coupled with the exercise of political power, or a public trust, the charters of corporations have frequently been amended by legislative authority. *Gray* v. *Portland Bank*, 3 Mass. 364; *Commonwealth* v. *Bird*, 12 Ibid. 443. In charters creating artificial persons, for purposes exclusively private, and not interfering with the common rights of the citizens, it may be admitted, that the legislature cannot interfere to amend, without the consent of the grantees. The grant of such a charter might, perhaps, be considered as analogous to a contract between the state and private individuals, affecting their private rights, and might thus be regarded as within the spirit of the constitutional prohibition. But this charter is merely a mode of exercising one of the great powers of civil government. Its amendment, or even repeal, can no more be considered as the breach of a contract, than the amendment or repeal of any other law.
*606] Such repeal or amendment is an ordinary act of public *legislation, and not an act impairing the obligation of a contract between the government and private citizens, under which personal immunities or proprietary interests are vested in them.

The *Attorney-General*, on the same side, stated, that the only question properly before court was, whether the several acts of the legislature of New Hampshire, mentioned in the special verdict, are repugnant to that clause of the constitution of the United States, which provides, that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts?"

Beside its intrinsic difficulty, the extreme delicacy of this question is evinced by the sentiments expressed by the court, whenever it has been called to act on such a question. *Calder* v. *Bull*, 3 Dall. 392, 394, 395; *Fletcher* v. *Peck*, 6 Cranch 87; *New Jersey* v. *Wilson*, 7 Ibid. 164; *Terrett* v. *Taylor*, 9 Ibid. 43. In the case of *Fletcher* v. *Peck*, the court says, "The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts are to be considered as void. The opposition between the constitution and the law should
*607] be such *that the judge feels a clear and strong conviction of their incompatibility with each other." 6 Cranch 128. In *Calder* v. *Bull*, 3 Dall. 395, Mr. Justice CHASE expressed himself with his usual emphatic energy, and said, "I will not decide any law to be void, but in a very clear case." It is, then, a very clear case, that these acts of New Hampshire are repugnant to the constitution of the United States?

1. Are they bills of attainder? The elementary writers inform us, that an attainder is "the stain or corruption of the blood of the criminal capitally condemned." 4 Bl. Com. 380. True it is, that the Chief Justice says, in *Fletcher* v. *Peck*, 6 Cranch 138, that a bill of attainder may affect the life of an individual, or may confiscate his estate, or both. But the cause did not turn upon this point, and the Chief Justice was not called upon to weigh,

with critical accuracy, his expressions in this part of the case. In England, most certainly, the first idea presented is that of corruption of blood, and consequent forfeiture of the entire property of the criminal, as the regular and inevitable consequences of a capital conviction at common law. Statutes sometimes pardon the attainder, and merely forfeit the estate; but this forfeiture is always complete and entire. In the present case, however, it cannot be pretended, that any part of the estate of the trustees is forfeited, and, if a part, certainly not the whole.

2. Are these acts "laws impairing the obligation *of contracts?" [*608
The mischiefs actually existing at the time the constitution was established, and which were intended to be remedied by this prohibitory clause, will show the nature of the contracts contemplated by its authors. It was the inviolability of private contracts, and private rights acquired under them, which was intended to be protected; (*a*) and not contracts which are, in their nature, matters of civil police, nor grants by a state, of power, and even property, to individuals, in trust to be administered for purposes merely public. "The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts," says Mr. Justice CHASE, "were inserted to secure private rights." *Calder* v. *Bull*, 3 Dall. 390. The cases determined in this court, illustrate the same construction of this clause of the constitution. *Fletcher* v. *Peck* was a case where a state legislature attempted to revoke its grant, so as to divest a beneficial estate in lands; a vested estate; an actual conveyance to individuals as their private property. 6 Cranch 87. In the case of *New Jersey* v. *Wilson*, there was an express contract, contained in a public treaty of cession with the Indians, by which the privilege of perpetual exemption from taxation was indelibly impressed upon the lands, and could not be taken away, without a violation of the public faith *solemnly [*609
pledged. 7 Cranch 164. *Terrett* v. *Taylor* was also a case of an attempt to divest an interest in lands actually vested under an act amounting to a contract. 9 Ibid. 43. In all those instances, the property was held by the grantees, and those to whom they had conveyed, beneficially, and under the sanction of contracts, in the ordinary and popular signification of that term. But this is an attempt to extend its obvious and natural meaning, and to apply it, by a species of legal fiction, to a class of cases which have always been supposed to be within the control of the sovereign power. Charters to public corporations, for purposes of public policy, are necessarily subject to the legislative discretion, which may revoke or modify them, as the continually fluctuating exigencies of the society may require. Incorporations for the purposes of education and other literary objects, in one age, or under one form of government, may become unfit for their office in another age, or under another government.

This charter is said to be a contract between Doctor Wheelock and the King; a contract founded on a donation of private property by Doctor Wheelock. It is hence inferred, that it is a private eleemosynary corporation; and the right of visitation is said to be in the founder and heirs; and that the state can have no right to interfere, because it is neither the founder of this charity, nor contributor to it. But if the basis of this argument is removed,

(*a*) The Federalist, No. 44; 1 Tucker's Bl. Com. part 1, Appendix, 312.

what becomes of the superstructure? The fact that Doctor Wheelock was
*610] a contributor, is not found by the *special verdict; and not having been such, in truth, it cannot be added, under the agreement to amend the special verdict. The jury find the charter, and that does not recite that the college was a private foundation by Doctor Wheelock. On the contrary, the real state of the case is, that he was the projector; that he had a school, on his own plantation, for the education of Indians; and through the assistance of others, had been employed for several years, in clothing, maintaining and educating them. He solicited contributions, and appointed others to solicit. At the foundation of the college, the institution was removed from his estate. The honors paid to him by the charter were the reward of past services, and of the boldness, as well as piety, of the project. The state has been a contributor of funds, and this fact is found. It is, therefore, not a private charity, but a public institution; subject to be modified, altered and regulated by the supreme power of the state.

This charter is not a contract, within the true intent of the constitution. The acts of New Hampshire, varying in some degree the forms of the charter, do not impair the abligation of a contract. In a case which is really one of contract, there is no difficulty in ascertaining who are the contracting parties. But here they cannot be fixed. Doctor Wheelock can only be said to be a party, on the ground of his contributing funds, and thus being the founder and visitor. That ground being removed, he ceases to be a party to the contract. Are the other contributors, alluded to in the charter, and
*611] enumerated *by Belknap in his history of New Hampshire, are they contracting parties? They are not before the court; and even if they were, with whom did they contract? With the King of Great Britain? He, too, is not before the court; and has declared, by his chancellor, in the case of the *Attorney-General* v. *The City of London* (3 Bro. C. C. 171; 1 Ves. jr. 243), that he has no longer any connection with these corporations in America. Has the state of New Hampshire taken his place? Neither is that state before the court, nor can it be, as a party, originally defendant. But suppose this to be a contract between the trustees, and the people of New Hampshire. A contract is always for the benefit and advantage of some person. This contract cannot be for the benefit of the trustees: it is for the use of the people. The *cestui que use* is always the contracting party; the trustee has nothing to do with stipulating the terms. The people then grant powers for their own use; it is a contract with themselves!

But if the trustees are parties on one side, what do they give, and what do they receive? They give their time and labor. Every society has a right to the services of its members, in places of public trust and duty. A town appoints, under the authority of the state, an overseer of the poor, or of the highways. He gives, reluctantly, his labor and services; he receives nothing in return, but the privilege of giving his labor and services. Such appointments to offices of public trust have never been considered
*612] *as contracts which the sovereign authority was not competent to rescind or modify. There can be no contract in which the party does not receive some personal, private, individual benefit. To make this charter a contract, and a private contract, there must be a private beneficial interest vested in the party who pays the consideration. What is the private beneficial interest vested in the party, in the present case? The right of appoint-

ing the president and professors of the college, and of establishing ordinances for its government, &c. But to make these rights an interest which will constitute the end and object of a contract, the exercise of these rights must be for the private individual advantage of the trustees. Here, however, so far from that being the fact, it is solely for the advantage of the public; for the interests of piety and learning. It was upon these principles, that Lord KENYON determined, in the case of *Weller* v. *Foundling Hospital*, 1 Peake 154, that the governor and members of the corporation were competent witnesses, because they were trustees of a public charity, and had no private personal interest. It is not meant to deny, that mere right, a franchise, an incorporeal hereditament, may be the subject of a contract; but it must always be a direct, individual, beneficial interest to the party who takes that right. The rights of municipal corporators are of this nature. The right of suffrage, there, belongs beneficially to the individual elector, and is to be exercised for his own exclusive advantage. It is in relation to these town *corporations, that Lord KENYON speaks, when he says, [*613
that the king cannot force a new charter upon them. *Rex* v. *Pasmore*, 3 T. R. 244. This principle is established for the benefit of all the corporators. It is accompanied by another principle, without which it would never have been adopted; the power of proposing amendments, at the desire of those for whose benefit the charter was granted. These two principles work together for the good of the whole. By the one, these municipal corporations are saved from the tyranny of the crown; and by the other, they are preserved from the infinite perpetuity of inveterate errors. But in the present case, there is no similar qualification of the immutability of the charter, which is contended for in the argument on the other side. But in truth, neither the original principle, nor its qualification, apply to this case; for there is here no such beneficial interest and individual property as are enjoyed by town corporators.

3. But even admitting it to be a case of contract, its obligation is not impaired by these legislative acts. What vested right has been divested? None! The former trustees are continued. It is true, that new trustees are added, but this affords no reasonable ground of complaint. The privileges of the House of Lords, in England, are not impaired by the introduction of new members. The old corporation is not abolished, for the foundation, as now regulated, is substantially the same. It is identical in all its essential constituent parts, and all its former rights are *preserved and con- [*614
firmed. See *Mayor of Colchester v. Seaber*, 3 Burr. 1866. The change of name does not change its original rights and franchises. 1 Saund. 344, n. 1; *Luttrel's Case*, 4 Co. 87. By the revolution which separated this country from the British empire, all the powers of the British government devolved on the states. The legislature of New Hampshire then became clothed with all the powers, both of the king and parliament, over these public institutions. On whom, then, did the title to the property of this college fall? If, before the revolution, it was beneficially vested in any private individuals, or corporate body, I do not contend, that the revolution divested it, and gave it to the state. But it was not before vested beneficially in the trustees. The use unquestionably belonged to the people of New Hampshire, who were the *cestuis que trust*. The legal estate was, indeed, vested in the trustees, before the revolution, by virtue of the royal

charter of 1769. But that charter was destroyed by the revolution (*Attorney-General* v. *City of London*, 3 Bro. C. C. 171 ; s. c. 1 Ves. jr. 143), and the legal estate, of course, fell upon those who held the equitable estate—upon the people. If those who were trustees carried on the duties of the trust, after the revolution, it must have been subject to the power of the people. If it be said, that the state gave its implied assent to the terms of the old charter, then it must be subject to all the terms on which it was granted ; and among these, to the oath of allegiance to the king. But if,
*615] to avoid *this concession, it be said, that the charter must have been so far modified as to adapt it to the character of the new government, and to the change in our civil institutions ; that is precisely what we contend for. These civil institutions must be modified, and adapted to the mutations of society and manners. They belong to the people, are established for their benefit, and ought to be subject to their authority.

Hopkinson, in reply, insisted, that the whole argument on the other side proceeded on an assumption which was not warranted, and could not be maintained. The corporation created by this charter is called a public corporation ; its members are said to be public officers, and agents of government. They were officers of the king, it is said, before the revolution, and they are officers of the state since. But upon what authority is all this taken ? What is the acknowledged principle, which decides thus of this corporation ? Where are the cases in which such a doctrine has ever prevailed ? No case, no book of authority, has been, or can be, cited to this purpose. Every writer on the law of corporations, all the cases in law and equity, instruct us, that colleges are regarded in law as private eleemosynary corporations, especially, colleges founded, as this was, by a private founder. If this settled principle be not overthrown, there is no foundation for the defendant's argument. We contend, that this charter is a contract between the government and the members of the corporation created by it. It is a contract, because it is a grant of valuable rights and privileges ; and every
*616] grant implies *a contract not to resume the thing granted. Public offices are not created by contract or by charter ; they are provided for by general laws. Judges and magistrates do not hold their offices under charters ; these offices are created by public laws, for public political purposes, and filled by appointments made in the exercise of political power. There is nothing like this in the origin of the powers of the plaintiffs. Nor is there, in their duties, any more than in their origin, anything which likens them to public political agents. Their duties are such as they themselves have chosen to assume, in relation to a fund created by private benefaction, for charitable uses. These duties relate to the instruction of youth ; but instructors of youth are not public officers.

The argument on the other side, if it proves anything, will prove that professors, masters, preceptors and tutors, are all political persons and public officers ; and that all education is necessarily and exclusively the business of the state.[1] The confutation of such an argument lies in stating it.

[1] This appears to be the prevailing idea of the present day ; the people are taxed for the support of state schools, and the payment of state school-masters, as state officers, whether they can, in conscience, make use of these state institutions, or not. What would have been thought of this in 1819 ?

The trustees of this college perform no duties, and have no responsibility in any way connected with the civil government of the state. They derive no compensation for their services from the public treasury. They are the gratuitous administrators of a private bounty ; the trustees of a literary establishment, standing, in contemplation of law, on the same foundation as hospitals and other charities. It is true, that a college, in a popular sense, is a public institution, because its uses are public, and its benefits may be enjoyed by all who choose to enjoy them. *But in a legal and technical sense, they are not public institutions, but private charities. [*617
Corporations may, therefore, be very well said to be for public use, of which the property and privileges are yet private. Indeed, there may be supposed to be an ultimate reference to the public good, in granting all charters of incorporation ; but this does not change the property from private to public. If the property of this corporation be public property, that is, property belonging to the state, when did it become so ? It was once private property; when was it surrendered to the public ? The object in obtaining the charter, was not, surely, to transfer the property to the public, but to secure it for ever in the hands of those with whom the original owners saw fit to intrust it. Whence then, that right of ownership and control over this property, which the legislature of New Hampshire has undertaken to exercise ? The distinction between public, political or civil corporations, and corporations for the distribution of private charity, is fully explained, and broadly marked, in the cases which have been cited, and to which no answer has been given. The hospital of Pennsylvania is quite as much a public corporation, as this college. It has great funds, most wisely and beneficently administered. Is it to be supposed, that the legislature might rightfully lay its hands on this institution, violate its charter, and direct its funds to any purpose which its pleasure might prescribe ?

The property of this college was private property, before the charter ; and the charter has wrought no change in the nature or title of this property. The school had existed as a charity school, *for years before the charter was granted. During this time, it was manifestly a private [*618
charity. The case cited from Atkyns, shows, that a charter does not make a charity more public, but only more permanent. Before he accepted the charter, the founder of this college possessed an absolute right to the property with which it was endowed, and also the right flowing from that, of administering and applying it to the purposes of the charity by him established. By taking the charter, he assented, that the right to the property, and the power of administering it, should go to the corporation of which he and others were members. The beneficial purpose to which the property was to be used, was the consideration on the part of the government for granting the charter. The perpetuity which it was calculated to give to the charity, was the founder's inducement to solicit it. By this charter, the public faith is solemnly pledged, that the arrangement thus made shall be perpetual. In consideration that the founder would devote his property to the purposes beneficial to the public, the government has solemnly covenanted with him, to secure the administration of that property in the hands of trustees appointed in the charter. And yet the argment now is, that because he so devoted his property to uses beneficial to the public, the government

may, for that reason, assume the control of it, and take it out of those hands to which it was confided by the charter. In other words, because the founder has strictly performed the contract on his part, the government, on its part, is at liberty to violate it. This argument is equally unsound in
*619] morality and in law. *The founder proposed to appropriate his property, and to render his services, upon condition of receiving a charter which should secure to him and his associates certain privileges and immunities. He undertook the discharge of certain duties, in consideration of obtaining certain rights. There are rights and duties on both sides. On the part of the founder, there is the duty of appropriating the property, and of rendering the services imposed on him by the charter, and the right of having secured to him and his associates the administration of the charity, according to the terms of the charter, for ever. On the part of the government, there is the duty of maintaining and protecting all the rights and privileges conferred by the charter, and the right of insisting on the compliance of the trustees with the obligations undertaken by them, and of enforcing that compliance by all due and regular means. There is a plain, manifest, reasonable stipulation, mixed up of rights and duties, which cannot be separated but by the hand of injustice and violence. Yet the attempt now is, to break the mutuality of this stipulation ; to hold the founder's property, and yet take away that which was given him as the consideration upon which he parted with his property. The charter was a grant of valuable powers and privileges. The state now claims the right of revoking this grant, without restoring the consideration which it received for making the grant. Such a pretence may suit despotic power. It may succeed, where the authority of the legislature is limited by no rule, and bounded only by
*620] its will. It may prevail in those systems in which injustice is *not always unlawful, and where neither the fundamental constitution of the government sets any limits to power, nor any just sentiment or moral feeling affords a practical restraint against a power which in its theory is unlimited. But it cannot prevail in the United States, where power is restrained by constitutional barriers, and where no legislature is, even in theory, invested with all sovereign powers. Suppose, Dr. Wheelock had chosen to establish and perpetuate this charity, by his last will, or by a deed, in which he had given the property, appointed the trustees, provided for their succession, and prescribed their duties. Could the legislature of New Hampshire have broken in upon this gift, changed its parties, assumed the appointment of the trustees, abolished its stipulations and regulations, or imposed others? This will hardly be pretended, even in this bold and hardy argument—and why not? Because the gift, with all its restrictions and provisions, would be under the general and implied protection of the law. How is it, in our case? Why, in addition to the general and implied protection afforded to all rights and all property, it has an express, specific, covenanted assurance of protection and inviolability, given on good and sufficient considerations, in the usual manner of contracts between individuals. There can be no doubt that, in contemplation of law, a charter, such as this, is a contract. It takes effect only with the assent of those to whom it is granted. Laws enjoin duties, without or against the will of those who are to perform them. But the
*621] duties of the trustees, under this charter, are binding upon them *only because they have accepted the charter, and assented to its terms.

But taking this to be a contract, the argument of the defendant is, that it is not such a contract as the constitution of the United States protects. But why not? The constitution speaks of contracts, and ought to include all contracts for property or valuable privileges. There is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection. The decisions which have already been made in this court are a complete answer to the defendant's argument.

The attorney-general has insisted, that Dr. Wheelock was not the founder of this college; that other donors have better title to that character; and, that therefore, the plaintiff's argument, so far as it rests on the supposed fact of Dr. Wheelock's being the founder, fails. The first answer to this is, that the charter declares Dr. Wheelock to be the founder in express terms. It also recites facts, which would show him to be the founder, and on which the law would invest him with that character, if the charter itself had not declared him so. But if all this were otherwise, it would not help the defendant's argument. The foundation was still private; and whether Dr. Wheelock, or Lord Dartmouth, or any other person, possessed the greatest share of merit in establishing the college, the result is the same, so far as it bears on the present question. Whoever was founder, the visitatorial power was assigned to the trustees, by the charter, and it, therefore, is of no importance whether the founder was one individual or another. It *is narrowing the ground of our argument to suppose, that we rest it on the particular facts of Dr. Wheelock's being founder; although the fact is fully established by the charter itself. Our argument is, that this is a private corporation; that the founder of the charity, before the charter, had a right of visiting and governing it, a right growing out of the property of the endowment; that by the charter, this visitatorial power is vested in the trustees, as assignees of the founder; and that it is a privilege, right and immunity, originally springing from property, and which the law regards and protects, as much as it regards and protects property and privileges of any other description. By the charter, all proper powers of government are given to the trustees, and this makes them visitors; and from the time of the acceptance of the charter, no visitatorial power remained in the founder or his heirs. This is the clear doctrine of the case of *Green* v. *Rutherforth*, which has been cited, and which is supported by all the other cases. Indeed, we need not stop here in the argument. We might go further, and contend, that if there were no private founder, the trustees would pass the visitatorial power. Where there are charters, vesting the usual and proper powers of government in the trustees, they thereby become the visitors, and the founder retains no visitatorial power, although that founder be the king. 2 Ves. 328; 1 Ibid. 78. Even, then, if this college had originated with the government, and been founded by it; still, if the government had given a charter to *trustees, and conferred on them the powers of visitation and control, which this charter contains, it would by no means follow, that the government might revoke the grant, merely because it had itself established the institution. Such would not be the legal consequence. If the grant be of privileges and immunities, which are to be esteemed objects of value, it cannot be revoked. But this case is much stronger than that. Nothing is plainer than that Dr. Wheelock, from the

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recitals of this charter, was the founder of that institution. It is true, that others contributed; but it is to be remembered, that they contributed to Dr. Wheelock, and to the funds while under his private administration and control, and before the idea of a charter had been suggested. These contributions were obtained on his solicitation, and confided to his trust.

If we have satisfied the court that this charter must be regarded as a contract, and such a contract as is protected by the constitution of the United States, it will hardly be seriously denied, that the acts of the legislature of New Hampshire impair this contract. They impair the rights of the corporation as an aggregate body, and the rights and privileges of individual members. New duties are imposed on the corporation; the funds are directed to new purposes; a controlling power over all the proceedings of the trustees, is vested in a board of overseers unknown to the charter. Nine new trustees are added to the original number, in direct hostility with the provision of the charter. There are radical and essen-
*624] tial alterations, *which go to alter the whole organization and frame of the corporation.

If we are right in the view which we have taken of this case, the result is, that before, and at the time of, the granting of this charter, Dr. Wheelock had a legal interest in the funds with which the institution was founded; that he made a contract with the then existing government of the state, in relation to that interest, by which he devoted to uses beneficial to the public, the funds which he had collected, in consideration of the stipulations and covenants, on the part of the government, contained in the charter; and that these stipulations are violated, and the contract impaired, by the acts of the legislature of New Hampshire.

February 2d, 1819. The opinion of the court was delivered by MARSHALL, Ch. J.—This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled. A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December 1816, be valid, and binding on the trustees, without their assent, and not repugnant to the constitution of the United States; otherwise, it finds for the plaintiffs. *The superior court of judicature
*625] of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised—an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion, this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that

"no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument, they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

*The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body. [*626

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June 1816, and is entitled, "an act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives, of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect. The majority of the trustees of the college have refused to accept this amended charter, and have *brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated. [*627

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is to be found. The points for consideration are, 1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

1. On the first point, is has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state, for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause

in the constitution, if construed in its greatest latitude, *would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument, a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power, of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That, anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be
*629] confined, to cases of this *description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. 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 which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces.[2] Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of
*630] the college be *public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judg-

[1] See Newton *v.* Commissioners, 100 U. S. 557.
[2] Starr *v.* Hamilton, 1 Deady 268.

ment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property, for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds, in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist, that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them for ever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives, who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter. It becomes then the duty of the court, most *seriously to examine this charter, and to ascertain its true character. [*631

From the instrument itself, it appears, that about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England, for carrying on and extending his undertaking. In this pious work, he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money, which had been, and should be, contributed; which appointment Dr. Wheelock confirmed by a deed of trust, authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition, that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were, by that name, created a body *corporate, with power, for the use of the said college, to acquire real and personal property, and [*632 to pay the president, tutors and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office, until disapproved by the trustees. In case

of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal or disability; and also to make orders, ordinances and laws for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees. This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest *contributors. Yet the legal conclusion, from the
*633] facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college. The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him, in his last will, as the trustees of his charity-school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying, that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds, the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It *is then an eleemosynary (1 Bl.
*634] Com. 471), and so far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property,

so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity-school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have [*635
*supposed, that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England, and in America, enabled him to extend his care to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant-tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact, that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary—not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from *the [*636
act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument,

than a natural person exercising the same powers would be. If, then, a
*637] natural person, employed *by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals, for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property, in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognised, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit consitutes the consideration, and in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to
*638] advance the money necessary for its accomplishment, *provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being, a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred, which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither,
*639] in reason, can the incorporating act *change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and

the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point, we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province, Dartmouth College, as constituted by the charter. But, if these words, considered alone, could admit of doubt, that *doubt is completely [*640
removed, by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors *were originally named by the [*641
founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity-school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained, than on all that have been discussed. The founders of the college, at least, those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they

are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract, as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about
*642] *which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing for ever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives; they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So, with respect to the students who are to derive learning from this source; the corporation is a trustee for
*643] them also. Their potential rights, which, taken distributively, *are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet, then, as now, the donors would have no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interests in the property confided to their protection. Yet the

contract would, at that time, have been deemed sacred by all. What has since occurred, to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now, what is was in 1769.

This is plainly 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 [*644 contract, on the faith of which, real and personal 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 exception, taking this case out of the prohibition contained in the constitution.

It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The *case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, [*645 so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground, can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us, to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the

whole legal interest is in trustees, and can be asserted only by them. The
*646] donors, or claimants of the bounty, if *they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded, in order to leave them exposed to legislative alteration?

All feel, that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have, so far, withdrawn science, and the useful arts, from the action of the state governments. Why then should they be supposed so regardless of contracts made for the advancement of literature,
*647] as to intend to exclude them from provisions, made for the security *of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent, as to require a forced construction of that instrument, in order to effect it. These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps, delusive hope, that the charity will flow for ever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason
*648] to imagine, that the framers of our constitution were *strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the

most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that if allowed to continue themselves, they now are, and must remain for ever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature. It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students.

Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter, by the crown; but at whose suggestion were they named? By whom were they *selected? The charter informs us. Dr. Wheelock had represented, "that for many weighty reasons, it would be expedient, that [*649 the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted, that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these, is the doctor himself. If any others were appointed, at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation, which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably, with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity and *benevolence which suggested his undertaking. It surely cannot [*650 be assumed, that his trustees were selected without judgment. With as little probability can it be assumed, that while the light of science, and of liberal principles, pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that while the human race is rapidly advancing, they are stationary. Reasoning *à priori*, we should believe, that learned and

intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous, in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution, which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers?

*651] *From the review of this charter, which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated, that this corporation, thus constituted, should continue for ever; and that the number of trustees should for ever consist of twelve, and no more. By this contract, the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear, to require the support of argument, that all contracts and rights respecting property, remained unchanged by the revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter, at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the constitution of the United States has imposed this

*652] additional limitation, *that the legislature of a state shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder,

expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. *They contracted for a system, which should, so far as human foresight can [*653
provide, retain for ever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is re-organized; and re-organized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet, it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea, that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice *of, and appoint a president." According to the tenor of [*654
the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party, who appears in court to assert that interest; yet it is by no means clear, that the trustees of Dartmouth College have no beneficial interest in themselves. But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment

on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

WASHINGTON, Justice.—This cause turns upon the validity of certain laws of the state of New Hampshire, which have been stated in the case, and *655] which, it is contended by the counsel for the plaintiffs *in error, are void, being repugnant to the constitution of that state, and also to the constitution of the United States. Whether the first objection to these laws be well founded or not, is a question with which this court, in this case, has nothing to do: because it has no jurisdiction, as an appellate court, over the decisions of a state court, except in cases where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission.

The clause in the constitution of the United States which was drawn in question in the court from whence this transcript has been sent, is that part of the tenth section of the first article, which declares, that "no state shall pass any bill of attainder, *ex post facto* law, or any law impairing the obligation of contracts." The decision of the state court is against the title specially claimed by the plaintiffs in error, under the above clause, because *656] they contend, that the laws of New Hampshire, above referred to, *impair the obligation of a contract, and are, consequently, repugnant to the above clause of the constitution of the United States, and void. There are, then, two questions for this court to decide: 1st. Is the charter granted to Dartmouth College on the 13th of December 1769, to be considered as a contract? If it be, then, 2d. Do the laws in question impair its obligation?

1. What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on Cont. 6. Under this definition, says Mr. Powell, it is obvious, that every feoffment, gift, grant, agreement, promise, &c., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved: these must all concur, because the regular effect of all contracts is, on one side, to acquire, and on the other, to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. If a doubt could exist that a *657] grant is a contract, the point was decided in the case of *Fletcher* v. *Peck*, 6 Cranch 87, *in which it was laid down, that a contract is either

executory or executed; by the former, a party binds himself to do, or not to do, a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts.

If, then, a grant be a contract, within the meaning of the constitution of the United States, the next inquiry is, whether the creation of a corporation by charter, be such a grant, as includes an obligation of the nature of a contract, which no state legislature can pass laws to impair? A corporation is defined by Mr. Justice Blackstone (2 Bl. Com. 37) to be a franchise. It is, says he, "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise or freedom." This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the parties are the king and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. *The subjects of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. (2 Bl. Com. 37.) It implies, therefore, a contract not to re-assert the right to grant the franchise to another, or to impair it. There is also an implied contract, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit, and to govern the corporation, of which he is the acknowledged founder and patron, and also, that in case of its dissolution, the reversionary right of the founder to the property, with which he had endowed it, should be preserved inviolate. [*658

The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and of making by-laws. The obligation imposed upon them, and which forms the consideration of the grant is that of acting up to the end or design for which they were created by their founder. Mr. Justice BULLER, in the case of the *King v. Pasmore*, 3 T. R. 246, says, that the grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration *of the privileges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end of the compact. The charter of a corporation, says Mr. Justice Blackstone (2 Bl. Com. 484), may be forfeited through negligence, or abuse of its franchises, in which case, the law judges, that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void. It appears to me, upon the whole, that [*659

these principles and authorities prove, incontrovertibly, that a charter of incorporation is a contract.

2. The next question is, do the acts of the legislature of New Hampshire of the 27th of June, and 18th and 26th of December 1816, impair this contract, within the true intent and meaning of the constitution of the United States? Previous to the examination of this question, it will be proper clearly to mark the distinction between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this court of any other case, than the one immediately before it.

We are informed, by the case of *Philips v. Bury*, 1 Ld. Raym. 5; s. c. 2 T. R. 346, which contains all the doctrine of corporations connected with this point, that there are two kinds of corporations aggregate, viz., such as are for public government, and such as are for private charity. The first are those for the government of a town, city or the like; and being for *660] public advantage, are *to be governed according to the law of the land. The validity and justice of their private laws and constitutions are examinable in the king's courts. Of these, there are no particular founders, and consequently, no particular visitor; there are no patrons of these corporations. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full, to prove, that a college is a private charity, as well as an hospital, and that there is, in reality, no difference between them, except in degree; but they are within the same reason, and both eleemosynary.

These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and privileges, and their existence and subjection to public control. The one is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king, or government, may bestow upon it, and having no other founder or visitor than the king or government, the *fundator incipiens*. *The *661] validity and justice of its laws and constitution are examinable by the courts having jurisdiction over them; and they are subject to the general law of the land. It would seem reasonable, that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is, in reality, but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the foundation. These trustees or governors have no interest, no privileges or immunities, which are violated by such interference, and can have no more right to complain of them, than an ordinary trustee, who is called upon in a court of equity to execute the trust. They accepted the charter, for the public benefit alone, and there would seem to be no

reason, why the government, under proper limitations, should not alter or modify such a grant, at pleasure. But the case of a private corporation is entirely different. That is the creature of private benefaction, for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws and visitation, and not to the general control of the government; and all these powers, rights and privileges flow from the property of the founder in the funds assigned for the support of the charity. Although the king, by the grant of the charter, is, in some sense, the founder of all eleemosynary corporations, because, without his grant, they cannot exist; yet the patron or endower is the perficient founder, to whom belongs, as of right, all the powers and privileges, which [*662 have been described. With such a corporation, it is not competent for the legislature to interfere. It is a franchise, or incorporeal hereditament, founded upon private property, devoted by its patron to a private charity, of a peculiar kind, the offspring of his own will and pleasure, to be managed and visited by persons of his own appointment, according to such laws and regulations as he, or the persons so selected, may ordain.

It has been shown, that the charter is a contract on the part of the government, that the property with which the charity is endowed, shall be for ever vested in a certain number of persons, and their successors, to subserve the particular purposes designated by the founder, and to be managed in a particular way. If a law increases or diminishes the number of the trustees, they are not the persons which the grantor agreed should be the managers of the fund. If it appropriate the fund intended for the support of a particular charity, to that of some other charity, or to an entirely different charity, the grant is in effect set aside, and a new contract substituted in its place; thus disappointing completely the intentions of the founder, by changing the objects of his bounty. And can it be seriously contended, that a law, which changes so materially the terms of a contract, does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract, be of its essence, how *is it possible, that a new contract, substituted for, or engrafted on another, without such assent, should not [*663 violate the old charter?

This course of reasoning, which appears to be perfectly manifest, is not without authority to support it. Mr. Justice Blackstone lays it down (2 Bl. Com. 37), that the same identical franchise, that has been before granted to one, cannot be bestowed on another; and the reason assigned is, that it would prejudice the former grant. In the *King* v. *Pasmore*, 3 T. R. 246, Lord KENYON says, that an existing corporation cannot have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter. The reason is obvious; a charter is a contract, to the validity of which the consent of both parties is essential, and therefore, it cannot be altered or added to without such consent.

But the case of *Terrett* v. *Taylor*, 9 Cranch 43, fully supports the distinction above stated, between civil and private corporations, and is entirely in point. It was decided in that case, that a private corporation, created by the legislature, may lose its franchises by *misuser*, or *non-user*, and may be resumed by the government, under a judicial judgment of forfeiture. In

respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was purchased. But it is
*664] denied, that it has power to repeal *statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws; and that it can, by such repeal, vest the property of such corporations in the state, or dispose of the same to such purposes as it may please, without the consent or default of the corporators. Such a law, it is declared, would be repugnant both to the spirit and the letter of the constitution of the United States.

If these principles, before laid down, be correct, it cannot be denied, that the obligations of the charter to Dartmouth College are impaired by the laws under consideration. The name of the corporation, its constitution and government, and the objects of the founder, and of the grantor of the charter, are totally changed. By the charter, the property of this founder was vested in twelve trustees, and no more, to be disposed of by them, or a majority, for the support of a college, for the education and instruction of the Indians, and also of English youth, and others. Under the late acts, the trustees and visitors are different; and the property and franchises of the college are transferred to different and new uses, not contemplated by the founder. In short, it is most obvious, that the effect of these laws is to abolish the old corporation, and to create a new one in its stead. The laws of Virginia, referred to in the case of *Terrett* v. *Taylor*, authorized the overseers of the poor to sell the glebes belonging to the Protestant Episcopal Church, and to appropriate the proceeds to other uses. The laws in question divest the trustees of Dartmouth College of the property vested in them
*665] *by the founder, and vest it in other trustees, for the support of a different institution, called Dartmouth University. In what respects do they differ? Would the difference have been greater in principle, if the law had appropriated the funds of the college to the making of turnpike roads, or to any other purpose of a public nature? In all respects, in which the contract has been altered, without the assent of the corporation, its obligations have been impaired; and the degree can make no difference in the construction of the above provision of the constitution.

It has been insisted, in the argument at the bar, that Dartmouth College was a mere civil corporation, created for a public purpose, the public being deeply interested in the education of its youth; and that, consequently, the charter was as much under the control of the government of New Hampshire, as if the corporation had concerned the government of a town or city. But it has been shown, that the authorities are all the other way. There is not a case to be found which contradicts the doctrine laid down in the case of *Philips* v. *Bury*, viz., that a college, founded by an individual, or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government.

It is objected, in this case, that Dr. Wheelock is not the founder of Dartmouth College. Admit, he is not. How would this alter the case? Neither the king, nor the province of New Hampshire was the founder; and if the
*666] contributions made by the governor of New Hampshire, by those persons who *granted lands for the college, in order to induce its loca-

tion in a particular part of the state, by the other liberal contributors in England and America, bestow upon them claims equal with Dr. Wheelock, still it would not alter the nature of the corporation, and convert it into one for public government. It would still be a private eleemosynary corporation, a private charity, endowed by a number of persons, instead of a single individual. But the fact is, that whoever may mediately have contributed to swell the funds of this charity, they were bestowed at the solicitation of Dr. Wheelock, and vested in persons appointed by him, for the use of a charity, of which he was the immediate founder, and is so styled in the charter.

Upon the whole, I am of opinion, that the above acts of New Hampshire, not having received the assent of the corporate body of Dartmouth College, are not binding on them, and, consequently, that the judgment of the state court ought to be reserved.

JOHNSON, Justice, concurred, for the reasons stated by the Chief Justice.

LIVINGSTON, Justice, concurred, for the reasons stated by the Chief Justice, and Justices WASHINGTON and STORY.

STORY, Justice.—This is a cause of great importance, and as the very learned discussions, as well here, as in the state court, show, of no inconsiderable difficulty. There are two questions, to which the appellate jurisdiction of this court properly applies. *1. Whether the original charter of Dartmouth College is a contract, within the prohibitory [*667
clause of the constitution of the United States, which declares, that no state shall pass any "law impairing the obligation of contracts?" 2. If so, whether the legislative acts of New Hampshire of the 27th of June, and of the 18th and 27th of December 1816, or any of them, impair the obligations of that charter?

It will be necessary, however, before we proceed to discuss these questions, to institute an inquiry into the nature, rights and duties of aggregate corporations, at common law; that we may apply the principles, drawn from this source, to the exposition of this charter, which was granted emphatically with reference to that law.

An aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and *may contract with them in [*668
the same manner, as with any strangers. 1 Bl. Com. 469, 475; 1 Kyd on Corp. 13, 69, 189; 1 Wooddes. 471, &c. A great variety of these corporations exist, in every country governed by the common law; in some

of which, the corporate existence is perpetuated by new elections, made from time to time; and in others, by a continual accession of new members, without any corporate act. Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms and bounty of the founder, in such manner as he has directed; and in this class, are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. 1 Bl. Com. 469, 470, 471, 482. 1 Kyd on Corp. 25; 1 Wooddes. 474; *Attorney-General* v. *Whorwood*, 1 Ves. 534; *St. John's College* v. *Todington*, 1 W. Bl. 84; s. c. 1 Burr. 200; *Philips* v *Bury*, 1 Ld. Raym. 5; s. c. 2 T. R. 346; *Porter's Case*, 1 Co. 22 *b*, 23.

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many repects, they are so, although they involve some private interests; but strictly speaking, *669] public corporations *are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So, an hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.

This reasoning applies in its full force to eleemosynary corporations. An hospital, founded by a private benefactor, is, in point of law, a private corporation, although dedicated by its charter to general charity. So, a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. *670] This is the unequivocal doctrine of the authorities; and cannot be *shaken but by undermining the most solid foundations of the common law. *Philips* v. *Bury*, 1 Ld. Raym. 5, 9; s. c. 2 T. R. 346.

It was, indeed, supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity, which is extensive in its reach, may be called a public charity, in contradistinction to a charity embracing but a few definite objects. In this sense, the language was unquestionably used by Lord HARDWICKE in the case cited at the argument; *Attorney-General* v. *Pearce*,

2 Atk. 87 ; 1 Bac. Abr. tit. Charitable Uses, E, 589 ; and in this sense, a private corporation may well enough be denominated a public charity. So it would be, if the endowment, instead of being vested in a corporation, were assigned to a private trustee ; yet, in such a case, no one would imagine, that the trust ceased to be private, or the funds became public property. That the mere act of incorporation will not change the charity from a private to a public one, is most distinctly asserted in the authorities. Lord HARDWICKE, in the case already alluded to, says, "the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be ; but it is the extensiveness which will constitute it a public one. A devise to the poor of the parish is a public charity. Where testators leave it to the discretion of a trustee to choose out the objects, though each particular *object may be said to be private, yet in the extensiveness [*671
of the benefit accruing from them, they may properly be called public charities. A sum to be disposed of by A. B., and his executors, at their discretion, among poor house-keepers, is of this kind." The charity, then, may, in this sense, be public, although it may be administered by private trustees ; and for the same reason, it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public ; and consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation ; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord COKE.(*a*)

When, then, the argument assumes, that because the charity is public, the corporation is public, it manifestly confounds the popular, with the strictly legal, sense of the terms. And if it stopped here, it would not be very material to correct the error. But it is on this foundation, that a superstructure is erected, which is to compel a surrender of the cause. When the corporation is said, at the bar, to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such *an authority does not [*672
exist in the government, except where the corporation, is in the strictest sense, public ; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord HOLT down to the present day. *Rex v. Bury*, 1 Ld. Raym. 5 ; s. c. Comb. 265 ; Holt 715 ; 1 Show. 360 ; 4 Mod. 106 ; Skin. 447, and Ld. HOLT's opinion from his own MS., in 2 T. R. 346. Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them, without any assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary discretion of the government. Yet, who ever thought before, that the munificient gifts of private donors for general charity became instantaneously the property of the

(*a*) The case of Sutton Hospital, 10 Co. 23.

government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy, as we now find of law to sustain it.

An eleemosynary corporation, then, upon a private foundation, being a private corporation, it is next to be considered, what is deemed a foundation, *673] *and who is the founder. This cannot be stated with more brevity and exactness, than in the language of the elegant commentator upon the laws of England: "The founder of all corporations (says Sir William Blackstone), in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemysonary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the dotation of it, in which sense, the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense, we generally call a man the founder of a college or hospital." 1 Bl. Com. 480; 10 Co. 33.

To all eleemosynary corporations, a visitatorial power attaches, as a necessary incident; for these corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled. 1 Bl. Com. 480. The na- *674] ture and extent of this visitatorial power has been expounded *with admirable fulness and accuracy by Lord Holt in one of his most celebrated judgments. *Phillips* v. *Bury*, 1 Ld. Raym. 5; s. c. 2 T. R. 346. And of common right, by the dotation, the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs. 1 Bl. Com. 482. This visitatorial power is, therefore, an hereditament founded in property, and valuable, in intendment of law; and stands upon the maxim, that he who gives his property, has a right to regulate it in future. It includes also the legal right of patronage, for as Lord Holt justly observes, "patronage and visitation are necessary consequents one upon another." No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons, under the charter, it can be inferred, that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modifications or control, by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole power vests in the appointee. *Eden* v. *Foster*, 2 P. Wms. 325; *Attorney-General* v.

Middleton, 2 Ves. 327; *St. Johns College* v. *Todington*, 1 W. Bl. 84.; s. c. 2 Burr. 200; *Attorney-General* v. *Clare College*, 3 Atk. 662; s. c. 1 Ves. 78. In the construction *of charters, too, it is a general rule, that if [*675 the objects of the charity are incorporated, as for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character. *Philips* v. *Bury*, 1 Ld. Raym. 5; s. c. 2 T. R. 346; *Green* v. *Rutherforth*, 1 Ves. 472; *Attorney-General* v. *Middleton*, 2 Ibid. 327; *Case of Sutton Hospital*, 10 Co. 23, 31.

When a private eleemosynary corporation is thus created, by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn, and well settled doctrines of the common law.(*a*)

But an eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises, by *misuser* or *non-user* *of them. It is subject to the controling authority of its [*676 legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts. Where, indeed, the visitatorial power is vested in the trustees of the charity, in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds. 2 Fonbl. Eq., B. 2, pt. 2, ch. 1, § 1, note *a*; Coop. Eq. Pl. 292; 2 Kyd on Corp. 195; *Green* v. *Rutherforth*, 1 Ves. 462; *Attorney-General* v. *Foundling Hospital*, 4 Bro. C. C. 165; s. c. 2 Ves. jr. 42; *Eden* v. *Foster*, 2 P. Wms. 325; 1 Wooddes. 476; *Attorney-General* v. *Price*, 3 Atk. 108; *Attorney-General* v. *Lock*, 3 Ibid. 164; *Attorney-General* v. *Dixie*, 13 Ves. 519; *Ex parte Kirby Ravensworth Hospital*, 15 Ibid. 304, 314; *Attorney-General* v. *Earl of Clarendon*, 17 Ibid. 491, 499; *Berkhamstead Free School*, 2 Ves. & B. 134; *Attorney-General* v. *Corporation of Carmarthen*, Cooper 30; *Mayor, &c., of Colchester* v. *Lowten*, 1 Ves. & B. 226; *Rex* v. *Watson*, 2 T. R. 199; *Attorney-General* v. *Utica Ins. Co.*, 2 Johns. Ch. 371; *Attorney-General* v. *Middleton*, 2 Ves. 327. And where a corporation is a mere trustee of a charity, a court of equity will go yet further; and though it cannot appoint or remove a corporator, it will, yet, in a case of

(*a*) See Rex *v.* Pasmore, 3 T. R. 199, and the cases there cited.

*gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands. *Mayor, &c., of Coventry* v. *Attorney-General*, 7 Bro. P. C. 235 ; *Attorney-General* v. *Earl of Clarendon*, 17 Ves. 491, 499.

Thus much it has been thought proper to premise respecting the nature, rights, and duties of eleemosynary corporations, growing out of the common law. We may now proceed to an examination of the original charter of Dartmouth College.

It begins, by a recital, among other things, that the Rev. Eleazer Wheelock, of Lebanon, in Connecticut, about the year 1754, at his own expense, on his own estate, set on foot an Indian charity-school ; and by the assistance of other persons, educated a number of the children of the Indians, and employed them as missionaries and school-masters among the savage tribes ; that the design became reputable among the Indians, so that more desired the education of their children at the school, than the contributions in the American colonies would support ; that the said Wheelock thought it expedient to endeavor to procure contributions in England, and requested the Rev. Nathaniel Whitaker to go to England, as his attorney, to solicit contribution, and also solicited the Earl of Dartmouth and others, to receive the contributions and become trustees thereof, which they cheerfully agreed to, and he constituted them trustees accordingly, by a power of attorney, and they testified their acceptance by a sealed instrument ; that the said
*678] Wheelock also authorized the trustees to fix and determine *upon the place for the said school ; and to enable them understandingly to give the preference, laid before them, the several offers of the governments in America, inviting the settlement of the school among them ; that a large number of the proprietors of lands, in the western parts of New Hampshire, to aid the design, and considering that the same school might be enlarged and improved to promote learning among the English, and to supply the churches there with an orthodox ministry, promised large tracts of land for the uses aforesaid, provided the school should be settled in the western part of said province ; that the trustees, thereupon, gave a preference to the western part of said province, lying on Connecticut river, as a situation most convenient for said school : That the said Wheelock further represented the necessity for a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same ; that in the infancy of said institution, certain gentlemen whom he had already nominated in his last will (which he had transmitted to the trustees in England), to be trustees in America, should be the corporation now proposed ; and lastly, that there were already large contributions for said school in the hands of the trustees in England, and further success might be expected ; for which reason, the said Wheelock desired they might be invested with all that power therein, which could consist with their distance from the same. The charter, after these recitals, declares, that the king, considering the premises, and being willing to
*679] *encourage the charitable design, and that the best means of education might be established in New Hampshire for the benefit thereof, does, of his special grace, certain knowledge and mere motion, ordain and grant, that there be a college erected in New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes, and also of English youth and others ; that the trustees of said col-

lege shall be a corporation for ever, by the name of the Trustees of Dartmouth College: that the then governor of New Hampshire, the said Wheelock, and ten other persons, specially named in the charter, shall be trustees of the said college, and that the whole number of trustees shall for ever thereafter consist of twelve, and no more; that the said corporation shall have power to sue and to be sued by their corporate name, and to acquire and hold for the use of the said Dartmouth College, lands, tenements, hereditaments and franchises; to receive, purchase and build any houses for the use of said college, in such town in the western part of New Hampshire, as the trustees, or a major part of them, shall, by a written instrument, agree on; and to receive, accept and dispose of any lands, goods, chattels, rents, gifts, legacies, &c., not exceeding the yearly value of 6000*l.* It further declares, that the trustees, or a major part of them, regularly convened (for which purpose seven shall form a quorum), shall have authority to appoint and remove the professors, tutors and other officers of the college, and to pay them, and also such missionaries and school-masters as shall be employed by the trustees for instructing the Indians, salaries and *allowances, as well as other corporate expenses, out of the corporate funds. It [*680 further declares, that, the said trustees, as often as one or more of the trustees shall die, or, by removal or otherwise, shall, according to their judgment, become unfit or incapable to serve the interests of the college, shall have power to elect and appoint other trustees in their stead, so that when the whole number shall be complete of twelve trustees, eight shall be resident freeholders of New Hampshire, and seven of the whole number, laymen. It further declares, that the trustees shall have power, from time to time, to make and establish rules, ordinances and laws, for the government of the college, not repugnant to the laws of the land, and to confer collegiate degrees. It further appoints the said Wheelock, whom it denominates "the *founder* of the college," to be president of the college, with authority to appoint his successor, who shall be president, until disapproved of by the trustees. It then concludes with a direction, that it shall be the duty of the president to transmit to the trustees in England, so long as they should perpetuate their board, and as there should be Indian natives remaining to be proper objects of the bounty, an annual account of all the disbursements from the donations in England, and of the general plans and prosperity of the institution.

Such are the most material clauses of the charter. It is observable, in the first place, that no endowment whatever is given by the crown; and no power is reserved to the crown or government in any manner to alter, amend or control the charter. It is also apparent, *from the very [*681 terms of the charter, that Dr. Wheelock is recognised as the founder of the college, and that the charter is granted upon his application, and that the trustees were in fact nominated by him. In the next place, it is apparent, that the objects of the institution are purely charitable, for the distribution of the private contributions of private benefactors. The charity was, in the sense already explained, a public charity, that is, for the general promotion of learning and piety; but in this respect, it was just as much public before, as after the incorporation. The only effect of the charter was to give permanency to the design, by enlarging the sphere of its action, and granting a perpetuity of corporate powers and franchises, the better to

secure the administration of the benevolent donations. As founder, too, Dr. Wheelock and his heirs would have been completely clothed with the visitatorial power; but the whole government and control, as well of the officers as of the revenues of the college, being with his consent assigned to the trustees in their corporate character, the visitatorial power, which is included in this authority, rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the jurisdiction of the judicial tribunals of the state; but as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied.

From this summary examination it follows, that Dartmouth College was, under its original charter, a private eleemosynary corporation, endowed with
*682] *the usual privileges and franchises of such corporations, and among others, with a legal perpetuity, and was exclusively under the government and control of twelve trustees, who were to be elected and appointed, from time to time, by the existing board, as vacancies or removals should occur.

We are now led to the consideration of the first question in the cause, whether this charter is a contract, within the clause of the constitution prohibiting the states from passing any law impairing the obligation of contracts. In the case of *Fletcher* v. *Peck*, 6 Cranch 87, 136, this court laid down its exposition of the word "contract" in this clause, in the following manner: "A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one, in which a party binds himself to do, or not to do, a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is always estopped by his own grant." This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a state, under a legislative act. It determines, in the most unequivocal manner, that the grant
*683] of a state is a contract, within the clause of *the constitution now in question, and that it implies a contract not to re-assume the rights granted; *à fortiori*, the doctrine applies to a charter or grant from the king.

But it is objected, that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king, as an equivalent for the grant, it purporting to be granted *ex mero motû*, and further, that no contracts, merely voluntary, are within the prohibitory clause. It must be admitted, that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the constitution certainly did not mean to create any new obligations, or give any new efficacy to nude pacts. But it must, on the other hand, be also admitted, that the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. Now, when a contract has once passed, *bonâ fide*, into grant, neither the king, nor any private person, who may be the grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it

becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee. 2 Bl. Com. 441; Jenk. Cent. 104. And a gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed, comes completely *within the principle, and is, in the strictest sense of the terms, a grant. 2 Bl. Com. 317, 346; Shep. Touch. ch. 12, p. 227. Was it ever imagined, that land, voluntarily granted to any person by a state, was liable to be resumed, at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but in a country like ours, where thousands of land-titles had their origin in gratuitous grants of the states, it would go far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract, that the grantees should hold, and the grantor should not re-assume the grant, as much as if it had been founded on the most valuable consideration. [*684

But it is not admitted, that this charter was not granted for what the law deems a valuable consideration. For this purpose, it matters not how trifling the consideration may be; a pepper-corn is as good as a thousand dollars. Nor is it necessary, that the consideration should be a benefit to the grantor. It is sufficient, if it import damage or loss, or forbearance of benefit, or any act done or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer. *Pillans* v. *Van Mierop, per* Yates, J., 3 Burr. 1663; *Forth* v. *Stanton*, 1 Saund. 211, Williams' note 2, and the cases there cited.

With these principles in view, let us now examine *the terms of this charter. It purports, indeed, on its face, to be granted "of the special grace, certain knowledge and *mere motion*" of the king; but these words were introduced for a very different purpose from that now contended for. It is a general rule of the common law (the reverse of that applied in ordinary cases), that a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king, and most strictly against the grantee. Wherefore, it is usual to insert in the king's grants, a clause, that they are made, not at the suit of the grantee, but of the special grace, certain knowledge and mere motion of the king; and then they receive a more liberal construction. This is the true object of the clause in question, as we are informed by the most accurate authorities. 2 Bl. Com. 347; Finch's Law 100; 10 Rep. 112; 1 Shep. Abr. 136; Bull. N. P. 136. But the charter also, on its face, purports to be granted, in consideration of the premises in the introductory recitals. [*685

Now, among these recitals, it appears, that Dr. Wheelock had founded a charity-school at his own expense, on his own estate; that divers contributions had been made in the colonies, by others, for its support; that new contributions had been made, and were making, in England, for this purpose, and were in the hands of trustees appointed by Dr. Wheelock to act in his behalf; that Dr. Wheelock had consented to have the school established at such other place as the trustees should select; that offers had been made by several of the governments in America, inviting the* establishment of the school among them; that offers of land had also been [*686

made by divers proprietors of lands in the western parts of New Hampshire, if the school should be established there; that the trustees had finally consented to establish it in New Hampshire; and that Dr. Wheelock represented that, to effectuate the purposes of all parties, an incorporation was necessary. Can it be truly said, that these recitals contain no legal consideration of benefit to the crown, or of forbearance of benefit on the other side? Is there not an implied contract by Dr. Wheelock, if a charter is granted, that the school shall be removed from his estate to New Hampshire? and that he will relinquish all his control over the funds collected, and to be collected, in England, under his auspices, and subject to his authority? that he will yield up the management of his charity-school to the trustees of the college? that he will relinquish all the offers made by other American governments, and devote his patronage to this institution? It will scarcely be denied, that he gave up the right any longer to maintain the charity-school already established on his own estate; and that the funds collected for its use, and subject to his management, were yielded up by him, as an endowment of the college. The very language of the charter supposes him to be the legal owner of the funds of the charity-school, and in virtue of this endowment, declares him the founder of the college. It matters not, whether the funds were great or small; Dr. Wheelock had procured them, by his own influence, and they were under his control, to be applied to the *sup-
*687] port of his charity-school; and when he relinquished this control, he relinquished a right founded in property acquired by his labors. Besides, Dr. Wheelock impliedly agreed to devote his future services to the college, when erected, by becoming president thereof, at a period when sacrifices must necessarily be made to accomplish the great design in view. If, indeed, a pepper-corn be, in the eye of the law, of sufficient value to found a contract, as upon a valuable consideration, are these implied agreements, and these relinquishments of right and benefit, to be deemed wholly worthless? It has never been doubted, that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money; *à fortiori*, the relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration; for it is parting with a legal right. Even a right of patronage (*jus patronatus*) is of great value in intendment of law. Nobody doubts, that an advowson is a valuable hereditament; and yet, in fact, it is but a mere trust, or right of nomination to a benefice, which cannot be legally sold to the intended incumbent. 2 Bl. Com. 22, Christian's note. In respect to Dr. Wheelock, then, if a consideration be necessary to support the charter as a contract, it is to be found in the implied stipulations on his part in the charter itself. He relinquished valuable rights, and undertook a laborious office, in consideration of the grant of the incorporation.

*688] *This is not all. A charter may be granted upon an executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet *in fieri*. Upon the acceptance, there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it. This was the doctrine asserted by the late learned Mr. Justice Buller, in a modern case. *Rex* v. *Pasmore*, 3 T. R. 199, 239, 246. He there said,

"I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown, and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place," (*i. e.*, the place incorporated). It will not be pretended, that if a charter be granted for a bank, and the stockholders pay in their own funds, the charter is to be deemed a grant, without consideration, and therefore, revocable at the pleasure of the grantor. Yet, here, the funds are to be managed, and the services performed exclusively for the use and benefit of the stockholders themselves. And where the grantees are mere trustees to perform services, without reward, exclusively for the benefit of others, for public charity, can it be reasonably argued, that these services are less valuable to the government, than if performed for the private emolument of *the trustees themselves? In respect then to the trustees also, there was a valuable consideration for the charter, the consideration of services agreed to be rendered by them, in execution of a charity, from which they could receive no private remuneration. [*689

There is yet another view of this part of the case, which deserves the most weighty consideration. The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter, the trustees, and their successors, in their corporate capacity, were to receive, hold and exclusively manage all the funds so contributed. The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be for ever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the crown, with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation, according to the general law of the land. As, soon, then, as a donation was made to the corporation, there was an implied contract, springing up, and founded on a valuable consideration, that the crown would not revoke or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor, *upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter. [*690

In every view of the case, if a consideration were necessary (which I utterly deny) to make the charter a valid contract, a valuable consideration did exist, as to the founder, the trustees, and the benefactors. And upon the soundest legal principles, the charter may be properly deemed, according to the various aspects in which it is viewed, as a several contract with each of these parties, in virtue of the foundation, or the endowment of the college, or the acceptance of the charter, or the donations to the charity.

And here we might pause: but there is yet remaining another view of the subject, which cannot consistently be passed over without notice. It seems to be assumed by the argument of the defendant's counsel, that there is no contract whatsoever, in virtue of the charter, between the crown and

the corporation itself. But it deserves consideration, whether this assumption can be sustained upon a solid foundation.

If this had been a new charter, granted to an existing corporation, or a grant of lands to an existing corporation, there could not have been a doubt, that the grant would have been an executed contract with the corporation; as much so, as if it had been to any private person. But it is supposed, that as this corporation was not then in existence, but was created and its franchises bestowed, *uno flatu*, the charter cannot be construed a contract, because there was no person *in rerum naturæ*, with whom it might be made.

*691] Is this, however, a just and legal view of the *subject? If the corporation had no existence, so as to become a contracting party, neither had it, for the purpose of receiving a grant of the franchises. The truth is, that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority, wherever it is necessary to effectuate the objects of the grant. *Case of Sutton Hospital*, 10 Co. 23; *Buckland* v. *Fowcher*, cited, Ibid. 27–8, and recognised in *Attorney-General* v. *Bowyer*, 3 Ves. jr. 714, 726–7; s. p. Highmore on Mort. 200, &c. From the nature of things, the artificial person called a corporation, must be created, before it can be capable of taking anything. When, therefore, a charter is granted, and it brings the corporation into existence, without any act of the natural persons who compose it, and gives such corporation any privileges, franchises or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence, by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life, the franchises instantaneously attach to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose. Ibid. And if the corporation have an existence, before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it, than if granted by another instrument, at a subsequent period?

*692] It behooves those also, who hold, that a grant to a corporation, not then in existence, is incapable *of being deemed a contract, on that account, to consider, whether they do not, at the same time, establish, that the grant itself is a nullity, for precisely the same reason. Yet such a doctrine would strike us all, as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities, or rights or property on the corporation it created. It may be admitted, that two parties are necessary to form a perfect contract; but it is denied, that it is necessary, that the assent of both parties must be at the same time. If the legislature were voluntarily to grant land in fee, to the first child of A., to be hereafter born; as soon as such child should be born, the estate would vest in it. Would it be contended, that such grant, when it took effect, was revocable, and not an executed contract, upon the acceptance of the estate? The same question might be asked, in a case of a gratuitous grant by the king, or the legislature, to A. for life, and afterwards, to the heirs of B., who is then living. Take the case of a bank, incorporated for a limited period, upon the express condition that it shall pay out of its corporate funds, a certain sum, as the consideration for the charter, and after the corporation is organized,

a payment duly made of the sum, out of the corporate funds ; will it be contended, that there is not a subsisting contract between the government and the corporation, by the matters thus arising *ex post facto*, that the charter shall not be revoked, during the stipulated period ? Suppose, an act declaring that all persons, who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of certain *lands belonging to the state, in certain proportions ; if a person, afterwards born, [*693 pays the stipulated sum into the treasury, is it less a contract with him, than it would be with a person *in esse* at the time the act passed ? We must admit, that there may be future springing contracts, in respect to persons not now *in esse*, or we shall involve ourselves in inextricable difficulties. And if there may be, in respect to natural persons, why not also in respect to artificial persons, created by the law, for the very purpose of being clothed with corporate powers ? I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is *in esse*, and the franchises and property become vested and executed in it, the grant is just as much an executed contract, as if its prior existence had been established for a century.

Supposing, however, that in either of the views which have been suggested, the charter of Dartmouth College is to be deemed a contract, we are yet met with several objections of another nature. It is, in the first place, contended, that it is not a contract, within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institution, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest.

It is admitted, that the state legislatures have *power to enlarge, [*694 repeal and limit the authorities of public officers, in their official capacities, in all cases, where the constitutions of the states respectively do not prohibit them ; and this, among others, for the very reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities ; they are to exercise them only during the good pleasure of the legislature. But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens. Will it be contended, that the legislature of a state can diminish the salary of a judge, holding his office during good behavior? Such an authority has never yet been asserted, to our knowledge. It may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators ? If a municipal corporation be capable of holding

devises and legacies to charitable uses (as many municipal corporations *695] *are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it. *Terrett* v. *Taylor*, 9 Cranch 43; *Town of Pawlet* v. *Clark*, Ibid. 292.

As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts, recognised as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction *jure loci contractûs*. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution. Yet no one ever supposed, that when acquired *bonâ fide*, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court. Ibid. A general law, regulating *696] divorces from the contract of marriage, like a law regulating *remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract.(*a*) It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations were no longer observed, is, in no correct sense, a law impairing the obligations of the contract. Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. But if the argument means to assert, that the legislative power to dissolve such a contract, without such a breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive, why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition, as any other contract for a valuable consideration. A man has just as good a right *697] to his wife, as to the property acquired under a marriage *contract. He has a legal right to her society and her fortune; and to divest such right, without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate. I leave this case, however, to be settled, when it shall arise. I have gone

(*a*) See Holmes *v.* Lansing, 3 Johns. Cas. 73.

into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument derived from this source, does not press my mind with any new and insurmountable difficulty.

In respect also to grants and contracts, it would be far too narrow a construction of the constitution, to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private trustee, for the benefit of a particular *cestui que trust*, or for any special, private or public charity, cannot be the less a contract, because the trustee takes nothing for his own benefit. A grant of the next presentation to a church is still a contract, although it limit the grantee to a mere right of nomination or patronage. 2 Bl. Com. 21. The fallacy of the argument consists, in assuming the very ground in controversy. It is not admitted, that a contract with a trustee is, in its own nature, revocable, whether it be for special or general purposes, for public charity or particular beneficence. A private donation, vested in a trustee, for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee, and administer *in its own way. The truth is, that the government has no power to revoke a grant, even of its [*698 own funds, when given to a private person, or a corporation, for special uses It cannot recall its own endowments, granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.

Another objection growing out of, and connected with that which we have been considering, is, that no grants are within the constitutional prohibition, except such as respect property in the strict sense of the term; that is to say, beneficial interests in lands, tenements and hereditaments, &c., which may be sold by the grantees, for their own benefit: and that grants of franchises, immunities and authorities not valuable to the parties, as property, are excluded from its purview. No authority has been cited to sustain this distinction, and no reason is perceived to justify its adoption. There are many rights, franchises and authorities, which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. A grant of the next presentation to a church, limited to the grantee alone, has been already mentioned. A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is another instance. *A grant of lands [*699 to a trustee, to raise portions or pay debts, is, in law, a valuable grant, and conveys a legal estate. Even a power, given by will, to executors, to sell an estate for payment of debts is, by the better opinions and authority, coupled with a trust, and capable of survivorship. Co. Litt. 113 *a*, Harg. & Butler's note 2; Sugden on Powers 140; *Jackson* v. *Jansen*, 6 Johns. 73; *Franklin* v. *Osgood*, 2 Johns. Cas. 1; s. c. 14 Johns. 527; *Zebach* v. *Smith*, 3 Binn. 69; *Lessee of Moody* v. *Vandyke*, 4 Ibid. 7, 31; *Attorney-General* v. *Gleg*, 1 Atk. 356; 1 Bac. Abr. 586 (Gwillim's edit.). Many dignities and offices, existing at common law, are merely honorary, and without profit, and sometimes are onerous. Yet a grant of them has never been supposed the

less a contract on that account. In respect to franchises, whether corporate or not, which include a pernancy of profits, such as a right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank or bridge, there is no pretence to say, that grants of them are not within the constitution. Yet they may, in point of fact, be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseisin of them. Whenever they are the subjects of a contract or grant, they are just as much within the
*700] reach of the constitution as any other grant. *Nor is there any solid reason why a contract for the exercise of a mere authority should not be just as much guarded, as a contract for the use and dominion of property. Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him, for that very reason. But it is otherwise, where a power is to be exercised in aid of a right vested in the grantee. We all know, that a power of attorney, forming a part of a security upon the assignment of a *chose in action*, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest. *Walsh* v. *Whitcomb*, 2 Esp. 565 ; *Bergen* v. *Bennett*, 1 Caines' Cas. 1, 15 ; *Raymond* v. *Squire*, 11 Johns. 47. So, if an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best settled estates stand upon conveyances of this nature ; and there can be no doubt, that such grants are contracts within the prohibition in question.

In respect to corporate franchises, they are, properly speaking, legal estates, vested in the corporation itself, as soon as it is *in esse*. They are not mere naked powers, granted to the corporation ; but powers coupled with an interest. The property of the corporation rests upon the possession of its franchises ; and whatever may be thought, as to the corporators, it cannot be denied, that the corporation itself has a legal interest in them. It may sue and be sued for them. Nay, more, this very right is one of its
*701] ordinary *franchises. "It is likewise a franchise," says Mr. Justice Blackstone, "for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and do other corporate acts ; and each individual member of such corporation is also said to have a franchise or freedom." 2 Bl. Com. 37 ; 1 Kyd on Corp. 14, 16. In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or property, the counsel for the defendant are driven to contend, that the corporators or trustees are mere agents of the corporation, in whom no beneficial interest subsists ; and so nothing but a naked power is touched, by removing them from the trust ; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, but having no interest in them which can be the subject of contract. Neither of these positions is admissible. The former has been already sufficiently considered, and the latter may be disposed of in a few words. The corporators are not mere agents, but have vested rights, in their character, as corporators. The right to be a freeman of a corporation, is a valuable temporal right. It is a right of voting and acting in the cor-

porate concerns, which the law recognises and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such a right has always been deemed a valuable franchise or privilege. *Ashby* v. *White*, 2 Ld. Raym. 938; 1 Kyd on Corp. 16.

*This reasoning, which has been thus far urged, applies with full force to the case of Dartmouth College. The franchises granted by the charter were vested in the trustees, in their corporate character. The lands and other property, subsequently acquired, were held by them in the same manner. They were the private demesnes of the corporation, held by it, not, as the argument supposes, for the use and benefit of the people of New Hampshire, but, as the charter itself declares, "for the use of Dartmouth College." There were not, and in the nature of things, could not be, any other *cestui que use*, entitled to claim those funds. They were, indeed, to be devoted to the promotion of piety and learning, not at large, but in that college and the establishments connected with it: and the mode in which the charity was to be applied, and the objects of it, were left solely to the trustees, who were the legal governors and administrators of it. No particular person in New Hampshire possessed a vested right in the bounty; nor could he force himself upon the trustees as a proper object. The legislature itself could not deprive the trustees of the corporate funds, nor annul their discretion in the application of them, nor distribute them among its its own favorites. Could the legislature of New Hampshire have seized the land given by the state of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question cannot be answered in the affirmative, until it is established that the legislature may lawfully take the property of A. and give it to B.; and if it *could not take away or restrain the corporate funds, upon what pretence can it take away or restrain the corporate franchises? Without the franchises, the funds could not be used for corporate purposes; but without the funds, the possession of the franchises might still be of inestimable value to the college, and to the cause of religion and learning. [*702 [*703

Thus far, the rights of the corporation itself, in respect to its property and franchises, have been more immediately considered. But there are other rights and privileges, belonging to the trustees, collectively and severally, which are deserving of notice. They are intrusted with the exclusive power to manage the funds, to choose the officers, and to regulate the corporate concerns, according to their own discretion. The *jus patronatûs* is vested in them. The visitatorial power, in its most enlarged extent, also belongs to them. When this power devolves upon the founder of a charity, it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs, it escheats to the government. *Rex* v. *St. Catherine's Hall*, 4 T. R. 233. It is a valuable right, founded in property, as much so as the right of patronage in any other case. It is a right which partakes of a judicial nature. May not the founder as justly contract for the possession of this right, in return for his endowment, as for any other equivalent? and if, instead of holding it as an hereditament, he assigns it in perpetuity to the trustees of the corporation, is it less a valuable hereditament in their hands? The right is not merely a

collective right in all the trustees ; *each of them also has a franchise in it. Lord HOLT says, "it is agreeable to reason, and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit redound to the particular members, and be enjoyed by them in their private capacities. Where the privilege of election is used by particular persons, it is a particular right vested in each particular man." *Ashby* v. *White*, 2 Ld. Raym. 938, 952 ; *Attorney-General* v. *Dixie*, 13 Ves. 519. Each of the trustees had a right to vote in all elections. If obstructed in the exercise of it, the law furnished him with an adequate recompense in damages. If ousted unlawfully from his office, the law would, by a *mandamus*, compel a restoration.

It is attempted, however, to establish that the trustees have no interest in the corporate franchises, because it is said, that they may be witnesses, in a suit brought against the corporation. The case cited at the bar certainly goes the length of asserting, that in a suit brought against a charitable corporation, for a recompence for services performed for the corporation, the governors, constituting the corporation (but whether intrusted with its funds or not by the act of incorporation does not appear), are competent witnesses against the plaintiff. *Weller* v. *Governor of the Foundling Hospital*, 1 Peake's Cas. 153. But assuming this case to have been rightly decided (as to which, upon the authorities, there may be room to doubt), the
*705] corporators *being technically parties to the record (*Attorney-General* v. *City of London*, 3 Bro. C. C. 171 ; s. c. 1 Ves. jr. 243 ; *Burton* v. *Hinde*, 5 T. R. 174 ; *Nason* v. *Thatcher*, 7 Mass. 398 ; Phillips on Evid. 42, 52, 57 and notes ; 1 Kyd on Corp. 304, &c. ; Highmore on Mortm. 514), it does not establish, that in a suit for the corporate property vested in the trustees in their corporate capacity, the trustees are competent witnesses. At all events, it does not establish, that in a suit for the corporate franchises to be exercised by the trustees, or to enforce their visitatorial power, the trustees would be competent witnesses. On a *mandamus* to restore a trustee to his corporate or visitatorial power, it will not be contended, that the trustee is himself a competent witness, to establish his own rights, or the corporate rights. Yet, why not, if the law deems that a trustee has no interest in the franchise ? The test of interest assumed in the argument proves nothing in this case. It is not enough, to establish, that the trustees are sometimes competent witnesses ; it is necessary to show, that they are always so, in respect to the corporate franchises, and their own. It will not be pretended, that in a suit for damages for obstruction in the exercise of his official powers, a trustee is a disinterested witness. Such an obstruction is not a *damnum absque injuriâ*. Each trustee has a vested right, and legal interest, in his office, and it cannot be divested but by due course of law. The illustration, therefore, lends no new force to the argument, for it
*706] does not establish, that when their own rights *are in controversy, the trustees have no legal interest in their offices.

The principal objections having been thus answered, satisfactorily, at least, to my own mind, it remains only to declare, that my opinion, after the most mature deliberation is, that the charter of Dartmouth College, granted in 1769, is a contract within the purview of the constitutional prohibition.

I might now proceed to the discussion of the second question ; but it is necessary previously to dispose of a doctrine which has been very seriously

urged at the bar, viz., that the charter of Dartmouth College was dissolved at the revolution, and is, therefore, a mere nullity. A case before Lord THURLOW has been cited in support of this doctrine. *Attorney-General* v. *City of London*, 3 Bro. C. C. 171; s. c. 1 Ves. jr. 243. The principal question in that case was, whether the corporation of William & Mary College, in Virginia (which had received its charter from King William and Queen Mary), should still be permitted to administer the charity, under Mr. Boyle's will, no interest having passed to the college, under the will, but it acting as an agent or trustee, under a decree in chancery, or whether a new scheme for the administration of the charity should be laid before the court. Lord THURLOW directed a new scheme, because the college, belonging to an independent government, was no longer within the reach of the court. And he very unnecessarily added, that he could not now consider the college as a corporation, or as another report (1 Ves. jr. 243) states, *that he [*707 could not take notice of it, as a corporation, it not having proved its existence, as a corporation, at all. If, by this, Lord THURLOW meant to declare, that all charters acquired in America from the crown, were destroyed by the revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the crown, which would be monstrous. It is a principle of the common law, which has been recognised as well in this, as in other courts, that the division of an empire works no forfeiture of previously-vested rights of property. And this maxim is equally consonant with the common sense of mankind, and the maxims of eternal justice. *Terrett* v. *Taylor*, 9 Cranch 43, 50; *Kelly* v. *Harrison*, 2 Johns. Cas. 29; *Jackson* v. *Lunn*, 3 Ibid. 109; *Calvin's Case*, 7 Co. 27. This objection, therefore, may be safely dismissed without further comment.

The remaining inquiry is, whether the acts of the legislature of New Hampshire, now in question, or any of them, impair the obligations of the charter of Dartmouth College. The attempt certainly is to force upon the corporation a new charter, against the will of the corporators. Nothing seems better settled, at the common law, than the doctrine, that the crown cannot force upon a private corporation a new charter; or compel the old members to give up their own franchises, or to admit new members into the corporation. *Rex* v. *Vice-Chancellor of Cambridge*, 3 Burr. 1656; *Rex* v. *Pasmore*, 3 T. R. 240; 1 Kyd on Corp. 65; *Rex* v. *Larwood*, Comb. 316. Neither can the crown compel a man *to become a member of such [*708 corporation, against his will. *Rex* v. *Dr. Askew*, 4 Burr. 2200. As little has it been supposed, that under our limited governments, the legislature possessed such transcendent authority. On one occasion, a very able court held, that the state legislature had no authority to compel a person to become a member of a mere private corporation, created for the promotion of a private enterprise, because every man had a right to refuse a grant. *Ellis* v. *Marshall*, 2 Mass. 269. On another occasion, the same learned court declared, that they were all satisfied, that the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation. *Wales* v. *Stetson*, 2 Mass. 143, 146. These principles are so consonant with justice, sound policy and legal reasoning, that it is difficult to resist the impression of their perfect correctness. The application of

them, however, does not, from our limited authority, properly belong to the appellate jurisdiction of this court in this case.

A very summary examination of the acts of New Hampshire will abundantly show, that in many material respects they change the charter of Dartmouth College. The act of the 27th of June 1816, declares that the corporation known by the name of the Trustees of Dartmouth College shall be called the Trustees of Dartmouth University. That the whole number of *709] trustees shall be twenty-one, a majority *of whom shall form a *quorum;* that they and their successors shall hold, use, and enjoy for ever, all the powers, authorities, rights, property, liberties, privileges and immunities, heretofore held, &c., by the trustees of Dartmouth College, except where the act otherwise provides; that they shall also have power to determine the times and places of their meetings, and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof; to appoint and displace officers, and determine their duties and compensation; to delegate the power of supplying vacancies in any of the offices of the university for a limited term; to pass ordinances for the government of the students; to prescribe the course of education; and to arrange, invest and employ the funds of the university. The act then provides for the appointment of a board of twenty-five overseers, fifteen of whom shall form a *quorum*, of whom five are to be such *ex officio*, and the residue of the overseers, as well as the new trustees, are to be appointed by the governor and council. The board of overseers are, among other things, to have power, "to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors, and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new college buildings." The act then provides, that the president and professors shall *710] be nominated by the trustees, and appointed by the overseers, *and shall be liable to be suspended and removed in the same manner; and that each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards. The supplementary act of the 18th of December 1816, declares, that nine trustees shall form a *quorum*, and that six votes at least shall be necessary for the passage of any act or resolution. The act of the 26th of December 1816, contains other provisions, not very material to the question before us.

From this short analysis, it is apparent, that, in substance, a new corporation is created, including the old corporators, with new powers, and subject to a new control; or that the old corporation is newly organized and enlarged, and placed under an authority hitherto unknown to it. The board of trustees are increased from twelve to twenty-one. The college becomes a university. The property vested in the old trustees is transferred to the new board of trustees, in their corporate capacities. The *quorum* is no longer seven, but nine. The old trustees have no longer the sole right to perpetuate their succession, by electing other trustees, but the nine new trustees are, in the first instance, to be appointed by the governor and council, and the new board are then to elect other trustees, from time to time, as vacancies occur. The new board, too, have the power to suspend or remove any member, so that a minority of the old board, co-operating with the new

trustees, possess the unlimited power to remove the majority of the old board. The powers, too, of the corporation are varied. It has authority to organize new colleges in *"the university, and to establish an institute, and elect fellows and members thereof." A board of overseers [*711 is created (a board utterly unknown to the old charter), and is invested with a general supervision and negative upon all the most important acts and proceedings of the trustees. And to give complete effect to this new authority, instead of the right to appoint, the trustees are in future only to nominate, and the overseers are to approve, the president and professors of the university.

If these are not essential changes, impairing the rights and authorities of the trustees, and vitally affecting the interests and organization of Dartmouth College, under its old charter, it is difficult to conceive what acts, short of an unconditional repeal of the charter, could have that effect. If a grant of land or franchises be made to A., in trust for special purposes, can the grant be revoked, and a new grant thereof be made to A., B. and C., in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A. and B., for the use of a college, or an hospital, of private foundation, is not the obligation of that grant impaired, when the estate is taken from their exclusive management, and vested in them in common with ten other persons? If a power of appointment be given to A. and B., is it no violation of their right, to annul the appointment, unless it be assented to by five other persons, and then confirmed by a distinct body? If a bank or insurance company, by the terms of its charter, be under the management of directors, elected by the stockholders, would not the *rights acquired by the charter be im- [*712 paired, if the legislature should take the right of election from the stockholders, and appoint directors unconnected with the corporation? These questions carry their own answers along with them. The common sense of mankind will teach us, that all these cases would be direct infringements of the legal obligations of the grants to which they refer; and yet they are, with no essential distinction, the same as the case now at the bar.

In my judgment, it is perfectly clear, that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare, that the acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void.

In pronouncing this judgment, it has not for one moment escaped me, how delicate, difficult and ungracious is the task devolved upon us. The predicament in which this court stands in relation to the nation at large, is full of perplexities and embarrassments. It is called to decide on causes between citizens of different states, between a state and its citizens, and between different states. It stands, therefore in the midst of *jealousies [*713 and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a

motive to do more than its duty; and I trust, it will always be found to possess firmness enough to do that.

Under these impressions, I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavored to keep my steps *super antiquas vias* of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence, or popular appeal. We have nothing to do, but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgment of our country.

DUVALL, Justice, dissented. (*a*)

*714] *Upon the suggestion of the plaintiff's counsel, that the defendant had died since the last term, the court ordered the judgment to be entered *nunc pro tunc* as of that term, as follows:—

JUDGMENT.—This cause came on to be heard, on the transcript of the record, and was argued by counsel: And thereupon, all and singular the premises being seen, and by the court now here fully understood, and *715] mature deliberation being thereupon had, *it appears to this court, that the said acts of the legislature of New Hampshire, of the 27th of June and of the 18th and 26th of December, Anno Domini 1816, in the

(*a*) In the discussions which arose in France, in 1786, upon the new charter then recently granted to the French East India company, it seems to have been taken for granted, by the lawyers on both sides, to whom the questions in controversy were submitted by the company, and by the merchants who considered themselves injured by its establishment, that if the charter had regularly issued according to the forms of the French law, it was irrevocable, unless forfeited for *non-user* or *misuser*. The advocates (MM. LACRETELLE and BLONDE) who were consulted by the merchants of the kingdom opposed to the establishment of the company, denied its legal existence, on the ground, that the king had been surprised in his grant; that it was not yet perfected by the issuing of letters-patent, nor duly registered by the parliaments; and that it both might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy. On the other hand, it was contended by the company, that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was at the time solemnly protested against by the parliament of Paris as illegal); that their new grant might still be perfected by letters-patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested, as a right of property, of which they could not be deprived by any authority in the kingdom. "*En effet, quand le roi accorde un privilége exclusif, ce privilége est le prix d'une mise de fonds, dans un commerce hazardeux, dont l'entreprize est jugée avantageuse à l'etat. Delà naît par conséquent un contrat synallagmatique, qui se forme entre le souverain et les actionnaires. Delà naît un droit de propriété qui devient inébranlable pour le souverain lui-même.*" And of this opinion were the advocates (MM. HARDOIN, GERBIER and DE BONNIERES) consulted by the company. See a Collection of Tracts on the French East India company, Paris, 1788, in the Library of Congress.

record mentioned, are repugnant to the constitution of the United States, and so not valid ; and therefore, that the said superior court of judicature of the state of New Hampshire erred, in rendering judgment on the said special verdict in favor of the said plaintiffs ; and that the said court ought to have rendered judgment thereon, that the said trustees recover against the said Woodward, the amount of damages found and assessed, in and by the verdict aforesaid, viz., the sum of $20,000 : Whereupon, it is considered, ordered and adjudged by this court, now here, that the aforesaid judgment of the said superior court of judicature of the state of New Hampshire be, and the same hereby is, reversed and annulled : And this court, proceeding to render such judgment in the premises as the said superior court of judicature ought to have rendered, it is further considered by this court, now here, that the said trustees of Dartmouth College do recover against the said William Woodward the aforesaid sum of $20,000, with costs of suit ; and it is by this court, now here, further ordered, that a special mandate do go from this court to the said superior court of judicature, to carry this judgment into execution.

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APPENDIX.

NOTE I.

On Charitable Bequests.

(By Mr. Justice Story.)

Very few cases upon the subject of charitable donations have originated in the United States; in some of which, however, it is highly probable, the English doctrines on this subject may be of limited, and perhaps, even of general application. Where this is not the case, they may gratify professional curiosity, and afford materials for illustration in analogous branches of the law, as there is hardly any portion of the science in which more ingenious reasoning and indefatigable diligence have been employed. The object of the following sketch is to give a connected view of some of the principal features of the system.

It is highly probable, that the rudiments of the law of charities were derived from the civil law. One of the earliest fruits of the emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the church. (*a*) This permission was soon abused to so great a degree, as to induce Valentinian to enact a mortmain law, by which it was restrained. (*b*) But this restraint was gradually relaxed, and in the time of Justinian, it became fixed, as a maxim of Roman jurisprudence, that legacies to pious uses, which included all legacies destined for works of charity, whether they related to spiritual or temporal concerns, were of *peculiar favor, and to be deemed privileged testaments. (*c*) The construction of [*4
testaments of this nature was most liberal; and the legacies were never permitted to be lost, either by the uncertainty or failure of the persons or objects for which they were destined. Hence, if a legacy was given to the church, or to the poor generally, without any description of what church or what poor, the law sustained it, by giving it, in the first case, to the parish church of the place where the testator lived; and in the latter case, to the hospital of the same place; and if there was none, then to the poor of the same parish. (*d*) And in all cases where the objects were indefinite, the legacy was carried into effect under the direction of the judge having cognisance of the subject. (*e*) So, if a legacy were given for a definite object, which either was previously accomplished, or which failed, it was, nevertheless, valid, and applied under judicial direction to some other object. (*g*)

The high authority of the Roman law, coinciding with the religious notions of the times, could hardly fail to introduce the principles of pious legacies into the common

(*a*) Cod. Theodos. L. 16, t. 2, leg. 4.

(*b*) Ibid. leg. 20.

(*c*) 2 Domat, Loix Civiles, L. 4, t. 2, § 6, l. 1, 2, 7, p. 161, 163; Ferriere, Dict. h. t.; Swinburne, p. 1, § 13, p. 103.

(*d*) 2 Domat, L. 4, t. 2, § 6, l. 4, p. 162; Ferriere, Dict. h. t.

(*e*) 2 Domat, L. 4, t. 2, § 6, l. 5, p. 152; Swinburne, p. 1, § 16, p. 104.

(*g*) 2 Domat, L. 4, t. 2, § 6, l. 6, p. 162, 163.

law of England; and the zeal and learning of the ecclesiastical tribunals must have been constantly exercised to enlarge their operation. Lord THURLOW(*a*) was clearly of opinion, that the doctrine of charities grew up from the civil law; and Lord ELDON,(*b*) in assenting to that opinion, has judiciously remarked, that, as at an early period, the Ordinary had power to apply a portion of every man's personal estate to charity, when, afterwards, the statute compelled a distribution, it is not impossible, that the same favor should have been extended to charity, in wills which, by their own force, purported to authorize such a distribution. Be the origin, however, what it may, it cannot be

*5] *denied, that many of the privileges attached to pious legacies have been for ages incorporated into the English law. Indeed, in former times, the construction of charitable bequests was pushed to a most alarming extravagance; and though it has been in a great measure checked in later and more enlightened times, there are still some anomalies in the law of this subject, which are hardly reconcilable with any sound principles of judicial interpretation, or the proper exercise of judicial authority.

The history of the law of charitable bequests, previous to the statute of 43 Elizabeth, c. 4. which is emphatically called the statute of Charitable Uses, is extremely obscure.(*c*) Few traces remain of the exercise of jurisdiction over charities, in any shape, by any courts, previous to that period. Of the jurisdiction of chancery, nothing is ascertained with precision; and the few cases to be found at law turned mainly on the question whether the uses were charitable, or whether they were superstitious, within the statutes against superstitious uses. One of the earliest cases is Porter's Case, 1 Co. 22 *b*, in 34 & 35 Eliz., already alluded to in the decision of the supreme court in the text (*ante*, p. 33), but there the parties made out their case at law, upon general principles, without reference to any peculiar rules of construction as to charities; and Lord ELDON seems to think, that this was the usual course, prior to the time of Lord ELLESMERE.(*d*)

The statute of Elizabeth is now considered as the principal source of the law of charities, and has given rise to various questions. It is to this statute that the very extensive jurisdiction at present exercised by the court of chancery over subjects of this nature is generally, if not exclusively, to be referred.

*6] The statute, in its preamble,(*e*) enumerates certain uses which *it deems charitable. These are gifts, devises, &c., for the relief of aged, impotent and poor people; for maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools and scholars of universities; for repairs of bridges, ports, havens, causeways, *churches*, sea-banks, and highways; for education and preferment of orphans; for or towards the relief, stock or maintenance for houses of correction; for marriages of poor maids; for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; for relief or redemption of prisoners or captives; and for aid or ease of any poor inhabitants, concerning payments of fifteenths, setting out of soldiers, and other taxes. These are all the classes of uses which the statute reaches.

Since the passage of the staute, it has become a general rule that no uses are to be considered as charitable, and entitled, as such, to the protection of the law, except such as fall within the words or obvious intent of the statute. Sir WILLIAM GRANT has observed, that the word "charity," in its widest extent, denotes all good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses, is it employed in the court of chancery. There, its signification is chiefly derived from the statute of Elizabeth.(*g*) And, therefore, where a testatrix bequeathed her personal estate to the Bishop of Durham, &c., upon

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(*a*) White *v.* White, 2 Bro. C. C. 12.

(*b*) Moggridge *v.* Thackwell, 7 Ves. 36, 69; Mills *v.* Farmer, 1 Merivale 55, 94, 95.

(*c*) There was, in fact, a statute passsed respecting charitable uses, in 39 Eliz., c. 9; but it was repealed by the statute 43 Eliz. See Com. Dig., Charitable Uses, N, 14.

(*d*) Attorney-General *v.* Boyer, 3 Ves. 714, 726.

(*e*) See the statute at large, 2 Inst. 707; Bridgman's Duke on Charit. Uses, c. 1.

(*g*) Morice *v.* Bishop of Durham, 9 Ves. 399.

trust, to pay her debts and legacies, &c., and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham, in his own discretion, shall most approve of; and she appointed the Bishop her sole executor: upon a bill brought by the next of kin to establish the will and all the legacies, except the residuary bequest, and to declare that void, and a resulting trust for the next of kin, it was held, first, by the master of the rolls, and afterwards on appeal by the lord chancellor, that the residuary bequest was void, and that the property was a resulting trust for the next of kin, upon the ground, that objects of benevolence and liberality were not necessarily such as were within the statute of Elizabeth, and, *therefore, were [*7
objects too indefinite to be executed by the court; and if so, then the trust was void; for there can be no valid trust, over which the court of chancery will not assme a control. The master of the rolls said, those purposes are considered as charitable which the statute enumerates, or which, by analogies, are deemed within its spirit or intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear that liberality and benevolence can find numberless objects not included in the statute, in the largest construction of it. The use of the word "charitable," seems to have been purposely avoided in this will. The question is not whether the bishop may not apply the residue upon purposes strictly charitable, but whether he is bound so to apply it.(*a*)

The statute appoints a mode of inquiring into, and enforcing, all charitable uses, bequests, &c., by a commission issuing out of chancery; and the commissioners, upon such inquiry, are authorized to set down such orders, judgments and decrees, as that the lands, &c., may be faithfully employed for the charitable uses to which they were appointed; which orders, judgments and decrees are to stand good, until undone and altered by the court of chancery, upon due complaint of the party grieved. The statute, then, after enumerating certain exceptions to its operation, gives authority to the court of chancery to take order for the due execution of the orders, judgments and decrees of the commissioners, returned into chancery, and upon any complaint in the premises, and the hearing thereof, to "annul, diminish, alter or enlarge the said orders, judgments and decrees, &c., as shall be thought to stand with equity and good conscience, &c."

Shortly after the statute passed, it became a question, whether the court of chancery could grant relief by original bill, in cases within the statute, or whether the remedy was confined to the process by commission. That doubt remained until the reign of Charles II., when the question was finally settled in *favor of the jurisdiction [*8
by original bill.(*b*) It is not quite certain, upon what grounds the court arrived at this conclusion. The probability is, that in cases of charitable uses of a definite nature, where the trustees were alive, and the objects were certain, the court exercised a general jurisdiction by original bill, upon the same grounds as other bills; for definite trusts are maintained upon its ordinary jurisdiction. And as the court might, upon all commissions, alter, amend and enlarge the decrees of the commissioners, in all cases of charities within the statute, whether definite or indefinite, the proceeding in both cases became mixed in practice, and was inveterately established, before its correctness was very extensively questioned. And it was, in reality, more convenient for all parties, that the court should do that, in the first instance, which it certainly could do, after the return of the commission, upon complaint, so that public convenience and private interest might produce a general acquiescence in a course, which settled the law of the case without any circuity, until it became too late successfully to combat its regularity.(*c*)

(*a*) Morice *v.* Bushop of Durham, 9 Ves. 399. s. c. 10 Id. 522.

(*b*) Attorney-General *v.* Newman, 1 Ch. Cas. 157; s. c. 1 Lev. 284; West *v.* Knight, 1 Ch. Cas. 134; Anon., Ibid. 267; Parish of St. Dunstan *v.* Beauchamp, Ibid. 193; 2 Fonbl. Eq. b. 3, p. 2, c. 1, § 1.

(*c*) See Attorney-General *v.* Dixie, 13 Ves. 519; Kirkby Ravensworth Hospital, 15 Ibid. 305; Green *v.* Rutherforth, 1 Ibid. 362; Attorney-General *v.* Earl of Clarendon, 17 Ibid. 491, 499; 2 Fonbl. Eq. b. 3, p. 2, c. 1, § 1, note a; Cooper's Eq. Pl. 292; Bailiffs, &c., of Burford *v.* Lenthall, 2 Atk. 550.

Charitable Bequests.

Be this as it may, it is very certain, that chancery will now relieve by original bill, or information, upon gifts, bequests, &c., within the statute of Elizabeth; and informations by the attorney-general to settle, establish or direct charitable donations, are very common in practice.(*a*) But where the gift is not a charity within the statute, no information lies in the name of the attorney-general to enforce it.(*b*) And if an information be brought in the name of the attorney-general, and it appears to be such a charity as the court ought to support, though the information be mistaken in the title or prayer of relief, yet the bill will not be dismissed, but the court will support and
*9] establish *the charity in such manner as by law it may.(*c*) But the jurisdiction of chancery over charities does not exist, where there are local visitors appointed; for it then becongs to them and their heirs to visit and control the charity.(*d*)

As to what charities are within the statute, they are enumerated with great particularity in Duke on Charitable Uses, and Comyn's Digest, tit. Charitable Uses, N, 1. It is clear, that no superstitious uses are within its purview, such as gifts of money for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or *obiit*, or of any light or lamp in any church or chapel, or for prayers for the dead, or to such purposes as the superior of a convent or her successor may judge expedient.(*e*) But there are certain uses which, though not within the letter, are yet deemed charitable, within the equity of the statute; such as money given to maintain a preaching minister; to maintain a school-master in a parish; for the setting up an hospital for the relief of poor people; for the building of a sessions-house for a city or county; the making a new or repairing an old pulpit in a church, or the buying of a pulpit cushion or pulpit cloth; or the setting up of new bells where none are, or amending of them where they are out of order.(*f*)

And charities are so highly favored in the law that they have always been more liberally construed than the law will allow in gifts to individuals. In the first place, the same words in a will, applied to individuals, may require a very different construction when applied to the case of a charity. If a testator gives his property to such person as he shall hereafter name to be his executor, and afterwards appoint no exec-
*10] utor; or if, having appointed an executor, the latter dies in the lifetime *of the testator, and no other person is appointed in his stead, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favor of charity, chancery will, in both instances, supply the place of an executor, and carry into effect that which in the case of individuals must have failed altogether.(*g*) Again, in the case of an individual, if an estate be devised to such person as the executor shall name, and no executor is appointed, or, one being appointed, dies in the testator's lifetime, and no one is appointed in his place, the bequest amounts to nothing. Yet such bequest to charity would be good, and the court of chancery would, in such case, assume the office of executor.(*h*) So, if a legacy be given to trustees, to distribute in charity, and they die in the testator's lifetime, although the legacy is lapsed at law (and if they had taken to their own use, it would have been gone for ever), yet it will be enforced in equity.(*i*) Again,

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(*a*) Com. Dig. Chan. 2, N, 1. The proceeding by commission appears to have almost fallen practically into disuse. Ed. Rev. No. lxii. p. 383.

(*b*) Attorney-General *v.* Hever, 2 Vern. 382.

(*c*) Attorney-General *v.* Smart, 1 Ves. 72; Attorney-General *v.* Jeanes, 1 Atk. 355; Attorney-General *v.* Breton, 2 Ves. 425; Attorney-General *v.* Middleton, Ibid. 327; Attorney-General *v.* Parker, 1 Ibid. 43; s. c. 2 Atk. 576; Attorney-General *v.* Whittley, 11 Ves. 241, 247.

(*d*) Attorney-General *v.* Price, 3 Atk. 108; Attorney-General *v.* Governors of Harrow School, 2 Ves. 552.

(*e*) Duke's Char. Uses, 105; Bridg. Duke 349, 466; Adams *v.* Lambert, 4 Co. 104; Smart *v.* Spurrier, 6 Ves. jr. 567.

(*f*) Duke 105, 113; Bridg. Duke 354; Com. Dig. Char. Uses, N, 1.

(*g*) Mills *v.* Farmer, 1 Merivale 55, 96; Moggridge *v.* Thackwell, 7 Ves. 36.

(*h*) Mills *v.* Farmer, 1 Merivale 55, 94; Moggridge *v.* Thackwell, 7 Ves. 36; Attorney-General *v.* Jackson, 11 Ibid. 365, 367.

(*i*) Attorney-General *v.* Hickman, 2 Eq. Cas.

although in carrying into execution a bequest to an individual, the mode in which the legacy is to take effect must be of the substance of the legacy; yet, where the legacy is to charity, the court will consider charity as the substance; and in such cases, and in such cases only, if the mode pointed out fail, it will provide another mode by which the charity may take, but by which no other than charitable legatees can take.(*a*) A still stronger case is, that if the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain, or to some future act, the mode by which it is to be carried into effect, there, the court of chancery, if no mode is pointed out, will of itself supply the defect and enforce the charity.(*b*) *Therefore, it has been held, that if a man devise a sum of money to such charitable uses as he shall direct by a codicil annexed to his will, or by a note in writing, and afterwards leaves no direction by note or codicil, the court of chancery will dispose of it to such charitable purposes as it thinks fit.(*c*) So, if a testator bequeath a sum for such a school as he should appoint, and he appoints none, the court of chaucery may apply it for what school it pleases.(*d*) The doctrine has been pressed yet further; and it has been established that if the bequest indicate a charitable intention, but the object to which it is to be applied is against the policy of the law, the court will lay hold of the charitable intention and execute it for the purpose of some charity agreeable to the law, in the room of that contrary to it.(*e*) Thus, a sum of money bequeathed to found a Jews' synagogue has been taken by the court, and judicially transferred to the benefit of a foundling hospital!(*g*) And a bequest for the education of poor children in the Roman Catholic faith, has been decreed, in chancery, to be disposed of by the king at his pleasure, under his sign-manual.(*h*) [*11

Another principle equally well established is, that if the bequest be for charity it matters not how uncertain the persons or objects may be; or whether the persons who are to take are *in esse* or not; or whether the legatee be a corporation capable in law of taking or not; or whether the bequest can be carried into exact execution or not: in all these and the like cases, the court will sustain the legacy, and give it effect according to its own principles; and where a literal execution becomes inexpedient or impracticable, will execute it **cy pres.*(*i*) Thus, a devise of lands to the churchwardens of a parish (who are not a corporation capable of holding lands), for a charitable purpose, though void at law, will be sustained in equity.(*k*) So, if a corporation, for whose use a charity is designed, is not *in esse*, and cannot come into existence but by some future act of the crown, as for instance, a gift to found a new college, which requires an incorporation, the gift is valid and the court will execute it.(*l*) So, if a devise be to an existing corporation by a misnomer which makes it void at [*12

Abr. 193; s. c. Bridg. Duke 476; Moggridge *v.* Thackwell, 3 Bro. C. C. 517; s. c. 1 Ves. jr. 464; 7 Ibid. 36; Mills *v.* Farmer, 1 Merivale 55, 100; White *v.* White, 1 Bro. C. C. 12.

(*a*) Mills *v.* Farmer, 1 Meriv. 55, 100; Moggridge *v.* Thackwell, 7 Ves. 36; Attorney-General *v.* Berryman, 1 Dick. 168; Roper on Legacies 130.

(*b*) Mills *v.* Farmer, 1 Meriv. 55, 95; Moggridge *v.* Thackwell, 7 Ves. 36; White *v.* White, 1 Bro. C. C. 12.

(*c*) Attorney-General *v.* Syderfen, 1 Vern. 224; s. c. 2 Freem. 261, recognised in Mills *v.* Farmer, 1 Meriv. 55, and Moggridge *v.* Thackwell, 7 Ves. 36, 70.

(*d*) 2 Freem. 261; Moggridge *v.* Thackwell, 7 Ves. 36, 73, 74.

(*e*) De Costa *v.* De Pas, 1 Vern. 248; Attorney-General *v.* Guise, 2 Ibid. 266; Casey *v.* Abbot, 7 Ves. 490; Moggridge *v.* Thackwell, 7 Vern. 36, 75; Bridg. Duke 466.

(*g*) Ibid., and Mills *v.* Farmer, 1 Meriv. 55, 100.

(*h*) Cary *v.* Abbott, 7 Ves. 490.

(*i*) Attorney-General *v.* Oglander, 3 Bro. C. C. 166; Attorney-General *v.* Green, 2 Ibid. 492; Frier *v.* Peacock, Rep. temp. Finch, 245; Attorney-General *v.* Boultree, 2 Ves. jr. 380; Bridg. Duke 355.

(*k*) 1 Burn's Eccl. Law 226; Duke 33, 115; Com. Dig. Chancery, 2, N, 2; Attorney-General *v.* Combe, 2 Ch. Cas. 13; Rivett's case, Moore 890; Attorney-General *v.* Bowyer, 3 Ves. jr. 714; West *v.* Knight, 1 Ch. Cas. 135; Highmore on Mortm. 204; Tothill 34; Mills *v.* Farmer, 1 Meriv. 55.

(*l*) White *v.* White, 1 Bro. C. C. 12; Attorney-General *v.* Downing, Ambl. 550, 571; At-Attorney-General *v.* Bowyer, 3 Ves. jr. 714 727.

law.(*a*) So, where a devise was to the poor generally, the court decreed it to be executed in favor of three public charities in London.(*b*) So, a legacy towards establishing a bishop in America was held good, though none was yet appointed.(*c*) And where a charity is so given, that there can be no objects, the court will order a new scheme; but if objects may, though they do not, at present, exist, the court will keep the fund for the old scheme.(*d*) And when objects cease to exist, the court will new model the charity.(*e*)

In further aid of charities, the court will supply all defects of conveyances, where the donor hath a capacity and disposable estate, and his mode of donation does not contravene the provisions of any statute.(*g*) The doctrine is laid down with *great accuracy by Duke,(*h*) who says, that a disposition of lands, &c., to charitable uses is good, "albeit there be defect in the deed, or in the will, by which they were first created and raised, either in the party trusted with the use, where he is misnamed, or the like; or in the party for whose use, or that are to have the benefit of the use, or where they are not well named, or the like; or in the execution of the estate, as, where livery of seisin, or attornment, is wanting, or the like. And therefore, if a copyholder doth dispose of copyhold land to a charitable use, without a surrender; or a tenant in tail convey land to a charitable use, without a fine; or a reversion, without attornment or insolvency; and in divers such like cases, &c., this statute shall supply all the defects of assurance; for these are good appointments within the statute."(*i*) But a parol devise to charity out of lands, being defective as a will, which was the manner of the conveyance the testator intended to pass it by, it can have no effect as an appointment which he did not intend.(*k*) Yet, it has been nevertheless held, that where a married woman, administratrix of her husband, and entitled to certain personal estates belonging to him (viz., a *chose in action*), afterwards intermarried, and then, during coverture, made a will, disposing of that estate, partly to his heirs and partly to charity, the bequest, though void at law, was good as an appointment, under the statute of Elizabeth, for this reason, "that the goods in the hands of administrators are all for charitable uses, and the office of the ordinary and of the administrator is to em- *ploy them in pious uses, and the kindred *and children have no property nor pre-eminence but under the title of charity.(*l*)

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With the same view, the court of chancery was, in former times, most astute to find out grounds to sustain charitable bequests. Thus, an appointment under a will to charitable uses, that was precedent to the statute of Elizabeth, and thus utterly void, was held to be made good by the statute.(*m*) And a devise which was not within the statute was, nevertheless, decreed as a charity, and governed in a manner wholly different from that contemplated by the testator, although there was nothing unlawful in his intent; the lord chancellor giving as his reason, "*summa est ratio, quæ pro religione facit;*" and because the charity was for a weekly sermon, to be preached by a per-

(*a*) Anon., 1 Ch. Cas. 267; Attorney-General *v.* Platt, Rep. temp. Finch 221.

(*b*) Attorney-General *v.* Peacock, Rep. temp. Finch 245; Owens *v.* Bean, Ibid. 395; Attorney-General *v.* Syderfen, 1 Vern. 224; Clifford *v.* Francis, 1 Freem. 330.

(*c*) Attorney-General *v.* Bishop of Chester, 1 Bro. C. C. 144.

(*d*) Attorney-General *v.* Oglander, 3 Bro. C. C. 160.

(*e*) Attorney-General *v.* City of London, 3 Bro. C. C. 171; s. c. 1 Ves, jr. 243.

(*g*) Case of Christ's College, 1 W. Bl. 90; s. c. Ambl. 351; Attorney-General *v.* Rye, 2 Vern. 453, and Raithby's Notes; Rivett's Case, Moore 890; Attorney-General *v.* Burdett, 2 Vern. 755; Attorney-General *v.* Bowyer, 3 Ves. jr. 714; Damer's Case, Moore 822; Collinson's Case, Hob. 136; Mills *v.* Farmer, 1 Merivale 55.

(*h*) Duke 84, 85; Bridg. Duke 355.

(*i*) Duke 84, 85; Bridg. Duke 355; Christ's Hospital *v.* Hanes, Ibid. 370; 1 Burn's Eccl. Law 226; Tufnel *v.* Page, 2 Atk. 37; Tay *v.* Slaughter, Prec. Ch. 16; Attorney-General *v.* Rye, 2 Vern. 453; Rivett's Case, Moore 890; Kenson's Case, Hob. 136; Attorney-General *v.* Burdett, 2 Vern. 755.

(*k*) Jenner *v.* Harper, Prec. Ch. 389; 1 Burn's Eccl Law 226. And see Attorney-General *v.* Bains, Prec. Ch. 271.

(*l*) Damer's Case, Moore 822.

(*m*) Smith *v.* Stowell, 1 Ch. Cas. 195; Collinson's Case, Hob. 136.

son to be chosen by the greatest part of the best inhabitants of the parish, he treated this as a wild direction, and decreed that the bequests should be to maintain a catechist in the parish, to be approved by the bishop.(*a*) So, though the statute of Hen. VIII. of wills, did not allow of devises of land to corporations to be good, yet such devises to corporations for charitable uses were held good as appointments, under the statute of Elizabeth.(*b*) Lord Chancellor COWPER, in a case where he was called upon to declare a charitable bequest valid, notwithstanding the will was not executed according to the statute of frauds, and these cases were cited, observed, "I shall be very loth to break in upon the statute of frauds and perjuries in this case, as there are no instances where men are so easily imposed upon, as at the time of their dying, under the pretence of charity." "It is true, the charity of judges has carried several cases on the statute of Elizabeth great lengths; and this occasioned the distinction between operating by will and by appointment, which surely the makers of that statute never contemplated."(*c*)

It has been already intimated that the disposition of modern judges has been to curb this excessive latitude of construction *assumed by the court of chancery in early times. But, however strange some of the doctrines already stated may [*15 seem to us, as they have seemed to Lord ELDON, yet they cannot now be shaken, without doing (as he says) that, in effect, which no judge will avowedly take upon himself, to reverse decisions that have been acted upon for centuries.(*d*)

A charity must be accepted upon the same terms upon which it is given, or it must be relinquished to the right heir; for it cannot be altered by any new agreement between the heir of the donor and the donees.(*e*) And where several distinct charities are given to a parish, for several purposes, no agreement of the parishioners can alter or divert them to other uses.(*g*)

The doctrine of *cy pres*, as applied to charities, was formerly pushed to a most extravagant length;(*h*) but this sensible distinction now prevails, that the court will not decree execution of the trust of a charity, in a manner different from that intended, except so far as it is seen that the intention cannot be literally executed, but another mode may be adopted, consistent with the general intention, so as to execute it, though not in mode, yet in substance. If the mode becomes, by subsequent circumstances, impossible, the general object is not to be defeated, if it can be obtained.(*i*) And where there are no objects remaining to take the benefit of a charitable corporation, the court will dispose of its revenues by a new scheme, and upon the principles of *cy pres*. The rule is, that if lands are given to a corporation for charitable uses, which the donor contemplates to last for ever, the heir never can have the land back again; but if it becomes impracticable to execute the charity, another similiar charity must be substituted, so long as the corporation *exists. If the charity does not fail, *but* [*16 *the trustees or corporation fail*, the court of chancery will substitute itself in their stead, and carry on the charity.(*k*)

When the increased revenues of a charity extend beyond the original objects, the rule, as to the application of such increased revenues, is, that they are not a resulting trust for the heirs-at-law, but are to be applied to similiar charitable purposes, and to the augmentation of the benefit of the charity.(*l*)

(*a*) Attorney-General *v.* Combe, 2 Ch. Cas. 18,

(*b*) Griffith Flood's Case, Hob. 136.

(*c*) Attorney-General *v.* Bains, Prec. Ch. 261. And see Adlington *v.* Cann, 3 Atk. 141.

(*d*) Moggridge *v.* Thackwell, 7 Ves. 36, 87.

(*e*) Attorney-General *v.* Platt, Rep. temp. Finch 221. And see Margaret Professors, Cambridge, 1 Vern. 55.

(*g*) Man *v.* Ballet, 1 Vern. 42; 1 Eq. Cas. Abr. 99, pl. 4. And see Attorney-General *v.* Gleg, 1 Atk. 356; Ambl. 584.

(*h*) Attorney-General *v.* Minshall, 4 Ves. jr. 11, 14; Attorney-General *v.* Whitchurch, 3 Ibid. 141.

(*i*) Attorney-General *v.* Boultree, 2 Ves. 380, 387; s. c. 3 Ibid. 220; Attorney-General *v.* Whitchurch, Ibid. 141; Attorney-General *v.* Stepney, 10 Ibid. 22.

(*k*) Attorney-General *v.* Hicks, High. Mortm. 336, 353, &c.

(*l*) Attorney-General *v.* Earl of Winchelsea, 3 Bro. C. C. 373; High. Mortm. 187, 327; Ex parte Jortin, 7 Ves. 340; Bridg. Duke 588.

Charitable Bequests.

In former times, the disposition of chancery to assist charities was so strong, that, in equity, assets were held to satisfy charitable uses, before debts or legacies; though assets at law were held to satisfy debts, before charities. But even at law, charities were then preferred before other legacies.(*a*) And this, indeed, was in conformity to the civil law, by which charitable legacies are preferred to all others.(*b*) The doctrine, however, is now altered, and charitable legacies, in case of a deficiency of assets, abate in proportion as well as other pecuniary legacies.(*c*) And the courts have shown a disinclination to favor charities so far as to marshal a testator's assets, where the residue, bequeathed to charitable purposes, consists of mixed property, of real and personal estate, so as to direct the debts and other legacies to be paid out of the real estate, and reserve the personal to fulfil the charity, where the charity would be void as to the real estate.(*d*) Yet where there are general legacies, and the testator has charged his estate with payment of all his legacies, if the personal estate be not sufficient to pay the whole, the court has said, the charity shall be paid out of the personal estate, and the rest out of the real estate, that the whole may be performed *in toto*.(*e*)

It has been already stated, that charitable bequests are not void on account of any uncertainty as to the persons or objects *to which they are to be applied; *17]
although almost all the cases on this subject have been collected, compared and commented on with his usual diligence and ability by Lord Eldon, in two recent decisions. The first was the case of Moggridge *v.* Thackwell, 7 Ves. 36; s. c. 1 Ibid. 464; 3 Bro. C. C. 517, where the testator gave the residue of her personal estate to James Vaston, his executors and administrators, "desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen, who have large families and good characters; and appointed Mr. Vaston one of her executors. Mr. Vaston died in her lifetime, of which she had notice; but the will remained unaltered. The next of kin claimed the residue, as being lapsed by the death of Mr. Vaston; but the bequest was held valid, and established. In the next case (Mills *v.* Farmer, 1 Meriv. 55), the testator, by his will, after giving several legacies, proceeded, "the rest and residue of all my effects I direct may be divided for promoting the gospel in foreign parts, and in England; for bringing up ministers in different seminaries, and other charitable purposes, as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." The bill was filed by the next of kin, praying an account and distribution of the residue, as being undisposed of by the will or any codicil of the testator. The Master of the Rolls held the residuary bequest to charitable purposes void for uncertainty, and because the testator expressed not a present, but a future, intention to devise this property. Lord Eldon, however, upon an appeal, reversed the decree, and established the bequest, as a good charitable bequest, and directed it to be carried into effect accordingly.

It has been made a question, whether a court of equity, sitting in one jurisdiction, can execute any charitable bequests for foreign objects in another jurisdiction. In the case last stated, no objection ocurred to the residuary bequest, on the ground, that it contemplated the promotion of the gospel in foreign parts. In the case of Mr. Boyle's will, the bequest was not limited in terms to foreign countries or objects, but it was applied *to a foreign object, under a decree of the court of chancery; and when *18]
that object failed, a new scheme was directed.(*g*) There are several other cases, in which charities for foreign objects have been carried into effect. In the Provost, &c., of Edinburgh *v.* Aubery, Ambl. 236, there was a devise of 3500*l.* South Sea annuities to the plaintiffs, to be applied to the maintenance of poor laborers, residing in Edinburgh and the towns adjacent; and Lord Hardwicke said, he could not give any directions

(*a*) High. Mortm. 67.
(*b*) Fielding *v.* Bond, 1 Vern. 230.
(*c*) Ibid., and Raithby's Note, 2.
(*d*) High. Mort. 355; Moff *v.* Hodges, 2 Ves. 52.
(*e*) Attorney-General *v.* Graves, Ambl. 158; Arnold *v.* Chapman, 1 Ves. 108.
(*g*) Attorney-General *v.* City of London, 3 Bro. C. C. 171; s. c. 1 Ves. jr. 243.

as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the courts in Scotland; and therefore, he directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. So, in Oliphant *v.* Hendrie, 1 Bro. C. C. 571, where A., by will, gave 300*l.* to a religious society in Scotland, to be laid out in the purchase of heritable securities in Scotland, and the interest thereof to be applied to the education of twelve poor children, the court held it a good bequest. In Campbell *v.* Radnor, Ibid. 171, the court held a bequest of 7000*l.* to be laid out in the purchase of lands in Ireland, and the rents and profits to be distributed among poor people in Ireland, &c., to be valid in law, So, a legacy towards establishing a bishop in America, was supported, although no bishop was yet established.(*a*) In the late case of Curtis *v.* Hutton, 14 Ves. 537, a bequest of personal estate for the maintenance of a charity (a college) in Scotland was established; and in another still more recent case, a bequest in trust to the magistrates of Inverness, in Scotland, to apply the interest and income for the education of certain boys, was enforced as a charity.(*b*) Nor is the uniformity of the cases broke in upon by the doctrine in De Garcia *v.* Lawson, 4 Ves. 443, note. There, the bequests were to Roman *Catholic clergymen, or for Roman Catholic establishments, and were considered as void and illegal, being equally against the policy and the enactments of the British legislature. [*19

In respect to the mode of administering charities in chancery, it is not easy to extract from the authorities any consistent doctrine. Where the trust is for definite objects, and a trustee is appointed to administer it, who is *in esse* and capable of performing it, all the court does, is to watch over the charity, and see that it is executed faithfully, and without fraud; and if the trustees should die, so that it remains unexecuted, the court will then act as trustee, and do as the trustees ought to do, if living. But where money is given to charity, generally, without trustees or objects selected, in some cases, the charity has been applied by the king, under his sign manual, and in others, by the court of chancery, according to its usual course, that is, by a scheme reported by a master and approved by the court. It is not easy to perceive upon what principle the one case has in practice been distinguished from the other. Lord Eldon has observed, "all I can say upon it is, I do not know what doctrine could be laid down, that would not be met with some authority upon this point; whether the proposition is, that the crown is to dispose of it, or the master, by a scheme."(*c*)

It is laid down in books of authority, that the king, as *parens patriæ*, has the general superintendence of all charities, not regulated by charter, which he exercises by the keeper of his conscience, the chancellor; and therefore, the attorney-general, at the relation of some informant, when it is necessary, files *ex officio* an information in the court of chancery to have the charity properly established and applied.(*d*) And, it is added, that the jurisdiction thus established does not belong to the court of chancery, as a court of equity, but as administering the prerogative and the duties of the crown.(*e*) And it seems also to be held, that the jurisdiction vested in the Lord Chancellor by the statute of Elizabeth, is personal, and not in his ordinary *or extraordinary jurisdiction in chancery; like that, in short, which he exercises as to idiots and lunatics.(*g*) It seems in the highest degree reasonable, that the king, as *parens patriæ*, should have a right to guard and enforce all charities of a public nature, by virtue of his general superintending power over the public interests, where no other person is intrusted with such right. But where money is given to charity, generally and indefinitely, without any trustees, there does not seem to be any difficulty in con- [*20

(*a*) Attorney-General *v.* Bishop of Chester, 1 Bro. C. C. 444.

(*b*) Mackintosh *v.* Townsend, 16 Ves. 330.

(*c*) Moggridge *v.* Thackwell, 7 Ves. 36, 83.

(*d*) 3 Bl. Com. 427; 2 Fonbl. Eq. b. 3, p. 2, c. 1, § 1, and note a.

(*e*) Cooper's Eq. Pl. xxvii. 2 Fonbl. Eq. b. 2, p. 2, c. 1; Lord Falkland *v.* Bertie, 2 Vern. 342; Mitf. Eq. Pl. 29; Bailiffs, &c. of Burford *v.* Lenthall, 2 Atk. 551.

(*g*) Bailiffs, &c. of Burford *v.* Lenthall, 2 Atk. 551; 2 Fonbl. Eq. b. 2, p. 2, c. 1, § 1, and note a, § 3, and note i.

sidering it as a personal trust devolved on the crown, to be executed by the crown; and whether it be executed by the keeper of the king's conscience, his Lord Chancellor, as his personal delegate, or by himself under his sign manual, is not very material, and may well enough be considered as an authority distinct from that belonging to a court of equity. But where there is a trust and trustees with some general or specific objects pointed out, or trustees for indefinite or general charity, it is not easy to perceive, why, as a matter of trust, a court of equity may not take cognisance of it, in virtue of its ordinary jurisdiction; and the better authorities would seem to countenance this view of the subject.(*a*) At all events, where there are trustees, and the trust is for a definite object, and sustainable in law, there seems no reason why a court of equity, as such, may not take cognisance of such trust, at the suit of any competent party, whether the attorney-general or any interested private relator, as well as of any other trust, the execution of which is sought of the court.

In respect, however, to cases of indefinite trusts, or trusts where some general objects are pointed out, the distinction which appears to be most reconcilable with the cases, and to be acted upon in the modern decision, is this: that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king,
*21] by sign manual; *but where the execution is to be by a trustee, with general or some objects pointed out, whether such trustee survive the testator or not, there, the administration of the trust will be taken by the court of chancery (either as personal delegate of the crown or as a court of equity), and managed under a scheme reported by a master, and approved by the court.(*b*)

As to the remedy for misapplication of the charity funds, &c., in cases within the statute of Elizabeth, a proper, though not an exclusive remedy, is by commission under the statute.(*c*) But as the statute does not extend to any college, hospital or free school, which have special visitors, or governors or overseers appointed by their founders,(*d*) it is necessary to consider what is the remedy for frauds or misconduct in such cases. As to this, it may be observed, that all trustees, who are the managers of the revenues of such charities, are subject to the general superintending power of the court of chancery, not as, of itself, possessing a visitatorial power or a right to control the charity, but as possessing a general jurisdiction of an abuse of trusts, to redress grievances, and suppress frauds.(*e*) And if a corporation be the mere trustee of a charity, and grossly abuses the trust, the court of chancery will take it away from them, and vest it in other hands.(*g*) But the general controlling power of the court over charities, does not extend to a charity regulated by governors, under a charter, unless they have also the management of the revenues, and abuse their trust; and this will not be presumed, but must be apparent, and made out in evidence.(*h*)

*22] *It seems, that with a view to encourage the discovery of charitable donations, given for indefinite purposes, it is the practice for the crown, to reward the

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(*a*) Moggridge *v.* Thackwell, 7 Ves. 36, 83, 85, 86; Mills *v.* Farmer, 1 Meriv. 55; Paice *v.* Archbishop of Canterbury, 14 Ves. 364; Attorney-General *v.* Mathews, 2 Lev. 167; Attorney-General *v.* Wansay, 15 Ves. 231; Attorney-General v. Price, 17 Ves. 371; Waldo *v.* Caley, 16 Ibid. 206.

(*b*) Ibid.

(*c*) Bridg. Duke 590, 602. This proceeding appears to have almost fallen practically into disuse. Edin. Review, vol. 31, p. 503. It has been mentioned before, that the proceedings may be by information or original bill; and by a recent statute (52 Geo. III., c. 101), a more summary remedy is given by petition.

(*d*) Stat. 43 Eliz., c. 4, 2d proviso. Attorney-General *v.* Smart, 1 Ves. 72; Attorney-General *v.* Harrow School, 2 Ibid. 551.

(*e*) Fonbl. b. 2, p. 2, c. 1, § 1, note *a*; and the authorities cited by Mr. Justice Story, in the case of Dartmouth College *v.* Woodward (*ante*). See also, Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371, 384, 386.

(*g*) Attorney-General *v.* Mayor, &c., of Coventry, 7 Bro. P. C. 235; Attorney-General *v.* Earl of Clarendon, 17 Ves. 491, 499; Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 389. Bridg. Duke 574, &c.

(*h*) Attorney-General *v.* Foundling Hospital, 2 Ves. jr. 42.

persons who make the communication, if they can bring themselves within the scope of the charity, by giving them a part of the fund; and the like practice, whether well or ill founded, takes place in relation to escheats.(*a*)

These are the principal doctrines and decisions under the statute of Elizabeth, of charitable uses, which it seemed most important to bring in review before the learned reader. And it may not be useless to add, that the statute of mortmain and charities of the 9th of George II., c. 36, has very materially narrowed the extent and operation of the statute of Elizabeth, and has formed a permanent barrier against what the statute declares a "public mischief," which "had of late greatly increased, by many large and improvident alienations or dispositions made by languishing and dying persons, or by others, to uses, called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." It was the original design of this note, to have included a summary view of the principal clauses of this statute, and the decisions which have followed it; but it is already extended to so great a length, that it is thought best to omit it. The learned reader will, however, find a very accurate statement of both in Mr. Justice Blackstone's Commentaries (2 Bl. Com. 268), and in Bridgman's Duke on Charitable Uses, and Highmore's History of Mortmain and Charitable Uses. This statute was never extended to or adopted by the colonies, in general.(*b*) But certain of the provisons of it, or of the older statutes of mortmain (7 Edw. I., stat. 2, *De Religiosis;* the 13 Edw. I., c. 32; the 15 Richard II., c. 5; and the 23 Hen. VIII., c. 10), have been adopted by some of the states of the Union;(*c*) and it deserves the consideration of every wise and enlightened American legislator, whether provisions similar to those of *this celebrated statute are not proper to be enacted in this country, with a view to prevent undue influence and imposition upon pious and feeble minds, in their last moments, and to check that unhappy propensity, which sometimes is found to exist, under a bigotted enthusiasm, and the desire to gain fame as a religious devotee, at the expense of all the natural claims of blood and parental duty to children. [*23

NOTE II.

Different public Acts by which the Government of the United States has recognised the existence of a Civil War between Spain and her American Colonies.

Extract from the President's Message to Congress, November 17th, 1818.

"In suppressing the establishment at Amelia Island, no unfriendliness was manifested towards Spain, because the post was taken from a force which had wrested it from her. The measure, it is true, was not adopted in concert with the Spanish government, or those in authority under it; because, in transactions connected with the war in which Spain and the colonies are engaged, it was thought proper, in doing justice to the United States, to maintain a strict impartiality towards both the belligerent parties, without consulting or acting in concert with either. It gives me pleasure to state, that the governments of Buenos Ayres and Venezuela, whose names were assumed, have explicitly disclaimed all participation in those measures, and even the knowledge of them, until communicated by this government, and have also expressed their satisfaction that a course of proceedings had been suppressed, which, if justly imputable to them, would dishonor their cause.

(*a*) *Per* Lord ELDON, in Moggridge *v.* Thackwell, 7 Ves. 36, 71.

(*b*) Attorney-General *v.* Stewart, 2 Merivale 143.

(*c*) 3 Binn. Appendix, 626; Laws of New York, sess. 36, c. 60, § 4; 2 Caines Cas. 337.

South American Civil War.

"The civil war, which has so long prevailed between Spain, and the provinces in
*24] South America, still continues without any *prospect of its speedy termination. The information respecting the condition of those countries, which has been collected by the commissioners, recently returned from thence, will be laid before congress, in copies of their reports, with such other information as has been received from other agents of the United States.

"It appears, from these communications, that the government at Buenos Ayres declared itself independent, in July 1816, having previously exercised the power of an independent government, though in the name of the king of Spain, from the year 1810: that the Banda Oriental, Entre Rios and Paraguay, with the city of Santa Fe, all of which are also independent, are unconnected with the present government of Buenos Ayres: that Chili had declared itself independent, and is closely connected with Buenos Ayres: that Venezuela has also declared itself independent, and now maintains the conflict with various success; and that the remaining parts of South America, except Monte Video, and such other portions of the eastern bank of the La Plata as are held by Portugal, are still in the possession of Spain, or in a certain degree, under her influence.

"By a circular note addressed by the ministers of Spain to the allied powers with whom they are respectively accredited, it appears, that the allies have undertaken to mediate between Spain and the South American provinces, and that the manner and extent of their interposition would be settled by a congress, which was to have met at Aix-la-Chapelle, in September last. From the general policy and course of proceeding observed by the allied powers in regard to this contest, it is inferred, that they will confine their interposition to the expression of their sentiments, abstaining from the application of force. I state this impression, that force will not be applied, with the greater satisfaction, because it is a course more consistent with justice, and likewise authorizes a hope that the calamities of the war will be confined to the parties only, and will be of shorter duration.

"From the view taken of this subject, founded on all the information that we have been able to obtain, there is good cause to be satisfied with the course heretofore pur-
*25] sued by the United *States, in regard to this contest, and to conclude, that it is proper to adhere to it, especially in the present state of affairs."

Extract from Mr. Commissioner Rodney's report.

"Their private armed vessels are subjected to very strict regulations, agreeable to their prize code, which is among the original papers presented, and herewith delivered. It may be proper, in this place, to introduce the subject of the irregular conduct of the privateers under the patriot flag, against which the commissioners were directed to remonstrate. Having taken an opportunity of explaining to Mr. Tagle, the secretary of state, the proceedings of our government relative to Amelia Island and Galveston, agreeable to their instructions, the commissioners embraced a suitable occasion, to urge the just cause of complaint, which the malpractices of private armed vessels, wearing the patriot colors, had furnished our government. On both topics they had long and interesting conversations. With the conduct of the government respecting Amelia Island and Galveston, Mr. Tagle expressed himself perfectly satisfied, and he disclaimed for his government any privity or participation in the lodgments made at those places, by persons acting in the name of the patriots of South America. In reference to the acts of cruisers under the patriot flags, he said, he was sensible that great irregularities had occurred, though his government had done everything in their power to prevent them, and were willing, if any instance of aggression were pointed out, to direct an inquiry into the case, and if the facts were established, to punish those concerned, and redress the individuals. He professed his readiness to adopt any measures that would more effectually prevent a recurrence of such acts, in which he expressed his belief, that the privateers of Buenos Ayres had rarely participated, though the character of the government had suffered from the conduct of others. He stated, that they had, on

one occasion, sent out some of their public vessels to examine all cruisers wearing the Buenos Ayrean flag, to see that they were lawfully commisioned, *and to ascertain whether they had violated their instructions." [*26

Extract from Mr. Commissioner Bland's report.

"In a short time after our introduction to the director, and in about a week after our arrival, we waited on the secretary of state, as being the most formal and respectful mode of making our communications to this new and provisional government. We stated to the secretary, that our government had not viewed the struggle now pending between the revolutionary provinces of South America and Spain, merely as a rebellion of colonists; but as a civil war, in which each party was entitled to equal rights and equal respect; that the United States had, therefore, assumed, and would preserve with the most impartial and the strictest good faith, a neutral position; and in the preservation of this neutrality, according to the established rules of the law of nations, no rights, privileges or advantages would be granted by our government to one of the contending parties, which would not, in like manner, be extended to the other. The secretary expressed his approbation of this course; but, in an interview subsequent to the first, when the neutral position of the United States was again spoken of, he intimated a hope, that the United States might be induced to depart from its rigid neutrality in favor of his government; to which we replied, that as to what our government might be induced to do, or what would be its future policy towards the patriots of South America, we could not, nor were we authorized to say anything.

"We stated to the secretary, that it had been understood, that many unprincipled and abandoned persons, who had obtained commissions as privateers, from the independent patriot government, had committed great depredations on our commerce; and had evidently got such commissions, not so much from any regard to the cause of independence and freedom, as with a view to plunder; and that we entertained a hope, that there would be a due degree of circumspection exercised by *that government, in granting commissions, which in their nature were so open to abuse. [*27

"The secretary replied, that there had hitherto been no formal complaint made against any of the cruisers of Buenos Ayres; and if any cause of complaint should exist, his government would not hesitate to afford proper redress, on a representation and proof of the injury; that the government of Buenos Ayres had taken every possible precaution in its power, in such cases; that it had established and promulgated a set of rules and regulations for the government of its private armed vessels, a copy of which should be furnished us; and that it had, in all cases, as far as practicable, enjoined and enforced a strict observance of those regulations, and the law of nations."

Extract from Mr. Commissioner Bland's report relative to Chili.

"I then told him, that the government of the United States had been informed, that some of the cruisers, under the real flag of the patriot authorities, had committed considerable violations on our commerce; that if any such wrongs were to be committed by armed vessels, sailing under the Chileno flag, he could not but perceive, how inevitably such acts would tend to disturb all harmony between the two countries, and to crush, in the very formation, every friendly relation that might be begun, and desired to be matured, between the two nations; since my government would feel itself bound to protect the rights of its citizens against the insults or injuries of any other people, however deeply it might regret the repulsive measures it was thus driven to adopt; and that the president would wish to be informed, if there were any prize courts yet established in the country; and, if any, what regulations had been adopted for the government of the public and private armed vessels of Chili. The director said, that whatever cause of complaint the United States might have against the people of any other of the patriot powers, none, he felt satisfied could be made against Chilenos, or those under the flag of Chili; because, until very *lately, there were no shipping or vessels of any kind belonging to it, excepting, indeed, some fishing boats; and [*28

that within a few months only, some few vessels had been commissioned; that he had heard of abuses committed under the flag of other patriot powers; and to prevent the like, as far as practicable, from being perpetrated by those of Chili, it had been determined to put on board each, an officer, and such a number of marines as would be able to control and prevent the mischievous propensities of seamen; that with regard to matters of prize, they were brought before the ordinary and temporary tribunals of the country, until more formal and systematic institutions could be established: and, that for the regulation and government of armed vessels, a set of rules and orders had been adopted, a copy of which should be furnished me, which was accordingly handed me, and accompanies this as document marked A."(*a*)

An Ordinance of the Government of Buenos Ayres, regulating Privateers.

By the Supreme Director of the United Provinces of South America.

The bloody war which King Ferdinand VII. has, since his restoration to the throne of his ancestors, prosecuted, through his myrmidons, against all the inhabitants of the new world, who have claimed their natural freedom, demands that a recourse should be had to those measures of retaliation, which the law of nations permits, in order to make the Spanish nation sensible of the consequences attending the barbarous obstinacy of her monarch, fascinated by corrupted ministers, against the just claims of the injured Americans.

The insults offered to mankind by the cruel agents of the Court of Madrid, and the approbation by which it has confirmed all the acts of devastation, which, in contempt of divine and human laws, the Spanish leaders have committed, both with fire and
*29] sword, through all parts of America, unfortunately visited *by them, would, in the opinion of all the world, justify any act of reprisals. But being unwilling to tarnish, by acts unworthy of an enlightened age, the holy principles on which the emancipation of the United Provinces of the South rests, and resolved to regulate my conduct by that system of war which is received among civilized nations; being likewise aware of the advantages obtained by the privateers of the free governments of America: I have determined to give a suitable encouragement and extent to the hostilities by sea, in order to increase the losses which King Ferdinand himself, in his decree of the 8th of February of the present year, confesses to have already been caused to his subjects by this kind of warfare, which is to be vigorously prosecuted, until Spain shall acknowledge the independence proclaimed by the sovereign congress of these provinces, with the direction and security of which I am intrusted.

And for the purpose of intercepting the navigation and commerce of both countries, by opposing the naval force equipped in regular form, by the state or by private individuals, I have resolved, that privateering shall henceforth be continued against the subjects of Ferdinand VII. and their property, and that the same be done, strictly observing the provisions and regulations laid down and enacted in the following provisional Ordinance:

A provisional Ordinance to regulate Privateering.

Art. I. This government will grant commissions or letters of marque to those persons who may apply for the same, to arm any vessel, in order to act as a privateer against all vessels sailing under the enemy's flag; the requisite bond being previously given therefor, at the naval department. In such application, a description must be given of the kind of vessel intended for that purpose, her tonnage, arms, ammunitions and crew.

II. A commission being granted to arm any vessel as a privateer, the commandant of the marine will give, by all the means within his power, every facility to expedite
*30] the fitting out of *any such vessel, allowing her to receive all the men she may require, excepting such as are enlisted for the service of the state, or actually

(*a*) This document corresponds *verbatim* with the prize code of Buenos Ayres which follows.

employed therein. The equipment of the vessel being finished, the said commandant will deliver to her captain a copy of this ordinance, together with all other regulations made known to him through the private channel of communications of the naval department, touching the manner in which he is to act, in particular cases, with neutral vessels, more especially, of such nations the flags of which may be entitled to certain immunities or privileges arising from the treaties or agreements made with them for the punctual observance thereof in what concerns them.

III. The officers of the commissioned vessels or privateers are under the protection of the laws of these United Provinces; and they shall enjoy, even if foreigners, all the privileges and immunities of any other citizen thereof, whilst employed in their service.

IV. The owners of such privateers are at liberty to enter into any agreement they may think fit, with the officers and crew of the same, provided they do not contain any clause contrary to the laws and ordinances of the government. It being the duty of the owners, as aforesaid, to present a copy of the agreements they may make to the department of the general commandant of the marine, where care must be taken that the same be strictly fulfilled.

V. The owners of privateers, on giving bond, will be furnished from the public magazines of the state with the guns, muskets, gunpowder and ammunitions they may be in want of, for the complete equipment of the privateer; under the condition to return, after the expiration of the cruise, the articles thus supplied; they not being obliged to make any allowance for the deterioration or consumption thereof, caused by their use in the service. And in case of either wreck or capture of the privateer, the same being proved, they shall be discharged from all responsibility.

VI. The privateers are to be visited, at the time of their departure, by the commissioners appointed by the commandant-general of the marine, who shall read to them the penal laws, *a copy whereof must be given to their commanders, with injunctions to read them to the crew, once a week, mention of which circumstance is [*31
to be made in the certificate of the visit; should the privateers be cleared out in friendly ports, they shall be visited by the consuls or agents of the government, in pursuance of their private instructions.

VII. All merchandise, liquors, and other articles fit for the consumption of the country, which may be imported as proceeding from captured cargoes, must be appraised by the custom-house, the same as any other cargo of commerce, and out of the sum total of duties which may result therefrom, a third part shall be deducted for the benefit of the captors.

VIII. All prizes must be sent to the ports of these United Provinces, there to be adjudged in the customary lawful way in such cases,; but should there occur any extraordinary circumstance to prevent it, the commander of the privateer, consulting his security, may exercise his own discretion in this respect, reserving documents justifying the same, in order to present them in due time before the competent tribunal.

IX. Silver and gold, whether coined or in bars, or in bullion, being a capital proceeding from capture, shall pay to the treasury of the state, at the rate of six *per centum*, as a compensation for the benefits granted in the fifth and seventh articles.

X. Silver and gold, manufactured into articles of luxury, shall, on their importation, pay the same duties as any other commercial article, according to the particular valuation that may be made of them.

XI. The privateers that may take from the enemy important communications, officers of rank, &c., or that may cause similar damages to the enemy, shall be rewarded in a manner worthy the generosity of the government, and in proportion to the importance of the service they may have thus rendered.

XII. The government offers a reward to all privateers that shall capture a transport of the enemy with troops, ammunition or other warlike accoutrements, destined to commit hostilities against the free countries of America, or to reinforce any part of the Spanish dominions: which reward shall be regulated *according to the circumstances of the case, and in proportion to the amount of the capture. [*32

XIII. The commanders of the privateers employed to destroy the Spanish commerce, without being cruel in the treatment of the prisoners, shall burn and sink on the high seas every enemy's vessel which they may think proper not to man as a prize, owing to her small value. And they are prohibited, under the penalties which the case may require, either to restore or leave in the possession of the enemy, under any pretext whatever, any vessel of the said class; any favor of this nature being considered as an hostility against the United Provinces.

XIV. Captured vessels shall be free of all duties, those of the port excepted.

XV. All articles of war captured shall be free of duties. In case the same are wanted by this government, it may take them at the rate of ten *per centum* below the current prices in the market.

XVI. Should any negro slaves be captured, they must be sent to the ports of these United Provinces; and the government will allow as a bounty, the sum of fifty dollars for each of such slaves as may be fit to take up arms, from the age of twelve to forty years inclusively; they being obliged to serve four years in the armies, and then they shall be free of duties. Should they be either over or under that age, or unfit for the army, they will be absolutely free, and this government will distribute them in guardianship.

XVII. Any negroes captured, that on account of the blockade or unfitness of the vessel, &c., cannot be brought into the ports of these United Provinces, shall be sent to those of the free nations of America, and there given up to the disposal of those governments, with the express condition not to sell them as slaves, under the penalties to the transgressors of being deprived of all their privileges (whatever their services may be), and also of the protection of the laws of these United Provinces, who detest slavery, and have prohibited this cruel traffic in human beings.

*33] XVIII. The cognisance of the prizes which the privateers *may bring or send into our ports shall exclusively belong to our courts.

XIX. Should it be declared by the sentence of the court, that the captured vessel is not a lawful prize, or that there is no reason to detain her, she shall be forthwith set at liberty, without causing her the least expense, being exempted even from the duties of the port. And in case of said vessel being detained any longer, under that or any other pretext, all the damages which on that account may fall on her owners, shall be laid to the charge of the persons causing the same.

XX. If the captor does not acquiesce in the sentence of the court of prizes, and intends to appeal from it, having a special power from the parties interested, he is allowed so to do to the Supreme Director, on his giving, previously to the entering of such an appeal, the proper bond, to the satisfaction of the captured captain, to answer unto him for all the damages and detriments which may have a right to claim of the said captor, after the confirmation of the first sentence, on account of the detention and demurrage, loss of time and freight, damages, and deterioration of both vessel and cargo, and any other occurrences. Which damages, together with the costs of prosecution, shall be paid unto the captured captain by the captor, before his leaving the port; and in case of his not being able to make payment, recourse shall be had to the bonds or sureties he may have given, who, without any further step or delay, shall be compelled to do it, by all the rigor of the law.

XXI. No person enjoying a salary from the naval department shall exact any fees, stipend or contribution, for services rendered in the adjudication of prizes. They are also prohibited to take or appropriate to themselves any merchandise, or other articles of prize goods, under the penalty of confiscation, and of the loss of their employment.

XXII. Privateers and letters of marque are authorized to board all commercial vessels of any nation, and to oblige them to exhibit their sea-letters, passes, commissions and passports, together with the documents showing the ownership of the vessel, charter-parties or agreements of freight, the journal or log-book, the *roll d'equipage*,

*34] and the lists of the crew and passengers. *This examination shall be made, without employing any violence, or causing any damage or considerable detention

to the vessels on board whereof the same is to be performed, and whose master or captain, with the above-said documents, shall be ordered on board the privateer, that her captain may attentively examine them himself, or cause the same to be done by the interpreter he may have for that purpose. And in case no cause be found to detain the vessel any longer, she shall be permitted freely to continue her navigation. Should any vessel resist this examination, the privateer may compel her to do it, by force. But the officers, as well as other individuals belonging to the crews of said privateers, can in no case exact or require any contribution from the captain, sailors or passengers of the vessels they may board, neither cause, nor permit to be caused, to them, any extortion or violence of any kind whatsoever, under the penalty of being exemplarily punished, even unto death, according to the enormity of the case.

XXIII. When the captain of the vessels on board of which there shall be any articles belonging to enemies, shall *bonâ fide* declare them so to be, the removal thereof shall be made, without interrupting the navigation or detaining them longer than it shall be necessary, the safety of the vessel permitting the same. In this case, the captains shall be furnished with a receipt for the articles thus removed, therein expressing all the circumstances attending the same; and, should the privateer be unable to pay them in cash, the proportionate amount of freight of said articles, up to the place of their destination, according to the bills of lading or agreement of freight, he will furnish them with a note or draft for the same amount on the owner or agent of the said privateer, who shall be obliged to pay it, on its being presented; the captains or commanders of the privateers being hereby ordered to bring, in such cases, the declaration made by the captain of the detained vessel, signed by him and authenticated in the most formal manner.

XXIV. All vessels found navigating without lawful passes, sea-letter, or commissions from the republics, provinces or states, having authority to grant them, shall be detained; as well as those that may fight under a flag other than that of the *prince or state by which their commission may have been granted; as likewise [*35
such as may be found holding different commissions from several princes or states; all of which are declared a good prize; and in case of their being armed in war, their commanders and officers shall be considered as pirates.

XXV. Vessels of pirates, and such as may have been taken possession of by their revolted crews, shall be declared good prize, together with all the articles appertaining thereto, or found on board the same; excepting such as may be proved to belong to persons who neither directly or indirectly have contributed to the piracy, and are not enemies.

XXVI. It being unlawful, within the jurisdiction of this state, to arm any vessel in order to act as a privateer, without my permission, as likewise to admit, for that purpose, a commission or letters of marque from any other prince or republic, even if allied with this, any vessel found on the high seas, with such commissions, or without any commission at all, shall be adjudged a good prize, and her captain or commander punished as pirates.

XXVII. All armed vessels, whether commissioned cruisers, or merchant vessels with letters of marque, navigating under the flag, or with a commission from princes or states enemies to this government, shall be good prize, together with all the articles that may be found on board thereof, even if belonging to citizens of these United Provinces, in case of their having shipped them after the delaration of war, and the requisite time being elapsed for their having notice thereof.

XXVIII. Merchant vessels belonging to any nation whatsoever, that may make any defence, after the privateer's hoisting up her flag, shall be declared good prize, unless her captain should prove that the privateer gave him sufficient motive for such a resistance.

XXIX. Such vessels as may be found without the papers and documents specified in the 22d article, or the most important of them, to wit, the sea-letter, pass or commission, the bills of lading of the cargo, and other documents, in order to prove [*36
that it, as well as the vessel, are neutral property, shall be *declared a good

prize; unless on proof of their being lost by inevitable accident. All the documents that may be presented must be signed in due form, in order to be admitted in proof.

XXX. Should the captains, or other individuals of the vessels detained by the privateers, or by any of the vessels belonging to the navy of the state, throw overboard any papers; if this fact be proved in due form, by that very act, they shall be declared good prize. And the same construction is to be given to the foregoing, and any other articles touching the same matter.

XXXI. Privateers are prohibited to attack, to commit any kind of hostilities, or to capture, the vessels of the enemy, that may be found in the ports of allied or neutral princes or states; as likewise those that may be within cannon-shot of their fortifications. It being declared, in order to remove all doubts, that the distance of the cannon-shot must be observed, even if there should be no batteries on the spot where the capture may take place, provided the distance be the same, and that the enemy shall likewise respect this immunity in the territory of the neutral or allied powers.

XXXII. The vessels that privateers may capture in the ports, or within the reach of the cannon-shot of the territory of allied or neutral powers, even in the case of their being in fresh pursuit, and attacking them from sea, are declared to be no prize, as taken in a spot which is entitled to immunity; provided the enemy respect the same in like manner.

XXXIII. Every privateer that may retake a national vessel within twenty-four hours after her capture, shall be entitled to one-half of the value of said prize for salvage, the other half being restored for the benefit of the original owner of said vessel; which division is to be made speedily and summarily, in order to diminish the costs as much as possible. But if the re-capture should take place after the lapse of twenty-four hours from the capture, the privateer thus retaking her shall be entitled to the whole value of the same.

XXXIV. If a vessel should be found on the sea, or brought into our ports, without the bills of lading of her cargo, or other documents by which the ownership thereof
*37] may be ascertained, *and not having on board persons belonging to her own crew, both the captor and the captain of said prize shall be separately examined touching the circumstances in which the said vessel was found when taken possession of. Her cargo is likewise to be inspected by intelligent persons, and every possible means resorted to, in order to discover the true owner. Should this not be found out, an inventory of the whole shall be made, and everything kept deposited, to restore them to whomsoever shall, within a year, prove to be such; unless there should be ground to declare the same good prize; giving, in all events, the third part of the value to the captors. If the owner does not appear in the above said term, the other two remaining thirds shall be divided, as derelict goods, into three parts; one of which is likewise to be given to the captors, and the other two, to be applied to the use of the state.

XXXV. In any of the aforesaid cases, and when the privateer shall detain a vessel, care shall be taken to collect all her papers, of what kind soever they may be, and that the clerk shall make a correct memorandum thereof, giving a receipt to the captain or supercargo of the vessel thus detained, for them; and warning him not to conceal any papers he may have, it being declared, that only such as he may exhibit shall be admitted in the adjudication of the capture. This being done, the captain of the privateer shall secure the papers in a bag or package, sealed; which he must deliver to the prize-master, with orders to deliver the same to the government. The captain of the privateer, or any individual of her crew, who from any motive whatever, may conceal, break or embezzle any of said papers, shall be condemned to corporal punishment, as the circumstances of the case may require; the captain being over and above obliged to make good the damages; and other individuals to be sent to the public works for ten years.

XXXVI. The captain of the privateer shall, at the same time, take care to have the hatches of the vessels thus detained, nailed up, and to seal them in such a manner as

to render it impossible to open them without breaking the seals. He must secure the keys of the cabin, and other passages, and cause all the articles that may be found on deck, to be locked up—taking *down, if the time should permit it, a memorandum of everything that may be easily mislaid, in order to put them under the charge of the person who shall be appointed to command the same vessel. [*38

XXXVII. The articles that may be found on deck, or in the cabin, state-rooms or forecastle, shall not be permitted to be plundered, the right of so doing (commonly called *pendolage*), being absolutely prohibited; which, however, may be tolerated only in the case of the vessel's having shown resistance, even to the point of being boarded. But care must always be taken to prevent the disorders that an excessive license may produce.

XXXVIII. When the crew of a vessel, detained as aforesaid, shall be removed on board the privateer, the clerk shall, in the presence of the master, take a deposition from him, the mate and other individuals of such detained vessel, touching the circumstances of her navigation, voyage and cargo—writing down everything that may be necessary to the adjudication of the capture. He is also to interrogate them, whether they have on board any jewels or other valuables, not expressed in the bills of lading of the cargo, in order that proper measures may be taken to prevent their being embezzled.

XXXIX. The prize-master appointed to command any vessel, detained as aforesaid, shall be furnished with a detailed information, comprising everything that may appear from the above mentioned depositions—making him responsible for whatever, owing to his omission or fault, may be lost. And it is hereby declared, that any person who shall, without license, break open the sealed hatches, trunks, bales, casks, packages or lockers, where there may be any articles of merchandise, shall not only lose that part which of right might belong to him, should they be declared a good prize, but a prosecution shall be instituted against him, and be punished according to the result thereof.

XL. No other papers or documents are to be admitted, in order to decide upon the lawfulness or unlawfulness of the capture, but those that were produced and found on board the prize vessel. However, if, in case of a defect of papers to determine the cause, the captain of the captured vessel should *offer to prove his having lost them by unavoidable accident, the court will grant him a sufficient term for that purpose; regarding the summary manner with which such causes are to be determined. [*39

XLI. If, before sentence is pronounced on the prize, it should become necessary to unload the whole or part of the cargo, in order to prevent the loss thereof, the hatches are to be broken open in the presence of the commandant of the marine, or commissioners appointed by him, and of the respective parties concerned, who must be present at that act. An inventory shall then be made of all the articles that may be unladen; which with the assistance and knowledge of the officer of the revenue appointed by the collector of the customs, must be deposited either in the hands of a trusty person, or in store-houses of which the master or supercargo of the captured vessel is to keep a key.

XLII. Should the sale of any articles be deemed necessary, owing to the impossibility of preserving them, such sale must be effected at public auction, with all the customary solemnities, in the presence of the captured captain, and with the assistance of the officer of the custom-house, as aforesaid; and the proceeds thereof are to be deposited with a trusty person, to be delivered to whom the same may belong, after the sentence is pronounced on the capture.

XLIII. No person, whatever his rank or condition may be, is permitted secretly to buy or conceal anything, knowing it to belong to the prize or detained vessel, under the penalty of making restitution for the same, and of a fine, triple the value of the goods concealed or clandestinely bought, and even of corporal punishment, as the case may be; the cognisance of which causes shall exclusively belong to the courts of prize, as incidental thereto.

XLIV. If the vessel detained should not be condemned as good prize, her master or owner, together with her officers and crew, shall be forthwith reinstated in the possession of the same; restoring unto them whatever may belong to her, without retaining the least thing. She is to be furnished with a suitable safe-conduct, in order that she may prosecute her voyage, without any further detention; she is declared free of
*40] the *duties of the port, and before her departure is to be indemnified by the captor, for all the expenses, damages and losses that may have been caused to her, and which she may have a right to claim, with justice, should her case be comprehended among those specified in the 22d and 30th articles. But such claim is not to be admitted, if she should have given reasonable cause for suspicion to the capturing vessel, or incurred any other penalty comprised in this ordinance, in consequence of which a prosecution may have been instituted; all of which may appear from the proceedings had thereon.

XLV. Should the captured vessel be condemned as good prize, the captors shall be permitted the free use of her, previously paying the duties due to the treasury of this government. The whole amount resulting from sales of the captures made by vessels of war, shall be divided into two parts; one of them containing three-fifths, for the use of the crew and mariners, and the other two-fifths for the officers. No person, whether belonging to the navy or army, being a passenger, or going as a transport on board said vessels, at the time of the capture, shall, under any pretext whatever, be comprehended in the distribution. But it shall be the duty of the commander of such vessel to inform the chief officer of the naval department, whether any of the persons going on board as passenger, or otherwise, has distinguished himself by a special service in the action: to the end, that if he should deem it just, he may order such person to share according to his rank, as if he had been comprehended amongst the number belonging to the complement of the vessel.

XLV. Any other decrees, orders or regulations, prior or contrary to this present provisional ordinance, are, by virtue hereof, declared void anp without any effect.

Done at the Fortress of Buenos Ayres, on the 15th day of May 1817.

JUAN MARTIN DE PUEYRREDON.

MATHIAS DE YRIGOYEN,
Secretary of War and of the Navy.

The foregoing is a copy from the original.

YRIGOYEN.

*41] *Official Report, &c., of the Secretary of State to Congress.

Washington, Jan. 29. I transmit to the house of representatives, in compliance with the the resolution of the 14th of this month, a report from the secretary of state, concerning the applications which have been made by any of the independent governments of South America, to have a minister or consul-general accredited by the United States, with the answers of this government to the applications addressed to it.

JAMES MONROE.

The Report.

The secretary of state, to whom has been referred the resolution of the house of representatives, of the 14th inst., requesting of the president information whether any application has been made by any of the independent governments of South America, to have a minister or consul-general accredited by the government of the United States, and what was the answer given to such application; has the honor of submitting copies of applications made by Don Lino de Clemente, to be received as the representative of the republic of Venezuela; and of David C. De Forest, a citizen of the United Provinces, to be accredited as consul-general of the United

Provinces of South America, with the answers respectively returned to them. The reply of Mr. de Forest is likewise inclosed, and copies of the papers, signed and avowed by Mr. Clemente, which the president considered as rendering any communication between this department and him, other than that now inclosed, improper.

It is to be observed, that while Mr. Clemente, in March 1817, was assuming, with the name of deputy from Venezuela, to exercise with the United States powers transcending the lawful authority of any ambassador, and while in January 1818, he was commissioning, in language disrespectful to this government, Vincente Pazos, in the name of the republic of Venezuela, *to "protest against the invasion of Amelia Island, and all such further acts of the government of the United States, as [*42 were contrary to the rights and interests of the several republics, and the persons sailing under their respective flags, duly commissioned;" he had, himself, not only never been received by the government of the United States, as deputy from Venezuela, but had never presented himself to it in that character, or offered to exhibit any evidence whatsoever, of his being invested with it. The issuing of commissions, authorizing acts of war against a foreign nation, is a power which even a sovereign cannot lawfully exercise, within the dominions of another at amity with him, without his consent. Mr. Pazos, in his memorial to the president, communicating the commission signed by Mr. Clemente, at Philadelphia, and given to General McGregor, alleges, in its justification, the example of the illustrious Franklin, in Europe; but this example, instead of furnishing an exception, affords a direct confirmation of the principle now advanced. The commissions issued by the diplomatic agents of the United States in France, during our revolutionary war, were granted with the knowledge and consent of the French government, of which the following resolution from the secret journal of congress, of the 23d of December, 1776, is decisive proof:

"Resolved, that the commissioners (at the court of France) be authorized to arm and fit for war any number of vessels, not exceeding six, at the expense of the United States, to war upon British property; and that commissions and warrants be for this purpose sent to the commissioners: provided the commissioners be well satisfied this measure will not be disagreeable to the court of France."

It is also now ascertained, by the express declaration of the supreme chief, Bolivar, to the agent of the United States, at Angostura, "that the government of Venezuela had never authorized the expedition of General McGregor, nor any other enterprise against Florida or Amelia." Instructions have been forwarded to the same agent, to give suitable explanations to the government of Venezuela, of the motives for declining further communication with Mr. Clemente, and assurances that it *will readily [*43 be held with any person not liable to the same or like objection.

The application of Mr. de Forest, to be accredited as consul-general of the United Provinces of South America, was first made in May last; his credential was a letter from the supreme director of Buenos Ayres, Pueyrredon, announcing his appointment by virtue of articles concluded, in the names of the United States of America, and of the United Provinces of Rio de la Plata, between persons authorized by him, and W. G. D. Worthington, as agent of this government, who neither had, nor indeed pretended to have, any power to negotiate such articles. Mr. de Forest was informed, and requested to make known to the supreme director, that Mr. Worthington had no authority whatsoever, to negotiate on the part of the United States any article to be obligatory on them, and had never pretended to possess any full power to that effect. That any communication interesting to the supreme director, or to the people of Buenos Ayres, would readily be held with Mr. de Forest, but that the recognition of him as a consul-general from the United Provinces of South America, could not be granted, either upon the stipulation of supposed articles, which were a nullity, or upon the commission, or credential letter of the supreme director, without recognising thereby the authority from which it emanated, as a sovereign and independent power.

With this determination, Mr. de Forest then declared himself entirely satisfied. But shortly after the commencement of the present session of congress, he renewed his solicitations, by the note dated the 9th of December, to be accredited as the consul-

general of the United Provinces of South America, founding his claim on the credentials from his government, which had been laid before the president last May.

A conversation was shortly afterwards held with him, by direction of the president, in which the reasons were fully explained to him upon which the formal acknowledgment of the government of Buenos Ayres, for the present, was not deemed expedient. They were also, at his request, generally stated in the note dated 31st of December.

*44] It has not been thought necessary on the part of this government, *to pursue the correspondence with Mr. de Forest any further; particularly, as he declares himself unauthorized to agitate or discuss the question with regard to the recognition of Buenos Ayres as an independent nation. Some observations, however, may be proper, with reference to circumstances alleged by him, arguing that a consul-general may be accredited, without acknowledging the independence of the government from which he has his appointment. The consul of the United States, who has resided at Buenos Ayres, had no other credential than his commission. It implied no recognition by the United States of any particular government; and it was issued before the Buenos Ayres declaration of independence, and while all the acts of the authorities there, were in the name of the king of Spain.

During the period while this government declined to receive Mr. Onis, as the minister of Spain, no consul received an *exequatur* under a commission from the same authority. The Spanish consuls, who had been received before the contest for the government of Spain had arisen, were suffered to continue the exercise of their functions, for which no new recognition was necessary. A similar remark may be made with regard to the inequality alleged by Mr. de Forest, to result from the admission of Spanish consuls, officially to protect before our tribunals the rights of Spanish subjects generally, while he is not admitted to the same privileges, with regard to those of the citizens of Buenos Ayres. The equality of rights to which the two parties to a civil war are entitled in their relations with neutral powers, does not extend to the rights enjoyed by one of them, by virtue of treaty stipulations contracted before the war; neither can it extend to rights, the enjoyment of which essentially depends upon the issue of the war. That Spain is a sovereign and independent power, is not contested by Buenos Ayres, and is recognised by the United States, who are bound by treaty to receive her consuls. Mr. de Forest's credential letter, asks that he may be received by virtue of a stipulation in supposed articles concluded by Mr. Worthington, but which he was not authorized to make; so that the reception of Mr. de Forest, upon the cre-

*45] dential on which he founds his claim, would imply *a recognition, not only of the government of the supreme director, Pueyrredon, but a compact as binding upon the United States, which is a mere nullity.

Consuls are, indeed, received by the government of the United States, from acknowledged sovereign powers, with whom they have no treaty. But the *exequatur* for a consul-general can obviously not be granted, without recognising the authority from whom his appointment proceeds as sovereign. "The consul," says Vattel (book 2, chap. 2, § 24), "is not a public minister; but as he is charged with a commission from his sovereign, and received in that quality, by him where he resides, he should enjoy, to a certain extent, the protection of the law of nations."

If, from this state of things, the inhabitants of Buenos Ayres cannot enjoy the advantage of being officially represented before the courts of the United States, by a consul, while the subjects of Spain are entitled to that privilege, it is an inequality resulting from the nature of the contest in which they are engaged, and not from any denial of their rights, as parties to a civil war. The recognition of them, as such, and the consequent admission of their vessels into the ports of the United States, operates with an inequality against the other party to that contest, and in their favor.

It was stated in conversation to Mr. de Forest, and afterwards in the note of the 31st of December, that it would be desirable to the United States, to understand whether Buenos Ayres itself claims an entire, or only an imperfect independence. That the necessity of an explanation upon this point arose from the fact, that in the

negotiation of the supposed article with Mr. Worthington, the supreme director had declined contracting the engagement, though with the offer of reciprocity, that the United States should enjoy at Buenos Ayres the advantages and privileges of the most favored nation. That the reasons given by him for refusing such an engagement was, that Spain having claims of sovereignty over Buenos Ayres, the right must be reserved, of granting special favors to her, for renouncing them, which other nations, having no such claims to renounce, could not justly expect to obtain. Without discussing *the correctness of this principle, it was observed, the United States, in acknowledging Buenos Ayres as independent, would expect either to be treated on the [*46 footing of the most favored nation, or to know the extent and character of the benefits which were to be allowed to others, and denied to them; and that while an indefinite power should be reserved, of granting to any nation advantages to be withheld from the United States, an acknowledgment of independence must be considered premature.

Mr. de Forest answers, that this reservation must appear to every one contrary to the inclination, as well as interest of the government of Buenos Ayres; that it must have been only a proposition of a temporary nature, not extending to the acknowledgment by the United States of the independence of South America, which he is confident would have rendered any such reservations altogether unnecessary, in the opinion of the government of Buenos Ayres, who must have seen they were treating with an unauthorized person, and suggested the idea, from an opinion of its good policy; and, he adds, that Portugal is acknowledged by the United States as an independent power, although their commerce is taxed higher in the ports of Brazil than that of Great Britain.

It had not been intended to suggest to Mr. de Forest, that it was in any manner incompatible with the independence or sovereignty of a nation, to grant commercial advantages to one foreign state, and to withhold them from another. If any such advantage is granted for an equivalent, other nations can have no right to claim its enjoyment, even though entitled to be treated as the most favored nations, unless by the reciprocal grant of the same equivalent. Neither had it been intended to say, that a nation forfeited its character of acknowledged sovereignty, even by granting, without equivalent, commercial advantages to one foreign power, and withholding them from another. However absurd and unjust the policy of a nation granting to one, and refusing to another, such gratuitous concessions, might be deemed, the question, whether they affected its independence or not, would rest on the concessions themselves. The idea meant to be conveyed was, that the reservation of an indefinite *right to grant hereafter special favors to Spain, for the renunciation of her [*47 claims of sovereignty, left it uncertain whether the independence of Buenos Ayres would be complete or imperfect, and it was suggested, with a view to give the opportunity to the supreme director of explaining his intention in this respect, and to intimate to him, that while such an indefinite right was reserved, an acknowledgment of independence must be considered as premature. This caution was thought the more necessary, inasmuch as it was known, that at the same time, while the supreme director was insisting on this reservation, a mediation between Spain and her colonies had been solicited by Spain, and agreed to by the five principal powers of Europe, the basis of which was understood to be a compromise between the Spanish claim to sovereignty, and the colonial claim to independence.

Mr. de Forest was understood to have said, that the congress at Tucuman had determined to offer a grant of special privileges to the nation which should be the first to acknowledge the independence of Buenos Ayres. He stated in his notes, that he knew nothing of any such resolution by that congress, but that it was a prevailing opinion at Buenos Ayres, and his own opinion also, that such special privileges would be granted to the first recognising power, if demanded. It has invariably been avowed by the government of the United States, that they would neither ask nor accept of any special privilege or advantage for their acknowledgment of South American independence; but it appears, that the supreme director of Buenos Ayres, far from being prepared to grant special favors to the United States for taking the lead in the acknowl-

edgment, declined even a reciprocal stipulation, that they should enjoy the same advantages as other nations. Nor was this reservation, as Mr. de Forest supposes, defeasible, by the acknowledgment, on the part of the United States, of South American independence. The supreme director could not be ignorant, that it was impossible for this government to ratify the articles prepared by his authortiy with Mr. Worthington, and yet to withhold the acknowledgment of independence. He knew, that if that
*48] instrument should be ratified, the United *States must thereby necessarily be the first to grant the acknowledgment, yet he declined inserting in it an article, securing to each party, in the ports of the other, the advantages of the most favored nation. It is, nevertheless, in conformity to one of those same articles, that Mr. de Forest claimed to be received in the formal character of consul-general.

With regard to the irregularities and excesses committed by armed vessels, sailing under the flag of Buenos Ayres, complained of in the note of the 1st of January, it was not expected, that Mr. de Forest would have the power of restraining them, otherwise than by representing them to the supreme director, in whom the authority to apply the proper remedy is supposed to be vested. The admission of Mr. de Forest, in the character of consul-general, would give him no additional means of suppressing the evil. Its principal aggravation arises from the circumstance, that the cruisers of Buenos Ayres are almost, if not quite, universally manned and officered by foreigners, having no permanent connection with that country, or interest in its cause. But the complaint was not confined to the misconduct of the cruisers. It was stated, that blank commissions for privateers, their commanders and officers, had been transmitted to this country, with the blanks left to be filled up here, for fitting out, arming and equipping them, for purposes prohibited by the laws of the United States, and in violation of the law of nations. It was observed, that this practice, being alike irreconcilable with the rights and the obligations of the United States, it was expected by the president, that being made known to the supreme director, no instance of it would again occur hereafter. No reply to this part of the note has been made by Mr. de Forest, for it is not supposed, that he meant to disclaim all responsibility of himself, or of the government of Buenos Ayres, concerning it, unless his character of consul-general should be recognised. As he states that he has transmitted a copy of the note itself to Buenos Ayres, the expectation may be indulged, that the exclusive sovereign authority of the United States, within their own jurisdiction, will hereafter be respected. All which is respectfully submitted.

Department of State, January 28, 1819. JOHN QUINCY ADAMS.

*49] *Correspondence with Mr. Clemente.

No. 1. Lino de Clemente to the Secretary of State.

Most Excellent Sir:—Having been appointed by the government of the republic of Venezuela, its representative near the United States of North America, I have the honor to inform you of my arrival in this city, for the purpose of discharging the trust committed to me: to effect this, I have to request, that you will please to inform me at what time it will be convenient for you to afford me an opportunity of presenting my respects to you personally; and of communicating to you the object of my arrival in the federal city. I avail myself of this occasion to tender you the assurance of the high consideration and respect, with which, I am, &c.

LINO DE CLEMENTE.

Washington, Dec. 11, 1818—8th year of the Republic.

The Honorable John Q. Adams.

No. 2. The Secretary of State to Don L. de Clemente.

Department of State, Washington, December 16, 1818.

Sir:—Your note of the 11th inst. has been laid before the president of the United States, by whose direction I have to inform you, that your name having been avowedly

affixed to a paper drawn up within the United States, purporting to be a commission to a foreign officer, for undertaking and executing an expedition in violation of the laws of the United States, and also to another paper avowing that act, and otherwise insulting to this government, which papers have been transmitted to congress, by the message of the president, of the 25th of March last, I am not authorized to confer with you, and that no further communication will be received from you at this department.

I am, &c. J. Q. Adams.

Correspondence with Mr. de Forest.

No. 5. Mr. de Forest to the Secretary of State.

I have the honor to announce to Mr. Adams, that I have again arrived in this district, in order to renew my solicitations *to be accredited by this government as the consul-general of the United Provinces of South America, founding my [*50 claim on the credentials from my government, in the month of May last.

The information recently acquired by this government, respecting the provinces of South America, I presume, has established the fact beyond doubt, that Buenos Ayres, their capital, and a large portion of their territory, are, and have been, free and independent of the government of Spain, for more than eight years ; and possess ample ability to support their independence in future. That a regular system of government is established by their inhabitants, who show themselves, by the wisdom of their institutions, sufficiently enlightened for self-government; and that they look up to this great republic as a model, and as to their elder sister, from whose sympathies and friendship, they hope and expect ordinary protection at least.

The messages of the president of the United States, as well the last as the present year, have created a general belief, that the United States have placed us on an equal footing with Spain, as it respects our commercial operations ; but, Sir, it is found not to be the case. A consul of Spain is known and respected as such by your tribunals of justice, which enables him, *ex officio*, to protect and defend the interests of his countrymen. Whereas, the verbal permission I have to act in the duties of my office, will not avail in your tribunals; and a number of instances have already occurred, where the property of my absent fellow-citizens has been jeopardized, for want of a legally authorized protector. The case of the Spanish schooner ———, a prize to our armed vessels Buenos Ayres and Tucuman, which was brought into Scituate, some time since, by her mutinous crew, after having murdered the captain and mate, by throwing them overboard, is a striking instance of the necessity of there being resident here an accredited agent, to superintend the commercial concerns of South America; and without such accredited agent, our citizens cannot be considered as completely protected in their rights.

I request you, Sir, to lay this communication before the president of the United States, as early as may be convenient, and to assure him, that I duly appreciate the friendly reception I *met with from his government, on my arrival in this [*51 country; and that, as circumstances have since materially altered, I have no doubt but I shall receive his permission to act, in the accustomed form. While I remain, with the highest consideration and respect, Sir, your most obedient servant.

Georgetown, Dec. 9. D. C. de Forest.

The Honorable John Q. Adams, Secretary of State.

No. 6. Mr. de Forest to the Secretary of State.

I took the liberty, on the 9th inst. of addressing a note to Mr. Secretary Adams requesting to be accredited as the consul-general of the United Provinces of South America; and have now the honor of informing Mr. Adams that I have lately received an official communication from the government of Buenos Ayres, directing me to inform the government of this country, that the supposed conspiracy against the person of the supreme director, proves to have originated with an obscure and disap-

pointed individual; who, to gain adherents, pretended to be connected with people of the first respectability and influence, several of whom he named, but who have convinced the government that they had no knowledge whatever of his base project. The supreme director, anxious to do away any unfavorable impressions which the report of such an affair might cause at this distance, has ordered me to assure the president of he United States, that the government of South America was never more firmly supported, nor its prospects more brilliant, than at the present time. I have the honor, &c. (Signed) DAVID C. DE FOREST.

Georgetown, December 12, 1818.

No. 7. Mr. Adams to Mr. de Forest.

Mr. Adams presents his compliments to Mr. de Forest, and has the honor of assuring him, by direction of the president of the United States, of the continued interest
*52] that he takes in the welfare and prosperity of the provinces of La Plata, and of *his disposition to recognise the independent government of Buenos Ayres, as soon as the time shall have arrived when that step may be taken with advantage to the interests of South America, as well as of the United States.

In the meantime, he regrets an *exequatur* to Mr. de Forest, as consul-general of the United Provinces of South America, cannot be issued, for reasons stated in part by the president, in his message to congress, at the commencement of the present session; and further explained to Mr. de Forest by Mr. Adams, in the conversation which he has had the honor of holding with him. Mr. de Forest must have seen, that any privileges which may be attached to the consular character, cannot avail in the judicial tribunals of this country, to influence in any manner the administration of justice; and with regard to the schooner brought into Scituate, such measures have been taken, and will be taken, by the authorities of the United States, as are warranted by the circumstances of the case, and by the existing laws.

With respect to the acknowledgment of the government of Buenos Ayres, it has been suggested to Mr. de Forest, that, when adopted, it will be merely the recognition of a fact, without pronouncing or implying an opinion with regard to the extent of the territory or provinces under their authority, and particularly without being understood to decide upon their claim to control over the Banda Oriental, Santa Fe, Paraguay, or any other provinces disclaiming their supremacy or dominion. It was also observed, that in acknowledging that government as independent, it would be necessary for the United States to understand, whether Buenos Ayres claims itself an entire or only an imperfect independence. From certain transactions between persons authorized by the supreme director and an agent of the United States (though unauthorized by their government), after the declaration of independence by the congress at Tucuman, and within the last year, it appears, that the supreme director declined contracting the engagement, that the United States should hereafter enjoy at Buenos Ayres the advantages and privileges of the most favored nation, although with the offer of a reciprocal
*53] stipulation on the part of the United *States. The reason assigned by the supreme director was, that Spain, having claims to the sovereignty of Buenos Ayres, special privileges and advantages might ultimately be granted to the Spanish nation, as a consideration for the renunciation of those claims. It is desirable, that it should be submitted to the consideration of the government of Buenos Ayres, whether, while such a power is reserved, their independence is complete; and how far other powers can rely, that the authority of Spain might not be eventually restored. It has been stated by Mr. de Forest, that the congress at Tucuman had passed a resolution to offer special advantages to the nation which should first acknowledge their independence, upon which the question was proposed, whether such a resolution, if carried into effect, would not be rather a transfer of dependence from one nation to another, than the establishment of independence? rather to purchase support than to obtain recognition? The United States have no intention of exacting favors of Buenos Ayres for the acknowledgment of its independence; but in acknowledging it, they will expect

either to enjoy, in their intercourse with it, the same privileges and advantages as other foreign nations, or to know precisely the extent and character of the benefits which are to be allowed to others, and denied to them. It should, indeed, be known to the supreme director, that, while such an indefinite power is reserved of granting to any nation, advantages to be withheld from the United States, an acknowledgment of independence must be considered premature.

In adverting to these principles, it was observed to Mr. de Forest, that their importance could not but be peculiarly felt by the United States, as having been invariably and conspicuously exemplified in their own practice, both in relation to the country whose colony they had been, and to that which was the first to acknowledge their independence. In the words of their declaration, issued on the 4th of July 1776, they resolved thenceforth "to hold the British nation, as they hold the rest of mankind, enemies in war, in peace friends;" and in the treaty of amity and commerce, concluded on the 6th of February 1778, between the United States and France, being the first acknowledgment by a foreign power of the independence of *the United States, and the first treaty to which they were a party, the preamble declares, that the [*54
king of France and the United States, "willing to fix, in an equitable and permanent manner, the rules which ought to be followed relative to the correspondence and commerce which the two parties desire to establish between their respective countries, states and subjects, have judged that the said end could not be better obtained, than by taking for the basis of their agreement the most perfect equality and reciprocity, and by carefully avoiding all those burdensome preferences, which are usually sources of debate, embarrasment and discontent; by leaving also each party at liberty to make, respecting commerce and navigation, those interior regulations which it shall find most convenient to itself; and by founding the advantage of commerce solely upon reciprocal utility, and the just rules of free intercourse; reserving withal to each party the liberty of admitting, at its pleasure, other nations to a participation of the same advantage."

In the second article of the same treaty, it was also stipulated, that neither the United States nor France should thenceforth grant any particular favor to other nations, in respect of commerce and navigation, which should not immediately become common to the other nations, freely, if the concession was free, or for the same compensation, if conditional.

In answer to Mr. de Forest's note of the 12th instant, Mr. Adams has the honor of assuring him, that the president has received with much satisfaction the information contained in it; and will derive great pleasure from every event which shall contribute to the stability and honor of the government of Buenos Ayres. Mr. Adams requests Mr. de Forest to accept the assurance of his distinguished consideration.

Washington, Dec. 31, 1818.

No. 8. Mr. Adams to Mr. de Forest.

Mr. Adams presents his compliments to Mr. de Forest, and in reference to the case of the schooner brought into Scituate, mentioned in Mr. de Forest's communication of the 9th inst., as well as to several others which have occurred of a similar character, requests him to have the goodness to impress upon the *government of Buenos Ayres, the necessity of taking measures to repress the excesses and irregulari- [*55
ties committed by many armed vessels, sailing under their flag, and bearing their commissions. The government of the United States have reason to believe that many of these vessels have been fitted out, armed, equipped and manned in the ports of the United States, and in direct violation of their laws.

Of the persons composing the prize-crew of the vessel at Scituate, and now in confinement upon charges of murder and piracy, it is understood, that three are British subjects, and one a citizen of the United States. It is known, that commissions for private armed vessels, to be fitted out, armed and manned in this country, have been sent from Buenos Ayres to the United States, with the names of the vessels, commanders and officers, in blank, to be filled up here, and have been offered to the avidity

of speculators, stimulated more by the thirst for plunder, than by any regard for the South American cause.

Of such vessels, it is obvious, that neither the captains, officers nor crews can have any permanent connection with Buenos Ayres, and from the characters of those who alone could be induced to engage in such enterprises, there is too much reason to expect acts of atrocity, such as those alleged against the persons implicated in the case of the vessel at Scituate.

The president wishes to believe that this practice has been without the privity of the government of Buenos Ayres, and he wishes their attention may be drawn to the sentiment, that it is incompatible both with the rights and obligations of the United States—with their rights, as an offensive exercise of sovereign authority by foreigners, within their jurisdiction, and without their consent—with their obligations, as involving a violation of the neutrality which they have invariably avowed, and which it is their determination to maintain. The president expects, from the friendly disposition manifested by the supreme director towards the United States, that no instance of this cause of complaint will hereafter be given.

Mr. Adams requests Mr. de Forest to accept the renewed assurance of his distinguished consideration.

Washington, Jan. 1, 1819.

*56] *No. 9.

Sir:—It is not my intention to give any unnecessary trouble to the department of state; but having had the honor of receiving two notes from Mr. Secretary Adams, on the 4th instant, dated December 31st, and January 1st, some explanation appears to be necessary.

In the first place, I do not suppose "that any privileges which may be attached to the consular character, can avail in the judicial tribunals of this country, to influence, in any manner, the administration of justice." But I suppose, that a consul, duly accredited, is *ex officio*, the legal representative of his fellow-citizens, not otherwise represented by an express power: and that the tribunals of justice do, and will, admit the legality of such representation. Mr. Adams has misunderstood me, in another observation, which was in substance, that there was a general opinion prevailing at Buenos Ayres, that the power first recognising our independence, would expect some extraordinary privilege or advantage therefor; and that, in my opinion, the government of Buenos Ayres would readily grant it, if demanded. I know nothing, however, of any resolution having been passed on this subject by the congress at Tucuman.

It appears, from the relation of a fact in Mr. Adams's note of the 31st ultimo, that the government of Buenos Ayres had intimated a desire (in the course of a negotiation with an agent of the United States) to reserve the right of granting more extraordinary privileges to Spain, on the settlement of a general peace, which must appear to every one contrary to their inclination, as well as interest; and it can be accounted for only by supposing that the proposition of the United States agent was merely of a temporary nature, and did not extend to an acknowledgment, by the United States, of the independence of South America; which act, I am confident, would have rendered any such reservation altogether unnecessary, in the opinion of the government of Buenos Ayres, who must have seen that they were treating with an unauthorized person, and must have thought it good policy, at this time, to suggest such an idea. Indeed, were the government of Buenos Ayres to pursue that course, *they might plead the *57] example of a neighboring power, acknowledged to be independent by the United States; and its chief, both illustrious and legitimate. It is well known, that the government of Brazil taxes the commerce of the United States about thirty per cent. higher than that of Great Britain. It may be, that Great Britain is entitled to this preference, on account of important services rendered by her to the king of Portugal; and permit me to ask you, sir, what services could be rendered to any nation already in existence, so great as would be the acknowledgment by Great Britain, or by the United States, of

the independence of South America? Such recognition, merely, by either of these powers, would probably have the immediate effect of putting an end to the cruel and destructive war, now raging between Spain and South America, and crown with never-fading laurels the nation thus first using its influence in favor of an oppressed, but high-minded people.

The account given by Mr. Adams, in his note of the 1st instant, respecting the irregular conduct of vessels sailing under the Buenos Ayres flag, has caused me much mortification, and has already been transmitted to my government, by the Plattsburgh; as also a copy of Mr. Adams's frank and friendly communication of the 31st ultimo. The supreme director will certainly be desirous to adopt the most prompt and efficacious measures within his power, to remedy the evils complained of. But pray, sir, what can he do more than has already been done? The government of Buenos Ayres have established the most just rules and regulations for the government of their vessels of war, as well as of commerce; and have sent me to this country, invested with the title and powers of their consul-general; as well as to guard against any breach of those rules and regulations, by their citizens and vessels frequenting these seas, and the ports of these United States, as to protect them in their rights: but, sir, without a recognition of my powers, on the part of the government, I can have no right whatever to question any individual on the subject of his conduct; nor can any responsibility attach to me, nor to my government, *during such a state of things, for irregularities committed. [*58

A considerable number of our seamen are foreigners by birth, who have voluntarily entered our service; therefore, it is not a matter of surprise, that, of the mutineers of the prize crew of the vessel at Scituate, three should have been born Englishmen, and one a North American. It is, however, an absolute fact, to which I am personally knowing, that the captors of that prize (the Buenos Ayres and Tucuman privateers), were legally fitted out at Buenos Ayres, early in the last year, from which port they sailed on a cruise off Cadiz; and it will afford the government of South America much satisfaction, to learn that the United States will prosecute those mutineers, and punish such as are found guilty of crimes, according to the laws.

Before I close this note, I beg leave to make a few observations, in answer to one of the reasons for not accrediting me, given by Mr. Adams, by direction of the president of the United States, in a conversation which I have had the honor of holding with him, viz: "That the act of accrediting me as consul-general, would be tantamount to the formal acknowledgment of the independence of the government which sent me." I do not profess to be skilled in the law of nations, nor of diplomacy, nor would I doubt the correctness of any opinion expressed by the president, for whose person and character I have entertained the most profound respect; yet, I must say, that I cannot understand the difference between the sending of a consular agent, duly authorized, to Buenos Ayres, where one was accredited from this country, four or five years ago, and has continued ever since in the exercise of the duties of his office, and the reception of a similar agent here. I also beg leave to mention, that I was in this country, soon after the arrival of the present minister of Spain, the Chevalier de Onis; and recollect to have heard it observed, that being a political agent, he was not accredited, because the sovereignty of Spain was in dispute; but that the consuls, who acknowledged the same government (one of the claimants to the sovereignty, and the one actually in possession of it), were allowed to exercise their functions. *If this was the case at that time, the government of the United States must have then had a different opinion on this subject, from what it now has. Mr. Adams will please to bear in mind, that I have only solicited to be accredited as a consular agent, having never agitated the question of an acknowlegment of our independence as a nation, which most certainly is anxiously desired by the government and people of South America, but which being a political question, I have never asked. [*59

Mr. Adams will also be pleased to accept the renewed assurances of my most distinguished consideration and respect. (Signed) DAVID C. DE FOREST.

Georgetown, January 8, 1819.

No. 10.

The Supreme Director of the United Provinces of La Plata, to his Excellency, the President of the United States of North America.

Most Excellent Sir:—The supreme government of these provinces have long exerted their zealous efforts to establish the closest and most amicable relations with the United States of America, to which the most obvious interests seem mutually to invite them. This desirable object has hitherto been frustrated, by the events of the times; but the moment appears at length to have arrived, which presents to the people of these provinces, the flattering prospect of seeing their ardent wishes accomplished. In consideration of these circumstances, and in conformity with the 23d of the articles agreed upon with citizen William G. D. Worthington, the agent of your government in these provinces, I have nominated citizen David C. de Forest, their consul-general to the United States, with the powers specified in his commission and instructions, respectively. I therefore request your excellency, to grant him the attention and consideration, which in the like case will be afforded to the public agents of your excellency resident in these regions.

I avail myself of this renewed occasion of reiterating to your excellency, assurances of the sentiments of respect and consideration, with which I have the honor to be, your excellency's most obedient and most humble servant,

(Signed) JN. MN. DE PUEYRREDON.

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