CHISHOLM, executor, *v.* GEORGIA.

Suits against states.

A state may be sued, in the supreme court, by an individual citizen of another state. And in such suit judgment may be entered, in default of an appearance.

THIS action was instituted in August term 1792. On the 11th of July 1792, the marshal for the district of Georgia made the following return :

"Executed as within commanded, that is to say, served a copy thereof on his excellency Edward Telfair, Esq., governor of the state of Georgia, and one other copy on Thomas P. Carnes, Esq., the attorney-general of said state. ROBERT FORSYTH, Marshal."

Upon which, Mr. *Randolph*, the Attorney-General of the United States, as counsel for the plaintiff, made the following motion, on the 11th of August 1792. "That unless the state of Georgia, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said state, on the fourth day of the next term, or shall then show cause to the contrary, judgment shall be entered against the said state, and a writ of inquiry of damages shall be awarded." But to avoid every appearance of precipitancy, and to give the state time to deliberate on the measures she ought to adopt, on motion of Mr. *Randolph*, it was ordered by the court, that the consideration of this motion should be postponed to the present term. And now, *Ingersoll* and *Dallas* presented to the court a written remonstrance and protestation on behalf of the state, against the exercise of jurisdiction in the cause; but in consequence of positive instructions, they declined taking any part in arguing the question. The Attorney-General, therefore, proceeded as follows :

Randolph, for the plaintiff.—I did not want the remonstrance of Georgia, to satisfy me, that the motion which I have made, is unpopular. Before that remonstrance was read, I had learnt from the acts of another state, whose will must be always dear to me, that she too condemned it. On ordinary occasions, these dignified opinions might influence me greatly; but on *this, which brings into question a constitutional right, supported by [*420 my own conviction, to surrender it, would, in me, be official perfidy.

It has been expressed, as the pleasure of the court, that the motion should be discussed, under the four following forms : 1st. Can the state of Georgia, being one of the United States of America, be made a party defendant in any case, in the supreme court of the United States, at the suit of a private citizen, even although he himself is, and his testator was, a citizen of the state of South Carolina? 2d. If the state of Georgia can be made a party defendant in certain cases, does an action of *assumpsit* lie against her? 3d. Is the service of the summons upon the governor and attorney-general of the state of Georgia, a competent service? 4th. By what process ought the appearance of the state of Georgia to be enforced?

I. The constitution and the judicial law are the sources from which the jurisdiction of the supreme court is derived. The effective passages in the constitution are in the second section of the third article. "The judicial power shall extend to controversies between a state and citizens of another state. In cases in which a state shall be a party, the supreme court shall have original

jurisdiction." The judicial act thus organizes the jurisdiction delineated by the constitution. "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states and aliens, in which latter case it shall have original, but not exclusive jurisdiction." Upon this basis we contend: 1st. That the constitution vests a jurisdiction in the supreme court over a state, as a defendant, at the suit of a private citizen of another state. 2d. That the judicial act recognises that jurisdiction.

1st. The constitution vests a jurisdiction in the supreme court over a state, as a defendant, at the suit of a private citizen of another state. Consult the letter of the constitution, or rather the influential words of the clause in question. The judicial power is extended to controversies between a state and citizens of another state. I pass over the word "between," as in no respect indicating who is to be plaintiff or who defendant. In the succeeding paragraph, we read a comment on these words, when it is said, that in cases in which a state shall be a *party* the supreme court shall have original jurisdiction. Is not a defendant a *party*, as well as a plaintiff? *421] If authority *be necessary for so notorious a definition, recur to 1 Harr. Ch. Pr. p. 35, where it is observed, that "in this court," that is, in the high court of chancery of England, "suits are generally commenced. prosecuted and *defended* by *parties* in their own names only." I might appeal, too, to a work of greater solemnity and of greater obligation; the articles of confederation. In describing the mode by which differences between two or more states shall be adjusted, they speak of a day to be assigned for the appearance of the *parties;* of each *party* alternately striking the names of the persons proposed as judges; of either *party* neglecting to attend; of striking names in behalf of a *party* absent; of any of the *parties* refusing to submit to the authority of the court; and of lodging the sentence among the acts of congress for the security of the *parties* concerned. Human genius might be challenged to restrict these words to a plaintiff state alone. It is, indeed, true, that according to the *order* in which the controversies of a state are mentioned, the state is the first; and from thence it may be argued, that they must be those in which a state is first named, or plaintiff. Nobody denies, that the citizens of a state may sue foreign subjects, or foreign subjects the citizens of a state. And yet, the expression of the constitution is, "between a state or the citizens thereof, and foreign states, citizens or subjects." The order, in this instance, works no difference. In common language, too, it would not violate the substantial idea, if a controversy, said to be between A. B. and C. D., should appear to be between C. D. and A. B. Nay, the opportunity fairly occurs, in two pages of the judicial article, to confine suits to states, as plaintiffs, but they are both neglected, notwithstanding the consciousness which the convention must have possessed, that the words, unqualified, strongly *tended*, at least, to subject states as defendants.

With the advantage of the *letter* on our side, let us now advert to the *spirit* of the constitution, or rather its genuine and necessary interpretation. I am aware of the danger of going into a wide history of the constitution, as a guide of construction; and of the still greater danger of laying any important stress upon the preamble, as explanatory of its powers. I resort, therefore, to the *body* of it; which shows that there may be various actions

of states, which are to be annulled. If, for example, a state shall suspend the privilege of a writ of *habeas corpus*, unless when in cases of rebellion or invasion the public safety may require it; should pass a bill of attainder or *ex post facto* law; should enter into any treaty, alliance or confederation; should grant letters of marque and reprisal; should coin money; should emit bills of credit; should make anything but gold and silver coin a tender in payment of debts; should pass a *law impairing the obligation of contracts; should, without the consent of congress, lay imposts or duties on imports or exports, with certain exceptions; should, without the consent of congress, lay any duty on tonnage, or keep troops or ships of war, in time of peace; these are expressly prohibited by the constitution; and thus is announced to the world, the probability, but certainly the apprehension, that states may injure individuals in their property, their liberty and their lives; may oppress sister states; and may act in derogation of the general sovereignty. [*422

Are states then to enjoy the high privilege of acting thus eminently wrong, without control; or does a remedy exist? The love of morality would lead us to wish that some check should be found; if the evil, which flows from it, be not too great for the good contemplated. The common law has established a principle, that no prohibitory act shall be without its vindicatory quality; or, in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable. Government itself would be useless, if a pleasure to obey or transgress with impunity, should be substituted in the place of a sanction to its laws. This was a just cause of complaint against the deceased confederation. In our solicitude for a remedy, we meet with no difficulty, where the conduct of a state can be animadverted on, through the medium of an individual. For instance, without suing a state, a person arrested may be liberated by *habeas corpus;* a person attainted, and a convict under an *ex post facto* law, may be saved; those who offend against improper treaties may be protected, or who execute them, may be punished; the actors under letters of marque and reprisal may be mulcted; coinage, bills of credit, unwarranted tenders, and the impairing of contracts between individuals, may be annihilated. But this redress goes only half way; as some of the preceding unconstitutional actions must pass without censure, unless states can be made defendants. What is to be done, if, in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What, if a state should adulterate or coin money below the congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What, if a state should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected, without a suit against the state. It is not denied, that one state may be sued by another; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the state aggrieving. A distinction between the cases is supportable only on a supposed comparative inferiority of the *plaintiff. But the framers of the constitution could never have thought thus: they must have viewed human rights in their essence, not in their mere form. They had heard, seen, I will say, felt that legislators were not so far sublimed above other men, as to soar beyond the region of passion. Unfledged as America [*423

was in the vices of old governments, she had some, incident to her own new situation: individuals had been victims to the oppression of states.

These doctrines are moreover justified: 1st. By the relation in which the states stand to the federal government: 2d. By the law of nations, on the subject of suing sovereigns: and 3d. They are not weakened by any supposed embarrassment attending the mode of executing a decree against a state.

1st. I acknowledge, and shall always contend, that the states are sovereignties. But with the free will, arising from absolute independence, they might combine in government for their own happiness. Hence sprang the confederation; under which, indeed, the states retained their exemption from the forensic jurisdiction of each other, and, except under a peculiar modification, of the United States themselves. Nor could this be otherwise; since such a jurisdiction was nowhere (according to the language of that instrument) *expressly* delegated. This government of supplication cried aloud for its own reform; and the public mind of America decided, that it must perish of itself, and that the Union would be thrown into jeopardy, unless the energy of the general system should be increased. Then it was, the present constitution produced a new order of things. It derives its origin immediately from the people; and the people individually are, under certain limitations, subject to the legislative, executive and judicial authorities thereby established. The states are, in fact, assemblages of these individuals who are liable to process. The limitations which the federal government is admitted to impose upon their powers, are diminutions of sovereignty, at least, equal to the making of them defendants. It is not pretended, however, to deduce from these arguments alone, the amenability of states to judicial cognisance; but the result is, that there is nothing in the nature of sovereignties, combined as those of America are, to prevent the words of the constitution, if they naturally mean what I have asserted, from receiving an easy and usual construction. But pursue the idea a step further; and trace one, out of a multitude of examples, in which the general government may be convulsed to its centre without this judicial power. If a state shall injure an individual of another state, the latter must protect him by a remonstrance. What if this be ineffectual? To stop there, would cancel his allegiance; one
*424] state cannot sue another for such a cause; acquiescence is not to *be believed. The crest of war is next raised; the federal head cannot remain unmoved, amidst these shocks to the public harmony. Ought then a *necessity* to be created for drawing out the general force, on an occasion so replete with horror? Is not an adjustment by a judicial form far preferable? Are not peace and concord among the states, two of the greatest ends of the constitution? To be consistent, the opponents of my principles must say, that a state may not be sued by a foreigner. What? Shall the tranquillity of our country be at the mercy of every state? Or, if it be allowed, that a state may be sued by a foreigner, why, in the scale of reason, may not the measure be the same, when the citizen of another state is the complainant?

Nor is the history of confederacies wholly deficient in analogy; although a very strict one is scarcely to be expected. A parade of deep research into the Amphictyonic Council, or the Achæan league, would be fruitless, from the dearth of historical monuments. With the best lights, they would probably be found, not to be positively identical with our union. So little did they approach to a national government, that they might well be destitute

of a common judicatory. So ready were the ancient governments to merge the injuries to individuals in a state quarrel, and so certain was it, that any judicial decree must have been enforced by arms, that the mild form of a legal discussion could not but be viewed with indifference, if not contempt. And yet, it would not be extravagant, to conjecture, that all civil causes were sustained before the Amphyctionic Council.(*a*) What we know of the Achæan confederacy, exhibits it as purely national, or rather consolidated. They had common magistrates, taken by rotation from the towns;(*b*) and the amenability of the constituent cities to some supreme tribunal, is as probable as otherwise. But, in fact, it would be a waste of time, to dwell upon these obscurities. To catch *all* the semblances of confederacies, scattered through the historic page, would be no less absurd, than to search for light in regions of darkness, or a stable jurisprudence in the midst of barbarity and bloodshed. Advancing then, into more modern times, the Helvetic union presents itself; one of whose characteristics is, that there is no common judicatory. (Stanyan, 117.) Nor does it obtain in Holland. But it cannot be concluded from hence, that the Swiss, or the Dutch, the jealousy of whom would not suffer them to adopt a national government, would deem it an abasement, to summon a state, connected as the United States are, before a national tribunal. But our anxiety for precedents is relieved by appealing to the Germanic Empire. The jumble of fifty principalities together, no more deserves *the name of one body, than the incoherent parts of Nebuchadnezzar's image. The princes wage war, [542* without the consent of their paramount sovereign; they even wage war upon each other; nay, upon the emperor himself; after which, it will add but little to say, that they are distinct sovereignties. And yet, both the Imperial Chamber, and the Aulic Council hear and determine the complaints of individuals against the Prince.(*c*)

It will not surely be required to assign a reason, why the confederation did not convey a similar jurisdiction; since that scanty and strict paper was of so different a hue and feature from the constitution, as scarcely to appear the child of the same family.

I hold it, therefore, to be no degradation of sovereignty, in the states, to submit to the supreme judiciary of the United States. At the same time, by way of anticipating an objection, I assert, that it will not follow, from these premises, that the United States themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminences. We have, indeed, known petitions of right, *monstrans de droit*, and even process in the exchequer. But the first is in the style of entreaty; the second, being apparent upon the record, is so far a deduction from the royal title; the third, as in the *Banker's case*, in the 11th volume of the State Trials, is applicable only, where the charge is claimed against the revenue; and all of them are widely remote from an involuntary subjection of the sovereign to the cognisance of his own courts.

2d. But what, if the high independence of dissevered nations remained

(*a*) See Anacharsis, 3 Vol. p. 300.
(*b*) See Gast's Hist. of Greece, p. 321.
(*c*) See History of Germanic Body, p. 157–8.

uncontrolled among the United States, so far as to place the individual states no more within the sphere of the supreme court, than one independent nation is within the jurisdiction of another? It has been a contest amongst civilians, whether one Prince, found within the territory of another, may be sued for a contract.(*a*) I do not assert the affirmative; but it is allowable to observe, that such a position, once conceded, would illustrate and almost settle the present inquiry. But the same author, who repudiates the former idea, is strenuous in the opinion, that where the effects or property of one Prince are arrested in the dominions of another, the proprietor Prince may be summoned before a tribunal of that other.[1] Now, although, each state has its separate territory, in one sense, the whole is that of the United States, in another. The jurisdiction of this court reaches to Georgia, as well as to Philadelphia. If, therefore, the process could be commenced *in rem*, the authority *of Bynkershoek would justify us; and whether it be com-
*426] menced in *rem*, or in *personam*, the principle of amenability is equally avowed.

3d. Nor will these sentiments be weakened by the want of a special provision in the constitution for an execution; since it is so provided in no case, not even where states are in litigation. This will be more properly arranged under the following head concerning the judicial act.

1. The judicial act recognises the jurisdiction over states. Instead of using the first expression in the constitution, to wit, "controversies *between*, &c.," it adopts the second, namely, "where a state shall be a party." Thus, it makes no distinction between a state as plaintiff, or as defendant: but evidently comprehends in the word "*party*" a state, as defendant, in one case, at least, where a state is opposed to a state. This, after what has been said, need not be further pressed.

2. The master objection is, that the law has prescribed no execution against a state; that none can be formed with propriety; and that, therefore, a judgment against a state must be abortive. It is true, that no express execution is given by the judicial act, or the process act. But has it ever been insinuated, that a dispute between two states is not within federal cognisance, because no execution is marked out? Or, that for a like reason, the court, given by the confederation, could not proceed?

The supreme court are either vested with authority by the judicial act, to form an execution, or possess it, as incidental to their jurisdiction. By the 14th section of the judicial act, the supreme court, as one of the courts of the United States, has power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. Executions for one state against another, are writs not specially provided for by statute, and are necessary for the exercise of the jurisdiction of the supreme court, in a contest between states; and although, in neither the common law, nor any statute, the form of such an execution appears; yet, is it agreeable to the principles and usages of law, that there should be a mode of carrying into force a jurisdiction which is

(*a*) See Bynk. c. 3, 4.

[1] But see Nathan *v.* Virginia, *ante*, p. 77, in note.

not denied. If, then, the supreme court may create a mode of execution, when a state is defeated at law, by a state, why may not the same means be exerted, where an *individual* is successful against a state?

Again, the process act, which dictates the modes of execution to the other courts, is silent as to the supreme court; it must, therefore, be either wholly without executions, or derive them from the foregoing section of the judicial act, or adopt them, on the ground of incidental *power. The total negation of execution is obviously inadmissible; and the construction of [*427 the judicial act, which has been just insisted on, would be sufficiently efficacious. But why may not executions even spring from the will of the supreme court, as the writs of *fieri facias*, *levari facias* and *distringas* were originally the creation of courts? Such an incidental authority is not of a higher tone than that of fine and imprisonment, which belongs to every court of record, without a particular grant of it.

But what species of execution can be devised? This, though, a difficult task, is not impracticable. And if it were incumbent on me to anticipate the measures of the court, I would suggest these outlines of conduct. First, that if the judgment be for the specific thing, it may be seized: or, secondly, if for damages, such property may be taken, as, upon the principles, and under the circumstances cited from Bynkershoek, would be the ground-work of jurisdiction over a foreign prince. However, it is of no consequence, whether the conjectures be accurate or not; as a correct plan can doubtless be discovered.

Still, we may be pressed with the final question: "What if the state is resolved to oppose the execution?" This would be an awful question indeed! He, to whose lot it should fall to solve it, would be impelled to invoke the God of wisdom to illuminate his decision. I will not believe, that he would recall the tremendous examples of vengeance, which in past days have been inflicted by those who claim, against those who violate, authority. I will not believe that in the wide and gloomy theatre, over which his eye should roll, he might perchance catch a distant glimpse of the federal arm uplifted. Scenes like these are too full of horror, not to agitate, not to rack, the imagination. But at last, we must settle on this result; there are many *duties*, precisely defined, which the states must perform. Let the remedy which is to be administered, if these should be disobeyed, be the remedy on the occasion which we contemplate. The argument requires no more to be said; it surely does not requires us to dwell on such painful possibilities. Rather, let me hope and pray, that not a single star in the American constellation will ever suffer its lustre to be diminished, by hostility against the sentence of a court, which itself has adopted.

But, after all, although no mode of execution should be invented, why shall not the court proceed to judgment? It is well known, that the courts of some states have been directed to render judgment, and there stop; and that the chancery has often tied up the hands of the common law, in a like manner. Perhaps, if a government could be constituted, without mingling at all the three orders of power, courts should, in *strict theory, only [*428 declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the executive. But that any state should refuse to conform to a solemn determina-

tion of the supreme court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character.

Combine then into one view, the letter and the spirit of the constitution; the relation of the several states to the Union of the states; the precedents from other sovereignties; the judicial act, and process act; the power of forming executions; the little previous importance of this power to that of rendering of judgment; the influence under which every state must be to maintain the general harmony; and the inference, wili, I trust, be in favor of the first proposition; namely, that a state may be sued by the citizens of another state.

II. The next question is, whether an action of *assumpsit* will lie against a state? I acknowledge, that it does not follow, from a state being suable in some actions, that she is liable in every action. But that of *assumpsit* is of all others most free from cavil. Is not a state capable of making a promise? Certainly; as a state is a moral person, being an assemblage of individuals, who are moral persons. Vatt. lib. 1, § 2. On this ground, treaties and other compacts, are daily concluded between nations. On this ground, the United States and the particular states have moved, during and since the war. On this ground, the constitution transmitted from the old to the new government all the obligations of the former. Without it, every government must stagnate. But I shall enter into this matter no further, as it is open for discussion in almost every stage of the cause.

III. I affirm, in the third place, that the service of the summons on the governor and attorney-general, is a competent service. The service of process is solely for the purpose of notice to prepare for defence. The mode, if it be not otherwise prescribed by law, or long usage, is in the discretion of the court; and here that discretion must operate. The defence must rest either upon the three branches of government collectively, or one of them. But as the judiciary are manifestly disjoined from such an office, and the legislative are only to provide funds to answer damages, the practice of considering the executive, as the ostensible representative of a state, devolves upon it this function. In the instance of Georgia, her constitution establishes the governor as the channel of communication with the legislature; he is bound by oath to *defend* her; and he has instituted a suit, now depending in this court, in her behalf, against Brailsford and others. It was supererogation to serve *the process on the attorney-general; although this has satisfied even etiquette itself, by notifying the officer who is the instrument of defence.

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IV. As to the steps proper for compelling an appearance; these too, not being dictated by law, are in the breast of the court. I banish the comparison of states with corporations; and therefore, search for no resemblance in them. I prefer the scheme contained in the motion; because it tempers with moderation the preliminary measures; and postpones embarrassments, at any rate, until the close of the business. It is unnecessary to spend time on this head; as the mode is to me absolutely indifferent, if it be effectual, and respectful.

With this discussion, though purely legal, it will be impossible to prevent the world from blending political considerations. Some may call this an attempt to consolidate. But before such an imputation shall be pronounced, let them examine well, if the fair interpretation of the constitution

does not vindicate my opinions. Above all, let me personally assure them, that the prostration of state-rights is no object with me; but that I remain in perfect confidence, that with the power, which the people and the legislatures of the states indirectly hold over almost every movement of the national government, the states need not fear an assault from bold ambition, nor any approaches of covered stratagem.

The Court held the case under advisement, from the 5th to the 18th of February, when they delivered their opinions *seriatim*.

IREDELL, Justice.—This great cause comes before the court, on a motion made by the attorney-general, that an order be made by the court to the following effect: "That unless the state of Georgia shall, after reasonable notice of this motion, cause an appearance to be entered on behalf of the said state, on the fourth day of next term, or show cause to the contrary, judgment shall be entered for the plaintiff, and a writ of inquiry shall be awarded." Before such an order be made, it is proper that this court should be satisfied it hath cognisance of the suit; for, to be sure, we ought not to enter a conditional judgment (which this would be), in a case where we were not fully persuaded we had authority to do so.

This is the first instance wherein the important question involved in this cause has come regularly before the court. In the Maryland case, it did not, because the attorney-general of the state voluntarily appeared. We could not, therefore, without the greatest impropriety, have taken up the question suddenly. That case has since been compromised; but had it proceeded to trial, and a verdict been given for the plaintiff, it would have been our duty, previous to our giving judgment, to have well *considered whether we were warranted in giving it. I had then great doubts upon my [*430 mind, and should, on such a case, have proposed a discussion of the subject. Those doubts have increased since, and after the fullest consideration I have been able to bestow on the subject, and the most respectful attention to the able argument of the attorney-general, I am now decidedly of opinion, that no such action as this before the court can legally be maintained.

The action is an action of *assumpsit*. The particular question then before the court, is, will an action of *assumpsit* lie against a state? This particular question (abstracted from the general one, viz., whether, a state can in any instance be sued?) I took the liberty to propose to the consideration of lhe attorney-general, last term. I did so, because I have often found a great deal of confusion to arise from taking too large a view at once, and I had found myself embarrassed on this very subject, until I considered the abstract question itself. The attorney-general has spoken to it, in deference to my request, as he has been pleased to intimate, but he spoke to this particular question slightly, conceiving it to be involved in the general one; and after establishing, as he thought, that point, he seemed to consider the other followed of course. He expressed, indeed, some doubt how to prove what appeared so plain. It seemed to him (if I recollect right), to depend principally on the solution of this simple question; can a state assume? But the attorney-general must know, that in England, certain judicial proceedings, not inconsistent with the sovereignty, may take place against the crown, but that an action of *assumpsit* will not lie. Yet, surely, the King can assume as well as a state. So can the United States themselves, as well as

any state in the Union: yet, the attorney-general himself has taken some pains to show, that no action whatever is maintainable against the United States. I shall, therefore, confine myself, as much as possible, to the particular question before the court, though every thing I have to say upon it will effect every kind of suit, the object of which is to compel the payment of money by a state.

The question, as I before observed, is—will an action of *assumpsit* lie against a state? If it will, it must be in virtue of the constitution of the United States, and of some law of congress conformable thereto. The part of the constitution concerning the judicial power, is as follows, viz: Art. III., § 2. The judicial power shall extend, (1) To all cases, in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority: (2) To all cases affecting ambassadors, or other public ministers and consuls: (3) To all cases of admiralty and maritime jurisdiction: (4) To all controversies to
*431] which the *United States shall be a party: (5) To controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens or subjects. The constitution, therefore, provides for the jurisdiction wherein a state is a party, in the following instances: 1st. Controversies between two or more states: 2d. Controversies between a state and citizens of another state: 3d. Controversies between a state, and foreign states, citizens or subjects. And it also provides, that in all cases in which a state shall be a party, the supreme court shall have original jurisdiction.

The words of the general judicial act, conveying the authority of the supreme court, under the constitution, so far as they concern this question, are as follows: § 13. "That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens, in which latter case, it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party."

The supreme court hath, therefore, *first*, exclusive jurisdiction in every controversy of a civil nature: 1st. Between two or more states: 2d. Between a state and a foreign state: 3d. Where a suit or proceeding is depending against ambassadors, other public ministers, or their domestics or domestic servants. *Second*, original, but not exclusive jurisdiction, 1st. Between a state and citizens of other states: 2d. Between a state and foreign citizens or subjects: 3d. Where a suit is brought by ambassadors or other public ministers: 4th. Where a consul or vice-consul is a party. The suit now before the court (if maintainable at all) comes within the latter description, it being a suit against a state by a citizen of another state.

The constitution is particular in expressing the parties who may be the objects of the jurisdiction in any of these cases, but in respect to the subject

matter upon which such jurisdiction is to be exercised, used the word "controversies" only. The act of congress more particularly mentions civil controversies, a qualification of the general word in the constitution, which I do not doubt every reasonable man will think well warranted, for it *cannot be presumed, that the general word "controversies" was [*432 intended to include any proceedings that relate to criminal cases, which in all instances that respect the same governor only, are uniformly considered of a local nature, and to be decided by its particular laws. The word "controversy" indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in congress to guard against the possibility of it.

A general question of great importance here occurs. What controversy of a civil nature can be maintained against a state by an individual? The framers of the constitution, I presume, must have meant one of two things—Either, 1. In the conveyance of that part of the judicial power which did not relate to the execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself), to refer to antecedent laws for the construction of the general words they use: or, 2. To enable congress in all such cases to pass all such laws as they might deem necessary and proper to carry the purposes of this constitution into full effect, either absolutely at their discretion, or, at least, in cases where prior laws were deficient for such purposes, if any such deficiency existed.

The attorney-general has indeed suggested another construction, a construction, I confess, that I never heard of before, nor can I now consider it grounded on any solid foundation, though it appeared to me to be the basis of the attorney-general's argument. His construction I take to be this: "That the moment a supreme court is formed, it is to exercise all the judicial power vested in it by the constitution, by its own authority, whether the legislature has prescribed methods of doing so, or not." My conception of the constitution is entirely different. I conceive, that all the courts of the United States must receive, not merely their *organization* as to the number of judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the legislature only. This appears to me to be one of those cases, with many others, in which an article of the constitution cannot be effectuated, without the intervention of the legislative authority. There being many such, at the end of the special enumeration of the powers of congress in the constitution, is this general one: "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 in any department or officer thereof." None will deny, that an act of legislation is necessary to say, at least, of what number the judges are to consist; the President, with the consent of the senate, could not nominate a number at their *discretion. The [*433 constitution intended this article so far, at least, to be the subject of a legislative act. Having a right thus to establish the court, and it being capable of being established in no other manner, I conceive it necessarily follows, that they are also to direct the manner of its proceedings. Upon this authority, there is, that I know, but one limit; that is, "that they shall not exceed their authority." If they do, I have no hesitation to say, that

any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law, paramount to all others, which we are not only bound to consult, but sworn to observe; and therefore, where there is an interference, being superior in obligation to the other, we must unquestionably obey that in preference. Subject to this restriction, the whole business of organizing the courts, and directing the methods of their proceeding, where necessary, I conceive to be in the discretion of congress. If it shall be found, on this occasion, or on any other, that the remedies now in being are defective, for any purpose, it is their duty to provide for, they no doubt will provide others. It is their duty to *legislate*, so far as is necessary to carry the constitution into effect. It is *ours* only to *judge*. We have no reason, nor any more right to distrust their doing their duty, than they have to distrust that we all do ours. There is no part of the constitution that I know of, that authorizes this court to take up any business where they left it, and in order that the powers given in the constitution may be in full activity, supply their omission by making *new laws* for *new cases;* or, which I take to be the same thing, applying *old principles* to *new cases* materially different from those to which they were applied before.

With regard to the attorney-general's doctrine of incidents, that was founded entirely on the supposition of the other I have been considering. The authority contended for is certainly not one of those necessarily incident to all courts merely as such.

If therefore, this court is to be (as I consider it) the organ of the constitution and the law, not of the *constitution* only, in respect to the manner of its proceeding, we must receive our directions from the legislature in this particular, and have no right to constitute ourselves an *officina brevium*, or take any other short method of doing what the constitution has chosen (and, in my opinion, with the most perfect propriety) should be done, in another manner.

But the act of congress has not been altogether silent upon this subject. The 14th section of the judicial act, provides in the following words: "All the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their
*434] respective *jurisdictions, and agreeable to the principles and usages of law." These words refer as well to the supreme court as to the other courts of the United States. Whatever writs we issue, that are necessary for the exercise of our jurisdiction, must be agreeable to the principles and usages of law. This is a direction, I apprehend, we cannot supersede, because it may appear to us not sufficiently extensive. If it be not, we must wait until other remedies are provided by the same authority. From this it is plain, that the legislature did not choose to leave to our own discretion the path to justice, but has prescribed one of its own. In doing so, it has, I think, wisely, referred us to principles and usages of law, already well known, and by their precision calculated to guard against that innovating spirit of courts of justice, which the attorney-general, in another case, reprobated with so much warmth, and with whose sentiments in that particular, I most cordially join. The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the

special words I have above cited, from the judicial act, I apprehend, can be, either, 1st. Those of the particular laws of the state, against which the suit is brought. Or 2d. Principles of law, common to all the states. I omit any consideration arising from the word "usages," though a still stronger expression. In regard to the principles of the particular laws of the state of Georgia, if they in any manner differed, so as to affect this question, from the principles of law, common to all the states, it might be material to inquire, whether, there would be any propriety or congruity in laying down a rule of decision which would induce this consequence, that an action would lie in the supreme court against some states, whose laws admitted of a compulsory remedy against their own governments, but not against others, wherein no such remedy was admitted, or which would require, perhaps, if the principle was received, fifteen different methods of proceeding against states, all standing in the same political relation to the general government, and none having any pretence to a distinction in its favor, or justly liable to any distinction to its prejudice. If any such difference existed in the laws of the different states, there would seem to be a propriety, in order to induce uniformity (if a constitutional power for that purpose exists), that congress should prescribe a rule, fitted to this new case, to which no equal, uniform and impartial mode of proceeding could otherwise be applied.

But this point, I conceive, it is unnecessary to determine, because I believe there is no doubt, that neither in the state now in question, nor in any other in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a state, was in being, either when the constitution *was adopted, or at the time the judicial act was passed. Since that time, an act of assembly for such a purpose has been passed [*435 in Georgia. But that surely could have no influence in the construction of an act of the legislature of the United States, passed before.

The only principles of law, then, that can be regarded, are those common to all the states. I know of none such, which can affect this case, but those that are derived from what is properly termed "the common law," a law which I presume is the ground-work of the laws in every state in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England (unaltered by any statute), at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the states; and therefore, it is probable, the common law in each is in some respects different. But it is certain, that in regard to any common-law principle which can influence the question before us, no alteration has been made by any statute, which could occasion the least material difference, or have any partial effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered: each state in the Union is sovereign, as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to

them: of course, the part not surrendered must remain as it did before. The powers of the general government, either of a legislative or executive nature, or which particularly concerns treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states: they require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. The judicial power is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties. But it also goes further. Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial authority in
*436] regard to such *subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as states, under the constitution, can be made legally liable to this authority, so far, to be sure, they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires. The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to such controversies in which a state *can* be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by a reference either to pre-existent laws, or laws passed under the constitution and in conformity to it.

Whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a state may be involved with an individual, without regard to any prior exemption; yet it is certain, that the legislature has in fact proceeded upon the former supposition, and not upon the latter. For, besides what I noticed before, as to an express reference to principles and usages of law, as the guide of our proceeding, it is observable, that in instances like this before the court, this court hath a *concurrent jurisdiction* only; the present being one of those cases where, by the judicial act, this court hath *original* but not *exclusive* jurisdiction. This court, therefore, under that act, can exercise no authority, in such instances, but such authority as, from the subject-matter of it, may be exercised in some other court. There are no courts with which such a concurrence can be suggested but the circuit courts, or courts of the different states. With the former, it cannot be, for admitting that the constitution is not to have a restrictive operation, so as to confine all cases in which a state is a party, exclusively to the supreme court (an opinion to which I am strongly inclined), yet, there are no words in the definition of the powers of the circuit court, which give a color to an opinion, that where a suit is brought against a state, by a citizen of another state, the circuit court could exercise any jurisdiction at all. If they could, however, such a jurisdiction, by the very terms of their authority, could be only concurrent with the courts of the several states. It follows, therefore, unquestionably, I think, that look

ing at the act of congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally enacted), we can exercise no authority, in the present instance, *consistently with the [*437 clear intention of the act, but such as a proper state court would have been, at least, competent to exercise, at the time the act was passed.

If, therefore, no new remedy be provided (as plainly is the case), and consequently, we have no other rule to govern us, but the principles of the pre-existent laws, which must remain in force until superseded by others, then it is incumbent upon us to inquire, whether, previous to the adoption of the constitution (which period, or the period of passing the law, in respect to the object of this inquiry, is perfectly equal), an action of the nature like this before the court could have been maintained against one of the states in the Union, upon the principles of the common law, which I have shown to be alone applicable. If it could, I think, it is now maintainable here: if it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the constitution as to the power of congress to authorize such a one. Now, I presume, it will not be denied, that in every state in the Union, previous to the adoption of the constitution, the only common-law principles in regard to suits that were in any manner admissible in respect to claims against the state, were those which, in England, apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this constitution, could, in any manner, or upon any color, apply to the case of a claim against a state, in its own courts, where it was solely and completely sovereign, in respect to such cases, at least. Whether that remedy was strictly applicable or not, still, I apprehend, there was no other. The only remedy, in a case like that before the court, by which, by any possibility, a suit can be maintaineda gainst the crown, in England, or, at any period from which the common law, as in force in America, could be derived, I believe, is that which is called a *Petition of right*. It is stated, indeed, in Com. Dig. 105, that "until the time of Edward I., the King might have been sued in all actions, as a common person." And some authorities are cited for that position, though it is even there stated as a doubt. But the same authority adds—"but now, none can have an action against the King, but one shall be put to sue to him by petition." This appears to be a quotation or abstract from Theloall's Digest, which is also one of the authorities quoted in the former case. And this book appears (from the law catalogue) to have been printed so long ago as the year 1579. The same doctrine appears (according to a quotation in Blackstone's Commentaries, 1 vol. 243) to be stated in Finch's Law 253, the first edition of which, it seems, was published in 1579. This also more fully appears in the case of *The Bankers*, and particularly from the celebrated argument of *Somers, in the time [*438 of Wm. III., for, though that case was ultimately decided against Lord Somers's opinion, yet, the ground on which the decision was given, no way invalidates the reasoning of that argument, so far as it respects the simple case of a sum of money demandable from the King, and not by him secured on any particular revenues. The case is reported in Freeman, vol. 1, p. 331; 5 Mod. 29; Skin. 601; and lately very elaborately in a small pamphlet published by Mr. Harrgave, which contains all the reports at

length, except Skinner's, together with the argument at large of Lord Somers; besides some additional matter.

The substance of the case was as follows: King Charles II. having received large sums of money from bankers, on the credit of the growing produce of the revenue, for the payment of which, tallies and orders of the exchequer were given (afterwards made transferable by statute), and the payment of these having been afterwards postponed, the King at length, in order to relieve the bankers, in 1677, granted annuities to them out of the hereditary excise, equal to six per cent. interest on their several debts, but redeemable on payment of the principal. This interest was paid until 1683, but it then became in arrear, and continued so at the revolution; and the suits which were commenced to enforce the payment of these arrears, were the subject of this case. The bankers presented a petition to the barons of the exchequer, for the payment of the arrears of the annuities granted; to which petition the attorney-general demurred. Two points were made: First, whether the grant out of the excise was good; second, whether a petition to the barons of the exchequer was a proper remedy. On the first point, the whole court agreed, that, in general, the King could alienate the revenues of the crown; but Mr. Baron Lechmere differed from the other barons, by thinking that this particular revenue of the excise, was an exception to the general rule. But all agreed, that the petition was a proper remedy. Judgment was, therefore, given for the petition, by directing payment to the complainants, at the receipt of the exchequer. A writ of error was brought on this judgment, by the attorney-general, in the exchequer-chamber. There, all the judges who argued held the grant out of the excise good. A majority of them, including Lord Chief Justice Holt, also approved of the remedy by petition to the barons. But Lord Chief Justice Treby was of opinion, that the barons of the exchequer were not authorized to make order for payments on the receipt of the exchequer, and therefore, that the remedy by petition to the barons was inapplicable. In this opinion, Lord Somers concurred. A doubt then arose, whether the Lord Chancellor and Lord High Treasurer were at liberty to give judgment, according to their
*439] own *opinion, in opposition to that of a majority of the attendant judges; in other words, whether the judges called by the Lord Chancellor and Lord High Treasurer were to be considered as mere assistants to them, without voices. The opinion of the judges being taken on this point, seven against three, held, that the Lord Chancellor and Lord Treasurer were not concluded by the opinions of the judges, and therefore, that the Lord Keeper, in the case in question, there being then no Lord Treasurer, might give judgment according to his own opinion. Lord Somers concurring in this idea, reversed the judgment of the court of exchequer. But the case was afterwards carried by error into parliament, and there the Lords reversed the judgment of the exchequer-chamber, and affirmed that of the exchequer. However, notwithstanding this final decision in favor of the bankers and their creditors, it appears by a subsequent statute, that they were to receive only one-half of their debts; the 12 & 14 *Wm. III.*, after appropriating certain sums out of the hereditary excise for public uses, providing that in lieu of the annuities granted to the bankers and all arrears, the hereditary excise should, after the 26th of December 1601, be charged

with annual sums equal to an interest of three per cent., until redeemed by payment of one moiety of the principal sums. *Hargrave's Case of the Bankers*, 1, 2, 3.

Upon perusing the whole of this case, these inferences naturally follow: 1st. That admitting the authority of that decision, in its fullest extent, yet, it is an authority only in respect to such cases, where letters-patent from the crown have been granted for the payment of certain sums out of a particular revenue. 2d. That such relief was grantable in the exchequer, upon no other principle than that that court had a right to direct the issues of the exchequer as well after the money was deposited there, as while (in the exchequer language) it was *in transitu*. 3d. That such an authority could not have been exercised by any other court in Westminster Hall, nor by any court, that, from its particular constitution, had no control over the revenues of the kingdom. Lord C. J. Holt, and Lord Somers (though they differed in the main point) both agreed in that case, that the court of King's bench could not send a writ to the treasury. Hargrave's case, 45, 89. Consequently, no such remedy could, under any circumstances, I apprehend, be allowed in any of the American states, in none of which it is presumed any court of justice hath any express authority over the revenues of the state such as has been attributed to the court of exchequer in England.

The observations of Lord Somers, concerning the general remedy by petition to the King, have been extracted and referred to by some of the ablest law characters since; particularly, by *Lord C. Baron Comyns, in his digest. I shall, therefore, extract some of them, as he appears [*440 to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case. Hargrave's Preface to the Case of the Bankers.

After citing many authorities, Lord Somers proceeds thus: "By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent or annuity, or other charge from the crown; whether it was a rent or annuity, originally granted by the King, or issuing out of lands, which by subsequent title came to be in the King's hands; in all cases, the remedy to come at it was, by petition to the person of the King; and no other method can be shown to have been practised at common law. Indeed, I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy, at common law, is to sue by petition to the person of the King. I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in the nature of a defendant; and is admitted to interplead in the case, with the King, in defence of his title, which otherwise would be defeated by finding the office. And to show that this was so, I would take notice of several instances. That, in cases of debts owing by the crown, the subject's remedy was by petition, appears by *Aynesham's Case*, Ryley, 251, which is a petition for 19*l.* due for work done at Carnarvon castle. So, Ryley 251, the executors of John Estrateling petition for 132*l.* due to the testator, for

wages. The answer is remarkable ; for there is a latitude taken, which will very well agree with the notion that is taken up in this case ; *habeant bre. de liberate in canc. thes. et camerar, de* 32*l. in partem solutionis.* So, the case of *Yerward de Galeys*, for 56*l.* Ryley 414. In like manner, in the same book, 253 (33 *Edw. I.*), several parties sue by *petition* for money and goods taken for the King's use ; and also for wages due to them ; and for debts owing to them by the king. The answer is, *rex ordinavit per concilium thesaurarii et baronum de scaccario, quod satisfiet iis quam citius fieri poterit ; ita quod contertos se tenebunt.* And this is an answer given to a petition presented to the king in parliament ; and therefore, we have reason to conclude it to be warranted by law. They must be content, and they shall be paid, *quam citius fieri poterit.* The parties, in these cases, first go to the King by petition: it is by him they are sent to the exchequer; and it is by writ under the great seal, that the exchequer is impowered to act. Nor
*441] can *any such writ be found (unless in a very few instances, where it is mere matter of account), in which the treasurer is not joined with the barons. So far was it from being taken to be law at that time, that the barons had any original power of paying the King's debts; or of commanding annuities, granted by the King or his progenitors, to be paid, when the person applied to them for such payment. But, perhaps, it may be objected, that it is not to be inferred, because petitions were brought in these cases, that, therefore, it was of necessity, that the subject should pursue that course, and could take no other way. It might be reasonable to require from those who object thus, that they should produce some precedents, at least, of another remedy taken. But I think, there is a good answer to be given to this objection. All these petitions which I have mentioned, are after the Stat. 8 *Edw. I.* (Ryley 442), where notice is taken that the business of parliament is interrupted by a multitude of petitions, which might be redressed by the chancellor and justices. Wherefore, it is thereby enacted, that petitions which touch the seal shall come first to the chancellor ; those which touch the exchequer, to the exchequer ; and those which touch the justices, or the law of the land, should come to the justices ; and if the business be so great, or *fi de grace*, that the chancellor, or others, cannot do them without the King, then the petitions shall be brought before the King, to know his pleasure ; so that no petitions come before the King and his council, but by the hands of the chancellor, and other chief ministers ; that the King and his council may attend the great affairs of the King's realm, and his sovereign dominions. This law being made ; there is reason to conclude, that all petitions brought before the King or parliament, after this time, and answered there, were brought according to the method of this law ; and were of the nature of such petitions as ought to be brought before the person of the King. And that petitions did lie for a chattel, as well as for a freehold, does appear, 37 Ass. pl. ii.; Bro. Pet. 17. If tenant by the statute-merchant be ousted, he may have petition, and shall be restored. *Vide* 9 *Hen. IV.*, 4 ; Bro. Pet. 9 ; 9 *Hen. VI.*, 21 ; Bro. Pet. 2. If the subject be ousted of his term, he shall have his petition. 7 *Hen. VII.*, 2. Of a chattel real, a man shall have his petition of right, as of his freehold. 34 *Hen. VI.*, 51 ; Bro. Pet. 3. A man shall have a petition of right, for goods and chattels, and the King indorses it in the usual form. It is said, indeed, 1 *Hen. VII.*, 3; Bro. Pet. 19, that a petition will not lie on a chattel. And

admitting there was any doubt as to that point, in the present suit, we are in the case of a freehold." Lord Somers's argument in Hargrave's Case of the Bankers, 103–105.

The solitary case, noticed at the conclusion of Lord Somers's argument, "that a petition will not lie of a chattel," certainly * is deserving of no consideration, opposed to so many other instances mentioned, and [*442 unrecognised (as I believe it is) by any other authority, either ancient or modern, whereas, the contrary, it appears to me, has long been received and established law. In Comyn's Dig. 4 vol. 458, it is said, expressly, "suit shall be to the king by petition, for goods as well as for land." He cites Staundf. Prær. 75 *b*, 72 *b*, for his authority, and takes no notice of any authority to the contrary. The same doctrine is also laid down, with equal explicitness, and without noticing any distinction whatever, in Blackstone's Commentaries, 3 vol. 256, where he points out the petition of right as one of the common-law methods of obtaining possession or restitution from the crown, either of real or personal property; and says expressly, the petition of right "is of use, where the King is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself."

I leave out of the argument, from which I have made so long a quotation, everything concerning the restriction on the exchequer, so far as it concerned the case then before the court, as Lord Somers (although more perhaps by weight of authority than reasoning) was overruled in that particular. As to all others, I consider the authorities on which he relied, and his deduction from them, to be unimpeached.

Blackstone, in the first volume of his Commentaries (p. 203), speaking of demands in point of property upon the King, state the general remedy thus: "If any person has, in point of property, a just demand upon the King, he must petition him in his court of chancery, where his chancellor will administer right, as a matter of grace, though not upon compulsion. (For which he cites Finch L. 255.) "And this is exactly consonant to what is laid down by the writers on natural law. A subject, says Puffendorf, so long as he continues a subject, hath no way to oblige his prince to give him his due when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws. For the end of such action is not to compel the prince to observe the contract, but to persuade him."

It appears, that when a petition to the person of the King is properly presented, the usual way is, for the King to indorse or to underwrite *soit droit fait al partie* (let right be done to the party); upon which, unless attorney-general confesses the suggestion, a commission is issued to inquire into the truth of it; after the return of which, the King's attorney is at liberty to *plead in bar, and the merits shall be determined upon issue [*443 or demurrer, as in suits between subject and subject. If the attorney-general confesses the suggestion, there is no occasion for a commission, his admission of the truth of the facts being equally conclusive, as if they had been found by a jury. See 3 Blackstone's Commentaries, 256; and 4 Com. Dig. 458, and the authorities there cited. Though the above-mentioned

indorsement be the usual one Lord Somers, in the course of his voluminous search, discovered a variety of other answers to what he considered were unquestionable petitions of right, in respect to which he observes: "The truth is, the manner of answering petitions to the person of the King was very various; which variety did sometimes arise from the conclusion of the party's petition; sometimes, from the nature of the thing; and sometimes, from favor to the person; and according as the indorsement was, the party was sent into chancery or the other courts. If the indorsement was general, *soit droit fait al partie*, it must be delivered to the chancellor of England, and then a commission was to go, to find the right of the party, and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the King; but if the indorsement was special, then the proceeding was to be according to the indorsement in any other court. This is fully explained by Staundfort in his treatise of the Prerogative, c. 22. The case Mich. 10 *Hen. IV.*, No. 4, 8, is full as to this matter. The King recovers in a *quare impedit*, by default, against one who was never summoned; the party cannot have a writ of deceit, without a petition. If, then, says the book, he concludes his petition generally "*que le Roy lui face droit*" (that the King will cause right to be done), and the answer be general, it must go into the chancery, that the right may be inquired of by commission; and upon the inquest found, an original writ must be directed to the justices, to examine the deceit, otherwise, the justices before whom the suit was, cannot meddle. But if he conclude his petition especially, that it may please his highness to command his justices to proceed to the examination, and the indorsement be accordingly, *that* had given the justices a jurisdiction. They might, in such case, have proceeded upon the petition, without any commission or any writ to be sued out, the petition and answer indorsed giving a sufficient jurisdiction to the court to which it was directed. And as the book I have mentioned proves this, so many other authorities may be cited." He, accordingly, mentions many other instances, immaterial to be recited here, particularly remarking a very extraordinary difference in the case belonging to the revenue, in regard to which he said, he thought there was not an instance, to be found, where petitions were answered, *soit droit fait aux parties* (let right be done *to the parties). The usual reference appears to have been to the treasurer and barons, commanding them to do justice. Sometimes, a writ under the great seal was directed to be issued to them for that purpose: sometimes, a writ from the chancery directing payment of money immediately, without taking notice of the barons. And other varieties appear to have taken place. See Hargrave's Case of the Bankers, p. 73, *et seq.* But in all cases of petition of right, of whatever nature is the demand, I think it is clear, beyond all doubt, that there must be some indorsement or order of the King himself, to warrant any further proceedings. The remedy, in the language of Blackstone, being a matter of grace and not on compulsion.

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In a very late case in England, this point was incidentally discussed. The case I refer to, is that of *Macbeath* v. *Haldimand*, reported 1 T. R. 172. The action was against the defendant, for goods furnished by the defendant's order, in Canada, when the defendant was governor of Quebec. The defence was, that the plaintiff was employed by the defendant, in his official capacity, and not upon his personal credit, and that the goods being,

therefore, furnished for the use of government, and the defendant not having undertaken personally to pay, he was not liable. The defence was set up at the trial, on the plea of the general issue, and the jury, by Judge BULLER's direction, found a verdict for the defendant. Upon a motion for a new trial, he reported particularly all the facts given in evidence, and said, his opinion had been at the trial, that the plaintiff should be nonsuited; "but the plaintiff's counsel appearing for their client, when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant not being liable, any other person was, he told them, that was no part of their consideration, but being willing to give them any information, he added, that he was of opinion, that if the plaintiff's demands were just, his proper remedy was by a petition of right to the crown. On which, they found a verdict for the defendant. The rule for granting a new trial was moved for, on the misdirection of two points. 1st. That the defendant had, by his own conduct, made himself liable, which question should have been left to the jury. 2d. That the plaintiff had no remedy against the crown, by a petition of right, on the supposition of which the jury had been induced to give their verdict." "Lord MANSFIELD, Chief Justice, now declared, that the court did not feel it necessary for them to give any opinion on the second ground. His lordship said, that great difference had arisen, since the revolution, with respect to the expenditure of the public money. Before that period, all the public supplies were given to the King, who, in *his individual capacity, contracted for all expenses. [*445
he alone had the disposition of the public money. But since that time, the supplies had been appropriated by parliament to particular purposes, and now, whoever advances money for the public service, trusts to the faith of parliament. That according to the tenor of Lord Somer's argument in the *Banker's case*, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the *Banker's case;* and parliament was afterwards obliged to provide a particular fund for the payment of those debts. Whether, however, this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was necessary to determine; at any rate, if there were a recovery against the crown, application must be made to parliament, and it would come under the head of supplies for the year." The motion was afterwards argued on the other ground (with which I have at present nothing to do), and rejected.

In the old authorities, there does not appear any distinction between debts that might be contracted personally by the King, for his own private use, and such as he contracted in his political capacity, for the service of the kingdom. As he had, however, then, fixed and independent revenues, upon which depended the ordinary support of government, as well as the expenditure for his own private occasions, probably, no material distinction, at that time, existed, or could easily be made. A very important distinction may, however, perhaps, now subsist between the two cases, for the reasons intimated by Lord MANSFIELD; since the whole support of government depends now on parliamentary provisions, and except in the case of the civil list, those for the most part annual.

Thus, it appears, that in England, even in the case of a private debt con-

tracted by the King, in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it. If the debts contracted be avowedly for the public uses of government, it is at least doubtful, whether that remedy will lie, and if it will, it remains afterwards in the power of parliament to provide for it, or not, among the current supplies of the year.

Now, let us consider the case of a debt due from a state. None can, I apprehend, be directly claimed but in the following instances. 1st. In case of a contract with the legislature itself. 2d. In case of a contract with the excutive, or any other person, in consequence of an express authority from the legislature. 3d. In case of a contract with the executive, without any special authority. In the first and second cases, the contract is evidently made on the public faith alone. Every man must know that no suit can lie against a legislative body. His only *dependence, *446] therefore, can be, that the legislature, on principles of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the legislature may incur, the case is certainly without remedy in any of the courts of the state. It never was pretended, even in the case of the crown in England, that if any contract was made with parliament or with the crown, by virtue of an authority from parliament, that a petition to the crown would in such case lie. In the third case, a contract with the governor of a state, without any special authority. This case is entirely different from such a contract made with the crown in England. The crown there has very high prerogatives; in many instances, is a kind of trustee for the public interest; in all cases, represents the sovereignty of the kingdom, and is the only authority which can sue or be sued in any manner, on behalf of the kingdom, in any court of justice. A governor of a state is a mere executive officer; his general authority very narrowly limited by the constitution of the state; with no undefined or disputable prerogatives; without power to effect one shilling of the public money, but as he is authorized under the constitution, or by a particular law; having no color to represent the sovereignty of the state, so as to bind it in any manner, to its prejudice, unless specially authorized thereto. And therefore, all who contract with him, do it at their own peril, and are bound to see (or take the consequence of their own indiscretion) that he has strict authority for any contract he makes. Of course, such contract, when so authorized, will come within the description I mentioned, of cases where public faith alone is the ground of relief, and the legislative body, the only one that can afford a remedy, which, from the very nature of it, must be the effect of its discretion, and not of any compulsory process. If, however, any such cases were similar to those which would entitle a party to relief, by petition to the King, in England, that petition being only presentable to him, as he is the sovereign of the kingdom, so far as analogy is to take place, such petition in a state could only be presented to the sovereign power, which surely the governor is not. The only constituted authority to which such an application could, with any propriety, be made, must undoubtedly be the legislature, whose express consent, upon the principle of analogy, would be necessary to any further proceeding. So that this brings us (though by a different route) to the same goal—the discretion and good faith of the legislative body.

There is no other part of the common law, besides that which I have

considered, which can, by any person, be pretended, in any manner, to apply to this case, but that which concerns corporations. The applicability of this, the attorney-general, with great candor, has expressly waived. But as it may be *urged on other occasions, and as I wish to give the fullest satisfaction, I will say a few words to that doctrine. Suppose, therefore, [*447 it should be objected, that the reasoning I have now used, is not conclusive, because, inasmuch as a state is made subject to the judicial power of congress, its sovereignty must not stand in the way of the proper exercise of that power, and therefore, in all such cases (though in no other), a state can only be considered as a subordinate corporation merely. I answer: 1st. That this construction can only be allowed, at the utmost, upon the supposition that the judicial authority of the United States, as it respects states, cannot be effectuated, without proceeding against them in that light: a position, I by no means admit. 2d. That according to the principles I have supported in this argument, admitting that states ought to be so considered for that purpose, an act of the legislature is necessary to give effect to such a construction, unless the old doctrine concerning corporations will naturally apply to this particular case. 3d. That as it is evident, the act of congress has not made any special provision in this case, grounded on any such construction, so it is to my mind perfectly clear, that we have no authority, upon any supposed analogy between the two cases, to apply the common doctrine concerning corporations, to the important case now before the court. I take it for granted, that when any part of an ancient law is to be applied to a new case, the circumstances of the new case must agree in all essential points with the circumstances of the old cases to which that ancient law was formerly appropriated. Now, there are, in my opinion, the most essential differences between the old cases of corporations, to which the law intimated has reference, and the great and extraordinary case of states separately possessing, as to everything simply relating to themselves, the fullest powers of sovereignty, and yet, in some other defined particulars, subject to a superior power, composed out of themselves, for the common welfare of the whole. The only law concerning corporations, to which I conceive the least reference is to be had, is the common law of England on that subject. I need not repeat the observations I made in respect to the operation of that law in this country. The word "corporations," in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate), whether its power be restricted or transcendent, is in this sense, "a corporation." The king, accordingly, in England, is called a corporation. 10 Co. 29 *b*. So also, by a very respectable author (Sheppard, in his Abridgement, 1 vol. 431), is the parliament itself. In this extensive sense, not only each state singly, but even the United States may, without impropriety, be termed "corporations." I have, therefore, in contradistinction to this large and indefinite *term, used the term [*448 "subordinate corporations," meaning to refer to such only (as alone capable of the slightest application, for the purpose of the objection) whose creation and whose powers are limited by law.

The differences between such corporations, and the several states in the Union, as relative to the general government, are very obvious, in the following particulars. 1st. A corporation is a mere creature of the king, or of parliament; very rarely, of the latter; most usually, of the former only.

It owes its existence, its name, and its laws (except such laws as are necessarily incident to all corporations merely as such), to the authority which create it. A state does not owe its origin to the government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people. 2d. A corporation can do no act but what is subject to the revision either of a court of justice, or of some other authority within the government. A state is altogether exempt from the jurisdiction of the courts of the United States, or from any other exterior authority, unless in the special instances where the general government has power derived from the constitution itself. 3d. A corporation is altogether dependent on that government to which it owes its existence. Its charter may be forfeited by abuse: its authority may be annihilated, without abuse, by an act of the legislative body. A state, though subject, in certain specified particulars, to the authority of the government of the United States, is, in every other respect, totally independent upon it. The people of the state created, the people of the state can only change, its constitution. Upon this power, there is no other limitation but that imposed by the constitution of the United States; that it must be of the republican form. I omit minuter distinctions. These are so palpable, that I never can admit that a system of law, calculated for one of these cases, is to be applied, as a matter of course, to the other, without admitting (as I conceive) that the distinct boundaries of law and legislation may be confounded, in a manner that would make courts arbitrary, and, in effect, makers of a new law, instead of being (as certainly they alone ought to be) expositors of an existing one. If still it should be insisted, that though a state cannot be considered upon the same footing as the municipal corporations I have been considering, yet, as relative to the powers of the general government, it must be deemed in some measure dependent; admitting that to be the case (which to be sure is, so far as the necessary execution of the powers of the general government extends), yet, in whatever character this may place a state, this can only afford a reason for a new law, *calculated to effectuate the powers of the general government in this new case: but it affords no reason whatever for the court admitting a new action to fit a case, to which no old ones apply, when the *application* of law, not the *making* of it, is the sole province of the court.

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I have now, I think, established the following particulars. 1st. That the constitution, so far as it respects the judicial authority, can only be carried into effect, by acts of the legislature, appointing courts, and prescribing their methods of proceeding. 2d. That congress has provided no new law in regard to this case, but expressly referred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with.

From the manner in which I have viewed this subject, so different from that in which it has been contemplated by the attorney-general, it is evident, that I have not had occasion to notice many arguments offered by the attorney-general, which certainly were very proper, as to his extended view

of the case, but do not affect mine. No part of the law of nations can apply to this case, as I apprehend, but that part which is termed, "The conventional Law of Nations;" nor can this any otherwise apply, than as furnishing rules of interpretation, since, unquestionably, the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples. If, upon a fair construction of the constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression. If it does not exist, upon that authority, ten thousand examples of similar powers would not warrant its assumption. So far as this great question affects the constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I would not shrink from its discussion. But it is of extreme moment, that no judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money. I *think, every word [*450
in the constitution may have its full effect, without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case), would authorize the deduction of so high a power. This opinion, I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. With regard to the policy of maintaining such suits, that is not for this court to consider, unless the point in all other respects was very doubtful. Policy might then be argued from, with a view to preponderate the judgment. Upon the question before us, I have no doubt. I have, therefore, nothing to do with the policy. But I confess, if I was at liberty to speak on that subject, my opinion on the policy of the case would also differ from that of the attorney-general. It is, however, a delicate topic. I pray to God, that if the attorney-general's doctrine, as to the law, be established by the judgment of this court, all the good he predicts from it may take place, and none of the evils with which, I have the concern to say, it appears to me to be pregnant.

Blair, Justice.—In considering this important case, I have thought it best to pass over all the strictures which have been made on the various European confederations; because, as, on the one hand, their likeness to our own is not sufficiently close to justify any analogical application; so, on the other, they are utterly destitute of any binding authority here. The constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the Union; for no state could have become a member, but by an adoption of it by the people of that state. What then do we find there, requiring the submission of individual states to the judicial authority of the United States? This is expressly extended,

among other things, to controversies between a state and citizens of another state. Is, then, the case before us one of that description? Undoubtedly, it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one state and another state. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude, that the jurisdiction of this court reaches the case where a state is plaintiff, but not where it is defendant? In this latter case, should any man be asked, whether it was not a controversy between a state and citizen of another state, must not the answer be in the affirmative? A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have no doubt, were intended; and probably, the state
*451] was first named, *in respect to the dignity of a state. But that very dignity seems to have been thought a sufficient reason for confining the sense to the case where a state is plaintiff. It is, however, a sufficient answer to say, that our constitution most certainly contemplates, in another branch of the cases enumerated, the maintaining a jurisdiction against a state, as defendant; this is unequivocally asserted, when the judicial power of the United States is extended to controversies between two or more states; for there, a state must, of necessity, be a defendant. It is extended also to controversies between a state and foreign states; and if the argument taken from the order of designation were good, it would be meant here, that this court might have cognisance of a suit, where a state is plaintiff, and some foreign state a defendant, but not where a foreign state brings a suit against a state. This, however, not to mention that the instances may rarely occur, when a state may have an opportunity of suing, in the American courts, a foreign state, seems to lose sight of the policy which, no doubt, suggested this provision, viz., that no state in the Union should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature. But if a foreign state, though last named, may, nevertheless, be a plaintiff against an individual state, how can it be said, that a controversy between a state and a citizen of another state means, from the mere force of the order of the words, only such cases where a state is plaintiff? After describing, generally, the judicial powers of the United States, the constitution goes on to speak of it distributively, and gives to the supreme court original jurisdiction, among other instances, in the case where a state shall be a *party*; but is not a state a party as well in the condition of a defendant, as in that of a plaintiff? And is the whole force of that expression satisfied, by confining its meaning to the case of a plaintiff-state? It seems to me, that if this court should refuse to hold jurisdiction of a case where a state is defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the constitution; because, it would be a refusal to take cognisance of a case, where a state is a party.

Nor does the jurisdiction of this court, in relation to a state, seem to me to be questionable, on the ground, that congress has not provided any form of execution, or pointed out any mode of making the judgment against a state effectual; the argument *ab inutile* may weigh much, in cases depending upon the construction of doubtful legislative acts, but can have no force, I think, against the clear and positive directions of an act of congress and of the constitution.
*452] Let us go on so far as we can; and if, at the end of the business, notwithstanding the powers given us in the 14th section *of the judicial law,

we meet difficulties insurmountable to us, we must leave it to those departments of government which have higher powers; to which, however, there may be no necessity to have recourse. Is it altogether a vain expectation, that a state may have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the supreme court of the United States, though not conformable to their own ideas of justice? Besides, this argument takes it for granted, that the judgment of the court will be against the state; it possibly may be in favor of the state: and the difficulty vanishes. Should judgment be given against the plaintiff, could it be said to be void, because extra-judicial? If the plaintiff, grounding himself upon that notion, should renew his suit against the state, in any mode in which she may permit herself to be sued in her own courts, would the attorney-general for the state be obliged to go again into the merits of the case, because the matter, when here, was *coram non judice?* Might he not rely upon the judgment given by this court, in bar of the new suit? To me, it seems clear, that he might. And if a state may be brought before this court, as a defendant, I see no reason for confining the plaintiff to proceed by way of petition; indeed, there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own courts, such a method may have been established, as the most respectful form of demand; but we are not now in a state court; and if sovereignty be an exemption from suit, in any other than the sovereign's own courts, it follows, that when a state, by adopting the constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.

With respect to the service of the summons to appear, the manner in which it has been served, seems to be as proper as any which could be devised for the purpose of giving notice of the suit, which is the end proposed by it, the governor being the head of the executive department, and the attorney-general the law officer, who generally represents the state in legal proceedings: and this mode is the less liable to exception, when it is considered, that in the suit brought in this court, by the state of *Georgia* against *Brailsford* and others,(*a*) it is conceived in the name of the governor in behalf of the state. If the opinion which I have delivered, respecting the liability of a state to be sued in this court, should be the opinion of the court, it will come, in course, to consider, what is the proper step to be taken for inducing appearance, none having been yet entered in behalf of the defendant. A judgment by default, in the present state of the business, and writ of inquiry for damages, would *be too precipitate in any case, and too incompatible with the dignity of a state in this. Further [*453 opportunity of appearing to defend the suit ought to be given. The conditional order moved for the last term, the consideration of which was deferred to this, seems to me to be a very proper mode; it will warn the state of the meditated consequence of a refusal to appear, and give an opportunity for more deliberate consideration. The order, I think, should be thus: "Ordered, that unless the state of Georgia should, after due notice of this order, by a service thereof upon the governor and attorney-general of the said state, cause an appearance to be entered in behalf of the state, on the

(*a*) *Ante*, p. 402.

5th day of the next term, or then show cause to the contrary, judgment be then entered up against the state, and a writ of inquiry of damages be awarded."

WILSON, Justice—This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this state, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others, more important still; and may, perhaps, be ultimately resolved into one, no less *radical* than this—"do the People of the United States form a Nation?"

A cause so conspicuous and interesting, should be carefully and accurately viewed, from every possible point of sight. I shall examine it, 1st. By the principles of general jurisprudence. 2d. By the laws and practice of particular states and kingdoms. From the law of nations, little or no illustration of this subject can be expected. By that law, the several states and governments spread over our globe, are considered as forming a society, not a nation. It has only been by a very few comprehensive minds, such as those of Elizabeth and the Fourth Henry, that this last great idea has been even contemplated. 3d. And chiefly, I shall examine the important question before us, by the constitution of the United States, and the legitimate result of that valuable instrument.

I. I am first to examine this question by the principles of general jurisprudence. What I shall say upon this head, I introduce, by the observation of an original and profound writer, who, on the philosophy of mind, and all the sciences attendant on this prime one, has formed an era not less remarkable, and far more illustrious, than that formed by the justly celebrated Bacon, in another science, not prosecuted with less ability, but less dignified as to its object; I mean the philosophy of nature. Dr. Reid, in his excellent inquiry into the human mind, on the principles of common sense, speaking of
*454] the sceptical and illiberal *philosophy, which, under bold, but false, pretensions to liberality, prevailed in many parts of Europe before he wrote, makes the following judicious remark: "The language of philosophers, with regard to the original faculties of the mind, is so adapted to the prevailing system, that it cannot fit any other; like the coat that fits the man for whom it was made, and shows him to advantage, which yet will fit very awkward upon one of a different make, although as handsome and well proportioned. It is hardly possible to make any innovation in our philosophy concerning the mind and its operations, without using new words and phrases, or giving a different meaning to those that are received." With equal propriety, may this solid remark be applied to the great subject, on the principles of which the decision of this court is to be founded. The perverted use of *genus* and *species* in logic, and of *impressions* and *ideas* in metaphysics, have never done mischief so extensive or so practically pernicious, as has been done by *states* and *sovereigns*, in politics and jurisprudence; in the politics and jurisprudence even of those who wished and meant to be free. In the place of those expressions, I intend not to substitute new ones; but the expressions themselves I shall certainly use for purposes different from those, for which hitherto they have been frequently used; and one of them I shall apply to an object still more different from that, to which it

has been hitherto, most frequently, I may say, almost universally, applied. In these purposes, and in this application, I shall be justified by example the most splendid, and by authority the most binding; the example of the most refined as well as the most free nation known to antiquity; and the authority of one of the best constitutions known to modern times. With regard to one of the terms, "state," this authority is declared: with regard to the other, "sovereign," the authority is implied only; but it is equally strong: for, in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive.

To the constitution of the United States the term *sovereign* is totally unknown. There is but one place where it could have been used with propriety. But even in that place, it would not, perhaps, have comported with the delicacy of those who ordained and established that constitution. They might have announced themselves *sovereign* people of the United States: but serenely conscious of the past, they avoided the ostentatious declaration.

Having thus avowed my disapprobation of the purposes for which the terms *state* and *sovereign*, are frequently used, and of the object to which the application of the last of them is almost universally made; it is now proper, that I should disclose the meaning which I assign to both, and the application *which I make of the latter. In doing this, I shall have occasion incidentally to evince, how true it is, that states and governments were made for man; and at the same time, how true it is, that his creatures and servants have first deceived, next vilified, and at last, oppressed their master and maker. [*455

Man, fearfully and wonderfully made, is the workmanship of his all-perfect Creator: a state, useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity, derives all its acquired importance. When I speak of a state, as an inferior contrivance, I mean that it is a contrivance inferior only to that which is divine: Of all human contrivances, it is certainly most transcendently excellent. It is concerning this contrivance, that Cicero says so sublimely, "Nothing which is exhibited upon our globe, is more acceptable to that divinity which governs the whole universe, than those communities and assemblages of men, which, lawfully associated, are denominated states."(*a*)

Let a state be considered as subordinate to the People: but let everything else be subordinate to the state. The latter part of this position is equally necessary with the former. For in the practice, and even, at length, in the science of politics, there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the state has claimed precedence of the people; so, in the same inverted course of things, the government has often claimed precedence of the state; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the sovereigns of the state. This second degree of perversion is confined to the old world, and begins to diminish even there: but the first degree is still too prevalent, even in the several states of which our

(*a*) Som. Sup. c. 8.

Union is composed. By a state, I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: it has its rules: it has its rights: and it has its obligations. It may acquire property, distinct from that of its members: it may incur debts, to be discharged, out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this *feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak and act, are men.

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Is the foregoing description of a state, a true description? It will not be questioned, but it is. Is there any part of this description, which intimates, in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fulfil engagements? It will not be pretended, that there is. If justice is not done; if engagements are not fulfilled; is it, upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper, it surely cannot be. The only reason, I believe, why a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the courts of justice, which are formed and authorised by those laws. If one free man, an original sovereign, may do all this, why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each, singly, is undiminished; the dignity of all, jointly, must be unimpaired. A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, wilfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a *sovereign* state? Surely not. Before a claim, so contrary, in its first appearance, to the general principles of right and equality, be sustained by a just and impartial tribunal, the person, natural or artificial, entitled to make such claim, should certainly be well known and authenticated. Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable. To enumerate all, therefore, will not be expected: to take notice of some, will be necessary to the full illustration of the present important cause. In one sense, the term *sovereign* has for its correlative, *subject*. In this sense, the term can receive no application; for it has no object in the constitution of the United States. Under that constitution, there are *citizens*, but no *subjects*. "Citizens of the *United States*." (*a*) "Citizens of another state." "Citizens of different states." "A state or citizen thereof."(*b*) The term *subject* occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet "foreign"(*c*) is prefixed. In this sense, I presume the state of Georgia has no claim upon her own citizens: in this sense, I am certain, she can have no claim upon the citizens of another state.

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(*a*) Art. 1, § 2. (*b*) Art. 3, § 3. (*c*) Art. 3, § 3.

In another sense, according to some writers, (*a*) every state, which governs itself, without any dependence on another power, is a sovereign state. Whether, with regard to her own citizens, this is the case of the state of Georgia; whether those citizens have done, as the individuals of England are said, by their late instructors, to have done, surrendered the supreme power to the state or government, and reserved nothing to themselves; or whether, like the people of other states. and of the United States, the citizens of Georgia have reserved the supreme power in their own hands; and on that supreme power, have made the state dependent, instead of being sovereign; these are questions, to which, as a judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the Union, I know, and am interested to know, that the most satisfactory answers can be given. As a citizen, I know, the government of that state to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people. As a judge of this court, I know, and can decide, upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did *not* surrender the supreme or sovereign power to that state; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, Georgia *is not a sovereign state.* If the judicial decision of this case forms one of those purposes; the allegation that Georgia is a sovereign state, is unsupported by the fact. Whether the judicial decision of this cause is, or is not, one of those purposes, is a question which will be examined particularly, in a subsequent part of my argument.

There is a third sense, in which the term sovereign is frequently used, and which it is very material to trace and explain, as it furnishes a basis for what, I presume, to be one of the principal objections against the jurisdiction of this court over the State of Georgia. In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so degrading to man, still retains it influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American states. The accurate and well informed President Henault, in his excellent chronological abridgment of the History of France, tells us, that, about the end of the second race of Kings, a new kind of possession was acquired, under the name of fief. The governors of cities and provinces usurped equally the property of land, *and the administratson of justice; and established themselves as proprietary seigniors over [*458
those places in which they had been only civil magistrates or military officers. By this means, there was introduced into the state a new kind of authority, to which was assigned the appellation of sovereignty (*b*). In process of time, the feudal system was extended over France, and almost all the other nations of Europe; and every kingdom became, in fact, a large fief. Into England, this system was introduced by the conqueror; and to this era we may, probably, refer the English maxim, that the King or sovereign is the fountain of justice. But in the case of the King, the sovereignty had a double operation. While it vested him him with jurisdiction over others, it excluded all others from jurisdiction over him. With regard to him,

(*a*) Vatt. lib. 1, § 4.

(*b*) Henault 113.

there was no superior power; and consequently, on feudal principles, no right of jurisdiction. "The law," says Sir William Blackstone, (*a*) ascribes to the King, the attribute of sovereignty: he is sovereign and independent, within his own dominions; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the King, even in civil matters; because no court can have jurisdiction over him: for all jurisdiction implies superiority of power." This last position is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care. Of this plan, the author of the Commentaries was, if not the introducer, at least, the great supporter. He has been followed in it, by writers later and less known; and his doctrines have, both on the other and this side of the Atlantic, been implicitly and generally received by those, who neither examined their principles nor their consequences. The principle is, that all human law must be prescribed by a superior: this principle I mean not now to examine: suffice it, at present, to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the *consent* of those whose obedience they require. The sovereign, when traced to his source, must be found in the man.

I have now fixed, in the scale of things, the grade of a state; and have described its composure: I have considered the nature of sovereignty; and pointed its application to the proper object. I have examined the question before us, by the principles of general jurisprudence. In those principles, I find nothing, which tends to evince an exemption of the State of Georgia, from the jurisdiction of the court. I find everything to have a contrary tendency.

*II. I am, in the second place, to examine this question by the laws and practice of different states and kingdoms. In ancient Greece, as we learn from Isocrates, whole nations defended their rights before crowded tribunals. Such occasions as these excited, we are told, all the powers of persuasion; and the vehemence and enthusiasm of the sentiment was gradually infused into the Grecian language, equally susceptible of strength and harmony. In those days, law, liberty and refining science made their benign progress in strict and graceful union; the rude and degrading league between the bar and feudal barbarism was not yet formed.

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When the laws and practice of particular states have any application to the question before us, that application will furnish what is called an argument *à fortiori;* because all the instances produced will be instances of subjects instituting and supporting suits against those who were deemed their own sovereigns. These instances are stronger than the present one, because between the present plaintiff and defendant, no such unequal relation is alleged to exist.

Columbus achieved the discovery of that country which, perhaps, ought to bear his name. A contract made by Columbus furnished the first precedent for supporting, in his discovered country, the cause of injured merit against the claims and pretensions of haughty and ungrateful power. His

(*a*) 1 Bl. Com. 241, 242.

son Don Diego wasted two years in incessant, but fruitless, solicitation at the Court of Spain, for the rights which descended to him, in consequence of his father's original capitulation. He endeavored, at length, to obtain, by a legal sentence, what he could not procure from the favor of an interested monarch. He commenced a suit against Ferdinand, before the Council which managed Indian affairs, and that court, with integrity which reflects honor on its proceedings, decided against the King, and sustained Don Diego's claim.(*a*)

Other states have instituted officers to judge the proceedings of their Kings. Of this kind, were the Ephori of Sparta ; of this kind also, was the mayor of the palace, and afterwards, the constable of France.(*b*)

But of all the laws and institutions relating to the present question, none is so striking as that described by the famous Hottoman, in his book entitled Franco Gallia. When the Spaniards of Arragon elect a King, they represent a kind of play, and introduce a personage whom they dignify by the name of Law, *la Justiza*, of Arragon. This person they declare, by a public decree, to be greater and more powerful than their king, and then address him in the following remarkable expressions : "We, who are of as great worth as you, and can do more *than you can do, elect you to be our King, [*460 upon the conditions stipulated. But between you and us, there is one of greater authority than you."(*c*)

In England, according to Sir William Blackstone, no suit can be brought against the King, even in civil matters. So, in that kingdom, is the law at this time received. But it was not always so. Under the Saxon government, a very different doctrine was held to be orthodox. Under that government, as we are informed by the Mirror of Justice, a book said by Sir Edward Coke, to have been written, in part, at least, before the conquest; under that government, it was ordained, that the King's court should be open to all plaintiffs, by which, without delay, they should have remedial writs, as well against the King or against the Queen, as against any other of the people.(*d*) The law continued to be the same, for some centuries after the conquest. Until the time of Edward I., the King might have been sued as a common person. The form of the process was even imperative. "*Præcipe Henrico Regi Angliæ*,"*&c.* "Command Henry, King of England," &c.(*e*) Bracton, who wrote in the time of Henry III., uses these very remarkable expressions concerning the King : "*In justitia recipienda, minimo de regno suo comparetur*"—in receiving justice, he should be placed on a level with the meanest person in the kingdom.(*f*) True it is, that now, in England, the King must be sued in his courts, by petition ; but even now, the difference is only in the form, not in the thing. The judgments or decrees of those courts will substantially be the same upon a precatory as upon a mandatory process. In the courts of justice, says the very able author of the considerations on the laws of forfeiture, the King enjoys many privileges ; yet not to deter the subject from contending with him freely.(*g*) The judge of the high court of admiralty, in England, made, in a very late cause, the following manly and indepdenent declaration : "In any case, where the crown is a

(*a*) R. A. 231.
(*b*) 1 Sid. 131.
(*c*) Hol. 71, b. 31.
(*d*) 4 C. A. N. 480.
(*e*) Com. 104.
(*f*) Bract. 107; Com. 104.
(*g*) G. F. 124.

party, it is to be observed, that the crown can no more withhold evidence of documents in its possession that a private person. If the court thinks proper to order the production of any public instrument, that order must be obeyed. It wants no *insignia* of an authority derived from the crown."(*a*)

"Judges ought to know, that the poorest peasant is a man, as well as the king himself: all men ought to obtain justice, since, in the estimation of justice, all men are equal, whether the prince complain of a peasant, or a peasant complain of the prince."(*b*) These are the words of a king, of the late Frederic of Prussia. In his courts of justice, that great man stood *upon his native greatness, and disdained to mount upon the artificial stilts of sovereignty. *461]

Thus much concerning the laws and practice of other states and kingdoms. We see nothing against, but much in favor of, the jurisdiction of this court over the state of Georgia, a party to this cause.

III. I am, thirdly, and chiefly, to examine the important question now before us, by the constitution of the United States, and the legitimate result of that valuable instrument. Under this view, the question is naturally subdivided into two others. 1. Could the constitution of the United States vest a jurisdiction over the state of Georgia? 2. Has that constitution vested such jurisdiction in this court? I have already remarked, that in the practice, and even in the science of politics, there has been frequently a strong current against the natural order of things; and an inconsiderate or an interested disposition to sacrifice the end to the means. This remark deserves a more particular illustration. Even in almost every nation which has been denominated free, the state has assumed a supercilious pre-eminence above the people who have formed it: hence, the haughty notions of state independence, state sovereignty, and state supremacy. In despotic governments, the government has usurped, in a similar manner, both upon the state and the people: hence, all arbitrary doctrines and pretensions concerning the supreme, absolute, and uncontrollable power of government. In each, man is degraded from the prime rank, which he ought to hold in human affairs: in the latter, the state as well as the man is degraded. Of both degradations, striking instances occur in history, in politics, and in common life. One of them is drawn from an anecdote, which is recorded concerning Louis XIV., who has been styled the Grand Monarch of France. This prince, who diffused around him so much dazzling splendor, and so little vivifying heat, was vitiated by that inverted manner of teaching and of thinking, which forms kings to be tyrants, without knowing or even suspecting that they are so. The oppression under which he held his subjects, during the whole course of his long reign, proceeded chiefly from the principles and habits of his erroneous education. By these, he had been accustomed to consider his kingdom as his patrimony, and his power over his subjects as his rightful and undelegated inheritance. These sentiments were so deeply and strongly imprinted on his mind, that when one of his ministers represented to him the miserable condition, to which those subjects were reduced, and in the course of his representation, frequently used the word *L'Etat*, the state, the King, though he felt the truth and approved the substance of all that was said, yet was shocked at the frequent repetition of

(*a*) Col. Jur. 68. (*b*) War. 343

the expression *L'Etat;* and *complained of it as an indecency offered to his person and character. And, indeed, that kings should imagine themselves the final causes, for which men were made, and societies were formed, and governments were instituted, will cease to be a matter of wonder or surprise, when we find, that lawyers and statesmen and philosophers have taught or favored principles which necessarily lead to the same conclusion. Another instance, equally strong, but still more astonishing, is drawn from the British government, as described by Sir William Blackstone and his followers. As described by him and them, the British is a despotic government. It is a government without a people. In that government, as so described, the sovereignty is possessed by the parliament: in the parliament, therefore, the supreme and absolute authority is vested: (*a*) in the parliament resides that uncontrollable and despotic power, which, in all governments, must reside somewhere. The constituent parts of the parliament are the King's Majesty, the Lords spiritual, the Lords temporal, and the Commons. The King and these three estates together form the great corporation or body politic of the kingdom. All these sentiments are found; the last expresssons are found *verbatim*, (*b*) in the Commentaries upon the Laws of England. (*c*) The parliament form the great body politic of England! What, then, or where, are the people? Nothing! Nowhere! They are not so much as even the "baseless fabric of a vision!" From legal contemplation, they totally disappear! Am I not warranted in saying that, if this is a just description, a government, so and justly so described, is a despotic government? Whether this description is or is not a just one, is a question of very different import.

In the United States, and in the several states which compose the Union, we go not so far: but still, we go one step farther than we ought to go, in this unnatural and inverted order of things. The states, rather than the *people*, for whose sakes the states exist, are frequently the objects which attract and arrest our principal attention. This, I believe, has produced much of the confusion and perplexity, which have appeared in several proceedings and several publications on state-politics, and on the politics, too, of the United States. Sentiments and expressions of this inaccurate kind prevail in our common, even in our convivial, language. Is a toast asked? "The United States," instead of the "People of the United States," is the toast given. This is not politically correct. The toast is meant to present to view the first great object in the Union: it presents only the second: it presents only the artificial person, instead of the natural persons, who spoke it into existence. A *state*, I cheerfully *admit, is the noblest work of man: but man himself, free and honest, is, I speak as to this world, the noblest work of God! [*463

Concerning the prerogative of Kings, and concerning the sovereignty of states, much has been said and written; but little has been said and written, concerning a subject much more dignified and important, the majesty of the people. The mode of expression, which I would substitute in the place of that generally used, is not only politically, but also (for between true liberty and true taste there is a close alliance) classically, more correct. On the mention of Athens, a thousand refined and endearing associations

(*a*) 1 Bl. Com. 46–52, 147, 160–62. (*b*) Ibid. 153. (*c*) Ibid. 153.

rush at once into the memory of the scholar, the philosopher, and the patriot. When Homer, one of the most correct, as well as the oldest of human authorities, enumerates the other nations of Greece, whose forces acted at the siege of Troy, he arranges them under the names of their different Kings or Princes: but when he comes to the Athenians, he distinguishes them by the peculiar appellation of the People(*a*) of Athens. The well-known address used by Demosthenes, when he harangued and animated his assembled countrymen, was "O! men of Athens." With the strictest propriety, therefore, classical and political, our national scene opens with the most magnificent object, which the nation could present: "The People of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen states, each of which had a separate constitution and government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several states terminated its legislative authority: executive or judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquility, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present constitution. By that constitution, legislative power is vested, executive power is vested, judicial power is vested.

The question now opens fairly to our view, could the people of those states, among whom were those of Georgia, bind those states, and Georgia, among the others, by the legislative, executive, and judicial power so vested? If the principles on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those states were the work of those people; those people, and, that I may apply the case closely, the people of Georgia, in particular, *could alter, as they pleased, their former work: to any given degree, they could *diminish* as well as enlarge it: any or all of the former state-powers, they could extinguish or transfer. The inference, which necessarily results, is, that the constitution ordained and established by those people; and, still closely to apply the case, in particular, by the people of Georgia, could vest jurisdiction or judicial power over those states, and over the state of Georgia in particular.

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The next question under this head is—has the constitution done so? Did those people mean to exercise this, their undoubted power? These questions may be resolved, either by fair and conclusive deductions, or by direct and explicit declarations. In order, ultimately, to discover, whether the people of the United States intended to bind those states by the judicial power vested by the national constitution, a previous inquiry will naturally be: Did those people intend to bind those states by the legislative power vested by that constitution? The articles of confederation, it is well known, did not operate upon individual citizens, but operated only upon states. This defect was remedied by the national constitution, which, as all allow, has an operation on individual citizens. But if an opinion, which some seem to entertain, be just; the defect remedied, on one side, was balanced by a defect introduced

(*a*) Iliad, I., 2, *v.* 54. Δημοσ, Pol. 12, one of the words of which democracy in compounded.

on the other: for they seem to think, that the present constitution operates only on individual citizens, and not on states. This opinion, however, appears to be altogether unfounded. When certain laws of the states are declared to be "subject to the revision and control of the congress;"(*a*) it cannot, surely, be contended, that the legislative power of the national government was meant to have no operation on the several states. The fact, uncontrovertibly established in one instance, proves the principle in all other instances, to which the facts will be found to apply. We may then infer, that the people of the United States intended to bind the several states, by the legislative power of the national government.

In order to make the discovery, at which we ultimately aim, a second previous inquiry will naturally be—Did the people of the United States intend to bind the several states, by the executive power of the national government? The affirmative answer to the former question directs, unavoidably, an affirmative answer to this. Ever since the time of Bracton, his maxim, I believe, has been deemed a good one—"*Supervacuum esset, leges condere, nisi esset qui leges tueretur.*"(*b*) (It would be superfluous to make laws, unless those laws, when made, were to be enforced.) When the laws are plain, and the application of them is uncontroverted, they are enforced immediately by the *executive authority of government. When the application of them [*465 is doubtful or intricate, the interposition of the judicial authority becomes necessary. The same principle, therefore, which directed us from the first to the second step, will direct us from the second to the third and last step of our deduction. Fair and conclusive deduction, then, evinces that the people of the United States did vest this court with jurisdiction over the state of Georgia. The same truth may be deduced from the declared objects, and the general texture of the constitution of the United States. One of its declared objects is, to form an union more perfect than, before that time, had been formed. Before that time, the Union possessed legislative, but unenforced legislative power over the states. Nothing could be more natural than to intend that this legislative power should be enforced by powers executive and judicial. Another declared object is, "to establish justice." This points, in a particular manner, to the judicial authority. And when we view this object, in conjunction with the declaration, "that no state shall pass a law impairing the obligation of contracts;" we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several states. What good purpose could this constitutional provision secure, if a state might pass a law, impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controlling judiciary power? We have seen, that on the principles of general jurisprudence, a state, for the breach of a contract, may be liable for damages. A third declared object is—"to insure domestic tranquillity." This tranquillity is most likely to be disturbed by controversies between states. These consequences will be most peaceably and effectually decided, by the establishment and by the exercise of a superintending judicial authority. By such exercise and establishment, the law of nations—the rule between contending states—will be enforced among the several states, in the same manner as municipal law.

(*a*) Art. 1, § 10. (*b*) Bract. 107.

Whoever considers, in a combined and comprehensive view, the general texture of the constitution, will be satisfied, that the people of the United States intended to form themselves into a nation, for national purposes. They instituted, for such purposes, a national government, complete in all its parts, with powers legislative, executive and judiciary; and in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person, natural or artificial, should be permitted to claim successfully, an entire exemption from the jurisdiction of the national government? Would not such claims, crowned with success, *466] be repugnant to our very existence as a nation? When *so many trains of deduction, coming from different quarters, converge and unite at last, in the same point, we may safely conclude, as the legitimate result of this constitution, that the state of Georgia is amenable to the jurisdiction of this court.[1]

But in my opinion, this doctrine rests not upon the legitimate result of fair and conclusive deduction from the constitution: it is confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself. "The judicial power of the United States shall extend, to controversies between *two* states."(*a*) Two states are supposed to have a controversy between them: this controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two states" can be brought before a court of law; and yet neither of those states be a defendant? "The judicial power of the United States shall extend to controversies, between a state and citizens of another state." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: on the former solely, her attention is fixed: to the latter, she is, as she is painted, blind.

I have now tried this question by all the touchstones, to which I proposed to apply it. I have examined it by the principles of general jurisprudence; by the laws and practice of states and kingdoms; and by the

(*a*) Art III., § 2.

[1] A great political argument in favor of the federal idea of a concentration of power in the general government; but one which will never be admitted by the people of these states, in whom the doctrine of state sovereignty has been a political axiom from the foundation of the government. No wonder, that such a judicial harangue produced the 11th amendment to the constitution. The object of a state constitution is not to grant legislative power, but to confine and restrain it; whilst that of the federal constitution is to grant certain defined powers to the general government. Hence, the rule of interpretation for a state constitution differs totally from that which is applicable to the constitution of the United States; the latter instrument must have a strict construction; the former, a liberal one. Congress can pass no laws but those which the constitution authorizes, either expressly, or by clear implication; whilst the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. Therefore, the ultimate sovereignty must reside in the states, who possessed it before the formation of the Union, and still retain it, except in so far as they have voluntarily resigned the same, as to certain objects, to the federal authorities.

constitution of the United States. From all, the combined inference is, that the action lies.

CUSHING, Justice.—The grand and principal question in this case is, whether a state can, by the federal constitution, be sued by an individual citizen of another state?

The point turns not upon the law or practice of England, although, perhaps, it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the constitution established by the people of the United States; and particularly, upon the extent of powers given to the federal judiciary in the 2d section of the 3d article of the constitution. It is declared, that "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, or treaties made or which shall be made under their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies, to which the United *States shall be a party; to controversies between two or more states and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state and citizens thereof and foreign states, citizens or subjects." The judicial power, then, is expressly extended to "controversies between a state and citizens of another state." When a citizen makes a demand against a state, of which he is not a citizen, it is as really a controversy between a state and a citizen of another state, as if such state made a demand against such citizen. The case, then, seems clearly to fall within the letter of the constitution. It may be suggested, that it could not be intended to subject a state to be a defendant, because it would affect the sovereignty of states. If that be the case, what shall we do with the immediate preceding clause—"controversies between two or more states," where a state must of necessity be defendant? If it was not the intent, in the very next clause also, that a state might be made defendant, why was it so expressed, as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended? [*467

Again, what are we to do with the last clause of the section of judicial powers, viz., "controversies between a state, or the citizens thereof, and foreign states or citizens." Here again, states must be suable or liable to be made defendants by this clause, which has a similar mode of language with the two other clauses I have remarked upon. For if the judicial power extends to a controversy between one of the United States and a foreign state, as the clause expresses, one of them must be defendant. And then, what becomes of the sovereignty of states so far as suing affects it? But although the words appear reciprocally to affect the state here and a foreign state, and put them on the same footing so far as may be, yet ingenuity may say, that the state here may sue, but cannot be sued; but that the foreign state may be sued, but cannot sue. We may touch foreign sovereignties, but not our own. But I conceive, the reason of the thing, as well as the words of the constitution, tend to show that the federal judicial power extends to a suit brought by a foreign state against any one of the United States. One design of the general government was, for managing the great affairs of peace and war and the general defence, which were impossible to be conducted,

with safety, by the states separately. Incident to these powers, and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, states at home and their citizens, and foreign states and their citizens,
*468] are put together without *distinction, upon the same footing, so far as may be, as to controversies between them. So also, with respect to controversies between a state and citizens of another state (at home), comparing all the clauses together, the remedy is reciprocal; the claim to justice equal. As controversies between state and state, and between a state and citizens of another state, might tend gradually to involve states in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship. Further, if a state is entitled to justice in the federal court, against a citizen of another state, why not such citizen against the state, when the same language equally comprehends both? The rights of individuals and the justice due to them, are as dear and precious as those of states. Indeed, the latter are founded upon the former; and the great end and object of them must be, to secure and support the rights of individuals, or else, vain is government.

But still it may be insisted, that this will reduce states to mere corporations, and take away all sovereignty. As to corporations, all states whatever are corporations or bodies politic. The only question is, what are their powers? As to individual states and the United States, the constitution marks the boundary of powers. Whatever power is deposited with the Union by the people, for their own necessary security, is so far a curtailing of the power and prerogatives of states. This is, as it were, a self-evident proposition; at least, it cannot be contested. Thus, the power of declaring war, making peace, raising and supporting armies for public defence, levying duties, excises and taxes, if necessary, with many other powers, are lodged in congress; and are a most essential abridgement of state sovereignty. Again, the restrictions upon states: "No state shall enter into any treaty, alliance or confederation, coin money, emit bills of credit, make anything but gold and silver a tender in payment of debts, pass any law impairing the obligations of contracts;" these, with a number of others, are important restrictions of the power of states, and were thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union. So that, I think, no argument of force can be taken from the sovereignty of states. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole. If the constitution is found inconvenient in practice, in this or any other particular, it is well that a regular mode is pointed out for amendment. But while it remains, all officers, legislative, executive and judicial, both of the states and of the Union, are bound by oath to support it.

*469] *One other objection has been suggested, that if a state may be sued by a citizen of another state, then the United States may be sued by a citizen of any of the states, or, in other words, by any of their citizens. If this be a necessary consequence, it must be so. I doubt the consequence, from the different wording of the different clauses, connected

with other reasons. When speaking of the United States, the constitution says, "controversies to which the United States shall be a party," not controversies between the United States and any of their citizens. When speaking of states, it says, "controversies between two or more states; between a state and citizens of another state." As to reasons for citizens suing a different state, which do not hold equally good for suing the United States; one may be, that as controversies between a state and citizens of another state, might have a tendency to involve both states in contest, and perhaps in war, a common umpire to decide such controversies. may have a tendency to prevent the mischief. That an object of this kind was had in view, by the framers of the constitution, I have no doubt, when I consider the clashing interfering laws which were made in the neighboring states, before the adoption of the constitution, and some affecting the property of citizens of another state, in a very different manner from that of their own citizens. But I do not think it necessary to enter fully into the question, whether the United States are liable to be sued by an individual citizen? in order to decide the point before us. Upon the whole, I am of opinion, that the constitution warrants a suit against a state, by an individual citizen of another state.

A second question made in the case was, whether the particular action of *assumpsit* could lie against a state? I think *assumpsit* will lie, if any suit; provided a state is capable of contracting.

The third question respects the competency of service, which I apprehend is good and proper; the service being by summons and notifying the suit to the governor and the attorney-general; the governor, who is the supreme executive magistrate and representative of the state, who is bound by oath to defend the state, and by the constitution to give information to the legislature of all important matters which concern the interest of the state; the attorney-general, who is bound to defend the interests of the state in courts of law.

JAY, Chief Justice.—The question we are now to decide has been accurately stated, viz.: Is a state suable by individual citizens of another state?

It is said, that Georgia refuses to appear and answer to the plaintiff in this action, because she is a sovereign state, and therefore, not liable to such actions. In order to ascertain the merits *of this objection, let us inquire, 1st. In what sense, Georgia is a sovereign state. 2d. Whether [*470 suability is compatible with such sovereignty. 3d. Whether the constitution (to which Georgia is a party) authorizes such an action against her.

Suability and suable are words not in common use, but they concisely and correctly convey the idea annexed to them.

1st. In determining the sense in which Georgia is a sovereign state, it may be useful to turn our attention to the political situation we were in, prior to the revolution, and to the political rights which emerged from the revolution. All the country, now possessed by the United States, was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing, or exercised here, flowed from the head of the British

Empire. They were, in strict sense, fellow-subjects, and in a variety of respects, one people. When the revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain and Spain, while Roman provinces, viz., only that affinity and social connection which result from the mere circumstance of being governed by the same prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

The revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued, without interruption, to manage their national concerns accordingly; afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the states, the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity,[1] established the present constitution.

*471] It is remarkable, *that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We, the people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country; and in the language

[1] It is not to be inferred, from the language of the judges, in this and other cases, that the preamble to the constitution points to the majority of the whole people of the United States, in their aggregate collective capacity, as the original depository of the powers conferred by that instrument; the true doctrine would seem to be, that the constitution was adopted by the people of the several states, who had been previously been confederated under the name of the United States, acting through the delegates, by whom they were respectively represented in the convention which formed the constitution. Baldwin's Constitutional Views, 29–42. And see Worcester *v.* Georgia, 6 Pet. 569, where it is said by Judge McLean, to have been formed "by a combined power, exercised by the people, through their delegates, limited in their sanctions to the respective states. For the opposite view, see Judge Sprague's charge to the grand jury, in March 1863, during the heat of the rebellion, when the doctrine of state sovereignty was deemed a political heresy, and the expression of it, almost as an act of treason. 2 Sprague 292. But it is true, nevertheless: "the earth does move," though it may be a heresy to assert it. Even Chief Justice Agnew, of the supreme court of Pennsylvania, an ardent advocate of the federal theory, says, in Craig *v.* Kline, 65 Penn. St. 399, that it is a difficult problem to define the boundaries of state and federal powers; the doctrine of the rights of the states, pushed to *excess*, culminated in civil war; the rebound caused by the success of the federal arms, threatens a consolidation equally serious. The 9th and 10th amendments to the constitution expressly provide, that "the enumeration in the constitution of certain rights, shall not be construed to deny or disparage others, retained by the people;" and 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."

of sovereignty, establishing a constitution by which it was their will, that the state governments, should be bound, and to which the state constitutions should be made to conform. Every state constitution is a compact made by and between the citizens of a state, to govern themselves in a certain manner; and the constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner. By this great compact, however, many prerogatives were transferred to the national government, such as those of making war and peace, contracting alliances, coining money, &c.

If, then, it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each state in the people of each state, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. There is reason to suspect, that some of the difficulties which embarrass the present questions, arise from inattention to differences which subsist between them.

It will be sufficient to observe briefly, that the sovereignities in Europe, and particularly in England, exist on feudal principles. That system considers the prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant, derives all franchises, immunities and privileges; it is easy to perceive, that such a sovereign could not be amendable to a court of justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the prince having all the executive powers, the judgment of the courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here; at the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African *slaves among us may be so called) and have none to govern but themselves; the citizens of [*472
America are equal as fellow-citizens, and as joint-tenants in the sovereignty.

From the differences existing between feudal sovereignties and governments founded on compacts, it necessarily follows, that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or state-sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the prince; here it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities and pre-eminences, our rulers have none but official; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.

2d. The second object of inquiry now presents itself, viz., whether suability is compatible with state sovereignty.

Suability by whom? Not a subject, for in this country there are none;

not an inferior, for all the citizens being, as to civil rights, perfectly equal, there is not, in that respect, one citizen inferior to another. It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases, one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally sued. In this city, there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the state of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them, should not prosecute them? Can the difference between forty odd thousand, and fifty odd thousand make any distinction as to right? Is it not as easy, and as convenient to the public and parties, to serve a summons on the governor and attorney-general of Delaware, as on the mayor or other officers of the corporation of Philadelphia? Will it be said, that the fifty odd thousand citizens in Delaware, being associated under a state government, stand in a rank so superior to the forty odd thousand of Philadelphia, associated under their charter, that although it may become the latter to meet an individual on an equal footing in a court of justice, yet that such a procedure would not comport with the dignity of the former? In this land of equal liberty, shall forty odd thousand, in one place, be compellable to do justice, and yet
*473] fifty odd thousand, in *another place, be privileged to do justice only as they may think proper? Such objections would not correspond with the equal rights we claim; with the equality we profess to admire and maintain; and with that popular sovereignty in which every citizen partakes. Grant that the governor of Delaware holds an office of superior rank to the mayor of Philadelphia, they are both nevertheless the officers of the people; and however more exalted the one may be than the other, yet, in the opinion of those who dislike aristocracy, that circumstance cannot be a good reason for impeding the course of justice.

If there be any such incompatibility as is pretended, whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this, any one state in the Union may sue another state, in this court, that is, all the people of one state may sue all the people of another state. It is plain, then, that a state may be sued, and hence it plainly follows, that suability and state sovereignty are not incompatible. As one state may sue another state in this court, it is plain, that no degradation to a state is thought to accompany her appearance in this court. It is not, therefore, to an appearance in this court, that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens. But why it should be more incompatible, that all the people of a state should be sued by one citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike. Nor can I observe any greater inconveniencies in the one case than in the other, except what may arise from the feelings of those who may regard a lesser number in an inferior light. But if any reliance be made on this inferiority as an objection, at least one-half of its force is done away, by this fact, viz., that it is conceded that a state may appear in this court, as plaintiff, against a single

citizen, as defendant ; and the truth is, that the state of Georgia is at this moment prosecuting an action in this court against two citizens of South Carolina. (*a*)

The only remnant of objection, therefore, that remains is, that the state is not bound to appear and answer as a defendant, at the suit of an individual; but why it is unreasonable that she should be so bound, is hard to conjecture : that rule is said to be a bad one, which does not work both ways ; the citizens of Georgia are content with a right of suing citizens of other states ; but are not content that citizens of other states should have a right to sue them.

Let us now proceed to inquire, whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another state. This inquiry naturally *leads our attention, 1st. To the design of the constitution. 2d. To the letter and express declaration in it. [*474

Prior to the date of the constitution, the people had not any national tribunal to which they could resort for justice ; the distribution of justice was then confined to state judicatories, in whose institution and organization the people of the other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice which another state might yield to her, or to her citizens ; and that, even in cases where state considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result ; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period, the United States had, by taking a place among the nations of the earth, become amenable to the law of nations ; and it was their interest, as well as their duty, to provide, that those laws should be respected and obeyed ; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties ; and there the inexpediency of referring all such questions to state courts, and particularly to the courts of delinquent states, became apparent. While all the states were bound to protect each, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done to each, and the citizens of each; but also to cause justice to be done by each, and the citizens of each ; and that, not by violence and force, but in a stable, sedate and regular course of judicial procedure.

These were among the evils which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare, that their design in establishing it, comprehended six objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To ensure domestic

(*a*) Georgia *v.* Brailsford *et al.*, *ante*, p. 402.

tranquility. 4th. To provide for the common defence. 5th. To promote the general welfare. 6th. To secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful, to consider and trace the relations which each of these objects bears to the others ; *and *475] to show that they collectively comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy : on the present occasion, such disquisitions would be unseasonable, because foreign to the subject immediately under consideration.

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the 2d section of the 3d article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases, viz.: 1st. To all cases arising under this constitution ; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the United States ; because as such laws, constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority ; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors, or other public ministers and consuls ; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognisable by national authority. 5th. To all cases of admiralty and maritime jurisdiction ; because, as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party ; because in cases in which the whole people are interested, it would not be equal or wise to let any one state decide and measure out the justice due to others. 7th. To controversies between two or more states ; because domestic tranquillity requires, that the contentions of states should be peaceably terminated by a common judicatory ; and because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a state and citizens of another state ; because, in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute their demands in a national court, than in a court of the state to which those citizens belong ; the danger of irritation and criminations arising from apprehensions and *suspicions of partiality, being thereby obviated. Because, in cases *476] where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid, that the latter should be the sole judges of the justice due to the latter ; and true republican government requires, that free and equal citizens should have free, fair and equal justice. 9th. To controversies between citizens of the same state, claiming lands under grants of different states ; because, as the rights

of the two states to grant the land, are drawn into question, neither of the two states ought to decide the controversy. 10th. To controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by, and depend on national authority. Even this cursory view of the judicial powers of the United States, leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the 2d section, which extends the judicial power "to controversies between a state and citizens of another state." It is contended, that this ought to be construed to reach none of these controversies, excepting those in which a state may be plaintiff. The ordinary rules for construction will early decide, whether those words are to be understood in that limited sense.

This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good, that, not only the controversies in which a state is plaintiff, but also those in which a state is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a state and citizens of another state." If the constitution really meant to extend these powers only to those controversies in which a state might be plaintiff, to the exclusion of those in which citizens had demands against a state, it is inconceivable, that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in *any part [*477
of the constitution. It cannot be pretended, that where citizens urge and insist upon demands against a state, which the state refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice, and how can it affect the definition of the word *controversy*, whether the demands which cause the dispute, are made by a state against citizens of another state, or by the latter against the former? When power is thus extended to a *controversy*, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists.

The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: to the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one state, a right of suing individual citizens of another state, and

yet deny to those citizens a right of suing them. We find the same general and comprehensive manner of expressing the same ideas, in a subsequent clause; in which the constitution ordains, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction." Did it mean here party-plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptation, and the word party being, in common usage, applicable both to plaintiff and defendant, we cannot limit it to one of them, in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the 13th section of the judicial act, of controversies where a state is a party, and as they do not, impliedly or expressly, apply that term to either of the litigants, in particular, we are to understand them as speaking of both. In the same section, they distinguish the cases where ambassadors are plaintiffs, from those in which ambassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose, that they would, in like manner, have distinguished between cases where a state was plaintiff, and where a state was defendant, if they had intended to make any difference between them; or if they had apprehended that the constitution had made any difference between them.

*478] *I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: the same section of the constitution which extends the judicial power to controversies "between a state and the citizens of another state," does also extend that power to controversies to which the United States are a party. Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States, in very different points of view.

I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.

As this opinion, though deliberately formed, has been hastily reduced to writing, between the intervals of the daily adjournments, and while my mind was occupied and wearied by the business of the day, I fear, it is less concise and connected than it might otherwise have been. I have made no references to cases, because I know of none that are not distinguishable from this case; nor does it appear to me necessary to show that the senti-

ments of the best writers on government and the rights of men, harmonise wtih the principles which direct my judgment on the present question. The acts of the former congresses, and the acts of many of the state conventions, are replete with similar ideas; and to the honor of the United States, it may be observed, that in no other country are subjects of this kind better, if so well, understood. The attention and attachment of the constitution to the equal rights of the people are discernible in almost every sentence of it; and it is to be regretted that the provision in it which we have been considering, has not, in every instance, received the approbation and acquiescence which it merits. Georgia has, in strong language, advocated the cause of republican equality: and there is reason to *hope, that the people of that state will yet perceive that it would not have been [*479 consistent with that equality, to have exempted the body of her citizens from that suability, which they are at this moment exercising against citizens of another state.

For my own part, I am convinced, that the sense in which I understand and have explained the words "controversies between states and citizens of another state," is the true sense. The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice, without respect of persons, and by securing individual citizens, as well as states, in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring state; because it obviates occasions of quarrels between states on account of the claims of their respective citizens; because it recognises and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice, without any danger of being overborne by the weight and number of their opponents; and because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently, that fellow-citizens and joint-sovereigns cannot be degraded, by appearing with each other, in their own courts, to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of constitutional law and government can ensure the continuance and enjoyment of them.

For the reasons before given, I am clearly of opinion, that a state is suable by citizens of another state; but lest I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, viz.: That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say, that an individual may sue a state on bills of credit issued before the constitution was established, and which were issued and received on the faith of the state, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

The following order was made:—

By the Court—It is ordered, that the plaintiff in this cause do file his declaration on or before the first day of March next.

Ordered, that certified copies of the said declaration be served on the governor and attorney-general of the state of Georgia, on or before the first day of June next.

Ordered, that unless the said state shall either in due form appear, or show cause to the contrary in this court, by the first day of next term, judgment by default shall be entered against the said state.(*a*)

AUGUST TERM, 1793.

The Court being met, a commission appointing William Paterson, one of the justices, bearing date the 4th of March 1793, was read; and he was qualified according to law.(*b*)

(*a*) In February term 1794, judgment was rendered for the plaintiff, and a writ of inquiry awarded. The writ, however, was not sued out and executed; so that this cause, and all the other suits against states, were swept at once from the records of the court, by the amendment of the federal constitution, agreeable to the unanimous determination of the judges, in Hollingsworth *v.* Virginia, argued at February term 1798. (3 Dall. 378.)

(*b*) Judge Paterson's appointment was in the room of Mr. Justice Johnson, who had resigned.

The malignant fever, which during this year, raged in the city of Philadelphia, dispersed the great body of its inhabitants, and proved fatal to thousands, interrupted, likewise, the business of the courts; and I cannot trace, that any important cause was agitated in the present term.