ples of an abandonment by the French possessors, the whole property ought not to have been decreed to the American libellants, or, at least, a greater portion of it, by way of salvage; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause. Upon the whole, let the decree be affirmed.

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*199] *WARE, administrator of JONES, Plaintiff in error, *v.* HYLTON *et al.*

Confiscation of debts of alien enemies.

The treaty of peace concluded between the United States and Great Britain, in 1783, enabled British creditors to recover debts previously owing to them by American citizens, notwithstanding a payment into a state treasury, under a state law of sequestration.[1]

An individual citizen of one state cannot set up the violation of a public treaty, by the other contracting party, to avoid an obligation arising under such treaty; the power to declare a treaty void, for such cause, rests solely with the government, which may, or may not, exercise its option in the premises. IREDELL, J., in the court below.

ERROR from the Circuit Court for the district of Virginia. The action was brought by William Jones (but as he died, *pendente lite*, his administator was duly substituted as plaintiff in the cause), surviving partner of Farrel & Jones, subjects of the king of Great Britain, against Daniel Hylton & Co., and Francis Eppes, citizens of Virginia, on a bond, for the penal sum of 2976*l.* 11*s.* 6*d.* sterling, dated the 7th July 1774.

The defendants pleaded: 1st, Payment; and also, by leave of the court, the following additional pleas in bar of the action.

2d. That the plaintiff ought not to have and maintain his action aforesaid, against them, for $3111. 1-9, equal to 933*l.* 14*s.*, part of the debt in the declaration mentioned, because they say that, on the fourth day of July, in the year 1776, they, the said defendants, became citizens of the state of Virginia, and have ever since remained citizens thereof and residents therein; and that the plaintiff, on the said fourth day of July, in the year 1776, and the said Joseph Farrel, were, and from the time of their nativity ever had been, and always since have been, and the plaintiff still is, a British subject, owing, yielding and paying allegiance to the king of Great Britain; which said king of Great Britain, and all his subjects, as well the plaintiff as others, were, on the said fourth day of July, in the year 1776, and so continued until the 3d of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America; and that being so enemies, and at open war as aforesaid, the legislature of the state of Virginia did, at their session begun and held in the city of Williamsburgh, on Monday, the 20th day of October, in the year 1777, pass an act, entitled "an act for se-
*200] questering British property, enabling those indebted *to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties," whereby it was enacted, "that it may and shall be law-

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[1] Hamilton *v.* Eaton, Mart. (N. C.) 1; s. c. 1 Hughes 249; Jones *v.* Walker, 2 Paine 688. The plea of alien enemy only goes in abatement of the suit; Bell *v.* Chapman, 10 Johns. 183; if put in, after issue joined, as it may be, *puis darrein continuance* (Smith *v.* McConnel, 11 Id. 424), the plaintiff may reply a subsequent restoration of peace (Russel *v.* Skipwith, 1 S. & R. 310), whereby the disability is removed Hamersly *v.* Lambert, 2 Johns. Ch. 508.

ful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the said debt." And the defendants say, that the said Daniel L. Hylton & Co. did, on the 26th day of April, in the year 1780, in the county of Henrico, and in the state of Virginia, while the said recited act continued in full force, in pursuance thereof, pay into the loan-office of this commonwealth, on account of the debt in the declaration mentioned, the sum of $3111.1-9, equal to 933*l.* 14*s.*, and did take out a certificate for the same, in the name of Farrel & Jones, in the declaration mentioned, as creditors, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, which certificate they, the defendants, then delivered to the governor and council, who gave a receipt therefor, in conformity to the directions of the said act, in the words and figures following, to wit:

"Received into the council's office, a certificate bearing date the twenty-sixth day of April 1780, under the hand of the treasurer, that Daniel L. Hylton & Co. have paid to him thirty-one hundred, eleven and one-ninth dollars, to be applied to the credit of their accounts with Farrel & Jones, British subjects. Given under my hand, at Richmond, this 30th May 1780.

T. JEFFERSON."

Whereby the defendants, by virtue of the said act of assembly, are discharged from so much of the debt in the declaration mentioned, as the said receipt specifies and amounts to, and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the said plaintiff ought to have or maintain his action aforesaid against them, for the 933*l.* 14*s.* part of the debt in the declaration mentioned.

3d. That the plaintiff ought not to have or maintain his action aforesaid against them, because they say that, on the 4th day of July, in the year 1776, the said defendants became citizens of the state of Virginia, and have ever since remained citizens thereof, and residents therein, and that the said plaintiff, and the said Joseph Farrel, on the said fourth day of July, in the year 1776, and from the time of their nativity, had ever been, and always since have been, British subjects, *and the plaintiff still is a British subject, yielding and paying allegiance to the king of Great Britain, which said king [*201
of Great Britain, and all his subjects, as well the plaintiff and the said Joseph Farrel, as others, were, on the said 4th day of July 1776, and so continued until the 3d day of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America; and that being so enemies and at open war as aforesaid, the legislature of the state of Virginia did, at their session commenced and held in the city of Williamsburg, on the 3d day of May, in the year 1779, pass an act entitled "an act concerning escheats and forfeitures from British subjects," whereby it was, among other things, enacted, "that all the property real and personal, within this commonwealth, belonging at this time to any British subject, or which did belong to any British subject, at the time when such escheat or forfeiture may have taken place, shall be deemed to be vested in the com-

monwealth; the lands, slaves and other real estate, by way of escheat, and the personal estate, by forfeiture." And the legislature of the state of Virginia did, in their session begun and held in the town of Richmond, on Monday, the 6th day of May, in the year 1782, pass an act, entitled "an act to repeal so much of a former act, as suspends the issuing of executions upon certain judgments, until December 1783," whereby it is enacted, that no demand whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court in this commonwealth, although the same may be transferred to a citizen of this state, or to any other person capable of maintaining such an action, unless the assignment hath been, or may be, made for a valuable consideration, *bonâ fide*, paid before the first day May 1777; which said acts are unrepealed, and still in force. And the defendants in fact say, that the debt in the declaration mentioned was personal property within this commonwealth, belonging to a British subject, at the time of the passing of the said act, entitled "an act concerning escheats and forfeitures from British subjects;" and the defendants in fact also say, that the debt in the declaration mentioned is a demand originally due to a subject of the king of Great Britain, not transferred to any person whatsoever. And these things they are ready to verify: wherefore, they pray the judgment of the court, whether the said plaintiff ought to have or maintain his action aforesaid against them.

4th. That the plaintiff, his action aforesaid against them, ought not to have or maintain, because they say, that a definitive treaty of peace between the United States of America and his Britannic majesty, was done at Paris, on the 3d day of September, in the year 1783, and that, by a part of the *202] 7th *article of the said treaty, it was expressly agreed, on the part of his Britannic majesty, with the United States, among other things, "That his said Britannic majesty should, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets, from the said United States, and from every port, place and harbor within the same," which may more fully appear, reference being had to the said treaty: And the said defendants aver, that on the said 3d day of September 1783, and from their birth to this day, they have been citizens of these United States, and of the state of Virginia, and that the plaintiff has ever been a British subject, and that the plaintiff ought not to maintain an action, because his Britannic majesty hath wilfully broken and violated the said treaty in this, that his Britannic majesty hath, from the day of the said treaty and ever since, continued to carry off the negroes in his possession, the property of the American inhabitants of the United States, and hath and still doth refuse to deliver them, or permit the owners of the said negroes to take them. And the defendants aver, that his Britannic majesty hath refused, and still doth refuse, to withdraw his armies and garrisons from every port and harbor within the United States, which his said Britannic majesty was bound to do by the said treaty: and the defendants aver, that from the day of the treaty, his Britannic majesty, by force and violence, and with his army, retains possession of the forts Detroit and Niagara, and a large territory adjoining the said forts, and within the bounds and limits of the United States of America: and the defendants say, that in further violation of the said treaty of peace, concluded as aforesaid, certain

nations or tribes of Indians, known by the names of Shawanese, Tawas, Twightees, Powtawatemies, Quiapoees, Wiandots, Mingoes, Piankaskaws and Naiadonepes, and others, being at open, public and known war with the inhabitants of the United States, and living within the limits thereof, and for the purpose of aiding the said Indians in such war and hostility, at certain posts, forts and garrisons, held and kept by the troops and garrisons of his Britannic majesty, to wit, at Detroit, Michelimachinac and Niagara, within the limits of the said United States, on the 4th day of September 1783, and at divers times after the said 4th day of September 1783, up to the institution of this suit, by orders and directions of his Britannic majesty, and his officers commanding his said troops and armies, at the said garrisons of Detroit, Michelimachinac and Niagara, and at other forts and places held by the said troops and armies, within the limits of the United States, are supplied and furnished with arms, ammunition and weapons of war, to wit, with guns and gunpowder, lead *and leaden bullets, tomahawks and scalping-knives, for the purpose of enabling them to prosecute the war [*203 against the citizens of these United States, and also giving and paying to the said Indians money, goods, wares and merchandise, for booty and plunder taken in such war, and for persons, citizens of these United States, made prisoners by the said Indians, in such their warfare against the United States; and so the king of Great Britain is an enemy to these United States: and this they are ready to verify. Wherefore, they pray judgment of the court, whether the plaintiff, his action aforesaid, against them ought to have or maintain.

5th. That the debt in the declaration mentioned, was contracted before the 4th day of July, in the year 1776, to wit, on the 7th day of July, in the year 1774, and that when the said debt was contracted, and from thence to the said 4th day of July 1776, and on that day, and until this day, the said plaintiff was and is a subject to the king of Great Britain, residing in Virginia, until the said 4th day of July, in the year 1776, on which day the people of North America, among whom were these defendants, who had theretofore been the subjects of the king of Great Britain, dissolved the until then subsisting government, whereby the right of the plaintiff to the debt in the declaration mentioned, was totally annulled: and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the plaintiff ought to have or maintain his action aforesaid against them.

The plaintiff replied: 1st. *Non solverunt*, to the plea of payment; on which issue was joined. And to the 2d plea in bar, he replied—

2d. That he, by reason of anything in the said plea alleged, ought not to be barred from having or maintaining his said action against the said defendants, because, protesting that that plea, and the matters therein contained, are not sufficient in law to bar the said plaintiff from having or maintaining his said action in this behalf, against the said defendants, to which the said plaintiff hath no reason, nor is he bound by the law of the land to answer; yet, for replication in this behalf, he, the said plaintiff, saith, that after the debt in the said declaration mentioned was contracted, and after the said 4th day of July 1776, in the said plea of the said defendants mentioned, and also after the said 20th day of October 1777, and the passing the act of general assembly, in the said plea also mentioned, and also after the day in which the said receipt in the plea stated, is said to have

been granted, to wit, on the 3d day of September, in the year of our Lord 1783, it was by the definitive treaty of peace between the United States of
*204] America and his Britannic majesty, made and done in the *city of Paris, that is to say, in the commonwealth, now district of Virginia, and now within the jurisdiction of this honorable court, stipulated and agreed, among other things, "that the creditors of either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all *bonâ fide* debts theretofore contracted;" and the said plaintiff in fact saith, that he, on the said 3d day of September, in the year 1783, and for a long time before (as well as the said Joseph Farrel, in his lifetime, were), then was, and ever since hath been, and still is, a subject of his Britannic majesty, and a creditor within the intent and meaning of the 4th article of the definitive treaty; and that the debt in the declaration mentioned, was contracted before the said 3d day of September 1783, that is to say, in the county and commonwealth aforesaid, now the district of Virginia, and now within the jurisdiction of this honorable court; and then was and still is owing and unpaid. And the said plaintiff, for further replication, saith, that after contracting the debt in the declaration mentioned by the said defendants, and also after the 4th day of July, in the year of our Lord 1776, and after the said 20th day of October, in the year of our Lord 1777, and also after the said 3d day of September, in the year of our Lord 1783, that is to say, on the —— day of —— 1787, in the then commonwealth, now the district of Virginia, and now within the jurisdiction of this honorable court, it was by the constitution of the United States of America, among other things, expressly declared, that treaties which were then made, or should thereafter be made, under the authority of the United States, should be the supreme law of the land, anything in the said constitution, or of the laws of any state, to the contrary notwithstanding; and the said plaintiff doth in fact aver, that the said constitution of the United States was made and accepted, subsequent to and after the ratification of the said definitive treaty of peace between the said United States of America and his Britannic majesty, whose subject the said plaintiff then was, and still is, and after the said 4th day of July, in the year 1776, and also after the said 20th day of October, in the year 1777: Wherefore, without that the debt in the declaration mentioned, was *bonâ fide* contracted before the making of the said definitive treaty of peace, and before the making of the said constitution of the United States, that he, the said plaintiff, is entitled to demand, have and recover of the said defendants, the aforesaid debt in the declaration mentioned, without that the governor and council did give a receipt for a certificate of the payment into the loan-office
*205] of the sum of $1311.1-9, in the name of Farrel & Jones, *and in conformity to the direction of the act of general assembly, entitled "An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits where such subjects are parties;" whilst the said act was in force, as in the said plea of the said defendants is alleged: and this he is ready to verify. Wherefore, the said plaintiff, as before, prays judgment of the court, and his debt aforesaid, and damages for detention of the debt to be adjudged to him. To the 3d, 4th and 5th pleas in bar, the plaintiff demurred generally.

The defendants, to the plaintiff's second replication, rejoined, that the

said plaintiff, for anything in the said replication contained, ought not to have or maintain his said action against them, because they, by way of rejoinder, in this behalf, say, that in the same definitive treaty of peace between the United States of America and his Britannic majesty, by the said plaintiff in his replication mentioned, and which is now to the court shown, it was among other things stipulated and contracted as follows: "There shall be a firm and perpetual peace between his Britannic majesty and the said United States, and between the subjects of the one and the citizens of the other; wherefore, all hostilities both by sea and land shall from henceforth cease, all prisoners on both sides shall be set at liberty, and his Britannic majesty shall, with all convenient speed, and without causing any destruction or carrying away any negroes, or other property of the American inhabitants, withdraw all his armies, garrisons and fleets, from the said United States, and from every port, place and harbor, within the same:" And the defendants in fact say, that his said Britannic majesty hath not performed those things which, by the said treaty of peace, he was bound to perform, but hath altogether failed to do so, and hath broken the said treaty in this: that on the 4th day of September, in the year 1783, and on the 3d day of June 1790, and at divers times between the said 4th day of September 1783, and the said 3d day of June, in the year 1790, his Britannic majesty, at Detroit, and other parts within the boundaries of the United States, to wit, within the commonwealth of Virginia, the jurisdiction of this honorable court, in open violation of the said treaty, and the articles thereof, excited, persuaded and stirred up the Shawanesse, and divers other tribes of Indians, to make war upon the said United States of America, and the commonwealth of Virginia; and gave them, the said Indians, aid in the prosecution of the said war, and furnished them with arms and ammunition, for the purpose of enabling them to prosecute the same. And his said Britannic *majesty hath not, with all convenient speed, and without causing any destruction or carrying away any negroes, or other [*206 property of the American inhabitants, withdrawn all his armies, garrisons and fleets, from the said United States, and from every port and place within the same—but hath carried away five thousand negroes, the property of American inhabitants, on the 4th day of September, in the year 1783, from New York, to wit, in the commonwealth of Virginia, and within the jurisdiction of the court; and hath refused to withdraw with all convenient speed, his armies and garrisons from the United States, and from every post and place within the same—but hath, with force and violence, and in open violation of the said treaty of peace, on the said 3d day of September, in the year 1783, and since, maintained his armies and garrisons in the forts of Niagara and Detroit, which are posts and places within the United States, and still doth maintain his armies and garrisons within the said forts; and the defendants further say, that the debt in the declaration mentioned, or so much thereof, as is equal to the sum of 933*l.* 14*s.*, was not a *bonâ fide* debt due and owing to the plaintiff, on the said 3d day of September 1783, because the defendant had, on the ——— day of ——— 1780, in Virginia as aforesaid, paid in part thereof, the sum of $3111.1-9, and afterwards obtained a certificate therefor, according to the act of the general assembly, entitled "An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits, where such subjects are parties," which payment was made while the said act continued in full force;

without that the said treaty of peace, and the constitution of the United States, entitle the said plaintiff to maintain his said action against the said defendants, for so much of the said debt in the declaration mentioned, as is equal to 933*l.*, 14*s.*, and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the plaintiff ought to have or maintain his action aforesaid against them, for so much of the debt in the declaration mentioned, as is equal to the said sum of 933*l.* 14*s.*

The defendants joined issue on the demurrer to the 3d, 4th and 5th pleas in bar: and the plaintiff having demurred to the defendants' rejoinder to the 2d replication, issue was thereupon likewise joined.

On the demurrer to the defendant's rejoinder to the plaintiff's replication to the second plea, judgment was given by the circuit court, for the defendants, and that as to so much of the debt in the declaration mentioned, as is in the said second plea set forth, the plaintiff take nothing by his bill; on *207] which judgment, the present writ of error was brought: but on *demurrer to the 3d, 4th and 5th pleas, judgment was given for the plaintiff; a *venire* was awarded to try the issue in fact on the first plea of payment; and on the trial, a verdict and judgment were given for the plaintiff for $596, with interest at five per cent. from the 7th of July 1782, and costs.

On the return of the record, the error assigned was, that judgment had been given for the defendants, instead of being given for the plaintiff, upon his demurrer to their rejoinder to the replication to the second plea. *In nullo est erratum* was pleaded, and thereupon, issue was joined.

The general question was—whether by paying a debt due before the war, from an American citizen to British subjects, into the loan-office of Virginia, in pursuance of the law of that state, the debtor was discharged from his creditor? And the argument took the following general course.(*a*)

E. Tilghman, for the plaintiff in error.—It is conceded, that a debt was due from the defendants to the plaintiff, at the commencement of the revolutionary war; and it has been decided, in the case of *Georgia* v. *Brailsford* (*ante*, p. 1), that although the state had a power to suspend the payment of such a debt, during the continuance of hostilities, yet, that the creditor's right to recover it revived, as an incident and consequence of the peace. There is, indeed, no controverting the general right of a belligerent power to confiscate the property of its enemy, in ordinary cases; though the modern policy of nations abstains from the exercise of that right, in respect to debts. Vatt. lib. 3, § 77, p. 484. But the relative situation of Great Britain and her colonies was of a peculiar nature, widely different from the situation of the Grecian or Roman colonies; and therefore, requiring a new and appropriate rule of action. At the time of the revolution, the creditor and debtor were members of the same society; subjects of the same empire. Had they belonged, originally, to distinct, independent states, both would have anti-

(*a*) As I was not present during the argument, I was in hopes to have obtained the briefs of the counsels themselves, for a more full display of their learning and ingenuity in this cause; but being disappointed in that respect, I have been aided by the notes of Mr. *W. Tilghman*, to whose kindness, it is just, on the present occasion, to acknowledge, I have been frequently indebted for similar communications, in the course of the compilation for these reports.

cipated, in the case of a war, an exercise of the power of confiscation; but the event of a civil contest could not be reasonably contemplated nor provided for. We find, therefore, upon the law of positive authority, as well as upon a principle of natural justice, that even the declaration of independence was deemed to have no obligatory operation upon any inhabitant of the United States, who did not choose, voluntarily, to remain in the country, or to take an *oath of allegiance to some member of the confederation. [*208
1 Dall. 53. On the declaration of independence, the American debtor might choose his political party, but he could not dissolve his obligation to his British creditor; and if he had no power to dissolve it himself, it follows, that he could not communicate such a power to the society of which he became a member. Vatt. Pr. Dis. § 5, 11. Besides, there are, certainly, a variety of cases, to which the rigorous power of confiscation cannot and ought not to extend. Suppose, a contract is formed in a neutral country, between subjects of two belligerent powers, the debt thus incurred could hardly be the object of confiscation. An action, it has been adjudged, may be maintained on a ransom bill, even during the continuance of the war. Doug. 19. And, in general, it may be stated, that capitulations, made in time of war, though they embrace the security of debts, as well as other property, must be held sacred. Vatt. lib. 3, § 263, 264, p. 612, 613.

But supposing Virginia had the right of confiscation in the present instance, two grounds for judicial inquiry will still remain to be explored: 1st. Whether an act of the legislature of that state has been passed, and so acted upon, as ever to have created an impediment to the plaintiff's recovering the debt in controversy? And 2d. Whether such impediment, if it ever existed, has been lawfully removed?

1st. It does not appear, from the enacting clauses of the law of Virginia, which has been pleaded, that the state had any intention to confiscate the British debts paid into her treasury; and the preamble (which, though it cannot control, may be advantageously employed to expound the enacting clauses) is manifestly inconsistent with such an intention. The money, when paid by the debtor into the treasury, was, simply, to remain there, subject to the directions of the legislature; and as the debtor was not bound so to pay it, the provisions of the act could not amount to a confiscation; but were merely an invitation to pay, with an implied promise, that whoever accepted the terms of the invitation, should be indemnified by the state. Nor was the invitation indiscriminately given to all debtors, but only to those who were sued; from which the inference is irresistible, that whatever responsibility the state meant herself to assume, there was no intention to extinguish the responsibility of the Virginia debtor to the British creditor. The act of the Virginia legislature, passed the 3d of May 1779, is *in pari materiâ*, and throws light on the construction of the former act; for there, when the legislature meant to interpose a bar to the recovery, they have in express terms declared it. Several other acts have passed on the subject, to which it is merely necessary to refer: The act of the 1st of *May 1780, [*209
repeals the act of the 20th of October 1777, so far as regards the authority to pay debts into the treasury. The acts of the 6th of May 1782, and 20th of October 1783, revive the authority of making such payments in relation to British debts; and prevents the recovery by British creditors. The act of the 3d of January 1788, fixes the amount for which the state will

be liable on account of payments into the treasury; to wit, for the value of the money at the time it was so paid, with interest.

2d. But if any impediment ever existed to the recovery of the debt, it is removed by the operation of the treaty between the United States and Great Britain, congress having a power to repeal all the acts of the several states, in order to obtain peace; and the treaty made for that purpose being the supreme law of the land. The fourth article declares, that creditors on either side shall meet with no lawful impediment to the recovery of debts heretofore contracted; and unless this provision applies to cases like the present, it will be useless and nugatory. An interpretation which would render a clause in the treaty of no effect, ought not to be admitted. Vatt. lib. 2, § 283. The 5th article expressly stipulates, that congress shall recommend the restoration of some parts of confiscated property, and a composition as to other parts; but that "all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." Both parties to the treaty seemed to think that there had been no confiscation of debts;(*a*) and debts were the great object which the British commissioners wished to secure. Whatever tends to produce equality in national compacts, ought to be favored; Vatt. lib. 2, § 301; and as the British government had thrown no impediment in the way of recovering debts, the American should be presumed to have acted on the same liberal principle, if any doubt arises upon the construction of the public acts. When a statute is repealed, mesne acts are valid; but it is not so, when a subsequent act declares a former one to be void. Jenk. 233, pl. 6. Had the treaty meant to obviate only a part of the impediments, the meaning would have been expressed in qualified terms. But as it could not be supposed, that, after the peace, laws would be passed creating impediments to the recovery of British debts; the treaty cannot be construed merely to intend to prevent the passing future laws, but to annihilate the operation of such as were previously enacted. There is no such clause
*210] in the treaties which England *made at the same period with France, Spain and Holland, and for this obvious reason, that those countries had passed no law to impede the recovery of British debts. A change of circumstances, a recognition, *ex post facto*, will often impose an obligation, which may not, originally, be binding on the party: The debt contracted by an infant is obligatory on him, if he promises to pay it, when of age. The assumption of a certificated bankrupt, to satisfy a debt, which the certificate would, otherwise, have discharged, affords a new cause of action. And the bare acknowledgment of a debt, barred by the statute of limitations, is sufficient to maintain an action against the debtor. So, in the present case, the treaty, operating as a national compact, is a promise to remove every pre-existing bar to the recovery of British debts; and whatever may have been the previous state of things, this is a paramount engagement, entered into by a competent authority, upon an adequate consideration.

Marshall (of Virginia), for the defendant in error.—The case resolves itself into two general propositions: 1st. That the act of assembly of Virginia

(*a*) IREDELL, Justice.—The state of North Carolina did actually pass a confiscation law.

is a bar to the recovery of the debt, independently of the treaty. 2d. That the treaty does not remove the bar.

I. That the act of assembly of Virginia is a bar to the recovery of the debt, introduces two subjects for consideration: 1st. Whether the legislature had power to extinguish the debt? 2d. Whether the legislature had exercised that power.

1st. It has been conceded, that independent nations have, in general, the right of confiscation; and that Virginia, at the time of passing her law, was an independent nation. But it is contended, that from the peculiar circumstances of the war, the citizens of each of the contending nations having been members of the same government, the general right of confiscation did not apply, and ought not to be exercised. It is not, however, necessary for the defendant in error to show a parallel case in history; since, it is incumbent on those who wish to impair the sovereignty of Virginia, to establish, on principle or precedent, the justice of their exception. That state, being engaged in a war, necessarily possessed the powers of war; and confiscation is one of those powers, weakening the party against whom it is employed, and strengthening the party that employs it. War, indeed, is a state of force; and no tribunal can decide between the belligerent powers. But did not Virginia hazard as much by the war, as if she had never been a member of the British empire? Did she not hazard more, from the very circumstance of its being a civil war? It will be allowed, that nations have equal powers; and that America, in her own tribunals, at least, must, from the 4th of July 1776, be *considered as independent a nation as Great Britain: then, what would have been the situation of American property, had Great [*211
Britain been triumphant in the conflict? Sequestration, confiscation and proscription would have followed in the train of that event; and why should the confiscation of British property be deemed less just, in the event of the American triumph? The rights of war clearly exist between members of the same empire, engaged in a civil war. Vatt. lib. 3, § 292, 295. But, suppose a suit had been brought, during the war, by a British subject, against an American citizen, it could not have been supported; and if there was a power to suspend the recovery, there must have been a power to extinguish the debt: they are, indeed, portions of the same power, emanating from the same source. The legislative authority of any country can only be restrained by its own municipal constitution: this is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution. It is not necessary to inquire, how the judicial authority should act, if the legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions. There is no weight in the argument, founded on what is supposed to be the understanding of the parties, at the place and time of contracting debts; for the right of confiscation does not arise from the understanding of individuals, in private transactions, but from the nature and operation of government. Nor does it follow, that because an individual has not the power of extinguishing his debts, the community to which he belongs, may not, upon principles of public policy, prevent his creditors from recovering them. It must be repeated, that the law of property, in its origin and operation, is the off-

spring of the social state; not the incident of a state of nature. But the revolution did not reduce the inhabitants of America to a state of nature; and if it did, the plaintiff's claim would be at an end. Other objections to the doctrine are started: it is said, that a debt which arises from a contract formed between the subjects of two belligerent powers, in a neutral country, cannot be confiscated; but the society has a right to apply to its own use, the property of its enemy, wherever the right of property accrued, and wherever the property itself can be found. Suppose, a debt had been contracted between two Americans, and one of them had joined England, would not the right of confiscation extend to such a debt? As to the case of the ransom-bill, if the right of confiscation does not extend to it (which is, by no means, admitted), it must be, on account of the peculiar nature of the con-
*212] tract, implying a waiver of the rights of *war. And the validity of capitulations depends on the same principle. But, let it be supposed, that a government should infringe the provisions of a capitulation, by imprisoning soldiers who had stipulated for a free return to their home, could an action of trespass be maintained against the jailer? No, the act of the government, though disgraceful, would be obligatory on the judiciary department.

2d. But it is now to be considered, whether, if the legislature of Virginia had the power of confiscation, they have exercised it? The third section of the act of assembly discharges the debtor; and on the plain import of the term, it may be asked, if he is discharged, how can he remain charged? The expression is, he shall be discharged from the debt; and yet, it is contended, he shall remain liable to the debt. Suppose, the law had said, that the debtor should be discharged from the commonwealth, but not from his creditor, would not the legislature have betrayed the extremest folly in such a proposition? and what man in his senses would have paid a farthing into the treasury, under such a law? Yet, in violation of the expressions of the act, this is the construction which is now attempted. It is likewise contended, that the act of assembly does not amount to a confiscation of the debts paid into the treasury; and that the legislature had no power, as between creditors and debtors, to make a substitution or commutation in the mode of payment. But what is a confiscation? The substance, and not the form, is to be regarded. The state had a right either to make the confiscation absolute, or to modify it as she pleased. If she had ordered the debtor to pay the money into the treasury, to be applied to public uses; would it not have been, in the eye of reason, a perfect confiscation? She has thought proper, however, only to authorize the payment, to exonerate the debtor from his creditor, and to retain the money in the treasury, subject to her own discretion, as to its future appropriation. So far as the arrangement has been made, it is confiscatory in its nature, and must be binding on the parties; though in the exercise of her discretion, the state might choose to restore the whole or any part of the money to the original creditor. Nor is it sufficient to say, that the payment was voluntary, in order to defeat the confiscation. A law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty. Banks, canal companies, and numerous associations of a similar description, are formed on the principle of voluntary subscription. The nation is desirous that such institutions should exist; individuals are invited to subscribe, on

the terms of the law; and, when they have subscribed, they are entitled to all the benefits, and are subject to all the inconveniences of the association, *although no penalties are imposed. So, when the government of [*213
Virginia wished to possess itself of the debts previously owing to British subjects, the debtors were invited to make the payment into the treasury; and having done so, there is no reason or justice, in contending that the law is not obligatory on all the world, in relation to the benefit which it promised as an inducement to the payment. If, subsequently to the act of 1777, a law had been passed confiscating British debts, for the use of the state, with orders that the attorney-general should sue all British debtors, could he have sued the defendants in error, as British debtors, after this payment of the debt into the treasury? Common sense and common honesty revolt at the idea; and yet, if the British creditor retained any right or interest in the debt, the state would be entitled, on principles of law, to recover the amount.

II. Having thus, then, established, that at the time of entering into the treaty of 1783, the defendant owed nothing to the plaintiff; it is next to be inquired, whether that treaty revived the debt in favor of plaintiff, and removed the bar to a recovery, which the law of Virginia had interposed? The words of the fourth article of the treaty are "that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." Now, it may be asked, who are creditors? There cannot be a creditor, where there is not a debt; and British debts were extinguished by the act of confiscation. The article, therefore, must be construed with reference to those creditors, who had *bonâ fide* debts subsisting, in legal force, at the time of making the treaty; and the word *recovery* can have no effect to create a debt, where none previously existed. Without discussing the power of congress to take away a vested right by treaty, the fair and rational construction of the instrument itself is sufficient for the defendant's cause. The words ought, surely, to be very plain, that shall work so evident a hardship, as to compel a man to pay a debt which he had before extinguished. The treaty itself does not point out any particular description of persons, who were to be deemed debtors; and it must be expounded in relation to the existing state of things. It is not true, that the fourth article can have no meaning, unless it applies to cases like the present. For instance, there was a law of Virginia, which prohibited the recovery of British debts that had not been paid into the treasury: these were *bonâ fide* subsisting debts; and the prohibition was a legal impediment to the recovery, which the treaty was intended to remove. So, likewise, in several other states, laws had been passed, authorizing a discharge of British debts in paper money, or by a tender of property *at a valuation, and the treaty was calculated to [*214
guard against such impediments to the recovery of the sterling value of those debts. It appears, therefore, at the time of making the treaty, the state of things was such, that Virginia had exercised her sovereign right of confiscation, and had actually received the money from the British debtors. If debts thus paid were within the scope of the fourth article, those who framed the article knew of the payment; and upon every principle of equity and law, it ought to be presumed, that the recovery which they contemplated, was intended against the receiving state, not against the paying debtor. Virginia

possessing the right of compelling a payment for her own use, the payment to her, upon her requisition, ought to be considered as a payment to the attorney or agent of the British creditor. Nor is such a substitution a novelty in legal proceedings: a foreign attachment is founded on the same principle. Suppose, judgment had been obtained against the defendants in error, as garnishees in a foreign attachment brought against the plaintiff in error, and the money had been paid, accordingly, to the plaintiff in the attachment; but it afterwards appeared that the plaintiff in the attachment had, in fact, no cause of action, having been paid his debt, before he commenced the suit: if the treaty had been made in such a state of things, which would be the debtor contemplated by the fourth article—the defendants in error, who had complied with a legal judgment against them, or the plaintiff in the attachment, who had received the money? This act of Virginia must have been known to the American and British commissioners; and therefore, cannot be repealed, without plain and explicit expressions directed to that object. Besides, the public faith ought to be preserved. The public faith was plighted by the act of Virginia; and as a revival of the debt in question would be a shameful violation of the faith of the state to her own citizens, the treaty should receive any possible interpretation to avoid so dishonorable and so pernicious a consequence. It is evident, that the power of the government, to take away a vested right, was questionable in the minds of the American commissioners, since they would not exercise that power, in restoring confiscated real estate; and confiscated debts or other personal estate must come within the same rule. If congress had the power of divesting a vested right, it must have arisen from the necessity of the case; and if the necessity had existed, the American commissioners, explicitly avowing it, would have justified their acquiescence to the nation. But the commissioners could have no motive to form a treaty such as the opposite construction supposes; for if the stipulation was indispensable to the attainment of peace, the object was national, and so should be the
*215] *payment of the equivalent: the commissioners, in such case, would have agreed, at once, that the public should pay the British debts; since, the public must, on every principle of equity, be answerable to the Virginia debtor, who is now said to be the victim. The case cited from Jenkins, does not apply; as there is no article of the treaty, that declares the law of Virginia void. See Old Law of Evidence, 196.

Campbell, of Virginia, on the same side.—The questions to be discussed are these: 1st. Did the act of assembly of Virginia discharge the debtor? 2d. Did any subsequent act, or law, of the government recharge him?

I. The right of confiscation, in a time of war, is incontrovertibly established (Vatt. lib. 3, c. 5, § 77); and nothing but the conventional or customary law of nations can restrain the exercise of that general right. But the conventional or customary law of nations is only obligatory on those nations by whom it is adopted. Vatt. Pref. Disc. § 24, 25, 17; Vatt. lib. 3, c. 28, § 287, 292. Even in the English courts, indeed, the confiscation law of Georgia has been adjudged to be valid. If, therefore, the right of confiscation might be exercised by an individual state, nothing can more emphatically prove its exercise than the language of the act of Virginia. The act is a discharge, in express terms, saying, that "the receipt of the proper

officer shall *discharge* the payer from so much of his debt, as is paid into the treasury,"—whereas, a confiscation of the debt would only work a discharge by legal inference. To restrict the meaning of the discharge to a discharge from the state, is absurd; for the state never had a charge against the debtor; or, if the state had a right to charge him, another consequence, equally fatal to the plaintiff's cause, would ensue, that the right of the British creditor to charge him was extinguished; since the debtor clearly could not be responsible to both.

II. In considering whether anything has been done by the government to revive the charge, in favor of the British creditor, it is to be premised, that the state of things, at the time of making the treaty, is to be held legitimate; and whatever tends to change that state, is odious in the eye of the law. Vatt. lib. 4, c. 2, § 21; Ibid. lib. 2, c. 17, § 305. As, therefore, by the law of nations, a payment under a confiscation discharges a debtor, though if there had been no payment, the debt would have revived at the peace (Bynk. c. 8, p. 177, de Reb. Bell.); nothing short of an express and explicit declaration of the treaty should be allowed so to alter the state of things, as to revive a debt, that had been lawfully extinguished. If, then, the treaty had been intended to alter the state of things, reason, equity and law concur in supposing, that it would have been by a provision, *calling on Virginia, who had received the money, to refund it in satisfaction of the claim of the British creditor. [*216 Adverting to the words of the 4th article of the treaty, and thence deducing a fair, legal and consistent meaning, the claim of the plaintiff cannot be supported. It may not be improper, to apply the word *creditors* to British subjects; but it is contended, that the Virginia act interposes a lawful impediment (not an impediment in fact, such as payment to the creditor himself) to the recovery of the debt, which impediment the treaty intended to remove. The answer, however, is conclusive, that this was not a debt, at the time of making the treaty; and therefore, the expression, whatever may be its general import, cannot be applied to the case. It is urged likewise, that the words debts *heretofore contracted*, are peculiarly descriptive of debts of the present class: but the words "heretofore contracted," cannot alter the nature and import of the word *debt;* and those words were necessary to be inserted; because they ascertained the debts which were, at all events, to be paid in sterling money —debts contracted afterwards being left to the *lex loci*, and liable to the tender laws, which the different states had made or might think proper to make. If, indeed, the opposite construction prevails, then all debts, previously contracted, in whatever manner they may have been extinguished, are revived by the treaty. But, surely, obscure words ought not to be construed so as to alter the existing state of things between the two nations, and involve thousands of individual citizens in ruin. It is not now contended, that debts do not revive by the peace; though the commissioners who formed the treaty might entertain doubts on the subject; and therefore, provided specially for the case. Grotius, lib. 3, c. 9, § 9, says (though his commentator dissents), that debts are not, of course, revived by a peace; and there are many instances of conventions between nations, stipulating for the revival. Bynk. de Reb. Bell. c. 8, p. 177. The treaty extends to British, as well as to American, debtors; and as Britain had passed no act of confiscation, the article was meant solely as a convention, that debts not

paid to the public, should be recoverable of the original creditor. To elucidate the subject, it is necessary to inquire into the power of the commissioners; for it is not to be presumed, that they were ignorant of their power, or that they meant to exceed it; and if one construction will produce an effect, to which they were competent, while the other construction will amount to a mere usurpation, the former ought certainly to be adopted. Thus, congress never was considered as a legislative body, except in relation to those subjects expressly assigned to the federal jurisdiction; and could, at no time, nor in any manner, repeal the laws of the several states, or *217] sacrifice the rights of individuals. The power of abrogating, *is as eminent as the power of making laws (Vatt. lib. 1, c. 3, § 34, 47); and even the powers of war and peace may be limited by the fundamental law of the society. Vatt. lib. 4, c. 2, § 10. The fundamental law of the Union was declared in the articles of confederation; and those articles, as well as the written constitutions of the several states, must have been known to the commissioners on both sides, as the boundaries of the authority of the American government itself, and of course, of all authority derived from that government. But the right of sacrificing individuals, even on the ground of public necessity, belongs only to that power in a state, which is vested with the eminent domain, a domain inseparable from empire. Vatt. lib. 4, § 12; Ibid. lib. 1, c. 20, § 244, 245. On the revolution, the eminent domain was vested in the people of America, in their respective state legislatures; and it could not be divested and transferred, without an express grant by the same authority. The debates that arose in the British parliament on the subject of the treaty, show, likewise, that the British commissioners were sensible, that the power of the American commissioners did not extend to the repeal of any state law. On the faith of the Virginia law, many citizens collected their estates from other hands, and paid them into the treasury; and therefore, even if the treaty requires a payment of those debts, the responsibility ought only to attach upon the state. If the Virginia law had made a direct and unqualified confiscation, there would be no doubt of its validity; but it discharges the debtor as much as if it had been a confiscation, and being discharged, it can be no reason to revive the debt, that the discharge was procured by a voluntary payment. Upon the whole, the act of assembly amounts, substantially, to a confiscation; which means nothing more, than a bringing into the public treasury the confiscated property; and the state may, if she pleases, restore it, in that case, as well as in the case of a discretion expressly reserved, or in the case of a forfeiture for treason or felony.

Wilcocks, for the plaintiff in error.—It is necessary, 1st, to ascertain the meaning of the acts of the legislature of Virginia; and 2d, the operation of the treaty of peace, in relation to those acts.

I. That the legislature of Virginia did not mean to confiscate debts, is evident from the declaration contained in the preamble, that such a confiscation is not agreeable to the custom of nations; and where the enacting clause is doubtful, the preamble will furnish a key to the construction. After droviding, therefore, for the sequestration of real estate, the law proceeds merely to permit the payment of British debts into the public

treasury. There is nothing compulsory on the debtor; *all* *debtors are not enjoined to pay; and no debtor is restrained from remitting to his British creditor. Even, indeed, if a bare sequestration had been intended, there never could be terms more defective. The legislature only says, if a debtor chooses to pay his debt into the treasury, he shall be indemnified; and in a subsequent act, when the state declares the amount for which she will be responsible (the value of the money paid, with interest), she does not determine, whether the payment by the American debtors was a discharge from the British creditors. To pay the British creditor in that way, would be manifestly unjust; but if the American debtor is reimbursed the value of what he paid, with interest, he has no right to complain.

II. In examining the effect of the treaty, if it be conceded, that the Virginia act extinguished the debt, it may be assumed, that the commissioners had power to enter into the treaty. That instrument, therefore, is the supreme law of the land: and, upon the whole, it is highly favorable to America. Treaties ought to be construed liberally; but it would be illiberal to construe this treaty, so as to prevent the recovery of *bonâ fide* debts. The British commissioners gave up a great deal; but they were particularly anxious on two points, the property of the loyalists, and the security of the British debts. It is objected, that the treaty does not make any express mention of the repeal of state laws: but the laws interfering with the object of the fourth article were so numerous, that, probably, the commissioners did not know them all; and it was safest to resort to general expressions. The words "heretofore contracted," mean debts contracted before the revolution; and include not only existing debts, at the time of forming the treaty, but all debts contracted before that memorable epoch, though extinguished by the acts of state legislatures, without the consent or co-operation of the British creditors. The words that "creditors shall meet with no lawful impediment in the recovery of all such debts," mean, that when the creditors apply to a court of justice, no law shall be pleaded in bar to a judgment for their debts. What else, indeed, could reasonably be the object of the British minister, who was bound to protect the commercial interests of his nation, and who insisted on the insertion of the fourth article? Could he mean to relinquish all debts paid into the public treasury of the different states? Then, if all had been so paid, the article was nugatory. But the impediments referred to must have been the existing impediments, and not impediments to be afterwards created; and the enforcement of the former would be, on general principles, as unjust to the British creditor, as the introduction of the latter. Besides, if the former description of impediments was not contemplated, British creditors were in a worse predicament *than loyalists, owners of confiscated real estate, in whose favor, it was stipulated, that a congressional recommendation should be made. [*219

Lewis, for the plaintiff in error.—The individuals of different nations enter into contracts with each other, upon a presumption, that, in case of a war, debts will not be confiscated. The presumption is founded upon the uniform practice of the monarchies of Europe; and the national character of the American republic is interested that a more rigorous policy should not

be introduced. Congress, indeed, never attempted the seizure of debts; and very few of the states have passed confiscating laws. It is now, then, to be inquired, 1st. Had the legislature of Virginia a competent authority to extinguish the debt? 2d. If the legislature had such an authority, has it been exercised? And 3d. If the authority was lawfully exercised, what is the effect of the treaty of peace?

1st. If the power to confiscate debts existed, it existed in the United States, and not in the individual states. It has been admitted, that congress possessed the power of war and peace; and that the right of confiscation emanates from that source. All America was concerned in the war, and it seems naturally to follow, that all America (not the constituent parts, respectively) was entitled to the emoluments of confiscation. It is true, that when a civil war breaks out, each party is entitled to the rights of war, as between independent nations; and it is not denied, that Virginia was vested, at the revolution, with all the eminent domain attached to empire, which was not delegated to congress, as the head of the confederation. Such was the peculiar state of things, that although Virginia might, in any future war, have acted as she pleased, in the war then subsisting, she had no election; all the powers of war and peace were vested in congress, not in the legislatures of the several states. When it is said, that even the British courts recognise the validity of a state confiscation; it should be remembered, that the case alluded to, arose from a law of treason, and the forfeiture for treason, properly belonged to the state of Georgia. 1 H. Bl. 148–9. So, when it is said, that the act of Virginia was passed, prior to the completion of the articles of confederation, it is sufficient to answer, that the same objection has already been overruled in *Penhallow* v. *Doane* (*ante*, p. 54). It is absurd to suppose, that congress and Virginia could, at the same time, possess the powers of war and peace. The war was waged against all America, as one nation or community; and the peace was concluded on the same principles. Before the revolution, the power of confiscation was vested in the king, not in the parliament. When the revolution commenced, conventions, committees of safety, and other popular associations *were formed, *220] even while the legislatures of the several states were in session. The people assumed, themselves, in the first instance, the powers of war and peace, but quickly and wisely vested them in congress. At what period, then, could the state legislatures assert that they possessed those powers? All the property of the enemy, likewise, of whatever kind, was booty of war, and belonged to the Union. The authorities say, that one belligerent power may confiscate debts due from its subjects, to the subjects of the other belligerent power; but it is nowhere said, that a member of any belligerent power, a constituent part of the nation, possesses such authority. The eminent domain of Virginia must, therefore, be confined to internal affairs; and it is not sufficient to object, that the property of the debt in question, was within the limits of her territory, and therefore, was subject to her laws. The inference would be false, even if the premises were true; but the premises are unfounded; for a debt is always due, where the creditor resides, except in the case of an obligation, which is due where the instrument is kept. 1 Roll. Abr. 908, pl. 1, 4; Ibid. 909, pl. 1, 7; Salk. 37; 4 Bur. Ecc. L. 157.

2d and 3d. On the second and third points, there can be but little added

to the arguments already advanced. If laws change according to the manners of times, as reason and authority inculcate (1 Ld. Raym. 882), the act of Virginia should be so expounded as to conform to the modern law of nations, which is adverse to the confiscation of debts. The right of sequestration may exist (and that is all the case in the Old Law of Evidence can prove), but Bynkershoeck says expressly, that a debt not exacted, revives upon the peace; and in the present instance the payment was surely voluntary, without force of any kind.

The Court, after great consideration, delivered their opinions, *seriatim*, as follows:

Chase, Justice.—The defendants in error, on the 7th day of July 1774, passed their penal bond to Farrel & Jones, for the payment of 2976*l.* 11*s.* 6*d.* of good British money; but the condition of the bond, of the time of payment, does not appear on the record. On the 20th October 1777, the legislature of the commonwealth of Virginia passed a law to sequester British property. In the 3d section of the law, it was enacted, "that it should be lawful for any citizen of Virginia, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he should think fit, into the loan-office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement, under the hand of the commissioner of the said office, expressing the name of the payer; and *shall deliver such certificate to the governor and the council, whose receipt [*221 shall discharge him from so much of the debt. And the governor and the council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons by, and for whom they were paid; and shall see to the safe-keeping of the same; subject to the future directions of the legislature: provided, that the governor and the council may make such allowance, as they shall think reasonable, out of the interest of the money so paid into the loan-office, to the wives and children, residing in the state, of such creditor. On the 26th of April 1780, the defendants in error paid into the loan-office of Virginia, part of their debt, to wit, $3,111\frac{1}{9}$, equal to 933*l.* 14*s.* 0*d.* Virginia currency; and obtained a certificate from the commissioners of the loan-office, and a receipt from the governor and the council of Virginia, agreeable to the above in part recited law.

The defendants in error being sued on the above bond, in the circuit court of Virginia, pleaded the above law, and the payment above stated, in bar of so much of the plaintiff's debt. The plaintiff, to avoid this bar, replied the fourth article of the definitive treaty of peace between Great Britain and the United States, of the 3d of September 1783. To this replication, there was a general demurrer and joinder. The circuit court allowed the demurrer, and the plaintiff brought the present writ of error.

The case is of very great importance, not only from the property that depends on the decision, but because the effect and operation of the treaty are necessarily involved. I wished to decline sitting in the cause, as I had been counsel, some years ago, in a suit in Maryland, in favor of American debtors; and I consulted with my brethren, who unanimously advised me not to withdraw from the bench. I have endeavored to divest myself of all former prejudices, and to form an opinion with impartiality. I have dili-

gently attended to the arguments of the learned counsel, who debated the several questions that were made in the cause, with great legal ability, ingenuity and skill. I have given the subject, since the argument, my deliberate investigation, and shall (as briefly as the case will permit) deliver the result of it, with great diffidence, and the highest respect for those who entertain a different opinion. I solicit, and I hope I shall meet with, a candid allowance for the many imperfections which may be discovered in observations hastily drawn up, in the intervals of attendance in court, and the consideration of other very important cases.

The first point raised by the counsel for the plaintiff in error was, "that
*222] the legislature of Virginia had no right to make *the law of the 20th October 1777, above in part recited. If this objection is established, the judgment of the circuit court must be reversed; because it destroys the defendant's plea in bar, and leaves him without defence to the plaintiff's action.

This objection was maintained, on different grounds, by the plaintiff's counsel. One of them (Mr. Tilghman) contended, that the legislature of Virginia had no right to confiscate any British property, because Virginia was part of the dismembered empire of Great Britain, and the plaintiff and defendants were, all of them, members of the British nation, when the debt was contracted, and therefore, that the laws of independent nations do not apply to the case; and if applicable, that the legislature of Virginia was not justified by the modern law and practice of European nations, in confiscating private debts. In support of this opinion, he cited Vattel, lib. 3, c. 5, § 77, who expresses himself thus: "The sovereign has naturally the same right over what his subjects may be indebted to enemies. Therefore, he may confiscate debts of this nature, if the term of payment happen in the time of war. But at present, in regard to the advantage and safety of commerce, all the sovereigns of Europe have departed from this rigor; and as this custom has been generally received, he who should act contrary to it, would injure the public faith; for strangers trusted his subjects, only from a firm persuasion, that the general custom would be observed." The other counsel for the plaintiff in error (Mr. Lewis) denied any power in the Virginia legislature to confiscate any British property, because all such power belonged exclusively to congress; and he contended, that if Virginia had a power of confiscation, yet, it did not extend to the confiscation of debts, by the modern law and practice of nations.

I would premise, that this objection against the right of the Virginia legislature to confiscate British property (and especially debts) is made on the part of British subjects, and after the treaty of peace, and not by the government of the United States. I would also remark, that the law of Virginia was made after the declaration of independence by Virginia, and also by congress; and several years before the confederation of the United States, which, although agreed to by congress on the 15th of November 1777, and assented to by ten states, in 1778, was only finally completed and ratified on the 1st of March 1781.

I am of opinion, that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the legislature of that commonwealth. I shall hereafter consider, whether the law of the 20th of October 1777, operated

to confiscate or extinguish *British debts, contracted before the war. It is worthy of remembrance, that delegates and representatives were elected by the people of the several counties and corporations of Virginia, to meet in general convention, for the purpose of framing a new government, by the authority of the people only; and that the said convention met on the 6th of May, and continued in session until the 5th of July 1776; and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had, therefore, an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive and a judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the commonwealth. This abolition of the old government, and this establishment of a new one, was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and for ever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the separation; and was proper, to give notice of the event to the nations of Europe. I hold it as unquestionable, that the legislature of Virginia, established, as I have stated, by the authority of the people, was for ever thereafter invested with the supreme and sovereign power of the state, and with the authority to make any laws in their discretion, to affect the lives, liberties and property of all the citizens of that commonwealth, with this exception only, that such laws should not be repugnant to the constitution or fundamental law, which could be subject only to the control of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of the Virginia legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and in my opinion, on the courts of the United States. If Virginia, as a sovereign state, violated the ancient or modern *law of nations, in making the law of the 20th of October 1777, she was unanswerable, in her political capacity, to the British [*224
nation, whose subjects have been injured in consequence of that law. Suppose, a general right to confiscate British property, is admitted to be in congress, and congress had confiscated all British property within the United States, including private debts, would it be permitted, to contend, in any court of the United States, that congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode and manner. The same reasoning is strictly applicable to Virginia, if considered a sovereign nation; provided, she had

not delegated such power to congress, before the making of the law of October 1777, which I will hereafter consider.

In June 1776, the convention of Virginia formally declared, that Virginia was a free, sovereign and independent state; and on the 4th of July 1776, following, the United States, in congress assembled, declared the thirteen united colonies free and independent states; and that, as such, they had full power to levy war, conclude peace, &c. I consider this as a declaration, not that the united colonies jointly, in a collective capacity, were independent states, &c., but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth.

Before these solemn acts of separation from the crown of Great Britain, the war between Great Britain and the united colonies, jointly and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a public war between independent governments; and immediately thereupon, all the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all the former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt. lib. 3, c. 18, § 292–95; lib. 3, c. 5, § 70, 72, 73.

From the 4th of July 1776, the American states were *de facto*, as well as *de jure*, in the possession and actual exercise of all the rights of independent governments. On the 6th of February 1778, the king of France entered into a treaty of alliance with the United States; and on the 8th of October 1782, a treaty of amity and commerce was concluded between the United States and the states-general of the United Provinces. I have ever
*225] *considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of congress, on the 4th of July 1776; and that no other period can be fixed on for its commencement; and that all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments.

That Virginia was part of the dismembered British empire, can, in my judgment, make no difference in the case. No such distinction is taken by Vattel (or any other writer); but Vattel, when considering the rights of war between two parties absolutely independent, and no longer acknowledging a common superior (precisely the case in question), thus expresses himself (lib. 3, c. 18, § 295): "In such case, the state is dissolved, and the war between the two parties, in every respect, is the same with that of a public war between two different nations." And Vattel denies, that subjects can acquire property in things taken during a civil war.

That the creditor and debtor were members of the same empire, when the debt was contracted, cannot (in my opinion) distinguish the case, for the same reasons. A most arbitrary claim was made by the parliament of Great Britain, to make laws to bind the people of America, in all cases whatsoever, and the king of Great Britain, with the approbation of parliament, employed not only the national forces, but hired foreign mercenaries

to compel submission to this absurd claim of omnipotent power. The resistance against this claim was just, and independence became necessary; and the people of the United States announced to the people of Great Britain, "that they would hold them, as the rest of mankind, enemies in war, in peace, friends." On the declaration of independence, it was in the option of any subject of Great Britain, to join their brethren in America, or to remain subjects of Great Britain. Those who joined us were entitled to all the benefits of our freedom and independence; but those who elected to continue subjects of Great Britain, exposed themselves to any loss that might arise therefrom. By their adhering to the enemies of the United States, they voluntarily became parties to the injustice and oppression of the British government; and they also contributed to carry on the war, and to enslave their former fellow-citizens. As members of the British government, from their own choice, they became personally answerable for the conduct of that government, of which they remained a part; and their property, wherever found (on land or water), became liable to confiscation. On this ground, congress, on the 24th of July 1776, confiscated any British property taken on the seas. See 2 Ruth. Inst. lib. 2, c. 9, § 13, p. 531, 559; Vatt. *lib. 2, c. 7, § 81, and c. 18, § 344; lib. 3, c. 5, § 74; and c. 9, § 161, [*226 193. The British creditor, by the conduct of his sovereign, became an enemy to the commonwealth of Virginia; and thereby his debt was forfeitable to that government, as a compensation for the damages of an unjust war.

It appears to me, that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all movable property of its enemy (of any kind or nature whatsoever), wherever found, whether within its territory, or not. Bynkershoeck, Q. J. P. *de rebus bellicis*, lib. 1, c. 7, p. 175, thus delivers his opinion: "*Cum ea sit belli conditio ut hostes sint, omni jure, spoliati proscriptique, rationis est, quascunque res hostium, apud hostes inventas, dominum mutare, et fisco cedere.*" "Since it is a condition of war, that enemies, by every right, may be plundered and seized upon, it is reasonable, that whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated, or go into the treasury." s. p. Lee on Capt. c. 8, p. 111; 2 Burl. p. 209, § 12, p. 219, § 2, p. 221, § 11. Bynkershoeck; the same book and chapter, page 177, thus expresses himself: "*Quod dixi de actionibus recte publicandis ita demum obtinet. Si quod subditi nostri hostibus nostris debent, princeps a subditis suis, revera exegerit: Si exegerit recte solutum est, si non exegerit, pace facta, reviviscit jus pristinum creditoris; quia occupatio, quæ bello sit, magis in facto, quam in potestate juris consistit. Nomina igitur, non exacta, tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc, inter gentes fere convenit ut nominibus bello publicatis, pace deinde facta, exacta censeantur periisse, et maneant extincta; non autem exacta reviviscant, et restituantur veris creditoribus.*"

"What I have said of things in action being rightfully confiscated, holds thus: If the prince truly exacts from his subjects, what they owed to the enemy; if he shall have exacted it, it is rightfully paid; if he shall not have exacted it, peace being made, the former right of the creditor revives; because the seizure, which is made during war, consists more in fact than in

right. Debts, therefore, not exacted, seem as it were to be forgotten in time of war, but upon peace, by a kind of *postliminy*, return to their former proprietor. Accordingly, it is for the most part agreed among nations, that things in action, being confiscated in war, the peace being made, those which were paid are deemed to have perished, and remain extinct; but those not paid revive, and are restored to their true creditors." Vatt. lib. 4, § 22; s. p. Lee on Capt. c. 8, p. 118.

*227] *That this is the law of nations, as held in Great Britain, appears from Sir Thomas Parker's Rep. p. 267 (11 William III.), in which it was determined, that choses in action belonging to an alien enemy are forfeitable to the crown of Great Britain; but there must be a commission and inquisition to entitle the crown; and if peace is concluded, before inquisition taken, it discharges the cause of forfeiture.

The right to confiscate the property of enemies, during war, is derived from a state of war, and is called the rights of war. This right originates from self-preservation, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. Justice also is another pillar on which it may rest; to wit, a right to reimburse the expense of an unjust war. Vatt. lib. 3, c. 8, § 138, and c. 9, § 161.

But it is said, if Virginia had a right to confiscate British property, yet by the modern law and practice of European nations, she was not justified in confiscating debts due from her citizens to subjects of Great Britain; that is, private debts. Vattel is the only author relied on (or that can be found) to maintain the distinction between confiscating private debts, and other property of an enemy. He admits the right to confiscate such debts, if the term of payment happen in the time of war; but this limitation on the right is nowhere else to be found. His opinion alone will not be sufficient to restrict the right to that case only. It does not appear in the present case, whether the time of payment happened before, or during the war. If this restriction is just, the plaintiff ought to have shown the fact. Vattel adds, "at present, in regard to the advantages and safety of commerce, all the sovereigns of Europe have departed from this rigor; and this custom has been generally received, and he who should act contrary to it (the custom) would injure the public faith." From these expressions it may be fairly inferred, that by the rigor of the law of nations, private debts to enemies might be confiscated, as well as any other of their property; but that a general custom had prevailed in Europe to the contrary; founded on commercial reasons.

The law of nations may be considered of three kinds, to wit, general, conventional or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory on those nations who have adopted it. The relaxation or departure from the strict rights of war to confiscate private debts, by the commercial nations of Europe, was not binding on the state of Virginia, because founded on custom only; and she was at liberty to reject or adopt the

*228] custom, as she pleased. *The conduct of nations at war is generally governed and limited by their exigencies and necessities. Great Britain could not claim from the United States, or any of them, any relaxation of the general law of nations, during the late war, because she did not

consider it as a civil war, and much less as a public war, but she gave it the odious name of rebellion; and she refused to the citizens of the United States the strict rights of ordinary war.

It cannot be forgotten, that the parliament of Great Britain, by statute (16 *Geo. III.*, *c.* 5, in 1776), declared, that the vessels and cargoes belonging to the people of Virginia, and the twelve other colonies, found and taken on the high seas, should be liable to seizure and confiscation, as the property of open enemies; and that the mariners and crews should be taken and considered as having voluntarily entered into the service of the king of Great Britain; and that the killing and destroying the persons and property of the Americans, before the passing this act, was just and lawful: and it is well known that, in consequence of this statute, very considerable property of the citizens of Virginia was seized on the high seas, and confiscated; and that other considerable property, found within that commonwealth, was seized and applied to the use of the British army or navy. Vattel, lib. 3, c. 12, § 191, says, and reason confirms his opinion, "That whatever is lawful for one nation to do, in time of war, is lawful for the other." The law of nations is part of the municipal law of Great Britain, and by her laws, all movable property of enemies, found within the kingdom, is considered as forfeited to the crown, as the head of the nation; but if no inquisition is taken to ascertain the owners to be alien enemies, before peace takes place, the cause of forfeiture is discharged by the peace, *ipso facto*. Sir Thomas Parker's Rep. p. 267. This doctrine agrees with Bynk. lib. 1, c. 7, p. 177, and Lee on Capt. c. 8, p. 118, that debts not confiscated and paid, revive on peace. Lee says, "debts, therefore, which are not taken hold of, seem, as it were, suspended and forgotten in time of war; but, by a peace, return to their former proprietor, by a kind of *postliminy*." Mr. Lee, who wrote since Vattel, differs from him in opinion, that private debts are not confiscable, p. 114. He thus delivers himself: "By the law of nations, rights and credits are not less in our power than other goods; why, therefore, should we regard the rights of war in regard to one, and not as to the other? And when nothing occurs which gives room for a proper distinction, the general law of nations ought to prevail." He gives many examples of confiscating debts, and concludes (p. 119), "All which prove, that not only actions, but all *other things whatsoever, are forfeited in time of war, and are often exacted." [*229

Great Britain does not consider herself bound to depart from the rigor of the general law of nations, because the commercial powers of Europe wish to adopt a more liberal practice. It may be recollected, that it is an established principle of the law of nations, "that the goods of a friend are free in an enemy's vessel; and an enemy's goods lawful prize in the vessel of a friend." This may be called the general law of nations. In 1780, the Empress of Russia proposed a relaxation of this rigor of the laws of nations, "That all the effects belonging to the subjects of the belligerent powers shall be free on board neutral vessels, except only contraband articles." This proposal was acceded to by the neutral powers of Sweden, Denmark, the States-General of the United Provinces, Prussia and Portugal; France and Spain, two of the powers at war, did not oppose the principle, and Great Britain only declined to adopt it, and she still adheres to the rigorous principle of the law of nations. Can this conduct of Great Britain be ob-

jected to her, as an uncivilized and barbarous practice? The confiscating private debts by Virginia has been branded with those terms of reproach, and very improperly, in my opinion.

It is admitted, that Virginia could not confiscate private debts, without a violation of the modern law of nations, yet if, in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her courts of justice; and in my opinion, on all the courts of the United States. If Virginia, by such conduct, violated the law of nations, she was answerable to Great Britain, and such injury could only be redressed in the treaty of peace. Before the establishment of the national government, British debts could only be sued for in the state court. This, alone, proves that the several states possessed a power over debts. If the crown of Great Britain had, according to the mode of proceeding in that country, confiscated, or forfeited American debts, would it have been permitted, in any of the courts of Westminster Hall, to have denied the right of the crown, and that its power was restrained by the modern law of nations? Would it not have been answered, that the British nation was to justify her own conduct; but that her courts were to obey her laws.

It appears to me, that there is another and conclusive ground, which effectually precluded any objection, since the peace, on the part of Great Britain, as a nation, or on the part of any of her subjects, against the right of Virginia to confiscate British debts, or any other British property, during the war; even on the admission that such confiscation was in violation of the ancient or modern law of nations.

*230] *If the legislature of Virginia confiscated or extinguished the debt in question, by the law of the 20th of October 1777, as the defendants in error contend, this confiscation or extinguishment took place in 1777, *flagrante bello;* and the definitive treaty of peace was ratified in 1783. What effects flow from a treaty of peace, even if the confiscation or extinguishment of the debt was contrary to the law of nations, and the stipulation in the fourth article of the treaty does not provide for the recovery of the debt in question?

I apprehend, that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violences, injuries or damages sustained by the government or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore, not necessary to be expressed. Hence, it follows, that the restitution of, or compensation for, British property confiscated or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision respecting these subjects, in the treaty, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the treaty of peace, it is thereby so far considered lawful, as never afterwards to be revived, or to be a subject of complaint.

Vattel, lib. 4, § 21. p. 121, says, "The state of things at the instant of the treaty, is held to be legitimate, and any change to be made in it requires an express specification in the treaty; consequently, all things not mentioned

in the treaty, are to remain as they were at the conclusion of it. All the damages caused during the war are likewise buried in oblivion ; and no plea is allowable for those, the reparation of which is not mentioned in the treaty : they are looked on as if they had never happened." The same principle applies to injuries done by one nation to another, on occasion of, and during the war. See Grotius, lib. 3, c. 8, § 4. The Baron De Wolfius, 1222, says, "*De quibis nihil dictum, ea manent quo sunt loco.*" Things of which nothing is said, remain in the state in which they are.

It is the opinion of the celebrated and judicious Doctor Rutherforth, that a nation in a just war may seize upon any movable goods of an enemy (and he makes no distinction as to private debts), but that whilst the wa continues, the nation has, of right, nothing but the custody of the goods taken ; and *if the nation has granted to private captors (as privateers) the property of goods taken by them, and on peace, restitution is agreed on, that the nation is obliged to make restitution, and not the private captors ; and if, on peace, no restitution is stipulated, that the full property of movable goods, taken from the enemy during the war, passes, by tacit consent, to the nation that takes them. This I collect as the substance of his opinion, in lib. 2, c. 9, from p. 558 to 573. [*231

I shall conclude my observations on the rights of Virginia to confiscate any British property, by remarking, that the validity of such a law would not be questioned in the court of chancery of Great Britain ; and I confess the doctrine seemed strange to me in an American court of justice. In the case of *Wright* v. *Nutt*, Lord Chancellor Thurlow declared, that he considered an act of the state of Georgia, passed in 1782, for the confiscation of the real and personal estate of Sir James Wright, and also his debts, as a law of an independent country ; and concluded with the following observation, that the law of every country must be equally regarded in the courts of justice of Great Britain, whether the law was a barbarous or civilized institutions, or wise or foolish. H. Black. 149. In the case of *Folliot* v. *Ogden*, Lord Loughborough, chief justice of the court of common pleas, in delivering the judgment of the court, declared, "that the act of the state of New York, passed in 1779, for attainting, forfeiting and confiscating the real and personal estate of Folliot, the plaintiff, was certainly of as full validity, as the act of any independent state. H. Black. 135. On a writ of error, Lord Kenyon, chief justice of the court of king's bench, and Judge Grose, delivered direct contrary sentiments ; but Judges Ashurst and Buller were silent. 3 Term Rep. 726.

From these observations, and the authority of Bynkershoek, Lee, Burlamaque and Rutherforth, I conclude, that Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had before delegated that power to congress, which Mr. Lewis contended she had done. The proof of the allegation that Virginia had transferred this authority to congress, lies on those who make it ; because if she had parted with such power, it must be conceded, that she once rightfully possessed it.

It has been inquired, what powers congress possessed from the first meeting in September 1774, until the ratification of the articles of confederation, on the 1st of March 1781 ? It appears to me, that the powers of congress, during that whole period, were derived from the people they represented,

expressly given, through the medium of their state conventions, or state
*232] legislatures; or that after they were exercised, they were *impliedly ratified by the acquiescence and obedience of the people. After the confederacy was completed, the powers of congress rested on the authority of the state legislatures, and the implied ratifications of the people; and was a government over governments. The powers of congress originated from necessity, and arose out of, and were only limited by events; or, in other words, they were revolutionary in their very nature. Their extent depended on the exigences and necessities of public affairs. It was absolutely and indispensably necessary that congress should possess the power of conducting the war against Great Britain, and therefore, if not expressly given by all (as it was by some of the states), I do not hesitate to say, that congress did rightfully possess such power. The authority to make war, of necessity, implies the power to make peace; or the war must be perpetual. I entertain this general idea, that the several states retained all internal sovereignty; and that congress properly possessed the great rights of external sovereignty: among other, the right to make treaties of commerce and alliance; as with France, on the 6th of February 1778. In deciding on the powers of congress, and of the several states, before the confideration, I see but one safe rule, namely, that all the powers actually exercised by congress, before that period, were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the state conventions or state legislatures were also rightfully exercised, on the same presumption of authority from the people. That congress did not possess all the powers of war is self-evident, from this consideration alone, that she never attempted to lay any kind of tax on the people of the United States, but relied altogether on the state legislatures to impose taxes, to raise money to carry on the war, and to sink the emissions of all the paper money issued by congress. It was expressly provided, in the 8th article of the confederation, that "all charges of war (and all other expenses for the common defence and general welfare), and allowed by congress, shall be defrayed out of a common treasury, to be supplied by the several states in proportion to the value of the land in each state; and the taxes for paying the said proportion, shall be levied by the legislatures of the several states." In every free country, the power of laying taxes is considered a legislative power over the property and persons of the citizens; and this power the people of the United States granted to their state legislatures, and they neither could, nor did, transfer it to congress; but on the contrary, they expressly stipulated that it should remain with them. It is an incontro-
233*] vertible fact, that congress never attempted to confiscate *any kind of British property, within the United States (except what their army or vessels of war captured), and thence I conclude that congress did not conceive the power was vested in them. Some of the states did exercise this power, and thence, I infer, they possessed it. On the 23d of March, 3d of April, and 24th of July 1776, congress confiscated British property taken on the high seas. (a)

(a) See the ordinance of the 30th of November 1781. See also, the resolution of the 23d of November 1781, in which congress recommended to the states, to pass laws to punish infractions of the law of nations.

The second point made by the counsel for the plaintiff in error was, "if the legislature of Virginia had a right to confiscate British debts, yet she did not exercise that right by the act of the 20th October 1777." If this objection is well founded, the plaintiff in error must have judgment for the money covered by the plea of that law, and the payment under it. The preamble recites, that the public faith, and the law and the usage of nations require, that debts incurred, during the connection with Great Britain, should not be confiscated. No language can possibly be stronger to express the opinion of the legislature of Virginia, that British debts ought not to be confiscated, and if the words, or effect and operation, of the enacting clause are ambiguous or doubtful, such construction should be made as not to extend the provisions in the enacting clause, beyond the intention of the legislature, so clearly expressed in the preamble; but if the words in the enacting clause, in their nature, import and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction. It is not an uncommon case, for a legislature, in a preamble, to declare their intention to provide for certain cases, or to punish certain offences, and in enacting clauses to include other cases, and other offences. But I believe very few instances can be found, in which the legislature declared, that a thing ought not to be done, and afterwards did the very thing they reprobated. There can be no doubt, that strong words in the enacting part of a law may extend beyond the preamble. If the preamble is contradicted by the enacting clause, as to the intention of the legislature, it must prevail, on the principle, that the legislature changed their intention.

I am of opinion, that the law of the 20th of October 1777, and the payment in virtue thereof, amounts either to a confiscation or extinguishment of so much of the debt as was paid into the loan-office of Virginia. 1st. The law makes it lawful for a citizen of Virginia, indebted to a subject of Great Britain, *to pay the whole, or any part of his debt, into the loan-office of that commonwealth. 2d. It directs the debtor to take a certificate of his [234 payment, and to deliver it to the governor and the council; and it declares that the receipt of the governor and the council for the certificate shall discharge him (the debtor) from so much of the debt as he paid into the loan-office. 3d. It enacts that the certificate shall be subject to the future direction of the legislature. And 4th, it provides, that the governor and council may make such allowance, as they shall think reasonable, out of the interest of the money paid, to the wives and children, residing within the state, of such creditor. The payment by the debtor into the loan-office is made a lawful act. The public receive the money, and they discharge the debtor, and they make the certificate (which is the evidence of the payment) subject to their direction; and they benevolently appropriate part of the money paid, to wit, the interest of the debt, to such of the family of the creditor as may live within the state. All these acts are plainly a legislative interposition between the creditor and debtor; which annilates the right of the creditor; and is an exercise of the right of ownership over the money; for the giving part to the family of the creditor, under the restriction of being residents of the state, or to a stranger, can make no difference. The government of Virginia had precisely the same right to dispose of the whole as of part of the debt. Whether all these acts amount to a confiscation of the debt, or not, may

be disputed, according to the different ideas entertained of the proper meaning of the word confiscation. I am inclined to think, that all these acts, collectively considered, are substantially a confiscation of the debt. The verb confiscate is derived from the Latin *con*, with, and *fiscus*, a basket, or hamper, in which the emperor's treasure was formerly kept. The meaning of the word to confiscate is, to transfer property from private to public use; or to forfeit property to the prince or state. In the language of Mr. Lee (page 118), the debt was taken hold of; and this he considers as confiscation. But if, strictly speaking, the debt was not confiscated, yet it certainly was extinguished, as between the creditor and debtor; the debt was legally paid, and of consequence extinguished. The state interfered and received the debt, and discharged the debtor from his creditor; and not from the state, as suggested. The debtor owed nothing to the state of Virginia, but she had a right to take the debt, or not, at her pleasure. To say, that the discharge was from the state, and not from the debtor, implies that the debtor was under some obligation or duty to pay the state what he owed his British creditor. If the debtor was to remain charged to his creditor, notwithstanding his payment; not one farthing would have been *paid into the loan-office. Such a construction, therefore, is too violent, and not to be admitted. If Virginia had confiscated British debts, and received the debt in question, and said nothing more, the debtor would have been discharged by the operation of the law. In the present case, there is an express discharge, on payment, certificate and receipt.

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It appears to me, that the plea, by the defendant, of the act of assembly, and the payment agreeable to its provisions, which is admitted, is a bar to the plaintiff's action, for so much of his debt as he paid into the loan-office; unless the plea is avoided or destroyed, by the plaintiff's replication of the fourth article of the definitive treaty of peace between Great Britain and the United States, on the 3d of September 1783.

The question then may be stated thus: whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor?

It was doubted by one of the counsel for the defendants in error (Mr. Marshall), whether congress had a power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts. Another of the defendant's counsel (Mr. Campbell) expressly, and with great zeal, denied that congress possessed such power. But a few remarks will be necessary to show the inadmissibility of this objection to the power of congress.

1st. The legislatures of all the states have often exercised the power of taking the property of its citizens for the use of the public, but they uniformly compensated the proprietors. The principle to maintain this right is for the public good, and to that the interest of individuals must yield. The instances are many; and among them are lands taken for forts, magazines or arsenals; or for public roads or canals; or to erect towns.

2d. The legislatures of all the states have often exercised the power of divesting rights vested; and even of impairing, and in some instances, of almost annihilating the obligation of contracts, as by tender laws, which

made an offer to pay, and a refusal to receive, paper money, for a specie debt, an extinguishment, to the amount tendered.

3d. If the legislature of Virginia could, by a law, annul any former law; I apprehend, that the effect would be to destroy all rights acquired under the law so nullified.

4th. If the legislature of Virginia could not, by ordinary acts of legislation, do these things, yet, possessing the supreme sovereign power of the state, she certainly could do them, by a treaty of peace; if she had not parted with the power of making *such treaty. If Virginia had such power, before she delegated it to congress, it follows, that afterwards, that body possessed it. Whether Virginia parted with the power of making treaties of peace, will be seen by a perusal of the 9th article of the confederation (ratified by all the states, on the first of March 1781), in which it was declared, "that the United States in congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in the two cases mentioned in the 6th article; and of entering into treaties and alliances, with a proviso, when made, respecting commerce." This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must, of necessity, imply a power to decide the terms on which they shall be made: a war between two nations can only be concluded by treaty. [*236

Surely, the sacrificing public or private property, to obtain peace, cannot be the cases in which a treaty would be void. Vatt. lib. 2, c. 12, § 160, 161, p. 173; lib. 6, c. 2, § 2. It seems to me, that treaties made by congress, according to the confederation, were superior to the laws of the states; because the confederation made them obligatory on all the states. They were so declared by congress on the 13th of April 1787; were so admitted by the legislatures and executives of most of the states; and were so decided by the judiciary of the general government, and by the judiciaries of some of the state governments.

If doubts could exist, before the establishment of the present national government, they must be entirely removed by the 6th article of the constitution, which provides "That all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act *of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior [*237

to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded.

Four things are apparent, on a view of this 6th article of the national constitution. 1st. That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. 2d. That the constitution or laws of any of the states, so far as either of them shall be found contrary to that treaty, are, by force of the said article, prostrated before the treaty. 3d. That, consequently, the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution, which was its creator. 4th. That it is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty (or any other), made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.(*a*)

The argument, that congress had not power to make the 4th article of the treaty of peace, if its intent and operation was to annul the laws of any of the states, and to destroy vested rights (which the plaintiff's counsel contended to be the object and effect of the 4th article), was unnecessary, but on the supposition that this court possess a power to decide whether this article of the treaty is within the authority delegated to that body, by the articles of confederation. Whether this court constitutionally possess such a power, is not necessary now to determine, because I am fully satisfied, that congress were invested with the authority to make the stipulation in the 4th article. If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed. One further remark will show how very circumspect the court ought to be, before they would decide against the right of congress to make the stipulation objected to. If congress had
*238] no *power (under the confederation) to make the 4th article of the treaty, and for want of power, that article is void, would it not be in the option of the crown of Great Britain to say, whether the other articles in the same treaty shall be obligatory on the British nation?

I will now proceed to the consideration of the treaty of 1783. It is evident, on a perusal of it, what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit: 1st. An acknowledgment of their independence by the crown of Great Britain. 2d. A settlement of their western bounds. 3d. The right of fishery. And 4th. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit: 1st. A recovery by British merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2d. Restitution of the confiscated property of real British subjects, and of persons residents in districts in possession

(*a*) See the oath, in the act of the 24th of September 1789, § 8; 1 U. S. Stat. 76.

of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons. And 3d. A prohibition of all future confiscations and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore, must have been very well known to the gentlemen who assented to it. 1st. That British debts, to a great amount, had been paid into some of the state treasuries, or loan-offices, in paper money of very little value, either under laws confiscating debts, or under laws authorizing payment of such debts in paper money, and discharging the debtors. 2d. That tender laws had existed in all the states; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed, there was good reason to fear, that similar laws, with the same or less consequences, might be again made (and the fact really happened), and prudence required to guard the British creditor against them. 3d. That in some of the states, property of any kind might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the states, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the states, at the time of the treaty, to prevent suits by any person, for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases, compelled the receipt of property instead of gold and silver.

To secure the recovery of British debts, it was, by the latter part of the fifth article, agreed as follows: "That all persons *who have any interest in confiscated lands, by debts, should meet with no lawful [*239 impediment in the prosecution of their just rights." This provision clearly relates to debts secured by mortgages on lands in fee simple, which were afterwards confiscated; or to debts on judgments, which were a lien on lands, which also were afterwards confiscated, and where such debts on mortgages or judgments had been paid into the state treasuries, and the debtors discharged. This stipulation was absolutely necessary, if such debts were intended to be paid. The pledge, or security by lien, had been confiscated and sold. British subjects being aliens, could neither recover the possession of lands by ejectment, nor foreclose the equity of redemption; nor could they claim the money secured by a mortgage, or have the benefit of a lien from a judgment, if the debtor had paid his debt into the treasury, and been discharged. If a British subject, in either of those cases, prosecuted his just right, it could only be in a court of justice, and if any of the above causes were set up as a lawful impediment, the courts were bound to decide, whether this article of the treaty nullified the laws confiscating the lands, and also the purchases made under them, or the laws authorizing payment of such debts to the state; or whether aliens were enabled, by this article, to hold lands mortgaged to them before the war. In all these cases, it seems to me, that the courts, in which the cases arose, were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it. One instance among many will illustrate my meaning. Suppose, a mortgagor paid the mortgage money into the public treasury, and afterwards sold the land, would not the British creditor, under this article, be entitled to a remedy against the mortgaged lands?

The 4th article of the treaty is in these words: "It is agreed, that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts, heretofore contracted."

Before I consider this article of the treaty, I will adopt the following remarks, which I think applicable, and which may be found in Dr. Rutherforth and Vattel (2 Ruth. 307 to 315; Vattel, lib. 2, c. 17, § 63 and 271). The intention of the framers of the treaty must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctly and perfectly, there ought to be no other means of interpretation; but if the words are obscure, or ambiguous, or imperfect, recourse must be had to other means of interpretation, and in these three cases, we must collect the meaning from the
*240] words, * or from probable or rational conjectures, or from both. When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and indeed, if the words, and the construction of a writing, are clear and precise, we can scarce call it interpretation, to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation, is to follow that sense, in respect both of the words and the construction, which is agreeable to common use. If the recovery of the present debt is not within the clear and manifest intention and letter of the 4th article of the treaty, and if it was not intended by it to annul the law of Virginia, mentioned in the plea, and to destroy the payment under it, and to revive the right of the creditor against his original debtor; and if the treaty cannot effect all these things, I think, the court ought to determine in favor of the defendants in error. Under this impression, it is altogether unnecessary to notice the several rules laid down by the counsel for the defendants in error, for the construction of the treaty.

I will examine the 4th article of the treaty in its several parts; and endeavor to affix the plain and natural meaning of each part. To take the 4th article, in order, as it stands:

1st. "It is agreed," that is, it is expressly contracted; and it appears from what follows, that certain things shall not take place. This stipulation is direct. The distinction is self-evident, between a thing that shall not happen, and an agreement that a third power shall prevent a certain thing being done. The first is obligatory on the parties contracting: the latter will depend on the will of another; and although the parties contracting had power to lay him under a moral obligation for compliance, yet there is a very great difference in the two cases. This diversity appears in the treaty.

2d. "That creditors on either side," without doubt, meaning British and American creditors.

3d. "Shall meet with no lawful impediment," that is, with no obstacle (or bar) arising from the common law, or acts of parliament, or acts of congress, or acts of any of the states, then in existence, or thereafter to be made, that would, in any manner, operate to prevent the recovery of such debts as the treaty contemplated. A lawful impediment to prevent a recovery of a debt can only be matter of law, pleaded in bar to the action.

If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed, is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied, by the removal of one impediment, and leaving another; and *à *fortiori*, by taking away the less and leaving the greater. These words have both a retrospective and future aspect. [*241

4th. "To the recovery," that is, to the right of action, judgment and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea (as in the present case), or by proceedings, after judgment, to compel receipt of paper money or property, instead of sterling money. The word recovery is very comprehensive, and operates, in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. "In the full value in sterling money," that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or anything else but the full value of their debts, according to the exchange with Great Britain. This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the state where entered into. This provision has also a future aspect in this particular, namely, that no lawful impediment, no law of any of the states made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in anything but the value in sterling money. The obvious intent of these words was, to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation.

6th. "Of all *bonâ fide* debts," that is, debts of every species, kind or nature, whether by mortgage, if a covenant therein for payment; or by judgments, specialties or simple contracts. But the debts contemplated were to be *bonâ fide* debts, that is, *bonâ fide* contracted before the peace, and contracted with good faith, or honestly and without covin, and not kept on foot fraudulently. *Bonâ fide* is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of assembly of all the states, and signifies a thing done really, with a good faith, without fraud or deceit, or collusion or trust. The words *bonâ fide* are restrictive, for a debt may be for a valuable consideration, and yet not *bonâ fide*. A debt must be *bonâ fide*, at the time of its commencement, or it never can become so afterwards. The words *bonâ fide*, were not prefixed to describe the nature of the debt, at the date of the treaty, but the nature of the debt, at the time it was contracted. Debts created before the war, were almost the only debts in the contemplation of the treaty; although debts contracted during the war were covered by the general provision, taking in debts from the most distant period of time, *to the date of the treaty. The recovery, where no lawful impediments were to be interposed, was to have two qualifications: 1st. The debts were to be *bonâ fide* contracted: and 2d. They were to be contracted before the peace. [*242

7th. "Heretofore contracted," that is, entered into at any period of time, before the date of the treaty; without regard to the length or distance

of time. These words are descriptive of the particular debts that might be recovered, and relate back to the time such debts were contracted. The time of the contract was plainly to designate the particular debts that might be recovered. A debt entered into during the war, would not have been recoverable, unless under this description of a debt contracted at any time before the treaty.

If the words of the 4th article, taken separately, truly bear the meaning I have given them, their sense, collectively, cannot be mistaken, and must be the same.

The next inquiry is, whether the debt in question is one of those described in this article. It is very clear, that the article contemplated no debts but those contracted before the treaty; and no debts but only those to the recovery whereof some lawful impediment might be interposed. The present debt was contracted before the war, and to the recovery of it a lawful impediment, to wit, a law of Virginia, and payment under it, is pleaded in bar. There can be no doubt, that the debt sued for, is within the description, if I have given a proper interpretation of the words. If the treaty had been silent as to debts, and the law of Virginia had not been made, I have already proved, that debts would, on peace, have revived, by the law of nations. This alone shows that the only impediment to the recovery of the debt in question, is the law of Virginia. and the payment under it; and the treaty relates to every kind of legal impediment.

But it is asked, did the 4th article intend to annul a law of the states? and destroy rights acquired under it? I answer, that the 4th article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment; and would bar a recovery, if not destroyed by this article of the treaty. This stipulation could not intend only to repeal laws that created legal impediments to the recovery of the debt (without respect to the mode of payment) because the mere repeal of a law would not destroy acts done, and rights acquired under the law, during its existence, and before the repeal. This right to repeal was only admitted by the counsel for the defendants in error, because a repeal would not affect their case; but on the same ground, that a treaty can repeal a law of the state, it can nullify it. I have already proved, that
*243] a treaty can totally annihilate *any part of the constitution of any of the individual states that is contrary to a treaty. It is admitted, that the treaty intended and did annul some laws of the states, to wit, any laws, past or future, that authorized a tender of paper money to extinguish or discharge the debt, and any laws, past or future, that authorized the discharge of executions by paper money, or delivery of property at appraisement; because if the words sterling money have not this effect, it cannot be shown that they have any other. If the treaty could nullify some laws, it will be difficult to maintain that it could not equally annul others.

It was argued, that the 4th article was necessary to revive debts which had not been paid, as it was doubtful, whether debts not paid would revive on peace, by the law of nations. I answer, that the 4th article was not necessary on that account, because there was no doubt, that debts not paid do revive by the law of nations; as appears from Bynkershoeck, Lee, and Sir Thomas Parker. And, if necessary, this article would not have this effect, because it revives no debts, but only those to which some legal impediment

might be interposed, and there could be no legal impediment or bar to the recovery, after peace, of debts not paid, during the war, to the state.

It was contended, that the provision is, that creditors shall recover, &c., and there was no creditor, at the time of the treaty, because there was then no debtor, he having been legally discharged. The creditors described in the treaty were not creditors generally, but only those with whom debts had been contracted, at some time before the treaty; and is a description of persons, and not of their rights. This adhering to the letter, is to destroy the plain meaning of the provision; because, if the treaty does not extend to debts paid into the state treasuries or loan-offices, it is very clear that nothing was done by the treaty as to those debts, not even so much as was stipulated for royalists and refugees, to wit, a recommendation of restitution. Further, by this construction, nothing was done for British creditors, because the law of nations secured a recovery of their debts, which had not been confiscated and paid to the states; and if the debts paid in paper money of little value, into the state treasuries or loan-offices, were not to be paid to them, the article was of no kind of value to them, and they were deceived. The article relates either to debts not paid, or to debts paid into the treasuries or loan-offices. It has no relation to the first, for the reasons above assigned; and if it does not include the latter, it relates to nothing.

It was said, that the treaty secured British creditors from payment in paper money. This is admitted, but it is by force *and operation of the words "in sterling money;" but then the words, "heretofore contracted," are to have no effect whatsoever; and it is those very words, and those only, that secure the recovery of the debts paid to the states; because no lawful impediment is to be allowed to prevent the recovery of debts contracted at any time before the treaty. [*244

But it was alleged, that the 4th article only stipulates, that there shall be no lawful impediment, &c., but that a law of the state was first necessary to annul the law creating such impediment; and that the state is under a moral obligation to pass such a law; but until it is done, the impediment remains.

I consider the 4th article in this light, that it is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states to do those acts; but that it is an express agreement, that certain things shall not be permitted the American courts of justice; and that it is a contract on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts. "Creditors are to meet with no lawful impediment, &c." As creditors can only sue for the recovery of their debts in courts of justice; and it is only in courts of justice that a legal impediment can be set up, by way of plea in bar of their actions; it appears to me, that the courts are bound to overrule every such plea, if contrary to the treaty. A recovery of a debt can only be prevented, by a plea in bar to the action: a recovery of a debt in sterling money can only be prevented, by a like plea in bar to the action, as tender and refusal, to operate as an extinguishment. After judgment, payment thereof in sterling money can only be prevented, by some proceedings under some law, that authorizes the debtor to discharge an execution in paper money, or in property at a valuation. In all these and similar cases, it appears to me, that the courts of the United States are bound, by the treaty, to interfere. No one can doubt, that a treaty may stipulate, that certain acts shall be done by

the legislature; that other acts shall be done by the executive; and others by the judiciary. In the 6th article, it is provided, that no future prosecutions shall be commenced against any person, for or by reason of the part he took in the war. Under this article, the American courts of justice discharged the prosecutions, and the persons, on receipt of the treaty, and the proclamation of congress (*Respublica* v. *Gordon*), 1 Dall. 233.

If a law of the state to annul a former law was first necessary, it must be either on the ground that the treaty could not annul any law of a state; or that the words used in the treaty were not explicit or effectual for that purpose. Our federal constitution establishes the power of a treaty over the
*245] constitution *and laws of any of the states; and I have shown that the words of the 4th article were intended, and are sufficient, to nullify the law of Virginia and the payment under it. It was contended, that Virginia is interested in this question, and ought to compensate the defendants in error, if obliged to pay the plaintiff, under the treaty. If Virginia had a right to receive the money, which I hope I have clearly established, by what law is she obliged to return it? The treaty only speaks of the original debtor, and says nothing about a recovery from any of the states.

It was said, that the defendant ought to be fully indemnified, if the treaty compels him to pay his debt over again; as his rights have been sacrificed for the benefit of the public. That congress had the power to sacrifice the rights and interests of private citizens, to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the states that confiscated and received British debts, pledged to the debtors; and the rights of the debtors, violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty, for the benefit of the public. This principle is recognised by the constitution, which declares, "that private property shall not be taken for public use without just compensation." See Vattel, lib. 1, c. 20, § 244. Although Virginia is not bound to make compensation to the debtors, yet, it is evident, that they ought to be indemnified, and it is not to be supposed, that those whose duty it may be to make the compensation, will permit the rights of our citizens to be sacrificed to a public object, without the fullest indemnity.

On the best investigation I have been able to give the 4th article of the treaty, I cannot conceive that the wisdom of men could express their meaning in more accurate and intelligible words, or in words more proper and effectual to carry their intention into execution. I am satisfied, that the words, in their natural import and common use, give a recovery to the British creditor from his original debtor of the debt contracted before the treaty, notwithstanding the payment thereof into the public treasuries or loan-offices, under the authority of any state law; and therefore, I am of opinion, that the judgment of the circuit court ought to be reversed, and that judgment ought to be given on the demurrer, for the plaintiff in error; with the costs in the circuit court, and the costs of the appeal.

Paterson, Justice.—The present suit is instituted on a bond, bearing date the 7th of July 1774, and executed by Daniel Lawrence, Hylton & Co.
*246] and Francis Eppes, citizens of the state of Virginia, to Joseph Farrel and William Jones, subjects *of the king of Great Britain, for the

payment of 2976*l.* 11*s.* 6*d.*, British or sterling money. The defendants, among other pleas, pleaded, 1st. Payment; on which issue is joined. 2d. That $\$3,111\frac{1}{9}$, equal to 933*l.* 14*s.* 0*d.*, part of the debt mentioned in the declaration, were, on the 26th of April 1780, paid by them into the loan-office of Virginia, pursuant to an act of that state, passed the 20th of October 1777, entitled, "an act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties." The material section of the act is recited in the plea.

To this plea, the plaintiffs reply, and set up the 4th article of the treaty, made the 3d of September 1783, between the United States and his Britannic majesty, and the constitution of the United States making treaties the supreme law of the land. The rejoinder sets forth, that tne debt in the declaration mentioned, or so much thereof as is equalto the sum of 933*l.* 14*s.* 0*d.*, was not a *bonâ fide* debt due and owing to the plaintiffs on the 3d of September 1783, because the defendants had, on the 26th of April 1780, paid, in part thereof, the sum of $\$3111\frac{1}{9}$, into the loan-office of Virginia, and obtained a certificate and receipt therefor, pursuant to the directions of the said act; without that, that the said treaty of peace, and the constitution of the United States entitle the plaintiffs to maintain their action against the defendants for so much of the said debt in the declaration mentioned as is equal to 933*l.* 14*s.* To this rejoinder, the plaintiffs demur. The defendants join in demurrer.

On this issue in law, judgment was entered for the defendants, in the circuit court for the district of Virginia. A writ of error has been brought, and the general errors are assigned.

The question is, whether the judgment rendered in the circuit court be erroneous? I shall not pursue the range of discussion, which was taken by the counsel on the part of the plaintiffs in error. I do not deem it necessary to enter on the question, whether the legislature of Virginia had authority to make an act, confiscating the debts due from its citizens to the subjects of the king of Great Britain, or whether the authority in such case was exclusively in congress. I shall read and make a few observations on the act, which has been pleaded in bar, and then pass to the consideration of the 4th *article of the treaty. The first and third sections are the only parts of the act necessary to be considered. [*247

§ 1. "Whereas, divers persons, subjects of Great Britain, had, during our connection with that kingdom, acquired estates, real and personal, within this commonwealth, and had also become entitled to debts to a considerable amount, and some of them had commenced suits for the recovery of such debts, before the present troubles had interrupted the administration of justice, which suits were at that time depending and undetermined, and such estates being acquired and debts incurred, under the sanction of the laws and of the connection then subsisting, and it not being known that their sovereign hath as yet set the example of confiscating debts and estates, under the like circumstances, the public faith, and the law and usages of nations require, that they should not be confiscated on our part, but the safety of the United States demands, and the same law and usages of nations will justify, that we should not strengthen the hands of our enemies, during the

continuance of the present war, by remitting to them the profits or proceeds of such estates, or the interest or principal of such debts."

§ 3. "And be it further enacted, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt. And the governor and council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons by and for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature."

The act does not confiscate debts due to British subjects. The preamble reprobates the doctrine as being inconsistant with public faith, and the law and usages of nations. The payments made into the loan-office were voluntary, and not compulsive; for it was in the option of the debtor to pay or not. The enacting clause will admit of a construction in full consistency with the preamble; for although the certificates were to be subject to the future direction of the legislature, yet it was under the express declaration, that there should be no confiscation, unless the king of Great Britain should set the example; if he should confiscate debts due to the citizens *of
*248] Virginia, then the legislature of Virginia would confiscate debts due to British subjects. But the king of Great Britain did not confiscate debts on his part, and the legislature of Virginia have not confiscated debts on their part. It is, however, said, that the payment being made under the act, the faith of Virginia is plighted. True, but to whom is it plighted; to the creditor or debtor—to the alien enemy, or to its own citizen who made the voluntary payment? Or will it be shaped and varied according to the event; if one way, then to the creditor; if another, then to the debtor. Be these points as they may, the legislature thought it expedient to declare to what amount Virginia should be bound for payments so made. The act for this purpose was passed on the 3d of January 1780; and is entitled "An act concerning moneys paid into the public loan-office, in payment of British debts."

"§ 1. Whereas, by an act of the general assembly, entitled, 'An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits where such subjects are parties,' it is, among other things, provided, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the same, in the name of the creditor; with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer; and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt; and the governor and council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons, by and

for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature.

"§ 2. And whereas, it belongs not to the legislature to decide particular questions, of which the judiciary have cognisance, and it is, therefore, unfit for them to determine, whether the payments so made into the loan-office as aforesaid, be good or void between the creditor and debtor; but it is expedient to declare to what amount this commonwealth may be bound for the payments aforesaid. Be it enacted and declared, that this commonwealth shall, at no time, nor in any event or contingency, be liable to any person or persons whatsoever, for any sum, on account of the payments aforesaid, other than the value thereof, when reduced by the scale of depreciation, established by one other act of the general assembly, entitled, 'an act directing the mode of adjusting and settling the payment *of certain debts and contracts, and for other purposes,' with interest thereon, at the [*249 rate of six *per centum per annum*; any law, usage, custom, or any adjudication or construction of the first recited act already made, or hereafter to be made, notwithstanding."

On the part of the defendants, it has been also urged, that it is immaterial whether the payment be voluntary or compulsive, because the payer, on complying with the directions of the act, shall be discharged from so much of the debt. Be it so. If the legislature had authority to make the act, the congress could, by treaty, repeal the act, and annul everything done under it. This leads us to consider the treaty and its operation. Treaties must be construed in such manner, as to effectuate the intention of the parties. The intention is to be collected from the letter and spirit of the instrument, and may be illustrated and enforced by considerations deducible from the situation of the parties; and the reasonableness, justice and nature of the thing for which provision has been made. The fourth article of the treaty gives the text, and runs in the following words: "It is agreed, that creditors on either side, shall meet with no legal impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted."

The phraseology made use of leaves in my mind no room to hesitate as to the intention of the parties. The terms are unequivocal and universal in their signification, and obviously point to and comprehend all creditors, and all debtors, previously to the 3d of September 1783. In this article, there appears to be a selection of expressions, plain and extensive in their import, and admirably calculated to obviate doubts, to remove difficulties, to designate the objects, and ascertain the intention of the contending powers, and in short, to meet and provide for all possible cases that could arise under the head of debts. The words "creditors on either side," embrace every description of creditors, and cannot be limited or narrowed down to such only, whose debtors had not paid into the loan-office of Virginia. Creditors must have debtors; debtors is the correlative term. Who are these debtors? On the part of the defendants in error, it has been contended, that Virginia is the substituted debtor, so far as respects debtors, who may have paid money into the loan-office under its laws. But the idea, that the treaty may be satisfied by substituting the state of Virginia in the stead of the original debtor, is far-fetched and altogether inadmissible. The terms in which the article is expressed, clearly evince a contrary intention, and naturally and irresistibly carry the mind back to the original debtor; for, as between

the British creditor and the *state of Virginia, there was no express and pre-existing stipulation or debt. Besides, what lawful impediment was to be removed out of the way of the creditor, if Virginia was the substituted or self-created debtor? Did this clause make Virginia liable to a prosecution for the debt? Is Virginia now suable by such British creditor? No, he would in such case be totally remediless, unless the nation of which he is a subject would interpose in his behalf. The words "shall meet with no lawful impediment," refer to legislative acts, and everything done under them, so far as the creditor might be affected or obstructed in regard either to his remedy or right. All lawful impediments, of whatever kind they might be, whether they related to personal disabilities, or confiscations, sequestrations, or payments into loan-offices or treasuries, are removed. No act of any state legislature, and no payment made under such act into the public coffers, shall obstruct the creditor in his course of recovery against his debtor. The act itself is a lawful impediment, and therefore, is repealed; the payment under the act is also a lawful impediment, and therefore is made void. The article is to be construed according to the subject-matter or nature of the impediment; it repeals, in the first instance, and nullifies, in the second. Unless this be the construction, it is not true, that the creditor shall meet with no legal impediment to the recovery of his debt. Does not the plea, in the present case, contradict the treaty, and raise an impediment in the way of recovery, when the treaty declares there shall be none? Payments made in paper money into loan-offices and treasuries, were the principal impediments to be removed, and mischiefs to be redressed. The article makes provision accordingly. It stipulates, that the creditor shall recover the full value of his debt, in sterling money; hereby securing and guarding him against all payments in paper money. Suppose, the creditor should call on Virginia for payment; what would it be? the paper money paid into the loan-office, or its value? Would this be a compliance with the article? In the one case, the money being cried down and dead, is no better than waste paper; and in the other, the payment, when reduced by the table of depreciation, would be inconsiderable, and in many cases, not more than six-pence in the pound. Can this be called payment to the full value of the debt, in sterling money?

The subsequent expressions in the article, enforce the preceding observations, and mark the will and intention of the contracting parties, in the most clear and precise terms. The concluding words are, "all *bonâ fide* debts heretofore contracted." In the construction of contracts, words are to be taken in their natural and obvious meaning, unless some good reason be assigned, to show, *that they should be understood in a different sense. *251] Now, if a person, in reading this article, should take the words in their common meaning, and as generally understood, could he mistake the intention of the parties? Their design unquestionably was, to restore the creditor and debtor to their original state, and place them precisely in the situation they would have stood, if no war had intervened, or act of the legislature of Virginia had not been passed. The impediments created by legislative acts, and the payments made in pursuance of them, and all the evils growing out of them, were, so far as respected creditors, done away and cured. This is the only way in which all lawful impediments can be

removed, and all debts, contracted before the date of the treaty, can be recovered to their full value, by the creditors against their debtors.

It has, however, been urged, that this article must be restricted to debts existing and due at the time of making the treaty; that the debt in question was discharged, because it had been paid into the loan-office, agreeable to law; and that the treaty ought not to be construed so as to renovate or revive it. To enforce this objection, the rule laid down by Vattel was relied on, "that the state of things, at the instant of the treaty, is to be held legitimate, and any change to be made in it requires an express specification in the treaty; consequently, all things not mentioned in the treaty are to remain as they were at the conclusion of it." Vatt. lib. 4, c. 2, § 21. The first part of the objection has been already answered; for it is within both the letter and spirit of the instrument, that the creditors should be reinstated and of course, that the debtors should be liable to pay. The act of Virginia, and the payment under it, have, so far as the creditor is concerned, no operation, and are void. There is no difficulty in answering the objection arising from the passage in Vattel. The universality of the terms is equal to an express specification in the treaty, and indeed includes it. For it is fair and conclusive reasoning, that if any description of debtors or class of cases was intended to be excepted, it would have been specified in the instrument, and the words, "that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all debts heretofore contracted," would not have been made use of, in the unqualified manner, in which they stand in the treaty. Another article in the treaty now under review, will serve by way of illustration.

"Art. 7. There shall be a firm and perpetual peace between his Britannic majesty and the said states, and between the subjects of the one and the citizens of the other, wherefore, all hostilities both by sea and land shall then immediately cease: all prisoners on both sides shall be set at liberty, and his Britannic *majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every port, place and harbor within the same; leaving in all fortifications the American artillery that may be therein. And shall also order and cause all archives, records, deeds and papers, belonging to any of the said states, or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper states and persons to whom they belong." Would it be an objection on the part of his Britannic majesty, that the state of things at the instant of the treaty is to be held legitimate, and any change to be made in it, requires an express specification? That the forts are not specified, and therefore, not to be given up? The objection would be considered as futile and evasive. The answer would be, that there is no doubt, because the expressions are general, comprehend the forts, and are equal to an express specification. So, in the present case, the universality of the terms are equal to a specification of every particular debt, or an enumeration of every creditor and debtor; it is the same thing as though they had been individually named. All the creditors on either side, without distinction, must have been contemplated by the parties in the fourth article. Almost every word, separately taken, is expressive of this idea, and when all

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the words are combined and taken together, they remove every particle of doubt. But if the class of British creditors, whose debtors have paid into the loan-office of Virginia, are not comprehended in the fourth article, then they pass without redress, without notice, without so much as a recommendation in their favor. The thing is incredible. Why a distinction? why should the creditors, whose debtors paid into the loan-office, be in a worse situation than the creditors, whose debtors did not thus pay? The traders, and others of this country, were largely indebted to the merchants of Great Britain. To provide for the payment of these debts, and give satisfaction to this class of subjects, must have been a matter of primary importance to the British ministry. This, doubtless, is at all times, and in all situations, an object of moment to a commercial country. The opulence, resources and power of the British nation, may, in no small degree, be ascribed to its commerce; it is a nation of manufacturers and merchants. To protect their interests, and provide for the payment of debts due to them, especially, when those debts amounted to an immense sum, could not fail of arresting the attention, and calling forth the utmost exertions of the British cabinet. A measure of this kind, it is easy to perceive, would be pursued with
*253] unremitting *diligence and ardor; sacrifices would be made to insure its success; and perhaps, nothing short of extreme necessity would induce them to give it up. But if the debts which have been confiscated, or paid into loan-offices or treasuries, be not within the provision of the fourth article, then a numerous class of British merchants are passed over in silence, and not so much attended to, as the loyalists, or Americans, who attached themselves to the cause of Britain during the war. Is it a supposable case, that the British negotiators would have been more regardful of the interests of the loyalists, than of their own merchants? That they would make a discrimination between merchants, when, in a national and political view, and in the eye of justice, they were equally meritorious, and entitled to receive complete satisfaction for their debts? No line should be drawn between creditors, unless it be found in the treaty. The treaty does not make it: the truth is, that none was intended; for, if intended, it would have been expressed. The indefinite and sweeping terms made use of by the parties, such as "creditors on either side, no lawful impediment to the recovery of the full value in sterling money, of all debts heretofore contracted," exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination. The fourth article appears to me to come within the first general maxim of interpretation laid down by Vattel. "It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless. Let the brightest light shine on all the parts of the piece, let it be expressed in terms the most clear and determinate; all this shall be of no use, if it be allowed to search for foreign reasons, in order to maintain what cannot be found in the sense it naturally presents." Vatt. lib. 2, c. 17, § 263.

To proceed, the construction on the part of the defendants excludes

mutuality. The debts due from British subjects to American citizens were not confiscated or sequestered, nor drawn into the public coffers. They were left untouched. Now, if all the British debtors be compelled to pay their American creditors, and a part only of the American debtors be compelled to pay their British creditors, there will not be that mutuality in thething, which its nature and justice require. The rule in such case should work both ways: whereas, the other construction creates mutuality, and proceeds upon *indiscriminating principles. The former construction [*254
does violence to the letter and spirit of the instrument; the latter flows easily and naturally out of it.

It has been made a question, whether the confiscation of debts, which were contracted by individuals of different nations, in time of peace, and remain due to individuals of the enemy, in time of war, is authorised by the law of nations among civilized states? I shall not, however, controvert the position, that by the rigor of the law of nations, debts of the description just mentioned may be confiscated. This rule has by some been considered as a relic of barbarism; it is certainly a hard one, and cannot continue long among commercial nations; indeed, it ought not to have existed among any nations, and perhaps, is generally exploded at the present day in Europe. Hear the language of Vattel on this subject, lib. 3, c. 5, § 77. "But at present, in regard to the advantage and safety of commerce, all the sovereigns of Europe have departed from this rigor. And as this custom has been generally received, he who should act contrary to it, would injure the public faith; for strangers trusted his subjects only from a firm persuasion, that the general custom would be observed. The state does not so much as touch the sums which it owes to the enemy. Everywhere, in case of war, funds credited to the public are exempt from confiscation, and seizure." The legislators of Virginia, who made the act, which has been pleaded in bar, lay down the doctrine relative to this point, in strong and unequivocal terms. For they expressly declare, that the law and usages of nations require that debts should not be confiscated. If the enemy should, in the first instance, direct a confiscation of debts, retaliation might, in such case, be a proper and justifiable measure. The truth is, that the confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce; it is also unproductive, and in most cases, impracticable. Ingenious writers have endeavored to defend the doctrine, on the ground, that the confiscation of debts weakens the enemy and enriches ourselves. The first is not true, because remittances are seldom, if ever, made during a war, and the second generally proves unprofitable, when attempted to be carried into practice. The gain is, at most, temporary and inconsiderable; whereas, the injury is certain and incalculable, and the ignominy great and lasting. History furnishes a remarkable instance in support and illustration of the foregoing remarks. For, in the war that broke out between France and Spain, in the year 1684, his Catholic majesty endeavored to seize the effects of the subjects of France in his kingdom; but the attempt proved *abortive, for not one Spanish agent or factor violated his trust, [*255
or betrayed his French principal or correspondent. If the payments which have been made into the loan-office, pursuant to the act of Virginia, should be scaled according to a subsequent act of that state, they would not, it is probable, amount to a very large sum. Other reasons in support of the

doctrine have been assigned, namely, that the confiscation of debts operates as an indemnity for past losses, and a security against future injuries; but they do not appear to me to be more solid than those already mentioned. Confiscation of debts is considered a disreputable thing among civilized nations of the present day; and indeed, nothing is more strongly evincive of this truth, than that it has gone into general desuetude, and whenever put into practice, provision is made by the treaty, which terminates the war, for the mutual and complete restoration of contracts and payment of debts.

I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments, in consequence of national quarrels and hostilities. National differences should not affect private bargains. The confidence, both of an individual and national nature, on which the contracts were founded, ought to be preserved inviolate. Is not this the language of honesty and honor? Does not the sentiment correspond with the principles of justice, and the dictates of the moral sense? In short, is it not the result of right reason and natural equity?

The relation which the parties stood in to each other, at the time of contracting these debts, ought not to pass without notice. The debts were contracted, while the creditors and debtors were subjects of the same king, and children of the same family. They were made under the sanction of laws common to, and binding on both. A revolution-war could not, like other wars, be foreseen or calculated upon; the thing was improbable. No one, at the time that the debts were contracted, had any idea of a severance or dismemberment of the empire, by which persons, who had been united under one system of civil polity, should be torn asunder, and become enemies for a time, and perhaps, aliens, for ever. Contracts entered into, in such a state of things, ought to be sacredly regarded: inviolability seems to be attached to them.

Considering then the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted, we ought to take the expressions in this fourth article in their most extensive sense. We ought to admit of no comment, *256] that will narrow and restrict their operation and *import. The construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign. For these reasons, this clause in the treaty deserves the utmost latitude of exposition. The fourth article embraces all creditors, extends to all pre-existing debts, removes all lawful impediments, repeals the legislative act of Virginia, which has been pleaded in bar, and with regard to the creditor, annuls everything done under it. This article reinstates the parties; the creditor and debtor before the war, are creditor and debtor since; as they stood then, they stand now.

To prevent mistakes, it is to be understood, that my argument embraces none but lawful impediments, within the meaning of the treaty, such as legislative acts, and payments under them into loan-offices and treasuries. An impediment created by law stands on different ground from an impediment created by the creditor. To conclude, I am of opinion, that the

demurrer ought to have been sustained; and of course, that the judgment rendered in the court below, is erroneous, and must be reversed.

IREDELL, Justice.(*a*)—In delivering my opinion on this important case, I feel myself deeply affected by the awful situation in which I stand. The uncommon magnitude of the subject, its novelty, the high expectation it has excited, and the consequences with which a decision may be attended, have all impressed me with their fullest force. I have trembled, lest by an ill-informed or precipitate opinion of mine, either the honor, the interest, or the safety of the United States should suffer or *be endangered, on the one hand, or the just rights and proper security of any individual, on the other. In endeavoring to form the opinion I shall now deliver, I am sure, the great object of my heart has been, to discover the true principles upon which a decision ought to be given, unbiassed by any other consideration than the most sacred regard to justice. Happy should I have thought myself, if I could as confidently have relied on a strength of abilities equal to the greatness of the occasion. [*257

The cause has been spoken to, at the bar, with a degree of ability equal to any occasion. However painfully I may at any time reflect on the inadequacy of my own talents, I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard on this case: they have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to anything I have ever witnessed, and some of them have been adorned with a splendor of eloquence surpassing what I have ever felt before. Fatigue has given way under its influence, and the heart has been warmed, while the understanding has been instructed.

The action now before the court is an action of debt, brought by a British creditor against an American debtor, to recover upon a bond executed before the late war. To this action there are five pleas, substantially as follows:

The 1st, a plea of payment, on which issue is joined, but not now before the court, and which is to be tried by a jury, in case judgment be given for

(*a*) Judge IREDELL (one of the judges who decided the original cause), in conformity to a practice which the judges of this court have generally pursued, forebore taking any part in this decision, as a judge, upon the present writ of error, having declared from the first, he meant only to do so, in case of an equal division of opinion among the other judges. But he observed, that he thought there would be no impropriety in his reading in his place, the reasons he had given in support of the judgment in the circuit court, a practice expressly authorized in the case of the district judge, upon an appeal to the circuit court from his own decision; though he is, at the same time, excluded from voting. And Judge Iredell added, that upon consulting his brethren on the bench, they had acquiesced in the propriety of this proceeding. He, therefore, read these reasons in his place, so far as they respected the same subject of discussion in both courts, which was only as to the effect of payments into the treasury, every other point in contest in the circuit court having been relinquished.

It is, however, thought proper, on this occasion, to publish the whole of the argument, as delivered in the circuit court, there being some observations on that part of the subject that was relinquished which, it is conceived, serve to illustrate the great topic of controversy that occasioned the present writ of error.

The judge, after reading his opinion, as delivered in the court below, added, that it had not been changed by anything which had occurred, in arguing the case on the present writ of error.

the plaintiff upon the legal questions arising on the other pleas, so as to entitle him to try the issue.

The 2d is a plea of a payment into the treasury of the state, of part of the debt, under an act of assembly of the 20th of October 1777.

The 3d plea is grounded on two acts of assembly: one of May 1779, under which it is alleged, that the debt in question became forfeited to the state; the other, of May 1782, which is relied on as a bar to the recovery. The former part of the plea, I understand to be given up by the defendant's counsel, and certainly with great propriety, because debts are expressly expected in the act it refers to.

The 4th plea alleges a non-compliance with the treaty on the part of Great Britain, and therefore, that the British creditor cannot now recover a benefit under the same treaty. It also alleges acts of hostility by Great Britain since the peace, as likewise forming a bar to the recovery of the plaintiff, who is a British creditor.

The 5th plea is, that this debt was absolutely annulled by the change of government. This also I understand to have *been given up, in the course of the argument, and undoubtedly, it is not tenable.

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The only pleas, therefore, for us to consider, are the second, part of the third, and the fourth. Everything I have to say on that part of the third not relinquished, admitting the fullest operation of the act of 1782, as intending to affect British creditors themselves, as well as assignees, which does not appear to me to have formed any part of its object, will appear from my observations on the second plea; and therefore, to prevent unnecessary repetition, I shall not consider it separately by itself.

It seems proper to speak of the fourth degree first, because, if that can be maintained, it is altogether immaterial to consider either of the others. I am clearly of opinion, that the fourth plea is not maintainable. It is grounded on two allegations. 1st. The breach of the treaty by Great Britain, as alleged in the plea. 2d. New acts of hostility on the part of that kingdom.

1. In regard to the first, I consider the law of nations to be decided as to the following position, viz.: "That if a treaty be broken by one of the contracting parties it becomes (in the expressive language of the law) not absolutely void, but voidable; and voidable, not at the option of any individual of the contracting country injured, however much he may be affected by it, but at the option of the sovereign power of that country, of which such individual is a member." The authorities, I think, are full and decisive to that effect. Grotius, lib. 2, c. 15, § 15; Ibid. lib. 3, c. 20, § 35, 36, 37, 38; 2 Burl. p. 355, part 4, c. 14, in § 8; Vattel, lib. 4, c. 4, § 54.

The gentlemen for the defendant, taking hold of some particular expressions without regarding the whole of these authorities, and considering the reason of them, have argued, that true, in the present instance (for example) congress might have remitted the infraction, but not having done so, the plaintiff is barred for the present, however he might be restored to the right, in case the infraction should hereafter be actually remitted. But to me it is very evident, that such a position is not maintainable, either by the authorities I have recited, or the reason of the thing.

The words of Grotius are pointed and express, to show not that the treaty shall be reputed broken, until a remission is actually pronounced

by the injured party, but that it shall not be reputed as broken, until the injured party shall think proper actually to pronounce it broken; and it is remarkable, that his *words to this effect, are calculated for the very purpose of removing any doubts which other more general expressions might occasion. His words are: "When there is treachery on one side, it is certainly at the choice of the innocent party to let the peace subsist; as Scipio did formerly after many perfidious actions of the Carthagenians. Because no man, by doing contrary to his obligation, can thereby discharge himself from it. For though it is expressed, that by such a fact the peace shall be reputed as broken, yet this clause is to be understood only in favor of the innocent, if he thinks fit to make use of it." Grotius, lib. 3, c. 20, § 38. [*259

The whole clause of Vattel is substantially to the same purpose; and therefore, where in one part of the clause he says, "the offended party may remit the infraction committed," this must be understood, to make the whole consistent, a remission not arising from an express declaration, but from a tacit acquiescence in the breach. Otherwise, what becomes of the words, "but if he choses not to come to a rupture, the treaty remains valid and obligatory." The treaty, therefore, must remain valid and obligatory, until the power, authorized to come to a rupture, does come to it. The same observations apply to Burlamaqui, who expresses himself more generally, but states substantially the same doctrine. His expression is, "it is at the choice of the innocent party to let the peace subsist," which certainly does not require a positive declaration that it shall subsist.

This doctrine appears to me to be grounded on the highest reason. It is undoubtedly true, that each nation is considered as a moral person, and the welfare and interest of all the individuals of that nation, so far as they may be affected by its concerns with foreign nations, are in each country intrusted to some particular power, authorized to negotiate with them, or to speak the sense of the nation on any emergency. When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to the authority of his own, he may complain to that power in his own nation, which is intrusted with the sovereignty of it, as to foreign negotiations, and he will be entitled to all the redress which the nature of his case requires, and the situation of his own country will enable him to obtain. The people of the United States, in their present constitution, have devolved on the president and senate, the power of making treaties, and upon congress, the power of declaring war. To one or other of these powers, in case of an infraction of a treaty that has been entered into with the United States, I apprehend, application, is to be made.

*Upon such an application various important considerations would necessarily occur. 1. Whether the treaty was first violated on the part of the United States, or on that of the other contracting power? 2. Whether, if first violated by the latter, it was a violation in an important or an inconsiderable article; whether the violation was by design or accident, or owing to unforeseen obstacles; whether, in short, it was wholly or partially without excuse? 3. Whether, admitting it was either, it was a matter for which compensation could be made, or otherwise? 4. Whether the injury was of such a nature as to admit of negotiation, or to require immediate satisfaction, peremptorily, and without delay? 5. Whether, if the circumstances in [*260

all other cases justified it, it was advisable, upon an extensive view and wise estimation of all the relative circumstances of the United States, to declare the treaty broken, and of course void: for though the party first breaking the treaty cannot make it absolutely void, but it is only voidable, at the election of the injured party, yet when that election is made, by declaring the treaty void, I conceive it is totally so as to both parties, and that all rights enjoyed under the treaty are absolutely annulled, as if no stipulation had been made for them?

These are considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice. Miserable and disgraceful, indeed, would be the situation of the citizens of the United States, if they were obliged to comply with a treaty on their part, and had no means of redress for a non-compliance by the other contracting power. But they have, and the law of nations points out the remedy. The remedy depends on the discretion and sense of duty of their own government.

This plea is, therefore, defective, so far as concerns the breach of the treaty, not because this court hath no cognisance of a breach of treaty, but because by the law of nations, we have no authority, upon any information or concessions of any individuals, to consider or declare it broken; but our judgment must be grounded on the solemn declaration of congress alone (to whom, I conceive, the authority is intrusted), given for the very purpose of vacating the treaty, on the principles I have stated. The paper transmitted by order of congress, to the executive of Virginia, on the subject of a violation complained of on the part of the British, certainly cannot amount to so much, especially, as there is another paper of theirs in the year 1787, transmitted to the different states, complaining of violations
*261] *on our part. They have pronounced no solemn decision, which committed the first infraction; much less have they declared that in consequence of the infraction on the part of the British, they chose that the treaty should be annulled.

But it is said, that a declaration by congress, that the treaty was broken by Great Britain, would be exercising a judicial power, which by the constitution, in all cases of treaties, is devolved on the judges. Surely, such a thing was never in the contemplation of the constitution. If it was, a method is still wanting by which it could be executed; for, if we are to declare, whether Great Britain or the United States have violated a treaty, we ought to have some way of bringing both the parties before us. The method contended for by the defendant's counsel is very ill-suited to another part of their doctrine, which is certainly right, that a nation is a moral person, and that the act of a sovereign power to whom its foreign concerns are intrusted, is the act of every individual of that nation, because he represents the whole. But in this case, the king of Great Britain does not act on behalf of the plaintiff, his subject, and the United States on behalf of the defendants, their citizens; but the plaintiff is alleged to represent the king of Great Britain, and the defendant, the sovereignty of the United States, a dignity, for aught I know, of which they may be respectively worthy, but which certainly does not either politically or judicially belong to them.

The judiciary is, undoubtedly, to determine in all cases in law and equity, coming before them, concerning treaties. The subject of treaties, gentlemen

truly say, is to be determined by the law of nations. It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. If congress, therefore (who, I conceive, alone have such authority under our government), shall make such a declaration, in any case like the present, I shall deem it my duty to regard the treaty as void, and then to forbear any share in executing it as a judge. But the same law of nations tells me, that until that declaration be made, I must regard it (in the language of the law) valid and obligatory. The admission of the fact, stated in the plea, cannot be taken as an admission that the fact is strictly true, because the plaintiff had no way of avoiding the plea, but by a demurrer, whether it was true or not. If it was well pleaded, it is an admission of the entire truth, but not otherwise. For the reasons I have given, it is clear to me, that it is not well pleaded.

*2. In regard to the second branch of this plea, new acts of hostility, if meant as constituting a breach (which I don't understand it to be), the observations I have already made will equally apply to this part of the plea. If meant as a proof, that a war in fact, though not in name, subsists, and therefore, that the plaintiff is an alien enemy, the same observations will apply still more forcibly. We must receive a declaration, that we are in a state of war, from that part of the sovereignty of the Union to which that important subject is intrusted. We certainly want some better information of the fact than we have at present. However, this point seems so clear, that the defendant's counsel very faintly attempted to maintain this idea of the case. I conclude, therefore, for these reasons, that there is nothing in the 4th plea which is a bar to the plaintiff's action. [*262

The great difficulty of the case arises from the second plea. This is the only part of the case about which I have, from the beginning, entertained any doubt. And I must confess, I have had very great doubts, indeed, on this subject. My opinion has varied more than once in regard to it. I have endeavored to come to a conclusion, by analysing it in all its parts; and the result of my investigation has been, according to the best judgment I am capable of forming, upon the most deliberate examination, that the plea is supportable. My reasons for this opinion, I must give at considerable length, in order to show it is not a rash one, and that gentlemen may be enabled, in the future progress of this case, more easily to detect my errors, if I should have committed any.

I will divide the consideration of the plea into two points: 1. Whether the plea would have been a bar, if this case had stood independently of the treaty? 2. Whether the treaty destroys the operation of the plea?

In considering the first point, I shall, for the greater perspicuity, consider it under the following heads: 1. Whether the legislature of this state had a right, agreeable to the law of nations, to confiscate the debt in question? 2. Whether, admitting that the legislature had not a right, agreeably to the law of nations, to confiscate the debt, yet, if they in fact did so, it would not, while it remained unrepealed by any subsequent, sufficient authority, have been valid and obligatory within the limits of the state, so as to bar any suit for the recovery of the debt? 3. Whether, if it shall be considered that the legislature did not wholly confiscate the debt, so as totally to extinguish all right in the creditor (as I apprehend they clearly did not),

but only sequester it under the peculiar circumstances stated in the act, the payment in question, under the authority of the act, did not, at that time at least, wholly exonerate the debtor?

*263] *1. It being clear, that there was no absolute confiscation in this case, I shall not give a conclusive opinion upon the right; but as I think it highly probable such a right did exist, some observations on that subject will naturally and properly lead to those upon which my opinion, as to the validity of the payments, is ultimately founded. For this reason, and this reason only, I discuss the present question.

Whatever doubt might have been entertained, by reasoning on the particular examples of Grotius and Puffendorf, Bynkershoeck (who, I believe, is alone, a very great authority) is full and decisive in the very point, as to a general right of confiscating debts of an enemy. His doctrine I take to be this, that the law of nations authorizes it, unless in former treaties between the belligerent powers, there be particular stipulations to the contrary. Vattel recognises the general right, but states a prevailing custom in Europe to the contrary; in consequence of which, he says, "As this custom has been generally observed, he who would act contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed." Vattel mentions the fact, but does not state the origin of the fact; which, I think, it is not improbable, may have arisen in consequence of particular stipulations, as mentioned by Bynkershoeck; very few of the civilized nations of Europe not having treaties with each other.

Whether this customary law (admitting the principle to prevail by custom only) was binding on the American States, during the late war, in respect to Great Britain at least, may be a question of considerable doubt. There were particular circumstances in the relative situation of the two countries, which might possibly exempt this from the force of such a custom, could it be supposed that when this country became an independent nation, this customary law immediately attached upon it. However this country might have been considered bound to observe such a law, in regard to any nation recognising its independence, had we been unfortunately at war with such, and who observed it on her part (for, undoubtedly, a breach on one side would justify a non-observance by the other), it did not necessarily follow, that the people of this country were bound to observe it to a nation, which not only did not recognise, but sought to destroy their very existence as an independent people, considering them in no other light than as traitors, whose lives and fortunes were forfeited to the law. The people of this country literally fought *pro aris et focis;* and therefore, means of defence which, when inferior objects were in view, might not be strictly justifiable, might, in such an extremity, become so, on the great principle on

*264] which the laws of war are * founded, self-preservation; an object that may be attained by any means, not inconsistent with the eternal and immutable rules of moral obligation.

The principles of the common law of England, as appears from a case I showed to the bar (that in Sir Thomas Parker's Reports, p. 267, *The Attorney-General* v. *Weeden and Shales*), do undoubtedly recognise the forfeiture of a *chose in action* due to an enemy. At the utmost, it only requires, that an inquisition should be completed during the war, so as, by

ascertaining the fact, fully to establish the title of the crown. I can see no reason why that principle of the common law should not obtain here. If so, then, independent of any act of legislation whatever, an inquisition completed during the war, finding the fact, would have vested the title to the debt in question absolutely in the state, unless this debt can be distinguished from any other *chose in action*. Such a distinction has been attempted: 1st. Because this debt was due before the war. 2d. Because the state had not possession of the bond. To these objections, I think, easy answers may be given. 1st. The right acquired by war (detached from custom, which I am not now considering, or any express stipulation, if there be such) depends on the power of seizing the enemy's effects. It is not grounded on any antecedent claim of property, but, on the contrary, the property is admitted to be the enemy's, in the very act of seizing it. Its sole justification is, that being forced into a state of hostility, by an injury for which no satisfaction could be obtained in a peaceable manner, reprisals may be made use of, as a means to compel justice to be done, or to enable the injured party to obtain satisfaction for itself. Such a power, from its nature (being grounded on necessity only), seems incapable of limitation by any general rule, and if conscientiously used (of which each nation must judge for itself), the principle applies as well to property which was in the country before the war began, as to any other which may by accident come into its possession. The same objection would apply to the seizure of any other property of an enemy, which had been in the country before the war began, as of an incorporeal right. The first resolution in the case I cited is, as to *choses in action* generally, though the *chose in action* there in question, was, in fact, one which had accrued during the war. 2d. The objection from the state not having possession of the bond (though countenanced by one or two writers), I think, is also susceptible of a satisfactory answer. The bond does not create the debt, but is only evidence of it; possession of it alone can give no right; a robber, or an individual coming to the possession of it by accident, acquires no more title to the money than he had before. The law is so, even as to promissory notes payable to bearer, if the fact can be *made to appear. If a bond be lost, equity has long since afforded a remedy. [*265
In a modern case in a court of law, a *profert* of a deed has been dispensed with, upon a special declaration stating the loss of it.(*a*) It was while the possession and the right were confounded, that this objection was thought of weight. It is observable also, that it would create an idle and a trifling distinction between debts due by specialty, and simple-contract debts, a distinction that might be supported by ingenuity, but certainly not by reason. And it would sound harsh, to say, that simple-contract debts should be forfeitable, if the witnesses were in the country, but otherwise not. Now, if the forfeiture of the debt in question could have been effected at common law, by an inquisition completed during the war, I can see no reason why the legislature could not, with equal propriety as to the right, have effected the same object substantially in any other mode. The proceeding, in each case, must be *ex parte*, and the object affected can be conclusively bound by neither, if his case did not come within the principles of the law. This

(*a*) Read *v.* Brookman, 3 T. R. 151; by three judges against one; in the court of king's bench, in England.

I argue, upon a supposition that the customary law of nations, was not binding here, at least, in this instance. That, however, is a point of some delicacy, and not necessary for me now to determine, because, 2d, I am of opinion, that admitting that the legislature had not strictly a right, agreeable to the law of nations, to confiscate the debt in question; yet, if they in fact did so, it would, while it remained unimpeached by any subsequent sufficient authority, have been valid and obligatory within the limits of the state, so as to bar any suit for the recovery of the debt.

In this opinion, I have the misfortune to differ from a very high authority,(*a*) for which I have the greatest respect. But however painful it may be, to differ from gentlemen, whose superior abilities and learning I readily acknowledge, I am under the indispensable necessity of judging according to the best lights of my own understanding, assisted by all the information I can acquire. I confess, therefore, that I agree entirely with the defendant's counsel, in thinking, that the acts of the legislature of the state, in regard to the subject in question, so far as they were conformable to the constitution of the state, and not in violation of any article of the confederation (where that was concerned) were absolutely binding *de facto*, and that if, in respect to foreign nations, or any individual belonging to them, they were not *266] strictly warranted by the law of nations, which ought *to have been their guide, the acts were not for that reason void, but the state was answerable to the United States for a violation of the law of nations, which the nation injured might complain of to the sovereignty of the Union. There is no doubt, that an act of parliament in Great Britain, would bind in its own country, in every possible case in which the legislature thought proper to act. Blackstone (1 Com. 91) is precise as to that point, even in cases manifestly unjust, if the words of the law are plain and unequivocal. In this country, thank God! a less arbitrary principle prevails. The power of the legislatures is limited; of the state legislatures, by their own state constitutions and that of the United States; of the legislature of the Union, by the constitution of the Union. Beyond these limitations, I have no doubt, their acts are void, because they are not warranted by the authority given. But within them, I think, they are in all cases obligatory in the country subject to their own immediate jurisdiction, because, in such cases, the legislatures only exercise a discretion expressly confided to them by the constitution of their country, and for the abuse of which (if it should be abused) they alone are accountable. It is a discretion no more controllable (as I conceive) by a court of justice, than a judicial determination is by them, neither department having any right to encroach on the exclusive province of the other, in order to rectify any error in principle, which it may suppose the other has committed. It is sufficient for each to take care that it commits no error of its own. As to a distinction between a state court and this court, in this respect, I do, for my part, disclaim, according to my present sentiments, any authority to give a different decision in any case whatsoever from such as a state court would be competent to give, under the same circumstances. I have no conception, that this court is in the nature of a foreign

(*a*) Chancellor Wythe, of Virginia, who had given a contrary opinion in the high court of chancery of Virginia, a few days before.[1]

[1] Page v. Pendleton, Wythe's Rep. (2d ed.) 211.

jurisdiction. The thing itself would be as improper as it would be odious, in cases where acts of the state have a concurrent jurisdiction with it.

With regard to the exception I speak of, no one has suggested, that the act of October 1777, was in any manner inconsistent with the constitution of the state; and at that time, the articles of consideration were not in force; but if they had been, I think, there is no color for alleging any inconsistency with them, since congress could have passed no act on this subject, but if they had wished for an act, must have recommended to the state legislatures to pass it. And the very nature of a recommendation implies, that the party recommending cannot, but the party to whom the recommendation is made, can do the thing recommended.

*The third question under the present head, that I proposed, was this: "Whether, if it shall be considered that the legislature did not absolutely confiscate the debt, so as totally to extinguish all right in the creditor (as I apprehend they clearly did not), but only sequestered it, under the peculiar circumstances stated in the act; the payment in question, under the authority of the act, did not, at that time, at least, wholly exonerate the debtor." [*267

The words of the enacting clause concerning this subject, are as follows: "That it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan-office, taking thereout a certificate for the said sum, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt. And the governor and council shall, in like manner, lay before the general assembly, once in every year, an account of these certificates, specifying the names of the persons by and for whom they were paid, and shall see to the safe-keeping of the same, subject to the future direction of the legislature."

We are too apt, in estimating a law passed at a remote period, to combine, in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing. Let us, however, recollect, that at this period no British creditor could institute a suit for the recovery of his debt, as the war constituted him an alien enemy, and therefore, his remedy stood suspended at common law, so that he ran the risk of the entire loss of every debt, where his debtor proved insolvent, during the war. Consequently, it would, in his own estimation, have been doing him a considerable service, that the state should authorize a receipt on his behalf, had there been no other currency in circulation than gold or silver. It would have been placing him in a state of security, greater than he had any reason to expect. The extremity of the public situation, rendered paper money unavoidable, but this was an evil to which all Americans as well as British creditors were liable, and the former (as we all know) were compelled, upon a tender, under pain of being deemed enemies of their country, to receive it at its nominal value. It was natural, and perhaps, not altogether, if at all, unjust, if a man had 100*l.* due to him from B., and he himself owed C. 100*l.*, and B. paid him the 100*l.*, though in depreciated

*money, that he should immediately carry it to his creditor. Many, I have no doubt, paid their creditors upon these plain grounds of retribution, though others, undoubtedly (for no government can make all men honest), took most scandalous advantages of depreciation, in its advanced periods. When this law was passed, the depreciation, I believe, was little felt, and not at all acknowledged. *De minimis non curat lex*, is an old law maxim. I may parody it on this occasion, by saying *De minimis non curat libertas.* When life, liberty, property, everything dear to man was at stake, few could have coldness of heart enough to watch the then scarcely perceptible gradation in the value of money. In this situation, the legislature of the state passed the law in question. It did all that the then situation of affairs would admit of, even for the benefit of the British creditors themselves, and it put it in the power of American creditors, who were compelled to receive the existing currency, to pay their own debts with it. The deposition of money in the loan-office, was, at that time, by many, even in America itself, thought an eligible method of securing it, and with some foreigners, it was a favorite object of speculation. I know, myself, that the proceeds of some very valuable cargoes were ordered to be so applied, and probably there were such instances of which I knew nothing. The increased difficulties of the American war, in a great degree, disappointed the intentions of the original law, but still, British and American creditors were placed on the same footing, so far as it was in the power of the legislature to effect it. I thought it proper to say thus much, as introductory to the observations I shall make on the legal operation of those payments.

1. If the state, *de jure*, according to the law of nations (which I strongly incline to think), had a right wholly to confiscate this debt, they had undoubtedly a right to proceed a partial way towards it, by receiving the money, and discharging the debtor, substituting itself in his place. We are to be governed by things, and not names, and consequently, if the state had a right to say to a debtor—"We confiscate the right of your creditor, and you must pay your debt to us, and not to him"—they had a right to say—"We do not choose, for the present, absolutely to confiscate this debt, although we have the power so to do, but if you will pay the money to us, you shall be as completely discharged as if we did." In this point of view, I think, there can be no doubt, but that a discharge would, under such circumstances, have as completely extinguished the right of the creditor as to the debtor, as if, in case no war had intervened, and therefore, no right had accrued under it to the states, the debtor had actually paid the money
*269] *to the order of the creditor, and received a discharge from himself.

2. For the reasons I have before given, I think a confiscation, either whole or partial, or any less exercise of that power *de facto*, though not *de jure*, would, in this state, have been perfectly binding, and in legal contemplation, as effectual to bar a recovery, as if the law of nations had been strictly and unquestionably pursued.

3. I believe, there can be no doubt, but that according to the law of nations, even on the most modern notions of it, a sequestration merely for the purpose of recovering the debts, and preventing the remittance of them to the enemy, and thereby strengthening him, and weakening the government, would be allowable, and if so, surely it follows, as a matter of course

(perhaps, it would follow, without a solemn declaration), that when, in virtue of any such act, the money was paid to the government, the debtor was wholly discharged, and the government, if it thought proper not to proceed to confiscation afterwards, became itself liable.

The case cited from the Law of Evidence,(*a*) I think, is an authority substantially in point, to show the complete discharge of the debtor. "In debt upon a lease, the defendant pleaded payment, and in evidence showed, he paid it to sequestrators of the commonwealth, the plaintiff being a delinquent; and it was ruled, this was good payment to prove the issue, which was a payment to the plaintiff himself." *Anonymous*, Clayton 129; Law of Evidence (Edit. of 1744), p. 196, c. 9, c. 11. This case is certainly very strong, for it was not deemed necessary to plead it in bar, but it was admitted in evidence, upon a plea that he paid the money to the plaintiff himself. It does not appear, whether this action was tried under the commonwealth, or after the restoration. If under the former, it is more parallel to the present action. If it was tried after the restoration, it is a still stronger case, for it showed, that courts of justice thought themselves bound to protect individuals, who acted under laws of a government they deemed an usurpation, and on all occasions treated with contempt.(*b*) Besides an objection, which I shall notice presently, I can imagine but one real difference between that case and the one before us; and that is, that in England, the payment was compelled, here, *it was voluntary. I once thought that circumstance of weight, but on reflection, I consider the public faith equally pledged in one case as in the other; that the authority exercised in both is the same; and that it not only would be unjust in itself, but of dangerous example, to tell men that they should be protected under a compulsory obedience to government, but not upon a cheerful submission to it. [*270

4. My observations as to the paper money, which the necessities of this country unfortunately constrained us to use so long, had no other tendency than to show the circumstances of the fact as they really existed. As a judge, I conceive myself bound to say, that that makes no difference as to the right. The competency of such acts at that time was unquestionable; their justice depended on the degree of necessity which gave rise to them. A payment in paper money, then a legal tender, I must consider as complete and effectual a payment, at that time, as payment in gold or silver. Such was the law of the country! A law which severe necessity dictated! and by which, in the course of the war, in which many sacrifices became unavoidable, many thousand American citizens, as well as many British merchants, suffered. It is the lot of our nature to experience many evils for which we can find no remedy, and therefore, nothing can be more fallacious, than in anything of a general nature, to expect perfect exactness.

For these reasons, I am clearly of opinion, that under the acts of seques-

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(*a*) The book commonly called "The Old Law of Evidence;" originally printed in 1735, and afterwards in 1739 and 1744.[1]

(*b*) Upon consulting the Bibliotheca Legum, it appears that Clayton's reports were published in 1651, so that the decision must have been under the commonwealth.[2]

[1] The first edition of this work was published in 1717.

[2] The case cited was tried at the assizes, March 1648, before Thorpe, sergeant at law, judge of assize.

tration, and the payment and discharge, the discharge will be a complete bar in the present case, unless there be something in the treaty of peace to revive the right of the creditor against the defendant, so as to disable the latter from availing himself of the payment into the treasury, in bar to the present action.

The operation of that treaty comes, therefore, now to be considered. None can reverence the obligation of treaties more than I do; the peace of mankind, the honor of the human race, the welfare, perhaps, the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. If ever any people, on account of the importance of a treaty, were under additional obligations to observe it, the people of the United States surely are to observe the treaty in question. It gave peace to our country, after a war attended with many calamities, and, in some of its periods, presenting a most melancholy prospect. It insured, so far as peace could insure them, the freest forms of government, and the greatest share of individual liberty, of which, perhaps, the world has seen any example. It presented boundless views of future happiness and greatness, which almost overpower the imagination, and which, I trust, will not *271] be altogether *unrealized: the means are in our power; wisdom and virtue are alone required to avail ourselves of them. Such was the peace which was procured by the treaty now in question—a treaty which, when it shall be fully executed in all its parts, on both sides, future generations will look up to with gratitude and admiration, and no small degree of fervor towards those who had an active share in procuring it.

In proceeding to examine the treaty, with these sentiments, it may well be imagined, I do it with a reverential and sacred awe, lest by any misconstruction of mine, I should weaken any one of its provisions. The question now is, whether, under this treaty, the payment into the treasury is a bar to so much of the plaintiff's claim, as comprehends money to that amount? I shall examine this question under two divisions: 1st. Whether it would have been a bar, as the law existed, after the ratification of the treaty, and previous to the passing of the present constitution of the United States, even if the words of the treaty must be construed to comprehend such a case. 2d. Whether, under that constitution, it can now be considered as a bar.

I. My opinion, I confess, as to the first question, is, that if the treaty had plainly comprehended such cases, the plaintiff could not have recovered in a court of justice in this state, as the law stood, previous to the ratification of the present constitution of the United States. I feel, as I ought to do, great diffidence, when I am under the necessity, in the execution of my duty as a judge, of differing from the opinions of those entitled, from superior talents, and high authority, to my utmost respect. I am compelled to do so, in the present instance, but I shall, at the same time, assign my reasons for my opinion, and if, in the future course of this great cause, I can be convinced that in this, or in any other instance, I have committed an error, I shall most cheerfully acknowledge it.

The opinion I have long entertained and still do entertain, in regard to the operation of the fourth article is, that the stipulation in favor of creditors, so as to enable them to bring suits, and recover the full value of their debts, could not, at that time, be carried into effect, in any other manner, than by a repeal of the statutes of the different states, constituting the impediments

to their recovery, and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty. I consider a treaty (speaking generally, independent of the particular provisions on the subject, in our present constitution, *the effect of which I shall afterwards observe upon) as a solemn promise by the whole nation, that [*272 such and such things shall be done, or that such and such rights shall be enjoyed. I think, the distinction taken by the plaintiff's counsel as to stipulations in the treaty, executed or executory, will enable me to illustrate my meaning, by considering various stipulations in the treaty in question.

1st. I will consider what may be deemed executed articles. In this class, I would place, the acknowledgment of independence in the first article, the permission to fish on the banks, in the third; the acknowledgment of the right to navigate the Mississippi, in the eighth. These I call executed, because, from the nature of them, they require no further act to be done.

2d. The executory (so far as they concern our part in the execution) I would place in three classes. Those which concern either, 1st, the legislative authority; 2d, the executive; 3d, the judicial.

The fourth article in question, I consider to be a provision, the purpose of which could only be effected by the legislative authority; because, when a nation promises to do a thing, it is to be understood, that this promise is to be carried into execution, in the manner which the constitution of that nation prescribes. When, therefore, a treaty stipulates for anything of a legislative nature, the manner of giving effect to this stipulation is by that power which possesses the legislative authority, and which, consequently, is authorized to prescribe laws to the people for their obedience, passing such laws as the public obligation requires. Laws are always seen, and through that medium, people know what they have to do. Treaties are not always seen; some articles (being what are called secret articles) the public never see. The present constitution of the United States affords the first instance of any government which, by saying, treaties should be the supreme law of the land, made it indispensable that they should be published for the information of all. At the same time, I admit, that a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the legislative, executive and judicial departments (so far as the authority of either extends, which in regard to the last, must, in this respect, be very limited), as on every individual of the nation, unconnected officially with either; because it is a promise, in effect, by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for non-compliance, the public faith is violated.

I have mentioned this great article, which concerns the legislative *department: let me now, by way of further illustration, consider [*273 one which concerns the executive. It is stipulated in one part of this treaty, "that all prisoners on both sides shall be set at liberty." I very much doubt, whether the commander-in-chief, without orders from congress (then possessing the supreme executive authority of the Union), could have been justified in releasing such prisoners as he had then in custody, after the ratification. Certainly, no inferior officer, in whose actual care they were, could, without an order, directly or indirectly, from the commander-in-chief; and yet, I can see no reason, if a treaty is to be considered as operating *de facto*, by superior authority, notwithstanding any impediment arising from

laws then in being, why the rigor of the treaty, which in that instance is said to be uncontrollable, should not be so in every other. If legislative authority is superseded, why not executive? Surely, the former is not less sacred than the latter.

In like manner, as to the judicial. It is stipulated in the 6th article, "That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of any part which he or they may have taken in the present war: and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued." I apprehend, this article, so far as it respected the release of prisoners confined, could only be executed by an order from the judges of the court, having judicial authority, in the cases in question, in consequence either of an actual alteration in the law by the legislature, in conformity to the treaty (where that was necessary), or of a particular pardon by the executive; and that if a jailer, merely because the treaty was ratified, and he found this article in it, had set all such prisoners at liberty, he would have been guilty of an escape.

This reasoning, in my opinion, derives considerable weight from the practice in Great Britain. The king of Great Britain certainly represents the sovereignty of the whole nation, as to foreign negotiations, as completely as the congress of the United States ever represented the sovereignty of the Union, in that particular. His power, as to declaring war and making peace, is as unlimited as the respective authorities for those purposes in the United States. The whole nation of Great Britain speaks as effectually, and as completely, through him, as all the people of the United States can now speak through congress, as to a declaration of *war, or through the president and senate as to making peace; and of course, as they ever did through congress, under the old articles of confederation, the power certainly not being lessened. The law of nations equally applies to his treaties on behalf of Great Britain, as it can apply to any treaty made on behalf of the United States. Yet, I believe, it is an invariable practice in that country, when the king makes any stipulation of a legislative nature, that it is carried into effect by an act of parliament. The parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; but until such laws are passed, the system of law, entitled to actual obedience, remains, *de facto*, as before.[1]

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I doubt not, if my time had admitted of a full search, and I could have had access to the proper books for information, that I could find many instances of this. I will, however, mention one, which I have been able to procure here. It is a transaction of this nature, so late as the commercial treaty between Great Britain and France, in 1786. The information I derive is from the Annual Registers of 1786 and 1787, which I suppose, as to this point, are correct. One article of the treaty was in these words: "The wines of France, imported directly from France to Great Britain, shall, in no case, pay any higher duties than those which the wines of Portugal

[1] See Foster *v.* Neilson, 2 Pet. 253; Jones *v.* Walker, 2 Paine 688.

now pay." This treaty was signed at Versailles, the 26th of September 1786. On the 24th of January 1787, the king met his parliament, and among other things, informed the two houses, "That he had concluded a treaty of commerce with the French king, and had ordered a copy of it to be laid before them. He recommended, as the first object of their deliberation, the necessary measures for carrying it into effect; and expressed his trust, that they would find the provisions contained in it, to be calculated for the encouragement of industry, and the extension of lawful commerce in both countries; and by promoting a beneficial intercourse between their respective inhabitants, likely to give additional permanency to the blessings of peace." On the 15th of February, the house of commons being in a committee of the whole house, Mr. Pitt, the principal minister of the crown, moved the following resolution: "That the wines of France be imported into this country upon as low duties, as the present duties paid on the importation of Portugal wines."

I have not had time to examine them all, but I doubt not, it will be found, on inspection, that there was not a single provision *in the treaty, inconsistent with former parliamentary regulations, but parliament acted upon it by a new law, calculated to give it effect. The following quotation (which is a literal one), I think, is very much to the purpose: "On the Monday following, the report of the committee upon the commercial treaty, was brought up, and on the usual motion being made, that the house do agree to the same, notice was taken of the omission of the mention of Ireland, both in the treaty and the tariff; and it was asked, whether or no she was understood to be included in it? To this question, Mr. Pitt replied, that Ireland was undoubtedly entitled to all the benefits of the treaty; but it was entirely at her own option, whether she would choose to avail herself of those advantages; for it was only to be done, by her passing such laws as should put the tariff on the same footing in that country, as it was stipulated should be done in this. Had the adoption of the treaty by Ireland been a stipulation necessary to be performed, before it could be finally concluded on in this country, then this country would have been deprived of all the benefits resulting from it, in the event of Ireland's refusal." [*275

Now, it is observable, that in speaking of this tariff, in the treaty, the king of Great Britain does not promise, that the parliament shall pass laws to such an effect; but the language is thus: "The two high contracting parties have thought proper to settle the duties on certain goods and merchandises, in order to fix invariably the footing on which the trade therein shall be established between the two nations. In consequence of which, they have agreed upon the following tariff, &c.," viz. In another part, the king of Great Britain says, "His Britannic majesty reserves the right of countervailing, by additional duties on the under-mentioned merchandises, the internal duties actually imposed upon the manufactures, or the import duties which are charged on the raw materials; namely, on all linens or cottons, stained or painted, on beer, glass-ware, plate-glass and iron." Here is no mention of the parliament, and yet, no man living will say that a bare proclamation of the king, upon the ground of the treaty, would be an authority for the levying of any duties whatever; but it must be done in the constitutional mode, by act of parliament, which affords an additional proof, that where anything of a legislative nature is in contemplation, it is

constantly implied and understood (without express words), that it can alone be effected by the medium of the legislative authority.

*276] *That this practice I have noticed, is not an occasional one, but has been constantly observed, I think, is highly probable, from this circumstance; that if treaties were considered in that country as *ipso facto* repealing all laws inconsistent with them, and imposing new ones, they ought to be bound up with the statutes at large (which they never have been); otherwise, the publication would be at least incomplete, if not deceitful.

These examples from Great Britain I consider of very high authority, as they are taken from a kingdom equally bound by the law of nations as we are; possessing a mixed form of government as we do; and, so far as common principles of legislation are concerned, being the very country from which we derive the rudiments of our legal ideas.

But I must admit, that there is also a very high authority, and to which we naturally should be more partial, against this construction. It is the authority of the congress of the United States, in the year 1787. It is an authority derived from an unanimous opinion of that truly respectable body, conveyed in a circular letter from congress to the different states on this very subject. I bow with proper difference to that great authority: but I should be unworthy of the high station I hold, if I did not speak my real sentiments as a judge, uninfluenced by any authority whatsoever. It is certain, that in this particular, congress were not exercising a judicial power; and therefore, the opinion is not conclusive on any court of justice. I feel, however, some consolation in differing from an opinion for which so much respect must, and ought to be entertained, by reflecting that though this was the unanimous opinion of congress, it was not the unanimous opinion of the people of the United States. So far from it, that I believe no suit was ever maintained in any court in the United States, merely on the footing of the treaty, when an act of the legislature stood in the way. It was to remove the obstacle arising from such an opinion, that congress recommended the repeal of all acts inconsistent with the due execution of the treaty. And I must, with due submission, say, that in my opinion, without such a repeal, no British creditor could have maintained a suit in virtue of the treaty, where any legislative impediment existed, until the present constitution of the United States was formed.

II. The article in the constitution concerning treaties I have always considered, and do now consider, was in consequence of the conflict of opinions I have mentioned on the subject of the treaty in question. It was found, in this instance, as in many others, that when thirteen different legislatures were necessary to act in unison on many occasions, it was in vain to expect that they would always agree to act as congress might think it their duty to

*277] require. Requisitions formerly *were made binding in point of moral obligation (so far as the amount of money was concerned, of which congress was the constitutional judge), but the right and the power being separated, it was found often impracticable to make them act in conjunction. To obviate this difficulty, which every one knows had been the means of greatly distressing the Union, and injuring its public credit, a power was given to the representatives of the whole Union to raise taxes, by their own authority, for the good of the whole. Similar embarrassments had been

found about the treaty: this was binding in moral obligation, but could not be constitutionally carried into effect (at least in the opinion of many), so far as acts of legislation then in being constituted an impediment, but by a repeal. The extreme inconveniencies felt from such a system dictated the remedy which the constitution has now provided, "that all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and that the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Under this constitution, therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also, by the vigor of its own authority, to be executed in fact. It would not otherwise be the supreme law, in the new sense provided for, and it was so before, in a moral sense.

The provision extends to subsisting as well as to future treaties. I consider, therefore, that when this constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.

Before I go to the consideration of the words of the treaty itself, I think it material to say a few words as to the operation which an actual repeal would have had. I believe, no one will doubt, that everything done under the act, while in existence, so far as private rights, at least, were concerned, would have been unaffected by the repeal. If a statute requires a will of lands to be executed in the presence of two witnesses, and a will is actually executed in that manner, and the statute is afterwards repealed, and three witnesses are made necessary, the will executed in the presence of two others, when the former statute was in being, would be undoubtedly good; and if I am not mistaken, a will made according to a law in being has been held good, even though the devisor died after an alteration of it. Of this, however, I am not sure; but the general position, I imagine, will not be questioned.[1]

*Let us now see the words of the treaty. They are these: "It [*278 is agreed, that creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." The meaning of this provision may, perhaps, be better considered, by an analyzation of its parts, so far as they concern the question before us.

1. *Creditors:* There can be no creditor, without two correlatives, a debtor and a debt. *Primâ facie*, therefore, if a debtor has been discharged, he is not the person whom any other person can sue as a creditor. This probably may be fairly applied to the present defendant, who, as a debtor, was discharged by legal authority. With regard to the debt, *that*, in the present instance, was not extinguished even by the act of the state, because the right of the creditor to the money was not taken away. The debt, therefore, remains, but not from the same debtor. The state may be considered as substituting itself, in some measure, in the place of the debtor.

[1] See Mullen *v.* McKelvy, 5 Watts 399; Greenough, 11 Penn. St. 489; Barr *v.* Graybill, Murry *v.* Murry, 6 Id. 353; Greenough *v.* 13 Id. 396; Shinkle *v.* Crock, 17 Id. 159.

The full effect of that substitution, I am not now to consider, nor would it be proper for me, at present, to give an opinion upon it. The question is not, whether the creditor is entitled to his money, or in what manner, but whether he is entitled to recover it against the present defendant.

2. *No lawful impediment:* These words must be construed as relative to the former; for the whole clause must be taken together. Therefore, where there are a creditor and a debtor, there is to be no lawful impediment to the former recovering against the latter. If the present defendant be not a debtor to the plaintiff, how can the treaty operate as against him? The words "lawful impediment," may admit of two senses. One, "any lawful impediment whatsoever, arising from any act done to the prejudice of a creditor's right, during the war." I add that restriction, "during the war," because the rules of construction as to treaties, must narrow the words as to the object, the war, the affairs of which the treaty of peace was intended to operate upon. Or, "any impediment arising from any law then in being, or thereafter to be passed, to the prejudice of a creditor's right." The latter, I think, is not an unnatural construction, and would give the words great operation, and I think is to be preferred to the former, for the following reasons:

1st. This would stipulate for what each legislature of the Union would
*279] rightfully and honestly do, relinquish public claims * to debts existing before the war, and which otherwise might have stood upon a precarious footing; for though peace alone would do away a common-law disability to sue, yet, I apprehend, it would not *ipso facto* remove a disability expressly created by statute, much less extinguish any public right acquired under any act of confiscation.

2d. Though congress possibly might, as the price of peace, have been authorized to give up even rights fully acquired by private persons during the war, more especially, if derived from the laws of war only, against the enemy, and in that case, the individual might have been entitled to compensation from the public, for whose interests his own rights were sacrificed; yet, nothing but the most rigorous necessity could justify such a sacrifice; such a sacrifice is not to be presumed even to have been intended, under the operation of general words, not making such a construction unavoidable. For, it is reasonable to infer, that in such a case special words would have been used to obviate the least colorable doubt. Thus (for example), if it was stipulated in a treaty of peace between two European powers, "that all ships taken during the war should be restored," I imagine, this would not be construed to include ships taken by privateers, and legally condemned during the war, unless it had, in fact, happened that no other ships had been taken, and then, I suppose, they would be understood as comprehended, and their own nation must have indemnified them.

3d. If, according to the practice in Great Britain, in conformity to the law of nations, and upon the principles of a mixed government, in case any impediments had then existed, by acts of parliament in Great Britain, to the recovery of American debts, such impediments could only have been removed by a repeal, we may presume the British negotiator had reason to conclude, that the lawful impediments in this country could only be removed in the same manner; and if so, may we not fairly say, that the impediments in view could be no other than such as the legislatures in the respective coun-

tries could do away by a repeal, or might by subsequent laws enact? If they wanted a further act of legislation, grounded not merely on ordinary legislative authority, but upon power to destroy private rights acquired under legislative faith, long since pledged and relied on, very special words were proper to effect that object, and neither in one country nor the other, could it have been effected, with the least color of justice, but by providing at the same time the fullest means of indemnification.

4th. This construction derives great weight, from the recommendatory letter of congress, I before mentioned, for I will venture to say, had the act they recommended been passed in *the state, in the very words they recommended, they would not have had efficacy enough to [*280 destroy those payments as a bar. And yet, if congress thought such a case ought to have been comprehended, I presume, they would have recommended a special provision, clearly comprehending such cases, and accompanied with a full indemnity.

I said, the words of the treaty would have great operation, without giving them the very rigorous one contended for. And that will more fully appear when we take up the remaining words, viz.:

3. "To the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted." The operation (exclusive of these payments) would, therefore, be this: 1st. All creditors whose debts had not been confiscated, or where the confiscations were not complete, and no payments had been made, would have a right of recovering their debts. 2d. Perhaps, all creditors, whether their debts were confiscated or not, or whether confiscations were complete or not, excepting those only from whom the government had received the money, would be entitled to recover, because, undoubtedly, the respective legislatures were competent to restore all these. 3d. Another object, of no small importance, was to secure the payment of all these debts, in sterling money, so that the creditors might not suffer by paper currency, either then in existence, or that might be thereafter emitted.

When these general words, therefore, can comprehend so many cases, all reasonable objects of the article, I cannot think, I am compelled, as a judge, and therefore, I ought not to do so, to say, that the general words of this article shall extinguish private as well as public rights. I hold public faith so sacred, when once pledged, either to citizens or to foreigners, that a violation of that faith is never to be inferred as even in contemplation, but when it is impossible to give any other reasonable construction to a public act. I do not clearly see, that it was intended in the present instance. I cannot, therefore, bring myself to say, that the present defendant, having once lawfully paid the money, shall pay it over again. If the matter be only doubtful, I think, the doubt should incline in favor of an innocent individual, and not against him. I should hope that the present plaintiff will still receive his money, as his right to the money certainly has not been divested, but I think, for all the reasons I have given, he is not entitled to recover it from the present defendant.

My opinion, therefore, on the whole of this case is, that judgment ought to be given for the defendant upon the second plea; upon the third, fourth and fifth, for the plaintiff.

*Wilson, Justice.—I shall be concise in delivering my opinion, as [*281 it depends on a few plain principles.

If Virginia had a power to pass the law of October 1777, she must be equally empowered to pass a similar law, in any future war; for the powers of congress were, in fact, abridged by the articles of confederation; and in relation to the present constitution, she still retains her sovereignty and independence as a state, except in the instances of express delegation to the federal government.

There are two points involved in the discussion of this power of confiscation: the first arising from the rule prescribed by the law of nations; and the second arising from the construction of the treaty of peace.

When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable: and we know, that not a single confiscation of that kind stained the code of any of the European powers, who were engaged in the war which our revolution produced. Nor did any authority for the confiscation of debts proceed from congress (that body, which clearly possessed the right of confiscation, as an incident of the powers of war and peace), and therefore, in no instance can the act of confiscation be considered as an act of the nation.

But even if Virginia had the power to confiscate, the treaty annuls the confiscation. The fourth article is well expressed to meet the very case: it is not confined to debts existing at the time of making the treaty; but is extended to debts heretofore contracted. It is impossible, by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the constitution of the United States (which authoritatively inculcates the obligation of contracts), the treaty is sufficient to remove every impediment founded on the law of Virginia. The state made the law; the state was a party to the making of the treaty: a law does nothing more than express the will of a nation; and a treaty does the same.

Under this general view of the subject, I think, the judgment of the circuit court ought to be reversed.

Cushing, Justice.—My state of this case will, agreeable to my view of it, be short. I shall not question the right of a state to confiscate debts. Here is an act of the assembly of Virginia, passed in 1777, respecting debts; which, contemplating to prevent the enemy deriving strength by the receipt of them during the war, provides, that if any British debtor will pay his
*282] debt into the loan-office, obtain a certificate and *receipt as directed, he shall be discharged from so much of the debt. But an intent is expressed in the act not to confiscate, unless Great Britain should set the example. This act, it is said, works a discharge and a bar, to the payer. If such payment is to be considered as a discharge, or a bar, so long as the act had force, the question occurs—was there a power, by the treaty, supposing it contained proper words, entirely to remove this law, and this bar, out of the creditor's way? This power seems not to have been contended against, by the defendant's counsel; and indeed, it cannot be denied; the treaty having been sanctioned, in all its parts, by the constitution of the United States, as the supreme law of the land.

Then arises the great question, upon the import of the fourth article of

the treaty: And to me, the plain and obvious meaning of it goes to nullify, *ab initio*, all laws, or the impediments of any law, so far as they might have been designed to impair or impede the creditor's right or remedy against his original debtor. "Creditors on either side shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all *bonâ fide* debts heretofore contracted."

The article, speaking of creditors, and *bonâ fide* debts heretofore contracted, plainly contemplates debts, as originally contracted, and creditors and original debtors; removing out of the way all legal impediments; so that a recovery might be had, as if no such laws had particularly interposed. The words—"recovery of the full value, in sterling money," if they have force or meaning, must annihilate all tender laws, making anything a tender but sterling money; and the other words, or, at least, the whole taken together, must, in like manner, remove all other impediments of law aimed at the recovery of those debts.

What has some force to confirm this construction, is the sense of all Europe, that such debts could not be touched by states, without a breach of public faith: and for that, and other reasons, no doubt, this provision was insisted upon, in full latitude, by the British negotiators. If the sense of the article be as stated, it obviates, at once, all the ingenious, metaphysical reasoning and refinement upon the words, debt, discharge, extinguishment, and affords an answer to the decision made in the time of the *interregnum*—that payment to sequestrators, was payment to the creditor.

A state may make what rules it pleases; and those rules must necessarily have place within itself. But here is a treaty, the supreme law, which overrules all state laws upon the subject, to all intents and purposes; and that makes the difference. Diverse objections are made to this construction: that it is an odious one, and as such, ought to *be avoided: that [*283
treaties regard the existing state of things: that it would carry an imputation upon public faith: that it is founded on the power of eminent domain, which ought not to be exercised, but upon the most urgent occasions: that the negotiators themselves did not think they had power to repeal laws of confiscation; because they, by the 5th article, only agreed, that congress should recommend a repeal to the states.

As to the rule respecting odious constructions; that takes place where the meaning is doubtful, not where it is clear, as I think it is, in this case. But it can hardly be considered as an odious thing, to enforce the payment of an honest debt, according to the true intent and meaning of the parties contracting; especially, if, as in this case, the state, having received the money, is bound in justice and honor, to indemnify the debtor, for what it in fact received. In whatever other lights this act of assembly may be reviewed, I consider it in one, as containing a strong implied engagement on the part of the state, to indemnify every one who should pay money under it, pursuant to the invitation it held out. Having never confiscated the debt, the state must, in the nature and reason of things, consider itself as answerable to the value. And this seems to be the full sense of the legislators upon this subject, in a subsequent act of assembly; but the treaty holds the original debtor answerable to his creditor, as I understand the matter. The state, therefore, must be responsible to the debtor.

These considerations will, in effect, exclude the idea of the power of

eminent domain; and if they did not, yet there was sufficient authority to exercise it, and the greatest occasion that perhaps could ever happen. The same considerations will also take away all ground of imputation upon public faith.

Again, the treaty regarded the existing state of things, by removing the laws then existing, which intended to defeat the creditor of his usual remedy at law.

As to the observations upon the recommendatory provision of the 5th article; I do not see that we can collect the private opinion of the negotiators, respecting their powers, by what they did not do: and if we could, this court is not bound by their opinion, unless the reasons on which it was founded, being known, were convincing. It would be hard upon them, to suppose they gave up all, that they might think they strictly had a right to give up. We may allow somewhat to skill, policy and fidelity.

With respect to confiscations of real and personal estates, which had been completed, the estates sold, and perhaps, passed through the hands of a number of purchasers, and improvements made upon real estates, by the then possessors; they knew, that to give them up absolutely, must create much confusion in this *country. Avoiding that (whether from an apprehension of want of power does not appear from the instrument), they were led only to agree, that congress should recommend a restitution, or composition. The 4th article, which is particularly and solely employed about debts, makes provision, according to the doctrine then held sacred by all the sovereigns of Europe.

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Although our negotiators did not gain an exemption for individuals, from *bonâ fide* debts, contracted in time of peace, yet they gained much for this country: as rights of fishery, large boundaries, a settled peace, and absolute independence, with their concomitant and consequent advantages: all which, it might not have been prudent for them to risk, by obstinately insisting on such exemption, either in whole or in part, contrary to the humane and meliorated policy of the civilized world, in this particular.

The 5th article, it is conceived, cannot affect or alter the construction of the 4th article. For, first, it is against reason, that a special provision made respecting debts by name, should be taken away immediately after, in the next article, by general words, or words of implication, which words, too, have, otherwise, ample matter to operate upon. 2d. No implication from the 5th article can touch the present case, because that speaks only of actual confiscations, and here was no confiscation. If we believe the Virginia legislators, they say, "We do not confiscate—we will not confiscate debts, unless Great Britain sets the example"—which it is not pretended she ever did.

The provision, that "creditors shall meet with no lawful impediment," &c., is as absolute, unconditional and peremptory, as words can well express, and made not to depend on the will and pleasure, or the optional conduct, of any body of men whatever.

To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law, by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree. The treaty, then, as to the point in question, is of equal force with the constitution itself; and

certainly, with any law whatsoever. And the words, "shall meet with no lawful impediment," &c., are as strong as the wit of man could devise, to avoid all effects of sequestration, confiscation, or any other obstacle thrown in the way, by any law, particularly pointed against the recovery of such debts.

I am, therefore, of opinion, that the judgment of the circuit court ought to be reversed.

*By the Court.—All and singular the premises being seen by the court here and fully understood, and mature deliberation had thereon, [*285 because it appears to the court now here, that in the record and process aforesaid, and also in the rendition of the judgment aforesaid, upon the demurrer to the rejoinder of the defendants in error, to the replication of the second plea, it is manifestly erred, it is considered, that the said judgment, for those errors and others in the record and process aforesaid, be revoked and annulled, and altogether held for nought, and it is further considered by the court here, that the plaintiff in error recover against the defendants, 2976*l.* 11*s.* 6*d.* good British money, commonly called sterling money, his debt aforesaid, and his costs by him about his suit in this behalf expended, and the said defendants, in mercy, &c. But this judgment is to be discharged by the payment of the sum of $596, and interest thereon, to be computed after the rate of five per cent. *per annum*, from the 7th day of July 1782, until payment, besides the costs, and by the payment of such damages as shall be awarded to the plaintiff in error, on a writ of inquiry to be issued by the circuit court of Virginia, to ascertain the sum really due to the plaintiff in error, exclusively of the said sum of $596, which was found to be due to the plaintiff in error, upon the trial in the said circuit court, on the issue joined upon the defendant's plea of payment, at a time when the judgment of the said circuit court on the said demurrer was unreversed and in full force and vigor; and for the execution of the judgment of the court, the cause aforesaid is remanded to the said circuit court of Virginia.

Judgment reversed.

Den Onzekeren.

Geyer *et al. v.* Michel *et al.*, and The Ship Den Onzekeren.

Neutrality.

The mere replacement of the guns of a foreign privateer, in a neutral port, is not an augmentation of her force.[1]

This was a writ of error to the Circuit Court for the district of South Carolina; and on the return of the record, the following pleadings appeared:

*On the 2d of February 1795, a libel was filed by the plaintiffs in error, stating, that the ship Den Onzekeren and her cargo, on the 16th [*286 of November 1794, were, and ever since had been, the property of Spooner

[1] The Phœbe Anne, *post*, p. 319. As to what amounts to the augmentation of the force of a foreign privateer in our ports, see United States *v.* Grassen, 3 W. C. C. 65; The Nancy, Bee 73; The Brothers, Id. 76; The Betty Cathcart, Id. 392.