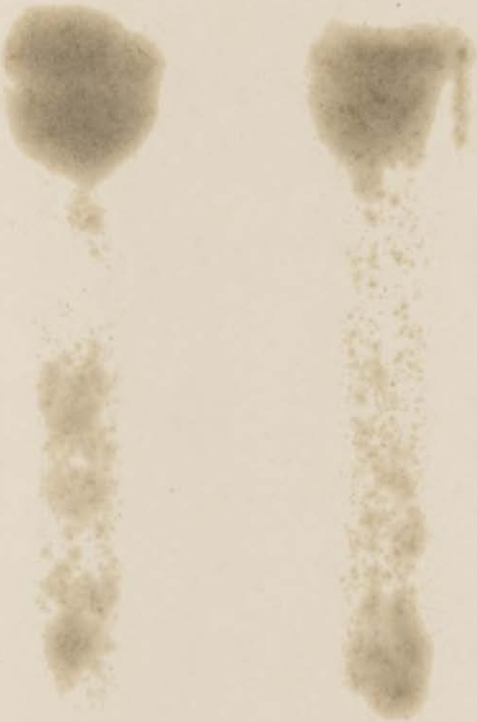

REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

SUPREME COURT

OF THE

UNITED STATES,

JANUARY TERM 1837.

By RICHARD PETERS,

COUNSELLOR AT LAW AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. XI.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHTLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING CO.
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1909

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE PERIOD OF THESE REPORTS.

Hon. ROGER B. TANEY, Chief Justice.

" JOSEPH STORY,
" SMITH THOMPSON,
" JOHN MCLEAN,
" HENRY BALDWIN,
" JAMES M. WAYNE,
" PHILIP P. BARBOUR,

} Associate Justices.

BENJAMIN F. BUTLER, ESQ., Attorney General.

WILLIAM T. CARROLL, Clerk.

ALEXANDER HUNTER, Marshal.

RICHARD PETERS, Reporter.

A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

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A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The References are to the Star *pages.

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RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

RULE No. 44.

When a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel. 1837.

Allotment of the Circuits.

There having been a chief justice and one associate justice of this court appointed since its last session, it is ordered, that the following allotment be made of the chief justice and the associate justices of the said supreme court, among the circuits, agreeable to the act of congress in such case made and provided; and that such allotment be entered on record, viz:

For the first Circuit,	Hon. Joseph Story.
" second Circuit,	" Smith Thompson.
" third Circuit,	" Henry Baldwin.
" fourth Circuit,	" Roger B. Taney, Ch. Justice.
" fifth Circuit,	" Philip P. Barbour.
" sixth Circuit,	" James M. Wayne.
" seventh Circuit,	" John McLean.

CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1837.

*Lessee of Joseph Marlett, Plaintiff in error, *v.* John Silk and John McDonald.

State decisions.

A tract of land, situated in that part of the state of Pennsylvania, which, by the compact with the state of Virginia, of 1780, was acknowledged to be within the former state, was held under the provisions of an act of assembly of Virginia, passed in 1779, by which actual *bonâ fide* settlers, prior to 1778, were declared to be entitled to the land on which the settlement was made, not exceeding four hundred acres; the settlement was made in 1772. On this tract, in the year 1786, a survey was made, and returned into the land-office of Pennsylvania, and a patent was granted for the same; the title set up by the defendants in the ejectment was derived from two land-warrants from the land-office of Pennsylvania, dated in 1773, under which surveys were made in 1778, and on which patents were issued on the 9th of March 1782. The compact confirms private property and rights existing previous to its date, under and founded on, and recognised by, the laws of either state, falling within the other; preference being given to the elder or prior right; subject to the payment of the purchase-money required by the laws of the state in which they might be, for such lands. *Held*, that the title derived under the Virginia law of 1779, and afterwards perfected by the patent from Pennsylvania, in 1788, was a valid title and superior to that asserted under the warrants of 1773, and the patent founded on them, and issued in 1782.

*The title derived under the act of the legislature of Virginia, of 1779, commenced in 1772, when the settlement was made; and therefore, stands as a right, prior in its commencement to that originating under the warrant of 1773. The question of the title between the contending parties is not to be decided by the laws or decisions of either Pennsylvania or Virginia, but by the compact of 1780. [*2

The principles on which the case of Jackson *v.* Chew, 12 Wheat. 163, are decided, are not affected by the decisions of the court in this case. In the case of Jackson *v.* Chew, the court said, that it adopted the state decisions, when applicable to the title of lands; that was in a case the decision of which depended on the laws of the state, and on their construction by the tribunals of the state. In the case at bar, the question arises under, and is to be decided by, a compact between two states, where the rule of decision is not to be collected from the decisions of either state, but is one of an international character.

ERROR to the District Court for the Western District of Pennsylvania. The plaintiff in error, a citizen of the state of Ohio, instituted an action of ejectment against the defendants, at October term 1831, to recover a tract of land situated in Allegheny county, Pennsylvania; and the case was tried before the district court for the western district of Pennsylvania, in October 1835. A verdict and judgment, under the charge of the court, were rendered in favor of the defendants, and the plaintiff having taken exceptions to the charge, prosecuted this writ of error.

The case, as stated in the opinion of this court, was as follows:—Thomas Watson, under whom the plaintiff in error claimed, on the 25th of April 1780, obtained from certain commissioners of Virginia, a certificate, entitling him to 400 acres of land, by virtue of an act of assembly of Virginia, passed in May 1779; the fourth section of which, after reciting that great numbers of people had settled in the country upon the western waters, upon waste and unappropriated land, for which they had been hitherto prevented from suing out patents, or obtaining legal titles, &c., enacted, "that all persons who, at any time before the first day of January, in the year 1778, have really and *bonâ fide* settled themselves, or their families, or at his, or her, or their charge, have settled others, upon any waste or unappropriated lands on the said western waters, to which no other person hath any legal right or claim, shall be allowed, for every family 400 acres of land, or such smaller quantity as the party chooses to include in such settlement." This certificate
*3] was granted in right of a *settlement which had been made by Watson, in the year 1772. This evidence of right under Virginia, was subsequently transferred to the land office of Pennsylvania (the land having, under a compact between that state and Virginia, been ascertained to be within the limits of Pennsylvania), and on the first of November 1786, a survey of his claim was made and returned to the land-office of that state, and a patent issued thereon by that state, in the year 1791, including the settlement made in 1772, and including the land in controversy. The defendants claimed under Edward Hand, who, by virtue of two land-warrants, granted by Pennsylvania, one for 300 acres, dated 24th November 1773, the other, for the same quantity, dated 27th November 1773, caused surveys to be made on both, on the 21st January 1778, and on the 9th of March 1782, obtained patents on both surveys, embracing the land in controversy.

Both Pennsylvania and Virginia having claimed the territory, of which the land in controversy was a part, as being within their limits, the dispute was finally adjusted by a compact made between them, which was ratified by Virginia on the 23d of June 1780, with certain conditions annexed; and absolutely, by Pennsylvania, on the 23d of September 1780, with an acceptance of the conditions annexed by Virginia. The compact declared, "that the private property and rights of all persons acquired under, founded on, or recognised by, the laws of either country, previous to the date hereof, shall be secured and confirmed to them, although they should be found to fall within the other; and that in disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under; such persons paying to the said states, in whose boundary the same shall be included, the same purchase or consideration money, which would have been due from them to the state under which they claimed the right."

The case was presented to the court, on printed arguments, by *Forward* and *Fetterman*, for the plaintiff in error; and by *Ross*, for the defendants.

It was contended for the *plaintiff*, that, in the construction given, the district court had erred. The rights of the parties to this cause will turn upon the construction that may be given to the compact for the settlement of *boundaries, entered into between Virginia and Pennsylvania, [*4
in the year 1780, and finally ratified in 1784. 2 Smith's Laws 261; *Sims's Lessee* v. *Irvine*, 3 Dall. 426. "It was a condition of the compact, that the private property and rights of all persons acquired under, founded on, or recognised, by the laws of either country, previous to the date hereof, be secured and confirmed to them, although they should be found to fall within the other, and that in disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under; such persons paying to the states within whose boundary their lands shall be included, the same purchase or consideration money, which would have been due from them to the state under which they claimed the right."

Thomas Watson, in 1772, entered, with his family, on a tract of vacant land, of which the land in dispute is a part; he continued to reside on and cultivate the tract, until his death in 1806; he sold, from time to time, parcels of this land; and in the year 1790, transferred and conveyed part of the tract, including his mansion-house and improvements. At the same time, he removed to the piece now in dispute, where he built a house, commenced a new clearing, and resided until his death. His heirs, and those claiming under them, continued the possession, until expelled by the sheriff, under a writ *habere facias possessionem*, issued in 1830, pursuant to a judgment obtained in the case of *Brien* v. *Elliot* (2 P. & W. 49). Whether Watson entered on the lands originally, as a Virginia settler, did not appear. But the land commissioners of that state being in his neighborhood, he appeared before them, on the 25th of April 1780, and caused his claim to be entered agreeable to the requisition of an act of assembly of Virginia, passed in May 1779, § 8, 10. (Henning's Statutes at Large, p. 42–3, 45–6.) After the ratification of the compact, in 1784, his Virginia entry was transferred to the land-office of Pennsylvania; and on the first of November 1786, a survey of his claim was made, returned and accepted in the land-office, and a patent issued in 1791. The amount of purchase-money paid by Watson to the state of Pennsylvania, was the same that he would have paid to the state of Virginia, had his title been completed in that state.

The defendant gave in evidence three Virginia entries, dated in February 1780. Upon these entries, no surveys had ever been made, nor had the inceptive equity, *which they are alleged to have conferred, been [*5
prosecuted in any way by the owners or holders thereof. It was not shown, that those entries described or called for the land in dispute; nor did it appear in evidence, that the improvement, which, by the law of Virginia, was made the basis of a Virginia entry, had ever been made. Having no legal foundation, and being moreover abandoned, the defendant's Virginia entries are regarded as mere nullities, and undeserving of further notice.

The defendant's title rest upon warrants issued by the land-office of

Pennsylvania, on the 24th of November 1773, surveyed in January 1778, and patented the 9th of March 1782; and the important question is this, whether, under the compact between Pennsylvania and Virginia, this title is to be preferred to that of Watson, which, although perfected by a patent from the government of Pennsylvania, was, in its inceptive state, recognised by the state of Virginia. It is admitted by the court below, that if Watson had waived his Virginia entry, and prosecuted his earlier settlement right under Pennsylvania, there could be no doubt of the plaintiff's right to recover. "Watson had it in his power to obtain a warrant from Pennsylvania, and to charge himself with interest from the date of his settlement; if he had done so, his survey, made under such warrant, would have given him the preference; but having his election, he chose to resort to a Virginia entry in 1780, thereby asserting a different jurisdiction, &c." A like concession is found in the opinion of the chief justice of the supreme court of Pennsylvania. "As an improver under Pennsylvania, Watson might have appropriated the land in dispute, by a survey, in a reasonable time." This improvement was begun in the year 1760 (1772), "but as a Pennsylvania settler, he had no survey at all." (2 P. & W. 60.) It is proper to remark here, that in Pennsylvania, a right founded on a prior actual settlement which has not been abandoned, is just as valid in law as a right vested by a prior warrant or patent. "Title by settlement and improvement, is now as well established as any species of title in Pennsylvania; and very often has been preferred to warrant, survey and patent.'" *Lessee of Bonnet* v. *Devebaugh*, 3 Binn. 175; *Nicholls* v. *Lafferty*, 3 Yeates 272; *Lessee of Elliot* v. *Bonnet*, 3 Ibid. 287.

It is not even necessary to the validity of a settlement right, so long as the settler remains in actual possession, that his boundaries be defined by an official survey; and if encroached upon, or expelled from his possession, he may recover in ejectment. *Davis* v. **Keefer*, 4 Binn. 161, and *Gilday* v. *Watson*, 2 S. & R. 410. The only difficulty is, that without a survey, the claim of the settler is so indefinite, that an action cannot be supported, by reason of the uncertainty of the land to be recovered. But in the first place, it cannot be denied, that the land on which a man has built a house, and that also which has been cultivated and inclosed by him, may be ascertained with absolute certainty. Neither do we think it can be denied, that in the case now under consideration, the claim of the settler may be reduced to certainty, because it is bounded by the lines of adjoining surveys. So likewise may a claim by a settlement be precisely ascertained, when the settler has defined his limits by an unofficial survey, marked on the ground, and made known to the neighborhood: TILGHMAN, Ch. J., in *Luck* v. *Duff*, 6 S & R. 191. The holder of a later warrant is not permitted to encroach upon a prior settler, and cut off land adjacent to his improvement, under the pretext that there is surplus land, and that the settler can fill his claim in another direction. Such encroachment was held unlawful, although made in 1814, upon a settlement which commenced in 1775, and upon which no legal survey had ever been made: *Blair* v. *McKee*, 6 S. & R. 193; and the same principle is recognised in *Creek* v. *Moon*, 7 Ibid. 330, 335.

*6]

These cases show how settlement-rights have been appreciated in Pennsylvania. They demonstrate not only that Watson, by waiving his Virginia

entry, and obtaining a warrant and patent under Pennsylvania, might have held the lands against the patents of the defendants, but that by waiving his Virginia entry, he might have held it under his actual settlement alone. Had a controversy arisen in a Pennsylvania court, between Watson and Hand, prior to the ratification of the compact in 1784, Watson's settlement-right would have been adjudged, without hesitation, to be valid; and Hand's title would have been treated as a nullity. The fact, if true, that Watson originally settled under what he supposed to be the rightful jurisdiction of Virginia, or that he had acknowledged her jurisdiction, by appearing before her land-commissioners, and procuring an entry of his land, would not have impaired, or in the least affected the merits of his settlement-title. Pennsylvania always favored and encouraged actual settlements, and they were sanctioned and held sacred, without any inquiry as to the opinion which the settlers might have entertained upon the abstruse and doubtful question of state jurisdiction. Had Pennsylvania receded from the contest, and yielded to Virginia, without any compact, the territory which [*7
included the land in dispute, Watson's title would have been unquestionable. For although it may be true, that before the passage of the Virginia act of May 1779, the land in dispute might have been entered and patented under that state, by any person, notwithstanding a prior settlement by another; and although the same act of assembly of 1779 may "apply only to controversies between mere settlers;" yet the fourth section of that act enacts, "that all persons who, at any time before the first day of January 1778, have really and *bonâ fide* settled themselves and their families upon any waste lands on the said western waters, to which no other person hath any legal right, a claim shall be allowed for every family so settled, of 400 acres of land:" and as Watson had really and *bonâ fide* settled himself, with his family, on the lands in dispute, in 1772; was residing on it as a *bonâ fide* settler, in January 1778, and May 1779, he was, therefore, entitled, as a settler, to the protection of the act, until a superior title by settlement, warrant or patent, under Virginia, should appear against him. No such superior title has been shown to have existed in General Hand; and as against him, Watson's title, in a Virginia court, would have been valid and undeniable. How then does it happen, that this title, which in the absence of the compact would have prevailed, without difficulty, in the courts of either state, is, under and by the compact, rendered worthless? The reason assigned by the court below for this strange result is, that Watson, instead of obtaining a warrant from Pennsylvania, has lost his preference, by resorting to his Virginia entry, and thereby asserting a different jurisdiction.

Had the compact been less careful in saving and preserving the rights of property originating under the respective governments, than we find it to be; had the claimants under Virginia been thrown upon the courtesy or compassion of Pennsylvania, without a guarantee or stipulation in their behalf; it might be very properly urged, that a party who persisted in holding on to his bad title, because it was the cheapest, should not have the benefit of a good one, which he had thereby repudiated. But the compact is not silent on the subject of Virginia claimants. Their rights are anxiously guarded by clauses which would seem to exclude the possibility of their being either postponed or frittered away by any effort of construction. "The private property and rights of all persons acquired under or *re- [*8

cognised by the laws of either country, are saved and confirmed to them, although they should fall within the other; and preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under, such person paying the same purchase-money which would have been due to the state under which they claimed the right." The reasoning of the court below is repugnant, not only to the sense and spirit of the above provision in the compact, but is flatly opposed to its words. If Watson could not, without disadvantage or peril, obtain a patent upon his settlement and Virginia entry, on paying the price originally due to Virginia; then the stipulation which proposed to set forth the terms upon which all his rights should be saved, was a mere decoy or trap. The injustice of this exposition is not limited to settlers under Virginia; it would be equally fatal to the claim founded upon warrants and surveys under that state. The right to perfect such title by a patent from Pennsylvania, on payment of the Virginia price of the land, if not already paid, rests upon a footing neither broader nor more safe, than that of the settler with a Virginia entry. The rights of both are secured by the same words; and if the non-payment of the Pennsylvania price of the land, with interest from the origin of the title, is a fatal delinquency in the one case, it must be equally so in the other; and the consequence must necessarily be, that the holder of a Virginia title, of any description, which has been completed by a patent from Pennsylvania, on paying the same purchase or consideration money, which would have been due from him to Virginia, must fail, in a conflict with a Pennsylvania title; although the Pennsylvania title be not the elder or prior right. These considerations show that the construction given to the compact, by the court below, is hostile to its terms; and would be, if carried out in practice, disreputable to Pennsylvania.

The titles of Watson and Hand constituted one of the subjects of controversy, in the case of *Brien* v. *Elliot*, 2 P. & W. 49. In that case, the court was equally divided; and the opinion which appears in the printed report would not, aside of its intrinsic merits, be entitled to any weight, in an inferior court of the state in which it was pronounced; much less will it be regarded here as conveying the views of the supreme court of Pennsylvania upon the question under consideration, as, under the law of Pennsylvania, one verdict and judgment are not conclusive; and it is perhaps due *to the learned chief justice, to remark, in conclusion, that his opinion may have been influenced by an unfortunate misconception of the facts of the case. He supposed the title of Hand to have originated in a location bearing date the 3d April 1768, three years *before* the settlement of Watson. But the commencement of Hand's title was the warrant of 1773, above referred to. No location was given in evidence by either party, applicable to this land. But even if it were so regarded, the construction given by that court, to the compact with Virginia, although regarded with all proper deference, would not be adopted by this court, as a matter of course. The possibility, if not the certainty, of a different and opposite construction prevailing in the courts of Virginia, makes it both proper and necessary, that the true meaning of the compact should be sought for and declared by this court, unfettered by the opinions of others. It is found, in its terms, to recognise and save every description of right. The high contracting parties designed that the benefits secured by it to the

*9]

claimants under both governments, should be equal and reciprocal; and that their titles should have, respectively, all the advantage and efficacy that could be derived under the laws of either. This is so plain, as never to have been questioned or doubted, in any case arising under the compact. In the case of *Brien* v. *Elliot*, 2 P. & W. 60–61, it is premised, as the basis of the argument of Chief Justice GIBSON, an argument which conducted him to a conclusion directly opposite to the premises from which it was drawn. His language is as follows: "Whatever may have been the case, originally, the titles of both 'states' were, as regards the question of priority, put, by the compact, exactly on a footing, and are, by a fair construction, to be treated as if they had always been so. Unless they were considered to have been, in relation to each other, valid co-existent rights from the beginning, as far as regards jurisdiction, how could there be any comparison as to dates?"

The very basis of the compact is an admission that the jurisdiction shall be taken to have been in common, and that claimants under the one state shall be entitled to the same protection against claimants under the other, "that they would be entitled to between themselves." Upon this construction of the compact, it would seem necessarily to follow, that Watson, in a contest with Hand, who claimed under Pennsylvania warrants, would be entitled to all the advantages of a Pennsylvania settler, and must, of course, prevail. But this natural inference was rejected by the learned chief justice; *and instead of allowing to Watson's improvement the merit to which, under his own proposition, it was entitled, he treats it as a [*10 mere Virginia settlement, giving no color of title till 1779; and then, by transmitting Hand's Pennsylvania warrants into Virginia warrants, he discovers, that they are the "elder or prior title." With all possible respect for the learned chief justice, we must be allowed to say, that in this instance, the use made of his own construction of the compact is most inapt and injurious. It is not true, that as against Pennsylvania warrants, Watson had no color of title, prior to 1779; as against those warrants, his title under the laws of Virginia, was valid from the date of his settlement. But the learned judge supposed, that by the compact, Hand's Pennsylvania warrants were converted into Virginia warrants; and that the rule applied in the case of *Jones* v. *Williams*, 1 Wash. 231, which was a conflict between Virginia claimants, unaffected by the compact, was decisive of the present case. We contend, however, that if, under the compact, a Pennsylvania warrant is clothed with the merit and efficacy of a Virginia warrant, a Virginia settlement is also invested with all the attributes and advantages of a Pennsylvania settlement. This is not only the clear import of the compact, but it is adopted by the learned chief justice himself; and it is only by denying to his own rule, the reciprocity secured by the compact, and dictated by every principle of reason and equity, that Watson's title can be rendered doubtful.

The learned chief justice says, that Virginia "having recognised the grants of another state as being equally valid as her own, it is fair to say, she recognised them as being attended with all the incidents of her own, against which, it appears by her own court, the doctrine of priority by relation never prevailed." This reasoning of the learned chief justice may be very pertinent and true, but if it be so, then it must follow, that Pennsyl

vania also having recognised the rights of all persons acquired under, founded on, or recognised by, the laws of Virginia, as being equally valid as her own; it is fair to say, she recognised them as being attended with all the incidents of her own: consequently, that Watson's settlement is, in the compact, recognised by her, as equally valid as a Pennsylvania settlement. This is plain reasoning, and a fair exposition of the compact. The error of the learned judge is in applying it to the claims originating under Pennsylvania, while he denies its application to claims originating under Virginia.

*11] *Keeping in view the application of the compact, as made by the learned judge, to the case of a Pennsylvania warrant in conflict with a Virginia settlement, it may be inquired, what would be the fate of a Virginia warrant, dated in 1773, in conflict with a Pennsylvania settlement originating in 1772? The reasoning of the learned judge requires the postponement of the Virginia title in this case also; and thus, while a Pennsylvania warrant is made to prevail against a prior Virginia settlement, a Pennsylvania settlement will prevail against a Virginia warrant. Further, it has been shown, that such settlement is, by the laws of Pennsylvania, a perfectly valid title, from its commencement, and cannot be overreached or affected by a later warrant, and survey and patent. Such being the case, the argument of the learned judge would give to a settler under Pennsylvania, who may have entered in that character, upon Watson's tract, in 1778, an older and better title than Watson's; and had such settler been removed by an action of ejectment, at the suit of Watson, *before* the compact, he (like a Pennsylvania warrantee or patentee, removed in the same manner) might, *after* the compact, have re-entered upon Watson and turned him out by action of ejectment. Proving thereby, that the law and the rights of the parties were one way *before* the compact, and another way *after* the compact. The learned chief justice appears to have foreseen this result of his reasoning, and he has accordingly provided for it, by asserting (2 P. & W. 61), that "the power of the two states to regulate questions of title to the soil, even at the expense of rights previously vested under either, is not now to be questioned; the compact is necessarily founded on an assumption of it. Here was no constitutional limitation on either side, and the parties, acting in the capacity of sovereigns, were fettered by no rule but their sense of expediency and justice. The consideration was the compromise of an international dispute; and the individuals whose titles were jeoparded, had no right to call on the state under which they held, to assert their rights to the soil." This is dealing very plainly with the compact, and with titles claiming its protection. The fact that Watson had a vested right, prior to the date of the compact, which might have been maintained, under either government, against the warrants and surveys of Hand, has been clearly demonstrated; and the fact, that by the judgment of the supreme court of Pennsylvania, the compact, which expressly guarantied his right, has been made the instrument of its destruction, is equally certain.

*12] A latent intention which the compact expressly *repels, by the declaration of a contrary intention, is finally imputed to it; and as Virginia had the power of annihilating the vested rights of claimants to whom her faith was pledged, it is insinuated, that she has actually done it. If such be not the meaning of the learned judge, then his language is inapplicable

and out of place. We insist, that this implied imputation upon the faith and honor of Virginia, rests on nothing better than mere assumption ; that it is disclaimed by her, in express terms, and repudiated by the confirming act of Pennsylvania, cited by the learned judge, in support of his opinion referred to. "Although the conditions annexed by the legislature of Virginia to the ratification of the boundary line agreed to by the commissioners of Pennsylvania, Virginia and Maryland, may seem to countenance some unwarrantable claim which may be made under Virginia, in consequence of pretended purchases or settlements pending the controversy ; yet this state does agree to the condition proposed by the state of Virginia," &c. *Sims's Lessee* v. *Irvine*, 3 Dall. 426. Such was the understanding of the legislature of Pennsylvania ; and like every other document emanating from the government of either state, respecting their controversy about limits, their desire to save and protect every description of private right, is a fact beyond cavil ; and when it is recollected, that neither state proposed to compromise or touch any rights of soil previously vested in individuals ; that the controversy was carefully restricted to the adjustment of boundaries, and that it terminated in an explicit, recorded disclaimer of any purpose to unsettle or jeopard private rights ; a construction of the compact which displaces a pre-existing valid title, by one that is proved to have been comparatively worthless, is a violation of its terms, and a palpable breach of the public faith.

The learned chief justice remarks (2 P. & W. 62), that the confirming act of Pennsylvania was doubtless an agreement to close with Virginia on her own terms, and to encounter the danger of fraud and imposition of surreptitious titles which these terms rendered more imminent ; not to waive all scrutiny, and submit to fraud and imposition when it might be detected. If, by this language, a suggestion is intended to be conveyed, that Watson's title is liable to the imputation of fraud, or that the case before the supreme court of Pennsylvania involved any question as to his Virginia entry having been fraudulently obtained ; then the case was totally misconceived by the learned chief justice. For it was neither proved nor pretended, that Watson's title was *surreptitious or fraudulent. If [*13
the learned chief justice intended to express a truism which no one ever disputed, and to take the risk of its being adopted by others, as a proper and the only basis of his conclusion ; then his language was inapplicable to the case.

The cases of *Smith* v. *Brown*, 1 Yeates 516, and *Hyde's Lessee* v. *Torrence*, 2 Ibid. 440, referred to by the learned chief justice, afford no countenance whatever to his opinion. In the case of *Smith* v. *Brown*, the plaintiff claimed under Pennsylvania, by a title originating in an actual settlement, which commenced in 1769. The defendant claimed under a Virginia entry, reciting a settlement commenced in 1770, but which was not proved on the trial. It was decided, that the recital of the settlement in the Virginia entry, was not conclusive as against the Pennsylvania claimant. In that case, the general rule of the compact is affirmed, viz., that there can be no reason for making a distinction between settlers under Virginia and Pennsylvania. 1 Yeates 517. In the case of *Hyde's Lessee* v. *Torrence*, 2 Ibid. 440, 442, the court reiterated the principle decided in the case of *Smith* v. *Brown*. In both cases, however, the question whether

prior settlements had been made under Virginia, was regarded by the counsel and court as material, if not vital: and in this respect they are authorities in favor of Watson's title.

Ross, for the defendants, argued:—A preliminary question arises, whether the decision of the supreme court of Pennsylvania, in this very controvery, must not be deemed conclusive. An attempt may be made to break its force, by asserting that the judges were divided on the point now brought up. Where is the evidence of such division? A great number of points—some of them of little importance—were discussed on that occasion; and a difference of opinion, upon any one of them, would lead to the brief memorandum of dissent made by the reporter. But aside from this consideration, is it not enough, that in the state courts of Pennsylvania, this controversy, relating to a tract of land within her boundaries, would be considered as closed? In 12 Wheat. 167, Mr. Justice THOMPSON, delivering the opinion of the supreme court of the United States, says, "this court adopts the state decisions," because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the state, *14] when *applied to the title of lands. And such a course is indispensable, in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the states of the United States would be productive of the greatest mischief and confusion." The civil jurisdiction of the federal tribunals was conferred, in order to secure to the foreigner, or to the citizen of another state, an impartial hearing; and the institution is perverted, when litigation may there be renewed, long after it had been put an end to, as between citizens of the state whose soil is the subject of controversy.

Supposing, however, the opinion of the supreme court of Pennsylvania to be open to criticism and reversal, can it be successfully assailed? Previous to the act passed by the legislature of Virginia, in 1779, a title to waste lands in that state could not be acquired by improvement. "Before that time, those lands might have been entered and patented, notwithstanding prior settlements by others; and even this act, which considers settlers entitled to some compensation for the risk they had run, allows them a preference only to such settlements as at that time were waste and unappropriated. As to the priority of settlement, it might still remain a question between persons, both of whom claim under the same sort of title; but the law of 1779 does not set up rights of this sort, so as to defeat those legally acquired under warrants; it applies to controversies between mere settlers." Such are the words of the president of her court of appeals, in delivering its opinion in *Jones* v. *Williams*, 1 Wash. (Va.) 231. It is said, however, that this is predicated of prior appropriations under grants by Virginia, and not those of Pennsylvania, which were disregarded before the period of the compact: be it so. But whatever may have been the case originally, the titles under both were, as regards the question of priority, put, by the compact, exactly on a footing; and are, by fair construction of it, to be treated as if they had always been so. Unless they were considered to have been, in relation to each other, valid co-existent rights, from the beginning, so far as regards jurisdiction, how could there be any comparison as to dates? The very

basis of the compact is an admission, that the jurisdiction shall be taken to have been in common; and that claimants under the one state shall be entitled to the same protection against claimants under the other, that they would be entitled to between themselves. If, then, the plaintiff's title under Pennsylvania *was perfected, before Watson had even color of title, by the laws of Virginia, will an *ex post facto* law, which, it is conceded, would not give him his title by relation, against a prior grantee of Virginia, be more efficient against a grantee of Pennsylvania? It is an unfair construction, to say, that a Virginia title shall be judged of, as it happened to stand by the laws of that state at the time of the compact. If the actual origin of a title under either state be the earlier, it is not to be overreached by a law of the other, assigning to the opposing title a fictitious origin, by the doctrine of relation. Granting, Virginia might lawfully declare that an unauthorized improvement should be taken to have vested title from its inception, against herself, yet having recognized the grants of another state as being equally valid as her own; it is fair to say, she recognised them as being attended with all the incidents of her own, against which, it appears by the judgment of her own court, the doctrine of priority by relation never prevailed. Neither is the power of the two states to regulate questions of title to the soil, even at the expense of rights previously vested under either, now to be questioned; the compact is necessarily founded in an assumption of it. There was no constitutional limitation on either side; and the parties, acting in the capacity of sovereigns, were fettered by no rule but their sense of expediency and justice. The consideration was the compromise of an international dispute; and the individuals whose titles were jeoparded, had no right to call on the state from which they held, to assert their rights to the soil. [*15

In the act of ratification by Pennsylvania, it was resolved, "That although the conditions annexed by the legislature of Virginia to the ratification of the boundary line agreed to by the commissioners of Pennsylvania and Virginia, on the 31st of August 1779, may tend to countenance some unwarrantable claims which may be made under the state of Virginia, in consequence of pretended purchases or settlements pending the controversy, yet this state (Pennsylvania), determining to give to the world the most unequivocal proof of its desire to promote peace and harmony with a sister state, so necessary in this great contest with the common enemy, does agree to the conditions proposed by the state of Virginia, in its resolves of the 31st of June last." And this was, at one time, supposed to be a waiver of objection to any Virginia title that should be certified. It was, doubtless, an agreement to close with Virginia on her own terms, and to encounter the danger of fraud and imposition of surreptitious titles, which those terms rendered more imminent; not to waive all scrutiny and submit to fraud and imposition, where it might be detected. Such a construction would, in all cases, have made the certificate conclusive evidence of the facts stated in it; which it was held, in *Smith* v. *Brown*, 1 Yeates 516, and the *Lessee of Hyde* v. *Torrence*, 2 Ibid. 445, not to be. In the latter, it was declared, that a Pennsylvania claimant may show fraud, mistake or trust; or that the Virginia claimant was not in the country, before the 1st of January 1778—the point of time limited for the commencement of his settlement. [*16

The following in a true history of the whole controversy: 1779, August 31: Compact between Virginia and Pennsylvania entered into. 1780, June 23: Ratified by Virginia, with conditions annexed. 1780, September 23: Ratified by Pennsylvania, absolutely; with acceptance of the annexed condition. The compact was closed, and took effect on the 23d of September 1780. Both titles were then conclusively settled. The states might compensate losers; but could not alter the right.

At that epoch, the title of Gen. Hand stood thus: Warrant in name of Edward Hand for 300 acres, dated the 24th of November 1773, surveyed the 21st of January 1778, 389 acres. Warrant in the name of John Elder for 300 acres, dated the 27th of November 1773, surveyed the 21st of January 1778, 371 acres. Three Virginia certificates for 400 acres each, in right of these settlements, made in 1770. All regularly entered with the Virginia surveyor, and transcribed in his entry-book. The title of all his lands in that disputed region was effectually protected against both states. When the compact was finally closed, Gen. Hand, on the faith of it, had all his surveys returned into the land-office and accepted. The purchase-money and surveying and office-fees paid, exceeding (on the two tracts), $260; and on the 9th of March 1782, patents issued on both surveys, and actual possession of both tracts by his tenants occupying the land. At this period of time, there was no *caveat* by Watson, nor any other person; there was no dispute, no complaint.

*17] *Thomas Watson, in 1780, April 25th, obtained a Virginia certificate, for 400 acres, in right of his settlement made in the year 1772. His cabin and improvements were distant half a mile from the nearest part of any of Hand's surveys. No lines run or marked; no request made, after the compact, to the surveyor in Pennsylavnia to inclose his claim, until the 1st of November 1786, when he caused a survey to be made and returned to the land-office. But it was here found to interfere with the patented surveys of other persons, and returned to him to be corrected; on the 17th of March 1791, he presented the corrected re-survey, and obtained a patent for 273 acres, "corrected and altered agreeably to a request of the surveyor-general." [Hand's patent was dated the 9th of March 1782. That such proceeding in Pennsylvania was illegal and void, see 13 S. & R. 23.] On this false suggestion, he obtained his patent, which is now the basis of the plaintiff's title. He then sold all the survey, outside of Hand's land, and removed from his house and improvement, and took possession of the cabin and land now in dispute. Soon afterwards, West Elliot set up a claim to these forty-seven acres, and gave notice that he would prosecute a suit against Watson, unless he would give up the land to him.

In the autumn of 1794, Gen. Hand came with the army to Pittsburgh, and went out to visit his lands. Soon after his return to town, he and Watson came to the house of Gen. Gibson, where they stated, that Hand had agreed to protect Watson against Elliot, and let him hold the forty-seven acres, for his lifetime, he (Watson) paying yearly a bushel of Indian corn; and desired Gibson to defend him, and get counsel for him when necessary. To this, Watson agreed, and several times afterwards, called on Gibson to explain the threats used by Elliot, but Gibson encouraged him to persevere and hold on. He did continue on the land during his life. Nor

is it known, that he at any time expressed any dissatisfaction at this arrangement. After his death, speculators purchased the supposed rights of his children, and employed counsel to bring and prosecute suits to recover these forty seven acres, which are now the subject of controversy.

Gen. Hand's titles under Pennsylvania and Virginia are clearly the eldest, and under the compact, must prevail.

It is an unalterable regulation, founded in equity, to preserve the honor and good faith of both states so far as possible; each had *made grants for the same lands; let the good old rule prevail "*prior in tempore, potior est in jure.*" Watson was culpably negligent; he never indicated his claim or boundary, until he made an erroneous survey, the 1st of November 1786, four years after Hand's patents had been issued; five years afterwards, he sends an amended survey to the office, falsely pretending he had corrected his errors and thrown out the interfering patented lands. This trick would, of itself, postpone and preclude him, and all claiming under him, for ever, from sustaining any suit in a court of justice. Besides this, he surrendered to Gen. Hand all his claim to the premises, for a life-estate, which he enjoyed and with which he was satisfied so long as he lived; and the plaintiffs, for a trifle, have bought up the claim that he had ceased to assert and was too honest to revive. [*18

Hand's lands were patented the 9th of March 1782; Watson's the 17th of March 1791, nine years afterwards. Watson's assignees being now plaintiffs, and holding under the junior grant, cannot maintain an ejectment, or recover in a court of the United States against the eldest patent. More especially, must Watson's patent fail, when a solemn compact has established the relative efficacy of each, and expressly stipulated that all conflicting titles in the disputed territory shall, without exception, be governed by this rule. A survey breaking into and including patented land, is void; was always illegal and inoperative, in Pennsylvania. 13 S. & R. 23.

Upon the whole, therefore, of this record, the defendants in error submit, with great confidence, that the judgment of the district court of the United States will be affirmed, with costs.

Barbour, Justice, delivered the opinion of the court.—This is a writ of error to the district court of the United States, for the western district of Pennsylvania, in an action of ejectment, in which the plaintiff in error was plaintiff in the court below; and in which judgment was given for the defendant in that court. It comes up upon two bills of exception, taken by the plaintiff in error to the opinion of the court, at the trial; the one, in relation to the admission of certain evidence which he alleges to have been improperly received; the other, to the ruling of the court, upon several points of law, in its charge to the jury. We think it unnecessary to discuss any of these points but one, *which we consider decisive of the case. And that is the relative priority of the respective rights under which the parties claim. [*19

The facts of the case are these: Thomas Watson, under whom the plaintiff in error claims, on the 25th of April 1780, obtained from certain commissioners of Virginia, a certificate entitling him to 400 acres of land, by virtue of an act of the assembly of Virginia, passed in May 1779; the fourth section of which, after reciting that great numbers of people have settled in

the country, upon the western waters, upon waste and unappropriated lands, for which they have been hitherto prevented from suing out patents, or obtaining legal titles, &c., enacts, "that all persons, who, at any time before the first day of January, in the year 1778, have really and *bonâ fide* settled themselves, or their families, or at his, her or their charges, have settled others, upon any waste or unappropriated lands on the said western waters, to which no other person has any legal right or claim, shall be allowed, for every family so settled, 400 acres of land, or such smaller quantity as the party chooses to include in such settlement." This certificate was granted in right of a settlement which had been made by Watson, in the year 1772. His evidence of right under Virginia was subsequently transferred to the land-office of Pennsylvania (the land having, under a compact between that state and Virginia, hereafter more particularly noticed, been ascertained to be within the limits of Pennsylvania), and on the first of November 1786, a survey of his claim was made and returned to the land-office of the latter state, and a patent issued thereon, by that state, in the year 1791, including his settlement made in 1772, and including the land in controversy.

The defendants claim under Edward Hand, who, by virtue of two land-warrants, granted by Pennsylvania, the one for 300 acres, dated the 24th of November 1773, the other, for the same quantity, dated the 27th of November 1773; caused surveys to be made on both, on the 21st of January 1778; and on the 9th of March 1782, obtained patents on both surveys, embracing the land in controversy.

Both Pennsylvania and Virginia having claimed the territory, of which the land in controversy is a part, as being within their limits, the dispute was finally adjusted by a compact made between them, which was ratified by Virginia on the 23d of June 1780, with certain conditions annexed; and absolutely, by Pennsylvania, on the 23d *of September 1780, with an acceptance of the conditions annexed by Virginia. That compact, *inter alia*, contains the following stipulation: "That the private property and rights of all persons, acquired under, founded on, or recognised by, the laws of either country, previous to the date thereof, be secured and confirmed to them, although they should be found to fall within the other, and that in disputes thereon, preference shall be given to the elder or prior right, whichever of the states the same shall have been acquired under; such persons paying to the states in whose boundary their land shall be included, the same purchase or consideration money, which would have been due from them to the state under which they claimed the right."

*20]

The rights of the parties must be decided by the true construction of this stipulation, as applied to the foregoing facts of the case. What is that construction? In the first place, it is declared, that the property and rights of all persons, acquired under, founded on, or recognised by, the laws of either country, previous to the date of the compact (that is, the year 1780), shall be secured and confirmed to them. The act of Virginia of May 1779, before cited, is, in point of chronology, previous to the date of the compact. Is not the settlement of Watson, made in 1772, recognised by the act? It is, in explicit terms, because the act makes an allowance of 400 acres of land to all those who shall have *bonâ fide* made a settlement on waste and unappropriated land, before the first of January 1778; and it has been seen, that Watson's settlement was made in 1772. What was the motive which induced

the legislature of Virginia to make this allowance? We find it declared, in the preamble to the fourth section of the act of May 1779: it was, that persons who had made settlements, had been prevented from suing out patents, or obtaining legal titles, by the king of Great Britain's proclamations, or instructions to his governors, or by the then late change of government, and the then present war having delayed, until that time, the opening of a land-office, and the establishment of any certain terms for granting lands. And what was the consideration, we do not mean pecuniary, but valuable, on which the allowance was founded? The same preamble informs us, that it consisted in the justice of making some compensation for the charge and risk which the settlers had incurred in making their settlements. It is apparent, then, that the legislature did not pass the law in *question as making a donation, but as allowing a reasonable compensation, for [*21 something of value, on the part of settlers; not of money, indeed, paid into the coffers of the state, but of charge and risk incurred by the settlers. We think, then, that the allowance, thus made, is, in the language of the compact, a right recognised by the law of Virginia, previous to the date of that compact. Considering it as thus recognised, and consequently, as secured and confirmed, we come now, in the order of the argument, to the other part of the stipulation aforesaid; which declares, that in disputes thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall have been acquired under.

How is this question of priority to be decided? In answering this question, we think, that the first thing to be done is, to ascertain the character of the rights of the parties, as settled by the laws of the states, under which they respectively claim, as these laws stood at the date of the compact. In this aspect of the subject, it has been seen, that the defendants claim under warrants granted by Pennsylvania, in 1773, and surveyed in 1778. But the act of Virginia of 1779, having allowed 400 acres of land to those who had made a settlement before the first of January 1778, and having founded that allowance on the charge and risk which they had incurred; in our judgment, the equitable claim, or the inchoate right of the parties, must, consequently, be referred, for its commencement, to the period when the charge and risk were incurred—that is, in the case at bar, to the year 1772. If, as we think, this principle be correct, this mere comparison of dates would decide the case. It has, however, been argued, that if this case were in a Virginia court, it would be decided in favor of the right under which the defendants claim, because that is by warrant, before the act of 1779; and in support of this, the court has been referred to the case of *Jones* v. *Williams*, 1 Wash. (Va.) 230, in which the court of appeals of that state says, that before the act of 1779, those lands (that is, lands on which settlements had been made) might have been entered and patented by any person, notwithstanding prior settlements by others; that the act of 1779 applies to controversies between mere settlers; that it does not set up prior rights of this sort, so as to defeat those legally acquired under warrants. The error of this argument, as we conceive, consists in this; that the doctrine here stated, however true in itself, does not apply to the case at bar. That was laid down, in a case between two persons, *both of whom claimed under Virginia, and was, therefore, governed by the laws of [*22 Virginia alone; whereas, in this case, one of the parties claims under Penn-

sylvania, and the other, under Virginia ; and the case is to be decided, not by the laws of either state, by themselves ; except that, as before remarked, the character of each right is to be fixed by the laws of the state, as at the time of the compact under which the right is claimed ; and then the comparison between the two is to be made, not under the laws of either state, but under the stipulation in the compact before referred to. Thus, to illustrate, the origin of the plaintiff's claim, being, in our opinion, as operated upon by the act of Virginia of 1779, to be referred to the period of Watson's settlement in 1772 ; and that of the defendants, as affected by the laws of Pennsylvania, being of later date ; the foundation being thus laid for deciding which is the prior or elder title ; we then apply to the case the compact, which declares, that the preference shall be given to the prior or elder.

We suppose, that it will scarcely be denied, that by the act of 1779, Virginia recognised the inception of the title of settlers, as being of the date of the settlement, as against herself ; if so, can it be imagined, that by the compact, she intended their title to take its date from a later period ? If it should be said, that so also Pennsylvania cannot be supposed to have intended to impair the force of the titles claimed under her ; the answer, that each state intended that its own laws should settle the character of the right claimed under it, as to the time of its inception, and in every other respect ; and then, that according to the inception thus fixed, the rule of priority should decide, as provided for in the compact.

It was argued, that the question had been settled in the supreme court of Pennsylvania ; and the doctrine stated in 12 Wheat. 167, was referred to, where it is said, that this court adopts the state decisions, because they settle the law applicable to the case ; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands. To say nothing of the division of the court, in the case referred to, it is a decisive answer to this argument, to say, that the principle does not at all apply. It was laid down in reference to cases arising under, and to be decided by, the laws of a state ; and then the decisions of that state are looked to, to ascertain what that law is ; whereas, in the case at bar, the question arises under, and is to be decided by, a compact between two

*23] *states : where, therefore, the rule of decision is not to be collected from the decisions of either state, but is one, if we may so speak, of an international character. Upon the whole, we are of opinion, that the judgment of the court below is erroneous, in charging the jury, that the title of the defendants was the elder and prior right, and was, therefore, protected by the compact ; on the contrary, we think that of the plaintiff was the elder and prior; the judgment must, therefore, be reversed, and a *venire facias de novo* awarded.

TANEY, Ch. J., and McLEAN, Justice, dissented.

McLEAN, Justice.—The Chief Justice and Justice McLEAN think, that the condition of the compact, "that the private property and rights of all persons acquired under, founded on, or recognised by, the laws of either country, previous to the date hereof, be secured and confirmed to them, although they should be found to fall within the other ; and that in disputes

thereon, preference shall be given to the elder or prior right, whichever of the said states the same shall be acquired under," placed the land in controversy under the common jurisdiction of both states; and that the first appropriation of the land, under the authority of either state, must be considered, under the compact, as the prior right.

The Pennsylvania warrant which was located on this land, was surveyed on the 21st of January 1778. At this time, the Virginia claimant, though he lived on the land, had no color of right; he was, in fact, a trespasser. The Virginia act of 1779 provided, "that all persons, who, at any time before the 1st of January 1778, had *bonâ fide* settled upon waste or unappropriated lands, on the western waters, to which no other person hath any legal right or claim, shall be allowed four hundred acres," &c. Now, if the land in controversy was subject to the jurisdiction of both states, and might be appropriated by either, was it not appropriated under the Pennsylvania warrant, before the Virginia claimant had any right under the act of 1779? This is too clear to be controverted. In the language of the compact, then, had not the Pennsylvania claimant "the prior right?" The act of 1779 does not purport to vest any title in the settler *anterior to its passage. The settler, to bring himself within the act, must show that he [*24 was a *bonâ fide* settler, before the 1st of January 1778; and this entitled him to 400 acres of land under the act, provided, "no other person had any legal right or claim to it." At this time, the land, as has been shown, was appropriated under the Pennsylvania law, and which appropriation, if effect be given to "the prior right," under the compact, does constitute within the meaning of the act of 1779, a "right or claim to the land."

In 1 Wash. 231, the court of appeals of Virginia says, that the law of 1779 does not "set up rights, so as to defeat those legally acquired under warrants." This land, by the compact, was considered as liable to be appropriated by a Pennsylvania as by a Virginia warrant, before the act of 1779; and in ascertaining the priority of right, the time of the appropriation is the fact to be established.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, with directions to award a *venire facias de novo*.

*Charles McMicken, Plaintiff in error, *v.* Amos Webb, Aaron Smith and Ira Smith, Defendants.

Jurisdiction.

McMicken and Ficklin were in partnership, as merchants, in the state of Louisiana; and at the dissolution of the connection, Ficklin agreed to purchase the half of the stock belonging to McMicken; and after the partnership was dissolved, gave him, in payment for the same, a promissory note, payable, after its date, to the order of McMicken & Ficklin, which, was executed by Ficklin, Jedediah Smith and Amos Webb, by which they promised, jointly and severally, to pay the amount of the note. Although the note was made payable to the order of McMicken & Ficklin, the latter was in no wise interested in it, as the payee thereof; McMicken was a citizen of Ohio, and the makers of the note were citizens of the State of Louisiana; Amos Webb resided in the western district of Louisiana, but when the process in this suit was served upon him, he was in New Orleans, in the eastern district. The defendant, Webb, denied the jurisdiction of the district court of the United States for the eastern district of Louisiana, alleging that he was a citizen of the western district; the defendants pleaded in abatement, and to the jurisdiction, that the suit should have been brought in the name of both the payees, and at the time it was given, Ficklin was a citizen of Louisiana; this suit could not, therefore, be brought in the district court of the United States.

The residence of a party in another district of a state than that in which the suit is brought in a court of the United States, does not exempt him from the jurisdiction of the court; the division of a state into two or more districts, cannot affect the jurisdiction of the court, on account of citizenship; if a party be found in the district in which he is sued, the case is out of the prohibition of the judiciary act, which declares, that "no civil suit shall be brought in the courts of the United States, against the defendant, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

The objection to the jurisdiction of the court, on the ground, that the note was given to Ficklin & McMicken, and as Ficklin was a citizen of Louisiana, the suit is interdicted by the prohibition of the judiciary act, which declares, that the courts of the United States shall not have cognisance of a suit in favor of an assignee of a *chose in action*, unless a suit should have been prosecuted in said court, for the same, if no assignment had been made, except in cases of foreign bills of exchange, cannot be sustained. Ficklin never had any interest, as payee, in the note; although the note had been given in the names of both persons, it was for the sole and individual benefit of McMicken, and there was no interest which Ficklin could assign.

Error to the District Court for the Eastern District of Louisiana. The plaintiff in error filed his petition in the court below, averring that he
*26] was a citizen of and resident of the state of Ohio, claiming *that the defendant, Amos Webb, who was also averred to be a citizen and resident of the state of Louisiana, with Mary Ann Smith, in her own capacity, and also as tutrix to Catharine Smith and Sarah Smith, minor children and heirs of Jedediah Smith, who was deceased, and whom the said Mary Ann, as his widow, survived, having since his death, intermarried with Ira Smith, who was, therefore, the tutor of said children, all of whom, also, were citizens of and resident in the state of Louisiana, were jointly and severally indebted to the plaintiff in the sum of $4866.93\frac{1}{2}$, besides interest and costs. The plaintiff averred, that said indebtedness depended upon the following facts:

In 1815, the petitioner, the plaintiff, and one James H. Ficklin, formed a copartnership, and did business in the parish of Feliciana, in the state of Louisiana, under the name of McMicken & Ficklin; that on or about the 8th of September 1817, the partnership was dissolved by mutual consent; and the stock of merchandise then on hand, the said Ficklin agreed to take

to his own account, and to pay for one-half of the same to the petitioner, at the original cost, with the addition of five per centum; to conclude which agreement, the said Ficklin thereupon executed the note of which the following is a copy:

$4866.93½. St. Francisville, Sept. 20, 1817.

On the 1st day of March 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand eight hundred and sixty six dollars, ninety-three and one half cents, being for value received, with ten per cent. interest, after due, until paid.

James H. Ficklin,
Jed. Smith,
Amos Webb.

The petitioner then averred, that the note was made payable to McMicken & Ficklin; that it was, in fact, and intended so to be, for his (petitioner's) portion of said partnership property, the same having been made, after said firm had been dissolved; the joint name being used merely for the petitioner's sole benefit, the said Ficklin being in no wise a party thereto, except as one of the obligors. The petitioner further averred, that said Mary Ann Smith, and her two said minor children (Catharine and Sarah) owned and possessed *all the property and estate of said Jedediah Smith; the said Catharine, in right of her community, and the said children as heirs, and by reason of which they had become obligated, *in solido*, to pay to the petitioner the amount of the note aforesaid. A citation was prayed for, in the usual form. [*27

Service was legally made, and on the 11th of February 1835, Webb, one of the defendants, appeared by his attorney, and filed three pleas to the jurisdiction of the court. The other defendants, Mary Ann Smith and her children (Catharine and Sarah), appeared on the same day, by attorney, and filed two pleas to the jurisdiction. The pleas by all the defendants, with the exception of the first, were the same, and they presented the same questions for consideration.

The first plea by Webb was, "That while he admits he is a citizen of the state of Louisiana, and that he was in New Orleans, when the citation was served, he avers that he resides in the parish of St. Landry, in the western district of said Louisiana; wherefore, he prays judgment, and whether the court will take further cognisance of the cause, as regards him, or that the suit may be transferred to said western district of Louisiana, at the cost of the petitioner." The second plea, which was common to all the defendants, averred that as the note stated in the petition was made payable to McMicken & Ficklin—that, as the petitioner could only bring suit thereon by virtue of some assignment thereof, and protesting that there was no such assignment, it did not appear, by averment in the petition, that said McMicken & Ficklin, comprising the payees of said note, could have prosecuted their suit against the makers thereof in this court. To these statements was added the general prayer, that the court will not take jurisdiction. The third plea averred, that it did not appear by the petition, that the pavees, at the time said note was made, could have prosecuted, or that the makers could have been prosecuted, in the district court. Several other

pleas appeared in the record, but they presented matters in bar, and as they were not considered by the court below, they are not stated.

In December 1835, the cause came on for hearing, and the judgment of the court is thus recorded: "The court having maturely considered the plea to the jurisdiction made in this case, now order that the same be sustained, and that the plaintiff's petition be dismissed at his costs."

*28] *The plaintiff prosecuted a writ of error to this court.

The case was argued at the bar, by *Storer*, for the plaintiff in error; and *Eustis*, of counsel for the defendants, submitted a printed argument to the court.

Storer stated, that the plaintiff insisted, that the judgment of the circuit court of Louisiana should be reversed. As the opinion of the court is not clear in designating the particular plea which was sustained, it is necessary to examine them all. None of them will furnish a legal ground for the judgment of the court below. As to the residence of the defendant, Webb, in the western district, at the time he was served with process by the marshal of the eastern district, it is not apprehended, that the fact can change the relation of the debtor, or take away the jurisdiction of the court. The state of Louisiana is divided into two districts by the law of 1823. (3 U. S. Stat. 774.) "For the more convenient transaction of business," as is stated in the first section; there is no limitation of jurisdiction; there is but one judge to preside over both districts, and the same practice obtains in each. The limitation in the judiciary act of 1789, ch. 20, § 11, it is believed, is clear on this question. "If the defendant is an inhabitant of, or is found in the district, at the time process is served, the action is sustainable."

As to the second plea which is set up by all the defendants, the plaintiff in error insists, that, by the law of 1824 (4 U. S. 62), regulating the mode of practice "in the courts of the United States for the district of Louisiana," it is enacted, that the mode of proceeding in civil causes therein, shall be conformable to the laws directing the mode of practice in the district courts of that state. The mode of procedure by petition is adopted from the state practice, and is, in fact, a suit in chancery; a procedure derived from the civil law, and intended to avoid the technicalities of the ordinary pleadings in courts of common law. It is immaterial, then, as to the objection of an assignment to transfer title, when, in equity, a parol transfer, for good consideration, is equally as valid as a written assignment. Besides, a chancellor will reform a contract, to suit the intentions of the parties. *The plea

*29] of the defendants admits all the allegations in the petition, and they, it is insisted, make out a clear case of mistake.

If Ficklin had no interest, he need not have been made a party. If he had, there was a necessity that the court shall have required that he should be joined in the suit, before the final decree was rendered; when joined, it would then be the proper time to ascertain whether he was subject to the jurisdiction or not. In no view of the case, was there a necessity that Ficklin should be made plaintiff, provided the statements in the petition are true; and as such they must now be regarded. As Ficklin was not interested, nor could be made plaintiff on any just principle, it is immaterial, where his residence was, or is. McMicken, the petitioner, now resides in

Ohio; and it was never doubted, but the original parties to a contract might avail themselves of any federal tribunal where their residence gave jurisdiction. That jurisdiction does not depend upon the contract, but upon the legal character of the parties. It is admitted, that when a note is assigned, the assignors must have had the ability to sue in the United States court, at the time of the transfer; and this decision was made to prevent the transfer of notes *in fraudem legis;* to deny to the resident creditor, when he could not in his own name sue in the circuit court, to use the name of another. Here, the plaintiff labors under no such disability.

The third plea is similar to the second, and is answered by the same argument which has been opposed to it. It is broader, however, in one respect, as it includes the averment, that the defendants, the makers of the note, could not have been sued in the United States court, when the note was made, or when it was assigned. As to part of this matter, the objection is destroyed by the fact, that the place where the contract is made does not fix jurisdiction; and as to the other, the force of the plea is not perceived. If the note in its origin acquired no locality, certainly, a subsequent transfer could not give it an exclusive *situs;* besides, as it is contended, no assignment is set up, for none was necessary.

Eustis, for the defendant, submitted the following points: 1. The plaintiff does not make such allegations as to give the United States courts jurisdiction of the case; and this is pointed out by the exception of the defendants in plea to the jurisdiction. *2. In a suit against the makers of a promissory note, on the law side of the United States court, under the act of 1789, § 11, all the parties must join and allege the facts necessary to give jurisdiction. 3. In all obligations, not under seal, in a suit between original parties, when the plaintiff, in his own declaration or petition, shows all the defendants to be naked sureties, there are no equities against them, either for jurisdiction, form of action, or on the merits. [*30

This is a suit on a promissory note, in the following words:—

$4866.93½. St. Francisville, Sept. 2, 1817.

On the first day of March 1819, we, or either of us, promise to pay, jointly or separately, unto McMicken & Ficklin, or order, four thousand, eight hundred and sixty-six dollars, ninety-three and one half cents, being for value received, with ten per cent. interest, after due, until paid.

James H. Ficklin,
Jed. Smith,
Amos Webb.

It is a promissory note, payable to order, and therefore, completely within the act of September 24th, 1789, § 11, which is as follows: "Nor shall any district or circuit court have cognisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of any assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made; except in cases of foreign bills of exchange." (1 U. S. Stat. 79.) Sergeant's Const. Law 116.

It is to be observed, that the suit on this promissory note is brought by McMicken alone, although the note is payable to McMicken & Ficklin.

No indorsement or assignment is alleged to have been made by McMicken & Ficklin, but the following allegation is made: "Your petitioner further shows, that said obligation was erroneously made payable to McMicken & Ficklin, though, in truth and in fact, said note was dated and executed subsequently to the said dissolution of said firm, and was made towards and in behalf, and for the sole and individual benefit of, your petitioner; the joint name of the then late firm being used and intended for your petitioner's sole benefit, and Ficklin being in no wise a party, or interested therein, except as one of the obligors."

*31] *If anything can be gathered from this singular allegation, it is, that a note intended to be drawn in favor of Charles McMicken, and who alone was entitled to receive the contents, was, by mistake and error, drawn in favor of McMicken & Ficklin, who, according to previous allegations of the petition, had been in partnership together. This allegation, if it amounts to anything, amounts to an allegation that McMicken is the equitable assignee of the note. The claim of the plaintiff, according to the color and tenor of his own petition, if, on his own showing, it can be maintained at all, either as to the jurisdiction, or the merits, ought to have been prosecuted on the equity side of the court; and it is obvious, that the attorney for the plaintiff was at a loss how to state his case. He alleges error, without showing why it was an error. The consideration of the note moved from McMicken & Ficklin to Ficklin, it being alleged that Ficklin, one of the partners, purchased the goods of McMicken & Ficklin—unless, therefore, the goods all belong to McMicken, or unless the note was given for McMicken's one-half of the goods, neither of which allegations are made, the note was properly drawn in favor of McMicken & Ficklin.

Legally speaking, the plaintiff's case cannot have the benefit of the supposition, that he is an equitable assignee, for his suit is brought on the law side of the court. There is nothing in the shape, form, address, prayer or proceedings, which give it the character of a bill in equity; and from the decision against him, the plaintiff has taken a writ of error, not an appeal; although in relation to the distinctions of law and equity, proceedings in the courts of Louisiana are of an anomalous character, and are mixed up together, without any line of distinction, a party who goes into the United States court, in that state, must clearly announce his intention, when he seeks to avail himself of the equity powers of the court, in contradistinction to its legal jurisdiction.

The case was decided by the district judge, on the mere question of jurisdiction, on the third plea or exception to the jurisdiction, as contained in the printed record. This plea proceeds on the principle, that when a suit is brought in the United States courts, on a promissory note, payable to order, against the makers, it must be brought either—1st. By the payees, and then there must be the usual allegations of citizenship to give jurisdiction; or—2d. By an assignee or indorsee of the payee, and in this case,

*32] *besides the usual allegations of citizenship, there must be an allegation that the payee, at the time of assignment, could have prosecuted the suit in the United States courts, if no assignment had been made. 3d. That the suit in the present case is not brought by the payees, and does not contain the allegations necessary to give jurisdiction.

The second rule or principle is laid down in Sergeant 117, in these

words: "And if the plaintiff claim as assignee, it must appear by the record that the person under whom he claims by assignment, might have prosecuted his suit in the circuit court; otherwise, the court has no jurisdiction." Sergeant cites *Turner* v. *The Bank*, 4 Dall. 8; *Montalet* v. *Murray*, 4 Cranch 46. The necessity of the allegation that the payees were non-citizens, or could have brought the suit at the time of the assignment, is recognised in *Kirkman* v. *Hamilton*, 6 Pet. 20; the principle is directly deduced from the doctrine of the limited jurisdiction of the United States courts: "The decisions of this court require that the averment of jurisdiction shall be positive, that the declaration shall state expressly the fact on which the jurisdiction depends. It is not sufficient, that jurisdiction may be inferred argumentatively from its averments. *Brown* v. *Keene*, 8 Pet. 112. The right to the jurisdiction must rest on clear, plain and simple averments, on which a single and simple issue can be joined. If it be allowed to rest on error in the form of taking the note, it would require a chancery suit, and a full investigation of the merits of the case, before it could be settled, whether, the court had or had not jurisdiction. This court has decided, that the question of jurisdiction, when contested, must be settled by a preliminary trial, and before going into the merits of the case.

In this petition, there is no substantive allegation of an assignment of the note sued upon, or if the matters alleged amount to such an allegation, there is no allegation, when the assignment was made, or that at the time the assignment was made, the payees could have brought suit on this note in the United States court. McMicken is not the payee of the note—he brings the suit for his own exclusive benefit; the payees are McMicken & Ficklin —if, therefore, McMicken individually can bring suit on the note for his own benefit, it must be in virtue of some legal or equitable assignment from the payees. None such is alleged, and if the matter alleged be considered as amounting to an allegation that, in equity, McMicken is entitled to an *assignment of this note from McMicken & Ficklin; and that is the most favorable aspect of the case; still there is no allegation, that [*33 at the time that assignment ought to have taken place, McMicken & Ficklin could have prosecuted this suit in the United States courts. Equitable as well as legal assignments are included in the act. Serg. 116, cites *Sere* v. *Pitot*, 6 Cranch 332.

The court will disregard the vain attempt to combine an action at law on a promissory note, with a suit in equity to reform a written contract for alleged error. When practitioners come into the United States courts in Louisiana, they are bound to recognise the clear and manifest distinctions between legal and equitable rights and remedies. The court can only consider this suit to be what in its form, &c., it purports to be, viz., an action at law on a promissory note, payable to order, against the makers, brought by a plaintiff claiming in other rights and interests than as payee of the note.

It is believed, that if this case had been put in the form of a suit by McMicken & Ficklin as plaintiffs, for the use of Charles McMicken, a form used in some of the states, this form of action would have been considered as substantially an allegation of an assignment by McMicken & Ficklin to Charles McMicken; and the suit could not be maintained, without the required averments. Or, if McMicken & Ficklin were alleged to be trustees

for Charles McMicken, it must have been alleged, that both of them were citizens of other states than Louisiana. It may be asserted, without fear of contradiction, as a judicial question, that there are no such distinct and substantive averments of facts necessary to give jurisdiction upon which any issue can be joined. The court will perceive the difficulty the attorney of the defendant was under, in drawing a plea to the jurisdiction. The petition is an hermaphrodite, neither properly a proceeding at law nor in equity; and cannot scientifically be encountered by any known shape or form of defence. It is substantially met by the objection, that it does not contain averments and allegations of facts to give jurisdiction to the United States court in a suit on a promissory note.

It is respectfully urged, that the course of reasoning and construction of the law on subjects connected with the jurisdiction of the court, has heretofore been rigorous, and that this course ought not to be relaxed. *If
*34] suggestions like the one in the present case are admitted as the basis of jurisdiction, and the maxim, *est boni judicis ampliare jurisdictionem*, be acted upon, there is danger that fictions similar to the *ac etiam* and *quo minus* clauses, which gave universal jurisdiction to the king's bench and exchequer courts, will be resorted to; and the United States courts will cover the whole field of litigation, without any real limits to their jurisdiction and that the whole distinction of federal and state governments and jurisdiction will disappear; a result which is not considered desirable.

It is to be observed, that this subject and case are governed by a special and positive act of congress, from which the inferences of the allegations necessary to give jurisdiction are clear and precise; and the court will not be disposed to get round them, for the benefit of this very singular case. It is called singular, and so it appears on the statement of the plaintiff himself. According to that statement (by protestation, as to its being the whole truth), Charles McMicken and James H. Ficklin were in partnership as merchants—they dissolved, and Ficklin takes the goods at a stipulated price—for the price Ficklin gives the promissory note, the subject of the suit, with Smith and Webb as sureties, obligors *in solido*—that promissory note is made in favor of McMicken & Ficklin; and McMicken now says, that this was done in error, and that the note ought to have been drawn in his favor individually. He does not attempt to show why it was an error—on the contrary, if, as is alleged, the goods belonged to McMicken & Ficklin, the representative or price was properly made payable to the partnership; for each partner owned one-half of the goods, and was entitled to one-half of the price.

Had it been alleged, that this note was given for the one-half of the goods which belonged to McMicken, and was, by error, made payable to McMicken & Ficklin, instead of McMicken, a reason could have been given, why it was an error to make it payable as it was drawn—there would have been a *primâ facie* case of equity, to entitle McMicken to the jurisdiction of the equity side of the court—though it is denied, that even with such allegations, the right to the jurisdiction should be maintained, for it involves too complicated a preliminary investigation—and as to Webb and Smith, naked sureties, there are no equities. But no such allegation is made. The
*35] allegations go to show that the goods belonged to the partnership, and, of course, the note for *their price did also belong to the part-

nership. This transaction, it is alleged, took place on the dissolution, and as a part of the dissolution ; and it is strange to allege error, without showing in what respect, and for what reason, it was an error.

Smith and Webb are mere sureties, as is shown by the following considerations. 1st. This contract is a promissory note, a simple contract, and not a sealed one. 2d. The suit is between original parties to the note. Therefore, the considerations of the note may be inquired into. Again, the plaintiff himself alleges, that the consideration of the note was the sale of goods by McMicken & Ficklin to James H. Ficklin. This affirmative is pregnant with another affirmative ; for it follows as a necessary consequence from this allegation, that Ficklin was principal in the note, and Smith and Webb were mere sureties.

The court may think this controversy involved in a cloud, and feel disposed to favor a further development of it, or consider the objection to the jurisdiction as captious, and might feel more at ease in deciding, if any supposable explanation of the transaction were given. We will then suppose McMicken and Ficklin to be in partnership—they agree to dissolve—Ficklin buys the stock of goods, of which, as partner, he is one-half owner, and which is estimated at $9733.87½, viz., twice the amount of the note ; for McMicken's one-half, Ficklin pays cash. Ficklin is himself the owner of the other half ; McMicken is the liquidating partner, and undertakes to collect the debts due to, and pay the debts due by the late firm ; but McMicken suggests, that the debts due to the firm might not be sufficient to pay the debts due by the firm. In such case, Ficklin would have to bring back what he took out. To meet this possible contingency, Ficklin makes his note, with sureties, for the amount of his own one-half of the goods, in favor of the partnership, payable at an interval within which it was supposed the partnership affairs would be liquidated and settled, and places it in the hands of the liquidating partner. Such a solution explains the whole transaction, without supposing any error in any party ; and the decease of Ficklin, immediately afterwards, would explain the attempt and perseverance of McMicken in desiring to extract this money from the sureties, without showing any settlement of the partnership affairs.

*It will be observed, this is a very stale transaction ; not that McMicken has slept on his supposed rights (for this is the tenth suit brought on this identical note, see for one of them, *Walker* v. *McMicken*, 9 Mart. 192), but that he has never dared fairly to bring his case before a court of justice, and has, therefore, uniformly been driven out of court, or has discontinued, the moment a decision was about to be made. [*36

The citizens of Louisiana hold their property, and enter into contracts, under the doctrines and rules of the civil law ; and prefer having them passed upon by their domestic tribunals. If the plaintiff could, in any manner, have made such allegations as would have entitled him to the jurisdiction of the United States court, it was open to him, after the exception was filed, to have made such amendments to his petition, consistent with the facts of the case, as would have entitled him to the benefit of that jurisdiction. His not having done so, is conclusive that he can make no better statement of his case, in that respect, than is now on file. That Ficklin is dead, is a fact not alleged, is not judicially known to the court ; nor if it were alleged, would it avail, for there is no survivorship of action, even among commercial part-

ners, by the laws of Louisiana. *Crosier* v. *Hodge*, 3 La. 358. McMicken cannot, therefore, sue for this note as surviving payee; he claims the contents in his individual and private capacity.

The conclusion is, that for the reasons, and on the authorities before cited, the plaintiff, who sues the defendants as makers of a promissory note, payable to order, and who is not himself the payee of that note, and does not claim in that capacity, has not made such allegations and averments, and in such form and manner, as to show himself entitled to bring the suit in a court of the United States. If this conclusion is correct, the judgment of the court below will be confirmed.

Thompson, Justice, delivered the opinion of the court:—This case comes before this court on a writ of error from the district court of the United States, in and for the eastern district of the state of Louisiana. The suit in the court below was commenced by petition, in which the cause of action is set out, informally, but substantially, as follows: That the defendants are *37] jointly and severally indebted to the plaintiff *in the sum of $4866.93, besides interest and costs; for this, to wit, that some time in the year 1815, the petitioner and one James H. Ficklin formed a copartnership and did business in the parish of Feliciana, in the state of Louisiana, under the name and firm of McMicken & Ficklin; that on or about the 8th day of September 1817, said partnership was dissolved by mutual consent. That at the time of such dissolution, there was a quantity or stock of goods on hand, which Ficklin took and purchased at cost, with five per cent. addition, and for the payment of one-half of said stock of goods, he gave to the petitioner a promissory note, dated the 20th of September 1817, and payable on the 1st of March 1819, to the order of McMicken & Ficklin, for the sum of $4866.93, which note was executed by said Ficklin, Jedediah Smith (by the name of Jed. Smith), and Amos Webb, by which they promised, jointly and severally, to pay the aforesaid sum, according to the terms of said note, a copy of which is annexed to the petition. The petition avers, that the note was made and dated subsequent to the dissolution of the partnership, and although made payable to McMicken & Ficklin, it was made for the sole benefit of the petitioner, McMicken, and that Ficklin was in no wise interested therein, except as one of the obligors. The petition then sets out the death of Jedediah Smith, and how the other defendants become bound to pay the note. It also contains an averment that the petitioner is a citizen of the state of Ohio, and that the defendants are citizens of the state of Louisiana.

To this petition, several pleas to the jurisdiction of the court are interposed. The defendant, Webb, in one of his pleas, admits, that he is a citizen of Louisiana, and that he was in New Orleans, when the petition and citation were served upon him; but avers, that he resides in the parish of St. Landry, in the western district of Louisiana, and denies the jurisdiction of the court, on this ground. The second plea in abatement is founded on the fact, which is set out in the petition, that the note in question is made payable to McMicken & Ficklin, and the suit is in the name of McMicken alone, without showing any assignment by Ficklin, or that at the time of making said note, McMicken & Ficklin could have prosecuted a suit upon it in this court. The third plea alleges a want of jurisdiction in the court; because the petition does not allege, that at the time of assigning said note,

the payees might have prosecuted the makers in this court. *The other defendants also interposed pleas to the jurisdiction of the court, upon the grounds substantially as set forth in the last two pleas of Amos Webb. The court below sustained these pleas to the jurisdiction of the court, and dismissed the petition.

This petition, although informal in many respects, must be considered as the commencement of a suit at law, according to the course of proceedings in the courts of the state of Louisiana ; and is properly brought up here by writ of error. The object of the petition is simply to set forth the cause of action, and praying that the defendants may be cited in court to answer to the demand set up against them ; and all that is required in such petition, according to the practice in Louisiana, is, that it should contain a clear and concise statement of the object of the demand, or the cause of action upon which it is founded.

The question presented by the first plea to the jurisdiction of the court is, whether Webb, a citizen of the state of Louisiana, who resided in the western district of that state, could be sued by a plaintiff, who was a citizen of the state of Ohio, in the district court of the eastern district of the state of Louisiana. The residence of Webb being in the western district of Louisiana, could not affect the jurisdiction of the court. The plea admits, that he was a citizen of Louisiana, and the act of congress gives jurisdiction where the suit is between a citizen of the state where the suit is brought, and a citizen of another state ; and the division of a state into two or more districts cannot affect the jurisdiction of the court, on account of citizenship. This plea admits, that the petition and citation were served upon him in New Orleans, which takes the case out of the prohibition in the judiciary act, that no civil suit shall be brought in the courts of the United States, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

The second plea to the jurisdiction of the court is founded on the assumption, that the plaintiff McMicken, is to be considered as the assignee of McMicken & Ficklin of the note in question, and that the petition does not allege, that they could have prosecuted a suit upon it in the courts of the United States ; and that the case, therefore, falls within the prohibition in the judiciary act : That no district or *circuit court shall have cog- [*39
nisance of any suit to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made ; except in cases of foreign bills of exchange. (1 U. S. Stat. 79.) But the cause of action, and the right of the plaintiff to sustain it do not place him in the character of assignee. Ficklin never had any interest whatever in the note, according to the allegations in the petition ; the partnership had been dissolved, before the note in question was given. The consideration thereof was McMicken's share of the stock and goods on hand, at the time of the dissolution of partnership ; and the petition avers, that although the note is given in the name of the late firm of McMicken & Ficklin, it was for the sole and individual benefit of the petitioner, and that Ficklin was in no wise a party or interested therein, except as one of the obligors ; there was, therefore, no interest which Ficklin could assign, and

the objection is one purely of form and of a mere technical character, which ought not to be noticed, according to the course of proceedings in the courts of Louisiana. The facts set forth in the petition may well be considered as an averment that the note was given to the petitioner, McMicken, under the name and description of McMicken & Ficklin. And this view of the case disposes of the matter set up by the other defendants, in their pleas to the jurisdiction of the court, as well as of that which is set up in the third plea to the jurisdiction of the court.

There are other pleas to the merits interposed, *de bene esse*, by all the defendants, and which have not, of course, been in any manner considered or disposed of by the court below, as the pleas to the jurisdiction of the court were sustained, and the petition dismissed. Nor does the record contain the necessary matter to enable this court to dispose of the case upon its merits; some of these, turning upon questions of fact, the evidence to sustain which not all appearing upon the record; and the cause must, therefore, necessarily go back for further proceedings on those pleas. The judgment of the court below is accordingly reversed, and the cause sent back for further proceedings.

*40] THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of *Louisiana, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, for the further proceedings to be had therein, acrording to law and justice, and in conformity to the opinion of this court.[1]

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*41] *LESSEE of JAMES H. EWING, Plaintiff in error, *v.* JACOB BURNET.

Province of the jury.—Adverse possession.—Construction.—Punctuation.

It is the exclusive province of the jury to decide what facts are proved by competent evidence; it is their province to judge of the weight of testimony, as tending, in a greater or less degree, to prove the facts relied upon.

An elder legal title to a lot of ground gives a right of possession, as well as the legal seisin and possession thereof, co-extensive with the right; which continues, until there is an ouster by actual adverse possession, or the right of possession becomes in some other way barred.

An entry by one on the land of another, is or is not an ouster of the legal possession arising from the title, according to the intention with which is done; if made under claim or color of right, it is an ouster; otherwise, it is a mere trespass. In legal language, the intention guides the entry, and fixes its character.

It is well settled, that to constitute an adverse possession, there need not be a fence, a building or other improvement made; it suffices for this purpose, that visible notorious acts are exercised over the premises in controversy, for twenty-one years, after an entry under a claim and color of title.

Where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption or an adverse entry by him for twenty-one years; such acts are evidence of an ouster of the former owner, and of an actual adverse possession against

[1] For a decision of this case, upon the merits, see 6 How. 292.

him; if the jury think that the property was not susceptible of a more strict and definite possession than had been so taken and held. Neither actual occupation, nor cultivation, are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement; and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and could not exercise over property which he did not claim.[1]

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that be apparent, on judicially inspecting it, the punctuation will not be suffered to change it.

An adverse possession for twenty-one years, under claim or color of title, merely void, is a bar to recovery under an elder title by deed; although the adverse holder may have had notice of the deed.

Ewing *v.* Burnet, 1 McLean 266, affirmed.

ERROR to the Circuit Court of Ohio. The plaintiff in error instituted an action of ejectment in the circuit court of Ohio, at December term 1834, against the defendant, to recover a lot of ground in the city of Cincinnati. Both the plaintiff and the defendant claimed title under deeds from John Cleves *Symmes, the original grantee of the United States, for all the land on which the city of Cincinnati is erected. The deed from [*42 Symmes, under which the plaintiff asserted his title, was executed June 11th, 1798, to Samuel Forman; the deed from Symmes to the defendant, for the same lot, was dated May 21st, 1803. An adverse possession for twenty-one years and upwards, was relied on, as constituting a sufficient legal title, under the statute of limitations of Ohio. The case, and the evidence, are fully stated in the opinion of the court.

The cause was tried at July term 1835, and a verdict, under the instructions of the court, was found for the defendant, on which a judgment was rendered. The plaintiff tendered a bill of exceptions.

The charge of the court was as follows:—The plaintiff having shown a deed for the premises in controversy, older in date than that which was given in evidence by the defendant, on the prayer of the defendant, the court instructed the jury, that his actual possession of the lot, to protect his title, under the statute of limitations, must have been twenty-one years before the commencement of this suit. That suing for trespass on the lot, paying the taxes, and speaking publicly of his claim, were not sufficient to constitute an adverse possession. That any possession short of an exclusive appropriation of the property, by an actual occupancy of it, so as to give notice to the public and all concerned, that he not only claimed the lot, but enjoyed the profits arising out of it, was such an adverse possession as the statute requires. That to constitute an adverse possession, it is not essential, that the property should be inclosed by a fence, or have a dwelling-house upon it. If it were so situated as to admit of cultivation as a garden, or for any other purpose, without an inclosure, and it was so cultivated by the defendant, during the above period, it would be sufficient; or if the lot contained a coal-mine, or marble or stone quarry, and it was worked the above period, by the defendant, he having entered under a deed for the whole lot, such an occupancy would be an adverse possession, though the lot had no dwelling-house upon it, and was not inclosed by a fence. And also, if the lot

[1] Harris *v.* McGovern, 99 U. S. 167; Stephens *v.* Leach, 19 Penn. St. 262.

contained a valuable sand bank which was exclusively possessed and used by the defendant for his own benefit, by using the sand himself and selling it to others, and his occupancy of the lot in this manner was notorious to the public and all concerned; and if the defendant paid the taxes for the same, ejected and prosecuted trespasses on the lot, it being *situated *43] adjoining to the lots on which the defendant actually resided, except the intervention of a street which had not been graduated and opened so as to be used by she public; and said lot preserved the view of the defendant from his residence unobstructed, and such possession was continued the time required by the statute, it would constitute an adverse possession for the whole lot, the defendant having entered under a deed as aforesaid. The court also said to the jury, the law had been settled in Kentucky, that if a person residing on a tract of land should purchase, by deed, another tract adjoining to it, his possession would be extended over the tract thus purchased; and that this seemed to be reasonable, and was sustained by the doctrine of possession as generally recognised. That had the lot in controversy adjoined the premises on which the defendant resided, the case would come within the rule; but that a street intervened between the residence of the defendant and the lot in controversy, which would prevent an application of the rule.

Storer, for the plaintiff in error, contended, that the circuit court had erred, in charging the jury that the evidence adduced by the defendant established an adverse possession of the lot of ground in controversy, for twenty-one years. 2. That a part of the charge was erroneous, in having laid down law as applicable to a suppositional and different case, and in so stating it as that it was applied, by the jury, to the case on trial.

The substance of all the testimony is this: The defendant, Jacob Burnet, claimed to be the owner of the lot, under a deed dated in 1804. He has occasionally driven persons away from the lot, and prevented sand-diggers from carrying off sand. In 1820, he leased the privilege of digging sand. No fence was ever built around the lot, but, on the contrary, the lot was laid open as a common, and was passed over daily by the witnesses. Mr. Burnet has his residence on the opposite side of the street, and his own lot, opposite to this, on which was his dwelling, was fenced in. He has paid taxes on the lot since 1810, and has once or twice brought suit against persons for trespassing on the lot; and has always claimed it as his own. If these facts constitute an adverse possession, then the judgment is right. The evidence being all before the court, in the bill of exceptions, whether they constitute or amount to an adverse possession, is a question of law. "Adverse possession is a legal idea; *admits of a legal definition of *44] legal distinctions; and is, therefore, correctly laid down to be a question of law." *Bradstreet* v. *Huntington*, 5 Pet. 438.

In the absence of proof of any actual possession of the permises in controversy, the law presumes a possession in the person having the legal title; as the plaintiff's lessor shows the elder title in this case, aud the law having attached to that title a constructive possession, the proof of an actual adverse possession in cast upon the defendant. The law raises no presumptions against the elder title; it will not presume that anything has been done; hence, the defendant must show, beyond any reasonable doubt, first.

that there has been an adverse possession; second, that adverse possession has continued for at least twenty-one years. 8 Cranch 250; 5 Pet. 355; 3 Wend. 152; 4 Mass. 417; 3 Johns. Cas. 124; 10 Serg. & Rawle 305.

I. There must, then, have been an adverse possession; and here the inquiry will be, what constitutes such a possession, so as to create a bar to the recovery of the true owner? To constitute an ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. 4 Mass. 418; 1 Ibid. 486. Adverse possession must be marked by definite boundaries, and be regularly continued down, to render it availing. 9 Cow. 654; 10 Johns. 477. The act of limitation does not prevent the entry of the owner of the land, and bringing an ejectment, at any time, unless when there has been an actual, continued, visible, notorious, distinct and hostile possession for twenty-one years. 6 Serg. & Rawle 23. Rights, barred by limitation, are where there is an actual, exclusive, adverse possession; definite, positive and notorious; marked by definite boundaries; an uninterrupted and continued possession for twenty-one years. 3 Serg. & Rawle 294; 1 Har. & Johns. 545; 5 Ibid. 266. The possession that will give a title, under the statute of limitations, must be an actual occupancy, *a pedis possessio*, definite, positive and notorious. 2 Nott & McCord 343. Digging a canal, and felling trees, are not such acts of possession as may be the basis of the prescription of thirty years. 12 Mart. (La.) 11; 9 Ibid. 123; App'x to Adams on Eject. 493. *The occasional exercise of dominion, by broken and unconnected acts of ownership, over property [*45 which may be made permanently productive, is in no respect calculated to assert to the world a claim of right; for such conduct bespeaks rather the fitful invasions of a conscious trespasser, than the confident claims of a rightful owner. 2 N. Car. Law Repos. 400. This title by possession, so as to defeat a grant or other legal conveyance, is never to be presumed, but must be actually proved and shown, in order to rebut a prior title, in the same manner and with the same degree of precision, as plaintiff must show a clear title in himself before he can recover. 2 Bay 491. It is a settled rule, that the doctrine of adverse possession is to be taken strictly, and not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. 9 Johns. 167; 8 Ibid. 228; 5 Pick. 134–5; 3 Johns. Cas. 124; 1 Cow. 285.

Again, there must not only have been an adverse possession, but such possession must have continued during the period of twenty-one years. This possession must not only continue, but it must continue the same in point of locality, during the prescribed period of time, sufficient to constitute it a bar; that is to say, a roving possession, from one part of a tract of land to another, cannot bar the right of entry of the owner upon any part of the land which had not been held adversely for twenty-one years. Hall's Law Journ. 255–6. The possession must have so continued, that at any time an ejectment might have been brought against an occupant on the land, to try the right of entry. 3 A. K. Marsh. 366. If there is any period during the twenty years, in which the person having the right of entry could not find an occupant on the land, on whom he could bring and sustain his ejectment, that period cannot be counted against him. *Braxdale*

v. *Speed*, 3 A. K. Marsh. 366 ; 4 Bibb 257 ; 1 A. K. Marsh. 106 ; *Smith* v. *Mitchel*, Ibid. 208. An occasional use of the land, either by cutting down and taking away trees, digging or taking away stone or sand, or making sugar once a year, will not amount to an adverse possession. 1 A. K. Marsh. 106. In the case of *Smith* v. *Mitchel*, 1 A. K. Marsh. 208, the court
*46] *determined, that the appellee, having occasionally, for upwards of twenty years, made sugar at a camp erected by him upon the land in contest, did not confer upon him such a possession as would bar the plaintiff's right of entry. 3 J. J. Marsh. 519. Where the junior patentee, in such case, has neither settled upon nor improved the land, the senior patentee, in such case has a right to consider each act of occupation as a mere temporary intrusion. 3 J. J. Marsh. 552.

Applying these cases to the cause before the court, it is believed, that the evidence given by the defendant, on the trial, did not establish an adverse possession, and that the court ought so to have instructed the jury. Taking the whole evidence together, and drawing all the fair legal inferences from it, it is not proved, that the defendant has been in the continued adverse possession of the lot in controversy for twenty-one years. There is nothing more than evidence of occasional acts of ownership over the property. If cutting down trees, making sugar, digging canals, &c., on the land, are not evidence of an actual adverse possession ; how can the occasional drawing of a load of sand, or driving people away from the lot, be considered as more convincing evidence of an actual possession ?

It is not contended, that, in order to constitute an actual adverse possession, the lot must be inclosed by a fence ; on the contrary, it is admitted, that a fence is not actually necessary ; it is merely evidence of the fact of occupancy ; but it is the actual occupancy itself, connected with the claim of title, that constitutes the bar. Land may be occupied, without a fence ; and we know, that in some countries, thousands of acres of land are occupied and tilled although not under fence. In many parts of Europe, at this day, this is the case. But the fact of the land being occupied, and crops annually gathered, shows that an exclusive ownership is claimed by some one ; and if it is not the true owner that is so using the land, it becomes him to assert his right in time. So it is willingly admitted, that a lot may be so used and occupied for a period of years, without fencing, as to bar the right owner. For instance, a lot may be used for a coal or lumber yard ; the continually keeping such coal or lumber on the lot may as conclusively show an adverse holding, as though a fence was built around it. But because there may be such an adverse occupancy, without fence, it does not follow, that every pretence of ownership, or even a succession of trespasses in digging or permitting others to dig a load of sand on the lot, will constitute an adverse
*47] holding. *Admit the doctrine to the full extent, as contended for by the defendant, and it leads to this result, that any person may, by trespassing on his neighbor's lot or land, occasionally, in the course of time, become the owner of that land. Apply the same doctrine to wild land, and no man can safely own such property. Vacant lots in town are not usually inclosed, and so long as the public are permitted to pass over them, so long as they lie in common, it appears, that it would be extremely dangerous to admit a title by adverse holding. If a man holding such property will rely upon a mere possession, under a defective title, it is surely not requiring of

him too much (where no actual occupancy takes place), in compelling him to erect his fence, thereby giving all the world to know to that he claims, to the exclusion of all other owners. The decision made by this court, in *Ellicott* v. *Pearl*, 10 Pet. 414, since the trial of this cause, has been examined; the court are not asked to interfere with that decision; nothing is found therein opposed to the present case. It is not contended, that an occupany of land can only be proved by the erection of a fence, or actual residence, or actual possession must be proved, without either fence or actual residence; and these are the positions decided in the case alluded to. That case does not, therefore, affect the present controversy.

II. As to the second point, that the charge of the court was incorrect, in stating the law of a case different from that submitted to the jury, the judge said:—"If the defendant paid the taxes for the lot ejected, and prosecuted trespassers on the lot, it being situated adjoining to the lot on which the defendant actually resided, except the intervention of a street, which had not been graded and opened so as to be useful to the public; and said lot preserved the view of the defendant from his residence unobstructed, and such possession was continued the time, &c., it would constitute an adverse possession." This appears calculated to convey the impression to the jury, that the mere design on the part of the occupant of a house, on an adjoining lot, not in dispute, to preserve an unbroken view to his residence, may be considered as tending to establish an adverse possession of the lot in dispute. Surely, such a position cannot be sustained, upon any sound principle of law. If once admitted, it would place all vacant town lots in the utmost jeopardy. Nothing is more common in towns, particularly of modern origin, than to have a house surrounded with vacant lots; and if an actual occupation, or an inclosure, can be dispensed with, merely on the ground that the *claimant intended to preserve the view to a house on an adjoining lot, or a lot on the opposite side of [*48 the street; it is tantamount to establishing the proposition, that neither actual occupancy, nor an inclosure, is necessary to constitute an adverse possession of a city lot. The charge of the court, therefore, was entirely incorrect; and must have had an influence with the jury unfavorable to the plaintiff's rights.

Ewing, for the defendant.—The point presented by the counsel for the plaintiff in error, that the establishment of a subsequent title derived from the same source as the prior title, cannot affect the prior title, was not presented in the circuit court; and it cannot, therefore, be made a part of the case in this court. The whole question on the trial of the cause was the effect of the adverse possession asserted by the defendant, resting it on the statute of limitations of Ohio, upon the title of the plaintiff by deed, admitted to be prior in date to the deed under which the defendant also claimed.

Under the statute of limitations of Ohio, and under the general law, the circuit court had no right to exclude from the jury the evidence of possession. Some of the witnesses expressly say, that the defendant had possession of the lot for upwards of twenty years; and thus the court had no right to weigh the evidence. It was not the duty of the court, to say the evidence did not make out the case. It is true, title by possession is a legal

title ; but facts must be proved to make it out. The court was bound to state what facts would make out such a title, and they did so.

Did the court lay down the law correctly in favor of the plaintiff and the defendant, in the charge to the jury? All the statements of the law are right, and the plaintiff has, therefore, no right to complain. It is said, there cannot be two constructive possessions of the same property. This may be true ; but the defendant does not claim a constructive possession, but an actual possession ; and an ejectment might always have been brought against him by the plaintiff's lessee.

Storer, in reply, insisted, that asking a court to charge the jury whether the whole evidence was sufficient to establish an adverse possession, and asking instructions of the court on the whole evidence, are the same as a demurrer to evidence.

*49] *Baldwin, Justice, delivered the opinion of the court.—In the court below, this was an action of ejectment, brought in November 1834, by the lessor of the plaintiff, to recover possession of lot No. 209, in the city of Cincinnati ; the legal title to which is admitted to have been in John Cleves Symmes, under whom both parties claimed ; the plaintiff, by a deed dated 11th of June 1798, to Samuel Foreman, who, on the next day, conveyed to Samuel Williams, whose right, after his death, became vested in the plaintiff ; the defendant claimed by a deed to himself, dated 21st of May 1803, and an adverse possession of twenty-one years before the bringing of the suit.

It was in evidence, that the lot in controversy is situated on the corner of Third and Vine streets ; fronting on the former 198, on the latter, 98 feet ; the part on Third street is level for a short distance, but descends towards the south along a steep bank, from forty to fifty feet, to its south line ; the side of it was washed in gullies, over and around which the people of the place passed and repassed at pleasure. The bed of the lot was principally sand and gravel, with but little loam or soil ; the lot was not fenced, nor had any building or improvement been erected or made upon it, until within a few years before suit brought ; a fence could have been kept up on the level ground on the top of the hill on Third street, but not on its declivity, on account of the deep gullies washed in the bank ; and its principal use and value was in the convenience of digging sand and gravel for the inhabitants. Third street separated this lot from the one on which the defendant resided from 1804, for many years, his mansion fronting on that street ; he paid the taxes upon this lot from 1810 until 1834, inclusive; and from the date of the deed from Symmes, until the trial, claimed it as his own. During this time, he also claimed the exclusive right of digging and removing sand and gravel from the lot ; giving permission to some, refusing it to others ; he brought actions of trespass against those who had done it, and at different times made leases to different persons, for the purpose of taking sand and gravel therefrom, besides taking it for his own use, as he pleased. This had been done by others, without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel, or that he had ever intermitted his claim to the exclusive right of doing so ; on the contrary, several witnesses testified to his continued assertion of right to the lot ; their knowledge of his

exclusive claim, and their ignorance of any adverse claim, for more than twenty-one years *before the present suit was brought. They further stated, as their conclusion from these facts, that the defendant [*50 had, from 1806, or 1807, in the words of one witness, "had possession of the lot;" of another, that since 1804, "he was as perfectly and exclusively in possession as any person could possibly be of a lot not built on or inclosed;" and of a third, "that since 1811, he had always been in the most rigid possession of the lot in dispute; a similar possession to other possessions on the hill lot." It was further in evidence, that Samuel Williams, under whom the plaintiff claimed, lived in Cincinnati, from 1803, until his death in 1824; was informed of defendant having obtained a deed from Symmes, in 1803, soon after it was obtained, and knew of his claim to the lot; but there was no evidence that he ever made an entry upon it, demanded possession or exercised or assumed any exercise of ownership over it; though he declared to one witness, produced by plaintiff, that the lot was his, and he intended to claim and improve it, when he was able. This declaration was repeated often, from 1803, till the time of his death, and on his death-bed; and it appeared, that he was, during all this time, very poor; it also appeared in evidence, by the plaintiff's witness, that the defendant was informed, that Williams owned the lot, before the deed from Symmes, in 1803, and after he had made the purchase.

This is the substance of the evidence given at the trial, and returned with the record and a bill of exceptions, stating that it contains all the evidence offered in the cause; whereupon, the plaintiff's counsel moved the court to instruct the jury, that on this evidence the plaintiff was entitled to a verdict; also, that the evidence offered by the plaintiff and defendant was not sufficient, in law, to establish an adverse possession by the defendant; which motions the court overruled. This forms the first ground of exception by the plaintiff to the overruling his motions: 1. The refusal of the court to instruct the jury that he was entitled to recover: 2. That the defendant had made out an adverse possession.

Before the court could have granted the first motion, they must have been satisfied, that there was nothing in the evidence, or any fact which the jury could lawfully infer therefrom, which could in any way prevent the plaintiff's recovery; if there was any evidence which conduced to prove any fact that could produce such effect, the court must assume such fact to have been proved; for it is the exclusive province of the jury, to decide what facts are proved by *competent evidence. It was also their [*51 province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked, must depend upon the opinion of the court, on a finding by the jury in favor of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff.

Now, as the jury might have refused credence to the only witness who testifies to the notice given to the defendant of Williams's ownership of the lot in 1803, and of his subsequent assertion of claim, and intention to improve it; the testimony of this witness must be thrown out of the case, in testing the correctness of the court in overruling this motion; otherwise,

we should hold the court below to have erred, in not instructing the jury on a matter exclusively for their consideration—the credibility of a witness, or how far his evidence tended to prove a fact, if they deemed him credible. This view of the case throws the plaintiff back to his deed, as the only evidence of title; on the legal effect of which, the court were bound to instruct the jury as a matter of law, which is the only question to be considered on this exception.

It is clear, that the plaintiff had the elder legal title to the lot in dispute, and that it gave him a right of possession, as well as the legal seisin and possession thereof, co-extensively with his right; which continued till he was ousted by an actual adverse possession (6 Pet. 743); or his right of possession had been in some other way barred. It cannot be doubted, that from the evidence adduced by the defendant, it was competent for the jury to infer these facts—that he had claimed this lot under color and claim of title, from 1804 until 1834; had exercised acts of ownership on and over it, during this whole period; that his claim was known to Williams and to the plaintiff; was visible, of public notoriety, for twenty years previous to the death of Williams. And if the jury did not credit the plaintiff's witness, they might also find that the defendant had no actual notice of Williams's claim; that it was unknown to the inhabitants of the place, while that of the defendants was known; and that Williams never did claim the lot, to assert a right to it, from 1803 until his death in 1824. The jury might also draw the same conclusion from these facts, as the witnesses did; that the

*52] *defendant was, during the whole time, in possession of the lot, as strictly, perfectly and exclusively, as any person could be of a lot not inclosed or built upon; or as the situation of the lot would admit of. The plaintiff must, therefore, rely on a deed of which he had given no notice, and in opposition to all the evidence of the defendant, and every fact which a jury could find, that would show a right of possession in him, either by the presumption of a release or conveyance of the elder legal title, or by an adverse possession. On the evidence in the cause, the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams, under a deed in virtue of which he had made no assertion of right from 1798, in favor of a possession, such as the defendant held from 1804; though it may not have been strictly such an adverse possession, as would have been a legal bar, under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years (6 Pet. 513); and we think that the evidence in this case was, in law, sufficient to authorize the jury to have made the presumption, to protect a possession, of the nature testified, for thirty years; and if the jury could so presume, there is no error in overruling the first motion of the plaintiff.

On the next motion, the only question presented is on the legal sufficiency of the evidence to make out an ouster of the legal seisin and possession of Williams by the defendant; and a continued adverse possession for twenty-one years before suit brought. An entry by one man on the land of another, is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster, otherwise, it is a mere trespass; in legal language, the intention guides the entry and fixes its character. That the evidence in this case justified the jury in finding an entry by the defendant on this lot, as

early as 1804, cannot be doubted ; nor that he claimed the exclusive right to it, under color of title, from that time until suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to justify a finding that they were in assertion of a right in himself ; so that the only inquiry is, as to the nature of the possession kept up.

It is well settled, that to constitute an adverse possession, there need not be a fence, building or other improvement made (10 Pet. 442) ; it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in *controversy, for twenty-one years, after an entry under claim and color of title. So much depends on the nature and [*53 situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule, adapted to all cases. But it may with safety be said, that where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption, or an adverse entry by him, for twenty-one years ; such acts are evidence of an ouster of a former owner, and an actual adverse possession against him ; if the jury shall think, that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation nor residence, are necessary to constitute actual possession (6 Pet. 513), when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. Whether this was the situation of the lot in question, or such was the nature of the acts done, was the peculiar province of the jury ; the evidence, in our opinion, was legally sufficient to draw the inference that such were the facts of the case, and if found specially, would have entitled the defendant to the judgment of the court in his favor ; they, of course, did not err in refusing to instruct the jury that the evidence was not sufficient to make out an adverse possession.

The remaining exceptions are to the charge of the court, in which we can receive no departure from established principles. The learned judge was very explicit in stating the requisites of an adverse possession; the plaintiff had no cause of complaint to a charge, stating that exclusive appropriation, by an actual occupancy ; notice to the public, and all concerned of the claim, and enjoyment of profits by defendant, were all necessary. No adjudication of this court has established stricter rules than these ; and if any doubts could arise, as to their entire correctness, it would be on an exception by the defendant. In applying them, in the subsequent part of the charge, to the evidence, there seems to have been no relaxation of these rules. The case put by the court, as one of adverse possession, is of a valuable sand-bank, exclusively possessed, and used by the defendant, for his *own benefit, by using and selling the sand—and this occupancy, notorious to the public and all concerned ; which fully meets all the [*54 requisites before stated, to constitute adverse possession. If we take the residue of the charge literally, it would seem to superadd other requisites ; as, the payment of taxes, ejecting and prosecuting trespassers on the lot ;

its contiguity to the defendant's residence, &c.; but such is not the fair construction of the charge, nor the apparent meaning of the court. These circumstances would seem to have been alluded to, to show the intention with which the acts previously referred to were done; in which view they were important, especially, the uninterrupted payment of taxes on the lot for twenty-four successive years; which is powerful evidence of a claim of right to the whole lot. The plaintiff's counsel has considered these circumstances making a distinct case, in the opinion of the court, for the operation of the statute; and has referred to the punctuation of the sentence, in support of this view of the charge. Its obvious meaning is, however, to state these as matters additional or cumulative to the preceding facts; not as another distinct case, made out by the evidence, on which alone the jury could find an adverse possession. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.

It has also been urged, in argument, that as the defendant had notice of the claim of Williams, his possession was not fair and honest, and so not protected by the statute. This admits of two answers: 1. The jury were authorized to negative any notice; 2. Though there was such notice of a prior deed, as would make a subsequent one inoperative to pass any title, yet an adverse possession for twenty-one years, under claim and color of title, merely void, is a bar; the statutory protection being necessary, only where the defendant has no other title but possession, during the period prescribed. The judgment of the circuit court is, therefore, affirmed.

Judgment affirmed.

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*55] *Samuel Veazie *v.* Ira Wadleigh *et al.*

Discontinuance.

On the trial of a cause in the circuit court of the district of Maine, upon certain questions which arose in the progress of the trial, the judges of the court were divided in opinion, and the questions were, at the request of the plaintiff, certified to the supreme court, to January term 1835; in December 1836, the plaintiff filed in the office of the clerk of the circuit court of Maine, a notice to the defendant, that he had discontinued the suit in the circuit court, and that as soon as the supreme court should meet at Washington, the same disposition would be made of it there, and that the costs would be paid, when made up; a copy of this notice was given to the counsel of the defendants. The plaintiff's counsel asked the court for leave to discontinue the cause; and the discontinuance was allowed.[1]

Quære? Whether the party on whose motion questions are certified to the supreme court, under the act of congress, has a right, generally, to withdraw the record, or discontinue the case in the supreme court; the original cause being detained in the circuit court for ulterior proceedings.

Certificate of Division from the Circuit Court for the District of Maine. An action of trespass was instituted in 1835, in the circuit court of the district of Maine; and the question between the plaintiff and the

[1] And see, United States *v.* Minnesota and North-western Railroad Co., 18 How. 241.

defendant was, as to the title in certain lots of ground, described in the declaration, in the county of Penobscot, in the state of Maine.

The case came on to be tried before the circuit court, at October term 1835; and the judges of the court being divided in opinion on certain questions arising in the trial of the cause, the same were, at the request of the plaintiff, by the order of the court, certified to the supreme court of the United States. The case was docketed at January term 1836.

On the 15th of December 1836, the plaintiff filed a notice in the circuit court, that the case then under a certificate of division to the supreme court of the United States, was discontinued in the circuit court; and that the same would be discontinued in the supreme court at Washington as soon as that court should meet. The notice also stated the readiness of the plaintiff to pay the legal costs of the defendants, when the same should be made up. Notice of this paper was given to the defendants.

Smith and *Butler*, of counsel for the plaintiff, moved the court to discontinue the case.

* *Webster*, against the motion, stated, that the action had been brought to try the title to a very valuable quantity of land in Maine; [*56 and on the trial, the questions which were decisive as to the rights of the parties to the controversy, had been certified to this court. The cause was continued at the last term of this court, at the instance of the plaintiff, and now he asks the discontinuance of the case; this cannot be done by either party, without the consent of the other. This is the general ground of objection.

At present, there is no discontinuance on the record of the circuit court in Maine, for no discontinuance can take place in vacation. But if application had been made to the circuit court to allow the discontinuance, that court had no power over the case. There is no statute of Massachusetts or of Maine, declaring the cases in which a plaintiff may discontinue. The authority referred to from Dane's Abridgment, is applicable to costs only; it does not recognise it as a general doctrine, that a plaintiff may always discontinue. A discontinuance, after the trial, is always in the discretion of the court; and the rule is universal, that when anything has occurred in the course of the cause, which gives the defendant an interest to have the case decided, the plaintiff cannot discontinue. This is stated in 5 Dane's Abr. 672; 6 Ibid. 194, art. 1, § 12, and in the cases referred to. These authorities show that there cannot be a discontinuance by the plaintiff, where there has been a reference under a rule of court; as the defendant has, by the reference, acquired an interest in the termination of the cause.

The present proceeding is entirely a statutory one, and it was intended to take the place of a provision which should give to the parties in a case a full opportunity of having a final decision in this court over those questions which, when decided, would govern the circuit court in the case. In the early history of the circuit courts, there was no such provision, and when a difference of opinion prevailed between the judges of the court, the case was adjourned to the succeeding term, until another judge of the supreme court should hold the circuit court; these courts being then held by the judges of the supreme court, sitting in rotation, or in succession, in each circuit; and if the court should again be divided in opinion, the judge

of the supreme court holding the court should decide. The act of 1802 (2 U. S. Stat. 159), was passed after the judges of the supreme court were assigned to each circuit.

*57] *Two ejectment suits, involving the same questions as those presented in this cause, were depending, when the case was certified. The defendant has, therefore, an interest to have the questions settled. But whether he has, or not, it is enough, under the provisions of the act of congress, that he desires to have the law settled.

All the proceedings under this statute are prescribed by it. Nothing is said about the case being withdrawn. The questions upon which the court may divide in opinion are to be certified, and the supreme court are to decide upon them, and certify their decision to the circuit court. When this is done, the plaintiff may discontinue the cause, with the consent of the circuit court; but until the cause is again in the circuit court, he has no power over it. But it is not denied, that, both parties agreeing, the case may be withdrawn. By the provisions of the law, the case may be certified, at the instance of either party; and in the present case, it was done by the plaintiff; the defendant might have done it. The law says the division shall be certified, and that the supreme court shall decide it. Rule nineteen of this court, relating to writs of error, provides, that the plaintiff in error shall not discontinue. If he does, the defendant may go on. This rule, by analogy, applies to the case before the court. Cited, 12 Mass. 49, as to discontinuances.

Smith and *Butler*, for the plaintiff, contended, that the plaintiff had a full right to discontinue the case in the circuit court, where it was still pending; the certificate not having removed it into this court. The law of Maine recognises this right. 5 Dane's Abr. tit. Discontinuance, 671. The case in 15 Mass. 179, is to the same point.

This is not like a discontinuance after verdict. After this court shall have decided the questions certified, a jury must be called, and the case will proceed. Nothing is in the supreme court but the questions certified, and they are only incidents to the case. By the statute, notwithstanding the fact that questions on which the judges of the circuit court have differed, have been certified, the cause may go on and be tried, unless the questions are such as to prevent it. Cited, *Wayman* v. *Southard*, 10 Wheat. 1; *United States* v. *Daniel*, 6 Ibid. 542. These cases show, that if the decision on the

*58] questions certified *shall be a decision of the cause, yet this court cannot give judgment; nor can the whole case be sent up to this court for decision. *United States* v. *Bailey*, 9 Pet. 273.

What were the rights of the parties in the circuit court? We aver, that either of them could have had the questions on which the judges differed in opinion certified to this court. The plaintiff alone has chosen to exercise this right. It is admitted, that these questions are important; but if the defendant chose to take the chance of the plaintiff's discontinuing the cause here, he must abide by the consequences. He omitted to secure the decision of this court on these questions, by requesting to have them certified; and the case is now before this court, on the request of the plaintiff only. He withdraws it from the court, and what, then, is its authority to proceed? Until the argument of the case comes on, the record is not here for the benefit

of both parties. It is here, until then, only for the party at whose request it had been certified. This does not apply to costs.

It will not be denied, that if this case had been discontinued by order of the court below, this court would not afterwards go on. Has there been a discontinuance? Has it not been substantially withdrawn from the circuit court? Is it technically correct, to say, a case cannot be discontinued, without the act of the court in which it is depending; but yet, substantially, a discontinuance may be made in vacation, which will have the effect of a discontinuance? It is understood, that the act of the plaintiff in this case is, according to the practice in Maine, a discontinuance; and that he cannot now go on in the circuit court with the cause. The paper having been filed, it has become the property of the court and of the defendant; and the plaintiff cannot afterwards appear in the case. The paper states, that the case is discontinued; and this has been followed up by the application now made. No more proceedings can take place. In England, on the filing of such a paper, the court would order a nonsuit.

The statute of Maine, on giving costs on a discontinuance, affirms the right. By the common law, no costs were given on a discontinuance, except in certain cases, on the condition of paying costs. After the jury had retired, and after they have returned, and are ready to give their verdict, the plaintiff must be called, and he may retire. The penalty of costs is imposed in such cases. It is when a party seeks to discontinue, without costs, he must apply to the court. *As to the case of a reference under a rule of court, in which it is admitted, neither party can withdraw: here, by agreement, the cause is out of court, and neither party can go to court and discontinue, without the consent of the other. A different tribunal has been substituted, and each party has a right to its adjudication of the case. But there is no such right in this case. [*59

Suppose, the case had been argued and decided in this court, on the points certified, and had gone back to the circuit court of Maine; could that court proceed in the cause, if the plaintiff, on being called, does not appear? Could a *venire* be issued, and a jury be called? Could he not, after the jury was sworn, suffer a nonsuit? If all this may be done, after the cause has proceeded so far, may not the same be done, in an earlier period of the proceedings?

Story, Justice, delivered the opinion of the court.—This is a case certified from the circuit court for the district of Maine, upon a division of opinion of the judges of that court, upon certain questions which arose in the progress of the trial of the cause. These questions were certified to this court, at the last term, upon the motion of the plaintiff. On the 15th of December last, the plaintiff filed in the clerk's office of the circuit court (it being vacation) a written declaration, as follows:

"I hereby notify you, that the action of trespass, which is now pending in said court, to await the decision of certain questions carried up to the supreme court, is discontinued by me; and that the same disposition will be made of the case in the supreme court at Washington, as soon as it meets at Washington. You will, therefore, please to file this in the case, and notify the counsel for the defendants of the same, and that their legal costs in the

said circuit court may be immediately made up, and the same will be paid."

Due notice was accordingly given to the counsel of the defendants; and the counsel for the plaintiff have, accordingly, at the present term, made a motion in this court, under these circumstances, to discontinue the cause here, and to withdraw the record. The motion is resisted, on the other side, upon the ground, that the defendants have an interest in having these certified questions decided by this court, of which they cannot be deprived, without their own consent, by the dismissal of the cause. The point is confessedly new, and we have, therefore, thought it right, after the argument, to give it full consideration, with reference to the future practice of the court.

*60] *The act of 102, ch. 31, § 6, under which this case has been certified, provides, "That whatever any question shall occur before a circuit court, upon which the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated, under the direction of the judges; and certified, under the seal of the court, to the supreme court, at their next session to be held thereafter, and shall, by the said court, be finally decided. And the decision of the supreme court, and their order in the premises, shall be remitted to the circuit court, and be there entered on record, and shall have effect according to the nature of the said judgment and order; provided, however, that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had, without prejudice to the merits."

In construing a statute providing for such a novel mode of obtaining the decision of an appellate court upon the matters of controversy between the parties, it is not surprising, that there should be some difficulty in ascertaining the precise rights of the parties; whether the party upon whose motion the questions are brought here, is to be treated like a plaintiff in error, as entitled to dismiss his own certified cause, at his pleasure; or whether the other party is entitled to retain the cause, for his own benefit, and to insist upon a final adjudication of the questions here. It is clear, that the statute does not, upon the certificate of division, remove the original cause into this court; on the contrary, it is left in the possession of the court below, for the purpose of further proceedings, if they can be had without prejudice to the merits; so that, in effect, the certified questions only, and not the original cause, are removed to this court. In the next place, looking to the intent and objects of the provision, which are to enable the court below to proceed to a final adjudication of the merits of the cause, it seems equally clear, that if the original cause is entirely withdrawn from the cognisance of the circuit court, by discontinuance or otherwise, there is no ground upon which this court should be required to proceed to decide the certified questions, since they are thus become mere abstract questions. They are but incidents to the original cause, and ought to follow the fate of their principal. We have no doubt, then, that upon the true construction of the statute, if a discontinuance had been actually entered in the circuit court of Maine, in term, the record here ought not further to be acted upon by

*61] us; but a withdrawal or dismissal of the certified *questions ought to be allowed. If it were necessary to accomplish this object, in the

most formal way, we should order the case to stand continued until the next term of this court; so that the plaintiff might, in the intermediate time, make an application to the circuit court in term, to enter a discontinuance thereof in that court.

The only point of difficulty is, whether the filing of the above paper in the circuit court, in vacation, constitutes, *per se*, a discontinuance of the original cause, without any action of the circuit court thereon, upon which this court ought now to act. According to the practice of some of the courts in the Union, it is understood to be the right of the plaintiff to enter a discontinuance of the cause, at any time, either in term or in vacation, upon the payment of costs, before a verdict is given, without a formal assent of, or application to, the court; and that, thereupon, the cause is deemed, in contemplation of law, to be discontinued. In Massachusetts and Maine, a different practice is understood to prevail; and the discontinuance can only be in term, and is, generally, upon application to the court. In many cases, however, in these states, it is a matter of right. In *Haskell* v. *Whitney*, 12 Mass. 49–50, this doctrine was expressly recognised. The court, on that occasion, said, "The plaintiff or demandant may, in various modes, become nonsuit, or discontinue his cause, at his pleasure; at the beginning of every term at which he is demandable, he may neglect or refuse to appear; if the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or after issue joined, he may decline to open his cause to the jury; the court also may, upon sufficient cause shown, allow him to discontinue, even when it cannot be claimed as a right, or after the cause is opened and submitted to the jury." Before trial, then, the plaintiff may, in many cases, as a matter of right, discontinue his cause, according to the practice of the state courts, at any time when he is demandable in court. After a trial or verdict, he can do so only by leave of the court, which it may grant or refuse, in its discretion. But, under ordinary circumstances, before verdict, it is almost a matter of course to grant it, upon payment of costs, when it is not strictly demandable of right.

Under the circumstances of the present case, we have no doubt, that the plaintiff is estopped, hereafter, to withdraw his assent to the discontinuance of his suit in the circuit court; and that that court possesses full authority to enter such discontinuance at its next term, upon the mere footing of the paper filed in the clerk's office, without *any further act of the plaintiff. We think, too, that it would be the duty of that court [*62 to allow the entry of such discontinuance, upon the application of the plaintiff; as he certainly has a right, in that or some other form, to decline to proceed further in the suit, or to prosecute it further, subject to the payment of costs to the defendants. In substance, then, we think the original cause in the circuit court ought now to be treated by us as virtually at an end, for all the purposes of requiring our decision upon the certified questions; and that the motion to withdraw the record, and discontinue the cause, ought to be granted.

In making this decision, we wish to be understood, as not meaning to intimate, that the party, upon whose motion any questions are certified to this court under the statute, has a right, generally, to withdraw the record, or discontinue the case here, while the original cause is retained in the circuit court for ulterior proceedings. That is a point of a very different

nature from that now before us, and may require very different principles to govern it. It will be sufficient to decide it, when it shall arise directly in judgment.

On consideration of the motion made in this cause, on a prior day of the present term of this court, to wit, Thursday, the 12th inst., by Mr. Smith, of counsel for the plaintiff, to dismiss this cause, and of the arguments thereupon had, as well in support of as against the motion, it is now here considered by the court, that said motion be and the same is hereby granted. Whereupon, it is now here ordered and adjudged by this court that this cause be and the same is hereby dismissed.

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*63] *Crawford Allen, Appellant, *v.* John Hammond, Appellee.

Concellation of contract founded in mistake of fact.

The brig Ann, of Boston, on a voyage from New Orleans to Madeira, &c., was unlawfully captured by a part of the Portuguese squadron, and was, with her cargo, condemned; upon the remonstrance of the government of the United States, the claim of the owner for compensation for this capture was, on the 19th of January 1832, admitted by the government of Portugal, to an amount exceeding $33,000, one-fourth of which was soon after paid. On the 27th of January 1832, the owner of the Ann and cargo, neither of the parties knowing of the admission of the claim by Portugal, made an agreement with the appellant, to allow him a sum, a little below one-third of the whole amount of the sum admitted, as commissions, on his agreeing to use his utmost efforts for the recovery thereof; at the time this agreement was made, which was under seal, H., the appellee, was indebted to the appellant, A., $268, for services rendered to him in the course of a commercial agency for him; in the contract, it was agreed, that this debt should be released. Under the contract, A. received the payment of one-fourth of the amount admitted to be due to H., by Portugal; and H. filed a bill to have the contract rescinded, and delivered up to him; the debt of $268 to be deducted from the same, with interest, &c. The circuit court made a decree in favor of H., and on the payment of $268, with interest, the contract was ordered to be delivered up to be cancelled. The decree of the circuit court was affirmed; the court being of opinion, that the agreement had been entered into by both the parties to it, under a mistake, and under entire ignorance of the allowance of the claim of the owner of the Ann, and her cargo; it was without consideration; services long and arduous were contemplated, but the object of those services had been attained.

If a life-estate in land is sold, and at the time of the sale, the estate is terminated by the death of the person in whom the right vested, a court of equity would rescind the purchase; if a horse is sold, which both parties believed to be alive, the purchaser would not be compelled to pay the consideration.[1]

The law on this suject is clearly stated in the case of Hitchcock *v.* Giddings, Daniel's Exch. 1, where it is said, that a vendor is bound to know he actually has that which the professes to sell; and even though the subject of the contract be known to both parties to be liable to a contingency, which may destroy it immediately; yet if the contingency has already happened, it will be void.

Hammond *v.* Allen, 2 Sumn. 387, affirmed.

Appeal from the Circuit Court of Rhode Island. In the circuit court, the appellee, John Hammond, filed a bill, praying that a certain instrument in writing, executed by him and the appellant, in January 1832, by which he had stipulated to allow to the appellant a compensation for establishing a claim on the Portuguese government, for the illegal capture of a

[1] And see Martin *v.* McCormick, 8 N. Y. 331; Miles *v.* Stevens, 3 Penn. St. 21; s. c. 3 Clark 484.

*vessel belonging to him, should be cancelled; the consideration for the said stipulation having failed; the bill also prayed for further and other relief.

The instrument referred to was an irrevocable power of attorney from Hammond to Allen, to receive from the government of Portugal, or of the United States, and of and from all and every person and persons whomsoever, a certain claim or demand which said Hammond had, for and on account of the capture and condemnation of the American brig Ann, of Boston, and her cargo, on a voyage from New Orleans to Goree (intending to stop and trade at Fayal, Madeira and Teneriffe), by the Portuguese squadron cruising off the island of Terceira, and condemned by the tribunal sitting at Lisbon, under the authority of the Portuguese government, on the 22d of December 1831. The agreement was made on the 27th day of January 1832, between Hammond and Allen, by which Hammond agreed to pay Allen ten per cent. on all sums recovered, until the amount should equal $8000, and on all sums, over that amount, thirty-three per cent.; and Allen agreed to use his utmost efforts to bring the claim to a favorable issue, and to receive the aforesaid commission in full compensation for his services and expenses, already incurred, or thereafter to be incurred, in prosecuting the claims.

The bill, amongst other things, alleged, that on the 19th of January 1832, in consequence of measures taken by the representatives of the government of the United States, at Lisbon, the Portuguese government recognised and admitted the complainant's claim to the amount of [*65 $33,700, of which he alleged he was ignorant, until the month of March 1832. That the power of attorney was executed in consequence of certain representations made by Allen, that he could render important services in prosecuting the claim against the Portuguese government, without which services, the claim would be lost; and that Allen proposed to Hammond to appoint him his agent; that he was then ignorant his claim had been recognised, and also, that the agreement was executed, while he remained ignorant of the fact.

The bill also charged, that the claim has not been liquidated or paid, in consequence of any interference or exertions of the defendant, or through any agency or influence on his part. That both said instruments were executed, without due consideration, and when the complainant was ignorant of the situation of his claim on the Portuguese government. That the contract of January 27th, 1832, "was entered into and executed, without any adequate consideration or services to be by the said Crawford Allen paid or performed," under mistaken views and ignorance of the then situation of the complainant's claim; and was hard, unconscionable and unequal, and ought, on that account, to be set aside, even if said claim had not been liquidated by the Portuguese government, at the time said contract was made and executed.

The answer gave the history of the acquaintance between the complainant and defendant; showed the measures to enforce this claim, which the defendant had taken, as the agent of the complainant, prior to the execution of the power of attorney; that those measures were approved by the complainant; that the power was read to him; that three copies were executed; and that the complainant saw all the letters which the defendant had

received. It alleged, that the defendant relinquished all claims for commissions and services, amounting to $268, then due him ; and that the consideration to the complainant, for executing said instruments, was the defendant's relinquishment of the immediate payment of the money then in his own hands, of what was then justly due to him for commissions and for services already rendered in regard to the reclamation of said vessel from the Portuguese government, and the agreement on the part of said defendant, to use his "utmost efforts to bring the aforesaid claim to a favorable issue,"
*66] and to sustain all the expenses in prosecuting said claim. *The defendant expressly denied, that it was any part of the understanding or agreement between him and the complainant, that the defendant was not to receive said stipulated sums, in case there should be little or no trouble in obtaining said money. On the contrary (he stated), the understanding and agreement was, that the defendant was to receive said sums and no more, even though his trouble and expenses should much exceed said sums, and to receive said sums also, if his trouble and expenses should be but very small ; and both parties fully understood, that the value of the bargain to the defendant depended on these contingencies—and the defendant averred, that he had no knowledge, at the time, of the situation of the claim, except that derived from the letters annexed to his answer, that all the information he had was made known to the complainant and was common to them both ; that it was made known to the complainant in conversations, and by exhibiting said letters ; and he denied that the agreement, when executed, was to depend for its validity on any subsequent information, from any source whatever. "On the contrary, it was fully understood, that contingencies like the one which unexpectedly happened, or others of an opposite character, might render the agreement very advantageous, or very disadvantageous, to the defendant."

The circuit court gave a decree in favor of the complainant ; and the defendant appealed to this court. The decree required the defendant to bring the agreement of January 27th, 1832, into the clerk's office, within ninety days, for cancellation, and enjoined the defendant from asserting any title, at law or in equity, under the same ; and it also ordered the payment of $268, by the complainant to the defendant.

The case was agued by *Green* and *Ogden*, for the appellant ; and by *Webster*, for the appellee.

Green and *Ogden*, for the appellant, contended, that this decree ought to be reversed, because it appears by the evidence in the cause : 1. That the agreement was fairly made, and for a valuable consideration, and is not unconscionable or oppressive. 2. That it was made with an equal knowledge of all the circumstances on the part of each of the contracting parties. 3. That the fact that the claim might have been allowed by the Portuguese government must have been contemplated by the parties, when the agreement was made, and was one of the contingencies which might make it more or less profitable to the defendant ; and that the allowance of the claim of that government did not relieve the defendant from other duties
*67] to be performed, and expenses to be *incurred, under the agreement ; nor was the recognition of the claim, or even obtaining its payment, the sole consideration for the agreement. 4. That the defendant, by his

acts, affirmed the agreement, after he had full knowledge that the claim had been allowed by the Portuguese government.

The evidence fully shows that the agreement was fairly made, and for a valuable consideration. The consideration was a relinquishment of a debt of $268, due by the appellee, and of a compensation for services in prosecuting a claim. Heavy expenses would be incurred in the prosecution of the same; and at the time the arrangement was made, the issue of the undertaking of the appellant was very doubtful. The agreement was made with an equal knowledge of all the facts, by both parties to it. At the moment the agreement was made, both parties might have supposed the Portuguese government had recognised it; as it was known to both, that the government of the United States had made the injury done to the appellee the subject of diplomatic complaint, and had demanded satisfaction for it. Thus, the objection to the rights of the appellant, founded on a want of consideration, or too great a compensation, for services done, or to be done, by him, which was sustained by the circuit court, should not have prevailed. The contract was made with a view to every contingency; and that of an actual acknowledgment of the claim having been made, was one of those contingencies contemplated by the parties. There was also a sum of money actually paid for the contract; this the appellant was not to have returned to him under any circumstances. The situation of the claim of the appellee on the Portuguese government, at this time, even since its acknowledgment, and an agreement to pay the amount admitted to be due, shows that there was more in uncertainty than the mere fact that the claim was not allowed. But one of the instalments has been paid; and although the period for the payment of further sums has arrived, nothing more has been received. The government of Portugal is convulsed by intestine divisions, and is without the means of discharging its obligations. The appellant has, under his contract, duties yet to be performed; he is bound to keep an agent in Portugal, whose efforts are constant to procure the payment of the remaining sums due to the appellee.

Webster, for the appellee, contended, that at the period of the *contract with the appellee, there was no state of things existing, which [*68
could furnish a consideration for the sum agreed to be allowed to the appellant. He was to prosecute the claim on the Portuguese government, for the capture of the property of the appellee. In doing this, it was expected, he would be obliged to pay considerable sums for expenses; to devote much time to the object; to employ agents; and yet, at the instant it was agreed to pay him for all these services, or to provide for all these expenses, nothing was to be done; for all had been accomplished, without his agency. Thus, no foundation for the contract existed. As to the sum of $268, paid by the appellant, the same principles which prevent his obtaining anything from the appellee under the contract, entitle him to have that sum repaid to him, with interest. Where a fact of leading importance to parties entering into a contract, was supposed to exist, and did not exist, the contract formed on the belief that it was in existence, should be set aside. This was the case between these parties; nothing remained to be done by the appellant. It cannot be contended, that the payment of the sum of $268 to the appellee, was a consideration which entitled him to receive the thousands

of dollars the contract was to give him, and which he now claims. In *Hitchcock* v. *Giddings*, Daniel's Exch. 1 (s. c. 4 Price 135), the principles upon which this case is rested by the appellee, are sustained by the court. If the contingency which was the object of the contract has happened, the contract is void.

McLean, Justice, delivered the opinion of the court.—This suit in chancery is brought before this court, by an appeal from the decree of the circuit court for the district of Rhode Island. The bill was filed in the circuit court, by the appellee, to compel the appellant to deliver up to be cancelled a certain contract, on the ground of its having been given through mistake.

In the year 1830, the appellee being the sole owner and master of the brig Ann, of Boston, while on a voyage from New Orleans to Madeira, and thence to the coast of Africa, was illegally captured, off the Western Islands, by a part of a Portuguese squadron. Notice of the capture was given to the American government, but the vessel and cargo were condemned. Such remonstrances were made by the American government, that on the 19th
*69] day of January 1832, the claim of the appellee was *admitted, to the amount of $33,700, by the Portuguese government. On the return of the appellee to the United States, he executed a power of attorney to the appellant, which is stated to be irrevocable; authorizing him to prosecute his claim against the government of Portugal. And on the 27th of January 1832, the parties entered into a contract, under seal, in which Hammond agreed to pay Allen ten per centum on all sums which he should recover, up to $8000, and thirty-three per cent. on any sum above that amount, as commissions. And Allen agreed to use his utmost efforts to recover the claim.

Prior to this period, and before the power of attorney was given, Allen, who was a commission-merchant at Providence, Rhode Island, had acted as the agent of Hammond in procuring insurances on his vessel and cargo, at various times, and also in the transaction of other business. Commissions were charged by Allen as in ordinary cases; and it appears, that Hammond was indebted to him for these services, at the date of the above agreement, the sum of $268. Allen had effected an insurance on the brig for the voyage in which it was captured, and as soon as he heard of the capture, he made representations of the fact to the secretary of state, at Washington. This was not only sanctioned by Hammond, but from his correspondence with Allen, he seems to have placed great confidence in his disposition and ability to serve him. There are a great number of facts which are proved in the case, and contained in the record; but it is unnecessary to state them, as they can have no direct bearing on the principal, and indeed, the only, question in the cause.

It appears, that eight days before the agreement was entered into by the parties, the Portuguese government admitted the claim of Hammond, one-fourth of which was shortly afterwards paid. And the question arises, whether an agreement, entered into under such circumstances, ought to be delivered up and cancelled. No one can read the contract, without being struck with the large sum that Hammond is willing to pay on the contingency of recovering his claim. Allen was to receive as a compensation for his services, a sum little below the one-third of the amount recovered. This

shows, in the strongest point of view, that Hammond could have entertained but a remote prospect of realizing his claim; and indeed, *it would seem, when the circumstances of the case are considered, that he could [*70 have had little or no ground to hope for success. His vessel and cargo had been condemned; the Portuguese government was in an unsettled state, and its finances in the greatest confusion and embarrassment. In his vessel and cargo, Hammond appears to have lost his entire property; and this very naturally threw him into despondency, and induced him to agree to pay nearly one-third of his demand, to an agent, who might, by possibility, recover it. He, no doubt, supposed, that by interesting his agent so deeply in the claim, he would secure his sympathies, and his utmost exertions. And the prospect was, if the claim, or any part of it, should be obtained, it would be the work of time, and of great effort.

Allen is not chargeable with fraud in entering into the contract, nor in using the most persevering efforts to get possession of the instalment paid. That the contract was entered into by both parties, under a mistake, is unquestionable. Neither of them knew that the Portuguese government had allowed the claim. Can a court of equity enforce such a contract? Can it refuse to cancel it? That the agreement was without consideration, is clear. Services long and arduous were contemplated as probable, by both parties, at the time the contract was executed. But the object of pursuit was already attained. No services were required under the contract, and for those which Allen had rendered to Hammond prior to it, regular charges seem to have been made.

It is true, the amount of services required by the agent was uncertain. He took upon himself this contingency; and had not the claim been allowed by the Portuguese government, until after the contract, he would have been entitled to his commissions, however small his agency might have been in producing the result. This, it may be supposed, was a contingency within the contemplation of the parties, at the time of the contract; so that, unconnected with other circumstances, the smallness of the service rendered could have constituted no ground on which to set aside the contract. But no one can for a moment believe, that Hammond intended to give to his agent nearly $10,000, on the contingency of his claim having been allowed at the time of the contract. And it is equally clear, that his agent, under such a circumstance, had no expectation of receiving that, or any other amount of compensation. *The contract does not provide for [*71 such a case; and it could not have been within the contemplation of either party. Services were made the basis of the compensation agreed to be paid; but the allowance of the claim superseded all services in the case.

The equity of the complainant is so obvious, that it is difficult to make it more clear by illustration. No case, perhaps, has occurred, or can be supposed, where the principle on which courts of equity give relief, is more strongly presented than in this case. The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which, in ordinary cases, is held sufficient for relief in equity, unite in favor of the appellee. Suppose, a life-estate in land be sold, and at the time of the sale, the estate has terminated by the death of the person in whom the right vested; would not a court of equity relieve the purchaser? If the

vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. In either case, would it not be gross injustice, to enforce the payment of the consideration? If a horse be sold, which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration? These are cases in which the parties enter into the contract, under a material mistake as to the subject-matter of it. In the first case, the vendor intended to sell, and the vendee to purchase, a subsisting title, but which in fact, did not exist; and in the second, a horse was believed to be living, but which was in fact dead. If, in either of these cases, the payment of the purchase-money should be required, it would be a payment without the shadow of consideration; and no court of equity is believed ever to have sanctioned such a principle. And so, in the case under consideration, if Hammond should be held liable to pay the demand of the appellant, it would be without consideration.

There may be some cases of wager, respecting certain events, where one of the contingencies had happened at the time of the wager, which was unknown to both parties, and which was held not to invalidate the contract; of this character, is the case of the *Earl of March* v. *Pigot*, 5 Burr. 2802. But the question in that case, arose upon the verdict of a jury, on a rule to show cause, &c.; and *Lord MANSFIELD says, "the nature of the contract, and the manifest intention of the parties, support the verdict of the jury (to whom it was left without objection), that he who succeeded to his estate first, by the death of his father, should pay to the other, without any distinction, whether the event had, or not, at that time, actually happened." *72]

In 1 Fonbl. Eq. 114, it is laid down, that where there is an error in the thing for which an individual bargains, by the general rules of contracting, the contract is null, as in such a case, the parties are supposed not to give their assent. And the same doctrine is laid down in Puffendorff's Law of Nature and Nations, b. 1, c. 3, § 12. The law on this subject is clearly stated, in the case of *Hitchcock* v. *Giddings*, Daniel's Exch. 1 (s. c. 4 Price 135); where it is said, that a vendor is bound to know that he actually has that which he professes to sell. And even though the subject-matter of the contract be known to both parties to be liable to a contingency, which may destroy it immediately; yet if the contingency has already happened, the contract will be void.

By the decree of the circuit court, on the payment of the amount including interest, which is due from the appellee to the appellant, he is required to deliver up to be cancelled the agreement entered into on the 27th of January 1832, which leaves the parties as they were before the contract; and as we consider the decree just, and sustained by principle, it is affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel: On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*The Garonne.

United States, Plaintiff in error, *v.* The Ship Garonne: William Skiddey and others, Claimants.

United States, Plaintiffs in error, *v.* The Ship Fortune: Vasse Manuel, Claimant.

Slave-trade.

Certain persons, who were slaves in the state of Louisiana, were, by their owners, taken to France as servants; and after some time, were, by their own consent, sent back to New Orleans; some of them, under the declarations from their proprietors, that they should be free; and one of them, after her arrival, was held as a slave. The ships in which these persons were passengers, were, after arrival in New Orleans, libelled for alleged breaches of the act of congress of April 20th, 1818, prohibiting the importation of slaves into the United States: *Held*, that the provisions of the act of congress did not apply to such cases; the object of the law was, to put an end to the slave-trade, and to prevent the introduction of slaves from foreign countries; the language of the statute cannot properly be applied to persons of color who were domiciled in the United States; and who are brought back to their place of residence, after their temporary absence.

Appeals from the District Court for the Eastern District of Louisiana. The French ship Garonne, from Havre, and the ship Fortune, also from Havre, were libelled, by several proceedings, by the United States, at New Orleans, in the district court of the United States, January 1836, under the provisions of the first section of the act of congress, passed April 20th, 1818, entitled "an act in addition to an act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January 1808, and to repeal certain parts of the same."

The ship Garonne had arrived in New Orleans, about the 21st of November 1835; having on board a female, Priscilla, who had been born a slave in Louisiana, the property of the widow Smith, a native of that state, and resident in New Orleans. Mrs. Smith and her daughter, being in ill health, went from New Orleans, with her family, in 1835, to Havre, taking with her, as a servant, Priscilla; having previously obtained from the mayor of the city a passport for the slave, to prove that she had been carried out of the state, and that she should again be admitted into the same. Priscilla being desirous of returning to New Orleans, from Paris, was sent back on board the *Garonne, under a passport from the *chargè des áffaires* of the United States, in which she was described as a woman of color, [*74 the servant of a citizen of the United States. On the arrival of the ship, the baggage of the girl was regularly returned as that of the slave of Mrs. Smith.

The facts of the case of the ship Fortune were as follows: Mr. Pecquet, a citizen of New Orleans, went to France, in 1831, taking with him two servants, who were his slaves, as was alleged in the testimony, with an intention to emancipate them. They remained with the family of Mr. Pecquet, in France, for some time, and returned to New Orleans, at their own instance, in the ship Fortune, in 1835, as was asserted, as free persons. The passport of the American legation represented these females as domestics of

Mr. Pecquet, of New Orleans, a citizen of the United States. After their return to New Orleans, it did not appear, that they were claimed or held by the agent of Mr. Pecquet, or by any person, as slaves; but no deed of emancipation for either of them had been executed. On the arrival of the Fortune, in the list of passengers which was certified under the oath of the master, these persons, by name, were stated to be the slaves of Mr. Pecquet. The declarations of Mr. Pecquet that these persons were brought back as free, and that it was his intention that they should be free, were in evidence.

The district court of Louisiana dismissed both the libels, and the United States prosecuted these appeals.

The case was argued by *Butler*, Attorney-General, for the United States; and by *Jones*, for the defendants.

Butler stated, that in the case of the Garonne, the question was presented, whether a slave, who had been carried out of the United States by a master, could be afterwards brought back to the United States. The words of the statute are, that "it shall not be lawful to import or bring, in any manner whatsoever, into the United States," &c., "any negro, mulatto or person of color," with intent to hold, sell or dispose of "such persons as a slave, or to be held to service or labor." It is not claimed, that the United States have, under the constitutional power "to regulate commerce," a right to interfere *75] with the *regulations of states as to slaves. The powers of congress apply to foreign commerce. The words of the statute are, "import," or "bring," and the case stated in the proceedings is fairly within the law. The persons were brought into the state of Louisiana as slaves, and are here held as such. If the words of the statute comprehend the case, the court will apply them; and they will not be restrained from doing so by the supposition that the case to which they apply was not intended by congress.

In the case of the ship Fortune, the attorney-general argued, that there was error in the decree of the district judge in dismissing the libel of the United States, on the ground, that as the persons of color brought into New Orleans were free, the act of congress was not violated. This was not the issue; the allegation on the part of the United States is, and the evidence establishes, that persons of color were brought into the United States by the ship Fortune, and that they were to be held to service or labor, either as slaves or otherwise. In either case, the law is broken, and the penalties are incurred by the ship.

It is not necessary ts show that the persons were held as slaves, after their arrival in New Orleans. Were they brought into the United States as slaves? This is established by the list of passengers sworn to by the master of the ship. After naming them, he states, "these two negresses are slaves of Mr. Pecquet, and are sent to New Orleans by their master." In the *United States* v. *Gooding*, 12 Wheat. 460; it was decided, that the declarations of the master of a ship, in the transactions of the vessel, being a part of the *res gestæ*, are competent evidence of the voyage. The declaration of the master in this case was in the course of his duty. If the persons were brought to the United States, not as slaves, but to be held to service or labor, the case is the same.

If the construction given by the district court of Louisiana is maintained,

the act of 1807, to which this is a supplement, will be defeated. The objects and purposes of that law were, to prevent any persons of color being brought into the United States, to be held to service or labor. If evidence of intention is to acquit, the law will be null. The question is, whether not having made the persons brought in the vessel free, the intention only to emancipate them, will operate to defeat the law? Suppose, the intention of the owner, or his instructions to his agent, not carried into effect, how would the *case stand? Could not the persons have been sold as slaves after their arrival? Would the intention to emancipate them give a substantial claim to freedom? [*76

Congress had power to pass this law. They may have thought, that if an owner of slaves carried them to a foreign country, he ought not to be allowed to bring them back.

Jones, for the claimants of the Garonne, and for the claimants of the Fortune.—The government of the United States has no right to interfere with the property of the owners of slaves; nor was it the object of the law on which these proceedings are founded, to do so. The persons who were brought in the Garonne, were slaves in Paris; and when they returned, they came to a domicil they had never lost. Sojourning in France, did not deprive them of their domicil. The case may be illustrated, by supposing a Maryland gentleman shall take his slave with him, when travelling, into Virginia. He could not, according to the principles contended for by the United States, bring him back. But this is a misconception of the law. It was intended to apply to persons brought from foreign countries, and who were so imported for the purpose of their being slaves. Its whole application is to the slave-trade. To prohibit the return of slaves from a foreign country, to which they may have accompained their owners, is a direct interference with the rights of those owners; and is against the constitution of the United States.

But if these views of the case left it in any doubt, the whole of the case of the Fortune shows that the persons of color brought from Havre, were free. They had been discharged from slavery by their master, and were entitled to be emancipated. In a court of equity, their claim to freedom could have been substantiated. All the facts of the case exclude the supposition that they were to be held to service or labor.

Taney, Ch. J., delivered the opinion of the court.—These two cases are appeals from decrees of the district court for the eastern district of Louisiana, upon libels filed by the district-attorney, against these said ships, their tackle, apparel and furniture; for alleged breaches of the act of congress of April 20th, 1818 (3 U. S. Stat. 450), prohibiting the importation of slaves into the United States.

In the case of the ship Garonne, the facts were admitted by the *parties in the court below, and are in substance, as follows: Priscilla, a person of color, born in Louisiana, was a slave; the property of the widow Smith, who was a native of the same state. Mrs. Smith, and her daughter, Madame Couchain, being in an ill state of health, left New Orleans, with her family, for France, in 1835, taking with her as a servant, the above-mentioned girl. Priscilla being desirous of returning to New Orleans, Mr. Couchain, the son-in-law of Mrs. Smith, through the interven- [*77

tion of a friend, procured for her a passage in the ship Garonne from Havre to New Orleans; and since her arrival at that place, she has lived at the house of Mrs. Smith, and is held as her slave.

Upon this statement of facts, the question is presented, whether Mrs. Smith, a resident of Louisiana, going abroad, and sojourning for a time in a foreign country, and taking with her one of her slaves, as an attendant, may lawfully bring, or send her back to her home, with intent to hold her as before in her service. It does not appear from the evidence, or admissions in the case, whether the laws of France gave the girl a right to her freedom, upon her introduction into that country. But this omission is not material to the decision. For even assuming that, by the French law, she was entitled to freedom, the court is of opinion, that there is nothing in the act of congress under which these proceedings were had, to prevent her mistress from bringing or sending her back to her place of residence; and continuing to hold her as before, in her service.

The object of the law in question was, to put an end to the slave-trade; and to prevent the introduction of slaves into the United States, from other countries. The libel in this case was filed under the first section of the act, which declares, "that it shall not be lawful to import or bring in any manner into the United States or territories therof, from any foreign kingdom, place or country, any negro, mulatto or person of color, with intent to hold, sell or dispose of such negro, mulatto or person of color, as a slave, or to be held to service or labor;" and then proceeds to make the vessel liable to forfeiture, which shall be employed in such importation. The language of the law above recited, is obviously pointed against the introduction of negroes or mulattoes who were inhabitants of foreign countries, and cannot properly be applied to persons of color who are domiciled in the United States, and who are brought back to their place of residence, after a temporary absence. In the case before the court, although the girl had been staying for a time in *France, in the service of her mistress; yet in construction of law, she continued an inhabitant of Louisiana, and her return home in the manner stated in the record, was not the importation of a slave into the United States; and consequently, does not subject the vessel to forfeiture.

*78]

If the construction we have given to this section of the law needed confirmation, it will be found in the exception contained in the fourth section of the law in relation to persons of color, who are "inhabitants, or held to service by the laws of either of the states or territories of the United States." This section prohibits our own citizens, and all other persons resident in the United States, from taking on board of any vessel, or transporting from any foreign country or place, any negro or mulatto, "not being an inhabitant, nor held to service by the laws of either of the states or territories of the United States." Under this section, the mere act of taking or receiving on board the colored person, in a foreign country, with the intent to sell, or hold such person in slavery, constitutes the offence. But inasmuch as Priscilla was an inhabitant of New Orleans, and held to service by the laws of Louisiana, if the master of an American vessel had taken her on board at Havre, for the purpose of transporting her to Louisiana, there to be held in slavery, it is very clear, that by reason of the exception above-mentioned, the act of receiving her in his vessel for such a purpose, would have been

no offence; while the taking on board of a negro or mulatto, who was the inhabitant of any other country, would have been a high misdemeanor, and subjected the party to severe punishment, and the vessel to forfeiture. It would be difficult to assign a reason for this discrimination, if the persons of color described in the exception, could not be brought to this country, without subjecting the vessel to forfeiture; and the exception made in this section, in relation to those who are inhabitants, or held to service by the laws of either of the states or territories of the United States, proves that congress did not intend to interfere with persons of that description, nor to prohibit our vessels from transporting them from foreign countries back to the United States.

The principles above stated decide also the case of the *United States* v. *The Ship Fortune*. We think, there is enough in the record, to show that the persons of color therein mentioned, were sent to New Orleans, the place of their residence, for the purpose of being there manumitted, and not to be held in slavery. But it is *unnecessary to go into an examination of the evidence on this point; because, in either case, the bringing [*79 them home was not an offence against the act of congress, and the vessel in which they returned is not, on that account, liable to seizure and condemnation. The decree of the district court must, therefore, be affirmed, in each of these cases.

THESE causes came on to be heard, on the transcripts of the record from the district court of the United States for the eastern district of Louisiana, and were argued by counsel: On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said district court, in each of the causes, be and the same is hereby affirmed.

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*THOMAS EVANS, Plaintiff in error, *v.* STERLING H. GEE. [*80

Jurisdiction.— Bills of exchange.— Waiver of irregularities.

A bill of exchange was drawn in Alabama, by a citizen of that state, in favor of another citizen of Alabama, on a person at Mobile, who was also a citizen of that state; it was, before presentation, indorsed in blank by the payee, and became, *bonâ fide*, by delivery to him, the property of a citizen of North Carolina; and by indorsement subsequently made upon it, by the attorney of the indorsee, the blank indorsement was converted into a full indorsement, by writing the words, "pay to Sterling H. Gee," the plaintiff, over the indorser's name; the bill was protested for non-acceptance, and a suit was instituted on it, before the day of payment, against the indorser, in the district court of the United States for the district of Alabama. The district court rejected evidence offered by the defendant, to show that the bill was given by him to the partner of the plaintiff, a resident in Alabama, for property owned by him and the plaintiff, they being copartners; that the indorsement, when given, was in blank, and that the drawer and drawee of the bill are also citizens of Alabama; the district court also instructed the jury that the indorsement in blank, authorized the plaintiff to fill it up as had been done; and that the plaintiff was, under the law of Alabama, entitled to recover ten per cent. damages the bill not having been accepted: *Held*, that there was no error in the instructions of the district court: evidence to show that the original parties to the bill of exchange were citizens of the same state, if offered to affect the jurisdiction of the court, was inadmissible, under the general issue; a plea to the jurisdiction should have been put in.[1]

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[1] Sime *v.* Hundley, 6 How. 1; Smith *v.* Kernochan, 7 Id. 216; Railroad Co. *v.* Quigley, 21 Id. 202.

Evans v. Gee.

The rule was established by this court, in Young *v.* Bryan, 6 Wheat. 146, that a circuit court of the United States has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker, or not.[1]

The *bonâ fide* holder of a bill of exchange has a right to write over a blank indorsement, directing to whom the bill shall be paid, at any time before or after the institution of a suit; this is the settled doctrine in the English and American courts; and the holder, by writing such direction over a blank indorsement, ordering the money to be paid to a particular person, does not become an indorser.

A suit may be brought against the drawer and indorser of a bill of exchange, on its non-acceptance; the undertaking of the drawer and indorser is, that the drawee will accept and pay; and the liability of the drawer only attaches, when the drawee refuses to accept, or, having accepted, fails to pay. A refusal to accepts is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee, to recover from the drawee the value expressed in the bill; that being the consideration the payee gave for it; such also is the undertaking of an indorser, before the bill has been presented for acceptance, he being, in fact, a new drawer of the same bill, upon the terms expressed on the face of it.[2]

It was urged, that the transcript of the record from the district court, showed that a general demurrer had been filed, which had not been disposed of; that a nonsuit had been taken by the defendant in the district court, and that a motion to set it *aside had been overruled; that the case had been submitted to the jury, without an issue between the parties, and that the verdict had been returned by eleven instead of twelve jurors; on these alleged grounds, it was claimed that the judgment of the district court should be reversed. Whatever might have been the original imperfections, if not waived expressly, they were so, by the defendant going to trial upon the merits; and thus they cannot constitute an objection to the judgment on a writ of error.

*81]

Error to the District Court for the Southern District of Alabama. The defendant in error, Sterling H. Gee, a citizen of the state of North Carolina, instituted an action of *assumpsit* in the district court, against Thomas Evans, a citizen of the state of Georgia. The action was founded on a bill of exchange, drawn by Harris Smith, in Wilcox county, in the state of Alabama, December 16th, 1834, on George M. Rives, at twelve months after date, payable to the order of Thomas Evans, and by him indorsed in blank. The bill was regularly protested for non-acceptance, and the suit was brought, without waiting for the arrival of the day of payment. The cause was tried at May term 1836. The defendant excepted to the opinion of the court, and a verdict and judgment having been given for the plaintiff, the defendant prosecuted his writ of error.

The record showed, that at May term 1835, the defendant filed a demurrer to the plaintiff's declaration, which was in the common form; and that at the December term of the court following, "the plaintiff takes nonsuit;" upon which the court entered a judgment of nonsuit, and immediately after, on motion, the judgment of nonsuit was set aside. At the following May term, no other pleadings having been filed, the case was tried by a jury, and a verdict, under the instructions of the court, was given in favor of the plaintiff, for the whole amount claimed by him, on which the court entered a judgment, according to the verdict.

The bill of exceptions stated, that the bill being relied on by the plaintiff to sustain his action, together with proof of protest for non-acceptance, and notice to the drawer and indorser of the protest for non-acceptance; the defendant offered to prove by way of defence against the said evidence,

[1] See note to Young *v.* Bryan, 6 Wheat. 146.

[2] Watson *v.* Tarpley, 18 How. 517.

that the said bill was given by the said defendant to Charles J. Gee, for property purchased by him; that *the property belonged jointly to Charles J. Gee and Sterling H. Gee, the plaintiff; that they then [*82 were, and continued to be, and then were, general copartners; that when the indorsement was made on the bill, it was indorsed in blank, and that the said indorsement has been filled up by the plaintiff's counsel, since this suit was commenced; that Charles J. Gee resided in this state, and did when the suit was brought, and was a citizen of the state of Alabama; and that the defendant, and H. S. Evans and George M. Rives, were also, citizens of this state. This evidence the court rejected, on the ground, that the indorsement having been made and given in blank, the plaintiff was authorized to fill it up, as above shown; and that the facts above set forth could constitute no defence, and were not proper evidence. The court further instructed the jury, that the bill being drawn in this state, and on a person residing in this state, and made payable in this state, upon non-acceptance and notice, the indorser was liable for ten per cent. damages on the amount of the bill, for want of acceptance therefor.

The case was argued by *Key*, for the plaintiff in error; and by *Ogden*, for the defendant.

Wayne, Justice, delivered the opinion of the court.—This action is brought upon a bill of exchange of which the following is a copy.

$5350. Wilcox County, Dec. 16, 1834.

Twelve months after date of this my sole and only bill of same tenor and date, pay to the order of Thomas Evans, five thousand three hundred and fifty dollars; negotiable and payable at the office of discount and deposite branch Bank of the United States, at Mobile, for value received, this, the 16th day of December 1834.

To George M. Rives, Mobile. H. Smith Evans.

The plaintiff in error, the payee of the bill, indorsed the same in blank, and the defendant in error became the *bonâ fide* holder of it by delivery; though the indorsement in blank was, at the time of the delivery to the holder, by himself, and subsequently, by his attorney, converted into a full indorsement; the words, "pay to Sterling H. Gee," having been written over the indorser's name. Upon the trial of the cause in the court below, the bill, with proof of protest for *non-acceptance, and notice to the drawer and indorser of the protest, was given in evidence. To resist [*83 a recovery, "the defendant offered to prove, that the bill was given by him to Charles Gee, for property purchased by himself; that the property belonged jointly to Charles J. Gee and Sterling H. Gee, the plaintiff; that they then were, and continue to be, and now are, general copartners; that when the indorsement was made, it was in blank, and that the said indorsement has been filled up by the plaintiff's counsel, since the suit had been commenced; that Charles J. Gee resides in this state, and did when the suit was brought, and is a citizen of the state of Alabama; and that H. Smith Evans and George M. Rives, the drawer and drawee of the bill, are also, and were, citizens of the state." The court rejected this evidence, stating, "that the indorsement having been made and given in blank, the plaintiff was authorized to fill it up, as had been done; and that the facts

set forth could constitute no defence, and were not proper evidence; the court further instructed the jury, that the bill being drawn in this state, by a person residing in the state, and made payable in the state, upon non-acceptance and notice, the indorser was liable for ten per cent. damages on the amount of the bill, for non-acceptance. We consider the court was right in rejecting the evidence, and in instructing the jury as to the liability of the indorser for damages.

If, by the evidence proposed, it was intended to deny the jurisdiction of the court, on account of the citizenship of the parties to the action, that being averred on the record, a plea to the jurisdiction should have been filed, and such evidence was inadmissible under the general issue. If it was intended to apply to the jurisdiction, on account of the original parties to the bill having been citizens of the same state, when the bill was drawn, then the rule laid down by this court in *Turner* v. *Bank of North America*, 4 Dall. 8, which was a suit by the indorsee of a promissory note against the drawer, does not apply to the parties in this case; but the rule established in *Young* v. *Bryan*, 6 Wheat. 146, does apply; which was, that the circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who was a citizen of one state, against the indorser, who is a citizen of a different state; whether a suit could be brought in that court by the indorsee against the maker, or not. This is a case of an indorsee of one state, suing an indorser of a different state. If the evidence was intended to resist a recovery upon the merits, on account of the interest which
*84] another copartner *or other person had in the consideration for which the bill was indorsed; we observe, the plaintiff being the *bonâ fide* holder of it, such a fact could not be inquired into, in an action on the bill, as it would import a different bargain and agreement from the tenor of the bill and indorsement, when the bill was given or transferred; and a copartner's interest could only be inquired into, in a suit in equity between the copartners, for its recovery.

As regards the right of a *bonâ fide* holder of a bill to write over a blank indorsement, to whom the bill shall be paid, at any time before or after the institution of a suit against the indorser; it has long been the settled doctaine in the English and American courts; and the holder, by writing such direction over a blank indorsement, ordering the money to be paid to particular persons, does not become an indorser. *Edie* v. *East India Company*, 2 Burr. 1216; Com. 311; 1 Str. 557; *Vincent* v. *Horlock*, 1 Camp. 442; *Smith* v. *Clarke*, Peake 225.

But it was urged in argument, that this suit could not be maintained, because it appears by the record, that the action was brought before the expiration of the time limited by the bill for its payment. The law is otherwise, upon reason and authority. The undertaking of the drawer is, not that he will pay the bill, but that the drawee will accept and pay; and the liability of the drawer only attaches, when the drawee refuses to accept; or having accepted, fails to pay. A refusal to accept is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee, to recover from the drawer the value expressed in the blll, that being the consideration which the payee gave for it. Such is also the undertaking of an indorser, before the bill has been presented for acceptance, he being in fact a new drawer of the same bill, upon the terms

expressed on the face of it. The case of an indorser is not distinguishable from that of a drawer in regard to such liability. *Ballingalls* v. *Gloster*, 3 East 481; *Milford* v. *Mayor*, 1 Doug. 55; *Mason* v. *Franklin*, 3 Johns. 202.

As to the damages which the court ruled the indorser in this case to be liable for, we need only say, the statute of Alabama gives them, and applies directly to the case. Aiken's Alabama Digest, 328, § 5. "Every bill of exchange, of the sum of twenty dollars and upwards, drawn in, or dated at, and from, any place in this territory, and payable at a certain number of days, weeks or months after date or sight thereof, shall, in case of non-acceptance by the *drawee, when presented for acceptance; or, if accepted, in case of non-payment by the drawee, when due and [*85 presented for payment, be protested by a notary-public, in like manner as foreign bills of exchange, and the damages on such bill shall be ten per cent. on the sum drawn for, and shall in every other respect be regulated and governed by the same laws, customs and usages, which regulate and govern foreign bills of exchange: provided, that such protest shall, for want or in default of a notary-public, be made by any justice of the peace, whose act in such case, shall have the same effect as if done by a notary-public."

The counsel for the plaintiff in error, also contended for the reversal of the judgment, on the ground of sundry irregularities in the progress of the cause in the court below, apparent on the record. Such as, that a general demurrer had been filed, and had not been disposed of; that a nonsuit had been taken by the plaintiff in error, and that a motion to set it aside had been overruled; that the case had been submitted to a jury, without an issue between the parties; and finally, that the verdict, if an issue was made, had been returned by eleven, instead of twelve jurors. These irregularities, whatever might have been their original imperfections, if not waived, were in our opinion, waived, by the defendant going to trial upon the merits, and cannot now constitute any objection upon the present writ of error. For a writ of error does not bring up for review any irregularities of this sort. Judgment affirmed, with six per cent. damages.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the southern district of Alabama, and was argued by counsel: On consideration whereof, it is ordered and adjudged, by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*United States, Plaintiffs in error, *v.* Jacob and Isaac Leffler.

Competency of witnesses.

The United States instituted a joint action, on a joint and several bond, executed by a collector of taxes, &c., and his sureties; the defendant, the principal in the bond, confessed a judgment by a *cognovit actionem*, and the United States issued an execution against his body, on the judgment; upon which he was imprisoned, and was afterwards discharged from confinement, under the insolvent laws of the United States. The United States proceeded against the other defendants, and on the trial of the cause before a jury, the principal in the bond, having been released by his co-obligors, was offered by the defendants, and admitted by the circuit court, to prove that one of the co-obligors had executed the bond, on condition that others would execute it, which had not been done; the circuit court admitted the evidence: *Held*, that there was no error in the decision.

The principle settled by this court, in the case of Bank of the United States *v.* Dunn, 6 Pet. 51, goes to the exclusion of the evidence of a party to a negotiable instrument, upon the ground of the currency given to it by the name of the witness called to impeach its validity; and does not extend to any other case to which that reasoning does not apply.

Error to the Circuit Court for the Eastern District of Virginia. The United States instituted an action of debt, on a joint and several bond, executed on the 8th of December 1816, by Salathiel Curtis, Jacob Leffler, Isaac Leffler, Benjamin Biggs and Reuben Foreman, conditioned for the faithful performance by Salathiel Curtis, of the duties of collector of taxes, then held by him. The cause abated as to Biggs and Foreman, by their deaths.

After the institution of the suit, and prior to the trial of the same against Jacob and Isaac Leffler, the defendants in error, Salathiel Curtis, who had appeared and pleaded to the action, by his attorney, withdrew his plea; and having said nothing in bar to the action of the plaintiffs, the court, on consideration thereof, gave judgment for the plaintiffs against him, for the debt mentioned in the declaration, with costs. Afterwards, the United States sued out an execution on the judgment, against the body of the defendant, who was taken, and was in the custody of the marshal; when, he being in such custody, under a warrant from the president of the United States, bearing date on the 8th day of May 1824, he was duly discharged from *custody, under the insolvent laws of the United States, he having complied with the requisitions of those laws.

*87]

The United States proceeded to a trial of the suit against the defendants, Jacob and Isaac Leffler, in December 1835, upon issues joined on two pleas of Jacob Leffler; the first being a plea of *non est factum*, and the second a special plea, to the same effect, setting forth that he had executed the bond in question, as an escrow, and on the condition, that it should be executed by certain other persons, as co-sureties for Salathiel Curtis, who did not execute the same.

On the trial of the cause, the defendant, Jacob Leffler, to support the issue of *non est factum*, offered in evidence the deposition of Salathiel Curtis, which deposition was objected to by the district-attorney of the United States. The deposition stated, that Jacob Leffler and Reuben Foreman executed the bond, under the impression, and on the condition, that the deponent could procure the signatures of other persons to the same, and they were not so procured. The competency of the witness being so

objected to on the part of the United States; evidence of the proceedings against him to judgment and execution, and of his discharge under the insolvent laws of the United States, was given by the defendant, Jacob Leffler; and the circuit court having overruled the objection, the deposition, taken after the said proceedings, was admitted in evidence. The jury found a verdict for the defendant, on which judgment was given, and the United States having taken a bill of exceptions to the evidence, this writ of error was prosecuted on their behalf.

The case was argued by *Butler*, Attorney-General, for the plaintiffs in error; and by *Webster*, for the defendants.

Butler contended, that the deposition of Salathiel Curtis was not admissible in evidence; and that the judgment of the circuit court should, therefore, be reversed, and a *venire de novo* awarded. The precise question involved in the case before the court arose in the case of *Pauling* v. *United States*, 4 Cranch 219; but it was not decided. The United States now insisted, that the principal obligor in a bond is not a witness to invalidate it; he having affirmed it, by executing it; and having, by his own falsehood and fraud, involved the public in the losses they sustained, by entering on his duties as the collector of taxes, under such circumstances. The case of *Walton* v. *Shelley*, 1 T. R. 296, was the first case *which decided the principle on which the admission of this evidence is [*88 resisted. While it is admitted, the decisions of the courts of the different states vary, as to the rule adopted in the case referred to; this court, in the case of the *Bank of the United States* v. *Dunn*, have asserted and applied it. 6 Pet. 57. In Virginia, in a case in 3 Rand. 316, it has been expressly repudiated.

It makes no difference where the bond was executed; and although executed in Virginia, it looked to the city of Washington for the performance of the conditions imposed by it; the principal obligor being a collector of taxes, and required by the law under which he acted, to account for the taxes collected by him at the treasury department. This was so decided in the case of *Cox* v. *Dick*, 6 Pet. 173, 202. A bond executed in Louisiana was to be considered as made in the district of Columbia. There is a slight difference between the condition of the bond, in the two cases, but the difference is more favorable to the principle claimed. In this case, the duties of the officer were to be performed according to law; in Cox's case, the money was to be paid as the officer might be directed. If the law of this district is to prevail, the case is decided; for this court has said, that no one who has put his name to an instrument shall be permitted to discredit it. It is admitted, that the case referred to was like that of *Walton* v. *Shelley*; in which the instrument was negotiable.

But if the law of Virginia is to prevail, it will be shown, that the witness was a party to the suit, was interested in it, and could not, by the defendant's release, be made a witness. The suit was brought on a joint and several bond, but the plaintiffs have united to treat it as a joint bond. It is a rule, in Virginia, that in an action on a joint and several bond, the plaintiff may treat it as he pleases; but if he treats it as a joint bond, he must sue all; he cannot sue only a part of the obligors. 1 Hen. & Munf.

61 ; 1 Munf. 406. This suit is against all the five obligors, and if the United States fail to make out a joint obligation, they will be defeated.

Anything which may serve an individual for his own defence, may be given in evidence, as in cases of bankruptcy, in England, and cases of infancy, there and here. But such evidence will be applicable to the person of the individual obligor, after its execution ; and not to the execution of the instrument, as it might defeat the whole action, by destroying the joint action.

*89] If it should appear, *that one of the obligors executed the bond on a condition that made it void, the bond would be void. This is distinctly stated in 4 Cranch 223. In the case of a forged signature to a joint bond, the whole action on it would fail, on proof of the forgery ; not so, when the action was several. A joint action, or a joint and several one, is defeated as to all, when it is defeated as to one. 2 Munf. 33 ; 2 Binn. 195 ; 3 Rand. 316, 327, 334, 340, 351, 357, 360. In this case, it was held, that a defendant, or a party to a joint bond, could not be released by his co-obligor, as he is liable to costs, notwithstanding his release. 3 Leigh 590. These cases are in conformity with the rules of the common law. One defendant cannot give judgment against himself, to make himself a witness, and defeat the whole instrument.

A party to a suit cannot be called as a witness. He is incompetent, because he is a party to the record. This is a general rule of the common law; and the only case in which such party can be a witness, is, where his testimony will not affect the original contract. The rule which excludes a party to the record from giving evidence, is peculiar to the common law ; in equity, it is otherwise. It is, therefore, only necessary to show that Salathiel Curtis was a party to the record. This is apparent on the face of the proceedings ; he was so originally, and he continued to be so. As to the judgment entered against him having made him no party to the subsequent proceedings ; it is contended, that the judgment was irregular. The practice in all courts is, to continue the case as to a defendant who is in default, until the cause shall be determined against all ; this shows the proceeding to have been irregular. The fact that the attorney of the United States made no objection to it, and afterwards issued execution on it, does not alter the case. It was irregular ; it was void, and could not be made valid. It could have been set aside. That Curtis suffered imprisonment does not cure the defects of the judgment. The discharge of Curtis by the United States has no influence in this case. The discharge was not of his debts, but from the imprisonment. 5 Pet. 186 ; 1 Ibid. 573 ; 1 Gallis. 82.

In any view which can be taken of the case, Curtis was not a witness. He was a party to the suit ; a party named in the record ; he had a dor-

*90] mant, but a substantial, interest in its result, both as to the *amount of the recovery, and between the parties for costs, and for costs to the United States on a general judgment, to the parties to the bond.

If there is any case in which the moral purposes of the rule will apply, it is this now before the court ; as public policy, the rule which excludes a party to an instrument from discrediting it, should be extended, emphatically, when a public officer who has given currency to an obligation, and has by it obtained the confidence and the funds of the government should not be allowed to defeat it. The government is obliged to act through agents, and will be exposed, extensively, to frauds, unless protected by the applica-

tion of the principle to such cases. This is not a reason for asking the court to vary an established rule of law, but it is a sufficient reason for asking the court to extend a principle, declared by it to be the law in the case of the *Bank of the United States* v. *Dunn*, to a case which requires it.

No decision of this court has been given, which allows a party to the record to be a witness. In New York, the supreme court has decided, that the rule is inflexible, and he is always excluded.

Webster, for the defendant.—The case in the court below was on a bond executed by five persons, four of whom were the sureties of the other, for the performance of the duties of collector. When the trial took place, the state of the pleadings was as follows: Two of the obligors were dead; one had made "a *cognovit*," and the United States had chosen to take a judgment against him and had proceeded to execution; he could not have compelled them to go on. The other two pleaded *non est factum*, and that the bond was an escrow. The case was tried on these issues; and before the trial, the witness against whom judgment had been taken, had been released by the defendants; his testimony was admitted, to prove that the bond was executed on a condition which was not performed.

The objections to the witness are: 1. That he repudiated the instrument. 2. That he had an interest in the result of the suit. 3. That he was a party to the record, at the time of the trial, and as such cannot be permitted to testify.

As to the first objection, the cases of *Walton* v. *Shelley*, and *Bent* v. *Baker*, and all the subsequent cases apply this principle to negotiable instruments, and to them only. This is expressly said by this court, in the *Bank of the United States* v. *Dunn*, 6 Pet. 55. No *decision [*91
in any court of the United States has extended the rule beyond negotiable instruments; and in England, the same qualification has prevailed. The doctrine never applied to a bond.

The second objection is to the interest of the party in the suit. To sustain this objection, an attempt has been made, to show that the whole proceedings against Salathiel Curtis, the principal in the bond, are void; and that a judgment cannot be taken against one co-obligor, when it is not obtained against all who are joined with him. This position cannot be maintained. After the party has elected to proceed against one, he cannot afterwards treat the case differently. He has made the bond several as to him against whom judgment has been entered. Whether, when the pleas are several, and one defendant pleads that the bond was an escrow, the plaintiff may not proceed against the other obligors, it is not necessary now to decide. The case cited from 4 Cranch gives no support to the position for which it was referred to. How can Curtis be interested in the result of this suit? A judgment had been entered against him, and the plaintiff had proceeded by execution. No other judgment can be obtained; the United States had made its election, and what other proceedings can be had against him? The judgment remains in full force; if it had been defective, it should have been opened. Could any judgmeut be entered against him for costs, in this suit against Leffler?

Curtis is not a party to this suit; he is, in no part of its pleadings, named as a party. He could not have made a motion on the cause; he had no day in court. The suit was simply one against the defendants in error. In the

case of *Worrell* v. *Jones*, 7 Bing. 395, it was held, that a party to the record may be a witness, if he has no interest in the suit. Here, Curtis had no interest; or if he had, it was, until he was released by them, an interest against the sureties.

Barbour, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court of the United States for the fifth circuit and eastern district of Virginia. It was an action of debt, brought by the United States, against Salathiel Curtis, Jacob Leffler, Isaac Leffler, Benjamin Biggs and Reuben Foreman, in the district court for the western district of Virginia, upon a bond executed by Curtis, as principal, and the other defendants, as his sureties; conditioned, that Curtis, who had been
*92] appointed collector of direct taxes and internal duties for the fifth *collection district of Virginia, had truly and faithfully discharged, and should continue truly and faithfully to discharge, the duties of his office, according to law, and should faithfully collect and pay, according to law, all moneys assessed upon said district. The breach charged in the declaration was, that Curtis had, during his continuance in office, collected the sum of $2992.12, of internal duties, arising from said district, which he had failed to pay into the treasury department according to law.

To this declaration, the defendant Curtis, separately filed three pleas, the defendant Jacob Leffler two, and the defendants Jacob Leffler, Isaac Leffler, Reuben Foreman and Benjamin Biggs, jointly, fifteen other pleas, at the rules held in the clerk's office. At the term of the court next ensuing, the defendant Curtis, the principal obligor, withdrew his pleas; and thereupon, his attorney saying that he was not informed of any answer to be given for said Curtis, and that he had nothing to say in bar or preclusion of the action, whereby he remained undefended, judgment was rendered against him for the debt in the declaration mentioned, to be discharged by the payment of $2336.87, with interest from the 17th of October 1821, and the costs. At the next term thereafter, the pleas filed by the other defendants were withdrawn, and they filed a general demurrer to the declaration; and the defendant, Jacob Leffler, filed two pleas, to wit, a general and a special *non est factum;* and he and the other defendants, that is, Isaac Leffler, Reuben Foreman and Benjamin Biggs, filed several special pleas jointly. The plaintiffs joined in the demurrer, and time was given them to demur or reply to the other pleas.

In this posture of the case, the judge of the court, being concerned in interest in the cause, ordered it, together with an authenticated copy of the proceedings, to be certified to the circuit court of the United States for the fifth circuit and eastern district of Virginia; this was accordingly done. In that court, the defendants, by leave of the court, filed the plea of conditions performed, on which issue was joined; and by consent of the parties, and with the assent of the court, the defendants withdrew all the pleas theretofore filed by them, except the two pleas by the defendant Jacob Leffler, of general and special *non est factum;* with the agreement that all the matters alleged in the pleas thus withdrawn, and all other special matters, of which the defendants should give the attorney of the United States reasonable
*93] notice, might be *given in evidence upon the trial, provided such matters would be admissible under any proper form of pleading; and

leave was granted to the attorney of the United States, to amend his declaration. At a subsequent term, the defendants, by leave of the court, filed an additional plea, to which the plaintiffs demurred generally; which demurrer the court sustained, and overruled the plea. The plaintiffs thereupon filed an amended declaration, against all the defendants, including Curtis, against whom judgment had been rendered in the district court, as before stated.

Upon this amended declaration, and the pleas and agreement last stated, the cause came on to be tried in the circuit court, at the November term 1835, the death of the defendants, Biggs and Foreman, having been first suggested, whereby the suit as to them abated. On the trial, the defendant, Jacob Leffler, to support the issue joined on his special plea of *non est factum*, offered the deposition of Salathiel Curtis, the principal obligor in the bond; to the reading of which the plaintiffs objected, upon the ground, that the witness was interested in the event of the suit, and was, therefore, incompetent. But it appearing that judgment had been rendered in favor of the plaintiffs, against said Curtis, and that afterwards, and before the examination of the witness, the United States had sued out an execution upon said judgment, against his body, which was duly levied upon him, by the marshal, and that, whilst he, the said witness, was in custody of the marshal, under said execution, to wit, in the month of May 1834, he was, by virtue of a warrant from the president of the United States, bearing date the 8th of May 1824, duly discharged from custody, under the insolvent laws of the United States, he, the said witness, having complied with the requisitions of said laws; and it appearing, moreover, that before the examination of the witness, Jacob Leffler and Isaac Leffler, the only parties defendants in the suit, then alive, had executed to said witness a release of all claim against him for any money or other thing which he might be liable to pay them, or either of them, by reason of any recovery or judgment that might be had against them, or either of them, on said bond; and also for any costs incurred, or to be incurred by them, or either of them, by reason of any suit upon said bond; the court allowed the said deposition to go in evidence to the jury, who found a verdict for the defendants; the plaintiffs thereupon filed their exception, which brings before this court the question whether the *judgment of the court below was erroneous, by reason of allowing said deposition to go in evidence to the jury? [*94

In the argument, the counsel for the plaintiffs have taken three objections to the admissibility of the evidence. 1st. That the witness, being a public officer, bound to give bond, with sureties, and having delivered over the bond in this case to the government, as having been duly executed by all the obligors, who, from its face, seemed to have executed it, to allow the witness to prove that it had been executed as an escrow, by some of them, upon a condition which had not happened, would be to suffer him to allege his own turpitude. 2d. That the witness was incompetent, because he was directly interested in the event of the suit. 3d. That he was incompetent, because he was a party upon the record. We will examine these objections, in the order in which they have been stated.

The first is, that the witness should not have been received, because his evidence went to prove his own turpitude. And in support of this objection, we were referred, in the first place, to the case of *Walton* v. *Shelley*,

1 T. R. 296. It was, indeed, decided in that case, that a party who had signed any instrument or security (without limitation as to the character of the instrument), should not be permitted to give evidence to invalidate it. It was said, that every man who is a party to an instrument, gives credit to it; that it was of consequence to mankind, that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then giving testimony to invalidate it. And the civil law maxim, *nemo allegans suam turpitudinem audiendus est*, was relied on. This case was followed, a few years after, by that of *Bent* v. *Baker*, 3 T. R. 27, in which it was said, that the rule must be confined to negotiable instruments; and in 1798, the case of *Jordaine* v. *Lashbrooke*, 7 T. R. 601, overruled the case of *Walton* v. *Shelley*, even in regard to them; by deciding, that in an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness, to prove that the bill was void in its creation; and such is the doctrine which has since been held in England. In this court, in the case of the *Bank of the United States* v. *Dunn*, 6 Pet. 51, it was decided,
*95] that no man who was a party to a *negotiable* *instrument, should be permitted, by his own testimony, to invalidate it. The principle thus settled by this court, goes to the exclusion of such evidence only in regard to negotiable instruments, upon the ground of the currency given to them by the name of the witness called to impeach their validity; and does not extend to any other case, to which that reasoning does not apply; the case of the *Bank* v. *Dunn*, then, would be sufficient to defeat the objection which has been made to the witness, although he executed the bond, and although it was the bond of a public officer.

The second objection is, that the witness was directly interested in the event of the suit. This objection may be viewed in two respects. 1st. As it respects the interest of the witness, arising from his liability over to his co-obligors, who were his sureties. 2d. As it respects his interest, as being, as it is contended, a party upon the record, and as such, liable to a joint judgment with the other defendants, Jacob and Isaac Leffler.

In relation to the first of these aspects, it is certainly true, that in general, a principal obligor cannot be a witness for his co-obligors, who are his sureties in the bond sued upon, even although he be not a party; this is well settled, both upon principle and authority: amongst other cases, it was so decided by this court in the case of *Riddle* v. *Moss*, 7 Cranch 206; upon the plain ground, that he is liable to his sureties for costs, in case judgment should be rendered against them. Now, although that was once the position of this witness, yet it was not such, at the time he was examined; for it appears by the bill of exceptions, that before his examination, his sureties had executed a release, in the most ample form, of all claim against him, arising out of their relation to him as sureties upon the bond, embracing everything which could be recovered against them, including costs. There is, then, no interest in the witness, in the event of the cause, arising from his supposed liability over to his sureties, the defendants.

The second branch of the objection relates to his being, as it is contended, a party upon the record, and as such, liable to a joint judgment with the defendants, Jacob and Isaac Leffler, in this suit. In this respect,
*96] the whole question resolves itself into the inquiry, whether he *is*, or *is not*, a party upon the record; for it is conceded, *as it must neces-

sarily be, that if he be not, then this branch of the objection must fail. The argument to prove that he is a party upon the record is, in substance, this: That the plaintiffs having elected to bring a joint action upon the bond, there could not be a several judgment against any one of the obligors; but that it must be a joint one, either *for* all, or *against* all; that therefore, the several judgment in this case against Salathiel Curtis was erroneous; and that notwithstanding that judgment, he is still liable to a joint judgment, together with the defendants, Jacob and Isaac Leffler, in the event of one being recovered against them.

The general proposition thus stated, that in a joint action upon a bond against several obligors, the judgment must be joint against them all, is admitted to be true; we say the *general* proposition, because there are exceptions as well established as the principle itself. Thus, says Serjeant Williams, 1 Saund. 207 *a*, note 2, where the defendants sever in their pleas, as, where one pleads some plea which goes to his personal discharge, such as bankruptcy, *ne unques executor*, and the like, and not to the action of the writ, the plaintiff may enter a *nolle prosequi* against him, and proceed against the others. In the United States, the principle has been extended further. Thus, in New York, in the case of *Hartness* v. *Thompson*, 5 Johns. 160, an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of one of the defendants was set up at the trial; it was held no ground for a nonsuit; but the plaintiff, upon a verdict found in his favor against the other two defendants, might enter a *nolle prosequi* as to the infant, and take judgment upon the verdict against the others. So, in Massachusetts, 1 Pick. 500, upon a joint contract, and suit against two persons, one of whom pleaded infancy, it was held, that a *nolle prosequi* might be entered against the infant, and the suit prosecuted against the other defendant.

And in this court, in the case of *Minor* v. *Mechanics' Bank of Alexandria*, a suit was brought against Minor and four others, his sureties, for the faithful discharge of his duties, as cashier of the bank; the principal pleaded separately, and after judgment was given against the sureties, on all their pleas, the pleas of the principal being, *mutatis mutandis*, the same as some of their pleas, the plaintiffs were allowed to enter a *nolle prosequi* against the principal; and no objection to the judgment appearing to have been made by *the sureties, such proceeding was held to be not an error for which the judgment could be reversed. The court, in reasoning upon that case, admitted, that in a joint and several bond, the plaintiff ought to sue either all jointly, or one severally. They said, however, that the objection was not fatal to the merits, but was pleadable in abatement only; and if not so pleaded, it was waived, by pleading to the merits. They said, therefore, if the suit had been brought against the four sureties only, and they had omitted to take the exception, by plea in abatement, the judgment, in that case, would have been unimpeachable. Then they then inquired, whether the legal predicament of the case was changed, by having sued all the parties, and subsequently entered a *nolle prosequi* against one of them? And if not, in general, then, whether there was any difference where the party in whose favor the *nolle prosequi* was entered was not a surety, but a principal in the bond? The court, after an elaborate examination of these questions, both upon principle and authority, came to the conclusion, "that [*97

where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed; that it was a practice which violates no rule of pleading, and will generally subserve the public convenience; that in the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice." In arriving at this conclusion, the court cited with approbation the two cases from New York and Massachusetts, before referred to, and remarked, that the plea went not only in personal discharge, as in the case of bankruptcy, and the other pleas, before cited from Serjeant Williams's notes, but proceeded upon a matter which established an original defect in the joint contract.

This case clearly establishes these two propositions: 1st. That although in case of a joint contract, strictly speaking, the plaintiff must sue all or one, yet if he does sue any intermediate number, and the defendants do not avail themselves of this, by plea in abatement, the objection is waived, by pleading to the merits, and is not one which can avail them upon writ of error; and the reason which the court gives, drawn from high authority, is, "that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and therefore, there is no variance, in point of law, between the deed declared on and that proved; it is still the joint deed of the parties sued, although others have joined in it." 2d. Though
*98] the *plaintiff should elect to bring a joint suit against all the obligors, if they sever in their pleas, and the bond be joint and several, he may enter a *nolle prosequi* against one of them, even although his plea go to the action of the writ (it being the same with that of the other defendants), and take judgment against the other defendants, which cannot be reversed on error, where no objection to the judgment against them was made by those defendants at the time.

The case which we have been examining bears strong resemblance to the one at bar. In this case, as in that, the bond is several as well as joint; in this case, as in that, an action might have been maintained severally against the defendants; in this case, as in that, all the parties were retained, who had joined in their pleas, and between whom, there existed a right of mutual contribution. In this, as in that, the principal had pleaded separately from his sureties; finally, in this, as in that, the principal was severed from the record, and ceased to be a party. The cases differ only in this single particular, that in that case, he ceased to be a party, by the plaintiff's entering a *nolle prosequi* against him; whereas, in this, he ceased to be a party, as we think, by the judgment which was separately taken by the plaintiff against him; which, in our opinion, under the facts of the case, severed him from the record, to all intents and purposes.

The plaintiff's counsel relied, with great emphasis, upon the cases of *Taylor* v. *Beck*, 3 Rand. 316, as being, as he contended, conclusive in their bearing upon the case at bar. Let us examine them. They were two actions on promissory notes, negotiable at the bank, against the maker and indorsers jointly, brought in that form, by virtue of an act of assembly of Virginia. One of the defendants pleaded separately, and the others jointly. The defendant who had pleaded separately confessed a judgment; and at the trial, the other defendants offered to introduce him as a witness on their behalf; and the question was, whether he was not incompetent on account of interest? And it was decided, that he was incompetent. Now,

the first remark to be made upon that case is, that there was no release by the co-defendants, as there was in the case at bar. The court, however, thought, that as the action was joint, the plaintiff had a right to a joint judgment against all, for his debt, and all his costs; that the defendant who had confessed judgment, had no right to deprive him of this joint judgment, by having his *cognovit actionem* entered finally, against the plaintiff's will, whilst the cause was depending *on the pleas of the other defendants; they, therefore, considered him still a party to the record, and consequently, an incompetent witness. The fact that the judgment in that case was *without the consent of the plaintiff*, is mentioned, not less than four or five times, by the judges, in giving their opinions. Thus, in one place, it is said, that W. Woodford had no right to deprive the plaintiff of his joint judgment, by having his *cognovit actionem* entered finally, against the plaintiff's will. Again, it is said, that the court could not properly enter a final judgment, upon his confession, without the assent of the plaintiff, until after the issues were tried as to the other defendants, &c. Again, they say, it follows, that if either of the other defendants had been discharged from the plaintiff's demand, in whole, or in part, Woodford (the plaintiff having refused to take final judgment on the confession at the time it was made) would have been entitled to avail himself thereof. In page 336 of that case, one of the judges holds this language: "What effect had Woodford's confession of the plaintiff's action, upon the question of his competency to give evidence for the other defendants? The plaintiff refused to accept his confession, and to take judgment thereon. It is not necessary to inquire, whether a proper and unimpeachable judgment might have been entered on this confession, separately, against Woodford, if the plaintiff had desired it. One case has passed this court, in which such a separate judgment has been allowed, upon the agreement of the plaintiff and one defendant, and the cause proceeded in, against the other defendant; but the cause was not considered upon the point now under consideration." These several extracts show that the court, although they did not in that case decide the point, yet laid great stress upon the fact, that the judgment was against the consent of the plaintiff; and indeed, that one case had passed the court, where a judgment, with his consent was allowed, though it passed *sub silentio*. It would seem, then, that it is not at all certain, but that the court, if that fact had been in the case, would have considered the judgment, in the language of one of the judges, to be unimpeachable; especially, when we find them asserting, that it was the right of the plaintiff to have a joint judgment, but it is competent to a party to waive that right, as he may all others; and nothing can be a more conclusive waiver, than to take a separate judgment, of his own will, against one of the defendants.

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But it is unnecessary to inquire, whether, if judgment had been rendered *against the defendants, Jacob and Isaac Leffler, in this case, they could have reversed it upon a writ of error, notwithstanding the plaintiffs had, by their own consent, taken a separate judgment against their principal, Salathiel Curtis. Howsoever that may be, we are of opinion, that there is no ground on which these plaintiffs in error can reverse the judgment against them. They themselves have taken, with their own consents, a separate judgment against Curtis; upon that judgment, they issued

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a *ca. sa.*, by virtue of which his body was taken; under the insolvent laws of the United States, he was discharged from imprisonment; those laws declare, that the judgment shall remain good and sufficient in law, and may be satisfied out of any property that he then had, or might thereafter acquire; and the judgment under which all this has been done was rendered some ten or eleven years before the witness was examined. Let it be conceded, for the purpose of this part of the argument, that the judgment was ever so erroneous, can it be reversed? We think, clearly, that it cannot; and this, for many reasons: 1. It was taken by the plaintiffs themselves, with their own assent: 2. They have carried it into execution, and so far as they could, reaped its fruits: 3. The period within which a writ of error could be sued out, has been twice barred by lapse of time: 4. By the very terms of the law under which Curtis was discharged from imprisonment, the judgment is declared to remain in force, and that the plaintiffs have a right to satisfaction of it out of his property: 5. Curtis himself is barred, not only by his availing himself of the benefit of the insolvent law, which declares the judgment to remain in force, but also by lapse of time, from reversing it, if ever he could have done so. We think, therefore, that he is as completely severed from this record, and has as entirely ceased to be a party, as if he had never been sued.

Let us for a moment trace the consequences of considering him as yet a party upon the record. If this were so, then it would follow, that another judgment might be obtained against him; but we have seen, that there is already one against him, unreversed and irreversible; if, then, another could be obtained, we should have an anomaly, never before heard of in the law; that is to say, that there should be two subsisting judgments, in full force, at the same time, in favor of the same plaintiffs, against the same defendants, founded on the same original cause of action, and on both of which he would be liable to execution. This cannot be. If there be any one principle of law settled beyond all question, it is this, that whensoever
*101] a *cause of action, in the language of the law, *transit in rem judicatam*, and the judgment thereupon remains in full force unreversed, the original cause of action is merged and gone for ever.

We have anticipated the last objection, in our previous reasoning, by showing that the fact fails, because the witness is severed from the record, and is not a party. On the whole view of the case, we think that the witness was competent; that therefore, the judgment of the circuit court was correct, and must be affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the eastern district of Virginia, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed.

*The Mayor, Aldermen and Commonalty of the City of New York, Plaintiffs, *v.* George Miln.

Constitutionality of passenger laws.—Police powers of the states.

In February 1824, the legislature of New York passed "an act concerning passengers in vessels arriving in the port of New York;" by one of the provisions of the law, the master of every vessel arriving in New York from any foreign port, or from a port of any of the states of the United States, other than New York, was required, under certain penalties prescribed in the law, within twenty-four hours after his arrival, to make a report in writing, containing the names, ages and last legal settlement of every person who should have been on board the vessel commanded by him, during the voyage; and if any of the passengers should have gone on board any other vessel, or should, during the voyage, have been landed at any place, with a view to proceed to New York, the same should be stated in the report. The corporation of the city of New York instituted an action of debt, under this law, against the master of the ship Emily, for the recovery of certain penalties imposed by this act; and the declaration alleged, that the Emily, of which William Thompson was the master, arrived in New York, in August 1829, from a country out of the United States, and that one hundred passengers were brought in the ship, on the voyage, and that the master did not make the report required by the statute referred to; the defendant demurred to the declaration, and the judges of the circuit court being divided in opinion on the following point, it was certified to the supreme court: "That the act of the legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void." The supreme court directed it to be certified to the circuit court of New York, that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration, does not assume to regulate commerce between the port of New York and foreign ports; and that so much of the said act is constitutional.

The act of the legislature of New York is not a regulation of commerce, but of police; and being so, it was passed in the exercise of a power which rightfully belonged to the state; the state of New York possessed the power to pass this law, before the adoption of the constitution of the United States; the law was intended to prevent the state being burdened with an influx of foreigners, and to prevent their becoming paupers, and who would be chargeable as such; the end and means here used are within the competency of the states, since a portion of their powers were surrendered to the federal government.

The case of Gibbons *v.* Ogden, 9 Wheat. 203, and Brown *v.* State of Maryland, 12 Ibid. 419, cited. The section of the act of the legislature of New York on which this action is brought, falls within the limits of the powers of state laws drawn by the court in the case of Gibbons *v.* Ogden; and there is no aspect in which the powers exercised by it transcends there limits; there is not the least likeness between the case of Brown *v.* State of Maryland, and the case before the court.

In the case of Brown *v.* State of Maryland, this court did, indeed, extend the power to regulate commerce, so as to protect the goods inported from a state tax, *after they were landed, [*102
and were yet in bulk, because they were the subjects of commerce; and because as the power to regulate commerce, under which the importation was made, implied a right to sell, whilst the bales or packages were in their original form. This does not apply to persons; they are not the subjects of commerce.

There is a portion of the reasoning of the court, in the cases of Ogden *v.* Saunders, and Brown *v.* State of Maryland, which would justify measures on the part of the state, not only approaching the line which separates regulations or commerce from those of police, but even those which are almost indentical with the former class, if adopted in the exercise of their acknowledged powers. 9 Wheat. 204, 209.

From the language of the court, in these cases, it appears, that whilst a state is acting within the scope of its legitimate power, as to the end to be attained, it may use whatever means, being appropriate to the end, it may think fit; although they may be the same, or nearly the same, as scarcely to be distinguished from those adopted by congress, acting under a different power; subject, only, the court say, to this limitation, that in the event of collision, the law of the state must yield to the law of congress. The court must be understood, of course, as meaning, that the law of congress is passed upon a subject within the sphere of its power; even then, if the section of the act of New York, under consideration in this case, would be considered as par-

taking of the nature of a commercial regulation, the principle laid down in Gibbons *v.* Ogden would save it from condemnation, if no such collision existed. There is no collision between the provisions of the section of the law of New York, on which this suit has been brought, and the provisions of the laws of the United States of 1799 or 1819, relating to passengers.[1]

It is obvious, that the passengers laws of the United States only affect, through the power over navigation, the passengers, whilst on their voyage, and until they shall have landed; after that, and when they shall have ceased to have any connection with the ship, and when, therefore, they have ceased to be passengers, the acts of congress applying to them as such, and only professing to legislate in relation to them as such, have performed their office; and can, with no propriety of language, be said to come into conflict with the law of a state, whose operation only begins where that of the laws of congress end; whose operation is not even on the same subject; because, although the person on whom it operates is the same, yet, having ceased to be a passenger, he no longer stands in the only relation in which the laws of congress either professed or intended to act upon him.

A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation; when that jurisdiction is not surrendered or restrained by the constitution of the United States.

It is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, are not surrendered, or restrained by the constitution of the United States.

All those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and consequently, in relation to these the authority of a state is complete, unqualified and exclusive.

It is, at all times, difficult to define any subject with precision and accuracy; if this be so, in gen-
*104] eral, it is emphatically so, in relation to a subject so diversified and *various as that under the consideration of the court in this case; if the court were to attempt it, they would say, that every law came within the description of a regulation of police, which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the state in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. An example of the application of these principles, is the right of a state to punish persons who commit offences against its criminal laws within its territory.

Persons are not the subjects of commerce; and not being imported goods, they do not fall within the reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition of the states from imposing a duty on imported goods.[2]

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[1] But it is no answer to the objection, that a state law is void, as a regulation of commerce, to say, that it falls within the police powers of the states; for, to whatever class it may belong, it is prohibited to the states, if granted exclusively to congress, by the constitution. Henderson *v.* New York, 92 U. S. 259.

[2] In the cases of Smith *v.* Turner, and Norris *v.* Boston, 7 How. 283, it was decided, by a bare majority of the court, that the statutes of New York and Massachusetts which imposed a tax upon alien passengers, arriving in the ports of those states, were unconstitutional and void. The New York statute, which was under consideration, imposed a small tax upon every alien passenger, brought into the state, for the use of the Marine hospital on Staten Island. In that case, Judge McLean, who concurred with the majority of the court in New York *v.* Miln, said the law in question in that case was considered as an internal police regulation, and as not interfering with commerce. A duty was not laid upon the vessel, or the passengers, but a report only was required from the master. Now, every state has an unquestionable right to require a register of the names of the persons who come within it, to reside, temporarily or permanently. This was a precautionary measure to ascertain the rights of the individuals, and the obligations of the public, under any contingency that might occur. It opposed no obstruction to commerce, imposed no tax or duty, but acted upon the master, owner or consignee of the vessel, after the termination of the voyage, and when he was within the territory of the state, mingling with its citizens and subject to its law. 7 How. 404. Immediately after the decision of the Passenger Cases, New York mod-

New York v. Miln.

CERTIFICATE of Division from the Circuit Court for the Southern District of New York.[1] In the superior court of the city of New York, the plaintiffs instituted an action of debt, for the recovery of $15,000, the amount of certain penalties alleged to have been incurred by the defendant, under the provisions of an act of the legislature of the state of New York, passed February 11th, 1824, entitled "an act concerning passengers in vessels com-

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ified her statute on that subject, with a view to avoid the constitutional objection, and in 1875, the law provided, that the master or owner of any vessel, landing passengers from a foreign port, should make such a report as was held valid in New York *v.* Miln; and that on this report, the mayor should indorse a demand upon the master or owner, to give a bond for every passenger landed in the city, in the penal sum of $300, conditioned to indemnify the commissioners of emigration, and every county, city and town in the state, against any expense, for the relief or support of the person named in the bond, for four years thereafter; but the owner or consignee might commute for such bond, and be released from giving it, by paying, within twenty-four hours after the landing of the passengers, the sum of $1.50 for each of them. If neither the bond was given, nor the sum paid, within the twenty-four hours, a penalty of $500 for each pauper was incurred, which was made a lien on the vessel, collectible by attachment, at the suit of the commissioners of emigration. This act was declared unconstitutional, in Henderson *v.* New York, 92 U. S. 259, as a tax upon the importation of passengers. A similar statute, passed by the legislature of New York, in 1881, was declared unconsitutional and void, as a regulation of commerce, though it was declared, in its title, to be intended to raise money for the execution of the inspection laws of the state; which authorized passengers to be inspected, in order to determine who were criminals, paupers, lunatics, orphans or infirm persons, without means or capacity to support themselves, and subject to become a public charge, as such facts were not to be ascertained by inspection alone. People *v.* Compagnie Générale Transatlantique, 107 U. S. 59; s. c. 20 Bl. C. C. 296. See also, Chy Lung *v.* Freeman, 92 U. S. 275, where a somewhat similar law of California was declared unconstitutional, for a like reason. S. P. People *v.* Pacific Mail Steamship Co., 8 Sawyer 640. So, it has been decided, that a state cannot, in order to defray the expenses of its quarantine regulations, impose a tonnage-tax on vessels owned in foreign ports, and entering her harbors, in pursuit of commerce. Peete *v.* Morgan, 19 Wall 581.

Since the decision of the above cases, congress has undertaken, by the act of 30th August 1882 (22 U. S. Stat. 214), to regulate immigration. By that act, a duty of fifty cents is to be collected, for every passenger, not a citizen of the United States, who shall come to any port within the United States, by steam or sail vessel, from a foreign country, from the master of said vessel, by the collector of customs The money so collected is to be paid into the treasury of the United States, and to constitute a fund (to be called the immigrant fund) for the care of immigrants arriving in the United States, and the relief of such as are in distress. The secretary of the treasury is charged with the duty of executing the provisions of the act, and with supervision over the business of immigration; but no more of the fund so raised is to be expended on any port, than was collected there. As might have been expected, the passage of this act has led to many disputes and controversies over the disposal of the fund, which are not yet settled.

By the act of 6th May 1882 (22 U. S. Stat. 58), the immigration of Chinese laborers was suspended for a period of ten years. Under this act, it has been determined, that the term "laborer" does not include any person but those whose occupation involves physical toil, or who work for wages, or with a view of disposing of the product or result of their labor to others. Ex parte Ho King, 8 Sawyer 439. Neither does the act apply to Chinese who enter a port of the United States, as seamen or members of the crew of a vessel arriving from a foreign port, with the intention of returning or proceeding to another foreign port, in the ordinary course of commerce and navigation. Ex parte Moncan, 8 Sawyer 350. But see Ex parte Fook, 65 How. Pr. 404. The act does not apply to laborers, who, though Chinese by race and language, were never subjects of the Emperor of China, nor resident within his dominions. United States *v.* Douglas, 17 Fed. Rep. 634; contrà, Ex parte Ah Lung, 18 Id. 28. And see Ex parte Ah Sing, 7 Sawyer 536; Ex parte Ah Tie, Id. 542; Ex parte Low Yam Chow, Id. 546; Ex parte Chin A On, 18 Fed. Rep. 506; Ex parte Pong Ah Chee, Id. 527; Ex parte Leong Yick Dew, 19 Id. 490.

[1] For the opinion of Judge THOMPSON, in the court below, see 2 Paine 429.

ing to the port of New York." The defendant, being an alien, removed the cause into the circuit court of the United States, and the pleadings in the case were carried on to issue in that court.

The act of the legislature of New York provides, in the first section, that the master of any ship or vessel arriving in the port of New York from any country of the United States, or from any other state of the United States, shall, within twenty-four hours after his arrival, make a report, in writing, to the mayor of the city of New York, or, in his absence, to the recorder, on oath or affirmation, of the name, place of birth, and last legal settlement, age and occupation, of every person brought as a passenger in the ship or vessel, or on board of her, on her last voyage, from any country out of the United States, or from any of the United States, into the port of New York, or into any of the United States, and of all persons landed from the ship, during the voyage at any place, or put on board, or suffered to go on board any other vessel, with intention of proceeding to the city of New York; under a penalty, on the master and commander, the owner, consignee or consignees, of $75, for each passenger not *reported, and for every person whose name, place of birth, last legal settlement, age and occupation, shall be falsely reported.

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The second section authorizes the mayor, &c., to require from every master of such vessel that he be bound with sureties in such sum as the mayor, &c., shall think proper, in a sum not to exceed $300, for every passenger, to indemnify and save harmless the mayor, &c., of the city of New York, and the overseers of the poor of the city, from all expenses of the maintenance of such person, or of the child or children of such person, born after such importation; in case such person, child or children, shall become chargeable to the city within two years: and if, for three days after arrival, the master of the vessel shall neglect to give such security, the master of the vessels and the owners shall, severally and respectively, be liable to a penalty of $500, for each and every person not a citizen of the United States, for whom the mayor or recorder shall determine that bonds should have been given.

The third section enacts, that whenever any person brought in such vessel, not being a citizen of the United States, shall, by the mayor, &c., be deemed liable to become chargeable on the city, the master of the vessel shall, on an order of the mayor, &c., remove such person, without delay, to the place of his last settlement; and in default, shall incur all the expenses attending the removal of such person and of his maintenance.

The fourth section provides, that every person, not being a citizen of the United States, entering the city of New York, with an intention of residing therein, shall, within twenty-four hours, make a report of himself to the mayor, stating his age, occupation and the name of the ship or vessel in which he arrived, the place where he landed, and the name of the commander of the vessel.

The sixth section subjects the ship or vessel in which such passengers shall have arrived, to the penalties imposed by the former sections, for any neglect of the provisions of the law by the master or owner; and authorizes proceedings by attachment against the ship or vessel for the same, in the courts of New York.

The declaration set forth the several provisions of the act, and alleged

breaches of the same; claiming that the amount of the penalties stated had become due in consequence of such breaches. To this declaration, the defendant entered a demurrer, and the plaintiffs joined in the same.

The following point was presented to the court on the part of the *defendant: "That the act of the legislature of the state of New York, mentioned in the plaintiff's declaration, assumes to regulate [*106 trade and commerce between the port of New York and foreign ports, and is unconstitutional and void." Upon this question, the opinion of the judges being opposed, the same was certified to this court, at the request of the plaintiffs.

The case was argued at a former term of this court, and the justices of the court being divided in opinion, a re-argument was directed.

It was again argued by *Blount* and *Ogden*, for the plaintiffs; and by *White* and *Jones*, for the defendant.

Blount, for the plaintiff, contended, that the law in question was constitutional. The case, he said, was not without difficulty; indeed, the very hesitation of a court, constituted as this was, admonished him of the doubts and difficulties attending the solution of the question.

The law was one peculiar to this country, and it grew out of circumstances also peculiar to this country. The emigration to the United States, since the American revolution, was unprecedented in history, not merely in numbers, but in its character. It was not a military colonization, like the Greek and Roman colonies; nor was it mercantile, like the East India and American colonies of modern Europe. Neither did it resemble the emigration of the Moors from Spain, or the Huguenots from France. It was a constant and steady migration of civilized Europeans to an independent country, controlled by a civilized people. This migration was peculiar to the United States, and we cannot find legal analogies in other countries. That migration has now reached the amount of 60,500 yearly, into the port of New York alone. It was obvious, that laws were needed to regulate such a migration; and the Atlantic states, generally, have passed such laws; and the law in question is that of New York, providing that masters of vessels, bringing passengers to that port, who have no legal settlement in the state, shall give bonds to the city to indemnify it for three years from all charges on account of their maintenance. It also provides for a report to the mayor of the names, &c., of the passengers, and inflicts a penalty for a violation of the law.

At the previous argument, the defendant contended, that this was *a regulation of commerce, and that the power to regulate commerce [*107 was exclusively vested in congress. Hence this law, passed by a state, was unconstitutional. We do not admit this law to be a regulation of commerce; but conceding, for the sake of the argument, it to be so, it does not follow, that it is unconstitutional.

I. Because congress has the power to regulate commerce, it is not a consequence, that it is an exclusive power. Powers granted to congress are exclusive only: 1st. When granted in terms expressly exclusive. 2d. When the states are prohibited from exercising it. 3d. When exclusive in its nature. This power clearly does not fall under the first nor second class. Does it under the third class? The counsel contended, that a legislative

power is exclusive in its nature, only when its existence in another body would be repugnant to, and incompatible with, its exercise by congress. Not that its exercise by a state legislature would be incompatible with, its exercise by congress. That is a conflict between concurrent or co-ordinate powers; and where that takes place, we concede the federal power is supreme. A power exclusive in its nature, must be such that the states can pass no law upon the subject without violating the constitution. Federalist, No. 32; 5 Wheat. 49; 1 Story on Const. Law 432.

Concurrent powers are of two classes. 1st. Where any federal legislation covers the whole ground, and exhausts the subject; as fixing the standard of weights and measures. Here, after congress has legislated, the power of the states is at an end. 2d. Where the power may be exercised in different modes, or on different subjects; or where the object admits of various independent regulations operating together. In these cases, the concurrent laws are all in force, and the state law is void only so far as conflicts with the law of congress. The 2d section of 6th article of the constitution, providing that the laws of congress, made pursuant to the constitution, shall be the supreme law of the land, proves that this species of concurrent legislation was contemplated. This court has sanctioned this view of the subject. 4 Wheat. 122, 196; 5 Ibid. 49; 9 Ibid. 200. In the *108] case of *Saunders* v. *Ogden*, it was decided, that a bankrupt *law passed by a state was valid, until it conflicted with federal legislation.

The counsel, Mr. Blount, contended, that the case of *Gibbons* v. *Ogden*, did not touch the case before the court. 1st. Because, there the power to regulate commerce was regarded as exclusive only so far as it regulated the commerce of the United States as a whole. 2d. Because, there the question decided by the court was whether a state could regulate commerce, while congress was regulating it. 9 Wheat. 200. 3d. Because it was expressly said in that case, by the court, that it never was intended to deny to the states all legislation, which might affect commerce. Ibid. 204. That decision therefore does not touch the point; and the court is now called upon to go further, and declare all state laws affecting commerce void. This is the extent of defendant's doctrine.

There is here no conflict of concurrent laws. Congress has passed no law conflicting with this law. The acts of 1779, March 2d, and of 1819, March 2d, cited by the defendant's counsel in the former argument, are for different purposes. The first is a revenue law, and the provisions relating to passengers are confined entirely to the entering and landing of baggage, and they are intended to prevent smuggling. The second is intended to prevent the cupidity of masters and owners from crowding their ships with passengers, and to compel them to provide a sufficient quantity of water and provisions. The treaties with Brazil, and Austria and Prussia, are equally inapplicable. They merely secure freedom of commerce and intercourse to the subjects of these countries, they conforming to the laws of this country. This law was then in existence, and the exception provides for the execution of all such laws. Besides, the defendant here does not appear to be a subject of either of those powers; and, of course, cannot claim anything on account of those treaties, even if they were applicable to the case.

We do not deny, that in regulating commerce, the power of congress is

supreme, and it may be regulated either under that power, or under the treaty-making power. Until that be done, and the conflict occur, the state law is valid. Such are the doctrines of this *court, and of the ablest jurists. 1 Story, Const. Law 433. "Congress may make that a regulation of commerce, which a state may employ as a guard of its internal policy or to promote its own peculiar interests." "If the power to regulate commerce be exclusive, still the legislation of a state, acting on subjects within the reach of other powers, besides that of regulating commerce, would be constitutional." 2 Story, Const. Law 517. [*109

In order to decide the cause for the defendant, the court must come to the conclusion, that the power regulating commerce is so exclusive that all state laws affecting or regulating commerce are necessarily void, even where no conflict exists. This is beyond any former decision, and we think the court will not adopt such a conclusion. 1st. Because it is a case where power is claimed by implication, and it is not sufficient to show a possibility of inconvenience. All such cases, too, are decided upon their own grounds. 2d. It is a question of power, and the court will require most convincing arguments, before denying it to the states. 3d. Such a construction is not necessary to reconcile former decisions. 4th. The regulation of passengers was productive of no conflicting legislation under the old confederation. It was not the evil to be remedied, when the power to regulate commerce was given to congress. Supremacy of federal law is a sufficient remedy, and the court will not imply power further than necessary. 5th. This construction would throw upon congress a mass of legislation which it could not perform; and the tendency to alienation from the federal government would be increased by its incompetency to perform its duties. Among these laws are the laws regulating the discharge of ballast; the harbor regulations; the pilot laws of the states; the health laws; the laws of police as to the conduct of crews of vessels while in port; and a class of laws peculiar to the southern states, prohibiting traffic with slaves, and prohibiting masters of vessels from bringing people of color in their vessels. Such is the mass of legislation which must be abrogated by such a decision. But when we look at the course of commerce with foreign countries, at the commencement, the progress, and the conclusion of a voyage; it is difficult to estimate the extent to which such a conclusion *must lead the court. The merchandise that is sent abroad is purchased in the interior, and bills of exchange on the northern cities, and on Europe, given for it. The merchandise that is brought home on the return-voyage, is often kept in the original package, and is transported from state to state, with benefit of drawback, until it is again shipped for a foreign market. How much of this falls within the power to regulate commerce with foreign states; and if exclusive, how much must be withdrawn from state legislation? There is no criterion furnished, by referring to the place where the business is transacted, and by declaring that all transacted within the country falls within state jurisdiction, and the residue within federal jurisdictson. The shipping of sailors is within the country, and that is regulated by congress; and so is their discharge and enforcement of the contract. On the other hand, pilotage, a contract commenced upon the ocean, is regulated by state laws. [*110

Again, if the power to regulate commerce with foreign states be exclu-

sive, that of regulating commerce between the states is exclusive also. Both powers are conferred in the same terms, and in the same clause. Apply the construction contended for by the defendant, and the legislative power of the states is at an end. They become mere municipal corporations; and all legislation relative to commerce, the great business of the country, becomes exclusively vested in congress. Under this head of the argument, therefore, we conclude that, conceding the passenger law to be a commercial regulation, the states have a power concurrent with congress to legislate, but subject to the controlling power of congress.

II. The law is not a commercial regulation, in the sense contemplated in the constitution; but a police regulation. It is a part of the system of poor laws, and intended to prevent the introduction of foreign paupers. This power of determining how and when strangers are to be admitted, is inherent in all communities. 2 Ruth. Inst. 476. Fathers of families, officers of colleges, and the authorities of walled cities, all have this power, as an incident of police. In states, it is a high sovereign power. It belonged to the states, before the adoption of the federal constitution. It is nowhere relinquished; nor can it be, with safety. It is essential to the very existence of some, and to the prosperity and tranquillity of all. That it was not intended
*111] to relinquish it, we infer: *1st. Because it was not prohibited to the states. 2d. Because it is not expressly granted to congress, but only as an incident to other powers; as the war power, the treaty-making power, or the power to regulate commerce. It may also be used by the states as a police regulation, as part of the system of poor laws, or to promote internal tranquillity. But because it is an incident to some of the federal powers, it can never be pretended that it is necessarily prohibited to the states. 3d. Because § 9, art. 1, of constitution concedes, in so many words, that the states have this power, and imposes a restriction upon the concurrent power of congress, until 1808. It declares, that "the migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by congress prior to 1808." What is the meaning of the words, "the states shall think proper to admit?" States can only think through their laws; legislation is the thought of states. The very phrase shows that the states reserved the power to admit or prohibit; and consequently, to regulate the admission. The power of congress is suspended until 1808; but the power of the states remains as before the constitution. Did the arrival of the year 1808 extinguish that power in the states? Such a construction will hardly be contended for. After that year, congress is enabled to exercise one of the incidents to its powers, which before it was prohibited to do. It must exercise it, however, as a concurrent power, and supreme, when conflicting. Supposing congress had not chosen to pass any laws on this subject, after 1808, would the state laws necessarily be abrogated by the arrival of that year? Would the laws passed by the states, abolishing the slave-trade, before 1808, have been repealed? Such must be the conclusion, if the power be exclusive in its own nature.

Again, if the power to pass laws regulating the admission of passengers from Europe, falls under the power of regulating foreign commerce, that of regulating the arrival of passengers by land, falls under the power of regulating commerce between the states. If the one be exclusive, the other is exclusive; and all vagrant laws, all poor laws, and police regulations,

become, at once, solely of federal jurisdiction. The laws of the southern states in relation to the intercourse and traffic with slaves, and to the introduction of colored persons into those states, also become the subjects of federal jurisdiction, and the state laws are abrogated. Here the counsel examined *the character of those laws; and concluded by observing, [*112
that although he must not be understood as approving of the peculiar provisions of those laws, still it was obvious, that some legislation was necessary in reference to that population, and that the states clearly had the power to pass such laws. The poor laws, providing for sending back paupers to their place of settlement, in the adjoining counties of a bordering state, will share the same fate; and congress will have to provide a national system of poor laws. In our view, the law in question is altogether a police regulation; as much so as laws prohibiting entrance into a walled city after dark; laws prohibiting masters from bringing convicts into the state; or the laws prohibiting free negroes from being introduced among slaves.

The history of this law also throws some light upon its constitutionality. The federal constitution was adopted by nine states—the constitutional number—in 1788; and on the 13th of September of that year, a resolution was adopted by the old continental congress, announcing that fact; directing presidential electors to be chosen, and fixing the 4th of March 1789, for the commencement of the new government. Three days afterwards, on the 16th of September, the same body unanimously adopted a resolution, recommending to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States. When this resolution, so directly bearing upon the point in question, was adopted, there were present, Dana, the profound and enlightened jurist and framer of the government of the North-west Territory; Gilman, Williamson, Fox and Baldwin, members of the convention which formed the federal constitution; Hamilton and Madison, also members of that convention, and the eloquent expounders of that instrument. Jay, the third expounder, and the first chief justice of this court, was the secretary of foreign affairs, and, no doubt, recommended the passage of this law. If any contemporaneous authority is entitled to respect, here was one of the highest character. A resolution, at the very moment the new government was going into operation, recommending to the states to pass these laws, as peculiarly within their province. Under that resolution, the states acted. November 13th, 1788, Virginia passed a law forbidding masters of vessels from landing convicts, under a penalty of fifty pounds. South Carolina and Georgia *passed passenger laws the same year. New Hampshire [*113
passed a passenger law in 1791; Massachusetts, in 1791. The New York passenger law was first passed 7th March 1788, and has been re-enacted, with some modifications, at each subsequent revision of her laws.[1] The resolution of congress extends to the very point in dispute. If the admission of convicts may be prohibited, the mode of bringing passengers may be regulated. The same rule is applicable to the admission of paupers, as to convicts. This will not be denied.

The defendant's counsel asserted, in the former argument, that the laws

[1] This act is entitled "an act for the better settlement and relief of the poor." It is not a passenger law.

of 1799 and 1819 have regulated this intercourse. We deny it. Those laws were for other objects. It is not true, that a person conforming to those laws, may import passengers, in spite of state laws; because the laws of 1799 and 1819 were all the regulations that congress thought necessary.

A state law is not necessarily void, because persons violating it, are acting in conformity with an act of congress. Even in such cases, states acting under other powers may control individuals acting in conformity with laws of the federal government. A man may obtain a patent for making and vending a medicine, and a state may prohibit its sale. He may obtain a copyright for publishing a book, and the state may punish him, because it is libellous. A merchant may import gunpowder, or Chinese crackers, pursuant to the revenue laws; and the state of New York may prohibit the former from being landed, and the other from being sold in the city. He may also bring passengers, pursuant to the above-mentioned laws; and the legislature may compel him to give security that they will not become a public charge.

We therefore contend, 1st. That the power to regulate commerce is not exclusively in congress, but concurrent in the states; and that state laws are valid, unless conflicting, and only void, where repugnant. 2d. That the law in question is merely a police regulation, and not a regulation of commerce, in the sense of the constitution. 3d. That the power over this species of intercourse is vested in congress only; is incident to other powers, and not in any sense exclusive. 4th. That the law of New York is not repugnant to any existing treaties or laws of congress, and is, therefore, valid.

*114] *Such a conclusion produces no inconvenience; but, on the contrary, promotes a public good. It vests power where there is an inducement to exercise it. In congress, there is no such inducement. The west seeks to encourage emigration; and it is but of little importance to them, how many of the crowd are left as a burden upon the city of New York. There is, therefore, a hostile principle in congress to regulating this local evil. A construction that would vest this power exclusively there, would be contrary to the general design of our government; which is to intrust the care of local interests to local authorities; and only to congress, when necessary to the national welfare.

We trust that this court will not make a decision that, by absorbing so large a portion of state legislation in a power to regulate commerce, deemed exclusive by inference, will tend to weaken the authority of this court, and shake the stability of the government; but that, according to the design of the constitution, in conformity with its history, and in accordance with its own decisions and principles of interpretation, that it will decide that the states had power to pass such laws until 1808, without control; and after 1808, they had a concurrent power, subject to the control of congress; and that, until conflicting with federal laws, the law is valid and in force.

Quarantine Laws. Maine, Act 10th March 1821; New Hampshire, 3d February 1789; Massachusetts, Rev. Stat. 1834, 20th June 1799; Rhode Island, June 22d, 1797, and Rev. Stat. 1822; Connecticut, Rev. Stat. 1835; New York, 14th April 1820; New Jersey, 3d February 1812; Pennsylvania, 29th January 1818, and 2d April 1821; Delaware, 24th January 179[illegible] and 1800; Maryland, November 1793; Virginia, 26th December 1792; No[illegible]

Carolina, Acts 1794, 1802 and 1817 ; South Carolina, 19th December 1795, 21st July 1800, and December 1809; Georgia, 23d December 1833 ; Louisiana, 19th February 1825; Alabama, 21st December 1823.

Passenger Laws. Maine, 24th February 1821, and 28th February 1835; New Hampshire, 18th June 1807, 15th February 1791, 14th June 1820 ; Massachusetts, February 1794, and Rev. Stat. 1834 ; Rhode Island, Revised Laws, 1822 ; Connecticut, October 1788, and Rev. Laws, 1835 ; New York, 11th February 1824 ; New Jersey, 28th January 1797, 10th February 1819; Pennsylvania, 29th January 1818, 1st February 1818 ; Delaware, 24th January 1797, 12th February 1829 ; Maryland, November 1809, 22d March 1833, and 17th February 1835 ; Virginia, 13th November 1788, *26th December 1792, and 11th March 1833 ; North Carolina, 1792, 1832, 1825 and 1830 ; South Carolina, 1788, and 19th December 1835 ; Louisiana, 16th March 1818, and 26th March 1835. [*115

Pilot Laws. Maine, 24th February, and 10th March 1821 ; New Hampshire, 18th June 1805 ; Massachusetts, Rev. Stat. 1834 ; Pennsylvania, 2d April 1804, 20th March 1811, and 29th March 1803 ; Delaware, February 5th, 1819, and 31st January 1825 ; Maryland, November 1803, 1818, and 24th February 1824 ; Virginia, 10th February 1819, 26th February 1821, 27th January 1825 ; North Carolina, 1790, 1797, 1805, 1812, 1823 and 1831; South Carolina, 17th August 1807, July 31st, 1815; Georgia, 23d December 1835, 23d December 1830 ; Alabama, 23d December 1823, and 13th January 1828 ; Louisiana, 31st March 1805; 7th June 1806, and 1st March 1826.

Wreck Laws. Maine, 27th February 1821 ; Massachusetts, Rev. Stat. 1824; Connecticut, Rev. Laws, 1835, tit. 117 ; New York, 1 Rev. Stat. 690; New Jersey, Rev. Laws 716, and 7th March 1836 ; Delaware, 2d February 1786 ; Maryland, November 1799, and 3d January 1807 ; Virginia, 7th February 1819; North Carolina, Hayw. Dig. 668, and 1831 ; South Carolina, 1783.

Laws relating to Colored Passengers and Seamen. Delaware, 19th January 1826, and 7th February 1827 ; Maryland, November 1796, and November 1809 ; Virginia, 1 Rev. Laws, 428, 432, 443, 444, Act 24th February 1827, and 11th March 1834 ; North Carolina, Acts 1791, 1788, November 1819, 1825, 1826, 1830 and 1832; South Carolina, 18th December 1817, 19th December 1835; Georgia, 26th December 1817, 23d December 1833, and 26th March 1835 ; Louisiana, 26th March 1835.

Destroying Vessels. Maine, 27th February 1821 ; Massachusetts Rev. Stat. 1834, p. 725; Connecticut, Rev. Laws, 1835 ; New York, 2 Rev. Stat. 667 ; Maryland, November 1809 ; Delaware, 1782.

Harbor Regulations. Maine, 2d March 1821, 12th February 1828, and 11th March 1835 ; Connecticut, Rev. Laws, 1835, tit. 73 ; New Hampshire, 18th February 1793 ; Maryland, November 1807, 25th January 1806, and 13th March 1834 ; Pennsylvania, 29th March 1803 ; Virginia, 3d March 1821, 17th January 1829, and 7th April 1831 ; North Carolina, Rev. Laws, ch. 194 ; Louisiana, 17th February 1831 ; Alabama, 20th December 1825, 21st January 1832.

* *White*, for the defendant, stated the case to be of great general importance, not only as it affects the commerce of the city of New York, but as it affects the laws of the United States, and the treaties entered [*116

into with foreign commercial nations. If the evils which the law of New York is intended to remedy or prevent, exist, or may occur, congress may pass a law to provide a remedy, as this legislation by the state of New York is not authorized by the constitution, and is void. It is in direct opposition to the power which is given by the constitution to congress to regulate commerce; and is in actual collision with that power as it has been exercised by congress. The law is not a law which prevents the admission of felons and passengers into New York, but which affects the navigation of all countries, as connected by their commerce with this country; and conflicts with the express stipulations of treaties for the regulation of that commerce. It introduces new arrangements, requires other forms, establishes additional penalties, and prohibits many things which are not so regulated by these treaties. This court will look at the consequences to follow from such a law; and by so doing, they will see how extensive must be its effects. The powers of the states to establish harbor laws, and to preserve the navigation of rivers, by preventing obstructions in them, are not denied; but these powers are of an entirely different character from the provisions of the law under consideration. The law regulates the whole passenger commerce of the port of New York; it imposes duties, requires stipulations, and creates liabilities which do not exist in the acts of congress relative to passengers, and enjoins duties on aliens which are not required by these laws. Congress having made all the provisions relative to passengers, which, having the power to regulate commerce, has been thought necessary by it; the requirements of the law of New York are in direct conflict with, and repugnant to, these provisions; and should, therefore, be declared void.

A reference to the law of New York will show the number and extent of the duties imposed on masters of ships and their owners by this law, beyond the demands of the law of the United States. The master must make a report of the passengers who were on board his vessel, during any part of the voyage; he must give a bond, with surety, to prevent their being chargeable to the city of New York; *he must remove any of *117] the passengers who may become chargeable; and penalties are imposed, and the forfeiture of the vessel is to be made by proceedings of an admiralty character, before a court of New York, if any neglect or violation of these duties shall occur. Do not these interfere and conflict with the powers given to congress to regulate commerce? Are they not in conflict with the passenger laws of the United States?

Two cases have been decided in this court which settle and determine all the questions which can arise in the case now presented. Before the case of *Gibbons* v. *Ogden*, it had not been fully ascertained, what was the constitutional interpretation of that part of the instrument which gives to congress the power "to regulate commerce;" but this court, in that case, gave to it a full and a most satisfactory interpretation. The regulation of commerce by congress is, since that case was decided, well understood; and the only question which can be properly presented to the court now, is whether the principles of that case apply to this. The case will be found in 9 Wheaton, and the principles referred to are in pages 189, 197, of the report. Commerce is not merely buying and selling, and the exchanges of commodities. It is navigation, and the intercourse between nations. As it includes navigation, so it includes all the uses and purposes of it, as well

the transportation of passengers and persons, as of goods, and everything connected with them, and with each of them. Such also is the definition of commerce in the case of *Brown* v. *State of Maryland*, 12 Wheat. 445, 447.

The examination of the statute of New York, which has already been submitted, fully establishes the position that the whole of its provisions are commercial regulations. Its application is to all passengers; and it operates on the business of navigation, and the uses of shipping, as they are employed in one of the most profitable and important of its purposes. Sanitary regulations, quarantine laws which affect passengers, are, in England, made by acts of parliament, and are not police regulations; and even if such are, in part, the purposes of the act of the legislature of New York, they have gone far beyond those objects, and have embraced requirements which could not be constitutionally touched.

One of the great and prominent inducements to form the constitution, was the necessity, universally felt and acknowledged, to establish *uniform commercial regulations. The importance of this was seen [*118 by all; and hence, the surrender of the power to regulate commerce, by the states to the general government. The first movement of the purpose to establish the present government, was by Mr. Madison, under the influence of the importance of a uniform commercial system; and from this arose the appointment of the convention, which adopted the present constitution. The main object of this government will be at an end, if the states can exercise the power which is claimed by New York under this law. As the government of the United States, in its relations with foreign powers, might be affected by state legislations on matters connected with commerce, it became essential, that everything which affected commercial intercourse should be exclusively given to the government of the United States. By this means, the relations of the government with foreign nations could be preserved; and the stipulations for equal privileges, of the citizens of foreign nations connected with the United States by commercial treaties, cannot be disturbed: without this, all would have been confusion.

Jones, for the defendant, considered this case as relieved from all difficulties as to the application of the provisions of the constitution of the United States to it. With the decision of this court in the case of *Gibbons* v. *Ogden* before them, it would be seen, that the law of New York is a regulation of commerce, and is necessarily invalid. The provisions of the law interfere with a very important part of the commercial operations of the country; it affects the employment of the ships and vessels of other states, besides those of New York: it goes across the ocean, and interferes there with the operations of packet ships, prescribing the description of persons who may be brought on board of them; and subjecting the masters and owners of the vessels to duties and liabilities, which do not exist under the laws of the United States, and cannot, therefore, be imposed by a state law.

There may be police regulations, which are not commercial; other regulations may be both those of police and of commerce. While the police of the cities and states of the Union is entirely within the power of the states; it does not follow as a consequence, that where commerce is interfered with by the rules of police, they are constitutional. Many regulations may be

applied in the commercial cities to business matters, connected with com-
*119] merce, which are not *commercial; and the argument in favor of such regulations as those of the law of New York, derived from this state of things, is erroneous, as it confounded the thing with the use of it. The building of ships, the preservation of harbors, of wharves, the keeping open of rivers, may all be subjected to state laws. These are but the instruments of commerce, and not commerce itself. But if a state, by its laws, shall impose regulations connected with the uses of these things, which interfere with the operations of commerce, the constitutional power of congress is usurped, and the interference is void.

Let the array of state laws and state regulations, which has been presented by the counsel for the plaintiffs, be examined by these principles, and they will be found constitutional or void, as the examination will result. The number of these laws will not protect them, if they are obnoxious to the constitutional power of congress. They will all be *in pari delicto*, if they so interfere. No precedent will sanction unconstitutional laws. The argument, that a similar law of every state conflicts with the constitution, only shows the extent of the mischief, and the greater necessity for its cure.

It has been said by the counsel for the plaintiff, that the constitution of the United States, and the highest authority acting under it, has conceded the power exercised by New York to the states; and the ninth section of the constitution is referred to, which prohibits congress from interfering with the intercourse between the states for a period. It is known, that this provision had a special application to particular persons. But taking its provision in its general sense, it would appear, that without it, the power existed; and the provision was only to suspend the action of congress on the subject, the right of which was vested in that body. It was under the powers to regulate commerce, that the slave-trade was regulated; but the claim to interfere with that trade was not derived from the provision which related to migration and importation between states.

But it is said, that if this provision gives congress the power of interference, it also gives it or admits its existence in the states. This is not considered a correct deduction. If a state law prohibiting migration or importation, shall be brought in question; the point will arise, as to the power of the state to legislate upon it. The provision of the constitution is, that for a certain time, congress shall not prohibit the admission of those persons the the states may admit. The exception does not destroy the power, but sus-
*120] pends it. It is fully *granted, and could have been executed instantly, but for the limitation; and when that expired, it came into active existence. It was, from that time, as full as if it had never been interfered with.

The argument which is presented on the resolution of congress, after the adoption of the constitution, and before it went into operation, which recommended the states to pass laws prohibiting the admission of felons, asserts that the states may prevent the admission of all persons, unless under onerous conditions. But no such inference is justifiable. The law of New York is a prohibition of emigration; and if carried into full effect, will entirely prevent the entrance of all persons from abroad, into the city of New York, the great throat of emigration. It applies to all passengers

coming to New York; and operates on every ship or vessel taking passengers for New York, in any foreign country.

It is attempted to draw a distinction between this case, and the cases which exist by the great powers to regulate commerce under the constitution. This is said to be but an incident to those powers, and not important, or necessarily interfering with them; and therefore, within state legislation. But if this is an incident only, and may be taken away from the general government, the whole power to regulate emigration may be taken away; the whole passenger trade of the United States may be cut off; and thus one of the principal powers of the general government will be destroyed.

We have shown enactments by the national legislature, under the constitution relative to passengers, and thus congress have come in and occupied the ground. The right no longer rests upon the abstract question, whether it may be exercised. It has been used, and it is exclusive, from its very nature. If it be said, that provisions applicable to all cases have not been made; it may be said, with perfect safety, that they have not been thought necessary or proper. Their not having been made, is evidence, that congress did not deem them requisite. They are judges of the mode in which the power shall be used. The subject having been once within their view, it must be considered, that they have done with it as they considered it required; as in the case of a bankrupt law. By establishing a uniform system of bankruptcy, the whole power to legislate on the subject was occupied; and a state could not come in and legislate on matters which were not referred to, or provided for, in the legislation of congress, on the ground, that having been omitted, they could be so regulated. The wisdom of the legislature of the general *government is to be regarded as having looked over the whole of the subject, and to have done all that ought to be done. [*121

There is a direct conflict between the laws of the United States and the law of New York; for everything is in conflict with these laws on the subject of passengers, which adds to the regulations established by them. So also, the law of New York conflicts with treaties; for they impose upon the citizens and subjects of countries, united to us by treaties, restrictions not known to be general laws, and not contemplated as applicable to them. In fact, if such a law as this before the court may be passed by a state, a total prohibition of the entrance of a foreigner into the United States may be enacted by the legislature of the state; and then a treaty, containing assurances of ingress and protection to the citizens or subjects of a foreign state would cease to be the supreme law of the land.

It is denied, that congress, under the confederation, had the power to give to the states authority to pass laws relative to the admission of persons into their territorial limits. This would allow to that body authority to legislate over the constitution then coming into existence, and to supersede its provisions. The resolution was passed in the expiring hour of that body; and although many of those who formed the constitution were members of the confederate congress, that fact does not authorize the deduction, that, by adopting the resolution, they meant to give a construction to the constitutional provision with which it interfered. It was intended to operate on a present evil, and not to be a permanent law.

Ogden, for the plaintiff.—The defendant, in this case, states himself to be an alien, but does not state in his application to remove the cause from the superior court of the city of New York into the circuit court, from what country he came into the United States; but it is a fact worthy of notice, that, although a stranger among us, he has undertaken to teach us constitutional law. He assumes to set aside a law of New York, and to break down a policy which has existed for nearly thirty years, without, until now, a claim to object to its provisions or its purposes. The first act which contained provisions relative to passengers was called "an act for the relief and settlement of the poor." The act before the court is the same with that law, in purpose, and in many of its provisions.

*122] *The question is, whether the legislature of New York, by an act in force for the long period stated, have violated the constitution of the United States; and the act under consideration, therefore, is a nullity, having been passed in contravention of the constitution. The simple statement of the question is sufficient to show its importance.

It is the high prerogative of this court to examine the laws of the different states, and of congress, and the constitution of the United States. To do this, is the duty imposed upon the court by the constitution, confided to it by the people; and from the discharge and performance of which it will not shrink. The power to pronounce a law of a state legislature null and void, as being against the provisions of the constitution of the United States, is not only a great and important one; but, because it is so, it should be exercised with great care and caution. To suffer state legislatures to disregard the constitution of the Union, which all their members are sworn to support, would soon leave the constitution a dead letter, destroy its efficiency, and put an end to every hope of benefit to be derived from it. On the other hand, to take from the legislatures of the different states the powers legitimately vested in them, by a forced construction of the constitution, would be equally fatal to it; by exciting state pride and feelings against it; and thus driving it from that place in the good opinion, feelings and affections of the people, without which it cannot long exist. It is respectfully submitted, that the power to declare a state law void, which unquestionably exists in this court, should never be exercised in a doubtful case. It is an extremely delicate power; and should only be called into action, in cases so free from doubt, as to secure at once the acquiescence of state authorities and of the public. This case has been already before the court, and was argued at a former term. It is now under consideration a second time, the court having been divided in opinion after the first argument. This is evidence that the question involved in it is a doubtful one; and serves to afford, at least, a plausible ground of argument against any judgment being given against the validity of the state law.

Mr. Ogden stated, that he did not belong to that school of politicians, or lawyers, who are in favor of giving to the constitution of the United States a construction restricted to its words. All his reflections, and all his habits of thinking had induced him to give a more liberal interpretation and applica-

*123] tion to that instrument; *preservation of the constitution, in its true spirit, is essential to the prosperity and freedom of this country. Give to it all its fair, proper and essential powers, and the hope may be safely entertained, that it will daily acquire more strength, and that it will extend,

and continue to increase its benign influence over our people, as they increase in numbers, and as our country advances in wealth, in arts, and in all that is calculated to enlarge minds and augment the happiness of our citizens. On this occasion, it is not, therefore, proposed to advocate a restricted, limited and narrow construction of the constitution. But while this is properly and necessarily to be avoided, it is not to be stretched beyond its proper limits; or, like everything else, it will break and be destroyed.

It must always be borne in mind, when discussing and considering a question arising under the constitution, that it was not formed by a people who were without any government; but by the people of several independent states, all of whom had, in their respective territories, well-organized governments in full operation. These states, independent in themselves, had entered into certain articles of confederation; under which they had formed a union, for the purposes of contending for, and maintaining, their independence. When that was obtained, the articles by which they were bound together were found to be totally inadequate for their continued government as a nation. This was the reason why the present constitution was adopted by the people; as is, briefly, but strongly and clearly, declared in the preamble to the instrument. It may be proper to remark, and the influence of this fact in this case will be seen hereafter, that the articles of confederation were not made between the people of several states, but by the state governments; but the constitution was made, emphatically, by the people of the United States, and adopted by them in convention. The state governments could form no such constitution; they had no powers to do so, delegated or intrusted to them. The people are the sources of this power, both of the state and general governments; and after forming the constitution, they declared "this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties, &c., shall be the supreme law of the land." The constitution, then, so far as it extends, is, by the declared will of the people, supreme; and is so to be considered in all courts, and by all persons in the United States.

Before the constitution was formed and established, all the powers of government had been granted by the people, and vested by them, [*124 in their several state governments. By the constitution of the Union, the people granted to the government of the United States certain powers, for certain purposes and objects; and so far as these were so granted, and the states excluded from them, they were taken from the state governments, by those who gave these governments their existence; and by those who had a right and power to give and take away. That the constitution was a grant of powers by the people of the United States, is not only supported by the whole tenor of the constitution, but is so declared in express words. In the first article, it is said, "all legislative powers herein granted shall be vested in congress," &c. Whenever, therefore, a question occurs as to the constitutional powers of the general government, we must examine whether it be within the powers granted, or which are necessary to carry into effect the powers granted. But the powers of the general government are not now in question; the question is, whether the power exercised by the legislature of New York in passing the law now under consideration is prohibited; or rather whether it was taken away from the legislature, by the constitution. If both the state and the general government had been

formed at the same time, the question would have been different. It would then have been, what powers were given to each?

In some enumerated cases, all powers are taken away. The power "to coin money," "to issue bills of credit," "to pass tender laws." In another class of cases, the state legislatures cannot act without the consent of congress. The states may not lay duties, except they are necessary for their inspection laws, unless congress affirms their laws imposing them. In this class of cases, the states may legislate with the consent of congress, and their acts will then have validity. Cases also exist, in which the power of states is taken away by necessary implication. This class includes cases only where the exercise of state legislation upon the subject is wholly inconsistent with the powers vested in the government; and where the two powers must necessarily conflict with each other. Now, if the law of the state of New York be unconstitutional, it is not because it is one of those cases in which all state legislation is expressly prohibited by the constitution for it is not enumerated among the express prohibitions; nor because the consent of congress has not been obtained to the law, for it is not of the
*125] description of *such cases; it can only be invalid, because the power to pass it is taken away by necessary implication.

Is the law repugnant to the powers vested in the general government? Admit it to be a regulation of commerce, is it, therefore, void? Power is given to congress to regulate commerce, but there is nothing in the constitution which compels congress to do so; and it might have been left to the action of the states. Before the constitution was formed, the states had commercial regulations; and if the power given to congress was exclusive, all these laws were repealed and void, when the constitution came into operation. This could not be, and it was not so understood by any state in the Union; every state has acted under a different interpretation of the constitution.

What would have been the situation of the commerce of the country, if, on the adoption of the constitution, the whole of the commercial regulations of the several states had become invalid? Until congress should legislate, all would have been confusion; and if the legislation had been incomplete, the evils of such imperfection would remain. No state laws, however long in force and necessary, could have been invoked to supply the deficiencies. But if the state laws are left in force, until some act of congress should come in conflict with them, when they must yield; every principle of necessity or justice seems to be preserved.

The case of *Sturges* v. *Crowinshield*, which came before this court, decided, that a state insolvent law was invalid, because it impaired the obligation of a contract, and came, therefore, within the provision of the constitution which has taken the power from the states to pass such laws. In the case of *Gibbons* v. *Ogden*, it appeared, that a law of New York had given to Livingston and Fulton the exclusive right to navigate the waters of New York, by steamboats. The navigation of these rivers was a part of the commerce of the United States, a part of the coasting-trade which was open to all the citizens of the United States, in relation to which congress had exercised the powers granted to them by the constitution. They had made it necessary for all coasting vessels to take out licenses, which entitled them to navigate these waters; and the law of the state came directly in conflict

with the act of congress, and with the licenses under it, and was, therefore, invalid. The case of *Brown* v. *State of Maryland*, in 12 Wheat., and all the cases which have been cited, if examined, will show that none of *the laws were declared invalid, because they were regulations of [*126 commerce, but because they came in conflict with rights derived under acts of congress which are declared to be the supreme law of the land.

It is no answer to this argument to say, that congress have legislated on the subject of the regulation of commerce, and has, therefore, exercised the powers vested in them by the constitution, to the exclusion of the states. Unless congress have legislated on the particular branch of the subject; unless they have so legislated, as that their law, and the law of New York, before the court, are in collision with each other, no necessary implication requires, that the state power should be considered as taken away. In several cases, when powers are given to congress, because the public interest requires there should be a general legislation on the subject, this court has declared that the state power to legislate on it, has not been taken away, until congress actually exercises the power granted to them. This is the case in bankruptcy, and in the laws relative to naturalization. As to the first, cited 10 Wheat. 196; as to naturalization, *Collet* v. *Collet*, 2 Dall. 294.

By the constitution, congress have power to regulate commerce with foreign nations, and with the Indian tribes. At the time the constitution was adopted, in many of the states, there were large bodies of Indians. In New York, the whole of the now populous western part of the state was occupied by Indians. Congress did not legislate on the subject of commerce with the Indians, until many years after the power was granted to it. During the whole of this period, was not the trade with the Indians left to the regulation of the states? If the power of congress as to general commerce was exclusive, was it not equally so, as to the trade with the Indians?

It may be shown, that congress have recognised the powers of the states relative to this subject, and the exercise of it. A power to regulate commerce must necessarily include the means and manner of carrying it on. The power to regulate pilots is, therefore, given to congress; but it has not been considered as exclusive. The states have regulated pilots, and have adopted different systems for their government, and to induce or compel the performance of the duties they assume. The state regulations have been recognised by congress, in the "act regulating light-houses," passed August 1789. (1 U. S. Stat. 54, § 4.)

As to the proposition that a law of a state is valid, when congress *recognises it, and that it has its validity from this recognition; it [*127 is denied, that congress have the power to make laws in any other form but by express legislation. A law which is unconstitutional, is not changed in its character by the recognition of congress. So, too, the admission that state laws are good, until congress legislate on the same subject-matter, is an admission that the power of congress over the subject is not exclusive. Quarantine laws are commercial in their nature, and they are the regulations of the states. They have been recognised by an act of congress. (1 U. S. Stat. 619.) These laws declare how, where and when, goods imported under the authority of the laws and treaties of the United States, may be landed; and thus they materially interfere with, and affect commercial and shipping transactions. If, to a certain extent, the passenger act of

New York is a commercial regulation; in order to invalidate it, its conflict with the law of the United States on the subject must be shown. There is no incompatibility between them. All the provisions of the laws of the United States are left in full force, and the New York law superadds other regulations, deemed necessary for the prevention of the introduction of paupers, and to prevent the city being charged with the support of the out cast population of foreign nations.

But if the court shall be of opinion, that the power of congress to regulate commerce is exclusive, and that it is taken from the states by the constitution; the question is presented, is this act of New York a regulation of commerce? It is denied to be such. In the case of *Brown* v. *State of Maryland*, 12 Wheat. 441, Mr. Chief Justice MARSHALL, to whose every word upon constitutional questions great attention is most justly due, and from whose expositions of the constitution, every one who reads them will derive instruction, says:—"In our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words in any particular clause." It is admitted, in this opinion, that there are powers which remain in the states, which must often conflict with the powers of congress; and in these cases, we must always refer to, and take into view the object of the powers conferred on the general government of the Union. Now, without entering into an examination of any of the powers vested in congress, it is undoubt-
*128] edly true, that the object of *the people was to form a general national government, and to take from the states no powers not necessary for that object. Health laws, poor laws, laws respecting the landing and storing of gunpowder, are all necessary for the safety and security of the particular states, or of the inhabitants of those states; and they are in nowise necessary or proper to be intrusted to the general government, and do not, therefore, come within the object for which it was established. They are not embraced within its words; and are, therefore, not taken from, but necessarily remain proper subjects of the state regulation; although they may in some respects have an influence and bearing on the commerce of the country.

In the case of *Gibbons* v. *Ogden*, 9 Wheat. 203, the chief justice says: "That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is, to improve the quality of articles produced by the labor of the country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are component parts." And in the case of *Brown* v. *State of Maryland*, in 12 Wheaton, the same great constitutional expounder says, "the power to direct the

removal of gunpowder, is a branch of the police power which unquestionably remains and ought to remain in the states."

The power to regulate commerce is not that from which the right to pass the law is derived. It comes from a much higher source—from those great conservative rights which all governments have, and must have, and must maintain, and must preserve. The object of all well-regulated governments is, to promote the public good, and to secure the public safety; and the powers of that legislation necessarily extends to all those objects; and unless, therefore, in any particular case, the power is given to the general government, it necessarily still remains in the states. It is under these principles, *that the acts relative to police, which may operate on persons brought into a state, in the course of commercial operations, [*129 and the laws relative to quarantine and gunpowder, are within the power of the states. They are not national in their character, and are not, therefore, essentially within national regulation. They are protected by the principles laid down in the cases referred to, by Mr. Chief Justice MARSHALL; when, in the complex system of our governments, they may come into conflict with the powers of the general legislation. What are poor laws but police regulations? And are they not as essential to the security of all the inhabitants of a city, as are health laws, and all laws of the same character? The law in question, on its face, purports to be a poor law; and all its provisions relate to that subject. The power to pass poor laws involves in it the right to regulate the whole subject; and if the public, on principles of humanity and justice, are bound to provide for the poor, and can compel individuals to contribute to their support, may not the law prevent the influx of strangers who have no claims on the community into which they would come, and who are sent among us by those whose duty it was to provide for and sustain them. In *Brown* v. *State of Maryland*, the court say, "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. On this principle, if the right to pass poor laws exists in the state, the extent of it is to be decided by the legislatures of the states."

It has been the policy of the general government, to encourage the emigration of foreigners to this country. With the wisdom of that policy, we have nothing to do; congress are the sole judges of it. They have the power to regulate the manner in which they shall be brought here, under the power to regulate commerce, and they have the sole power of holding out encouragement to them to come here, by a naturalization system. But when they once arrive in this country, they must submit to the poor laws of the state in which they land; and with which congress have nothing to do. These laws have always regulated them; and they take care, that after being brought into the country, they shall not become burdensome to it. The powers of congress apply to their transit from abroad; they extend over the navigation employed for this purpose, and they go no further. No state can interfere with any such provisions; but this does not restrict the *authority of the state to interfere, for its own safety, after all objects of the legislation of congress are accomplished. If congress [*130 may regulate passengers from one state to another, their power will extend to compel the states to permit paupers to pass from one state into another

state. This, or any power to interfere with the regulations a state may adopt upon matters of this kind, will not, and never has been claimed.

A treaty between the United States and a foreign nation cannot annul a state law, rightfully and constitutionally enacted by a state, and in reference to matters within the power of her legislature. Treaties refer to commercial intercourse and advantages; and the law under the consideration of the court does not interfere with the provisions of any treaty.

The law of a state may require more than congress have thought necessary; but if the additional provisions impose duties which are required for police and internal safety, such as the laws relative to paupers and gunpowder, and they do not interfere with nor interrupt the action of the laws of the United States, they are not exceptionable.

Barbour, Justice, delivered the opinion of the court.—This case comes before this court upon a certificate of division of the circuit court of the United States for the southern district of New York. It was an action of debt, brought in that court, by the plaintiff, to recover of the defendant, as consignee of the ship called the Emily, the amount of certain penalties imposed by a statute of New York, passed February 11th, 1824, entitled, "an act concerning passengers in vessels coming to the port of New York." The statute, amongst other things, enacts, that every master or commander of any ship or other vessel, arriving at the port of New York, from any country out of the United States, or from any other of the United States than the state of New York, shall, within twenty-four hours after the arrival of such ship or vessel in the said port, make a report in writing, on oath or affirmation, to the mayor of the city of New York, or, in case of his sickness or absence, to the recorder of the said city, of the name, place of birth, and last legal settlement, age and occupation, of every person who shall have been brought as a passenger in such ship or vessel, on her last voyage from
*131] any country out of the United States into the *port of New York or any of the United States, and from any of the United States other than the state of New York, to the city of New York, and of all passengers who shall have landed, or been suffered or permitted to land, from such ship or vessel, at any place, during such her last voyage, or have been put on board, or suffered or permitted to go on board, of any other ship or vessel, with the intention of proceeding to the said city, under the penalty on such master or commander, and the owner or owners, consignee or consignees of such ship or vessel, severally and respectively, of $75 for every person neglected to be reported as aforesaid, and for every person whose name, place of birth, and last legal settlement, age and occupation, or either or any of such particulars, shall be falsely reported as aforesaid; to be sued for and recovered as therein provided.

The declaration alleges, that the defendant was consignee of the ship Emily, of which a certain William Thompson was master; and that in the month of August 1829, said Thompson, being master of such ship, did arrive with the same in the port of New York, from a country out of the United States, and that one hundred passengers were brought in said ship, on her then last voyage, from a country out of the United States, into the port of New York; and that the said master did not make the report required by the statute, as before recited. The defendant demurred to the declaration.

The plaintiff joined in the demurrer, and the following point, on a division of the court, was thereupon certified to this court, viz: "That the act of the legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void."

It is contended by the counsel for the defendant, that the act in question is a regulation of commerce; that the power to regulate commerce is, by the constitution of the United States, granted to congress; that this power is exclusive, and that consequently, the act is a violation of the constitution of the United States.

On the part of the plaintiff, it is argued, that an affirmative grant of power previously existing in the states to congress, is not exclusive; except, 1st, where it is so expressly declared in terms, by the clause giving the power; or 2d, where a similar power is prohibited to the states; or 3d, where the power in the states would be *repugnant to, and incompatible with, a similar power in congress; that this power falls within neither [*132 of these predicaments; that it is not, in terms, declared to be exclusive; that it is not prohibited to the states; and that it is not repugnant to, nor incompatible with, a similar power in congress; and that having pre-existed in the states, they, therefore, have a concurrent power in relation to the subject; and that the act in question would be valid, even if it were a regulation of commerce, it not contravening any regulation made by congress. But they deny that it is a regulation of commerce; on the contrary, they assert, that it is a mere regulation of internal police, a power over which is not granted to congress; and which, therefore, as well upon the true construction of the constitution, as by force of the tenth amendment to that instrument, is reserved to, and resides in, the several states.

We shall not enter into any examination of the question, whether the power to regulate commerce, be or be not exclusive of the states, because the opinion which we have formed renders it unnecessary: in other words, we are of opinion, that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states.

That the state of New York possessed power to pass this law, before the adoption of the constitution of the United States, might probably be taken as a truism, without the necessity of proof. But as it may tend to present it in a clearer point of view, we will quote a few passages from a standard writer upon public law, showing the origin and character of this power. Vattel, book 2, ch. 7, § 94.—"The sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state." Ibid. ch. 8, § 100.—"Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases, to the permission to enter." The power then of New York to pass this law having undeniably existed at the formation of the constitution, the simple inquiry is, whether by that instrument is was taken from the states, and granted to congress; for if it were not, it yet remains with them.

If, as we think, it be a regulation, not of commerce, but police; [*133 *then it is not taken from the states. To decide this, let us examine

its purpose, the end to be attained, and the means of its attainment. It is apparent, from the whole scope of the law, that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states; and for that purpose, a report was required of the names, places of birth, &c., of all passengers, that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable as paupers. Now, we hold, that both the end and the means here used, are within the competency of the states, since a portion of their powers were surrendered to the federal government. Let us see, what powers are left with the states. The Federalist, No 45, speaking of this subject, says, the powers reserved to the several states, all extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state. And this court, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 203, which will hereafter be more particularly noticed, in speaking of the inspection laws of the states, say, they form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are component parts of this mass.

Now, if the act in question be tried by reference to the delineation of power laid down in the preceding quotations, it seems to us, that we are necessarily brought to the conclusion, that it falls within its limits. There is no aspect in which it can be viewed, in which it transcends them. If we look at the place of its operation, we find it to be within the territory, and therefore, within the jurisdiction of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York, for whose protection and welfare the legislature of that state are authorized and in duty bound to provide. If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If *we examine the means by which these ends are proposed to be accomplished, they bear a just, natural and appropriate relation to those ends.

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But we are told, that it violates the constitution of the United States, and to prove this, we have been referred to two cases in this court; the first, that of *Gibbons* v. *Ogden*, 9 Wheat. 1, and the other that of *Brown* v. *State of Maryland*, 12 Ibid. 419. The point decided in the first of these cases is, that the acts of the legislature of New York, granting to certain individuals the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by steam, for a term of years, are repugnant to the clause of the constitution of the United States which authorizes congress to regulate commerce, so far as the said acts prohibit vessels, licensed according to the laws of the United States for carrying on the coasting trade, from navigating said waters by means of steam. In coming to that conclusion, this court, in its reasoning, laid down several propositions; such as, that the power over commerce included navigation;

that it extended to the navigable waters of the states; that it extended to navigation carried on by vessels exclusively employed in transporting passengers. Now all this reasoning was intended to prove that a steam-vessel licensed for the coasting trade, was lawfully licensed by virtue of an act of congress; and that as the exclusive right to navigate the waters of New York, granted by the law of that state, if suffered to operate, would be in collision with the right of the vessel licensed under the act of congress to navigate the same waters; and that as, when that collision occurred, the law of the states must yield to that of the United States, when lawfully enacted; therefore, the act of the state of New York was in that case void.

The second case, to wit, that of *Brown* v. *State of Maryland*, 12 Wheat. 419, decided that the act of the state of Maryland, requiring all importers of foreign goods by the bale or package, and other persons selling the same by wholesale, bale or package, &c., to take out a license for which they should pay fifty dollars, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, was repugnant, first, to that provision of the constitution of the United States, which declares that "no state shall, without the consent of congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and secondly, *to that which declares that congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." [*135

Now, it is apparent, from this short analysis of these two cases, that the question involved in this case is not the very point which was decided in either of those which have been referred to. Let us examine, whether, in the reasoning of the court, there is any principle laid down in either of them, which will go to prove that the section of the law of New York, on which this prosecution is founded, is a violation of the constitution of the United States. In *Gibbons* v. *Ogden*, the law of the state assumed to exercise authority over the navigable waters of the state; to do so, by granting a privilege to certain individuals, and by excluding all others from navigating them by vessels propelled by steam; and in the particular case, this law was brought to bear in its operation directly upon a vessel sailing under a coasting license from the United States. The court were of opinion, that as the power to regulate commerce embraced within its scope that of regulating navigation also; as the power over navigation extended to all the navigable waters of the United States; as the waters on which Gibbons's vessel was sailing were navigable; and as his vessel was sailing under the authority of an act of congress; the law of the state, which assumed, by its exclusive privilege granted to others, to deprive a vessel thus authorized of the right of navigating the same waters, was a violation of the constitution of the United States, because it directly conflicted with the power of congress to regulate commerce. Now, there is not, in this case, one of the circumstances which existed in that of *Gibbons* v. *Ogden*, which, in the opinion of the court, rendered it obnoxious to the charge of unconstitutionality. On the contrary, the prominent facts of this case are in striking contrast with those which characterized that. In that case, the theatre on which the law operated was navigable water, over which the court say that the power to regulate commerce extended; in this, it was the territory of New York, over which that state possesses an acknowledged, an undis-

puted jurisdiction for every purpose of internal regulation; in that, the subject-matter on which it operated, was a vessel claiming the right of navigation; a right which the court say is embraced in the power to regulate commerce; in this, the subjects on which it operates are *persons whose rights and whose duties are rightfully prescribed and controlled by the laws of the respective states within whose territorial limits they are found; in that, say the court, the act of a state came into direct collision with an act of the United States; in this, no such collision exists.

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Nor is there the least likeness between the facts of this case, and those of *Brown* v. *State of Maryland.* The great grounds upon which the court put that case were: that sale is the object of all importation of goods; that, therefore, the power to allow importation, implied the power to authorize the sale of the thing imported; that a penalty inflicted for selling an article in the character of importer, was in opposition to the act of congress, which authorized importation under the authority to regulate commerce; that a power to tax an article in the hands of the importer, the instant it was landed, was the same in effect as a power to tax it whilst entering the port; that, consequently, the law of Maryland was obnoxious to the charge of unconstitutionality, on the ground of its violating the two provisions of the constitution; the one giving to congress the power to regulate commerce, the other forbidding the states from taxing imports. In this case, it will be seen, that the discussion of the court had reference to the extent of the power given to congress to regulate commerce, and to the extent of the prohibition upon the states from imposing any duty upon imports. Now, it is difficult to perceive, what analogy there can be between a case where the right of the state was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not; the court did indeed extend the power to regulate commerce, so as to protect the goods imported from a state tax, after they were landed, and were yet in bulk; but why? Because they were the subjects of commerce; and because, as the power to regulate commerce, under which the importation was made, implied a right to sell; that right was complete, without paying the state for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate *commerce, and the prohibition to the states from imposing a duty on imported goods.

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Whilst, however, neither of the points decided in the cases thus referred to, is the same with that now under consideration; and whilst the general scope of the reasoning of the court in each of them, applies to questions of a different nature; there is a portion of that reasoning in each, which has a direct bearing upon the present subject, and which would justify measures on the part of states, not only approaching the line which separates regulations of commerce from those of police, but even those which are almost identical with the former class, if adopted in the exercise of one of their acknowledged powers. In *Gibbons* v. *Ogden*, 9 Wheat. 204, the court say, if a state, in passing laws on a subject acknowledged to be within its control

and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt ; it does not derive its authority from the particular power which has been granted, but from some other which remains with the state, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers ; but this does not prove that the powers are identical. Although the means used in their execution may sometimes approach each other, so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality. In page 209, the court say, since, however, in regulating their own purely internal affairs, whether of trading or of police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution ; they would inquire whether there was such collision in that case, and they came to the conclusion that there was.

From this it appears, that whilst a state is acting within the legitimate scope of its power, as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit ; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress, acting under a different power ; subject, only, say the court, to this limitation, that in the event of collision, the law of the state must yield to the law of congress. The court must be understood, of course, as meaning *that the law of congress is passed upon a subject within the sphere of its power. Even, then, if the section of the act [*138 in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision exist.

It has been contended at the bar, that there is that collision ; and in proof of it, we have been referred to the revenue act of 1799, and to the act of 1819, relating to passengers. The whole amount of the provision in relation to this subject, in the first of these acts, is to require in the manifest of a cargo of goods, a statement of the names of the passengers, with their baggage, specifying the number and description of packages belonging to each respectively ; now, it is apparent, as well from the language of this provision, as from the context, that the purpose was to prevent goods being imported without paying the duties required by law, under the pretext of being the baggage of passengers. The act of 1819 contains regulations obviously designed for the comfort of the passengers themselves ; for this purpose, it prohibits the bringing more than a certain number, proportioned to the tonnage of the vessel, and prescribes the kind and quality of provisions, or sea-stores, and their quantity, in a certain proportion to the number of the passengers. Another section requires the master to report to the collector a list of all passengers, designating the age, sex, occupation, the country to which they belong, &c. ; which list is required to be delivered to the secretary of state, and which he is directed to lay before congress. The object of this clause, in all probability, was to enable the government of the United States, to form an accurate estimate of the increase of population by emigration ; but whatsoever may have been its purpose, it is obvious, that these laws only affect, through the power over navigation, the passengers, whilst on their voyage, and until they shall have landed. After

that, and when they have ceased to have any connection with the ship, and when, therefore, they have ceased to be passengers ; we are satisfied, that acts of congress, applying to them as such, and only professing to legislate in relation to them as such, have then performed their office, and can, with no propriety of language, be said to come into conflict with the law of a state, whose operation only begins when that of the laws of congress ends ; whose operation is not even on the same subject, because, although *the
*139] person on whom it operates is the same, yet having ceased to be a passenger, he no longer stands in the only relation in which the laws of congress either professed or intended to act upon him.

There is, then, no collision between the law in question, and the acts of congress just commented on ; and therefore, if the state law were to be considered as partaking of the nature of a commercial regulation ; it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of *Gibbons* v. *Ogden.*

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation ; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends ; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

We are aware, that it is at all times difficult to define any subject with proper precision and accuracy ; if this be so in general, it is emphatically so, in relation to a subject so diversified and multifarious as the one which we are now considering. If we were to attempt it, we should say, that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it ; whether it related to their rights or their duties ; whether it respected them as men, or as citizens of the state ; whether in their public or private relations ; whether it related to the rights of persons or of property, of the whole people of a state or of any individual within it ; and whose operation was within the territorial limits of the state, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification, than by definition. No one will deny, that a state has a right to punish
*140] *any individual found within its jurisdiction, who shall have committed an offence within its jurisdiction, against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear, that a state has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon the offender, after it shall have been committed. The right to punish, or to prevent crime, does in no

degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the state, is just as subject to the operation of the law, as one who is a native citizen. In this very case, if either the master, or one of the crew of the Emily, or one of the passengers who were landed, had, the next hour after they came on shore, committed an offence, or indicated a disposition to do so, he would have been subject to the criminal law of New York, either by punishment for the offence committed, or by prevention from its commission, where good ground for apprehension was shown, by being required to enter into a recognisance, with surety, either to keep the peace, or be of good behavior, as the case might be; and if he failed to to give it, by liability to be imprisoned in the discretion of the competent authority. Let us follow this up to its possible results. If every officer, and every seaman belonging to the Emily, had participated in the crime, they would all have been liable to arrest and punishment; although, thereby, the vessel would have been left without either commander or crew. Now, why is this? For no other reason than this, simply, that being within the territory and jurisdiction of New York, they were liable to the laws of that state, and amongst others, to its criminal laws; and this too, not only for treason, murder and other crimes of that degree of atrocity, but for the most petty offence which can be imagined.

It would have availed neither officer, seaman nor passenger, to have alleged either of these several relations in the recent voyage across the Atlantic. The short but decisive answer would have been, that we know you now only as offenders against the criminal laws of New York, and being now within her jurisdiction, you are now liable to the cognisance of those laws. Surely, the officers and seamen of the vessel have not only as much, but more, concern with navigation, than a passenger; and yet, in the case here put, any and every one of them would be held liable. There would be the same liability, and for the same reasons, on the part of the officers, seamen *and passengers, to the civil process of New York, in a suit for [*141
the most trivial sum; and if, according to the laws of that state, the party might be arrested and held to bail, in the event of his failing to give it, he might be prisoned, until discharged by law. Here, then, are the officers and seamen, the very agents of navigation, liable to be arrested and imprisoned under civil process, and to arrest and punishment under the criminal law.

But the instrument of navigation, that is, the vessel, when within the jurisdiction of the state, is also liable by its laws to execution. If the state have a right to vindicate its criminal justice against the officers, seamen and passengers, who are within its jurisdiction, and also, in the administration of its civil justice, to cause process of execution to be served on the body of the very agents of navigation, and also on the instrument of navigation, under which it may be sold, because they are within its jurisdiction and subject to its laws; the same reasons, precisely, equally subject the master, in the case before the court, to liability for failure to comply with the requisitions of the section of the statute sued upon. Each of these laws depends upon the same principle for its support; and that is, that it was passed by the state of New York, by virtue of her power to enact such laws for internal policy as it deemed best; which laws operate upon the persons

and things within her territorial limits, and therefore, within her jurisdiction.

Now, in relation to the section in the act immediately before us, that is obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries, without possessing the means of supporting themselves. There can be no mode in which the power to regulate internal police could be more appropriately exercised. New York, from her particular situation, is, perhaps, more than any other city in the Union, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil; they have endeavored to do so, by passing, amongst other things, the section of the law in question. We should, upon principle, say that it had a right to do so.

Let us compare this power with a mass of power, said by this court, in *Gibbons* v. *Ogden*, not to be surrendered to the general government. They
*142] are inspection laws, quarantine laws, health *laws of every description, as well as laws for regulating the internal commerce of a state, &c. To which it may be added, that this court, in *Brown* v. *State of Maryland*, admits the power of a state to direct the removal of gunpowder, as a branch of the police power, which unquestionably remains, and ought to remain, with the states. It is easy to show, that if these powers, as is admitted, remain with the states, they are stronger examples than the one now in question. The power to pass inspection laws, involves the right to examine articles which are imported, and are, therefore, directly the subject of commerce; and if any of them are found to be unsound or infectious, to cause them to be removed, or even destroyed. But the power to pass these inspection laws, is itself a branch of the general power to regulate internal police. Again, the power to pass quarantine laws, operates on the ship which arrives, the goods which it brings, and all persons in it, whether the officers and crew, or the passengers; now the officers and crew are the agents of navigation; the ship is an instrument of it, and the cargo on board is the subject of commerce; and yet it is not only admitted, that this power remains with the states, but the laws of the United States expressly sanction the quarantines, and other restraints which shall be required and established by the health laws of any state; and declare that they shall be duly observed by the collectors and all other revenue officers of the United States.

We consider it unnecessary to pursue this comparison further; because we think, that if the stronger powers, under the necessity of the case, by inspection laws and quarantine laws, to delay the landing of a ship and cargo, which are the subjects of commerce and navigation, and to remove or even to destroy unsound and infectious articles, also the subject of commerce, can be rightfully exercised, then, that it must follow, as a consequence, that powers less strong, such as the one in question, which operates upon no subject either of commerce or navigation, but which operates alone within the limits and jurisdiction of New York, upon a person, at the time, not even engaged in navigation, is still more clearly embraced within the general power of the states to regulate their own internal police, and to

take care that no detriment come to the commonwealth. We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles *imported, or from a ship, the crew [*143
of which may be laboring under an infectious disease.

As to any supposed conflict between this provision and certain treaties of the United States, by which reciprocity as to trade and intercourse is granted to the citizens of the governments, with which those treaties were made; it is obvious to remark, that the record does not show that any person in this case was a subject or citizen of a country to which treaty stipulation applies; but moreover, those which we have examined, stipulate that the citizens and subjects of the contracting parties shall submit themselves to the laws, decrees and usages to which native citizens and subjects are subjected.

We are, therefore, of opinion, and do direct it to be certified to the circuit court for the southern district of New York, that so much of the section of the act of the legislature of New York, as applies to the breaches assigned in the declaration, does not assume to regulate commerce between the port of New York and foreign ports; and that so much of said section is constitutional. We express no opinion on any other part of the act of the legislature of New York; because no question could arise in the case in relation to any part of the act, except that declared upon.

THOMPSON, Justice.—This case comes up from the circuit court for the southern district of New York, upon a certificate of a division of opinion of the judges upon a question which arose upon the trial of the cause. The action is founded upon an act of the legislature of the state of New York, concerning passengers in vessels coming to the port of New York; and is brought against the defendant, being consignee of the ship Emily, to recover certain penalties given in the act, for the neglect of the master of the ship to make a report to the mayor of New York, of the name and description of the passengers who had been brought in the ship on her last voyage.

The declaration sets out, in part, the law on which the action is founded, and avers, that on the 27th day of August, in the year 1829, William Thompson, being master or commander of said ship, did arrive with the said ship or vessel, in the port of New York, from a country out of the United States, to wit, from Liverpool, in England, or from one of the United States other than this state (New York), to wit, from the state of New Jersey, at the city and within the county of New York; and it is further averred, that one hundred *persons were brought as passengers in the *[144
said ship, on her last voyage, from a country out of the United States, to wit, from Liverpool aforesaid, into the port of New York, or into one of the United States, other than the state of New York, to wit, into the state of New Jersey, and from thence to the city of New York; and that the said master of the vessel did not, within twenty-four hours after the arrival of the ship in the port of New York, make a report in writing to the mayor or recorder of the said city, of the name, place of birth, and last legal settlement, age and occupation of the several persons so brought as

passengers in said ship, pursuant to the provisions of the act, in part hereinbefore recited; but that a large number of the said persons, to wit, one hundred, were neglected to be reported, contrary to the directions and provisions of the said act, whereby an action hath accrued to the plaintiff, to demand and have from the defendant, the consignee of the said ship, the sum of $7500. To this declaration, there is a general demurrer and joinder.

The certificate then states, that the cause was continued, from term to term, until the last Monday in October, in the year 1829, at which term, the following point was presented on the part of the defendant, viz: That the act of the legislature of the state of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void. And upon the question thus occurring, the opinions of the two judges were opposed; and the point upon which the disagreement happened is certified to this court.

Although the point as here stated is general, and might embrace the whole of the act referred to in the plaintiff's declaration; yet its validity cannot come under consideration here, any further than it applied to the question before the circuit court. The question arose upon a general demurrer to the declaration, and the certificate under which the cause is sent here contains the pleadings upon which the question arose, and shows that no part of the act was drawn in question, except that which relates to the neglect of the master to report to the mayor or recorder an account of his passengers, according to the requisition of the act. No other part of the act could have been brought under the consideration of the circuit court, or could now be passed upon by this court, was it even presented in a separate and distinct point. For this court will not entertain any abstract question, upon a certificate of division of opinion, which does not *arise in the cause. The question must occur before the circuit court, according to the express terms of the act of congress, in order to come here upon such division of opinion. And if the only cause of action alleged in the declaration, was the neglect of the master to report his passengers to the mayor or recorder, no other part of the act could have been drawn in question; and although the question, as stated, may be broader than was necessary, yet as the declaration and demurrer are embraced in the certificate, the question in the circuit court cannot be mistaken. The certificate might have been sent back for a more specific statement of the point; but as the breach is assigned under this part of the act only, and as we see that no other part of the act could have been drawn in question in the circuit court, it is not deemed necessary to send the cause back for more specific statement of the point. I shall accordingly confine my inquiries simply to that part of the act of the legislature of the state of New York, which requires the master, within twenty-four hours after the arrival of the vessel in the port of New York, to make a report in writing to the mayor or recorder, of the name, place of birth, and last legal settlement, age and occupation of every person who shall have been brought as a passenger in such ship or vessel on her last voyage. I do not mean, however, to intimate, that any other part of the act is unconstitutional; but confine my inquiries to the part here referred to, because it is the only part that can

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arise in this case. And any opinion expressed upon other parts, would be extra-judicial.

This act is alleged to be unconstitutional, on the ground, that it assumes to regulate trade and commerce between the port of New York and foreign ports; and is a violation of that part of the constitution of the United States, which gives to congress the power to regulate commerce with foreign nations. This clause in the constitution has repeatedly been drawn in question before this court, and has undergone elaborate discussion, both at the bar and upon the bench; and so far as any points have been settled, I do not consider them now open for examination. In the leading cases upon this question, where the state law has been held to be unconstitutional, there was an actual conflict between the legislation of congress and that of the states, upon the right drawn in question. 9 Wheat. 195; 12 Ibid. 446; 6 Pet. 515. And in all such cases, the law of congress is supreme; and the state law, though enacted in the exercise of powers not controverted, must yield to it. *But in the [*146
case now before the court, no such conflict arises; congress has not legislated on this subject, in any manner to affect this question. By the 23d section of the duty act of 1799 (1 U. S. Stat. 644), it is required, that the manifest shall contain the names of the several passengers, distinguishing whether cabin or steerage passengers, or both, with their baggage, specifying the number and discription of packages belonging to each, respectively; but this is a mere revenue law, having no relation to the passengers, after they have landed. Nor does the act regulating passenger ships and vessels (3 U. S. Stat. 488), at all conflict with this state law. Its principal object is to provide for the comfort and safety of passengers on the voyage; it requires the captain or master of the vessel, to deliver a list or manifest of all passengers, with the manifest of the cargo; and the collector is directed to return, quarterly, to the secretary of state, copies of such list of passengers; by whom statements of the same are required to be laid before congress at every session; by which it is evident, that some statistical or political object was in view by this provision.

It is not necessary, in this case, to fix any limits upon the legislation of congress and of the states, on this subject; or to say how far congress may, under the power to regulate commerce, control state legislation in this respect. It is enough to say, that whatever the power of congress may be, it has not been exercised so as, in any manner, to conflict with the state law; and if the mere grant of the power to congress does not necessarily imply a prohibition of the states to exercise the power, until congress assumes to exercise it, no objection, on that ground, can arise to this law. Nor is it necessary to decide, definitively, whether the provisions of this law may be considered as at all embraced within the power to regulate commerce. Under either view of the case, the law of New York, so far at least as it is drawn in question in the present suit, is entirely unobjectionable.

This law does not, in any respect, interfere with the entry of the vessel or cargo. It requires the report of the master to be made within twenty-four hours after the arrival of the vessel. In the case of *Gibbons* v. *Ogden*, 9 Wheat. 195, it is said, the genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do

not affect other states; *and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state may then be considered as reserved for the state itself.

To test the present case by this rule. The duly here imposed arises, after the master and passengers have arrived within the limits of the state, and is applied to the purely internal concerns of the state. This provision does not affect other states, nor any subject necessary for the purpose of executing any of the general powers of the government of the Union. For although commerce, within the sense of the constitution, may mean intercourse, and the power to regulate it be co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, according to the language of this court in the case of *Brown* v. *State of Maryland*, 12 Wheat. 446; it cannot be claimed, that the master, or the passengers, are exempted from any duty imposed by the laws of a state, after their arrival within its jurisdiction; or have a right to wander, uncontrolled, after they become mixed with the general population of the state; or that any greater rights or privileges attach to them, because they come in through the medium of navigation, than if they come by land from an adjoining state; and if the state had a right to guard against paupers becoming chargeable to the city, it would seem necessarily to follow, that it had the power to prescribe the means of ascertaining who they were, and a list of their names is indispensable to effect that object. The purposes intended to be answered by this law fall within that internal police of the state; which, throughout the whole case of *Gibbons* v. *Ogden*, is admitted to remain with the states. The court, there, in speaking of inspection laws, say, they form a portion of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., are component parts of this mass. No direct general power over these objects is granted to congress: and, consequently, they remain subject to state legislation. If the legislative power of the state can reach them, it must be for national purposes; it must be, when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly *given. Again, in speaking of the *148] law relative to the regulation of pilots, it is said, that when the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every state; and that the adoption of these laws, as also the prospective legislation of the states, manifests an intention to leave this subject entirely to the states, until congress should think proper to interpose; but that the section of the law under consideration is confined to pilots within the bays, inlets, rivers, harbors and ports of the United States, which are, of course, in whole or in part, within the limits of some particular state; and that the acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent. But that the adoption of the state system, being temporary, until further legislative provision shall be made by congress, shows, conclusively, an opinion, that con-

gress could control the whole subject, and might adopt the system of the states or provide one of its own. Here seems to be a full recognition of the right of a state to legislate on a subject coming confessedly within the power to regulate commerce, until congress adopts a system of its own.

And again, in the case of *Brown* v. *State of Maryland*, the court, in speaking of state laws in relation to gunpowder, say, the power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. The state law here is brought to act directly upon the article imported, and may even prevent its landing, because it might endanger the public safety,

Can anything fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance? It is not intended, by this remark, to cast any reproach upon foreigners who may arrive in this country. But if all power to guard against these mischiefs is taken away, the safety and welfare of the community may be very much endangered.

A resolution of the old congress, passed on the 16th of September 1788, has an important bearing on this subject; 13 vol. Journals of Congress, 142. It is as follows: "Resolved, that it be and it is hereby recommended to the several states, to pass proper laws for *preventing the transportation of convicted malefactors from foreign countries into the United States." Although this resolution is confined to a certain description of persons; the principle involved in it must embrace every description which may be thought to endanger the safety and security of the country. But the more important bearing which this resolution has upon the question now before the court, relates to the source of the power which is to interpose this protection. It was passed, after the adoption of the constitution by the convention, which was on the 17th of September 1787. It was moved by Mr. Baldwin, and seconded by Mr. Williamson, both distinguished members of the convention which formed the constitution; and is a strong contemporaneous expression, not only of their opinion, but that of congress, that this was a power resting with the states; and not only not relinquished by the states, or embraced in any powers granted to the general government, but still remains exclusively in the states. [*143

The case of *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 251, is a strong case to show that a power admitted to fall within the power to regulate commerce, may be exercised by the states, until congress assumes the exercise. The state law under consideration in that case, authorized the erection of a dam across a creek, up which the tide flows for some distance, and thereby abridged the right of navigation by those who had been accustomed to use it. The court say, "the counsel for the plaintiff in error insist, that it comes in conflict with the power of the United States to regulate commerce with foreign nations, and among the several states. If congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should not have much difficulty in saying, that a state law,

coming in conflict with such act, would be void. But congress has passed no such act; the repugnancy of the law of Delaware to the constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several states; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as
*150] repugnant to the power to regulate *commerce in its *dormant* state; or as being in conflict with any law passed on the subject." The state law here operated upon the navigation of waters, over which the power to regulate commerce confessedly extends; and yet the state law, not coming in conflict with any act of congress, was held not to be unconstitutional; and was not affected by the *dormant* power to regulate commerce. By the same rule of construction, the law of New York, not coming in conflict with any act of congress, is not void by reason of the *dormant* power to regulate commerce; even if it should be admitted, that the subject embraced in that law fell within such power.

This principle is fully recognised by the whole court, in the case of *Houston* v. *Moore*, 5 Wheat. 1. The validity of a law of the state of Pennsylvania, relative to the militia of that state, came under the consideration of the court; and Mr. Justice WASHINGTON, who spoke for a majority of the court, says: "It may be admitted at once, that the militia belongs to the states respectively in which they are enrolled; and that they are subject, both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by acts of congress, constitutionally made. Congress has power to provide for organizing, arming and disciplining the militia; and it is presumable, that the framers of the constitution contemplated a *full* exercise of this power. Nevertheless, if congress had declined to exercise them, it was competent for the state governments to provide for organizing, arming and disciplining their respective militia in such manner as they may think proper." And Mr. Justice JOHNSON, who dissented from the court in the result of the judgment, when speaking on this point, says: "It is contended, that if the states do possess this power over the militia, they may abuse it. This, says he, is a branch of the exploded doctrine, that within the scope in which congress may legislate, the states shall not legislate. That they cannot, when legislating within that wide region of power, run counter to the laws of congress, is denied by no one. When instances of this opposition occur, it will be time enough to meet them." And Mr. Justice STORY, who also dissented from the result of the judgment, is still more full and explicit on this point. "The constitution," says he, "containing a grant of powers, in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted, that a mere grant of such powers, in
*151] affirmative terms, to congress, does, *per se*, transfer an exclusive *sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the states; unless when the constitution has expressly, in terms, given an exclusive power to congress, or the exercise of a like power is prohibited

to the states; or where there is a direct repugnancy, or incompatibility, in the exercise of it by the states. The example of the first class is to be found in the *exclusive* legislation delegated to congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c., of the second class, the prohibition of a state to coin money, or emit bills of credit; of the third class, as this court has already held, the power to establish a uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases, not falling within the classes already mentioned, it seems unquestionable, that the states retain concurrent authority with congress; not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principle of reasoning. There is this reserve, however, that in cases of concurrent authority, when the laws of a state, and of the Union, are in direct and manifest collision on the same subject; those of the Union, being the supreme law of the land, are of paramount authority; and the state laws so far, and so far only, as such incompatibility exists, must necessarily yield."

Whether, therefore, the law of New York, so far as it is drawn in question in this case, be considered as relating purely to the police and internal government of the state, and as part of the system of poor laws in the city of New York, and in this view belonging exclusively to the legislation of the state; or whether the subject-matter of the law be considered as belonging concurrently to the state and to congress, but never having been exercised by the latter; no constitutional objection can be made to it. Although the law, as set out in the record appears to have been recently passed, 11th February 1824, yet a similar law has been in force in that state for nearly forty years (1 Rev. Laws 1801, p. 556); and from the references at the argument to the legislation of other states, especially those bordering on the Atlantic, similar laws exist in those states. To pronounce all such laws unconstitutional, would be productive of the most serious and alarming consequences; and ought not to be done, *unless demanded by the most clear and unquestioned construction of the constitution. [*152

It has been argued at the bar, that this law violates certain treaties between the United States and foreign nations, and the treaties with Brazil, Prussia and Austria (8 U. S. Stat. 378, 390, 398), have been referred to as being in conflict with it. It would be a sufficient answer to this objection, that the national character of the defendant, or of the master or vessel, do not appear upon the record accompanying the certificate, so as to enable the court to inquire whether the law conflicts with any treaty stipulation. But there is nothing in the law, so far, at all events, as it relates to the present case, which is at all at variance with any of the treaties referred to. These treaties were entered into for the purpose of establishing a reciprocity of commercial intercourse between the contracting parties; but give no privileges or exemptions to the citizens or subjects of the one country over those of the other. But in some of them, particularly in the treaty with Brazil, it is expressly provided, that the citizens and subjects of each of the contracting parties shall enjoy all the rights, privileges and exemptions in navigation and commerce, which native citizens or subjects do or shall enjoy; submitting themselves to the laws, decrees and usages there estab-

lished, to which native citizens or subjects are subjected. And the other treaties referred to, have substantially the same provision.

Whether the law of New York, so far as it applies to the case now before the court, be considered as a mere police regulation, and the exercise of a power belonging exclusively to the state; or whether it be considered as legislating on a subject falling within the power to regulate commerce, but which still remains dormant, congress not having exercised any power conflicting with the law in this respect; no constitutional objection can, in my judgment, arise against it. I have chosen to consider this question under this double aspect, because I do not find, as yet laid down by this court, any certain and defined limits to the exercise of this power to regulate commerce; or what shall be considered commerce with foreign nations, and what the regulations of domestic trade and police. And when it is denied, that a state law, in requiring a list of the passengers arriving in the port of New York, from a foreign country, to be reported to the police authority of the city, is unconstitutional and void, because embraced within that power; I am at a loss to say, where its limits are to be found. It *153] becomes, therefore, a very important *principle to establish, that the states retain the exercise of powers; which, although they may in some measure partake of the character of commercial regulations, until congress asserts the exercise of the power under the grant of the power to regulate commerce.

Baldwin, Justice.—The direct question on which this case turns is, whether a law of New York, directing the commanders of passenger vessels, arriving from foreign ports, to make a report of their numbers, &c., and to give security that they shall not become chargeable to the city as paupers, before they shall be permitted to land, is repugnant to that provision of the constitution of the United States, which gives to congress power "to regulate commerce with foreign nations," &c. In considering this question, I shall not inquire, whether this power is exclusive in congress, or may be, to a certain extent, concurrent in the states, but shall confine myself to an inquiry as to its extent and objects. That the regulation of commerce, in all its branches, was exclusively in the several colonies and states, from April 1776, and that it remained so, subject to the ninth article of confederation, till the adoption of the constitution (one great object of which was to confer on congress such portion of this power as was necessary for federal purposes), is most apparent, from the political history of the country, from the peace of 1782 till 1787. 1 Laws U. S. 28–58.[1] It was indispensable to the efficiency of any federal government, that it should have the power of regulating foreign commerce, and between the states, by laws of uniform operation throughout the United States; but it was one of the most delicate subjects which could be touched, on account of the difficulty of imposing restraints upon the extension of the power, to matters not directly appertaining to commercial regulation.

"The idea that the same measure might, according to circumstances, be arranged with different classes of powers, was no novelty to the framers of the constitution. Those illustrious patriots and statesmen had been, many of them, deeply engaged in the discussions which preceded the war of our

[1] See Baldwin's Constitutional Views 70–71.

revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty, for the purpose of revenue, produced a war, perhaps as important, in its consequences, to the human race, as any the world has ever witnessed." *Gibbons* v. *Ogden*, 9 Wheat. 202.

In the declaration of rights, in 1774, congress expressly admitted the authority of such acts of parliament "as are *bonâ fide* restrained to the regulation of our *external* commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subject in America, without their consent." But in admitting this right, they asserted the free and exclusive power of "legislation in their several provincial legislatures, in all cases of taxation and *internal polity*, subject only to the negative of their sovereign, as has been heretofore used and accustomed."[1] Taxation was not the only fear of the colonies, as an incident or means of regulating external commerce; it was the practical consequences of making it the pretext of assuming the power of interfering with their "internal polity," changing their "internal police," the "regulation thereof," "of intermeddling with our provisions for the support of civil government, or the administration of justice." See Journ. Cong. 28, 98, 147, 177.

The states were equally afraid of intrusting their delegates in congress with any powers which should be so extended, by implication or construction, of which the instructions of Rhode Island, in May 1776, are a specimen. "Taking the greatest care to secure to this colony, in the strongest and most perfect manner, its present form and all the powers of government, so far as it relates to its *internal police*, and conduct of our own officers, civil and religious." 2 Journ. Cong. 163. In consenting to a declaration of independence, the convention of Pennsylvania added this proviso: that "the forming the government, and regulating the *internal police* of the colony, be always reserved to the people of the colony."[2] In the 3d article of confederation, the states guaranty to each other their freedom, &c., and against all attacks on their sovereignty and trade; in the treaty of alliance with France, the latter guaranties to the states their sovereignty "in matters of commerce," absolute and unlimited. In the 9th article of confederation, the same feeling is manifest, in the restriction on the treaty-making power, by reserving the legislative power of the states over commerce with foreign nations. It also appears in the cautious and guarded language of the constitution, in the grant of the power of taxation, and the regulation of commerce, which give them, in the most express terms, yet in such as admit of no extension to other subjects of legislation, which are not included in the enumeration of powers. In giving power to congress "to lay and collect taxes, duties, imposts and excises," the objects are defined, "to pay the debts, and provide for the common defence and general welfare of the United States;" this does not interfere with the power of the states to tax for the support of their own government, nor is the exercise of that power by the states, an exercise of any portion of the power that is granted to the United States. 9 Wheat. 199. "That the power of taxation is retained by the states, is not

[1] Baldwin's Constitutional Views 69. [2] Ibid. 71.

abridged by the grant to congress, and may be exercised concurrently, are truths which have never been denied." 4 Ibid. 425. It results from the nature and objects of taxation, that it must be concurrent, as the power of raising revenue for the purposes of each government, is equally indispensable, though the extent of taxation is a matter which must depend on their discretion. Ibid. 428 ; 4 Pet. 561, 563. The objects of taxation depend, of course, on those to which the proceeds are to be applied. Congress is limited to those which are defined in the terms of the grant, but the states have no other limitations imposed on them than are found in their constitutions, and such as necessarily result from the powers of congress, which states cannot annul or obstruct by taxation. 4 Wheat. 400, &c.; 9 Ibid. 816 ; 2 Pet. 463. In other respects, the taxing power of congress leads to no collision with the laws of the states. But the power to regulate commerce has been a subject of more difficulty, from the time the constitution was framed, owing to the peculiar situation of the country. In other nations, commerce is only of two descriptions, foreign and domestic ; in a confederated government, there is necessarily a third ; "commerce between the constituent members of the confederacy;" in the United States, there was a fourth kind, which was carried on with the numerous Indian tribes, which occupied a vast portion of the territory. Each description of commerce was, in its nature, distinct from the other, in the mode of conducting it, the subjects of operation, and its regulation ; from its nature, there was only one kind which could be regulated by state law ; that commerce which was confined to its own boundaries, between its own citizens, or between them and the Indians. All objects of uniformity would have been defeated, if any state had been left at liberty to make its own laws, on any of the other subjects of commerce ; but the people of the states would never surrender their own control of that portion of their commerce which was purely internal. Hence, the grant is confined "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" which restricts the term commerce to that which concerns more states than one, and the enumeration of the particular classes to which the power was to be extended, pre-supposes something to which it does not extend. "The completely internal commerce of a state, then, may be considered as reserved for the state itself." 9 Wheat. 194–5.

This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. This principle is now universally admitted. 4 Wheat. 405. Another principle is equally so : that all powers not granted to the United States, or prohibited to the states, remain as they were before the adoption of the constitution, by the express reservation of the 10th amendment (1 Wheat. 325 ; 4 Ibid. 193), and that an exception presupposes the existence of the power excepted. 12 Ibid. 438. Though these principles have been universally adopted, their application presents questions which perpetually arise, as to the extent of the powers which are granted or prohibited, "and will probably continue to arise as long as our system shall exist ;" 4 Ibid. 405. It would seem, that the term commerce, in its ordinary sense, and as defined by this court, would by this time have become

intelligible; it has been held to embrace every species of commercial intercourse, trade, traffic and navigation; "all foreign commerce," and "all commerce among the states" (9 Wheat. 193; 12 Ibid. 446), the regulation of which has been surrendered. But it has been, at the same time, held, that as to those subjects of legislation "which are not surrendered to the general government," inspection, quarantine, health laws of every description, the internal commerce and police of a state, turnpike-roads, ferries, &c., "no direct general power over these objects is granted to congress, consequently they remain subject to state legislation" (9 Wheat. 203), and "ought to remain with the states." 12 Ibid. 443. In the broad definition given in these two cases, "to commerce with foreign nations, and among the several states," it has been applied, in the most cautious and guarded language, to three kinds of commerce which are placed under the jurisdiction of congress, expressly excluding the fourth kind, the internal commerce of a state. The court very properly call these branches of commerce, units (9 Wheat. 194); each a distinct subject-matter of regulation, which the states might delegate or reserve. It would contradict every principle laid down by the court, to contend, that a grant of the power "to regulate commerce with foreign nations," would carry with it the power to regulate commerce "among the several states, or with the Indian tribes," either by implication, construction, or as a means of carrying the first power into execution. It would be equally so, to contend, that the grant of the three powers could embrace the fourth, which is as distinct from all the others, as they are from each other; as units, they cannot be blended, but must remain as distinct as any other powers over other subjects which have not been surrendered by the states. If, then, the power of regulating internal commerce has not been granted to congress, it remains with the states, as fully as if the constitution had not been adopted; and every reason which leads to this result, applies with still greater force to the internal polity of a state, over which there is no pretence of any jurisdiction by congress. No subtlety of reasoning, no refinement of construction, or ingenuity of supposition, can make commerce embrace police or pauperism, which would not, by parity of reasoning, include the whole code of state legislation. Quarantine, health and inspection laws, come much nearer to regulations of commerce, than those which relate to paupers only; if the latter are prohibited by the constitution, the former are certainly so, for they operate directly on the subjects of commerce—the ship, the cargo, crew and passengers; whereas, poor laws operate only on passengers who come within their purview.

On the same principle by which a state may prevent the introduction of infected persons or goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers who will add to the burdens of taxation, or convicts who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease. The whole subject is necessarily connected with the internal police of a state, no item of which has to any extent been delegated to congress, every branch of which has been excepted from the prohibitions on the states, and is, of course, included among their reserved powers.

If there is any one case to which the following remark of this court is peculiarly applicable, it is this: "It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider

the power of the states as existing over such cases as the laws of the Union may not reach." 4 Wheat. 195. Let this case be tested by this rule, and let it be shown, that any clause in the constitution empowers congress to pass a law which can reach the subject of pauperism, or the case of a pauper imported from a foreign nation or another state. They are not articles of merchandise or traffic, imports or exports. Congress cannot compel the states to receive and maintain them, nor establish a system of poor laws for their benefit or support; and there can be found in no decision of this court any color for the proposition, that they are in any respect placed under the regulation of the laws of the Union, or that the states have not plenary power over them. The utmost extent to which they have held the power of regulating commerce by congress to operate as a prohibition on states, has been in the cases of *Gibbons* v. *Ogden*, to the vessel in which goods or passengers were transported from one state to another, and in *Brown* v. *Maryland*, to the importation of goods from foreign ports to the United States.

In the former case, the only question was, whether a state law was valid, which prohibited a vessel, propelled with steam, from navigating the waters of New York, though she had a coasting license; in the latter, the question was whether a state law "could compel an importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported." Both laws were held void, on account of their direct repugnance to the constitution and existing laws of congress; the court holding that they comprehended vessels of all descriptions, however propelled, and whether employed in the transportation of goods or passengers; and that an importer of goods, on which he had paid or secured the duties, could not be prevented from selling them as he pleased, before the packages were broken up. In the New York case, the whole reasoning of the court was, to show, that "a coasting vessel, employed in the transportation of passengers, is as much a portion of the American marine, as one employed in the transportation of a cargo;" and they referred to the provisions of the law regulating the coasting trade, to the constitution respecting the migration or importation of certain persons, to the duty acts containing provisions respecting passengers, and the act of 1819, for regulating passenger ships for the same purpose. 9 Wheat. 215–19, &c. Nothing more was decided, or was intended to be decided, than that the power to regulate commerce, including navigation, comprehended all vessels, and "the language of the laws excluding none—none can be excluded by construction." "The question, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation, by a coasting license, are not and cannot be raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privilege conferred by a license." 9 Wheat. 219. It is evident, therefore, that there is nothing in the cases then before the court, in their reasoning or judgment, which can operate unfavorably on the present law; on the contrary, there is much (in my opinion) which directly affirms its validity, not merely negatively, but positively, as the necessary result of the principles declared in these and other cases.

Taking it as a settled principle, that those subjects of legislation which

are not enumerated in the surrender to the general government, remain subject to state regulation, it follows, that the sovereignty of the states over them, not having been abridged, impaired or altered by the constitution, is as perfect as if it had not been adopted. Having referred to the cases in which this court has defined the nature and extent of state sovereignty, "in all cases where its action is not restrained by the constitution,"[1] it is unnecessary to make a second quotation from their opinions, the inevitable conclusion from which is, that independently of the grants and prohibitions of the constitution, each state was and is "a single sovereign power," a nation over whom no external power can operate, whose jurisdiction is necessarily exclusive and absolute, within its own boundaries, and susceptible of no limitation, not imposed by itself, by a grant or cession to the government of the Union. The same conclusion results from the nature of an exception or reservation in a grant; the thing excepted or reserved always is in the grantor, and always was;[2] of consequence, the reserved powers of a state remain, as stated in the treaty of alliance with France, and the confederation. The states severally bound themselves to assist each other against all attacks on account of sovereignty, trade or any other pretext whatever. France guarantied to them their liberty, sovereignty and independence, absolute and unlimited, as well in matters of government as commerce.[3] So the states remain, in all respects where the constitution has not abridged their powers; the original jurisdiction of the state adheres to its territory as a portion of sovereignty not yet given away, and subject to the grant of power, the residuary powers of legislation remain in the state. "If the power of regulating trade had not been given to the general government, each state would have yet had the power of regulating the trade within its territory (3 Wheat. 386, 389), and this power yet adheres to it, subject to the grant, the only question then is, to what trade or commerce that grant extends. This court has held, that it does not extend to the internal commerce of a state, to its system of police, to the subjects of inspection, quarantine, health, roads, ferries, &c., which is a direct negation of any power in congress. They have also held, that, "consequently, they remain subject to state legislation," which is a direct affirmation that those subjects are within the powers reserved, and not those granted or prohibited.

We must then ascertain, what is commerce, and what is police, so that when there arises a collision between an act of congress regulating commerce, or imposing a duty on goods, and a state law which prohibits, or subjects the landing of such goods to state regulations, we may know which shall give way to the other; which is supreme and which is subordinate, the law of the Union, or the law of the state. On this subject, this court seems to me to have been very explicit. In *Brown* v. *Maryland*, they held, that an importer of foreign goods may land them, and hold them free from any state taxation, till he sells them or mixes them with the general property of the state, by breaking up his packages, &c. Up to this point, then, the goods remained under the protection of the power to regulate foreign commerce, to the exclusion of any state power to tax them as articles of domestic

[1] Baldwin's Constitutional Views, 13–15, 87, 95, 98.

[2] Ibid. 64–5.

[3] Ibid. 78, 80.

commerce. This drew a definite line between the powers of the two governments, as to the regulation of what was commerce or trade, and it cannot be questioned, that it was the true one; the power of congress was held supreme, and that of the state subordinate. But the conclusion of the court was very different, when they contemplated a conflict between the laws which authorized the importation and landing of ordinary articles of merchandise, and the police laws of a state, which imposed restrictions on the importation of gunpowder, or articles injurious to the public health. In considering the extent of the prohibition on states, against imposing a tax on imports or exports, this court use this language:

"The power to direct the removal of gunpowder, is a branch of the police power, which unquestionably remains, and ought to remain with the states. If the possessor stores it himself, out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles, is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state. The principle, then, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the states, to that dangerous extent which is apprehended. It carries the prohibition in the constitution no further, than to prevent the states from doing that which it was the great object of the constitution." 12 Wheat. 442, 444.

Now, as it is acknowledged, that the right of the importer, so secured by the constitution and acts of congress, is subject to the restraints and limitations of the police laws of a state, and the removal and destruction of dangerous, infectious and unsound articles, is an undoubted exercise of the power of a state to pass inspection laws, the consequence is obvious. The power of congress is, and must be, subordinate to that of the states, whenever commerce reaches that point at which the vessel, the cargo, the crew, or the passengers on board, become subject to the police laws of a state; the importer must submit to inspection, health and quarantine laws, and can land nothing contrary to their provisions. For such purposes, they are an express exception to the prohibitions on the states against imposing duties on exports and imports, which power might have been exercised by the states, had it not been forbidden (9 Wheat. 200); the restriction pre-supposes the existence of the power restrained, and the constitution certainly recognises inspection laws as the exercise of a power remaining in the state. Ibid. 203; 12 Ibid. 438–42. The constitution thus has made such laws an exception to the prohibition. The prohibition was a restriction on the pre-existing power of the state, and being removed as to all police laws and those of inspection, the effect thereof is, by all the principles of this court, as to exceptions, the same as by the rules of the common law. "An exception out of an exception, leaves the thing unexcepted." 4 Day's Com. Dig. 290.

It may, therefore, be taken as an established rule of constitutional law, that whenever anything which is the subject of foreign commerce, is brought

within the jurisdiction of a state, it becomes subject to taxation and regulation by the laws of a state, so far as is necessary for enforcing the inspection and all analogous laws, which are a part of its internal police. And as these laws are passed, in virtue of an original inherent right in the people of each state, to an exclusive and absolute jurisdiction and legislative power, which the constitution has neither granted to the general government, nor prohibited to the states, the authority of these laws is supreme, and incapable of any limitation or control by congress. In the emphatic language of this court, this power "*adheres* to the territory of the state, as a portion of sovereignty not yet given away." It is a part of its soil, of both of which the state is tenant in fee, till she makes an alienation.

No opinions could be in more perfect conformity with the spirit and words of the constitution, than those delivered in the two cases. They assert and maintain the power of congress over the three kinds of commerce which are committed to their regulation; extend it to all its ratifications, so as to meet the objects of the grant to their fullest extent, and prevent the states from interposing any obstructions to its legitimate exercise within their jurisdiction. But having done this—having vindicated the supremacy of the laws of the Union over foreign commerce, wherever it exists, and for all the purposes of the constitution—the court most strictly adhered to that line, which separated the powers of congress from those of the states, and is drawn too plainly to be mistaken, when there is a desire to find it.

By the constitution, "the congress shall have power," "to regulate commerce with foreign nations, and to pass all laws which may be necessary and proper for carrying into execution the foregoing power," "as to regulate commerce," &c. By inherent original right, as a single sovereign power, each state has the exclusive and absolute power of regulating its internal police, and of passing inspection, health and quarantine laws; and by the constitution, as construed by this court, may lay any imposts and duties on imports and exports, which may be absolutely necessary for executing its inspection laws, and those which relate to analogous subjects. Here are two powers in congress, by a grant from states; one to regulate, the other to enforce, execute or carry its regulations into effect; there are also two powers in a state, one to pass inspection laws, the other to lay duties and imposts on exports and imports, for the purpose of executing such laws. The power of the state is original, that of congress is derivative by the grant of the state; both powers are brought to bear on an article imported, after it has been brought within the state, so that each government has jurisdiction over the article, for different purposes; and there is no constitutional objection to the exercise of the powers of either, by their respective laws. The framers of the constitution foresaw and guarded against the conflict, by first providing against the imposition of taxes, by a state, on the articles of commerce, for the purposes of revenue, and next securing to the states the execution of their inspection laws, by this provision: "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports, shall be for the use of the treasury of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

There can be no plainer or better defined line of power; a state can, by its reserved power, tax imports and exports, to execute its inspection laws; it can tax them for no other purpose, without the consent of congress, and if it is even by an inspection law, it is subject to two restrictions—the United States are to receive the net produce, and congress may revise and control the law. If the inspection law imposes no duty or impost, congress has no power of revision or control over it, and their regulations of commerce must be subject to its provisions; no restraints were imposed on this reserved power in the states, because its exercise would neither defeat nor obstruct any of the powers of congress, and these are the reasons of the court for the construction of the constitution which they have given. "It carries the prohibition in the constitution no further, than to prevent the states from doing that which it was the great object of the constitution to prevent."

This object is clearly pointed out in the clause above quoted, by the nature of the prohibition, with its qualifications; it was not to wholly deny to the states the power of taxing imports or exports, it only imposed, as a condition, the consent of congress. In this respect, it left to the states a greater power over exports than congress had; for, by the ninth section of the first article, they were prohibited from taxing exports, without any qualification, even by the consent of the states; whereas, with the consent of congress, any state can impose such a tax by a law, subject to the conditions prescribed. But if the state law imposes no tax on imports or exports, the prohibition does not touch it, either by requiring the consent of congress, or making the law subject to its revision or control; consequently, an inspection law, which consists merely of regulations as to matters appropriate to such subjects, is no more subject to any control, than any other law relating to police. If the law imposes a tax, it then becomes so far subject to revision; but this power to revise and control extends only to the tax; and as to that, congress cannot go so far as to prevent a state from imposing such as "may be absolutely necessary for executing its inspection laws." Thus far the power of the state is incapable of control; and as this court has declared, that health, police and quarantine laws, come within the same principle as inspection laws, the same rule must apply to them; the powers of the states over these subjects are absolute, if they impose no tax or duty on imports or exports. If they impose such a tax, the law is valid, by the original authority of the state, and if not altered by congress, by its supervisory power, is as binding as it would have been, before the constitution, because it has conferred no original jurisdiction over such subjects to congress.

Taken in this view, the object of this prohibition is apparent, and when carefully examined, will be found materially different from the prohibitions in the next sentence, which relate to matters wholly distinct, and are as different in their nature as their object. Among them, is a prohibition on the states, against laying a duty on tonnage, without the consent of congress, but it imposes no other condition; so that if this consent is once given, no revision or control over the law exists. This provision would apply to a law regulating pilots, which has never been considered by congress as a regulation of commerce, and has been left to the states, whose laws have been adopted from the beginning of the government; such adoption being the consent required by the constitution.

When the constitution thus gives congress a revising and controlling power over state laws, which impose a tax or duty on imports or exports, or in any case makes their consent necessary to give validity to any law or act of a state; the meaning, object and intention is, to declare that no other restriction exists. Any case, therefore, which does not come within the prohibition, or in which the prohibition is removed by the performance of the condition, can be no more reached by any act of congress, than if no jurisdiction over it had been granted. The reserved power of the state, when thus disincumbered of all restraints, embraces the case as one appropriate to its exclusive power of legislation, which congress cannot interfere with; though they may tax or regulate the same thing for federal purposes, they cannot impair the power of the states to do either, for such purposes and objects as are recognised or authorized by the constitution. Thus, the states, by inspection and analogous laws, may regulate the importation and exportation of the subject of foreign commerce, so far as is necessary for the execution of such laws; for all other purposes, the power of congress over them is exclusive, until they are mixed with the common mass of the property in a state, by a package sale. Thus, all the objects of the constitution having been effected, the state has the same power over the articles imported, as over those which had never been subject to the regulation of congress.

In applying these plain deductions from the provisions of the constitution, as expounded by this court, to the present case, it comes within none of the prohibitions. The law in question encroaches on no power of congress, it imposes no tax for any purpose; it is a measure necessary for the protection of the people of a state against taxation for the support of paupers from abroad, or from other states, which congress have no power to impose by direct assessment, or as a consequence of their power over commerce. The constitutional restraints on state laws, which bear on imports, exports or tonnage, were intended, and are applicable only to cases where they would injuriously affect the regulations of commerce prescribed by congress; not the execution of inspection or analogous laws, with which the constitution interferes no further, than to prevent them from being perverted to the raising money for the use of the state, and subjecting them to the revision and control of congress. In this view of the respective powers of the general and state governments, they operate without any collision. Commerce is unrestricted by any state laws, which assume the obstruction of navigation by any vessels authorized by law to navigate from state to state, or from foreign ports to those of a state, whether to transport goods or passengers. Imported articles remain undisturbed, under the protection of congress, after they are landed, until by a package sale they become incorporated into the common mass of property within a state, subject to its powers of taxation and general jurisdiction. But neither vessels nor goods are protected from the operation of those laws and regulations of internal police, over which the states have an acknowledged power, unaffected by any grant or prohibition which impairs its plenitude; the consequence of which is, congress have no jurisdiction of the subject-matter, can pass no laws for its regulation, nor make any exemption from their provisions.

In any other view, collisions between the laws of the states and congress would be at inevitable as interminable. The powers of a state to execute

its inspection laws, is as constitutional as that of congress to carry into execution its regulations of commerce ; if congress can exercise police powers as a means of regulating commerce, a state can, by the the same parity of reasoning, assume the regulation of commerce with foreign nations, as the means of executing and enforcing its police and inspection laws. There is no warrant in the constitution to authorize congress to encroach upon the reserved rights of the states, by the assumption, that it is necessary and proper for carrying their enumerated powers into execution ; or to authorize a state, under color of their reserved powers, or the power of executing its inspection or police regulations, to touch upon the powers granted to congress, or prohibited to the states. Implied or constructive powers of either description, are as wholly unknown to the constitution, as they are uterly incompatible with its spirit and provisions.

"The constitution unavoidably deals in general language" (1 Wheat. 326) ; "it marks only its great outlines and designates its important objects" (4 Ibid. 407) ; but these outlines and objects are all enumerated ; none can be added or taken away ; what is so marked and designated in general terms, comprehends the subject-matter in its detail. A grant of legislative power over any given subject, comprehends the whole subject ; the *corpus*, the body, and all its constituent parts ; so does a prohibition to legislate ; yet the framers of the constitution could not have intended to leave it in the power of congress to so extend the details of a granted power, as to embrace any part of the *corpus* of a reserved power. A power reserved or excepted in general terms, as *internal police*, is reserved as much in detail and in all its ramifications, as the granted power to regulate commerce with foreign nations ; the parts or subdivisions of the one cannot be carried into the other, by any assumed necessity of carrying the given power, in one case into execution, which could not be done in the other. Necessary is but another word for discretionary, when there is a desire to assume power ; let it once be admitted, as a constitutional apology for the assumption by a state, of any portion of a granted power, or by congress, of any portion of a reserved power, the same reasoning will authorize the assumption of the entire power. States have the same right of deciding when a necessity exists, and legislating on its assumption, as congress has. The constitution has put them on the same footing in this respect ; but its framers have not left their great work subject to be mangled and mutilated by any construction or implication, which depends on discretion, or actual or assumed necessity. Its grants, exceptions and reservations are of entire powers, unless there are some expressed qualifications or limitations ; if either are extended or contracted by mere implication, there are no limits which can be assigned, and there can be no certainty in any provision in the constitution or its amendments. If one power can be incorporated into, and amalgamated with, another distinct power, or if substantive and distinct powers, which are vested in one legislative body, can be infused, by construction, into another legislature, as the means of carrying into execution some other power, the consequences are obvious.

Any enumeration or specification of legislative powers is useless, if those which are omitted are inserted on the ground of necessity ; this would be supplying the defects of the constitution, by assuming the organic powers of conventions of the people in the several states ; so it would be,

if constructive restrictions on the states were made, in cases where none had been imposed, or none resulted from the granted powers which were enumerated. When an implied power or restriction would thus be added as a constructive provision of the constitution, it would have the same force and effect as if it was expressed in words, or was apparent on inspection; as a power which was necessary and proper, it must also be construed to carry with it the proper means of carrying it into effect, by a still further absorption by congress of specific powers reserved to the states, or by the states, of those enumerated in the grant to congress. Let, then, this principle be once incorporated in the constitution, the federal government becomes one of consolidated powers, or its enumerated powers will be usurped by the states. When the line of power between them is drawn by construction, and substantive powers are used as necessary means to enforce other distinct powers, the powers, the nature and character of the federal and state governments must necessarily depend on the mere opinions of the constituent members of the tribunal which expounds the constitution, from time to time, according to their views of an existing necessity. No case can arise, in which the doctrine of construction has been attempted to be carried further than in this; the law of New York, on which this case turns, has but one object, the prevention of foreign paupers from becoming chargeable on the city or other parts of the state; it is a part of the system of internal police, prescribing laws in relation to paupers. The state asserts as a right of self-protection, the exclusion of foreigners who are attempted to be forced upon them, under the power of the laws for the regulation of commerce, which the defendant contends, protects all passengers from foreign countries, till they are landed, and puts it out of the power of a state to prevent it. On the same principle, convicts from abroad may be forced into the states without limitation; so, of paupers from other states, if once put in a vessel with a coasting license; so that all police regulations on these subjects by states must be held unconstitutional. One of two consequences must follow. There can be no poor-laws applicable to foreigners; they must be admitted into the state, and be supported by a tax on its citizens, or congress must take the subject into their own hands, as a means of carrying into execution their power to regulate commerce. Their laws must not be confined to the sea-ports in the states into which foreign paupers are introduced, they must entend to every part of the state to which paupers from other states can be brought; for the power to regulate commerce among the several states is as broad in all respects as to do it with foreign nations. "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." "If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it." 9 Wheat. 194. To my mind, there can be no such cause for discriminating between an imported and a domestic pauper; one is as much an article of commerce as another, and the same power which can force them into a state from a vessel, can do it from a wagon, and regulate their conveyance on the roads or canals of a state, as well as on its rivers, havens or arms of the sea. In following out these principles to their consequences, congress may, and, to be consistent, ought to go further. Poor laws are analogous to

health, quarantine and inspection laws, all being parts of a system of internal police, to prevent the introduction of what is dangerous to the safety or health of the people; and health and quarantine laws extend to the vessel, the cargo and passengers. Laws excluding convicts and paupers are as necessary to preserve the morals of the people from corruption, and their property from taxation, as any laws of the other description can be; nor do they interfere any further with the regulations of commerce; as laws *in pari materia*, they must stand or fall together, or some arbitrary unintelligible distinction must be made between them, which is neither to be found in the constitution, nor decisions of this court. If the principle on which health and quarantine laws are sustained, is applied to this case, the validity of the law in question is not to be doubted; if this principle is not so applied, then it is an unsound one, which must be abandoned, whereby the reserved powers of the states over their internal police, must devolve on congress, as an incident to, or the means of regulating, "commerce with foreign nations," and "among the several states." There is no middle ground on which health and quarantine laws can be supported, which will not equally support poor laws; nor can poor laws be declared void on any ground that will not prostrate the others; all must be included within, or excepted from, the prohibition.

When we recur to the political history of the country from 1774 to the adoption of the constitution, we find the people and the states uniformly opposing any interference with their internal polity, by parliament or congress; it is not a little strange, that they should have adopted a constitution which has taken from the states the power of regulating pauperism within their territory. They little thought that in the grant of a power to regulate commerce with foreign nations and among the states, they also granted, as a means, the regulation of internal police; they little feared that the powers which were cautiously reserved to themselves by an amendment, could be taken from them by construction, or that any reasoning would prevail, by which the grant would be so stretched as to embrace them. We should never have had a federal government, if there had been a declaration in its frame, that congress could pass poor-laws, or interfere to revise or control those passed by the states; or that congress could legislate on any subject of legislation over which no jurisdiction was granted to them, and which was reserved to the states or people, in the same plenitude as they held it before they surrendered any portion of their power. The constitution gives no color for such doctrines, nor can they be infused into it, by any just rule of interpretation; the tenth amendment becomes a dead letter, if the constitution does not point to the powers which are "delegated to the United States," or "prohibited to the states," and reserve all other powers "to the states respectively or the people." Any enumeration of powers granted, any specific prohibitions on the states, will not only become wholly unmeaning, if new subjects may be brought within their scope, as means of enforcing the given powers, or the prohibitions on the states extended beyond those which are specified, but the implied powers and implied prohibitions must be more illimitable than those which are express.

When the constitution grants a power, it makes exceptions to such as were not intended to be absolute; but from the nature of those which are

assumed, they are not included in the enumeration, and cannot be controlled by the exceptions, which apply only to what is granted. When prohibitions are imposed on the states, the constitution uses terms which denote their character, whether they are intended to be absolute or qualified. In the first clause of the tenth section of the first article, the prohibitions are positive and absolute; no power can dispense with them: those in the second are qualified; "no state shall, without the consent of congress," is merely a conditional prohibition; when the consent is given, the condition is performed; and the power of the state remains as if no condition had ever been exacted. See *Poole* v. *Fleeger* (*post*, p. 212). But if a state lays a tax on imports or exports, then two other conditions are imposed, the produce goes to the United States, and congress may revise and control the state law; congress can, however, do no more than consent or dissent, or revise or control the law of the state, they have no power to pass a distinct law, embracing the same subject in detail. The original primary power is in the state, and, subject to the consent and supervision of congress, it admits of no other restriction.

Now, when a law which imposes no tax on imports, exports or tonnage, is brought within a prohibition, by construction, it cannot be validated by the consent of congress; and if they can take jurisdiction of the subject, they cannot be confined to mere revision or control, the power must be coextensive with their opinion of the necessity of using it, as the means of effecting the object. This seems to me utterly inconsistent with the constitution, which has imposed only a qualified prohibition on the power of states to tax the direct subjects of foreign commerce, imports and exports. I cannot think, that it intended, or can be construed, to impose an unqualified prohibition on a state, to prevent the introduction of convicts or paupers, who are entitled to no higher protection than the vessel or goods on board; which are subject to state taxation with the assent of congress; and to health, inspection and quarantine laws, without their consent. I can discriminate no line of power between the different subjects of internal police, nor find any principle in the constitution, or rule of construing it by this court, that places any part of a police system within any jurisdiction except that of a state, or which can revise or in any way control its exercise, except as specified. Police regulations are not within any grant of powers to the federal government for federal purposes; congress may make them in the territories, this district, and other places where they have exclusive powers of legislation, but cannot interfere with the police of any part of a state. As a power excepted and reserved by the states, it remains in them in full and unimpaired sovereignty, as absolutely as their soil, which has not been granted to individuals or ceded to the United States; as a right of jurisdiction over the land and waters of a state, it adheres to both, so as to be incapable of exercise by any other power, without cession or usurpation. Congress had the same power of exclusive legislation in this district, without a cession from Maryland and Virginia; they have the same power over the sites of forts, arsenals and navy yards, without a cession from a state, or purchase with its consent, as they have to interfere with its internal police.

It is the highest and most sovereign jurisdiction, indispensable to the separate existence of a state; it is a power vested by original inherent right, existing before the constitution, remaining in its plenitude, incapable

of any abridgment by any of its provisions. The law in question is confined to matters of police, it affects no regulations of commerce, it impairs no rights of any persons engaged in its pursuits; and while such laws are not extended beyond the legitimate objects of police, there is, in my opinion, no power, under the constitution, which can impair its force, or by which congress can assume any portion or part of this power, under any pretext whatever. By every sound rule of constitutional and common law, a power excepted or reserved by a grantor, "always is with him and always was," and whatever is a part of it, is the thing reserved, which must remain with the grantor.

If it be doubtful whether the power is granted, prohibited or reserved, then, by the settled rules and course of this court, its decision must be in favor of the validity of the state law. 6 Cranch 128; 4 Pet. 625; 12 Wheat. 436. That such a course of decision is called for by the highest considerations, no one can doubt; in a complicated system of government like ours, in which the powers of legislation by state and federal government are defined by written constitutions, ordained by the same people, the great object to be effected in their exposition, is harmony in their movements. If a plain collision arises, the subordinate law must yield to that which is paramount; but this collision must not be sought by the exercise of ingenuity or refinement of reasoning; it ought to be avoided, whenever reason or authority will authorize such a construction of a law, "*ut magis valeat quam pereat.*" While this remains, as it has been the governing rule of this court, its opinions will be respected, its judgments will control public opinion, and tend to give perpetuity to the institutions of the country. But if state laws are adjudged void, on slight or doubtful grounds, when they are not manifestly repugnant to the constitution, there is great reason to fear, that the people, or the legislatures of the states, may feel it necessary to provide some additional protection to their reserved powers, remove some of the restrictions on their exercise, and abridge those delegated to congress.

STORY, Justice. (*Dissenting.*)—The present case comes before the court upon a certificate of division of opinion of the judges of the circuit court of the southern district of New York. Of course, according to the well-known practice of this court, and the mandates of the law, we can look only to the question certified to us, and to it, in the very form in which it is certified. In the circuit court, the following point was presented on the part of the defendant, viz: that the act of the legislature of the state of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the port of New York and foreign ports, and is unconstitutional and void. And this point constitutes the matter of division in the circuit court; and that upon which our opinion is now required.

The act of New York, here referred to, was passed on the 11th of February 1824, and is entitled "an act concerning passengers in vessels coming to the port of New York." By the first section, it requires the master of any ship arriving at the port of New York, from any country out of the United States, or from any other of the United States than New York, within twenty-four hours after the arrival, to make a report in writing, on oath or affirmation, to the mayor of the city, &c., of the name, place of birth,

and last legal settlement, age and occupation of every passenger brought in the ship, on her last voyage, from any foreign country, or from any other of the United States, to the city of New York, and of all passengers landed, or suffered or permitted to land, at any place, during her last voyage, or put on board, or suffered or permitted to go on board, of any other ship, with an intention of proceeding to the said city, under the penalty of $75 for every passenger not so reported, to be paid by the master, owner or consignee. The second section makes it lawful for the mayor, &c., to require every such master to give bond, with two sufficient sureties, in a sum not exceeding $300 for each passenger, not being a citizen of the United States, to indemnify and save harmless the mayor, &c., and overseers of the poor, from all expense and charge *which may be incurred for the maintenance and support of every such passenger, &c., under a penalty of [*154
$500. The third section provides, that whenever any person brought in such ship, and being a citizen of the United States, shall be, by the mayor, &c., deemed likely to become chargeable to the city, the master or owner shall, upon an order for this purpose, remove every such person, without delay, to the place of his last settlement, and in default, shall be chargeable with the expenses of the maintenance and removal of such person. The fourth section requires persons, not citizens, entering into the city, with the intention of residing there, to make a report prescribed by the act, under the penalty of $100. The fifth section provides for the manner of recovering the penalties; the sixth section makes the ship liable to attachment and seizure for the penalties. The seventh section repeals former acts; and the eighth and last section declares persons swearing or affirming falsely in the premises guilty of perjury, and punishable accordingly.

Such is the substance of the act. It is apparent, that it applies to all vessels coming from foreign ports, and to all coasting vessels and steam boats from other states, and to all foreigners, and to all citizens, who are passengers, whether they come from foreign ports or from other states. It applies also, not only to passengers who arrive at New York, but to all passengers landed in other states, or put on board of other vessels, although not within the territorial jurisdiction or limits of New York.

The questions then presented for our consideration under these circumstances are: 1st. Whether this act assumes to regulate trade and commerce between the port of New York and foreign ports? 2d. If it does, whether it is unconstitutional and void? The counsel for the plaintiff assert the negative; the counsel for the defendant maintain the affirmative, on both points.

In considering the first point, we are spared even the necessity of any definition or interpretation of the words of the constitution, by which power is given to congress "to regulate commerce with foreign nations, and among the several states;" for the subject was most elaborately considered in *Gibbons* v. *Ogden*, 9 Wheat. 1. On that occasion, Mr. Chief Justice Marshall, in delivering the opinion of the court, said, "commerce undoubtedly is traffic; but it is something more; it is intercourse; it describes the commercial intercourse between nations, and parts of nations, in all its branches; *and is regulated by prescribing rules for carrying on that [*155
intercourse." 9 Wheat. 189. And again, "these words comprehend every species of commercial intercourse between the United States and

foreign nations; no sort of trade can be carried on between this country and any other, to which this power does not extend." 9 Wheat. 193–4. "In regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states; it would be a very useless power, if it could not pass those lines." "If congress has the power to regulate it, that power must be exercised, wherever the subject exists; if it exists within the states, if a foreign voyage may commerce or terminate at a port within a state, then the power of congress may be exercised within a state." 9 Wheat. 195. "The power of congress then comprehends navigation within the limits of every state in the Union, so far as that navigation may be connected with commerce, with foreign nations, or among the several states." 9 Wheat. 197. And again, "it is the power to regulate, that is, to prescribe the rule, by which commerce is governed." 9 Wheat. 196. But what is most important to the point now under consideration, it was expressly decided in that case, that vessels engaged in carrying passengers were as much within the constitutional power of congress to regulate commerce, as vessels engaged in the transportation of goods. "Vessels (said the chief justice) have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business; yet it has never been suspected, that the general laws of navigation did not apply to them." And again, "a coasting vessel employed in the transportation of passengers is as much a portion of the American marine, as one employed in the transportation of a cargo." 9 Wheat. 215–16. And this language is the more impressive, because the case then before the court, was that of a steamboat, whose principal business was the transportation of passengers. If, then, the regulation of passenger ships be in truth a regulation of trade and commerce, it seems very difficult to escape from the conclusion, that the act in controversy is, in the sense of the objection, an act which assumes to regulate trade and commerce between the port of New York and foreign ports. It
*156] requires a *report, not only of passengers who arrive at New York, but of all who have been landed at any places out of the territorial limits of New York, whether in foreign ports or in the ports of other states. It requires bonds to be given by the master or owner for all passengers, not citizens; and it compels them to remove, or pay the expenses of removal of, all passengers, who are citizens, and are deemed likely to become chargeable to the city, under severe penalties. If these enactments had been contained in any act passed by congress, it would not have been doubted, that they were regulations of passenger ships engaged in foreign commerce? Is their character changed, by their being found in the laws of a state?

I admit, in the most unhesitating manner, that the states have a right to pass health laws and quarantine laws, and other police laws, not contravening the laws of congress rightfully passed under their constitutional authority. I admit, that they have a right to pass poor-laws, and laws to prevent the introduction of paupers into the state, under the like qualifications. I go further, and admit, that in the exercise of their legitimate authority over

any particular subject, the states may generally use the same means which are used by congress, if these means are suitable to the end. But I cannot admit, that the states have authority to enact laws, which act upon subjects beyond their territorial limits, or within those limits and which trench upon the authority of congress in its power to regulate commerce. It was said by this court, in the case of *Brown* v. *State of Maryland*, 12 Wheat. 419, that even the acknowledged power of taxation by a state cannot be so exercised as to interfere with any regulation of commerce by congress.

It has been argued, that the act of New York is not a regulation of commerce, but is a mere police law upon the subject of paupers; and it has been likened to the cases of health laws, quarantine laws, ballast laws, gunpowder laws, and others of a similar nature. The nature and character of these laws were fully considered, and the true answer given to them, in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1; and though the reasoning there given might be expanded, it cannot, in its grounds and distinctions, be more pointedly illustrated, or better expounded. I have already said, that I admit the power of the states to pass such laws, and to use the proper means to effectuate the objects of them; but it is with this reserve, that these means are not exclusively vested in congress. A state cannot make a regulation of commerce, to enforce its health laws, because it is a *means withdrawn from its authority. It may be admitted, that it is a means adapted to the end; but it is quite a different question, whether it be a means within the competency of the state jurisdiction. The states have a right to borrow money; and borrowing by the issue of bills of credit, would certainly be an appropriate means; but we all know, that the emission of bills of credit by a state is expressly prohibited by the constitution. If the power to regulate commerce be exclusive in congress, then there is no difference between an express and an implied prohibition upon the states. [*157

But how can it be truly said, that the act of New York is not a regulation of commerce? No one can well doubt, that if the same act had been passed by congress, it would have been a regulation of commerce; and in that way, and in that only, would it be a constitutional act of congress. The right of congress to pass such an act has been expressly conceded at the argument. The act of New York purports, on its very face, to regulate the conduct of masters, and owners and passengers, in foreign trade; and in foreign ports and places. Suppose, the act had required, that the master and owner of ships should make report of all goods taken on board or landed in foreign ports, and of the nature, qualities and value of such goods; could there be a doubt, that it would have been a regulation of commerce? If not, in what essential respect does the requirement of a report of the passengers taken or landed in a foreign port or place, differ from the case put? I profess not to be able to see any. I listened with great attention to the argument, to ascertain upon what ground the act of New York was to be maintained not to be a regulation of commerce. I confess, that I was unable to ascertain any, from the reasoning of either of the learned counsel, who spoke for the plaintiff. Their whole argument on this point seemed to me to amount to this: that if it were a regulation of commerce, still it might also be deemed a regulation of police, and a part of the system of poor-laws; and therefore, justifiable as a means to attain the end. In my judgment, for the reasons already suggested, that is not a just consequence, or a legiti-

mate deduction. If the act is a regulation of commerce, and that subject belongs exclusively to congress, it is a means cut off from the range of state sovereignty and state legislation.

And this leads me more distinctly to the consideration of the other point in question; and that is, whether, if the act of New York be a regulation of commerce, it is void and unconstitutional? If the power of congress to regulate commerce be an exclusive power; or *if the subject-matter has been constitutionally regulated by congress, so as to exclude all additional or conflicting legislation by the states, then, and in either case, it is clear, that the act of New York is void and unconstitutional. Let us consider the question under these aspects.

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It has been argued, that the power of congress to regulate commerce is not exclusive, but concurrent with that of the states. If this were a new question in this court, wholly untouched by doctrine or decision, I should not hesitate to go into a full examination of all the grounds upon which concurrent authority is attempted to be maintained. But in point of fact, the whole argument on this very question, as presented by the learned counsel on the present occasion, was presented by the learned counsel who argued the case of *Gibbons* v. *Ogden*, 9 Wheat. 1; and it was then deliberately examined, and deemed inadmissible by the court. Mr. Chief Justice MARSHALL, with his accustomed accuracy and fulness of illustration, reviewed at that time the whole grounds of the controversy; and from that time to the present, the question has been considered (so far as I know) to be at rest. The power given to congress to regulate commerce with foreign nations, and among the states, has been deemed exclusive, from the nature and objects of the power, and the necessary implications growing out of its exercise. Full power to regulate a particular subject, implies the whole power, and leaves no residuum; and a grant of the whole to one, is incompatible with a grant to another of a part. When a state proceeds to regulate commerce with foreign nations, or among the states, it is doing the very thing which congress is authorized to do. *Gibbons* v. *Ogden*, 9 Wheat. 198–9. And it has been remarked, with great cogency and accuracy, that the regulation of a subject indicates and designates the entire result; applying to those parts which remain as they were, as well as to those parts which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that upon which it has operated. *Gibbons* v. *Ogden*, 9 Wheat. 209.

This last suggestion is peculiarly important in the present case; for congress has, by the act of the 2d of March 1819, ch. 170, regulated passenger ships and vessels. Subject to the regulations therein provided, passengers may be brought into the United States from foreign ports. These regulations, being all which congress have chosen to enact, amount, upon the reasoning already stated, to a *complete exercise of its power over the whole subject, as well in what is omitted as what is provided for. Unless, then, we are prepared to say, that wherever congress has legislated upon this subject, clearly within its constitutional authority, and made all such regulations, as, in its own judgment and discretion, were deemed expedient; the states may step in and supply all other regulations, which they may deem expedient, as complementary to those of congress, thus subject-

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ing all our trade, commerce and navigation, and intercourse with foreign nations, to the double operations of distinct and independent sovereignties, it seems to me, impossible to maintain the doctrine, that the states have a concurrent jurisdiction with congress on the regulation of commerce, whether congress has or has not legislated upon the subject; *à fortiori*, when it has legislated.

There is another consideration, which ought not to be overlooked in discussing this subject. It is, that congress, by its legislation, has, in fact, authorized not only the transportation but the introduction of passengers into the country. The act of New York imposes restraints and burdens upon this right of transportation and introduction. It goes even further, and authorizes the removal of passengers, under certain circumstances, out of the state, and at the expense of the master and owner in whose ship they have been introduced; and this, though they are citizens of the United States, and were brought from other states. Now, if this act be constitutional to this extent, it will justify the states in regulating, controlling, and, in effect, interdicting the transportation of passengers from one state to another, in steamboats and packets. They may levy a tax upon all such passengers; they may require bonds from the master, that no such passengers shall become chargeable to the state; they may require such passengers to give bonds, that they shall not become so chargeable; they may authorize the immediate removal of such passengers back to the place from which they came. These would be most burdensome and inconvenient regulations respecting passengers, and would entirely defeat the object of congress in licensing the trade or business. And yet, if the argument which we have heard be well founded, it is a power strictly within the authority of the states, and may be exerted, at the pleasure of all or any of them, to the ruin and, perhaps, annihilation of our passenger navigation. It is no answer to the objection, to say, that the states will have too much wisdom and prudence to exercise the authority to so great an extent. Laws were actually passed, of a retaliatory nature, by the states of New York, New Jersey and *Connecticut, during the steamboat controversy, which threatened the safety and security of the Union; and demonstrated [*160 the necessity, that the power to regulate commerce among the states should be exclusive in the Union, in order to prevent the most injurious restraints upon it.

In the case of *Brown* v. *State of Maryland*, 12 Wheat. 419, the state had, by an act, required, that every importer of foreign goods, selling the same by wholesale, should, before he was authorized to sell the same, take out a license for which he should pay fifty dollars; and in default, the importer was subjected to a penalty. The question was, whether the state legislature could constitutionally require the importer of foreign goods to take out such a license, before he should be permitted to sell the same in the imported package? The court held, that the act was unconstitutional and void, as laying a duty on imports, and also as interfering with the power of congress to regulate commerce. On that occasion, arguments were addressed to the court on behalf of the state of Maryland, by their learned counsel, similar to those which have been addressed to us on the present occasion; and in a particular manner, the arguments, that the act did not reach the property, until after its arrival within the territorial limits

of the state; that it did not obstruct the importation, but only the sale of goods, after the importation. The court said, "there is no difference, in effect, between the power to prohibit the sale of an article, and the power to prohibit its introduction into the country; the one would be a necessary consequence of the other; none would be imported, if none could be sold." "It is obvious, that the same power which imposes a light duty, can impose a heavy one, which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised; if it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." "The power claimed by the state is, in its nature, in conflict with that given to congress (to regulate commerce); and the greater or less extent to which it may be exercised, does not enter into the inquiry concerning its existence." "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce; since an essential part of that regulation, and principal object of it, is to prescribe the regular means of accomplishing that introduction and incorporation."

This whole reasoning is directly applicable to the present case; if, *161] *instead of the language respecting the introduction and importation of goods, we merely substitute the words, respecting the introduction and importation of passengers, we shall instantly perceive its full purpose and effect. The result of the whole reasoning is, that whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized and allowed by congress, whether in the shape of a tax or other charge, or whether before or after their arrival in port, interferes with the exclusive right of congress to regulate commerce.

Such is a brief view of the grounds upon which my judgment is, that the act of New York is unconstitutional and void. In this opinion, I have the consolation to know, that I had the entire concurrence, upon the same grounds, of that great constitutional jurist, the late Mr. Chief Justice Marshall. Having heard the former arguments, his deliberate opinion was, that the act of New York was unconstitutional; and that the present case fell directly within the principles established in the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, and *Brown* v. *State of Maryland*, 12 Ibid. 419.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the question and point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel; On consideration whereof, it is the opinion of this court, that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration, does not assume to regulate commerce between the port of New York and foreign ports; and that so much of said section is constitutional. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said circuit court.

* United States, Appellants, *v.* Nathaniel Cox.

Special jurisdiction.

No appeal lies from the decree of a district judge of the United States, on a petition presented by the defendant, under the second section of the "act providing for the better organization of the treasury department," where an order had issued by the solicitor of the treasury to the marshal of the United States, and the property of an alleged debtor, the petitioner, had been seized, and was about to be sold, to satisfy the alleged debt; no appeal by the government is authorized by the act, and the general law giving appeals does not embrace the case.

The law is the same, where an appeal was taken from the district judge to the circuit court, and an appeal taken thence to the supreme court; and where an appeal was taken to the supreme court, from the district judge of Louisiana, having the powers of a circuit court. United States *v.* Nourse, cited and confirmed.

The act of congress gives to the district judge a special jurisdiction, which he may exercise at his discretion, while holding the distrct court, or at any other time; ordinarily, as district judge, he has no chancery powers; but in proceeding under this statute, he is governed by the rules of chancery, which apply to injunctions, except as to the answer of the government.

Appeal from the District Court for the Eastern District of Louisiana. On the 18th of September 1833, Cox, the defendant in error, applied, by petition, to the judge of the district court of the United States for the eastern district of Louisiana, for an injunction, to forbid all further proceedings on a warrant, then in the hands of the marshal, issued by the solicitor of the treasury, under the act of the 15th of May 1830, and by which the marshal was directed to levy and collect the sum of $4163.50, then appearing to be due from said Cox, as a receiver of public moneys at New Orleans, to the United States. The petitioner alleged, that he was not indebted to the United States, but that they were indebted to him, in certain amounts which should be set off, or compensated, against the balance claimed under the warrant; and which, being allowed, would leave a balance due him from the United States of $4510.37. He, therefore, prayed, that an injunction might be granted; that the amount claimed by the warrant be declared satisfied and compensated; that the cause be tried by a jury; and that he have all other and further relief to which he might be entitled.

*Security being given, the injunction was issued as prayed for; a citation was issued to the marshal, and on affidavit of Cox, the [*163 cause was continued until the 6th of March 1835; when the court ordered the district-attorney to show cause, on the first day of the next term, why the facts arising in the case should not be tried by a jury. This rule having been argued, was subsequently made absolute by the court; and it was referred to a jury to settle whether Nathaniel Cox was entitled to the credits claimed in his petition or any of them. On the 9th of January 1836, the cause was tried by a jury, who found that Cox was not indebted to the United States; but that on the contrary, the United States were indebted to him in the sum of $1559.64. The court thereupon made the injunction perpetual, and certified that the United States are indebted to the said Nathaniel Cox in the sum of 1559.64. The United States, on the trial, took three several exceptions:

1. Before the jury were all sworn, the district-attorney objected to the swearing of the jury at all; that the case was one of chancery jurisdiction; that no issue had been directed by the court to ascertain any particular

fact; and that if the cause were submitted to the jury, under the rule of the 6th of March 1835, the entire cause should be submitted, as one of common-law jurisdiction. The objections were overruled, and the jury sworn as usual in common-law cases.

2. The defendant claimed to be credited with the amount of certain orders, bills and checks, issued by one Wilkinson, a purser in the navy, held by the defendant, Cox, and specified in the document exhibited and stated in the record; to which the district-attorney objected, and prayed the court to instruct the jury, that the defendant, as navy agent, was not authorized by law to pay the sums specified in the several vouchers, nor to buy such vouchers, and present the same against any sum due from him to the United States. The court refused this instruction, but charged the jury, that in point the strict law, the vouchers relied on, could not be received; but if they should be of opinion, that they presented equitable set-offs, they might allow them.

3. The defendant offered in evidence a certain schedule, and certain vouchers, in order to establish a set-off of $1433.12 and to show that the vouchers had been disallowed at the treasury, before the commencement of the suit, introduced certain depositions, to the introduction of which the district-attorney objected, on the ground, that said depositions were not
*164] legal or sufficient proof of the *presentation to, or disallowing of said documents by, the proper accounting officer of the treasury. The court overruled the objection, and the documents were permitted to go to the jury, who allowed them to the defendant.

The case was argued by *Butler*, Attorney-General, for the United States. No counsel appeared for the appellee.

Butler insisted, that this court had jurisdiction of the case; that the decisions of the court below, on the points presented, were erroneous; and that the decree or judgment should be reversed.

As to the jurisdiction of the court: A case similar to this was brought before this court, at January term 1833, by appeal. *United* v. *States Nourse*, 6 Pet. 470. That case shows that no appeal can be taken from the decision of the district judge, in a case of a proceeding by a distress-warrant issued by order of the treasury department, under the second section of the act of congress passed May 5th, 1820, entitled "an act for the better organization of the treasury department." The decision of the court in that case, does not entirely dispose of the case now before the court. In the case of Nourse, the proceeding was before the district judge, and the whole question was disposed of by him, and was within his jurisdiction. In this case, although the application was made to the district judge of Louisiana, he has the jurisdiction of a circuit court of the United States. One of the arguments in that case was, that it was a proceeding of chancery jurisdiction; and this court said, that no provision is made for an appeal from the district judge to the circuit court, in such a case. But appeals are given from the district court acting as a circuit court; and appeals in chancery or equity cases are authorized by the laws establishing the court. This was a case of chancery jurisdiction. At the time it was heard by the district judge, it was believed by him, that he had no chancery powers, and he, therefore, sent the case to a jury. The terms of the law under which the district judge acted, show

that the case is one of chancery proceedings. A court of equity may refer questions of fact to a jury, to assist the conscience of the judge. In this case, the judge proceeded to leave the case to the jury, without exercising his conscience.

*As to the other points in the case, the attorney-general referred to 9 Pet. 172; *United States* v. *Hawkins*, 10 Ibid. 125. If the court comes to the decision that the proceedings before the district judge are not conclusive; a rule is asked for a *mandamus* to the district judge, to vacate the rule referring the case to a jury, and that he proceed to adjudge the case. The duty is specially imposed on the district judge. The *mandamus* may issue, under the provisions of the 14th section of the judiciary act of 1789. (1 U. S. Stat. 81.) In the case of *New York Life & Fire Ins. Co.* v. *Wilson's Heirs*, 8 Pet. 291, all the cases of *mandamus* were examined. [*165

McLean, Justice, delivered the opinion of the court.—This case is brought before this court, by writ of error from the district court for the eastern district of Louisiana. The defendant, Nathaniel Cox, represented by petition to the district judge, that by virtue of an order issued by the solicitor of the treasury to the marshal, his property had been seized and was about to be sold to satisfy a balance exceeding $4000, claimed to be due the government from the petitioner, as late receiver of public moneys. And the petitioner represented, that he was not indebted to the government. An injunction was allowed by the judge, on security being given. After various steps were taken, some of which were clearly irregular, a final decree was entered, which made the injunction perpetual. Exceptions, in the course of the proceedings, were taken by the counsel for the government; and the points thus raised are attempted to be brought before the court by writ of error.

The treasury order or warrant stated in the petition, was issued under the second section of the act "providing for the better organization of the treasury department," passed the 15th day of May 1820; the injunction was allowed under the fourth section of that act. The fifth section provides, that the injunction may be allowed or dissolved by the judge, either in or out of court; and in the ninth section, it is provided, if the district judge shall refuse to grant the injunction, or shall dissolve it, after it has been allowed, an appeal in behalf of the party aggrieved, may be allowed by a judge of the supreme court. The case of the *United States* v. *Nourse*, 8 Pet. 470, was very similar to the one under consideration. In that case, after a full *investigation, this court decided, that no appeal by the government was authorized by the act; and that the general law giving appeals did not embrace the case. [*166

It is suggested, that some distinction may be drawn between the two cases. That in the case of Nourse, the proceeding was first had before the district judge, from whose decree an appeal was taken to the circuit court, where the decree of the district judge was affirmed, and from which affirmance, an appeal was made to this court; that in the case under examination an appeal is taken from the decree of the district judge. The act referred to gives to the district judge a special jurisdiction, which he may exercise at his discretion; while holding the district court, or at any other time Ordinarily, as district judge, he has no chancery powers; but in pro

ceeding under this statute, he is governed by the rules of chancery, which apply to injunctions, except no answer to the bill is required by the government. As no appeal is given to the government in the statute, by writ of error or otherwise, either to the circuit or the supreme court; the decree of the district judge in favor of the defendant, must be held final. We think the general law allowing appeals cannot be so construed as to enable this court, by appeal or writ of error, to revise the proceedings of the district judge, under this statute. The views of this court in the case of Nourse apply to this case; and it is unnecessary to repeat them. This case must be dismissed for want of jurisdiction.

On appeal from the district court of the United States for the eastern district of Louisiana. This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is now here ordered, adjudged and decreed by this court, that this appeal be and the same is hereby dismissed, for the want of jurisdiction.

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*167] *James McBride, Plaintiff in error, *v.* The Lessee of William Hoey.

Error to state court.

The supreme court has no power, under the 25th section of the judiciary act of 1789, to revise the decree of a state court, when no question was raised or decided in the state court, upon the validity or construction of an act of congress, nor upon an authority exercised under it, but on a state law only.

Error to the Supreme Court of Pennsylvania, for the western district. An action of ejectment was instituted by the lessee of William Hoey against James McBride, the tenant of William Clarke, in the common pleas of Mercer county, to recover a tract of land in that county. The plaintiff obtained a verdict; and judgment on the same was rendered by the court; and the case was carried by writ of error to the supreme court of the western district of Pennsylvania, where the judgment was affirmed. To that court, as the highest court of law of the state, this writ of error was prosecuted, under the provisions of the 25th section of the judiciary act of September 1789; the plaintiff in error claiming the exercise of the jurisdiction of this court, on the allegation that an act of congress has been misconstrued by the supreme court of Pennsylvania.

The plaintiff in the ejectment, in the common pleas of Mercer county, exhibited a regular title, derived under the laws of the state of Pennsylvania, subjecting unseated or unoccupied lands to sale, for taxes left unpaid by the owner of the land. These laws give to the owners of such lands a right to redeem them, within two years after the sale; by payment or tender, to the county treasurer, of the taxes for which the lands were sold, with twenty-five per cent. in addition. In the courts of Pennsylvania, construing the laws of that state, it had been decided, that no one but the owner of the land, or his agent, could be permitted to redeem lands so sold.

The defendant in the ejectment, as the tenant of William Clarke, alleged a redemption of the lands, by a tender of the amount of the taxes, with

the addition of twenty-five per cent.; and claimed, *that William Clarke, who had made the tender, was the owner of the land, under the following circumstances: The same tract of land had, he alleged, been sold for taxes due to the United States, under the authority of the acts of congress laying direct taxes, and had been purchased by Mr. Clarke, at the sale made under the authority of these acts. The defendant offered in evidence a deed, executed on the 3d of July 1821, by Theophilus T. Ware, designated collector of United States direct taxes, said to be for the tract of land in controversy. This deed was admitted, as *primâ facie* evidence of the matters stated in it. The plaintiff in the ejectment then proceeded to prove, and did prove, that the tract of land alleged to be conveyed by the deed, had never been legally assessed for the United States direct taxes, and that the assessments were void. This evidence completely invalidated the deed from the United States collector to Mr. Clarke; and this effect of the evidence was not controverted by the defendant. He, however, contended, that being in possession, and having the deed from the designated collector of the United States direct taxes, he had such sufficient *primâ facie* evidence of a title to the land, as to authorize him to redeem the same from the tax-sale made under the laws of Pennsylvania.

The court of common pleas instructed the jury, that "the plaintiff, William Hoey, having shown that he has purchased this tract of land according to law, at a treasurer's sale, and the plaintiff having shown that defendant's deed is illegal, for want of authority in the United States collector to make such sale, we instruct the jury, that the defendant has no right to interfere to defeat a regular and legal sale by the treasurer of the county to William Hoey. An invalid title, cannot defeat a good, legal and valid title."

The counsel for defendant in error moved to dismiss the writ of error, for a want of jurisdiction in this court to entertain the same.

The plaintiff in error had submitted the following points for the consideration of the court:

1. That, whatever be the intrinsic merits or defects of Mr. Clarke's title, as derived from the authority and laws of the United States; and whether the officers of the United States had, in the detail of their operations, preliminary to the collector's sale, strictly followed *the directions of the acts of congress or not; he had, *primâ facie*, such a title and interest, [*169 derived from the authority and laws of the United States, as qualified him to be recognised by the county treasurer as the person properly representing the proprietary interest in the land, until the nullity of his title should have been judicially ascertained and adjudged, in some course of judicial procedure, directly drawing the validity of his title in question; that so long as the only person entitle to dispute his right, acquiesced in it, or forbore to set up any adversary claim, he was entitled to be treated, by all third persons, as the true owner; that how defective soever this title, as against the original proprietor, he had nevertheless acquired an actual interest in the property, which he had a right to protect, by discharging the taxes imposed on it by the laws of the state; and further, that though he may have come into the title by wrong, yet, being in, he was privy in estate to the original proprietor, and so entitled, and perhaps, legally or morally bound, to protect the interests of both against forfeiture or alienation for legal defaults.

2. That in every view of his claim or title to the property, of the incidental interests and rights appertaining to it, and of the relations in which those interests and rights placed him to the county treasurer, the whole rested upon the construction and effect of statutes of the United States, and upon the validity of an authority exercised under the United States; all which matters are drawn in question in the judgment pronounced by the supreme court of Pennsylvania, and decided against the validity of such authority, and against the title, right and privilege claimed by the defendant in the original action, under such statutes and authority; therefore, such judgment may be properly re-examined in this court, under the authority of the 25th section of the judiciary act aforesaid.

Peters and *Pearson*, for the motion.—This is not a case for the jurisdiction of this court. The whole question decided in the common pleas of Mercer county, was one which did not involve, in any manner, the construction of an act of congress, or a provision of the constitution of the United States. The supreme court of Pennsylvania, in affirming the judgment of the common pleas, did no more than had been done by the inferior court. The decision of the courts of Pennsylvania is, that the defendant in the ejectment, *170] the plaintiff in error in this court, had no regular title *which could interfere with the plaintiff's regular title, derived under the laws of the state. The title of the defendant was a deed which he himself admitted to be invalid. He relied only on the *primâ facie* operation of a void deed; shown to be void, by testimony, and acknowledged to be so by him. He asserted, that although such was the character of the deed, it gave him a right to redeem the land; and because the court thought differently, the case is brought up to this court, on the ground, that an act of congress has been misconstrued. In stating this claim of jurisdiction, its insufficiency is fully shown.

The only question before the courts of Pennsylvania was upon the right of William Clarke to redeem the land, holding an admitted void deed. This was a question for the courts of Pennsylvania, and for those courts only, between citizens of that state. Had either of the parties been citizens of another state, other questions might have been presented—the construction of the tax laws; and as in the case of the *Lessee of Wolcott* v. *Hepburn*, in 10 Pet. 1, the construction would have been examined. The principles which regulate this question of jurisdiction were decided at the last court in *Crowell* v. *Randell*, 10 Pet. 386. In that case, the court reviewed, at large, all the previous decisions of the court on questions of a similar character with this now for consideration.

The decision of this case, when before the supreme court of Pennsylvania, is reported in 2 Watts 436. The construction of an act of congress, as is fully shown by the report of that case, was nowhere drawn in question. This is necessary to give jurisdiction on a writ of error from this court to a state court. It must appear that an act of congress has been drawn in question, and has been misconstrued. Until the case was brought into this court, the plaintiff in error had not invoked the aid of any act of congress; nor had he called on either the court of common pleas, or the supreme court of Pennsylvania, to give a construction to any such act. It was treated as a Pennsylvania question, arising under the Pennsylvania tax statutes; and

it was decided according to the decisions of the Pennsylvania courts, on the construction of those laws.

Anthony opposed the motion.—He contended, that the plaintiff in error derived his title under an act of congress; the tax-sale was made under a law of the United States. Having a *primâ facie* title by his deed, he had a right to redeem; and by the refusal *of the court to give this value to the deed, the United States law was violated, or set at nought. [*171 The object was, to show, that with this deed, and possession of the land, he should have been allowed to redeem the land from the tax-sale under which William Hoey claimed. A mere possession of lands gives a right to redeem. 8 Cranch 249; 7 Wheat. 59. The courts of Pennsylvania having decided, that the plaintiff in error, having this deed, had not a right to redeem, does not this present a question within the jurisdiction of this court, holding under a deed executed under a law of the United States? The construction of this title, under the law, comes into question; not whether the plaintiff in error had a right to hold the land, but whether he had not a right to redeem it. A person having a color of title may redeem. The effect of the deed was brought before the court; and this places the case within the rules of this court as to the provisions of the 25th section of the judiciary act of 1789. Cited, 1 Wheat. 304, 357; 6 Cranch 286; 3 Wheat. 208; also, 6 Smith's Laws 301.

Taney, Ch. J., delivered the opinion of the court.—This case comes before the court on a writ of error, directed to the judges of the supreme court of Pennsylvania for the western district. The material facts in the case may be stated in a few words: William Hoey, the defendant in error, brought an action of ejectment, in the court of common pleas of Mercer county, for the land in question; claiming under a deed from Aaron Hakney, treasurer of the county, upon a sale made for taxes due on the said land to the state of Pennsylvania; this deed is dated October 14th, 1822. The defendant offered in evidence a deed to him from Theophilus T. Ware, collector of the United States direct taxes, for the 10th collection district of the state of Pennsylvania, dated July 3d, 1821; and also offered evidence, that on the 10th of June 1824, he had paid to the treasurer of the county, the taxes due on the land to the state, and for which it had been sold, as above stated, in order to redeem it.

It appears from the exception, that the defendant admitted, that the sale made by the United States collector, was not warranted by the act of congress, and that the deed was invalid. But although the deed was inoperative, and did not convey the title to him, yet as he was in possession under this deed, claiming title, and the deed, upon *the face of it, purported to convey the land to him; he insisted, that the deed, coupled [*172 with the possession under it, was sufficient evidence of title to authorize him to redeem the land, within the time limited for redemption by the laws of Pennsylvania, after a sale for state taxes; and that having paid the taxes within that time, the title of the lessor under his deed was defeated. The court of common pleas gave judgment in favor of the plaintiff; and the case being removed by writ of error to the supreme court of Pennsylvania for the western district, the judgment of the court of common pleas was there affirmed.

The statement of the case shows, that the question upon which the case turned, and which was decided by the supreme court, depended entirely upon the laws of Pennsylvania; and not upon the act of congress. The question brought before the state court, and there decided against the plaintiff in error, was this: Is a person in possession of land in Pennsylvania, claiming title to it, under a deed, which, upon its face appears to be a good one, but which is inoperative and invalid, entitled to redeem the land, after it has been sold for taxes due to the state; so as to defeat the title of the purchaser under the state law? It is evident, that such a question must depend altogether upon the laws of the state, and not upon any law of the United States. The exception states, that the plaintiff in error admitted, that the sale and conveyance made by the United States collector was not warranted by the act of congress, and that his deed was invalid. No question was raised or decided by the court, upon the validity or construction of the act of congress, nor upon the authority exercised under it. The only question raised or decided in the state court was the one above stated; and upon such a question, depending altogether upon the state laws, this court have no power to revise the decision of the state court, in this form of proceeding. The writ of error must, therefore, be dismissed.

On consideration of the motion made in this cause yesterday, and of the arguments of counsel thereupon had, as well in support of, as against, the motion; it is now here considered, ordered and adjudged by this court, that this writ of error to the supreme court of Pennsylvania for the western district be and the same is hereby dismissed, for the want of jurisdiction.

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*173] *The Postmaster-General of the United States *v.* Stephen Trigg, Administrator of Elias Rector.

Mandamus.

Motion for a rule on the district judge of the district court of the United States for the Missouri district, to show cause why a *mandamus* should not issue from this court, commanding him to order an execution to issue on a judgment entered in that court in the case of the Postmaster-General of the United States *v.* Rector's administrator; the motion was founded on an attested copy of the record of the proceedings in the district court, by which it appeared, that the district judge, on a motion of the district-attorney of the United States for an order for an execution on this judgment, "after mature deliberation thereon," overruled the motion. The rule to show cause was refused.

The court have looked into the practice of this court upon motions of this sort, and it does not appear to have been satisfactorily settled; for anything that appears in this case, there may have been sufficient reason for the decision of the district court, overruling the motion for an execution; and there is nothing in the record to create a *primâ facie* case of mistake, misconduct or omission of duty, on the part of the district court. In such a state of facts, the court are bound to presume that everything was rightly done by the court, until some evidence is offered to show the contrary; and they cannot, upon the evidence before the court, assume that there is any ground for its interposition.

A rule to show a cause, is a rule upon the judge to explain his conduct; and implies, that a case had been made out which makes it proper that this court should know the reasons for his decision. When the record does not show mistake, misconduct or omission of duty on the part of the court, unless such a *primâ facie* case to the contrary is made out, supported by affidavit, as would make it the duty of the court to interpose, such a rule ought not to be granted.

Butler, Attorney-General, moved the court for a rule on the district judge of the United States for the district of Missouri, to show cause why a

writ of *mandamus* should not be issued, commanding him to order an execution to issue on the judgment of the said district court in this case.

TANEY, Ch. J., delivered the opinion of the court.—A motion has been made in this case, by the attorney-general of the United States, for a rule on the judge of the district court of the United States, for the Missouri district, to show cause why a *mandamus* should not issue from this court, commanding him to order an execution to issue on the judgment entered in that court in the case of the Postmaster-General *v.* Trigg, administrator, &c.

The motion is founded upon an attested copy of the record of the proceedings in the district court, by which it appears, that at *September term 1834, the postmaster-general recovered in the said court, a judgment against the above-named defendant, for the sum of $1595.53, the damages assessed by the jury, and costs of suit. That at March term 1835, the attorney of the United States moved the court to order the clerk to issue a *fieri facias* on this judgment, against the goods and chattels, lands and tenements of the said Elias Rector, deceased, in the hands of the said administrator to be administered. At September term 1835, the court decided upon this motion; and the record states that "after mature deliberation thereupon had," the court overruled the motion. This is the only evidence filed here by the attorney-general, in support of the motion for a rule to show cause why a *mandamus* should not issue. [*174

The court have looked into the practice of this court upon motions of this sort, and it does not appear to have been satisfactorily settled; and we have therefore thought it a fit occasion, when the court is full, to deliberate on the subject; and to state the principles by which the court will be guided.

The district court, upon which the rule is proposed to be laid, is a court of record, and the proceedings in the case before us appear to have been conducted in regular form; and the decision which has given rise to this motion, to have been made after mature deliberation. For anything that appears before us, there may have been sufficient reason for this decision; and there is nothing in the record to create a *primâ facie* case of mistake, misconduct or omission of duty on the part of the district court. In such a state of facts, we think, that we are bound to presume, that everything was rightfully done by the court, until some evidence is offered to show the contrary; and cannot, upon the proof before us, assume that there is any ground for the interposition of this court. A rule to show cause, is a call upon the judge to explain his conduct; and implies, that a case had been made out which makes it proper that this court should know the reasons for his decision. We think, that in a case like this, such a rule ought not to be granted, where the record does not show mistake, misconduct or omission of duty on the part of the court; unless such a *primâ facie* case to the contrary is made out, supported by affidavit, as would make it the duty of this court to interpose.

The rule is therefore refused; and it may be proper, in order to settle the practice in cases of this description, to state, that the court unanimously concur in this opinion.

Rule refused.

*The Steamboat Orleans, Henry Forsyth *et al.*, Claimants, Appellants, *v.* Thomas Phœbus.[1]

Jurisdiction of the admiralty.

It is very irregular, and against the known principles of courts of admiralty, to allow, in a libel *in rem*, and *quasi* for possession, the introduction of any other matters of an entirely different character; such as an account of the vessel's earnings, or the claim of a part-owner for his wages and advances as master. The admiralty has no jurisdiction in matters of account between part-owners.[2]

The master, even in a case of maritime services, has no lien upon the vessel for the payment of them.

The jurisdiction of courts of admiralty, in cases of part-owners having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages, properly so called; the majority of the owners have a right to employ the ship on such voyages as they please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it; and the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all.[3]

The admiralty has no jurisdiction over a vessel not engaged in maritime trade and navigation; though on her voyages she may have touched, at one *terminus* of them, in tide-water, her employment having been substantially on other waters. The true test of its jurisdiction, in all cases of this sort, is, whether the vessel is engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide-waters.

The jurisdiction of courts of admiralty is limited, in matters of contract, to those and those only which are maritime. The case of The Steamboat Jefferson, 10 Wheat. 429, cited and approved.

By the maritime law, the master has no lien on the ship, even for maritime wages. The case of Peyroux *v.* Howard, 7 Pet. 343, cited.[4]

The local laws of a state can never confer jurisdiction on the courts of the United States; they can only furnish rules to ascertain the rights of the parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States.

Appeal from the District Court for Eastern District of Louisiana. Thomas Phœbus, who was the owner of one-sixth part of the steamboat Orleans, on the 30th of November 1835, filed a libel in the district court of the United States for the district of Louisiana, against the appellants, who were the owners of the other five-sixths of said *boat, alleging that
*176] he had been on board of said boat as master and part-owner; but had been dispossessed by the other part-owners, who were navigating, trading with, and using, said boat, contrary to his wish, and, as he conceived, to his interest; and therefore, he desired no longer to be part-owner with the other proprietors; that he had amicably demanded the sale of said boat, and that he might receive his portion of the proceeds; that the other owners refused to do this, and were about to send her up the Mississippi on another trip, against his wishes; that the boat lay in the port of New Orleans,

[1] This case was overruled, as to the question of jurisdiction, in The Genesee Chief, 12 How. 443, and The Magnolia, 20 Id. 296. See notes to the cases of The Thomas Jefferson, 10 Wheat. 428, and The General Smith, 4 Id. 444.

[2] See Ward *v.* Thompson, 22 How. 330. Kellum *v.* Emerson, 2 Curt. 79.

[3] On this subject, see The Betsina, 5 Am. L. Reg. 406; Willings *v.* Blight, 2 Pet. Adm. 288; Fox *v.* Paine, Crabbe 271; The Marengo, 1 Lowell 52. In The Senica, 3 Clark (Pa.) 521, Judge Washington decided, that if two *equal* joint-owners differed as to the employment of a vessel, a court of admiralty would decree a sale.

[4] The Grand Turk, 1 Paine 73; Ravens *v.* Lewis, 2 Id. 203; The New Jersey, 1 Pet. Adm. 228; The Havana, 1 Sprague 402; The Superior, Newb. 176. Nor has the master a lien for his services as pilot, though he act in both capacities. The Eolian, 1 Biss. 321.

where the tide ebbs and flows, and within the admiralty jurisdiction of the court; therefore, he prayed that the boat might be sold, and one-sixth part of the proceeds paid to him, and that the other owners might account to him for the earnings of the boat to the day of sale.

The appellants filed their claim, denying the jurisdiction of the court over the subject-matter of the libel, and denied that said boat navigated water where the tide ebbs and flows, and alleging that she navigated only between New Orleans and the interior towns on the Mississippi and its tributary waters; that she was not a maritime boat, and was never intended to navigate the high seas; and if the court should be of opinion, it had jurisdiction, then they denied the merits of the case. At the same time, one of the crew of the boat, while she was in possession of Phœbus, filed a libel against her for wages. In that suit, Phœbus filed a claim against the boat for wages as master, and for necessaries advanced by him for the boat, while he acted in that capacity. These charges, he was permitted, by agreement of parties, to transfer to his own suit, as though they had made a part of the case stated in his libel.

On the 15th of April 1836, the district court rendered a final decree, which directed a public sale of the boat; that the libellant, Thomas Phœbus, should receive one-sixth of the proceeds; a year's wages at $1500 a year; and the further sum of $345.60, for necessaries furnished by him, with costs of suit. The claimants appealed to this court.

The case was argued by *Vinton* and *Crittenden*, for the appellants; and by *Catron*, for the appellee.

For the *appellants*, it was insisted, the district court of Louisiana, acting as a court of admiralty, had no jurisdiction over the case, *because the steamboat Orleans was not employed in a maritime service. [*177 The Orleans had been engaged in making voyages from Pittsburgh to New Orleans, and from and to Maysville, on the Ohio river; and thus the employment and business of the vessel was of the same character as that in the case of *The Steamboat Jefferson*, which was before this court in 1828; and the decision of which is in 12 Wheat. 425, 429. In that case, the court say, that the admiralty never exercises its jurisdiction over any but maritime contracts, where the services under them are to be substantially performed on the sea, or on tide-waters. The material question is, whether the service is essentially maritime. In this case, the whole voyage was to be performed above the tide, with a small exception.

The decision of this court in the case of *Peyroux* v. *Howard*, 7 Pet. 343, has no application to the case now under examination. That was a libel for repairs at New Orleans, done on a boat in tide-water; the claim did not arise from the voyage of the vessel; and the civil code of Louisiana gave the libellants a lien on the vessel for the amount of the repairs. The court enforced that lien. In the case of *The Jefferson*, the services were not performed in tide-waters, and the claim was refused. Cited, 2 Brown's Civil and Admiralty Law, 72, 94.

The distinctions in these cases are founded on common sense. If a vessel were to perform a voyage from Liverpool to Natchez, in Mississippi, which is 150 miles above the tide, that would be a service substantially maritime; and the principle would be applied to it, in favor of admiralty

jurisdiction over maritime claims on the ship. In the employment of the Orleans, the substantial character of the operations of the boat is on waters extending 2000 miles above tide; the *terminus* of the voyage being but a short distance within the tide. It was for some time doubtful, if there was any tide at New Orleans, but this is now conceded. A voyage cannot be of two characters; it must be maritime throughout, or otherwise; it cannot be maritime as to part of the distance, and different as to another part. The character of it is decided by the substantial part of it.

If it be assumed, that the intended termination of the voyage being New Orleans, will make the employment of a boat on the western waters, a maritime transaction; then, at any intermediate part of the *voyage, *178] a libel may be filed against such a vessel, and the jurisdiction or the admiralty will be carried to the furthest parts of the Mississippi and her parent rivers. This will make the services to depend not on their locality. If admiralty jurisdiction would exist at the end of a voyage, it would be absurd to say, it would not prevail at intermediate points. In 2 Gallis. 348, Mr. Justice STORY says, this jurisdiction depends on the subject-matter, and not on the locality. It would further follow, that if this were not the principle, that the admiralty could extend its jurisdiction over all the voyages of steamboats terminating at New Orleans.

If the court decide this, what will be the inevitable consequences? They will be to exclude common-law jurisdiction, in contracts for navigation on the western rivers. The jurisdiction of the courts of the United States is exclusive, in admiralty and maritime cases; and what will be the effects of such a decision? Even in the wide extent of the navigation of these waters, exceeding 20,000 miles, and daily increasing in every portion of its wide range, tribunals are found, which may be appealed to, and which can afford remedies for violated contracts. But if the courts of the Union can only be called upon for relief, the injuries will be augmented in number and extent. The district court of the United States for Western Virginia, is at a great distance from the Ohio, which passes by part of the district. The same or greater difficulties would exist in other districts.

It is most important, that the law on this subject shall be known. The reasons which have induced the application of admiralty jurisdiction to maritime contracts, do not exist as to those which relate to the navigation of the great rivers and lakes of the interior. Seamen may be left in foreign countries, and foreign ships may leave their seamen in our seaports. The lien of those who navigate such vessel for theirearnings, and such immediate enforcement, are peculiarly proper in such cases. But the vessels, in the interior, may always be found; and so may their owners. In some of the states, liens similar to those of the admiralty, have been given by special legislation; and it may be found convenient to do so universally. In Brown's Admiralty Law, it is said, that no suit for wages in the admiralty can exceed thirty days. If proceedings, thus rapid, were allowed against steamboats, they might be sold for wages, before the owners would know of the institution of a suit for their recovery, or even of their having been demanded. The importance of the question *of jurisdiction, and the *179] deep interest the owners of steamboats in the waters beyond tide, have in its issue, have been the principal inducements to bring this case up for decision.

The Steamboat Orleans.

A court of admiralty does not entertain the jurisdiction of a suit by an owner of a minor interest, to obtain a sale of the interests of the owners of a majority of the shares in a ship; the admiralty has no jurisdiction to compel a sale in such a case. See Abbott on Shipping 73; *Ouston* v. *Hebden*, 1 Wils. 101; *Willings* v. *Blight*, 2 Pet. Adm. 288; 2 Brown's Civil & Adm. Law 131; *Ex parte Young*, 2 Ves. & B. 242; *The Appollo*, 1 Hagg. 312. Nor can a part-owner originate in the court of admiralty a suit for account. 1 Hagg. 316; Abbott on Shipping 80.

Should the court be of opinion, that the case belongs to the admiralty jurisdiction, then it will be insisted that the decree is erroneous: 1st. In directing the proceeds of the entire share of the libellant to be paid over to him, without making provision for the satisfaction of a mortgage to Richardson, which would still be an outstanding incumbrance on the boat in the hands of the purchaser. 2d. The decree is erroneous, in directing the wages of the libellant, as master of the boat, to be paid out of the proceeds of its sale.

The maritime law gives the master no lien on the vessel for his wages, and he cannot sue for them in the admiralty. 3 Chitty on Com. & Manuf. 540; 1 Doug. 101; 9 East 426; 13 Ves. 598; 1 Barn. & Ald. 581; Abbot on Shipping 474; *Zane* v. *The Brig President*, 4 W. C. C. 459; *Gardner* v. *The Ship New Jersey*, 1 Pet. Adm. 228. In the case last cited, it was holden, that his claim being of a mere personal nature, the master could not be paid, even out of the surplus.

The decree of the district court gave to the libellant the whole amount of the wages claimed by him, without subjecting his one-sixth to the payment of a proportionate part of the sum. So too, the whole of the expenses incurred, are to be sustained by the owners of the five-sixths. This cannot be right. But these objections are of no importance, compared with that which denies the right of the district court to act in the case. It was a proceeding in the admiralty, and the vessel was not the subject of admiralty jurisdiction, by a person, who, if the jurisdiction existed, could not come into the court as a suitor, and on an alleged contract, of which an admiralty court cannot take cognisance.

*The local law of Louisiana, giving to the master a lien on the ship for wages, cannot be extended to the case of the libellant. Because [*180 his service, as master, having begun and ended at Louisville, or, at the farthest, at Memphis, was wholly without the limits of the state of Louisiana, and above tide-water. A state law cannot extend the admiralty jurisdiction to a subject in its nature not within that jurisdiction. 7 Pet. 337, 341.

But if he have a lien for his wages, then the decree is erroneous in giving him a year's salary for the services of a part of a year; on the idea, that an employment of a master of a boat is, in the absence of a specific stipulation, a hiring for one year; and that the owners cannot dismiss him without cause. A contract with a master, in the absence of a special agreement, is a hiring by the month, and not by the year. *Montgomery* v. *Wharton*, 2 Pet. Adm. 401. The owners of a ship may, at their pleasure, dismiss the master. 2 Pet. Adm. 397; 1 Dall. 49; Bee 388; 4 Rob. 287; Edw. 242; 1 Dods. 22; Abbot on Shipping 131, note 1.

The decree is also erroneous, in directing libellant's advances for necessaries to be paid out of the proceeds of sale.

After the argument had proceeded thus far, the court expressed a desire to hear the counsel for the appellees on the question of jurisdiction; before the merits were further discussed.

Catron, for the appellees, on the question of jurisdiction.—In the case in 7 Pet. 324, the steamboat Planter was of the very description of the Orleans, trading *up* the river from New Orleans, and only partly where the tide flowed. Her character, therefore, did not give the court jurisdiction. The repairs bestowed upon her formed no maritime lien, and did not give jurisdiction. What did? Her situation in tide-water gave the court power over her; and the lien created by the laws of Louisiana was enforced solely because of the locality of the vessel. The Orleans is a similar vessel; was fixed with a similar lien; and was found in a similar locality. She, by the laws of Louisiana, had a lien attached to her for wages, &c. There can be no doubt, the state courts of Louisiana can enforce such lien against the *thing;* they have done so, ever since Louisiana *has been part of the United States. This rests on the principle of ordinary attachment laws; and it is convenient. Every boat has a principal agent at New Orleans to procure freights, of course—the owners are scattered from Pittsburgh to New Orleans, as in this case. The boat-hands cannot sue them so well as by libel at New Orleans, where the boat certainly is detained—and not elsewhere is she certainly detained. The question to be decided in advance is, can, in any case, the boat's crew enforce the law of lien of Louisiana? If they can, then for the sake of the *principle*, we wish not to be forestalled by the supposed facts of the present cause. These have not been debated, and are certainly, to an extent, for the libellant.

*181]

A part-owner may enforce his rights in the admiralty. Brown's Civil Law, 131–2; 2 Pet. Adm. 290–1. He is a tenant in common, and part-owner, just as the boat-wrights were part-owners in case of the *The Planter*, 7 Pet. 324. So, he who has wages due, is part-owner, just as the boat-builders were. In case of *The Planter*, neither the nature of the vessel, nor the nature of the service performed, gave jurisdiction; it was by reason alone of the boat being in tide-water, that the lien created by the local laws was enforced. If the cases are not analogous, it is difficult to distinguish them.

The local law of lien, applicable to the cause, will be found in the Civil Code of Practice of Louisiana, § 104. It includes the master and all others navigating vessels, or water-craft navigating and trading to New Orleans. And when the lien is fixed, the right to seize and sell is expressly given. The main question in this cause, being settled for the libellant, puts all the incidents to rest: so, if it be adjudged to rest upon the general maritime law, the cause is, upon the whole of the incidental points, for the defendants.

Story, Justice, delivered the opinion of the court.—This is an appeal from the district court of the district of Louisiana. Thomas Phœbus, who is the owner of one-sixth part of the steamboat Orleans, filed a libel on the admiralty side of that court, against Forsyth and others, who are the owners of the other five-sixth parts of the same steamboat, alleging himself to be a part-owner and master of the steamboat, and that he had been dispossessed by the other owners, who were navigating, trading with, and

*using, the boat, contrary to his wishes; that he wished to have an amicable sale of the boat, but the other owners refused, and were about to send her up the Mississippi on another trip, against his wishes; that the boat then lay at New Orleans, within the ebb and flow of the tide, and within the admiralty jurisdiction of the court: therefore, he prayed admiralty process against the boat, and that the boat might be sold, and one-sixth part of the proceeds be paid to him; and that the other partners might account to him for the earnings of the boat to the day of the sale.

The appellants (the claimants and owners of the five-sixths) appeared, and in their answer admitted the title of the libellant to the one sixth part. But they denied the jurisdiction of the court, alleging that the boat did not navigate waters where the tide ebbs and flows; but that she navigated only between New Orleans and the interior towns on the Mississippi river, and its tributary waters. They further alleged, that she was not a maritime boat, and was never intended to navigate the high seas. They further answered, and in case their objection to the jurisdiction should be overruled, they alleged certain matters to the merits, upon which it is unnecessary to dwell, as our present discussion will be confined exclusively to the questions of jurisdiction.

It seems, that, subsequently, a libel was filed against the same boat, by one of her crew, for wages. In that suit, Phœbus also filed a claim for wages as master, and for necessaries advanced by him for the boat, while he acted as master. These charges were, by the agreement of the parties, allowed to be transferred to the present suit; and of course, were to be treated as if they had been alleged in the original libel. It may be here proper to state, that it is very irregular, and against the known principles of the courts of admiralty, to allow in a libel *in rem*, and *quasi* for possession (as the present libel assumes in some sort to be), the introduction of any other matters of an entirely different character; such as an account of the vessel's earnings, or the claim of the part-owner for his wages and advances as master. In the first place, the admiralty has no jurisdiction at all in matters of account between part-owners. In the next place, the master, even in case of maritime services, has no lien upon the vessel for the payment of them. So that, in both respects, these matters belonged *ad alium examen.*

But to return to the question of jurisdiction. There is no doubt, *that the boat was employed exclusively in trade and navigation upon the waters of the Mississippi, and its tributary streams; and [*183 that she was not employed or intended to be employed in navigation and trade on the sea, or on tide-waters. And the wages of the master, and the advances made by him, for which he now claims recompense out of the proceeds of the steamboat, are on account of voyages made on such interior waters. Under these circumstances, the question arises, whether the district court had jurisdiction, as a court of admiralty, to entertain either the original libel, or the claims in the supplementary proceedings. We shall shortly give our opinions on both points.

And in the first place, in respect to the original libel. The jurisdiction of courts of admiralty in cases of part-owners, having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime

voyages, properly so called. The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship, in the like manner, if the majority decline to employ her at all. So the law is laid down in Lord Tenterden's excellent Treatise on Shipping. (Abbott on Ship. part 1, ch. 3, § 4–7.) If, therefore, this were a vessel engaged in maritime navigation, the libel for a sale could not be maintained.

But the case is not one of a steamboat engaged in maritime trade or navigation. Though, in her voyages, she may have touched, at one *terminus* of them, in tide-waters, her employment has been, substantially, on other waters. The admiralty has not any jurisdiction over vessels employed on such voyages, in cases of disputes between part-owners. The true test of its jurisdiction in all cases of this sort is, whether the vessel be engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tide-waters. In the latter case, there is no jurisdiction. So that, in this view, the district court had no jurisdiction over the steamboat involved in the present controversy; as she was wholly engaged in voyages on such interior waters.

Secondly, in respect to the wages and advances claimed by the libellant. They are for services, not maritime, and for disbursements, nor maritime. *1841] Under such circumstances, the admiralty has no jurisdiction; *for its jurisdiction is limited, in matters of contract, to those, and those only, which are maritime. This was expressly decided by this court in the case of *The Steamboat Jefferson*, 10 Wheat. 429; which, substantially, on this point, decides the present case.

There is another ground equally fatal to the claim of the master for wages, which has been already alluded to. By the maritime law, the master has no lien on the ship, even for maritime wages; *à fortiori*, the claim would be inadmissible, for services on voyages not maritime.

But it is said, that the law of Louisiana creates a lien in favor of the master of a vessel engaged in voyages like the present; and if so, it may, upon the principles recognised by this court, in *Peyroux* v. *Howard*, 7 Pet. 343, be enforced in the admiralty. That decision does not authorize any such conclusion. In that case, the repairs of the vessel for which the state laws created a lien, were made at New Orleans, on tide-waters. The contract was treated as a maritime contract; and the lien under the state laws was enforced in the admiralty, upon the ground, that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced, according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States; they can only furnish rules to ascertain the rights of parties; and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States. In this view of the point of jurisdiction, we do not think it necessary to decide, whether, by the local law of Louisiana, the master had a lien on the steamboat for his wages, or not; nor, whether, if such a lien existed by that law, it could be applied to any steamboats not belonging to citizens of that state, for services not rendered in that state.

Upon the whole, our judgment is, that the district court had no jurisdiction of the libel or its incidents; and therefore, that the decree of the district court must, upon this ground, be reversed, and a mandate awarded to the district court to dismiss the suit, for want of jurisdiction.

Decree reversed.

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*Bergess Poole and others, Plaintiffs in error, *v.* The Lessee of John Fleeger and others. [*185

Compacts between states.—State boundaries.—Exceptions.— Will of lands. Ejectment.—Joint demise.

The plaintiffs, in the circuit court of West Tennessee, instituted an ejectment for a tract of land held under a Virginia military land-warrant, situate north of a line called Mathews's line, and south of Walker's line, the latter being the established boundary between the states of Kentucky and Tennessee, as fixed by a compact between these states, made in 1820; by which compact, although the jurisdiction over the territory to the south of Walker's line was acknowledged to belong to Tennessee, the titles to lands held under Virginia military land-warrants &c., and grants from Kentucky, as far south as "Mathews's line," were declared to be confirmed; the state of Kentucky having, before the compact, claimed the right to the soil as well as the jurisdiction over the territory, and having granted lands in the same; the compact of 1820 was confirmed by congress. The defendants in the ejectment claimed the lands under titles emanating from the state of North Carolina, in 1786, 1794 and 1795, before the formation of the state of Tennessee, and grants from the state of Tennessee in 1809, 1811, 1812 and 1814, in which the lands claimed by the defendants were situated, according to the boundary of the state of Tennessee, declared and established at the time the state of Tennessee became one of the states of the United States. The circuit court instructed the jury, that the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles were subject to the compact: *Held*, that the instructions of the circuit court were entirely correct.

It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective limits; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognised to exist in the states of the Union, by the constitution of the United States; and is guarded in its exercise, by a single limitation or restriction only, requiring the consent of congress.

The grants under which the defendants in the circuit court claimed to hold the land were not rightfully made, because they were originally beyond the territorial boundary of North Carolina and Tennessee; this is, by necessary implication, admitted by the compact between the states of Kentucky and Tennessee.

In the ordinary course of things, on the trial of a cause before a jury, if an objection is made and overruled, as to the admission of evidence, and the party does not take any exception, he is understood to waive it. The exception need not, indeed, then be put in form, or written out at large and signed; but it is sufficient, if it be taken, and the right reserved to put it in form, within the time prescribed by the practice or the rules of the court.

Where a will, devising lands, made in one state, is registered in another state, in which the lands lie, the registration has relation backwards; and it is wholly immaterial, whether the same was made before or after the commencement of a suit.

In the state of Tennessee, the uniform practice has been for tenants in common in ejectment, to declare on a joint demise; and to recover a part, or the whole, of the premises declared for, according to the evidence adduced. [*186

Fleeger *v.* Pool, 1 McLean 185, affirmed.

Error to the Circuit Court for the district of West Tennessee. John Fleeger and others, the defendants in error, instituted an action of eject-

ment, in 1832, to the September term of the circuit court of the United States for the district of West Tennessee, to recover a tract of land containing 2727 acres, lying in Montgomery county, in the state of Tennessee, and lying south of "Walker's line," the established boundary line between the state of Kentucky and the state of Tennessee, and north of a line called "Mathews's line," which is in latitude 36° 30′ north; being the line which, by the constitution of the state of North Carolina, was declared to be the true northern boundary line of the state of Tennessee, and which is described as such by the charter of King Charles II.

The original title of the plaintiffs in the circuit court, was a Virginia military warrant, No. 2685, dated 3d of March 1784, for 6000 acres of land, in favor of John Montgomery; and the plaintiffs read in evidence the will of Frederick Rohrer, to whom a grant from the state of Kentucky, as the assignee of John Montgomery, was issued, on the 24th of February 1796.

The will of Frederick Rohrer, made and duly admitted to probate in Pennsylvania, of which state he was a citizen, was not registered in the state of Tennessee, until after the institution of this suit.

The plaintiffs introduced in evidence a compact, made on the 2d of February 1820, between the states of Kentucky and Tennessee; which, after reciting that those states were desirous of terminating the controversy which had so long existed between them, relative to their common boundary, and the appointment of commissioners for that purpose, proceeds to declare; that the boundary and separation between the states of Kentucky and Tennessee shall be as follows:

Art. 1. The line run by the Virginia commissioners, in the year 1779–80, commonly called "Walker's line," as the same is now reputed, understood and acted upon by the said states, their respective officers and citizens, from the south-eastern corner of Kentucky, to the Tennessee river, thence with and up the said river *to the point where the line of Alexander *187] and Munsell, run by them in the last year, under the authority of an act of the legislature of Kentucky, entitled "an act to run the boundary line between this state and Tennessee, west of the Tennessee river, approved February 8th, 1819," would cross said river, and thence with the said line of Alexander and Munsell, to the termination thereof, on the Mississippi river, below New Madrid.

Art. 4. The claims to lands lying west of the Tennessee river, and north of Alexander and Munsell's line, derived from North Carolina or Tennessee, shall be considered null and void, and claims to lands lying south of said line, and west of Tennessee river, derived from Virginia or Kentucky, shall in like manner be considered null and void.

Art. 5. All lands now vacant and unappropriated by any person or persons claiming to hold under the states of North Carolina or Tennessee, east of the Tennessee river, and north of the parallel of latitude of 36° 30′ north, shall be the property of, and subject to the disposition of the state of Kentucky, which state may make all laws necessary and proper for disposing of and granting said lands, or any part thereof; and may, by herself or officers, do any acts necessary and proper for carrying the foregoing provisions of this article into effect; and any grant or grants she may make therefor shall be received in evidence, in all the courts of law or equity in the state

of Tennessee, and be available to the party deriving title under the same; and the land referred to in this article shall not be subject to taxation by the state of Tennessee for five years, except so far as the same may in the meantime be appropriated by individuals.

Art. 6. Claims to land east of the Tennessee river, between Walker's line and the latitude of 36° 30′ north, derived from the state of Virginia, in consideration of military services, shall not be prejudiced in any respect by the establishment of Walker's line, but such claims shall be considered as rightfully entered or granted; and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, or from any statute of limitations for any period prior to the settlement of the boundary between the two states: saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid, and of no effect, or that they have paramount and superior titles to the land covered by such Virginia claims.

*Art. 7. All private rights and interests of lands between Walker's line from the Cumberland river, near the mouth of Oby's river, [*188 to the south-eastern corner of Kentucky, at the point where the boundary line between Virginia and Kentucky intersected Walker's line, on the Cumberland mountain, and the parallel of 36° 30′ north latitude, heretofore derived from Virginia, North Carolina, Kentucky or Tennessee, shall be considered as rightfully emanating from either of those states; and the states of Kentucky and Tennessee reserve to themselves, respectively, the power of carrying into grant, claims not yet perfected, and in case of conflicting claims (if any there be), the validity of each claim shall be tested by the laws of the state from which it emanated, and the contest shall be decided as if each state, respectively, had possessed the jurisdiction and soil, and full power and right to authorize the location, survey or grant, according to her own rules and regulations.

Art. 8. It is agreed, that the foregoing articles shall receive the most liberal construction, for effecting the objects contemplated; and should any disagreement arise as to the interpretation, or in the execution thereof, two citizens of the United States, but residents of neither Kentucky or Tennessee, shall be selected, one by the executive of each state, with power to choose an umpire, in case of disagreement, whose decision shall be final on all points to them submitted.

Art. 9. Should any further legislative acts be requisite to effectuate the foregoing articles and stipulations, the faith of the two states is hereby pledged, that they will unite in making such provisions, and respectively pass such laws as may be necessary to carry the same into full and complete effect.

This treaty was ratified by acts of the several legislatures of the states of Kentucky and Tennessee, in 1803.

The plaintiffs also proved, that the legislature of Tennessee had, by several acts, recognised Mathews's line as being in the position of 36° 30′ north, and that, according to observations made by commissioners appointed by the governor of Tennessee, Walker's line was about eight statute miles north of the true meridian of 30° 30′. They proved, that the land in controversy was to the south of Walker's line, and between it and Mathews's line,

and that Mathews's line was run conformable to the observations of the commissioners.

The defendants objected to the introduction of the will of Frederick *Rohrer, as evidence : 1st, upon the ground that the probate and certificate were not such as to authorize its registration in this state ; 2d, upon the ground, that said will was registered in Tennessee, since the institution of this suit, and more than twelve months after the death of the testator ; and therefore, could only take effect from the date of registration. But these objections were overruled by the court, and the will was read to the jury by the plaintiffs, as evidence of title.

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The defendants proved, that all the lands in their possession lay south of Walker's line, from a half to two miles distance.

The defendants likewise objected to the evidence of title offered by the lessors of the plaintiffs, upon the ground, that their title was a tenancy in common, which would not, in law, support a joint demise, and they moved to nonsuit the plaintiffs, upon this ground. But their objection and motion were overruled by the court, with an intimation that the point would be considered on a motion for a new trial.

No exception to the opinion of the court in permitting the will to be read, was taken in the progress of the trial ; nor was it stated, that the right to do so was reserved. The practice of the court was for exceptions to be taken after trial, if deemed necessary.

The defendants read to the jury the following grants, to wit : No. 1629, from the state of North Carolina to Thomas Smith, for 640 acres, dated 27th of April 1792 ; No. 1140, from the state of North Carolina to James Ross, for 274 acres, dated 14th of March 1786 ; No. 102, from the state of North Carolina to N. Hughes, for 316 acres, dated 7th March 1786 ; a grant from the state of North Carolina to Samuel Barton, for 1000 acres, dated 9th of July 1797 ; a grant from said state to Duncan Stewart, for 370 acres, dated 17th November 1797; and a grant from said state to John McNairy, for 274 acres, dated 6th of December 1797.

The defendants also read the following grants from the state of Tennessee, to wit : No. 913, to John Shelby, for 320 acres, dated 6th of March 1809 ; another grant from the state of Tennessee to John Shelby, for 100 acres, dated 8th March 1814 ; a grant from the state of Tennessee to Robert Nelson, for 300 acres, dated 17th April 1811 ; and a grant from Tennessee to William E. Williams, for 80 acres, dated 6th November 1812.

The defendants then read to the jury regular conveyances, deducing the title to themselves from the different grantees above mentioned, *and proved, that said grants covered their possessions, respectively ; except that each of the defendants whom the jury found guilty of the trespass and ejectment in the declaration mentioned, were in possession of portions of land not covered by any grant older in date than the grant from the state of Kentucky to Frederick Rohrer, under which the lessors of the plaintiffs claimed. The defendants also proved, that the different grantees above mentioned, under whom they claimed, took possession of the different tracts of land contained in the grants by them read, on or about the dates of said grants ; and that they, and those deriving title under them, had continued in possession of the same, ever since, claiming the lands as their own.

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The defendants then read to the jury the statute of Virginia, passed on the 7th of December 1791, ch. 55, recognising and confirming Walker's line, as the boundary between that state and North Carolina; also the act of Virginia, passed on the 18th of December 1789, ch. 53, §§ 14, 15, proposing to erect the district of Kentucky into an independent state; also the act of congress, passed on the 4th of February 1791, ch. 78, §§ 1, 2, assenting to the erection of the said district of Kentucky into an independent state, at a certain future time, and upon certain conditions; also the compact between the states of Tennessee and North Carolina.

The defendants then proved, that the states of North Carolina and Tennessee had claimed up to Walker's line, as the true line of boundary between those states and the states of Virginia and Kentucky; from the time at which it was run, up to the time of the treaty between Tennessee and Kentucky, made for the settlement thereof, in 1820.

The defendant also proved, that the county lines of Tennessee were Walker's line on the north. That in her legislative, judicial and military capacity, Tennessee always claimed possession, and acted up to said line as the northern boundary of the state; that the process of her courts ran up to said line, and was executed up to it; that all criminal acts committed to the south of said line, and north of the southern boundary of Tennessee, were tried and punished in the state of Tennessee, and not in the state of Kentucky; and instances were proved, where persons put upon trial in Kentucky for criminal offences, had been acquitted, upon the sole ground that the offences were committed on the south side of Walker's line. That the inhabitants south of said line all paid taxes in the state of *Tennessee, [*191
and not in the state of Kentucky; that they were always enrolled as militia of the state of Tennessee, and mustered as such, up to said line; that they always voted at elections in Tennessee, as citizens thereof, and not in Kentucky. That, in fact, the state of Tennessee was in full and entire possession of all the lands lying to the south of said line, at and before the emanation of the grant to Frederick Rohrer, under which the lessors of the plaintiffs claimed title, and from the time of the earliest settlements that were made in that part of the country, which took place long before the dates of the titles under which either of the parties claimed. The defendants also proved, that the state of Kentucky, so far as regards the establishment of her county lines, the service of her militia, the payment and collection of taxes, the regulation of her judicial process, and of the right to vote at elections, conformed to Walker's line, as her southern boundary. The defendants also gave in evidence the observations made by Jefferson and Fry, and by Walker and Henderson, and those associated with them; and also proved, that the latitude of Walker's line had, since the running thereof, been taken by Gen. Daniel Smith, a man of science, and who was along with Walker at the running of his line, and that the latter observation of Gen. Smith found Walker's line to be about in latitude 36° 30′. The defendants also proved, that some years since, the latitude had been taken by a scientific gentleman, and from the result of his observation, Walker's line was two or three miles too far south. It also appeared in evidence, that Merewether Lewis, on his return from the expedition to the mouth of Columbia river, had taken an observation somewhere on Cumberland mountain, and that after taking it, he had written a letter to some person in

Kentucky, giving it as his opinion, that Walker's line was too far north; and that after the reception of said letter, there was much talk in the state of Kentucky about claiming to the true latitude of 36° 30′; but it did not appear that any definitive public act of the state of Kentucky had been done in consequence of the reception of the information aforesaid, from Merewether Lewis; or that, so far as Walker's line extended west, the relative possessions and claims of the two states had been interfered with in any way. But it did appear, that about the year 1819, shortly after the treaty with the Chickasaw tribe of Indians, by which the lands lying in Kentucky and Tennessee, between the Mississippi and Tennessee rivers, *192] were acquired, Kentucky sent two commissioners, Alexander *and Munsell, to begin at a point on the Mississippi river, exactly in the latitude of 36° 30′, and to run a line from thence east, to where the same would intersect the Tennessee river; and that said commissioners reported to Kentucky that they did so begin, and so run a line, and that the point where it would have crossed the Tennessee river, was about eleven miles to the south of where Walker's line reached said river, on the east side thereof. Walker's line never was extended farther west than Tennessee river.

The court instructed the jury, that as, by the compact between Kentucky and Tennessee, the boundary line of 36° 30′ north, was fixed several miles south of Walker's line, and of the land in controversy; the titles of the defendants were subject to the compact and could only be sustained under it. That the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles are subject to the condition of the compact. After the verdict of the jury, the defendants moved the court to grant them a new trial, which motion was overruled by the court.

The verdict of the jury was in favor of the plaintiffs, on which the circuit court entered judgment. To the instructions given by the court to the jury, on the several interlocutory questions raised on the trial, and in overruling the motion for a new trial, the defendants excepted; and tendered a bill of exceptions, which was signed by the court. The defendants prosecuted this writ of error.

A printed argument was submitted to the court by *Washington*, for the plaintiffs in error; and the case was argued at the bar by *Catron*, for the defendants in error, who also submitted a printed argument prepared by *Yerger* and *Forester*, the counsel for the plaintiffs in the circuit court.

The argument of *Washington*, for the plaintiffs in error, stated, that the locality of the land in controversy was not disputed; it lies south of Walker's line; neither is the latitude of that line, it being 36° 30′. It has been ascertained, that Walker's line was run south of the true meridian, thereby tak- *193] ing *from Virginia a portion of territory which properly belonged to her; and to the same extent increasing the territory of North Carolina.

The principal question in the case is, whether Walker's line, whether made correctly or not, did not become the boundary between Virginia and North Carolina; and if it did, whether the latter state had not, at the time of the inception of the title of the plaintiffs in error, such a property to the

land in controversy, as was capable of transmission by the grants under which the plaintiffs in error claim. This is contended for on the part of the plaintiffs, and also that this right continued down to 1820, except so far as North Carolina or Tennessee had transferred the property to individuals. The treaty of boundary was made in 1820, between Kentucky and Tennessee; and so far as the prior boundary of Walker's line was altered or affected thereby, Tennessee might part with her dominion over this territory; but not with property in it, previously transferred by North Carolina or herself, for a full and valuable consideration, and to which titles in full form had been given.

1. Walker's line, after the demarcation, became the boundary between Virginia and North Carolina, by express and positive enactment by the former state. Act of the legislature of Virginia, of December 1791; 1 Laws Va. 75, ch. 55.

2. On the 7th day of December 1791, the date of the passage of said act of assembly, Virginia still retained the sovereignty in what is now Kentucky, and had a right to dispose of the soil within that part of her chartered limits, or agree as to the limits with an adjoining state. On the 18th of December 1789 (1 Laws Va., ch. 53, p. 72), Virginia passed a law authorizing the district of Kentucky to elect members to a convention to form a state government; and authorizing her to become an independent state, with the consent of the congress of the United States; and on the 1st of June 1792, Kentucky became, by a law of the United States, a state of the Union. The law fixing definitely Walker's line as the boundary between Virginia and North Carolina, and which, when Kentucky became a state, was her southern line, was thus established, while Kentucky was a part of Virginia. The fact, that at the time of the adoption of Walker's line by Virginia as a boundary, what is now the state of Tennessee was no part of the dominion of North Carolina, but was the territory of the *United States, south of the Ohio, makes no difference in the case. Virginia [*194 fixed her own boundary, when it was competent for her to do it, without consultation with, or the concurrence of, the adjoining claimant, whoever it might be; provided she did not encroach upon territory not her own; and this is admitted.

3. Without any legislative enactment of Virginia, adopting Walker's line, that must be considered the boundary between Kentucky and Tennessee; in virtue of the principles of usucaption and prescription. The record in this case abundantly shows, that from the time at which Walker's line was run, it was mutually recognised by Virginia and North Carolina; and subsequently, by Kentucky and Tennessee, as the boundary between them. That the counties in those states were laid off on each side of the line, those in Kentucky, calling for it as the southern boundary, and those in North Carolina, as the northern boundary. That the territory on each side of the line was actually possessed by those states, respectively, according to the above designation of county limits. That exclusive jurisdiction was claimed and exercised by Virginia and Kentucky on the northern side, and by North Carolina and Tennessee, on the southern; and that the jurisdictions so claimed and exercised, were mutually conceded and acquiesced in. That both states, not only in the appropriation of territory, but in the settlement of inhabitants, the reputation of their citizenship, the organization of their

militia, the voting at the elections, the collection of taxes, and the administration of their laws, generally, had reference to this line as a common boundary. It is true, that some claims to land situated on the south of this line, and derived under the state of Virginia, do exist; but they are comparatively few, and without a single exception, originated either before the line was marked, or its position had become notorious. A decisive proof that many more private titles to land lying between this line and the true meridian of 36°30′ emanated from North Carolina, than did from Virginia, is to be found in the fact, that by the treaty of 1820, said line was finally established, notwithstanding it was then admitted, on all hands, to have been placed, in the first instance, too far north, and that Tennessee was suffered to retain dominion over the space in question; and that the claims of individuals, holding under her and North Carolina, were sanctioned, except so far as they conflicted with older ones derived under Virginia and Ken-
*195] tucky, and that too, for a very inconsiderable *equivalent. Now, why were these provisions contained in the treaty? For no other reason it is believed, than because almost the whole of this territory had been appropriated by North Carolina and Tennessee, and the citizens of the latter state had a deep interest that things should remain *in statu quo*, and the state itself was under obligations to maintain their rights which had been thus acquired. And for corresponding reasons, the state of Kentucky must have been willing to renounce a claim which had no legal foundation for its support; especially, when her engagements to her own citizens were not much concerned in the matter; and when, at the same time, she was providing security for the most of them against the adverse titles derived from another sovereignty.

The counsel for the plaintiffs in error also contended, that the possession of the lands south of Walker's line, had continued so long in North Corolina and Tennessee, as to amount to a prescription. Between nations there is no specific period during which possession of disputed territory must have remained with one of them, to constitute a title by prescription; because, as between such claimants, there is no supreme power to dictate to them a positive rule of action. But the principle applicable to such a case, which is derived from the law of nations, is, that possession must have endured long enough to evince a distinct acquiescence on the part of the adverse claimant in the rightfulness of the possession; and what length of possession is necessary for that purpose, must, of course, depend upon the peculiar circumstances of each case. To give to possession such an effect, it is requisite also, that it should have been held with the knowledge of the adverse claimant; for the fact of possession operates against the party which seeks to disturb it, as presumptive evidence of abandonment; and it furnishes to the party holding it, proof of the same description, and of equal force, in favor of the existence of the right. In this case, the possession of North Carolina may be coupled with that of Tennessee, or considered as one continuing possession, on account of the relation which those states sustain towards each other; and, for the same reason, the acts of Virginia and Kentucky are to be viewed as identical.

It was contended, that this possession, and the constant assertion by North Carolina and Tennessee, of title to the territory left out by Walker's line, was well known to Virginia, and was acquiesced in by her. This pos-

session commenced, and the acquiescence of *Virginia in it, before the title under which the defendant in error claims, accrued. The argument contained a reference to written testimony and to legislative enactments by Virginia ; as well as to evidence of her frequent recognition of the possession and disposition of this territory by the executive of that state, after the running of Walker's line.

It is a principle of municipal law, perfectly well established, that possession of land for a great length of time, and non-claim, will give a good title ; and that, in support of such a title, almost anything may be presumed ; such as an act of parliament, a grant from the crown, a deed of conveyance, the extinction of an outstanding opposing title, &c. *Chalmer* v. *Bradley*, and *Gibson* v. *Clark*, 1 Jac. & Walk. 63 note 2, 161 ; *Jackson* v. *Hudson*, 3 Johns. 375 ; *Powell* v. *Milbanke*, Cowp. 103 ; 10 Johns. 380 ; 3 Johns. Cas. 118 ; 3 Conn. 630 ; 11 East 280 ; 10 Ibid. 488. This principle also pervades the public law, and is not affected in its operation by the doctrine of *nullum tempus occurrit regi ;* because, whenever it is brought to bear upon questions of public law, both parties are sovereigns, and stand in the same relation to each other as individuals do in ordinary cases.

4. The treaty of 1820, made between Kentucky and Tennessee, does not affect the title of the plaintiffs in error. It has been shown, in the views already taken of this subject, that North Carolina and Tennessee acquired a complete title, including both sovereignty and property, to all the lands on the south side of Walker's line. If so, they were competent to transmit property in any portion of those lands, to the plaintiffs in error ; and that they did so, according to all legal formality, and that for a full and valuable consideration, is shown in the record, by the production of their grants. Then, the plaintiffs in error being once invested with title to the property in dispute, what has divested them ? It is said, that the treaty of 1820 has had the effect ; not by a direct process of divestiture, but by the admission of Tennessee, therein made, that the land, when it was granted, did not lie within her jurisdiction, nor within that of North Carolina. But how was the fact, notwithstanding that admission ? It was, that the land did lie within the jurisdiction of North Carolina and Tennessee, at the time referred to. Then, the question is presented, whether it be competent for a state, by admission or otherwise, to divest a title already conferred upon one of its citizens ? For, change the aspect of it as you will, it is *still a question as to the power to divest, assuming, that the land was not [*197 within the jurisdiction of North Carolina and Tennessee ; and their grant would be void, for want of property in the subject-matter of the grant. But proving, as the plaintiffs in error have done, and surely they stand in a situation to be permitted to make the proof, that the land did belong to the grantor, at the time that they became grantees of it ; and then the admission of the state to the contrary becomes of no avail. It is a principle of law, that when one claims title under another, he will not be permitted to deny the title of him under whom he claims. But the reverse of that principle is by no means true ; that is, where the grantor, after having made and delivered a grant, acknowledges that he had no title at the time of making it ; his grantee is not bound by that acknowledgment. So far is it from being true, that, if the grantor had not, in reality, any title when he

conveyed, but afterwards acquires one, it vests, *eo instanti*, by relation to the date of the grant, in the grantee; and this, too, by operation of law; so that the grantor could not, if he would, afterwards defeat his own sale. How is it possible, then, for a posterior admission of the state of Tennessee to take away from the plaintiffs in error, rights which they undoubtedly had before that admission was made?

It is likewise a principle of law, founded in abstract justice and morality, and highly promotive of good faith, that a party is estopped from denying his own deed. And the doctrine of estoppel does not apply to the execution of the deed simply, for, its being the deed of the party, necessarily implies its execution; but it applies to the operation and effect of it, so that the grantor is bound by all legal inferences and consequences resulting from it. Now, to say, that it lies in the mouth of the grantor, to deny that there was any subject-matter for the grant to act upon, appears to be as effectual a mode of destroying it, and of absolving him from the obligation of it, as any that could be devised. And why should not this principle be enforced against a state? When a state makes a grant to an individual, it is a contract, with all the incidents of any other contract of the same kind attached to it; and in the making of which, the state exerts only the same capacities that an individual would do in a like case; and it must, therefore, be governed by the same rules, regulations and restrictions, in every respect.

When Tennessee and Kentucky entered into the compact of 1820, it was competent for the former to part with what she had, and no *more. *198] She then possessed sovereignty over the land which is the subject of this suit, but no property in it; that belonged to the plaintiffs in error. She might, therefore, have parted with her sovereignty over the land, and have transferred the allegiance of the owners of it to the state of Kentucky; in which case, their right of property would have remained unaffected. But precisely the reverse of this is what, by the compact, she purports to have done; this is, to retain the sovereignty and cede the property; or, what amounts to the same thing, to give such an effect to a certain state of facts, as will enable the defendants in error successfully to hold the property against those in whom the title before existed; when, without such an effect, thus communicated, those facts would have been wholly inefficient for the purpose.

Now, is the doctrine to receive judicial sanction, that a state, although she may be sovereign, can thus tamper with the rights of individuals? In one sense, sovereign power may be competent to do anything; to destroy all the creations that have taken place under the exercise of it; and that, too, without any regard to the consequences of such wantonness. But under our constitution and laws, there is some restraint imposed upon the exercise of the power of the state; the functions of all public bodies, and public officers, are limited and defined; and no interference can take place with private property, that is inconsistent with right, and unwarranted by known rules and regulations. The legislature of Tennessee, in appointing commissioners to make this compact, and in the subsequent ratification of it, and the commissioners themselves in making it, all acted by virtue of a delegated power; and no power was delegated to them, or could be, that was incompatible with the charter whence that power was derived. The 20th section of the declaration of rights, which is a part of the constitution

of Tennessee, says, "that no retrospective law, or law impairing the obligation of contracts, shall be made." Now, here is an express limitation upon the power of the legislature. Has it been observed, in the making of this compact? What is meant by a retrospective law? It is one which changes, or injuriously affects, a present right, by going behind it, and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued. This compact looks back to the dates of the warrant and grant issued by Virginia and Kentucky, both powerless as emanating from those states; overleaps the intervening title derived from Tennessee and North Carolina, which was *good, if it had been let alone; and by the new life which it breathes into the worthless claim, subverts the other. And what is meant by the obligation of a contract, in the sense of the constitution? As applied to this case, we shall best see by inquiring what was the state of the contract upon which the plaintiffs in error rely, without the provisions of the compact; and what it is with them. Setting aside the compact, there is a grant, which is the highest muniment of title, and which binds the state to defend the possessor in the enjoyment of the land. But taking the compact into consideration, and giving force to it, according to its terms, you destroy the grant, and take away from the holder all the consequences flowing from it; thus most emphatically impairing the obligation which it had created. The passage of such a law would even exceed the competency of the British parliament, notwithstanding its attribute of omnipotence; and the judges there would not fail to pronounce it void, as being in violation of natural justice and inherent right. 18 Johns. 138; 7 Ibid. 497; 2 Dall. 308, 311. [*199

The sixth article of the compact of 1820, under which this suit was brought by the defendants in error, is in the following words: "Claims to land east of the Tennessee river, between Walker's line, and the latitude of 36° 30′ north, derived from the state of Virginia, in consideration of military services, shall not be prejudiced in any respect by the establishment of Walker's line, but such claims shall be considered as rightfully entered or granted; and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, from any statute of limitations, for any period prior to the settlement of the boundary between the two states; saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid, and of no effect; or that they have paramount and superior titles to the land covered by such Virginia claims."

It has already been shown, in the preceding views exhibited of this case, that, by the establishment of Walker's line, in the first instance, Virginia distinctly admitted, that the land to the south of it was not within her jurisdiction, and did not belong to her; and that North Carolina, by the possession of that land, acquired a complete tide to it. The title thus acquired by North Carolina, would certainly inure to the benefit of the plaintiffs in error, so far as any of that land was granted to them. Then, by the above article of the *compact, Tennessee renounced that title; which renunciation, as applied to this case, did not in the least affect the interest of the state, but only operated to destroy the right vested in her grantees. The article goes further, and says, that the claims under Virginia shall be considered as rightfully entered or granted; and shall [*200

not be prejudiced by lapse of time, or any statute of limitations. In this respect, the compact professed to act directly upon the rights of individuals situated as the parties to this suit are; giving to the one, a title which he had not before, and taking away from the other, that which he had—tying up the hands of one, and furnishing the other with a most deadly offensive weapon. By the provisions thus interposed, lapse of time, presumption and the statute of limitations, are all cut off, as sources from which title might have been acquired; and, in fact, was acquired. If there is any question perfectly well settled in the courts of Tennessee, so that no one thinks of meeting it again, it is, that our statutes of limitation, as applied to land, have a double operation—that is, that they bar the remedy of the plaintiff in ejectment, and give to the defendant, although his paper title was utterly void, a title good against the whole world, by positive prescription. Act of 1715, ch. 27, § 2; Act of 1797, ch. 43, § 4; Act of 1819, ch. 28, § 21; *Porter's Lessee* v. *Cocke*, Peck 47; *Ferguson* v. *Kennedy*, Ibid. 321; 3 Johns. Ch. 142–3; 10 Mod. 206. It appears, therefore, that the sixth article in the compact cannot be sustained, without its operating as a repeal of those statutes, a reversal of those decisions, and a direct judicial sentence.

5. The title under which the defendants in error claim is void for champerty. That title is the grant from the state of Kentucky, operating *proprio vigore;* or it is the above article in the compact; or it is both taken together. Now, considering it either way, there was an adverse possession by the state of Tennessee, or by those claiming under it, at the time of the origin of the title of the defendants in error; and the provisions of the statute of 32 Hen. VIII., c. 9, operate upon the conveyance thus attempted to be made, and render it absolutely void. *Williams* v. *Jackson*, 5 Johns. 498; Co. Litt. 214, § 347.

6. The lessors of the plaintiffs in the court below, have shown a title which makes them tenants in common only; and there is but *one demise in the declaration, and that a joint one. Tenants in common cannot support ejectment upon a joint demise. Although the action of ejectment is fictitious, yet such a demise must be laid as would, if actually made, having transferred the right of possession to the lessor. Ejectment is a possessory action, and each tenant in common is not capable of demising the whole premises; and therefore, a case is not made out upon the face of the declaration, which entitles the lessor to bring suit. Adams on Ejectment 186; *Trepart's Case*, 6 Co. 15 *b*. It is due, however, to the circuit judge who tried this cause, to state, that this defect in the declaration, if it be one, was not discovered until after the trial was gone into; and that, although he overruled the motion for a nonsuit, founded on it, he intimated, that he would reserve the point for further consideration, upon an application for a new trial, if one should be made. And that none but a formal application for a new trial was made, on account of circumstances known to the circuit judge, which caused the sudden and unexpected adjournment of the court.

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7. The will of Frederick Rohrer, under which the defendants in error claim, ought not to have been received in evidence. 1st. On account of the insufficiency of the certificate and probate to authorize its registration in the state. 2d. Upon the ground, that said will was registered in Tennes-

see, after the institution of this suit; and therefore, could only take effect from the date of registration. The will of Frederick Rohrer was a foreign one, that is, made and published in Pennsylvania; and what purported to be a copy only, was produced upon the trial of this cause. It is perfectly clear, that no will, made out of the state of Tennessee, can pass lands situated in it, and that no evidence of a will can be received in the courts there, for the purpose of affecting titles to land; but in strict conformity to the laws of Tennessee. *Kerr* v. *Moon*, 9 Wheat. 571. The probate of the will, and the registration, are all in the record, and the court is respectfully requested to examine them. They will compare them with the provisions of the act of the legislature of Tennessee on the subject. It will be observed, that the act of 1823, ch. 31, authorizes copies of such wills to be recorded in the country where the land lies, provided they shall have been proved according to the law then (1823) in force in the state, as to wills made and executed within the limits of the state (Act of the 1st session of *1784, ch. 22; Act of 2d session of 1784, ch. 10). And when so recorded, [*202 shall have the same force and effect as if the original had been executed in this state, and proved and allowed in our courts; and shall be sufficient to pass lands and other estate. Whether a copy of this will was duly proved and recorded in Tennessee, or not, it was not recorded, until after the commencement of the suit; and there is no principle better understood, or more universally admitted, than that in ejectment, the lessor of the plaintiff must have a title to the premises in dispute, at the date of the demise. And according to the construction of the above statute of 1823, the title to land here does not pass by such a will, until a copy thereof is actually recorded, in the manner therein prescribed; nor then, unless the probate is in due form, and the will itself shall have been executed with the solemnities required.

Catron, for the defendants in error.—By mutual legislation and arrangement between the states of Virginia and North Carolina, commissioners were appointed, as early as the year 1779, two from each state; who met, in September of that year, for the purpose of extending the common boundary of the states on parallel of latitude 36° 30′ north. The line, in part, had been previously run by Fry and Jefferson; beginning at the Currituck inlet, and extending west, 329 miles, to Steep-rock creek, near New-river, at 81° 12′ west longitude from London. (Haywood's History of Tennessee, 473.) The commissioners on the part of Virginia were, Doctor Thomas Walker and Daniel Smith; and those acting in behalf of North Carolina, Colonel Henderson and William B. Smith. The commissioners, by mutual observations, ascertained the precise latitude of 36° 30′ north, being one mile 201½ poles due south of the termination of Fry and Jefferson's line; and there fixed their beginning. After running the line as far as Carter's valley, forty-five miles west of Steep-rock creek, the Carolina gentlemen conceived the line was farther south than it ought to be; and on trial, it was found the variation of the needle had slightly altered. On making observations, it was supposed, the line at that point was more than two miles too far south—one of the Virginia commissioners concurring that this was the fact. The distance was measured off due north, and the line run eastward from that place, by the Carolina commissioners, to Steep-rock creek, aided by one of those from Virginia (Mr. *Smith), for about twenty miles east; when [*203

he became satisfied, from repeated observations, that the second line was wrong and the first right; to this conclusion the Carolina gentlemen refused their assent. Doctor Walker had continued to extend the line west, but was soon overtaken by Mr. Smith. Concurring that the first line was on the true latitude, they accordingly brought it up from Carter's valley, and extended it to the westward, separate from the Carolina commissioners, who did not again act in concert with them, but extended the second line as far as Cumberland mountain, protesting against the line run by the Virginia commissioners; and there they ceased the work and returned home. East of Cumberland mountain, the southern line was afterwards known as Walker's line, and the northern, as Henderson's line—being something more than two miles apart, and extending from Steep-rock creek to Cumberland mountain.

The Virginia commissioners, from Cumberland gap, where they struck the mountain, continued the extension of the line run by them, west, through the mountain, and marked it as far as Deer-fork, 124 miles from the beginning at Steep-rock creek. They there left off, running the line, and went west to Cumberland river, about 109 miles from Deer-fork; ascertained the true latitude of 36° 30′, as they supposed, and from that point ran and marked the line west (crossing the Cumberland river again at 131 miles), to the Tennessee, river, 41 miles from the first crossing of the Cumberland. Their authority extended no further; but on their way home, orders met them from the governor of Virginia to proceed to the river Mississippi, and there ascertain and mark the termination of the line; which service they performed. The line from Cumberland to Tennessee river is known as Walker's line; and where it strikes the Tennessee, is over eleven miles north of 36° 30′, but much less north, where it was commenced at Cumberland river. This circumstance produced the present controversy; to understand which, is has been deemed necessary to give, in something of detail, the history of Walker's line, and why it was not recognised as the true boundary between Kentucky and Tennessee; and the necessity of the compact of 1820, to settle the boundary between the two states.

The constitution of North Carolina declares the northern boundary of that state to be 36° 30′. § 25. It is attempted to be changed by Walker's line, run in 1779–80; and the Virginia act of assembly of the 7th of December 1791, ch. *55. The line had been marked west from Cumber-
*204] land river to the Tennessee river by Walker. In December 1789, a committee of the house of commons of North Carolina, to whom was referred the letter of the governor of Virginia, reported favorable to the establishment of Walker's line, but the senate did not act. At the next session, 11th December 1790, a committee of the house again reported, and recommended a law to be passed confirming Walker's line as the boundary between Virginia and North Carolina, reserving the right of the oldest grants or entries made by either state. The report was concurred with by both houses. (Hayw. Hist. Ten. 484.) To meet the report, Virginia took the first step, and on the 7th of December 1791, passed an act conformably to it. (Ibid. 485.) But North Carolina passed no law upon the subject; for the well-known reason, that in February 1790, she had ceded the western part of the state to the United States; which government (not North Carolina) had the sole power to fix the boundary with Virginia, from the north-

west corner of North Carolina to Cumberland gap. (See Cession Act; Hayw. Hist. 434.) In 1796, Tennessee became a state; and, of course, recognised no act of North Carolina after the cession of the United States. (Hayw. Hist. 8.) Nor did Kentucky recognise the legislation of Virginia west of Cumberland gap, after the 18th of December 1789. Then an act was passed, authorizing the district of Kentucky to call a convention, for the purpose of separating from Virginia, the assent of congress being had. The convention was called, a separation determined upon; and the act of congress of the 4th of February 1791, ch. 78, was passed, receiving Kentucky, according to its actual boundaries on the 18th day of December 1789; Kentucky to come in as a state on the 1st of June 1792. On the 2d of April 1792, Kentucky formed her first constitution, and thereby declared the compact with Virginia a part thereof. (Art. 8, § 7; 1 Marsh. Hist. Ky. 408.) Virginia is concluded by it. *Green* v. *Biddle*, 8 Wheat. 1. The act of congress of the 4th of February 1791, settled the southern boundary of Kentucky, at 36° 30′, and Virginia had no power to change it afterwards; her act of the 7th of December 1791, is, therefore, of no validity in this controversy. But it never was intended to have any force. North Carolina adopted a report (having no legal force), proposing a joint law to Virginia. So far as the latter had power, she passed the law, but North Carolina did not meet it; the object was a compact by mutual *legislation. Is it not most harsh to say, Virginia shall be bound, by her act, to [*205 confirm the North Carolina claims; to surrender territory equal to four counties, and North Carolina shall not be bound?

The act of Virginia, in its terms only, extends to the common boundary between North Carolina and Virginia, as run by Walker. The line was begun at Steep-rock creek, forty-five miles east of Carter's valley, and east of the north-west corner of Tennessee. From Steep-rock creek to the north-west corner of North Carolina, was the only part of the boundary between North Carolina and Virginia, to which the act of December 1791 did or could apply, because, west of this, North Carolina had no jurisdiction. And so Virginia understood the law, as is manifest from her compact of 1801, ch. 29 (1 Scott 716); 1803, ch. 58; by which commissioners from the respective states settled and marked a new boundary, equidistant between Walker's and Henderson's line, from Cumberland gap, east, to the north-west corner of North Carolina.

That either Tennessee or Kentucky ever imagined that the acts of Virginia or North Carolina had affected the common boundary of the states, cannot be pretended; the reverse is prominently manifest from Tennessee acts of 1801, ch. 29; 1803, ch. 63; 1812, ch. 61; 1815, ch. 192; 1817, ch. 157; 1819, ch. 89; and 1820, ch. 20. In fact, and by universal admission on the part of Tennessee and Kentucky, the act of Virginia never affected the question presented by the record Conceding to the act the validity claimed for it, and suppose North Carolina had met it by a corresponding statute, still it could have no binding effect. The constitutions of Virginia and North Carolina conferred jurisdiction to 36° 30′. Could the states, by legislation or by compact, fix the boundary ten miles further north? Would such act give North Carolina jurisdiction over the constitution? That the legislature of North Carolina had no power to authorize grants north of 36° 30′, must be admitted: her grants are clearly void. But then it is contended, the

act of Virginia of December 1791, prescribed Walker's line as the southern limit of the district in Kentucky, where Virginia military warrants could be located; and the plaintiff's grant being south of the line, it is also void; therefore, both titles being void, the plaintiff must fail.

The sixth article of the compact confirms the military grants of Virginia, south of the line and north of 36° 30′. The compact is just as good and effectual a grant as an ordinary patent. *North Carolina granted
*206] 25,000 to General Green, and 200 acres to the town of Nashville, by statute; and each of which grants has received the judicial sanction. So, Tennessee confirmed the military grants made north and east of the military boundary, by her act of 1815; ch. 173, and in various other cases. The compact is the supreme law, by the act of congress adopting it, of 12th of May 1820. (3 U. S. Stat. 609; Const. U. S. art. 6, § 2.) But for the confirmation, the jurisdiction of Tennessee could not extend beyond 36° 30′ north; because the legislature could not alter boundary fixed by the constitution. Congress had made it the supreme law over the constitution of Tennessee.

And in this connection, it may be remarked, that all legislation on the part of Virginia and North Carolina, tending to change the boundary from 36° 30′ to 36° 40′, would have been obnoxious to the 1st art. § 10, of the constitution of the United States, which declares: "No state shall, without the consent of congress, enter into any agreement or compact with another state." The prohibition must comprehend compacts of cession from one state to another; if not, Pennsylvania may treat for half of Delaware, and still leave her with two senators, and one representative in congress; and the ceded half be represented as part of Pennsylvania. Our disputed boundary presents an ample illustration of the necessity that the assent of congress should be had. By our act of 1801, ch. 28, we ordered commissioners to be appointed to treat for all the country south of Green river, including now about twenty-five counties in Kentucky. By the compact of 1820, Tennessee acquired nearly half a million of acres north of 36° 30′; if she could go ten miles north, she might two hundred, and purchase out a sister state, sapping the foundations of the Union.

But suppose, the Tennessee and North Carolina grants the better title, yet it becomes necessary to cede them to Kentucky, as part consideration of the compromise; we, says Kentucky, will give you the sovereignty to Walker's line, in consideration of which you shall give us the right of soil; and it was agreed. Is this not taking private property for public use? 3 Story's Com. 601; 2 Kent. 339 (2d ed.). By the treaties of 1817, 1819, the sovereignty of the Cherokee country was ceded to the United States, with the right of soil, and certain Cherokee occupants had granted to them a mile square each, as a part consideration. One of these reserves covered
*207] *a grant made to Stuart, in 1800, by North Carolina. It was holden, *per* Haywood, Judge, and not denied by any, that the private property of Stuart's assignee could be ceded to the Indian (*Cornet* v. *Winton*, 2 Yerg. 164–6); and congress paid Stuart's assignees for the land.

The provision of the constitution of the United States, that private property shall not be taken for public use, without just compensation, applies, exclusively, to a taking by the United States government, and has no reference to the acts of the states. To be bound, they must be named, as,

that no state shall pass any *ex post facto* law, or laws impairing the obligation of contracts. *Barron* v. *Mayor of Baltimore*, 7 Pet. 243. The constitution of Tennessee (Bill of Rights 21), declares, "no man's property shall be taken, or applied to public use, without the consent of his representatives; or without just compensation being made therefor." 1. By consent of his representatives, means by a law of the land, as where roads are located on private property, and no compensation is made. 2. In time of war, when the militia are called out, fuel, forage, provisions, boats, &c., may be taken, without any law, positively authorizing of it. Then compensation must be made.

STORY, Justice, delivered the opinion of the court.—This is the case of a writ of error to the judgment of the circuit court of the United States for the district of West Tennessee. The original writ was an ejectment, brought by Fleeger and others (the now defendants in error) against Poole and others (the now plaintiffs in error), to recover a tract of land containing 2727 acres, in Montgomery county, in Tennessee, lying south of Walker's line, so called; which constitutes the present boundary line between the states of Kentucky and Tennessee; and north of Mathews's line, so called, which is exactly now in latitute 36° 30′ north; which by the constitution of North Carolina, is declared to be the true northern boundary line of the state, and is so described in the charter of King Charles II.

At the trial, the original plaintiffs proved their title to be as devisees of one Frederick Rohrer, who claimed it by a grant of the state of Kentucky, dated the 24th of February 1796, in part satisfaction of a Virginia military land-warrant, held by Rohrer, as *assignee of one John Montgomery. [*208
They also read in evidence, the compact between the states of Kentucky and Tennessee, of the 2d of February 1820. The defendants claimed title under certain grants from the state of North Carolina, of various tracts, comprehending the premises in question, dated in 1786, 1792 and 1797; and also under certain grants from the state of Tennessee, in 1809, 1811, 1812 and 1814, from which they deduced a regular title to themselves; and they proved, that the same grants covered their possessions, respectively, except that each of the defendants, whom the jury at the trial found guilty of the ejectment, were in possession of portions of land, not covered by any grant, older in date than that to Rohrer. The defendants also proved, that the different grantees under whom they claimed, took possession of the different tracts of land contained in their grant, on or about the date thereof; and that they, and those deriving title under them, have continued in the possession of the same ever since. Various other evidence was introduced by the defendants, the object of which was, to establish that Walker's line had been for a long time acted upon as the boundary line between North Carolina and Virginia, before the separation of Kentucky and Tennessee therefrom; and that after that separation, Tennessee had continued to exercise exclusive jurisdiction up to that line, with the acquiescence of Kentucky, until the compact of 1820. As our judgment turns upon considerations distinct from the nature and effect of that evidence, it does not seem necessary to repeat it on the present occasion.

By the compact of 1820, between Kentucky and Tennessee (art. 1), it was agreed, that Walker's line (which was run in 1780) should be the boun-

dary line between those states; and by the sixth article, it was further agreed, that "claims to land east of Tennessee river, between Walker's line and the latitude of 36° 30′ north, derived from the state of Virginia, in consideration of military services, shall not be prejudiced in any respect, by the establishment of Walker's line; but such claims shall be considered as rightfully entered or granted; and the claimants may enter upon said lands, or assert their rights in the courts of justice, without prejudice by lapse of time, or from any statute of limitations, for any period prior to the settlement of the boundary between the two states; saving, however, to the holders and occupants of conflicting claims, if any there be, the right of showing such entries or grants to be invalid, and of no effect; or that they
*209] have paramount and superior titles to the land covered by such *Virginia claims." By another article (the 4th), it was further agreed, that "all lands now vacant and unappropriated by any person, claiming to hold under the states of North Carolina or Tennessee, east of the Tennessee river, and north of the parallel of latitude of 36° 30′ north, shall be the property of, and subject to the disposition of, the state of Kentucky."

Upon the whole evidence in the cause, the court instructed the jury, "that as by the compact between Kentucky and Tennessee, the boundary line of 36° 30′ north was fixed several miles south of Walker's line, and of the land in controversy; the titles of the defendants were subject to the compact, and could only be sustained under it. That the state of Tennessee, by sanctioning the compact, admitted, in the most solemn form, that the lands in dispute were not within her jurisdiction, nor within the jurisdiction of North Carolina, at the time they were granted; and that, consequently, the titles were subject to the conditions of the compact." To this opinion of the court, the defendants excepted; and the validity of this exception constitutes the main subject of inquiry upon the present writ of error; the jury having found a verdict in favor of the plaintiffs upon this opinion, and judgment having been rendered in conformity thereto, in the court below.

We are of opinion, that the instruction given by the court below is entirely correct. It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognised in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered, under the constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognised by the constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of congress. The constitution declares, that "no state shall, without the consent of congress, enter into any agreement or compact with another state;" thus plainly admitting, that with such consent, it might be done; and in the present instance, that consent has been expressly given. The compact, then, has full validity, and
*210] all the *terms and conditions of it must be equally obligatory upon the citizens of both states.

Independently of this broad and general ground, there are other ingredients in the present case, equally decisive of the merits. Although, in the compact, Walker's line is agreed to be, in future, the boundary between the two states, it is not so established as having been, for the past, the true and rightful boundary; on the contrary, the compact admits the fact to be the other way. While the compact cedes to Tennessee the jurisdiction up to Walker's line, it cedes to Kentucky all the unappropriated lands north of the latitude of 36° 30′ north. It thus admits, what is in truth undeniable, that the true and legitimate boundary of North Carolina is in that parallel of latitude; and this also is declared in the charter of Charles II., and in the constitution of North Carolina, to be its true and original boundary. It goes further, and admits, that all claims under Virginia, to lands north of that boundary, shall not be prejudiced by the establishment of Walker's line; but such claims shall be considered as rightfully entered or granted. The compact does, then, by necessary implication, admit that the boundary between Kentucky and Tennessee, is the latitude of 36° 30′; and that Walker's line is to be deemed the true line, only for the purpose of future jurisdiction.

In this view of the matter, it is perfectly clear, that the grants made by North Carolina and Tennessee, under which the defendants claimed, were not rightfully made, because they were originally beyond her territorial boundary; and that the grant, under which the claimants claim, was rightfully made, because it was within the territorial boundary of Virginia. So that, upon this narrower ground, if it were necessary, as we think it is not, to prove the case, it is clear, that the instruction of the court was correct.

And this disposes of the argument, which has been pressed upon us, that it is not competent for a state, by compact, to divest its citizens of their titles to land derived from grants under the state; and that it is within the prohibition of the constitution, that "no state shall pass any law impairing the obligation of contracts." If the states of North Carolina and Tennessee could not rightfully grant the land in question, and the states of Virginia and Kentucky could, the invalidity of the grants of the former arises, not from any violation of the obligation of the grant, but from an intrinsic defect of title in the states. We give no opinion, because it is unnecessary in *this case, whether this prohibition of the constitution is not to be understood as necessarily subject to the exception of the right of the states, under the same constitution, to make compacts with each other, in order to settle boundaries and other disputed rights of territory and jurisdiction. [*211

In the progress of the trial, one or two other objections were made, which may require some notice. The defendants objected to the introduction of the will of Frederick Rohrer, under which the plaintiffs claimed as devisees, as evidence; first, because the probate and certificate of that will (it having been made and proved in Pennsylvania) were not such as to authorize its registration in the state of Tennessee; secondly, because the will was not registered in the state of Tennessee, until after the institution of this suit. The court overruled the objection. But it does not appear, that any exception was taken to the opinion of the court upon this point, at the trial. On the contrary, the record states, that "no exception to the opinion of the court, permitting the will to be read, was taken in the progress of the trial,

nor was it stated that the right to do so was reserved; the practice of the court is, for exceptions to be taken after trial, if deemed necessary." Under these circumstances, some difficulty has arisen, as to the propriety of taking any notice whatsoever of this objection. In the ordinary course of things, at the trial, if an objection is made and overruled, as to the admission of evidence, and the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then, be put into form, or written out at large and signed; but it is sufficient, that it is taken, and the right reserved to put it into form, within the time prescribed by the practice or rules of the court. We do not find any copy of the will, nor any probate or certificate thereof, in the record, nor any registration thereof; and it is, therefore, impossible for us to say, whether the ground assumed in the first part of the objection is well founded or not. This leads us strongly to the inference, that the objection was intentionally waived at the trial. The second ground is clearly unmaintainable; for, if the registration was rightfully made in Tennessee, it has relation backwards; and the time of the registration is wholly immaterial, whether before or after the institution of the suit.

Another objection made by the defendants, at the trial, was to the evidence of title offered by the lessors of the plaintiff, upon the ground, that this title was a tenancy in common, which would not in *law support
*212] a joint demise. This objection was overruled, with an intimation that the point would be considered on a motion for a new trial. No exception was taken to this ruling of the court; and the new trial was, upon the motion, afterwards refused. The party not taking any exception, and acquiescing in the intimation of the court, must be understood to waive the point as a matter of error, and to insist upon it only as a matter for a new trial. But it is unnecessary to decide the point upon this ground; for, in the state of Tennessee, the uniform practice has been, for tenants in common in ejectment to declare on a joint demise, and to recover a part or the whole of the premises declared for, according to the evidence of title adduced. This was expressly decided by the court in *Barrow's Lessee* v. *Nave*, 2 Yerg. 227–8; and on that occasion, the court added, that this practice had never been drawn in question, so far as they knew or could ascertain; and in fact, no other, probably, could be permitted, after the act of 1801, ch. 6, § 60, which provided, "that after issue joined in any ejectment on the title only, no exceptions to form or substance shall be taken to the declaration, in any court whatever." The judgment of the circuit court is therefore affirmed, with costs.

Baldwin, Justice.—So far as my general views of the origin and nature of the federal constitution and government may be peculiar, that peculiarity will be carried, of course, into my opinions on constitutional questions. There are none which can arise, in which it is more important to attend carefully to the reasons of one's judgment, than in those where the prohibitions on the states come under consideration; those which have arisen have been found the most difficult to settle, because they involve not only the question of the powers granted to congress, and those reserved to the states, but on account of the nature and variety of the prohibitions and exceptions. In the case of *Briscoe* v. *Bank of Kentucky* (*post*, p. 328),

I gave my views of the three classes of prohibitions, in the first clause of the tenth section of the first article of the constitution, which in their terms are absolute, operating, without any exception, to annul all state power over the prohibited subjects.

The next clause of the same section contains prohibitions of a different kind. "No state shall, without the consent of congress, lay imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

It will be perceived, that these prohibitions apply to two distinct classes of cases; in those embraced in the first sentence, it is not only requisite that congress should consent to state laws laying duties and imposts on imports and exports, but they are made subject to its revision and control. In the second class, nothing more is required, than the consent of congress to the specified acts or laws of a state, giving no power whatever over them, after such consent has been given. There is also one particular in which compacts and agreements between one state and another, or with a foreign power, stand on a peculiar footing; all the other cases to which the prohibition applies, embrace those subjects on which there is a grant of power to congress to legislate, or which have a bearing on those powers; as, to lay duties and imposts, regulate commerce, declare war, &c. Whereas, the sole power of congress in relation to such agreements or compacts, is, to assent or dissent, which is the only limitation or restriction which the constitution has imposed, provided they are not treaties, alliances or confederations which are absolutely prohibited by the first clause of the section, and cannot be validated by any consent of congress. As the compact between Kentucky and Tennessee does not come within this prohibition, and is one merely of boundary between the two states, the subject-matter is not within the jurisdiction of congress, any further than that it is subject to its consent, which, once given, the constitution is *functus officio* in relation to its controlling power over its terms or validity. The effect of such consent is, that thenceforth, the compact has the same force as if it had been made between states who are not confederated, or between the United States and a foreign state, by a treaty of boundary; or as if there had been no restraining provision in the constitution. Its validity does not depend on any recognition or admission in or by the constitution, that states may make such compacts with the consent of congress; the power existed in the states, in the plenitude of their sovereignty, by original inherent right; they imposed a single restraint upon it, but did not make any surrender of their right, or consent to impair it to any greater extent. Like all other powers not granted to the United States, or prohibited to the states, by the constitution, it is reserved to them, subject only to such restraints as it imposes, leaving its exercise free and unlimited in all other respects, with-

out any auxiliary by any implied recognition or admission of the existence of the general power, consequent upon the particular limitation.

Herein consists the peculiarity of my reasons for affirming the judgment of the circuit court in this case; fully concurring with the opinion delivered, as to the original power of the states to make compacts of boundary, as well as to the effect of the prohibition, being "a single limitation or restriction" upon the power. (See 11 Pet. 209.) I can give it no other effect by implication, without impairing the great principle on which the reserved powers of the states rest. Though the result, in this case, would be the same, whether the right of making compacts of boundary is original in the states, or exists by the admissions of the constitution, it might have an important bearing on other questions and cases, depending on the same general principle, as to the granting and restraining power which established that instrument. If it is considered as the source of the powers which are reserved to the states, it necessarily admits that its origin is from a power paramount to theirs, and limits them to the exercise of such as it recognises or tacitly admits, by imposing limited restraints. This is a principle which, once conceded, will destroy all harmony between the state and federal governments, by resorting to implication and construction to ascertain their respective powers, instead of adopting the definite rule furnished by the tenth amendment. That refers to the constitution for the ascertainment of the specific powers granted to the United States, or prohibited to the states, as the certain and fixed standard by which to measure them; and then, by express declaration, reserves all other powers to the states, or the people thereof. The grant in the one case, or the prohibition in the other, must, therefore, be shown, or the given power remains with the state, in its original plenitude, not only independent of any power of the constitution, but paramount to it, as a portion of sovereignty attached to the soil and territory, in its original integrity. By adhering to this rule, there is found a marked line of separation between the powers of the two governments, the metes and bounds of which are visible; so that the portion of power separated from the state by its cession, can be as easily defined, as its cession of a portion of its territory, by known boundaries, a reference to which will bring every constitutional question to an unerring test. I have, therefore, considered those which have arisen in this case, as involving a general principle applicable to all restrictions on states. Though a narrower view would suffice to settle the questions presented upon this compact, or any compact between the states of this Union; yet, when we consider that the power of a state to make an agreement or compact with a *foreign power*, is put on the same footing as one between two or more states, the necessity of an adherence to principle is the more apparent.

It is a settled principle of this court, that the boundaries of the United States, as fixed by the treaty of peace, in 1783, were the boundaries of the several states (12 Wheat. 524); from which it follows, that in a contest between a state and a foreign power, respecting the boundary between them, the state has the same power over the subject-matter, as if the contest was with another state. It must then be ascertained, what is the source of that power, its extent by original right, how far it is restricted by the constitution; and when a compact of boundary is made with the consent of congress, whether their legislative power can be exercised over it to any extent?

When this is done, it must then be inquired, how far the judicial power has been extended over such compacts, by the constitution, and in controversies arising under them, what are judicial questions, on which courts can act, as distinguished from political questions, which must be referred to the parties to the compact?

In this view of the subject, I am disposed to take broader ground than is done in the opinion of the court, and think it necessary to examine, whether the powers of a state depend in any degree on the recognition or admission in the constitution, as the construction put upon it by those who framed or adopted it.

This is a sound principle, when applied to grants of power by paramount authority, to a body subordinate to it, which can act only under the authority of the grant; and fairly applies to the powers of the federal government, which is a mere creature of the constitution. Such is the established rule of this court, where there is an express exception of a particular case, in which any given power shall not be exercised, that it may be exercised in cases not within the exception; otherwise the exception would be useless, and the words of the constitution become unmeaning.

But the principle is radically different, when it is applied to a provision of the constitution, excepting a particular case from the exercise of state legislation, or containing a prohibition that a state law shall not be passed on any given subject, or shall not have the effect of doing what is prohibited; in such cases, there results no implication of power in other cases, for a most obvious reason: That states do not derive their powers from the constitution, but, by their own inherent reserved right, can act on all subjects which have not been delegated to the federal government, or prohibited to states. This distinction necessarily arises from the whole language of the constitution and amendments, and is expressly recognised in the most solemn adjudications of this court. "The government, then, of the United States, can claim no powers which are not granted to it by the constitution; and the powers, actually granted, must be such as are expressly given, or given by necessary implication." *Martin* v. *Hunter*, 1 Wheat. 326. "The powers retained by the states, proceed from the people of the several states, and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." 4 Ibid. 193. So, where there is an exception to the exercise of the power of congress, as in the first clause of the ninth section of the first article of the constitution: "The migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by congress, prior to the year 1808. The whole object of the exception is to preserve the power to those states which might be disposed to exercise it, and its language seems to convey this idea to the court unequivocally. It is an exception to the power to regulate commerce, and manifests clearly, the intention to continue the pre-existing right of the state to admit or exclude for a limited period. 9 Wheat. 206–7, 216. So, when a state is prohibited from imposing duties on imports, except what may be absolutely necessary for executing its inspection laws. "This tax is an exception to the prohibition on the states to lay duties on imports and exports; the exception was made, because the tax would otherwise have been within the prohibition." 12 Wheat. 436. "If it be a rule of interpretation to which all

assent, that the exception of a particular thing, from general words, proves, that in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made; we know no reason why this general rule should not be as applicable to the constitution as other instruments. Ibid. 438. In applying this rule to deeds, the language of this court is strong and clear: "It is observable, that the granting part of this deed begins, by excepting from its operation, all the lots, &c., which are within the exception. The words are, doth grant, &c., except as is hereinafter excepted, all those hereafter mentioned and described lots, &c. In order, therefore, to ascertain what is granted, we must ascertain what is within the exception; for whatever is included in the exception, is excluded from the grant, according to the maxim laid down in Co. Litt. 47 *a*. *Si quis rem dat et partem retinet, illa pars quam retinet semper cum eo est, et semper fuit.*" 6 Pet. 310. In a subsequent case, at the same term, the same rule and maxim was adopted, and applied to a treaty with a foreign nation. "It became, then, all-important, to ascertain what was granted, by what was excepted. The king of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted, and the thing reserved and excepted, in and by the grant." 6 Pet. 741. As this was a treaty of cession, granting soil and sovereignty, it is, in the latter respect, precisely analogous to the grant of power, by the constitution, to the federal government; so that its exceptions, prohibitions and reservations, as well as grants, must be interpreted as all other instruments, grants, treaties and cessions, taking the words as the words of the grantor, referred to the subject-matter granted or excepted, &c.

Assuming, on the reason and authority referred to in the preceding general views, that the constitution is a *grant* made by the *people of the several states*, by their separate ratifications, and that the prohibition on their pre-existing powers are their separate voluntary covenants, restraining the exercise of those which are reserved, over the subjects prohibited, these conclusions necessarily follow: That a prohibition upon a state, as to any given subject, can, by no just reasoning, enlarge or vary the powers delegated to congress, so as to bring within its jurisdiction, any matters not within the enumerations of the powers granted. That where the consent of congress is made necessary to validate any law of a state, congress can only assent or dissent thereto or therefrom, but can exercise no legislative power over the subject-matter, without some express authorty to *revise* and *control* such state law, by regulations of its own. And that in the absence of any power in congress, to do more than simply assent or dissent, the assent is a condition; and when once given to an act of a state, it has the same validity as if no prohibition had been made in the constitution against the exercise of any right of the state, to do the act, in virtue of its reserved powers, or any condition, in any way, imposed, to affect its original inherent sovereignty. The assent of congress is made an exception to the prohibition, and when given, takes the case out of the prohibition, and leaves the power of the state uncontrolled, on the common-law rule, that "an exception out of an exception leaves the thing unexcepted." 4 Day's Com. Dig. 290.

"No state shall, without the consent of congress, enter into any agree-

ment or compact with another state, or a foreign power." By the terms then, of this clause, whenever the consent of congress is given to any such agreement or compact, the prohibition is fully satisfied, and ceases to operate; the states stand towards each other, and foreign powers, as they did before the adoption of the constitution, so far as this sentence abridged their reserved powers. But as the consent of congress cannot dispense with the prohibition in the first sentence of this section, it becomes, by necessary implication, a proviso or limitation to the second. That such agreement or compact shall not be a *treaty*, *alliance* or *confederation;* if it does not come within the constitutional meaning of these terms, the agreement or compact is valid, if made with the consent of congress; if it does, it is void by the first part of the prohibition, which annuls whatever is done in opposition to it.

A reference to the articles of confederation will show the sense in which these terms are used in the constitution, in their bearing on this case. Art. 6. "No state, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with, any king, prince or state. No two or more states shall enter into any treaty, confederation or alliance whatever, between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." (1 U. S. Stat. 5.) Art. 9. "The United States, in congress assembled, shall have the sole and exclusive right and power of sending and receiving ambassadors, entering into treaties and alliances," &c. "The United States," &c., "shall also be the last resort on appeal, in all disputes and differences, now subsisting, or that may hereafter arise, between two or more states, concerning boundary, jurisdiction, or any cause whatever, which authority shall always be exercised in the manner following," &c. (Ibid. 6.) "All controversies respecting the private right of soil, claimed under different grants of two or more states, whose jurisdiction as they may respect such lands, and the states which passed such grants, are adjusted, the said grants or either of them being, at the same time, claimed to have originated antecedent to such settlement of jurisdiction, shall, on petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states." (Ibid. 7.)

From these provisions, it is most manifest, that the framers of the constitution had the whole subject-matter directly before them, and substituted the prohibitions in the tenth section of the first article, for those in the sixth article of confederation, with two important changes.

1. In the discrimination between the prohibition on states, in relation to foreign powers, and between themselves, apparent in the two first sentences of the sixth article of confederation. All embassies to or from, and all conferences or agreements with, foreign powers, are prohibited by the first sentence; while the second sentence prohibits only treaties, alliances and confederations between two or more states. In each sentence, the consent of congress is made a condition; but in the second, there is a further condition, that the purposes and duration of the treaty shall be specified, and the words conference or agreement are omitted, so that it prohibited only

such as were treaties, &c., and left the states free to make agreements or compacts, touching their boundaries, without the consent of congress. Hence we find, that after these articles were ratified, the states made agreements, compacts or conventions with each other, settling their boundaries, or confirming those previously made, of which the following are instances: Pennsylvania with New Jersey, in 1783; 2 Smith's Laws 77; with Virginia in 1784; Ibid. 261; with New York in 1786, confirmed in 1789, Ibid. 510; Georgia with South Carolina in 1787; Laws of Georgia, app'x, 752; none of which refer to any consent of congress. But in the constitution, agreements and compacts between the states and with foreign powers, are put on the same footing, being prohibited, if congress does not consent, and valid, if consent is given, and the condition of specifying the purposes and duration thereof, wholly omitted; thus leaving the power of the states subject only to the condition of consent.

2. The constitution gives congress no power to act on the boundaries of states, or on controversies about the titles to lands claimed under grants from different states; its whole jurisdiction consists in the power of assenting or dissenting to an agreement or compact of boundary. The only part of the constitution which grants any power on this subject to the federal government, is in the third article, which declares, "that the judicial power of the United States shall extend, &c., to controversies between two or more states, between citizens of the same state, claiming land under grants of different states," &c. These are the two cases which were defined in the two sentences of the ninth article of confederation, on which congress could act, but which the constitution has authorized no other than the judicial power to take within its cognisance.

From this view of the constitution, in its application to the agreements and compacts between states respecting their boundaries, the results are, to my mind, most clear and satisfactory; that when congress has exercised the only power confided to them over this subject, by consenting to the compact, their whole jurisdiction is completely *functus officio*. Such compacts are, thenceforth, the acts of sovereign states, which, interfering with no power granted to the United States by the constitution, or prohibited by it to the states, must be deemed to be an exercise of their reserved powers, neither given, nor in any way abridged, by that instrument, and by the 34th section of the judiciary act, are binding as rules of decision by this and all other courts of the United States, "in suits at common law." The consent of congress has been given to this compact, and the present suit is one at common law; there can be then no doubt, that the compact must be taken as made by competent authority, and as prescribing the rules by which the rights of the contending parties must be ascertained. This suit does not present for the action of the judicial power, "a controversy between two or more states," or "between citizens of the same state, claiming lands under grants of different states," but a controversy "between citizens of different states," in which the circuit court was bound to decide precisely as the state courts were (2 Pet. 656; 5 Ibid. 401); in whom the title to the premises in dispute is vested, which lie south of Walker's line, and north of latitude 36° 30′ north.

It is admitted, that the northern charter boundary of North Carolina is 36° 30′ of north latitude, which is so declared in the constitution of that

state and Tennessee ; neither state, therefore, had any right to lands north of that line ; having no original title thereto, any grants from either state would be, on that ground, merely void, according to the settled doctrine of this court. 9 Cranch 99 ; 5 Wheat. 303 ; 11 Ibid. 384 ; 6 Pet. 730. It is clear, then, that as the lands in dispute are situated without this boundary, those states had no title which could pass, by their grants, to the defendants, and that the plaintiffs must recover under their title by warrant under Virginia, consummated by a patent from Kentucky, unless the defendants have, in some way, acquired a better title than the state under whom they claim had, by original right. As Virginia had the oldest charter, no part of her territory could be taken from her, without her consent, or an express grant by the king, by his perogative right of disposing of all the vacant lands in the colonies, before the revolution, except within the provinces granted to proprietaries. Such grant or consent is not pretended, but the defendants rely on the implied consent of Virginia and Kentucky, in laws recognising Walker's line as the boundary between them and North Carolina and Tennessee, and acts of ownership and possession, long exercised by these states, over lands between that line and 36° 30′ north latitude, as giving to them and the grantees under them, a title by prescription. These grounds of defence present very important points for consideration, and in my opinion, are of a political, rather than a judicial nature.

The consent of congress to the compact, strips the case of every provision of the constitution which can affect it, saving the grant of the judicial power over "controversies between two or more states," which I take to be suits between states, touching matters in controversy between them. But here, there is no controversy between states, nor can a suit be sustained in the circuit court, where a state is a party, this court alone having original jurisdiction of such cases ; this is the ordinary action of ejectment, in which each party rests upon his own title ; the plaintiff, on a grant from a state, whose original title and jurisdiction confessedly embraced the land in question ; the defendant, under grants from states, who, as confessedly, had no original right of soil or jurisdiction to the lands they granted ; so that every question affecting the rights of other states, arises collaterally in a suit between two individuals. The states have adjusted all matters heretofore in controversy between them, by a solemn compact, the sixth article of which places the grant to the plaintiff on its original validity under the laws of the states from which it emanated and was perfected, and within whose acknowledged rightful boundary the lands granted are situated. If this compact is valid, the defendant has no standing in court ; if it can be declared invalid, in a collateral action, on the grounds contended for, it follows as a necessary consequence, that any judicial power, state or federal, is competent to annul it, though it is consistent with the constitution of the state, and ratified according to that of the United States. 10 Pet. 474. The exigencies of the defendants' case require them to go to this extent, for the terms of the sixth article are neither ambiguous nor admit of any construction which can give the defendants any protection, unless they can show the plaintiffs' "grant to be invalid and of no effect, or that they have paramount and superior titles to the land covered by such Virginia warrants ;" to do which, they must break through the constitution of the states under whose grants they claim, as well as the compact assented to by con-

gress. There could be no title *paramount* to a Virginia warrant, duly taken out, entered, surveyed and patented, unless that state had in some way lost her original right of soil and jurisdiction, north of latitude 36° 30′; or Kentucky had encroached on the *superior* title of Tennessee, who had no pretensions to the terrritory north of that line, by charter, who renounced them in her constitution, and by solemn compact stipulated expressly that Virginia warrants should be considered as rightfully entered for this land.

This leaves the defendant but one position to assume, in which he can invoke the action of the judicial power, which is, that before the compact was made, the state of Tennessee had, for the reasons set forth in the argument, or on some other ground, become incompetent to make a compact with Kentucky, by which the boundary between them should be any other than Walker's line. In other words, that the state was, by her grants to the defendants, or those under whom they claimed, estopped from so settling her boundaries, as to exclude the lands she had granted; that Virginia and Kentucky were also estopped from making grants of land, within the disputed territory, by their adoption of Walker's line, and because North Carolina and Tennessee had acquired a right by prescription; of consequence, that though these states had granted lands to which they had no title originally, yet when their title by prescription attached, their grants became valid, and no compact between Tennessee and Kentucky could divest them, or impair their legal effect.

So far as the argument rests on the prohibition of the constitution against impairing the obligation of the contract of grant, it is a sufficient answer, that as a grant by a state, of land to which she has no title, is void, there is no obligation in the contract, no right of property to impair or violate. Whether the state will refund the purchase money, or grant an equivalent out of what she does own (as was done by Pennsylvania, as to lands granted to her soldiers, which were within the state of New York), is optional with the state, but such grant cannot estop her from making a compact of boundary, nor impose on her any obligation to confirm a void title. The other points raised in the argument, present the question of how far judicial power can be exercised in settling the boundaries of states.

In a controversy between states, as to their boundaries, the constitution has given original jurisdiction to this court; whether it can be exercised by the inherent authority of the court, or requires an act of congress to prescribe and regulate the mode of its exercise, need not be now examined; but it will be assumed *ex gratiâ*, that it is by a bill in equity, according to the practice of this court, and the mode of proceedings in chancery. In the great case of *Penn* v. *Lord Baltimore*, Lord HARDWICKE laid it down as an established rule, that the court of chancery had no original jurisdiction of a question relating to the boundaries between the two proprietary provinces of Pennsylvania and Maryland, in any other case than where there was an agreement between the two proprietaries for settling their boundaries. In such case, chancery would enforce the agreement, by a decree for a specific performance; but without an agreement, the question was not one within the jurisdiction of the courts of the kingdom, and was only cognisable in council before the king, as the lord paramount under whom the provinces were held in socage, by the tenure of fealty and some nominal reservation.

"The subordinate proprietors may agree how they may hold their rights between themselves;" "if a settlement of boundaries is fairly made, without collusion, the boundaries so made are to be presumed to be the true and ancient limits," made between parties in an adversary interest, each concerned to preserve his own limits, and no other or pecuniary compensation pretended. 1 Ves. sen. 447–54.

It is, then, the agreement or compact, which alone gives jurisdiction to a court of equity, to decree on the boundaries of provinces owned by proprietaries subordinate to the king; otherwise, it is a political question, to be settled in council, and not a judicial one for any court. It cannot be doubted, that the king in council was competent, by an order of council, to settle any question of disputed boundary between those colonies which had royal governments, by their charters, or in those provinces which were under proprietary governments, as he was equally the lord paramount of all. When the colonies and provinces became states, by the revolution, they adopted this principle in the articles of confederation; by delegating to congress, as the then only power which was paramount over contending states, the power to appoint a tribunal to settle their disputed boundaries. On the same principle, the constitution made congress paramount over the states, by making their agreements and compacts, touching their boundaries, subject to its approbation; and by assigning to this court, the cognisance of "controversies between states," which includes those relating to boundaries —made it so. Thus, the line is most distinctly defined, which separates the political and judicial questions which arise touching the boundaries of provinces; where there is an agreement, it is matter of judicial cognisance, to decree what and where the agreed boundary is; where there is none, it was a matter cognisable only before the king in council, before the revolution. But even then, proprietaries were competent to settle the boundaries of their respective provinces, by an agreement, without the license ef the king; and chancery would enforce its execution, by a decree *in personam* on the delinquent proprietary, without any reference to the rights of the king, other than adding to the decree, a clause of *salvo jure coronæ* (1 Ves. sen. 449, 454); which was more form than substance, as those rights continued, be the boundary where it might.

When the prerogative of the king, and the transcendent powers of parliament devolved on the several states, by the revolution (4 Wheat. 651), there could be no paramount power competent to prescribe the boundaries of states which were sovereign by inherent right, until they should appoint some common arbiter, to whose decree they would submit. By the confederation, congress appointed the tribunal, and by the constitution, this court was authorized to decide these questions; but in both cases, the subject-matters referred were "controversies," not "compacts or agreements;" controversies, open and existing, which states could not settle; not those which they had settled by solemn compacts, about which there was no difference in construction, and which both stated had faithfully executed. If a controversy did exist, either as to the terms or the execution of the compact, or, in the absence of a compact, the question of boundary depended on the line of original right, or the joint or separate acts of the contending states, the tribunal thus appointed could settle it, as the umpire between them. But it could exercise no authority which exceeded the submission;

it could not establish a boundary different from what both states had made, or from that which resulted from their antecedent rights and relation with each other, when they could not adjust them amicably. The umpire must base his award on the compact, if one exists; if not, on the right of the states, as adverse claimants to the same territory; he cannot look through or over the compact, and make an award on grounds which would annul any of its provisions, by giving to either state anything which she had renounced, or stipulated that it should be held by the other state, its citizens or grantees, "as rightfully granted." No arbiter between nations ever assumed such power; no nation would submit to its exercise; no such power is granted to this court, and any construction of the constitution which should so torture its plain language, and most manifest intention would shake the Union to its centre.

If these views are correct, their application to this case is decisive. It comes up on a writ of error from a circuit court, in a suit at common law, between citizens of Pennsylvania, claiming under Virginia and Kentucky, and citizens of Tennessee, claiming under that state and North Carolina, in which the circuit court, and the courts of the state, have, by the 11th section of the judiciary act, a concurrent jurisdiction, and on which this court acts by its appellate power. The plaintiff claims to recover the land, in virtue of a title confirmed by the compact. The defendant does not attempt to show, that the plaintiff's title is invalid, of no effect, on any construction of the compact, or any doubt as to what or where the agreed boundary is; but rests his whole case on showing that Walker's line had been so definitely established, before the compact, as to annul those provisions which confirm the plaintiff's title. As the effect of so adjudicating on the rights of the parties, would be an assumption by the ordinary judicial power of a state, or an inferior court of the United States, of an authority to force upon two states, a boundary which both disclaim, a power which this court, as the constitutional arbiter between them, could not exercise, in virtue of its original jurisdiction, it is clear, that it cannot so act by appellate power. In deciding suits between individuals claiming lands by grants of different states, between whom there was a compact of boundary, this court looks only to the compact, its terms and construction, to ascertain the relative rights of the parties, without looking beyond it in order to find out what the boundary ought to have been. See *Sims's Lessee* v. *Irvine*, 3 Dall. 425, 456, &c.; *Lessee of Marlatt* v. *Silk*, at the present term (11 Pet. 1), arising under the compact between Pennsylvania and Virginia. Adopting the principles of the common law, laid down in *Penn* v. *Baltimore*, that where boundaries are doubtful, it is a proper case for an agreement, which being entered into, the parties could not resort back to the original rights between them (1 Ves. sen. 452), and those of the law of nations, laid down in the opinion of the court in this case, it follows— That the only questions for our judicial cognisance, by appellate power, are those which arise on the construction of the compact, and the locality of the boundary as agreed and declared by a compact ratified by congress, to be decided by the same principles as a question arising on a cession by a state of territory to the United States, of which the case of *Handly's Lessee* v. *Anthony* (5 Wheat. 374) is an illustration. That case arose on the cession by Virginia to the United States, of the North-western territory; one party claimed under Kentucky,

the other under the United States, by a grant of land in Indiana; the question of the boundary between these states, came up collaterally, and was decided on the terms and construction of the act of cession, and the compact between Virginia and Kentucky. 5 Wheat. 375.

But in the case of *Foster* v. *Neilson* (2 Pet. 253), where the title to the land in dispute turned upon the boundaries of the cession of Louisiana by Spain to France, and by France to the United States, it was otherwise. The land was situated south of lat. 31° N., west of the Perdido, east of the Mississippi, and north of the Iberville; being part of what the United States had long contended was ceded as part of Louisiana, and which Spain insisted was retained by her as part of West Florida; one party claimed by a Spanish grant made after the cession, the other by mere possession, on the ground, that the Spanish grant was void. This court held, that the question of boundary was one which must be acted on by the political department of the government, and "that it was the province of the court to conform its decision to the will of the legislature, if that will has been clearly expressed." 2 Pet. 307. That case presented the precise question on which this turns—"to whom did the country between the Iberville and Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?" Ibid. 300. Had there been a compact by the two governments, declaring that the land belonged to one of them or its grantees, or the boundary not contested, it would have been purely a judicial question between individuals, as to which had the title; but as it depended on a boundary contested by both nations, the court was not competent to settle it. This principle was affirmed in the *United States* v. *Arredondo*, which turned on the construction of the treaty with Spain, ceding the Floridas to the United States; and this court held, that without an act of congress, submitting the question to the decision of the court, as a judicial one, it would have been a political question, on which congress must act, before it was cognisable by the court. 6 Pet. 710, 735, 743.

Now, as the necessary consequence of over-riding the compact, is to throw the parties back to the original right of the different states, to revive an old controversy between them about their boundaries, and to make the title of the parties depend on the very question which, in the case of *Foster* v. *Neilson*, this court declared itself incompetent to decide—"to whom did the country between latitude 36° 30′ and Walker's line, belong rightfully, when the title, now asserted by the plaintiffs, was acquired?" my answer is, that was a political question between the two states, who have settled it by a compact, in virtue of the requisite sanction of the constitution to the exercise of a power reserved to the states; and that compact declares, that the grants of lands in this territory, made in virtue of Virginia warrants "shall be considered as rightfully entered or granted." And being fully convinced that I am bound to take this compact as the rule for my judgment, the law of this case, the test by which the rights of parties are to be settled, and finding in it abundant authority for affirming the judgment of the circuit court, I should feel, that by any further consideration of the points made in the argument of the plaintiffs in error, it might be inferred, that I entertained doubts of the soundness of the principles on which my opinion is founded. These principles are, in my judgment, as unquestion-

able as they are fundamental, and cannot be impaired without great danger to the harmony, if not the permanency of the Union.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and was argued by counsel: On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*213] *Williams Waters *v.* Merchants' Louisville Insurance Co.

Marine insurance.—Proximate cause of loss.

The steamboat Lioness was insured on her voyages on the western waters, particularly from New Orleans to Natchitoches on Red river, and elsewhere, the Missouri and Upper Mississippi excepted, for twelve months; one of the perils insured against was fire; the vessel was lost by the explosion of gunpowder. On the trial of the cause, the judges of the circuit court of Kentucky were divided in opinion, on the following questions, which were certified to this court: 1. Does the policy cover the loss of the boat by a fire, caused by the barratry of the master? 2. Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness or unskilfulness of the master and crew of the boat, or any of them? 3. Is the allegation of the defendants in these pleas, or any of them, to the effect that the fire by which the boat was lost, was caused by the carelessness or unskilful conduct of the master and crew, a defence to this action? 4. Are the pleas of the defendant, or either of them, sufficient?

A loss by fire, when the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents, when the fire was communicated, and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose, is not a loss within the policy, if barratry is not insured against.

If the master or crew should barratrously bore holes in the bottom of a vessel, and she should thereby be filled within water and sink, the loss would probably be deemed a loss by barratry, and not by a peril of the seas, or of rivers, though the water should co-operate in producing the sinking.

The doctrine, as applied to policies against fire on land, has, for a great length of time, prevailed, that losses occasioned by the mere fault or negligence of the assured, or his servants, unaffected by fraud or design, are within the protection of the policy, and as such, are recoverable from the underwriters; this doctrine is fully established in England and America.

It is a well-established principle of the common law, that in all cases of loss, we are to attribute it to the proximate cause, and not to the remote cause; this has became a maxim to govern cases arising under policies of insurance.

In the case of the Columbia Insurance Company *v.* Lawrence, 10 Pet. 507, this court thought, that in marine policies, whether containing the risk of barratry or not, a loss, whose proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it might have been occasioned, remotely, by the negligence of the master and mariners; the court have seen no reason to change that opinion.[2]

As the explosion on board the Lioness was caused by fire, the fire was the proximate cause of the loss.

If taking gunpowder on board a vessel insured against fire, was not justified by the usage of the trade, and therefore, was not contemplated as a risk, by the policy, there might be great reason to contend, that, if it increased the risk, the loss was not covered by the policy.

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[1] Reported below, in 1 McLean 275.

[2] American Ins. Co. *v.* Insley, 7 Penn. St. 223; Phœnix Fire Ins. Co. *v.* Cochran, 51 Id. 143; Mathews *v.* Howard Ins. Co., 11 N. Y. 9. The negligence or carelessness of a competent master does not amount to barratry. Stowe *v.* Atlantic Mutual Ins. Co. 63 N. Y. 77.

Waters v. Merchants' Louisville Insurance Co.

*CERTIFICATE of Division from the Circuit Court of Kentucky. The plaintiff, a citizen of the state of Louisiana, on the 12th day of September 1832, caused insurance to be made by the Merchants' Louisville Insurance Company, at the city of Louisville, in the state of Kentucky, in the sum of $6000, on the steamboat Lioness, her engine, &c., to navigate the western waters usually navigated by steamboats, &c.; the assured having the privilege of placing competent masters in command, at any time; the insurance to continue for twelve months, until 12th September 1833. The perils insured against, were those "of rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes which shall come to the hurt or detriment of the steamboat, her engine, tackle and furniture, according to the true intent and meaning of the policy."

An action was instituted in the circuit court, on this policy, by William Waters, the assured, to November term 1836; and the plaintiff averred in the declaration, an interest in the steamboat Lioness, at the time of the insurance, and up to her loss, of $16,000; that the said steamboat Lioness, her engine, tackle and furniture, after the execution of said policy, and before its termination, to wit, on the 19th of May 1833, on Red river, about one mile below the mouth of Bon Dieu river, whilst she was on her voyage from New Orleans to Natchitoches, Louisiana, on Red river, were, by the adventures and perils of fire and the river, exploded, sunk to the bottom of Red river aforesaid, and utterly destroyed; so as to cause and make it a total loss. And the plaintiff averred, that said steamboat Lioness was, at the time of the explosion, sinking and destruction aforesaid, by the perils aforesaid, sufficiently found in tackle and appurtenances thereto, and completely provided with master, officers and crew, and in good order and condition, and perfectly seaworthy. The declaration also averred, that a regular protest of the manner in which the loss of vessel took place, was made; and the same, with proof of the plaintiff's interest, were delivered to the defendants. To this declaration, the defendants filed the following pleas:

1. That the officers and crew of the Lioness, and the time of her explosion and sinking, so negligently and carelessly conducted themselves in managing and attending to the safety of the cargo on board, that *the steamboat was, by means of fire, negligently and carelessly communicated to gunpowder in the hold, by the officers and crew, blown up and destroyed. [*215

2. That the Lioness was loaded in part with gunpowder, and that the officers and crew, or some of them, carelessly and negligently carried a lighted candle or lamp into the hold, where the powder was stored, and negligently handled the candle or lamp at the time that the powder was exploded; and thereby produced the explosion and destruction of the said steamer.

3. That the Lioness was in part loaded with gunpowder; and the same was so unskilfully, negligently and carelessly stowed away in the boat, by the officers and crew, or some of them, that the gunpowder took fire by reason of the said unskilfulness, negligence and carelessness; and the boat was, consequently, lost and destroyed by explosion.

4. That the Lioness received and had on board a quantity of gunpowder, at the time of the explosion, which increased the risk of the insurers, con-

trary to the true intent and meaning of the policy ; by which the insurers were discharged from the obligations of the policy.

5. That the loss of the Lioness was caused by the officers and crew, or some of them, carelessly and negligently carrying a lighted candle or lamp into the hold ; and so negligently or carelessly carrying the same, as the explosion of the vessel was thereby produced.

6. That the loss of the boat was caused by the conduct of the officers, managers and crew of the boat, in taking and receiving on board large quantities of gunpowder, and by carelessly keeping the same ; in consequence of which, the gunpowder became ignited, while on board the boat, and by its explosion, caused her loss and destruction. To these pleas, the plaintiff demurred ; and the defendants joined in demurrer.

On the argument of the cause, the following questions and points occurred, upon which the judges of the circuit court were divided in opinion ; and the same, at the request of the defendants, were stated, and ordered to be certified to this court. 1st. Does the policy cover a loss of the boat by a fire, caused by the barratry of the master and crew? 2d. Does
*216] the policy of insurance cover a loss of the boat by fire, *caused by the negligence, carelessness or unskilfulness of the master and crew of the boat, or any of them? 3. Is the allegation of the defendants, in their pleas, or either of them, to the effect that the fire by which the boat was lost was caused by the carelessness, or the neglect or unskilful conduct of the master and crew of the boat, a defence to this action? 4th. Are the said pleas, or either of them, sufficient?

The case was argued by *Crittenden*, for the defendants. No counsel appeared for the plaintiff.

Crittenden said, as to the first question, the only inquiry that seems necessary to a satisfactory solution or answer to it, is, whether barratry is insured against by the policy. Barratry is a peculiar and distinct risk, for which insurers are made responsible by express stipulation only. *Grim* v. *Phœnix Ins. Co.*, 13 Johns. 451. And, accordingly, in the common forms of marine policies, it is always expressly embraced, and described by its appropriate and technical denomination, barratry. In this policy, there is an enumeration of the risks, and barratry is not included. Its omission is equivalent, in legal interpretation, to its express exclusion: *expressio unius est exclusio alterius.* The general clause in the policy, that follows the enumeration of the risks, to wit, "and all other losses and misfortunes," &c., has reference only to "losses and misfortunes" proceeding from the enumerated risks ; and is not intended or to be construed as adding other risks, or enlarging the perils that the insurers are to bear. They are nothing more than words used out of abundant caution, to give full effect to the previously enumerated risks ; for which alone the underwriters are responsible. It may, therefore, we think, be safely assumed, that the policy, in this case, contains no insurance against barratry ; and, we suppose it must follow, that if the defendants did not insure against barratry, they cannot be liable for a loss by fire, caused by barratry.

2. As to the other three questions, it is supposed, that they will all be virtually settled by the decision of a single point ; that is, whether the defendants, there being no insurance against barratry, are liable for a loss

by fire, arising from the negligence of the assured, or his agents, the master and crew? *The defendants contend for the negative of this question. [*217

If there be one case, turning on that very point, in which such a liability has been adjudged to exist, we have not met with it. The liability of underwriters for such losses, where barratry also is included in the policy, is supposed to have been settled in England, as late as the year 1818, by the decision in the case of *Busk* v. *Royal Exchange Insurance Company*, 2 Barn. & Ald. 72; and that decision was adopted and followed by this court in the case of the *Patapsco Insurance Company* v. *Coulter*, at the January term 1830 (3 Pet. 222); contrary to the case of *Grim* v. *Phœnix Insurance Company*[1] (13 Johns. 451), and all the American cases on the same point. But the English case, and the case in this court, leave undetermined the question of liability, where there is no insurance against barratry. In the latter case, it is said, that question "need not here be considered;" and in the English case, the reasoning of the court to establish the liability, where barratry is insured against, is strong against the existence of any such liability, where there is no insurance against barratry. The court say, "where we find that they (the insurers) make themselves answerable for the wilful misconduct (barratry) of the master, in other cases; it is not too much to say, that they meant to indemnify the assured against the fire, proceeding from the negligence of the master and mariners." Thus, the undertaking to indemnify against the effects of negligence, is inferred, exclusively, from the express agreement to be answerable for barratrous conduct; an argument pregnant with the conclusion, that, but for the insurance against barratry, there would have been no responsibility on the insurers for a loss by negligence; and such, we insist, is the correct doctrine recognised and sanctioned by elementary writers (Marsh. 156, 421, and Philips, 224–7), and by adjudged cases. *Grim* v. *Phœnix Insurance Company*, 13 Johns. 451; and the cases there cited, of *Vos* v. *United Insurance Company*, 2 Johns. Cas. 180; *Cleveland* v. *Union Insurance Company*, 8 Mass. 308, &c.; *Toulmin* v. *Inglis*, 1 Camp. 421; *Pipon* v. *Cope*, Ibid. 434; *Toulmin* v. *Anderson*, 1 Taunt. 227; and *Boyd* v. *Dubois*, 3 Camp. 133. The case of *Phyn* v. *Royal Exchange Assurance Company*, 7 T. R. 505, and many other cases, proceed on the same principle.

It is admitted, that the doctrine for which the defendants, in this *case contend, is, seemingly, in opposition to some remarks that fell from this court, in the late case of the *Columbia Insurance Company of Alexandria* v. *Lawrence*, 10 Pet. 507. It is respectfully suggested, that those remarks (entitled in all other respects to the highest consideration) related to a point not involved in the case, or necessary to its determination; and were, probably, therefore, less weighed and considered by the court. The point was not involved, because that was an insurance of a house against fire; and, in such cases, the books and authorities all seem to concur, in holding the insurer responsible for losses occasioned by the negligence of servants; in contradistinction to the responsibility resulting from marine policies. It is hoped, therefore, that the question now under [*218

[1] This case was overruled, in Mathews *v.* Howard Ins. Co., 11 N. Y. 9.

consideration, may be regarded as an open one; neither concluded nor affected by what fell from the court, in the case last mentioned.

Furthermore, the rule for which we contend, exempting insurers from liability for the negligence of the assured and his agents, is supported by its analogy to the familiar and well-established doctrines applicable to bailments generally; and is sanctioned by reason and sound policy, as contributing to the general interest and security, by rendering the assured and their agents more diligent and more careful.

STORY, Justice, delivered the opinion of the court.—This is a case certified to us from the circuit court for the district of Kentucky upon certain questions, upon which the judges of that court were opposed in opinion. The action was brought by Waters, the plaintiff, on a policy of insurance, underwritten by the Merchants' Louisville Insurance Company, whereby they insured, and caused to be insured, the plaintiff, "lost or not lost, in the sum of $6000, on the steamboat Lioness, engine, tackle and furniture, to navigate the western waters usually navigated by steamboats, particularly from New Orleans to Natchitoches, on Red river, or elsewhere, the Missouri and Upper Mississippi excepted (Captain Waters having the privilege of placing competent masters in command at any time, $6000 being insured at New Albany, Indiana); whereof William Waters in at ptesent master; beginning the adventure upon the said steamboat, from the 12 of September 1832, at twelve o'clock meridian, and to continue and endure until the 12th of September 1833, at twelve o'clock, meridian (twelve months)."
*219] The policy further *provided, that "It shall be lawful for the said steamboat, during said time, to proceed to, touch and stay at, any point or points, place or places, if thereunto obliged by stress of weather or other unavoidable accidents, also at the usual landings, for wood and refreshments, and for discharging freight and passengers, without prejudice to this insurance. Touching the adventures and perils, which the aforesaid insurance company is contended to bear; they are, of the rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes, which shall come to the hurt, detriment or damage of the said steamboat, engine, tackle and furniture, according to the true intent and meaning of this policy." The premium was nine per cent. The declaration avers a total loss; and that the said steamboat and appurtenances insured "were, by the adventures and perils of fire and the river, exploded, sunk to the bottom of Red river aforesaid, and utterly destroyed."

The defendants pleaded six several pleas, to which a demurrer was put in by the plaintiff; and on the consideration of the demurrer, the following questions and points occurred: 1. Does the policy cover a loss of the boat by a fire, caused by the barratry of the master and crew? 2. Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness or unskilfulness of the master and crew of the boat, or any of them? 3. Is the allegation of the defendants, in their pleas, or either of them, to the effect that the fire, by which the boat was lost, was caused by the carelessness, or the neglect or unskilful conduct of the master and crew, a defence to this action? 4. Are the said pleas, or either of them, sufficient? These questions constituted the points on which the division of the judges

took place in the court below; and they are those upon which we are now called to deliver our opinion, upon the argument had at the bar.

As we understand the first question, it assumes, that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents; or, in the other words, that the fire was communicated and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say, that a loss by fire caused by the barratry of the master or crew, is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its *proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. [*220 If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or of rivers, though the flow of the water should co-operate in producing the sinking.

The second question raises a different point, whether a loss by fire, remotely caused by the negligence, carelessness or unskilfulness of the master and crew of the vessel, is a loss within the true intent and meaning of the policy. By unskilfulness, as here stated, we do not understand, in this instance, a general unskilfulness, such as would be a breach of the implied warranty of competent skill to navigate and conduct the vessel; but only unskilfulness in the particular circumstances, remotely connected with the loss. In this sense, it is equivalent to negligence or carelessness in the execution of duty, and not to incapacity.

This question has undergone many discussions in the courts of England and America, and has given rise to opposing judgments in the two countries. As applied to policies against fire on land, the doctrine has, for a great length of time, prevailed, that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies; and as such recoverable from the underwriters. It is not certain, upon what precise grounds this doctrine was originally settled. It may have been from the rules of interpretation applied to such policies, containing special exceptions, and not excepting this; or it may have been, and more probably was, founded upon a more general ground, that as the terms of the policy covered risks by fire, generally, no exception ought to be introduced by construction, except that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied. It is probable, too, that the consideration had great weight, that otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur, which could not be traced back to some carelessness, neglect or inattention of the members of the family.

Be the origin of it, however, what it may, the doctrine is now firmly established both in England and America. We had occasion to consider and decide the point at the last term, in the case of the **Columbia Insurance Company of Alexandria* v. *Lawrence*, 10 Pet. 517–18; [*221 which was a policy against the risk of fire on land. The argument addressed to us on that occasion, endeavored to establish the proposition, that there was no real distinction between policies against fire on land and at sea; and

that in each case, the same risks were included ; and that as the risk of loss by fire, occasioned by negligence, was not included in a marine policy, unless that of barratry was also contained in the same policy, it followed, that as the latter risk was not taken on a land policy, no recovery could be had. In reply to that argument, the court made the comments which have been alluded to at the bar, and the correctness of which it becomes now necessary to decide.

It is certainly somewhat remarkable, that the question now before us should never have been directly presented in the American or English courts ; viz., whether, in a marine policy (as this may well enough be called), where the risk of fire is taken, and the risk of barratry is not (as is the predicament of the present case), a loss by fire, remotely caused by negligence, is a loss within the policy. But it is scarcely a matter of less surprise, considering the great length of time during which policies against both risks have been in constant use among merchants ; that the question of a loss by negligence, in a policy against both risks, should not have arisen in either country, until a comparatively recent period.

If we look to the question, upon mere principle, without reference to authority, it is difficult to escape from the conclusion, that a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy ; unless there be some other language in it, which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy. There is nothing unreasonable, unjust or inconsistent with public policy, in allowing the assured to insure himself against all losses, from any perils not occasioned by his own personal fraud. It was well observed by Mr. Justice BAYLEY, in delivering the opinion of the court in *Busk* v. *Royal Exchange Assurance Company*, 2 Barn. & Ald. 79, after referring to the general risks in the policy, that "the object of the assured, certainly, was to protect himself against all the risks incident to a marine adventure. The underwriter being, therefore, liable, *primâ facie*, by the express terms of the policy, it lies upon him to discharge himself. Does
*222] he do so, by showing that the *fire arose from the negligence of the master and mariners?" "If, indeed, the negligence of the master would exonerate the underwriter from responsibility, in case of a loss by fire ; it would also, in cases of a loss by capture or perils of the sea. And it would, therefore, constitute a good defence, in an action upon a policy, to show, that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power." There is great force in this reasoning, and the practical inconvenience of carving out such an implied exception from the general peril in the policy, furnishes a strong ground against it ; and it is to be remembered, that the exception is to be created by construction of the court, and is not found in the terms of the policy. The reasons of public policy, and the presumption of intention in the parties to make such an exception, ought to be very clear and unequivocal, to justify the court in such a course. So far from any such policy or presumption being clear and unequivocal, it may be affirmed, that they lean the other way. The practical inconvenience of creating such an exception would be very great. Lord TENTERDEN alluded to it, in *Walker* v. *Maitland*, 5 Barn. & Ald. 174. "No decision (said he) can be cited, where

in such a case (the loss by a peril of the sea), the underwriters have been held to be excused, in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule. It will introduce an infinite number of questions, as to the *quantum* of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy ; in that case, it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters are not liable. These, and a variety of other such questions, would be introduced, in case our opinion were in favor of the underwriters." His lordship might have stated the argument from inconvenience, even in a more general form. If negligence of the master or crew were, under such circumstances, a good defence, it would be perfectly competent and proper, to examine on the trial, any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taken in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the *voyage ; for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the [*222 peril might have been avoided or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy, for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard.

This is not all, we must interpret this instrument according to the known principles of the common law. It is a well-established principle of that law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause ; *causa proxima non remota spectatur:* and this has become a maxim, not only to govern other cases, but (as will be presently shown) to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case ; and why it should not be so applied, we are unable to see any reason.

Let us now look to the authorities upon the point. In *Busk* v. *Royal Exchange Assurance Company*, 2 Barn. & Ald. 73, the very point came before the court. The policy covered the risk by fire, and the question made was, whether the fact that the loss of the ship by fire, occasioned by the negligence of the crew, was a good defence ; the court held, that it was not. In that case, the policy also included the risk of barratry; and it is now said, that the decision of the court turned wholly upon that consideration, the court being of opinion, that in a policy, where the underwriter takes the superior risk of barratry, there is no ground to infer, that he does not mean to take the inferior risk of negligence ; it is certainly true, that the court do rely, in their judgment, upon this circumstance ; and it certainly does fortify it. But there is no reason to say, that the court wholly relied upon it, and that it constituted the exclusive ground of the judgment ; on the contrary, Mr. Justice Bayley, in delivering the opinion, takes pains, in the earlier part of that opinion, to state, and to rely upon the maxim already stated. He said, "in our law, at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks ; but the remote cause of which may be traced

to the misconduct of the master and mariners." "It is certainly a strong argument against the objection, now raised for the first time, that in the great variety of cases upon marine policies, which have been the subjects of litigation in courts of justice (the facts of many of which must have
*224] presented a ground for such a defence), *no such point has ever been made." In *Walker* v. *Maitland*, 5 Barn. & Ald. 173, a similar question was presented, where the maxim was still more strongly indicated, as the general, though not as the exclusive, ground of the judgment. The case of *Bishop* v. *Pentland*, 7 Barn. & Cres. 219, turned exclusively upon the very ground of the maxim; and not a single judge relied upon the policy, as containing the risk of barratry. Indeed, it does not appear, that the risk of barrarty was, in that case, in the policy. Mr. Justice BAYLEY, on that occasion, put the former cases as having been expressly decided upon this maxim. His language was, "the cases of *Busk* v. *Royal Exchange Assurance Company*, and *Walker* v. *Maitland*, establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks; though the remote cause may be traced to the negligence of the master and mariners."

Then came the case of the *Patapsco Insurance Company* v. *Coulter*, 3 Pet. 222, where the loss was by fire, and barratry also was insured against. The court, on that occasion, held, that in such a policy, a loss which was remotely caused by the master or the crew, was a risk taken in the policy; and the doctrine in the English cases already cited, was approved. It is true, that the court lay great stress on the fact, that barratry was insured against; but it may also be stated, that this ground was not exclusively relied on, for the court expressly refer to and adopt the doctrine of the English cases, that the proximate and not the remote cause of a loss is to be looked to. It is known to those of us who constituted a part of the court at that time, that a majority of the judges were then of opinion for the plaintiff, upon this last general ground, independently of the other. It was under these circumstances, that the case of the *Columbia Insurance Company of Alexandria* v. *Lawrence*, 10 Pet. 507, came on for argument; and the court then thought, that in marine policies, whether containing the risk of barratry or not, a loss whose proximate cause was a peril insured against, is within the protection of the policy; notwithstanding it might have been occasioned remotely by the negligence of the master and mariners. We see no reason to change that opinion; and on the contrary, upon the present argument, we are confirmed in it.

The third and fourth questions are completely answered by the reasoning already stated. Those pleas contain no legal defence to the action, in the form and manner in which they are pleaded; and are not sufficient to bar a recovery by the plaintiff.

*225] *Some suggestion was made at the bar, whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of opinion, that as the explosion was caused by fire, the latter was the proximate cause of the loss.

The fifth plea turns upon a different ground. It is, that the taking of gunpowder on board was an increase of the risk. If the taking of the gunpowder on board was not justified by the usage of the trade, and therefore, was not contemplated as a risk by the policy; there might be great reason

to contend, that if it increased the risk, the loss was not covered by the policy. But in our opinion, the facts are too defectively stated in the fifth plea, to raise the question.

Our opinion will be certified to the circuit court accordingly. On the first question, in the negative; on the second question, in the affirmative; and on the third and fourth questions, in the negative.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, 1st, that the policy does not "cover a loss of the boat by a fire, caused by the barratry of the master and crew;" 2d, that the policy does "cover a loss of the boat by fire, caused by the negligence, carelessness or unskilfulness of the master and crew of the boat, or any of them;" 3d, that the allegations of the defendants, in their pleas, or either of them to the effect that the fire, by which the boat was lost, was caused by the carelessness, or the neglect or unskilful conduct of the master and crew of the boat, "is not a defence to this action;" and 4th, that the said pleas, or either of them, are not sufficient in law as a bar to the action of the plaintiff. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said circuit court.

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*State of Rhode Island *v.* State of Massachusetts. [*226

Continuance.

In a case depending between the states of Rhode Island and Massachusetts, the senior counsel appointed to argue the cause for the state of Rhode Island, by the legislature, was prevented, by unexcepted and severe illness, attending the court; the court, on the application of the attorney-general of the state, ordered a continuance for the term.

Mr. *Green*, the Attorney-Gennral of the state of Rhode Island, moved the court for a continuance of this cause. He stated, that at the session of the general assembly of Rhode Island, in January 1836, a resolution was passed, associating Mr. Hazard with the attorney-general of the state, as counsel in the cause. Mr. Hazard had since been attacked with a disease, which was supposed to be temporary in its character; and until within a few days, confident expectations of his recovery, and that he would be able to attend and argue this case, were entertained. By an arrangement with the attorney-general of Massachusetts, attending the court, this case has been left open, in the hope of the arrival of Mr. Hazard. This hope no longer exists; as his indisposition has increased, so as to prevent his commencing the journey from Rhode Island to this place.

Mr. Hazard is the senior counsel in the case, and has been relied upon by the state of Rhode Island to argue it. It was his report, as chairman of the committee of the legislature of the state, upon which the resolution of that body was adopted, ordering this bill against the state of Massachusetts to be filed. No other counsel has been employed to argue the

cause in the place of Mr. Hazard; and, at the advanced period of the session of this court at which this motion is submitted, no counsel can be prepared to go into the argument.

Questions between the different states of the Union, are always of deep concern and of high importance. An appeal to this court for the decision of such questions, is an application to the highest powers of the court. Where these questions are for a part of the territory in possession of either of the contending states, occupied by a large population, they become of the deepest and highest interest. Such is the present controversy.

*227] *It is submitted, that this court will not apply the strict rules which govern other cases to this. The peace and tranquillity of the Union may be disturbed by the decision of such a case, however just and proper, if a belief shall prevail, that every opportunity for its full and complete discussion was not afforded to each party. Although no imputation of wrong would be charged to this court, which, in conformity with its established rules, had proceeded to the decision of the cause, against the party opposing the application of those rules, under an existing or asserted disadvantage to the opposing party, strong feelings of dissatisfaction and discontent might prevail; always, if possible, to be prevented between the citizens of neighboring commonwealths.

The questions which will be raised in the argument of this case, are of great and general importance; and some of them have not been decided. Questions of the jurisdiction of this court in a case between two states; and whether, if it exists, provision has been made by legislation for its exercise, are involved; and must be determined in the final disposition of the cause. These questions were raised in the case of the *State of New Jersey* v. *State of New York*, but they were not decided. The weight and interest of these questions were felt, when that case was before this court some years since. The controversy between those states was adjusted by commissioners, and the case was not decided here.

To the state of Massachusetts, the postponement of the final decision of this case to the next term, can do no injury. She is in possession of the territory which is claimed by Rhode Island, and the inhabitants of the same are subject and obedient to her laws. Rhode Island, this court will believe, does not, on other than grounds which she considers will sustain her claims, come into this high tribunal to assert her rights to that territory. Although the bill in this case was filed by a gentleman who is a member of this bar (Mr. Robbins), yet he was never counsel in the case, but acted only as the representative of the attorney-general of Rhode Island, in presenting it to this court. By the act of God, the state is deprived of the assistance of the counsel on which she relied in this cause; and this court, it is hoped, will order the postponement which has been asked. In the state of Rhode Island, illness of counsel is a sufficient ground for the continuance of a cause, depending in a state court.

Austin, the Attorney-General of the state of Massachusetts, opposed the

*228] continuance. *The state of Massachusetts is before the court, represented by counsel, and this at very considerable expense. She had notice that the case would be argued at this term; and she has attended in conformity with this requisition. The case is one of a character which

gives it a peculiar interest; and which, while it is unsettled, affects the tranquillity of not less than five thousand persons, who are inhabitants of the territory claimed by Rhode Island. No difference exists between states and individuals, in suits depending before this court; if any do exist, the case of a state brought here to defend her possession of her territory, and her jurisdiction over a part of her population in the occupation of it, has a strong claim to obtain an early decision of the court. The state of Rhode Island has chosen to come to this court, and she should be at all times prepared to sustain her claim for the interference of the court, in a controversy which she has brought forward, and has chosen her own time for its presentation.

It is admitted, that the indisposition of counsel may furnish an inducement to a court to postpone a cause, until a subsequent day in term; but it cannot be the foundation for a continuance for the whole term. It appears, that the bill which was filed on the commencement of this cause, was signed by a gentlemen of this bar, now in the city of Washington, Mr. Robbins, a member of the senate; and thus Rhode Island is represented by two most able counsel.

The cause has been pending for six years; and two years have passed since the answer of the state of Massachusetts was filed; since which the cause could have been disposed of, at either of the two terms which have occurred subsequent to the putting in of the answer. While every disposition to accommodate the wishes of the counsel representing the state of Rhode Island exists, and the circumstances under which the motion has been made, are fully appreciated; as the official representative of the state of Massachusetts, Mr. Austin stated, that he could not consent to the continuance of the cause.

Taney, Ch. J., on the day following the argument on the motion, said, the court had decided to order the cause to be continued.

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*Thomas Jackson, a Citizen of the State of Virginia, and others, Citizens of that state, *v.* The Reverend William E. Ashton, a Citizen of the State of Pennsylvania. [*229

Rescission of contract in equity.

The appellants filed a bill in the circuit court of Pennsylvania, claiming to have a bond and mortgage cancelled and delivered up to them; they alleged, that the same was given without consideration; was induced by threats of a prosecution for a criminal offence against the husband of the mortgagor; and that the instruments were, therefore, void; and that they were obtained by the influence the mortgagee exercised over the mortgagor, he being a clergyman, and her religious visiter; and her mind being weak or impaired. The circuit court of Pennsylvania dismissed the bill; and on appeal to this court, the decree of the circuit court was affirmed.[1]

A court of chancery will often refuse to enforce a contract, when it would also refuse to annul it; in such a case, the parties are left to their remedy at law.

No admissions in an answer to a bill in chancery can, under any circumstances, lay the foundation for relief, under any specific head of equity, unless it be substantially set forth in the bill.

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[1] See Greenfield's Estate, 24 Penn. St. 232; Audenreid's Appeal, 89 Id. 114.

[2] Knox *v.* Smith, 4 How. 298.

Jackson v. Ashton.

Appeal from the Circuit Court of Pennsylvania. The principal facts of the case, as stated in the opinion of the court, were as follows:

The appellants, who were the devisees of Maria Goodwin, brought their bill to set aside a bond and mortgage executed by Maria Goodwin, and her trustee, Kenneth Jewell, to the defendant, on the 5th of January 1829, to secure the payment of $3000. The bill represented, that the mortgage was given without consideration; that shortly after the decease of Thomas Goodwin, the husband of Mrs. Goodwin, which took place in February 1828, the defendant stated to her, that he had a demand against her husband, to whom she had been much attached, and who had treated him extremely ill; that he had it in his power to render his memory odious, by exposing his conduct; but that he would conceal the transaction, if she would execute a mortgage to him on her own property, to secure the debt; that she refused to execute the mortgage, or give any other security, by the advice of her counsel; and afterwards, avoided his visits, to get clear of his importunities; *230] that shortly after this, Mrs. Goodwin was *taken ill, and being executrix, her husband's affairs pressed much upon her, and she fell into a low nervous state of spirits, which impaired her memory and affected her mind; that whilst she was in this state, the defendant renewed his visits; and professing great kindness for her, took upon himself the management of her business; and having gained her confidence, prevailed upon her, in the absence of any friend and legal adviser, to execute the mortgage, and a corresponding bond, and to direct that her trustee should join in the execution; the defendant, as a clergyman, saying she ought to do so; that these representations had great influence on Mrs. Goodwin, who was a woman of devout religious feelings. The complainants further represented, that at the time the bond and mortgage were executed, Mrs. Goodwin was utterly incapable of understanding or comprehending their meaning and effect; that after the death of Mrs. Goodwin, the defendant stated to the complainants, that the mortgage was executed as collateral security for any sum that might be due to him from the estate of Thomas Goodwin, deceased.

In his answer, the defendant admitted the execution of the bond and mortgage, and stated, that in 1822, being about to receive a sum of money, he consulted Thomas Goodwin, who was then a broker in Philadelphia, in what way he could most advantageously invest it. That Goodwin advised him to leave the money in his hands, and that he would loan it out on good security. That the defendant, in pursuance of this advice, placed $3400 in his hands, and also loaned him $275; and took his notes by way of acknowledgment. That Goodwin received a bond and mortgage for $2600, in favor of defendant, from Samuel Jones, covering an estate which was under prior mortgages for $2500, which, with the money of the defendant, Goodwin was to satisfy; but that he paid but $1000 of the amount, and fraudulently withheld the balance. And to cover this fraud, that he obtained from the recorder of deeds, copies of the prior mortgages on the estate of Jones, and at the foot of the certificate of the recorder, wrote himself "paid and satisfied;" and then exhibited the papers to Jones and the defendant, to show that he had discharged the mortgages. And as there also remained on the *231] estate a prior lien of a *judgment for $700, that Goodwin took a bond of indemnity from Jones against it. That defendant often solicited

Goodwin to deliver up to him the mortgage, which, under various pretexts, he declined doing, but assured the defendant that he had discharged the prior mortgages; at length, the defendant becoming uneasy, he called at the recorder's office, and there found that the mortgage for $1500 had not been discharged; and that the indorsement upon it of "paid and satisfied," must have been made by Goodwin. On the same day that the defendant made this discovery, Goodwin informed him that he was about to stop payment; but he assured the defendant that he should not lose a cent.

Goodwin admitted to the defendant, that he had used the money for his own purposes, instead of paying off the mortgage, and that he had deceived both the defendant and Jones. And at the same time, Goodwin placed a mortgage in the hands of the defendant for $2575, to secure him against the mortgage on the property of Jones, which should have been discharged. That Goodwin assured him the property mortgaged was unincumbered, which was untrue; and the defendant reproached Goodwin with having again deceived him, and threatened him with an exposure, unless he should make payment or give security. Goodwin replied, "what can you do? if you push me, I will take the benefit of the insolvent law;" the defendant rejoined, "have you forgotten the certificate which you forged? My attorney informs me, that if Mr. Jones, or myself, shall come into court with that certificate, that you would be sentenced to hard labor." Goodwin became alarmed, and stated, that he would sell the property, and make good the deficiency, if the defendant would not expose him. This conversation took place in the presence of Mrs. Goodwin, who, when the defendant was leaving the house, accompanied him to the door, appealed to his friendship for her, entreated him not to expose the transaction, declared that she would not have it known, especially in the church, and among the congregation at Blockley, for any consideration whatever. She added, that Mr. Goodwin would sell the property, and make provision for the payment, and that she would make up the deficiency out of her separate estate; and that neither the defendant nor his child, whose deceased mother she greatly esteemed, should lose anything.

A few days after this, Mrs. Goodwin saw the certificate, and *acknowledged that it was in the handwriting of her husband; and she [*232
again entreated the defendant not to expose him, and said she would pay him, if her husband did not. This assurance was frequently repeated, on various occasions, up to the death of Goodwin, which took place suddenly, in February 1828. At the moment of his death, Mrs. Goodwin sent for the defendant, desired him to superintend the interment, and she threw herself upon his kindness for consolation. After the interment, the defendant spent the evening with Mrs. Goodwin, engaged in religious conversation; and being about to leave, she said, Mr. Ashton, I hope you will not forsake me. If you cannot come in the day-time, come in the evening, and pray with me. I will be pleased to see you, at any time, and as soon as I get a little over my trouble, I will fulfil my promise and settle with you. The defendant replied, that he hoped she would not let his concern trouble her at that time; that it gave him not a moment's uneasiness. This promise was repeated by Mrs. Goodwin again and again; and on one occasion, when the defendant was ill, she expressed uneasiness, lest he might die before the matter was arranged. On consulting counsel, she was advised to do nothing with her

property for a year, and he refused to draw a deed. But she said, the advice was unjust, that she would pay the defendant, and felt herself bound to do so, as a Christian. And she delivered a covenant to the defendant, binding herself to make good the deficiency, should there be one, on the sale of her husband's estate. Up to this time, the defendant had not expressed a desire to Mrs. Goodwin, that she should pay any part of her husband's debt.

In December 1828, the defendant stated to Mrs. Goodwin, that she had acted voluntarily in the matter and not through his persuasion. That if he might be permitted, for the first time, to become active in the business, he would suggest, that as her property was held in trust, the covenant which she had executed to him was not valid. She expressed surprise, and a willingness to secure him; and the bond and mortgage in controversy were prepared and executed at the office of Thomas Mitchell, a scrivener. An agreement was executed by the defendant, declaring that the bond and mortgage were given as collateral security, &c.

With the exception of the execution of the bond and mortgage, the defendant denied all the material allegations of the bill. *The other
*233] facts are stated in the opinion of the court; and by the counsel, in the argument.

The case was argued by *Key*, for the apellants; and by *Ingersoll*, for the appellee.

Key, for the appellants, contended:—1. There was no consideration for the bond or mortgage. 2. That they were executed by a weak woman, who, at the time, was incapable of making such a contract. 3. That they were extorted by a threat to prosecute her husband. 4. That the relation in which the defendant stood to Mrs. Goodwin, as her pastor and religious visiter, and as agent and adviser in her affairs, prohibited any contract with her; especially, when made in the absence of her counsel, and with his known disapprobation.

Mr. Key, in opening the case, represented the contract which gave rise to this controversy as having a remarkable origin, and followed by very singular circumstances. The origin, as exhibited by defendant in his answer, and the proofs, was this: he had been defrauded by Mr. Goodwin; the fraud, as defendant thought, was accompanied by forgery, and he goes to Goodwin, and finds him at his house, and in the presence of his wife, charges him with the fraud, and threatens him with a prosecution for forgery; he says he has taken counsel, and that he has a paper, which he is advised, proves the forgery, and would send Goodwin to hard labor. Goodwin is alarmed; begs him to keep the matter secret; and promises to pay or secure him. On leaving the room, Mrs. Goodwin follows him; the defendant was a clergyman, Mrs. Goodwin was a pious woman, of the same church, and had been a communicant in defendant's congregation. She begs the defendant "not to expose the transaction," saying, "she would not have it known, especially in the church and among the congregation at Blockley, for any consideration whatever;" and she added, that Mr. Goodwin would sell the property and pay it, and "she would make up the deficiency out of her separate estate." After a few days, she called on defendant, and asked to see the certificate, which defendant had charged to be a forgery; it was shown to her, and she observed "it was her husband's handwriting; and

again entreated the defendant not to expose it, and said that she would pay *him, if her husband did not;" this was in 1824; Goodwin died suddenly, in February 1828. The answer says, "the defendant continued to rest upon the assurances which had been so often given to him, by both the husband and wife; and especially upon the good faith of the latter, in which he placed great reliance, after the repeated solemn voluntary promises which she had made to him; which he believed she had both the inclination and ability to make good." [*234

At the death of her husband, Mrs. Goodwin "sent for defendant," "asked his friendly assistance, and threw herself upon him for consolation; and the defendant passed the evening at her house, in religious conversation." He continued to visit her, till he was taken sick. She then went to see him, and on her second visit, said, "she came to fulfil her promise, by offering him further security; that she would deed him the house in Lombard street, to hold as collateral security, till Mr. Goodwin's property was sold:" the defendant expressed himself satisfied with whatever she thought right. Goodwin (it should be observed), in his lifetime, had given the defendant some property as security, and the defendant himself, as he himself stated, only thought himself unsecured to the amount of $500 or $600. The conversation ended by her assuring the defendant, that "she would call on Mr. Ingraham, her attorney, to draw the deed, and bring it as soon as it was ready." A few days afterwards, she called again, and said, "she had called on Mr. Ingraham, agreeable to her promise, but he refused to draw the deed; stating it would be wrong for her to pay any of her husband's debts; and that she must do nothing with her property, any way, for a year." She added, "that the advice of Mr. Ingraham was very unjust, that it did not move her in the least from her intention to pay all Mr. Goodwin's friends to whom he was indebted, and that she felt bound in conscience, as a Christian, to do so." She, therefore, delivered to the defendant a covenant, whereby she agreed to make good the deficiency, should there be one, after the sale of her husband's property, in the payment of the defendant's claim of $2575, with the interest due thereon. This covenant bears date July 17th, 1828.

After this, the answer stated, about the 31st of December 1828, the defendant informed her this covenant did not bind her property, as it was held by trustees. She expressed her surprise, and said, she had executed a mortgage to the bank, and "and would execute a similar one in favor of the defendant." A mortgage was accordingly prepared and executed by herself and Kenneth Jewell, her trustee, *with a bond conditioned to pay $3000 to defendant, and a warrant of attorney to confess judgment; all dated on the 5th of January 1829. A defeasance was drawn, at the same time, to be signed by defendant; showing the true consideration of the mortgage was not the bond, but to pay the deficiency of defendant's debt from Thomas Goodwin, after applying the proceeds of Goodwin's property to that object. This defeasance was never, in point of fact, delivered to Mrs. Goodwin or her trustee. The scrivener did not know when it was executed. Defendant was to come back and execute it; it was then to be sent to Kenneth Jewell by the scrivener. This never was done; and there was never any other delivery of it than leaving it with the scrivener, when it was signed. Nor was it ever afterwards produced, till after this suit was brought, when it was produced by defendant, who [*235

was said to have borrowed it. It appears, by the evidence of B. G. Mitchell, that neither he, nor his father, nor the defendant, about a year before the suit was brought, knew where it was; and that it was then said defendant had borrowed it. The mortgage is not only for the house in Lombard street, but for two others; and so far as the case shows, for all her property. This is the bond and mortgage, which the defendant now asserts the right to establish, in opposition to the bill filed in the court below, by the representatives of Mrs. Goodwin, to set them aside, as made without consideration, as being obtained from a weak woman "utterly incapable, at the time of execution, from her state of health and mind, of understanding or comprehending the meaning of the same;" and in favor of a person "who having gained her confidence, prevailed upon her, in the absence of any friend or legal adviser, to execute to him the said bond and mortgage, and to direct her trustee to join in the execution, representing to her, as a clergyman, that she ought to do so; which said representation, she being of a devout disposition and religious inclination of mind, had, in her then state of health and mind, great influence upon her." He contended, that from the bill, answer and proof, it appeared—

1. That there was no consideration, or an illegal consideration, for this bond and mortgage. The answer represented the covenant of July as the consideration for the bond and mortgage; and the previous parol promise of Mrs. Goodwin, in the life of her husband, as the consideration for the covenant. But if that previous parol promise was without consideration (as it clearly was), then the giving the covenant, and, subsequently, *the mortgage, under the influence of the previous promise, and the impression that it was obligatory, is no confirmation. Under this head, he cited, 3 Bos. & Pul. 249; 7 Cow. 57; 2 Bro. C. C. 400; 3 Ibid. 117; 2 Vern. 121.

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He further contended, under this proposition, that an illegal consideration appeared, and was, of itself, alone, conclusive against the validity of the contract; the original consideration, which tainted all the subsequent contracts, was the suppression of a prosecution. This is shown by the answer, and by the testimony of Dodge, who states, that the defendant told him, "the consideration related to unfair conduct—the forging of a certificate from the recorder's office; and he was to let the matter rest, and not to prosecute, if she would pay. In the defendant's proof, a similar statement is shown to have been made by Mrs. Goodwin. That such a consideration vitiated the contract, he cited, *Marbury* v. *Brooks*, 7 Wheat. 575; 3 P. Wms. 279; Powell on Contracts, 354–6.

It is said, there was here no forgery in fact; and that, therefore, there could be no prosecution. Powell on Contracts 356, shows that if there was any color for the charge, it is enough; that it is not necessary the crime should appear to have been committed. And if, again, it is said, that complainants are not entitled to relief, if compounding the felony was the consideration, being *in pari delicto;* he answered, that that principle, and all the cases cited in support of it, only applied, where the party himself who had assented to the contract, came to a court of equity for relief; the representatives of such a party were not *in pari delicto*, and not liable to the objection; this distinction was taken, and relief allowed to the representatives in *Matthew* v. *Hanbury*, 2 Vern. 187; and the same case also

answers the objection, that the bill does not change the illegal consideration or the fraud. 9 Pick. 212 ; 3 Cow. 538. If, then, there was nothing more in the case, this illegal consideration being fully proved by the defendant himself, in his own evidence, and admitted by his own statement of the consideration to Mr. Dodge ; vitiates these securities.

2. He next contended, that these instruments were obtained from a weak women, incapable at the time of making such a contract ; and artfully extorted from her by exciting her fears for her husband. He compared the testimony of complainants and defendant as to her state of mind and body, when these contracts were made, and *contended, that the weight of evidence was against her competency ; the contracts she did make at [*237 that time, were all made with the approbation of her legal advisers ; and three of these witnesses say, they would not have made a contract with her otherwise. Further, the complainants' witnesses are her intimate acquaintances, and on most familiar and confidential terms of intimacy ; and those of the defendant had but a slight acquaintance with her. The defendant, on the contrary, is shown by all these transactions to have been a shrewd man. He gets security for $3000, to save him from a probable loss of $500 or $600 ; is to give a defeasance, which she never gets ; which he borrows, and nobody knows where it is, till its production is necessary for him. She offers one house, he gets three ; and apparently, all the property she had. He does not move in the business, during her husband's life, because he feared he would not have suffered his wife to be so imposed on. When she complains of a transaction, he quiets her, by promising to wait for his money, till after her death. And above all, by his art in making his threat of prosecution in her presence, knowing her affection for her husband would prompt her by securing him, to prevent the prosecution. Such a contract, he contended, could not be sustained between any persons ; but here—

3. The relation subsisting between the parties, the defendant being her pastor and religious visitor ; on whom, as he himself states, "she had thrown herself for consolation ;" and being, further, her agent and adviser, in attending to her property and managing her affairs, as the proof shows ; gives to the contract a character which a court of equity, on principles of public policy, must condemn. The relation being proved, the presumption of the undue and irresistible influence of such a relation is enough for the complainants. Under this head, he cited, 12 Ves. 371, in which the Lord Chancellor says, "without any consideration of fraud, or looking beyond the relation of the parties, the contract is void." Also 2 Jac. & Walk. 413, where the absence of the legal adviser in a bargain made between such parties, is considered an objection. Here, there was not only the absence of the legal adviser, but his decided advice against the contract, and his refusal to assist in it ; and *that advice and refusal known [*238 to the defendant. Cited, 3 Sch. & Lef. 31 ; 3 P. Wms. 130 ; 1 My. & K. 271 ; 14 Ves. 273 ; *Griffith* v. *Robins*, 3 Madd. 191 ; 1 Ves. 503 ; 1 Cox 112 ; 1 Hovend. 146 ; 8 Price 161 ; 16 Ves. 107 ; 2 Eden 290 ; 5 Pothier 572, 432 ; 1 Johns. Ch. 350.

The defendant has thought himself safe, because he presumed the complainants could not prove that he used the influence this relation gave him in gaining his object. But these cases show that the complainants need not prove it ; the whole burden of proof is on him. He must show, that it was

a fair and reasonable contract for a woman in distressed circumstances to make; that she made it with full knowledge, and freely, and with the advice of competent friends or counsel. He has shown nothing of this. It was most unreasonable to strip herself of her property, for no benefit. She was most cruelly tortured; and her fears, not her free-will, gave the promise; and she had the approbation of no friends, for she did not consult her trustee, who disapproved of it; and if consulted either by her or the defendant, would have prevented it; and her counsel had refused to draw the instrument, and the defendant knew of his refusal. It is to be hoped, that the high sanction of this court will never be given to such a contract; which is a temptation thrown in the way of the ministers of religion, which they may not always be able to resist. This most important and solemn relation that can subsist between individuals, ought, above all others to be guarded, even from the possibility of abuse, and hallowed by the most exalted purity.

Ingersoll, for the defendant.—The case of the appellee, as it stands without dispute or contrariety of testimony, exhibits strong claims for the consideration of a court of equity. A gentleman was defrauded of a considerable sum of money, in the course of arrangements for a mere investment, from which he could not possibly have gained a farthing; and could not, in the ordinary and even cautious estimate results, have anticipated a loss. The broker in whose hands he regularly places his funds in mere and necessary deposit, fails to procure the promised security; and the funds are dishonestly withdrawn from the use of their lawful owner. This state of things continues unchanged, during the joint lives of the parties to the transaction. One of them is a perfectly *fair and honest sufferer; *239] without being subject to the slightest imputation of misconduct or even indiscretion. The other is a gainer, precisely to the extent of the impropriety of his conduct; and lives and dies in the enjoyment of his ill-gotten gains. After the death of the fraudulent party, his wife executes an instrument, calculated merely to indemnify the party wronged. In doing so, she interferes with no just demand upon herself or her buried husband; she deprives no creditor of his claim. She does not even take from child or relative, a portion needed for education or support. She does an act which comes as near to the performance of an absolute duty, and a compliance with the exactions of positive right, as can be conceived; without a positive provision for it in the municipal code. It is an act which, in effect, some systems of legislation have enjoined; which in the code of morals, comes within a cardinal regulation; and which, in practice, is an honorable and not an unfrequent exhibition. Montesquieu highly commends a law of Geneva, which denies to the children of an insolvent parent the enjoyment of office, until they have paid his debts. Mrs. Goodwin herself did the like with other creditors of her husband, without any complaint on the part of her devisees.

The case thus presented, is one of those correct and even laudable transactions to which popular sentiment does homage, as to a useful example; and to which courts of justice will lend their aid, as directly within the just promotion of the purposes of all law, the good conduct and the happiness of those who live under it. The complainants must go far

out of the case, in order to succeed. They must show something stronger than a contract, to destroy such an arrangement as is stated to exist. It is within the limits of legal possibility to do so. A contract, however clearly made, is liable to be overturned, if it be found wanting in the necessary legal ingredients which must contribute to sustain it. The complainants assume this burden of disproof. Fraud will vitiate any contract, unless it be mutual fraud. The pleadings neither allege the existence of fraud, nor the existence of the relation of pastor and member of a flock, from which it is argued that influence was fraudulently exercised. Such allegation is required, according to the best authorities. *Flint* v. *Field*, 2 Aust. 543 ; *Gordon* v. *Gordon*, 3 Swanst. 492 ; *Gouverneur* v. *Elmendorf*, 5 Johns. Ch. 79 ; *E. I. Company* v. *Henchman*, 1 Ves. jr. 289 ; *Harding* v. *Handy*, 11 Wheat. 103

*This want of allegation is relied upon no further than to the extent of its preventing a suitable denial in the answer ; and thus [*240 exposing the case to the uncertainties which arise from conflicting assertions in argument. Every allegation in the bill, which is material, is denied ; and not one is sustained by testimony, to the disproof of the assertions in the answer. The bill relies upon the following positions ; all of which are denied. 1. That the complainant, Jackson, in the summer of 1819, discovered the mortgage recorded, and called on the defendant to know how the debt was contracted, &c. 2. That the defendant urged Mrs. Goodwin, shortly after her husband's death, to execute a mortgage. 3. That she refused to do so ; and that such refusal was by the advice of counsel. 4. That to avoid his importunities, she refused to receive his visits, or to see him. 5. That in December 1828 (before the mortgage was executed), she was taken ill. 6. That after her being taken ill, in December, defendant renewed his visits ; took upon himself the management of her affairs ; and having gained her confidence, and represented to her, as a clergyman, that she ought to execute the mortgage, prevailed on her to do so, in the absence of any friend or legal adviser. 7. That she was utterly incapable of "understanding or comprehending" the meaning of the mortgage. These assertions are made by one who does not pretend to know the truth of them, or to assert anything of his own knowledge. He is irresponsible, because he is uninformed. They are unfounded in proof. They are all contradicted by the answer, in terms which are unmeasured and unequivocal. They are all as far as negative proofs can go, contradicted by other testimony. They remain, therefore, assertions only—ineffective words.

We deny that any relationship subsisted, which justifies the imputation of undue influence. Mr. Ashton was a clergyman, and Mrs. Goodwin was a religious woman ; that is all that existed, and it is all that is alleged. There are relations which induce a high degree of confidence on the one side, and influence upon the other. They are stated in 1 Story's Equity, 306, &c. Wherever they exist, all arrangements between the parties are narrowly observed. It is equally true, as to *quasi* guardians or confidential advisers. But neither these, *nor the positive relations between trustee and *cestui que trust*, vitiate necessarily a contract. A man cannot [*241 buy of, or sell to, himself, if he stands in the double capacity ; but a trustee may, and often does purchase of his *cestui que trust*. *Coles* v. *Trecothick*, 9 Ves. 246. Cited, *Mackreth* v. *Fox*, 2 Bro. C. C. 400 ; *Morse* v. *Royal*, 12 Ves. 355 ; *Whichcote* v. *Lawrence*, 3 Ibid. 740 ; *Lessee of Lazarus* v. *Bry*

son, 3 Binn. 63 ; *Wormley* v. *Wormley*, 8 Wheat. 421. The doctrine of the complainants would vitiate every contract between a pastor and the members of his congregation. He would become *civiliter mortuus*, and perhaps starve. No gift can be accepted, no purchase made from those who are about him ; and the consequence would be, a condition of absolute seclusion and non-intercourse with his fellow-men.

The charge of imbecility of mind, is positively denied. It is denied in all its stages and degrees ; it is repelled throughout. Mrs. Goodwin was not only not a woman "utterly incapable of understanding and comprehending what she did ;" but she was a woman of strong, active, vigorous and acute intellect. The idea of insanity is more than absurd ; although it is suggested by one, at least, of the witnesses for the complainants. The act itself, conducted with infinite prudence and care in all its stages, proves her strength of mind and firmness of purpose. It was a fortnight or three weeks in progress ; it was conducted with great correctness and propriety ; with no undue haste, and no sort of surprise or irregularity. Much importance is always attached to the manner of conducting the very thing which is sought to be avoided by reason of alleged imbecility of mind. *Cartwright* v. *Cartwright*, 1 Eng. Eccl. 51. During her lifetime, not a suggestion was made of the invalidity of the act, or her incapacity to perform it. The complainant himself, her agent in business, as well as her successor in interest, and guardian by affinity, knew of the mortgage, and of the determination of the defendant to pursue it ; of his refusal to compromise ; and of his stern demand of the uttermost farthing, as a clear right. Yet he permits it to pass ; so does she. She does more ; she confirms it, in the belief which has been verified, that it would not be enforced during her life. All this omission to object in due and proper season, was the result of a conviction, that the presence of Mrs. Goodwin would have put down, at once, an attempt to avoid the mortgage. She never denied or doubted it ; her whole life was its confirmation ; and she would *have revolted indignantly at the thought of an inconsistent attempt to disaffirm it. There is no difficulty about stultifying oneself, if there be the slighest imposition. See 12 Petersd. 277–8. Witnesses are called to prove an illness, at a period subsequent to that alleged, and subsequent also to the date of the mortgage. Such evidence is not available, being counter to the party's own allegation in pleading. *East India Co.* v. *Keighly*, 4 Madd. 16 ; *Pilling* v. *Armitage*, 12 Ves. 78 ; *Willis* v. *Evans*, 2 Ball & Beat. 228 ; *Underhill* v. *Van Cortland*, 2 Johns. Ch. 339 ; *James* v. *McKernon*, 6 Johns. 543, 559 ; *Linker* v. *Smith*, 4 W. C. C. 224. The cases of influence reported in the books, show direct misrepresenation, and wilful fraud. *Slocum* v. *Marshall*, 2 W. C. C. 597 ; *Whelan* v. *Whelan*, 3 Cow. 537 ; *Huguenin* v. *Baseley*, 14 Ves. 273 ; *Norton* v. *Relly*, 2 Eden 286 ; *Pursell* v. *McNamara*, 14 Ves. 91.

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It has been argued by counsel, although not suggested in the pleadings, that the mortgage is void, because in furtherance of an attempt to compound a prosecution for a crime. We deny that any such arrangement was at any time made. The cases which have been decided on the subject of agreements, contrary to the policy of the law, do not apply to this. Leading ones are to be found, 2 Wils. 341 ; 1 Leon. 180 ; 3 P. Wms. 279 ; 1 Hopk. 11, &c. But the rule is, that if an arrangement may be lawful, no

principle directs that it shall be construed otherwise. *Harris* v. *Busk*, 5 Taunt. 54 ; *Shenk* v. *Mingle*, 13 Serg. & Rawle 29 ; *Wallace* v. *Hardacre*, 1 Camp. 45 ; *Brett* v. *Close*, 16 East 298. No forgery in fact had been committed. There was a gross fraud ; and Mrs. Goodwin anxiously desired that it should not be made public. That end was gained by the forbearance to sue during her husband's life. After his death, the fears of a prosecution were over. There was none to be dreaded, and none to be stifled. All that she did was purely voluntary. If she made any engagements before (she being a married woman), they were legally nonentities. 1 Sid. 120 ; 7 Mass. 14.

Were it otherwise, the case of the complainant would not be aided. A mutual agreement to violate the law, will not justify the application of either party to a court of justice for relief. This is not our attempt to enforce the mortgage. It is the attempt of the complainants to have it delivered up to be cancelled. If their views are correct *as to the nature of the contract, neither party can succeed. The distinction [*243 between an application for specific performance, and a bill like this, is well understood. *Smyth* v. *Smyth*, 2 Madd. 87 ; *Martin* v. *Mitchell*, 2 Jac. & Walk. 419. The law, however administered in point of form, does not lend its aid to those who allege that they have endeavored to violate it. *Hawes* v. *Loader*, Yelverton 196 ; *Osborne* v. *Moss*, 7 Johns. 161 ; *Simon's Lessee* v. *Gibson*, 1 Yeates 291 ; *Reichart* v. *Castator*, 5 Binn. 109 ; *Numan* v. *Capp*, Ibid. 76 ; 5 Co. 60 ; 2 Vern. 133.

We know nothing of the source from which the trust estate of Mrs. Goodwin was derived. If from her husband, it is a fund peculiarly appropriate for the payment of this debt ; and it is fraud to withhold it. Inducements stronger even than those of honest pride and affection, may have led her to provide this security. Under the consciousness, if it existed, that she held property which belonged to her husband ; it was the simple dictate of moral honesty, to yield it to so sacred a claim as that of the defendant. With or without the motive, she was sensible that the money of which the defendant had been spoiled, belonged to the child of a deceased friend ; and she, therefore, anxiously and naturally sought to secure its restoration.

Much has been said of the extent of pecuniary effort which Mrs. Goodwin's estate must make, to meet this engagement. It is supposed, that all her property was pledged for the purpose ; and more than once, she is declared to have stripped and beggared herself, to meet the object. It is easy to show how erroneous is this presumption ; and hence to defeat the argument drawn from the supposed unreasonable character of the sacrifice, and the appeal which it involves to our feelings of kinkness for her descendants.

1. The mortgage contains only three small lots in the city of Philadelphia ; and it is in evidence, that she had property in the country ; especially, the seat where she was visited by Dr. Beatty, during one of her attacks of indisposition.

2. The bill states, that Mrs. Goodwin's will devises, among other things, the mortgaged premises. The general character of the will does not enable us to judge of the comparative value of the property mortgaged, and that which was left free from liability.

*It is obvious, that the mortgage affords inadequate security to the defendant. The money loaned, and perhaps lost, is - -	$3675
The security given by Mrs. Goodwin, yielding beyond other liens, $61 a year, would afford a capital of about - -	1000
	$2675
Mr. Ashton saved by the purchase of premises mortgaged by Goodwin, and levied on, and sold by virtue of an earlier mortgage, - - - - - - - - - - -	496 92
Leaving a principal sum, unsecured, - - - - -	$2178 08

Something has been said with regard to the possession of the defeasance by the defendant. It wanted explanation, in proof, before the circuit court. But it is now fully explained by the testimony of Daniel R. Ashton; who states, that it was borrowed of the scrivener for the purpose of preparing the answer. It had remained in the hands of the scrivener, in consequence of the inadvertent omission of Mrs. Goodwin's trustee to call and receive it. Besides, there is nothing in the bill in relation to it; if there had been, it would have enabled the defendant himself fully to account for whatever there is supposed to be of mystery. It was executed in prefect good faith and form. It was left with the scrivener, according to agreement, and it was so left for the proper party (the trustee), and it remained subject to his call. A failure of memory in the scrivener, who did not chance to recollect how it passed out of his hands; or a little neglect in the trustee to call for it in season; cannot surely involve a case in jeopardy, or a party in so grave a charge as that of withholding a document necessary for the protection of the complainants against absolute liability. The defendant never alleged, that the mortgage was other than collateral.

McLean, Justice, delivered the opinion of the court.—This suit in chancery is brought before this court, by an appeal from the decree of the circuit court of Pennsylvania. The appellants, who are the devisees of Maria Goodwin, brought their bill to set aside a bond and mortgage executed by Maria Goodwin, and her trustee, Kenneth Jewell, to the defendant, on the
*245] 5th *of January 1829, to secure the payment of $3000. The bill represents that the mortgage was given without consideration; that shortly after the decease of Thomas Goodwin, the husband of Mrs. Goodwin, which took place in February 1828, the defendant stated to her that he had a demand against her husband, to whom she had been much attached, and who had treated him extremely ill; that he had it in his power to render his memory odious, by exposing his conduct; but that he would conceal the transaction, if she would execute a mortgage to him on her own property, to secure the debt; that she refused to execute the mortgage, or give any other security, by the advice of her counsel; and afterwards avoided his visits, to get clear of his importunities; that shortly after this, Mrs Goodwin was taken ill, and being executrix, her husband's affairs pressed much upon her, and she fell into a low nervous state of spirits, which impaired her memory and affected her mind; that whilst she was in this

state, the defendant renewed his visits, and professing great kindness for her, took upon himself the management of her business; and, having gained her confidence, prevailed upon her, in the absence of any friend or legal adviser, to execute the mortgage, and a corresponding bond; and to direct that her trustee should join in the execution; the defendant, as a clergyman, saying she ought to do so; that these representations had great influence on Mrs. Goodwin, who was a woman of devout religious feelings. The complainants further represent, that at the time the bond and mortgage were executed, Mrs. Goodwin was utterly incapable of understanding or comprehending their meaning and effect; that after the death of Mrs. Goodwin, the defendant stated to the complainants, that the mortgage was executed as collateral security for any sum that might be due to him from the estate of Thomas Goodwin, deceased.

In his answer, the defendant admits the execution of the bond and mortgage, and states, that in 1822, being about to receive a sum of money, he consulted Thomas Goodwin, who was then a broker in Philadelphia, in what way he could most advantageously invest it; that Goodwin advised him to leave the money in his hands, and that he would loan it out on good security. That the defendant, in pursuance of this advice, placed $3400 in his hands; and also loaned him $275, and took his notes by way of acknowledgment. That Goodwin received a bond and mortgage for $2600, in *favor of defendant, from Samuel Jones, covering an estate which was under [*246 prior mortgages for $2500, which, with the money of the defendant, Goodwin was to satisfy; but that he paid but $1000 of the amount, and fraudulently withheld the balance. And to cover this fraud, that he obtained from the recorder of deeds, copies of the prior mortgages on the estate of Jones; and at the foot of the certificate of the recorder, wrote himself, "paid and satisfied;" and then exhibited the papers to Jones and the defendant, to show that he had discharged the mortgages. And as there also remained on the estate a prior lien of a judgment for $700, that Goodwin took a bond of indemnity from Jones against it. That defendant often solicited Goodwin to deliver up to him the mortgage, which, under various pretexts, he declined doing; but assured the defendant, that he had discharged the prior mortgages; at length, the defendant becoming uneasy, he called at the recorder's office, and there found that the mortgage for $1500 had not been discharged, and that the indorsement upon it of "paid and satisfied," must have been made by Goodwin. On the same day that the defendant made this discovery, Goodwin informed him that he was about to stop payment; but he assured the defendant that he should not lose a cent.

Goodwin admitted to the defendant, that he had used the money for his own purposes, instead of paying off the mortgage; and that he had deceived both the defendant and Jones. And at the same time, Goodwin placed a mortgage in the hands of the defendant for $2575, to secure him against the mortgage on the property of Jones, which should have been discharged. That Goodwin assured him the property mortgaged was unincumbered, which was untrue; and the defendant reproached Goodwin with having again deceived him, and threatened him with an exposure, unless he should make payment or give security. Goodwin replied, "what can you do? if you push me, I will take the benefit of the insolvent law;" the defendant rejoined, "have you forgotten the certificate which you forged? My attor-

ney informs me, that if Mr. Jones, or myself, shall come into court with that certificate, that you would be in danger of being sentenced to hard labor." Goodwin became alarmed, and stated, that he would sell the property and make good the deficiency, if the defendant would not expose him. This conversation took place in the presence of Mrs. Goodwin; who, when the defendant was leaving the house, accompanied him to the door, appealed to his friendship for her, *entreated him not to expose the transaction, declared, that she would not have it known, especially in the church, and among the congregation at Blockley, for any consideration whatever. She added, that Mr. Goodwin would sell the property, and make provision for the payment; and that she would make up the deficiency out of her separate estate; and neither the defendant nor his child, whose deceased mother she greatly esteemed, should lose anything.

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A few days after this, Mrs. Goodwin saw the certificate, and acknowledged that it was in the handwriting of her husband; and she again entreated the defendant not to expose him, and said she would pay him, if her husband did not. This assurance was frequently repeated, on various occasions, up to the death of Goodwin; which took place, suddenly, in February 1828. At the moment of his death, Mrs. Goodwin sent for the defendant, desired him to superintend the interment, and she threw herself upon his kindness for consolation. After the interment, the defendant spent the evening with Mrs. Goodwin, engaged in religious conversation; and being about to leave, she said, Mr. Ashton, I hope you will not forsake me. If you cannot come in the day-time, come in the evening, and pray with me. I will be pleased to see you at any time; and as soon as I get a little over my trouble, I will fulfil my promise and settle with you. The defendant replied, that he hoped she would not let his concern trouble her at that time; that it gave him not a moment's uneasiness. This promise was repeated by Mrs. Goodwin, again and again, and on one occasion, when the defendant was ill, she expressed uneasiness lest he might die before the matter was arranged. On consulting counsel, she was advised to do nothing with her property for a year, and he refused to draw a deed. But she said, the advice was unjust, that she would pay the defendant, and felt herself bound to do so, as a Christian. And she delivered a covenant to the defendant, binding herself to make good the deficiency, should there be one, on the sale of her husband's estate. Up to this time, the defendant had not expressed a desire to Mrs. Goodwin, that she should pay any part of her husband's debt.

In December 1828, defendant stated to Mrs. Goodwin that she had acted voluntarily in the matter, and not through his persuasion. That if he might be permitted, for the first time, to become active in the business, he would suggest, that as her property was held in trust, *the covenant which she had executed to him was not valid. She expressed surprise, and a willingness to secure him; and the bond and mortgage in controversy were prepared and executed at the office of Thomas Mitchell, a scrivener. An agreement was executed by the defendant, declaring that the bond and mortgage were given as collateral security, &c. With the exception of the execution of the bond and mortgage, the defendant denies all the material allegations of the bill.

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The counsel for the complainants contend, that the proof sustains the charges in the bill; and that they are entitled to the relief prayed for, on the following grounds: 1. That there was no consideration for the bond and mortgage. 2. That they were executed by a weak woman; who, at the time, was incapable of making such a contract. 3. That they were extorted by a threat to prosecute her husband. 4. That the relation in which the defendant stood to her, as her pastor and religious visitor, and as agent and adviser in her affairs, prohibited any contract with her; especially, when made in the absence of her counsel and with his known disapprobation.

As to the want of consideration alleged in the first position, it must be observed, that this is not an application to the court for the specific execution of a contract; but to set one aside which is clothed with the highest solemnities known to the law; a contract under the hand and seal of the party; duly acknowledged, and placed upon the public records. This deed purports upon its face a consideration, whether it be considered at law or equity. A court of chancery will often refuse to enforce a contract, specifically, when it would also refuse to annul it. In such a case, the parties are left to their remedy at law. In the present case, as the deed purports a consideration, it is unnecessary for the defendant to prove one; and the deed is not vitiated, if the complainants show that it was given without a valuable consideration; unless there be connected with the transaction, mistake, deception, incapacity or fraud. The mortgage deed is impeached by the counsel on several of these grounds; all of which will be considered under the appropriate heads.

The second position assumed is, a want of capacity in Mrs. Goodwin to make a contract, at the time the deed was executed. This is the principal ground stated in the bill, and it covers a great portion of the evidence in the case. It is intimately connected with *the third position assumed, that the deed was extorted from Mrs. Goodwin by threats to prosecute her husband; and they will both be considered as one proposition. [*249

Was Mrs. Goodwin of sound and disposing mind, at the time the mortgage deed was executed? Did she act freely and voluntarily? The answer of the defendant is broader than the allegations in the bill, and although such parts of the answer as are not responsive to the bill, are not evidence for the defendant; yet the counsel on both sides have considered the facts disclosed, as belonging to the case. And, if the facts in the answer, not responsive to the bill, are relied on by the complainant's counsel, as admissions by the defendant; he is entitled, thus far, to their full benefit. It may be proper also to observe, that no admissions in an answer, can, under any circumstances, lay the foundation for relief, under any specific head of equity, unless it be substantially set forth in the bill.

Several years ago, it seems, the defendant, being a clergyman of the Baptist denomination, had the charge of a congregation at Blockley, in or near to Philadelphia; and Mr. and Mrs. Goodwin were members of that church. But some time before the deed was executed, they removed from the limits of that congregation and resided in another. From the business of Goodwin, he being a broker, and the connection which existed between him and the defendant, it was natural, that the defendant should

consult him, as to the investment he was desirous of making, in 1822. And it is not extraordinary, that the defendant should have confided in the integrity of Goodwin. It seems, that this confidence was not easily shaken; for although the money was placed in his hands for investment, in March 1822, yet the defendant did not discover the fraud of Goodwin, until the last of January 1823; and then another fraud was practised by Goodwin, by giving another security of little or no value. It was under such circumstances, and with a knowledge that Goodwin was about to stop payment, that the defendant called at his house; charged him with another deception, and insisted on security or immediate payment. Goodwin threatened him with taking the benefit of the insolvent act; and then the defendant asked him, if he had forgotten the certificate he had forged, and said, if it were brought into court, he would be in danger of "going to hard labor." That these were words of heat and passion, is evident. That there was strong provocation, is equally clear; still, it had been better, had
*250] *he not uttered them. The high and holy calling of the defendant should have guarded him against the influence of passion. He should have remembered, that those who are most skeptical, not unfrequently, make the highest exaction of purity in the station he occupied. But he was a man of like passions with others, and liable to err.

Did the defendant visit the house of Goodwin, with the premeditated design of making this charge, in order to extort from Mrs. Goodwin a promise to indemnity him? That he did, is most earnestly contended by the counsel for the complainants; and he is charged with the greatest impropriety, in making the charge against Goodwin in the presence of his wife. This inference is not authorized by the facts and circumstances of the case. As was very natural, Mrs. Goodwin felt great anxiety when she heard the charge, and was solicitous that her husband should not be exposed. She promised to make up any part of the debt to the defendant, which her husband should be unable to pay. This was about six years before Mrs. Goodwin executed the mortgage deed. On various occasions, during the lifetime of her husband, she repeated this promise to the defendant, as appears from the evidence, without his solicitation; and she made similar declarations to other persons.

As might be expected, the intercourse between the defendant and the family of Mr. Goodwin was, perhaps, after this, less frequent than it had been. On one occasion, however, his good offices were requested, to prevent the exhibition of the forged words, as evidence, in an action of slander brought by Goodwin. He interposed, but could not prevent the evidence from being offered.

It does not appear, that the defendant threatened to commence a prosecution against Goodwin, but only said what he was informed would be the effect of a prosecution. The facts do not justify the conclusion, that the defendant agreed to suppress the prosecution, in consideration of the promise of Mrs. Goodwin. That he confided in her promise, is extremely probable, from the fact that he seems to have made little or no effort, from this time until the death of Goodwin, five years afterwards, to obtain his money or additional security. At length, in February 1828, Goodwin died very suddenly. In her distress, Mrs. Goodwin sent for the defendant to

superintend the last offices to her departed husband, and to impart to her the *consolations of religion. This is admitted to afford the highest evidence of the confidence which she reposed in the friendship and piety of the defendant. [*251

Did he abuse that confidence? It is said, that he did. That he seized the occasion, while the heart of Mrs. Goodwin was broken under the weight of her afflictions, to insinuate himself into her confidence, and acquire an ascendency over her; that he might wring from her the debt of her husband. And here the eloquence of the counsel has depicted, in strong colors, the base, hypocritical, and mercenary spirit of the defendant. If, indeed, the picture is drawn from the life, and is not the work of the imagination; it presents human nature in so odious an aspect, as to create loathing and disgust. Called to give consolation to a female overwhelmed by the sudden death of a husband, to whom, with all his imperfections, she was tenderly attached, and that husband lying a corpse in the house, or just deposited in the grave; can it be supposed, without the strongest evidence, that a wretch exists, so lost to all the better feelings of the heart, as to use such an occasion to extort from the widow the payment of a debt? Both Mrs. Goodwin and the defendant have gone to their last and solemn account, and are alike beyond the reach of censure or praise; but no one could wish the charge against the defendant, in this respect, to be true. There is nothing in the evidence to justify it. He did not name the subject of the debt to Mrs. Goodwin, and when she mentioned it, as he was about taking leave, he begged her not to give herself any uneasiness on the subject; and it was not until near a year after this, that the mortgage deed was executed.

Six witnesses were examined by the complainants, to show that at the time Mrs. Goodwin executed the deed, she had not the capacity to make a contract; and that she labored under an improper influence exerted by the defendant. Some of these witnesses resided with Mrs. Goodwin, and they all speak of her being ill, more or less, at different periods of time; as well before, as after, the decease of her husband. She appears to have been rather of a dejected and melancholy cast of mind, and was often in a state of despondency. Some of the witnesses speak of times when her mind was shattered or impaired, while laboring under physical debility; and they state certain acts, which they considered as resulting from a mind somewhat unsettled and wandering. *At one time, she refused to attend her grand-daughter to church, who was to be received as a communicant; she declined family worship; would sometimes not answer questions; and on returning from a former country residence, shortly after the death of her husband, she seemed to be agitated, sat down in a chair, and burst into a flood of tears. She kept a boarding-house some time, and involved herself in debt. Miss Jackson, who refers to these circumstances, remarks, that she never knew Mrs. Goodwin to say a foolish thing, or do a foolish act; and except on the occasions specified, her conduct and conversation were intelligent and rational. [*252

It would seem, from the statement of the witnesses, that she was as subject to depression of spirits, before the death of Mr. Goodwin, as afterwards. Dr. Beatty attended Mrs. Goodwin, as a physician; first saw her in Lombard street, in 1827. She labored under great mental torpor, but had no serious organic disease. During the time she kept a boarding-house in

Twelfth street, she managed her own concerns; did the principal work of the house, and often went to market. Mr. Dodge states, that after the death of Mr. Goodwin, she, having more business to transact, was more active than she had been; but in two or three months, she relapsed into her former state of mind, and seemed much depressed on the subject of her business. The witness hardly thinks she had sufficient capacity to transact any other than the ordinary business of life. Some of the witnesses did not think her capable of conducting the business of a boarding-house; and certain acts of supposed miscalculation or extravagance are named.

It seems, that the defendant occasionally called to see Mrs. Goodwin, but less frequently than she desired. In July, after the death of Mr. Goodwin, Miss Long, who lived with Mrs. Goodwin, was called down stairs, to witness a written paper; and, after signing it, observed to the defendant, that she did not know what she had signed. Mrs. Goodwin was present. The defendant said, it was a piece of writing between Mrs. Goodwin and himself. Mrs. Goodwin once or twice expressed herself uneasy about the business of the defendant; but there is no evidence that at any of his visits he importuned her on the subject of his claim, or that he took any active agency in the matter, until about the time the mortgage was executed.

The scrivener who drew the bond and mortgage, and whose son drew the defeasance, states that Mrs. Goodwin, her trustee, and the *defend- *253] ant, were present when they were signed. Much conversation was had on the subject of the papers, and Mrs. Goodwin was very attentive to the business. She did not seem to be laboring under any remarkable feebleness of body or mind. The mortgage was intended as collateral security; and the defeasance was drawn on a separate paper. Since the commencement of the present suit, the defeasance was handed to the scrivener by the defendant, who said, he had borrowed it from the office; the paper had not been called for by the trustee. Jewell, the trustee of Mrs. Goodwin, states, that the defendant and Mrs. Goodwin called on him, and she observed, that she wished to execute a mortgage on her property, to secure the defendant in a claim he had on her late husband; and on being asked, if she had consulted Mr. Ingraham, her counsel, she replied, that she had not, and that he had treated her with coolness. She said, the mortgage was intended as collateral security. Some time after this, Mrs. Goodwin, becoming somewhat embarrassed in her circumstances, relinquished her house; and the defendant undertook the settlement of her accounts. Some ten or twelve witnesses, who were well acquainted with Mrs. Goodwin, before and after her husband's death, and about the time the deed was executed, were examined by the defendant, to prove that she was of capacity to contract generally. Some of these witnesses had business with her, and speak of her acuteness and uncommon smartness. Others say, that she was a woman of more than ordinary intelligence; that on religious subjects, she was very well informed. One of the witnesses speaks of her as a remarkably sensible woman; heard her speak of the defendant as having been injured by her husband, and that it was right he should be made secure. She spoke of the defendant's kindness, in not prosecuting her husband; and said, as the witness understood, partly for that, and other acts of kindness, the defendant ought to be made secure from loss.

On a careful examination of the whole evidence, as to the competency

of Mrs. Goodwin to execute the mortgage, at the time it was given, we are brought to the conclusion, that the ground of incapacity is not sustained. On the day the mortgage was executed, she was at the scrivener's, with her trustee and the defendant; and it does not seem to have occurred, either to her trustee or the scrivener, that she was laboring under any incapacity of mind. She took an *active part in the business; understood perfectly the nature of the writings; and her whole deportment, on that [*254 occasion, showed that she was capable of acting for herself in giving the security on her property. Prior to this period, Mrs. Goodwin had given to the defendant a covenant to indemnify him; this was the paper witnessed by Miss Long, in July 1828, and which was supposed not to be valid, the mortgage was given in lieu of this paper.

Was this mortgage deed executed, through any threat by the defendant to render the character of Goodwin infamous? There is not a shadow of proof to sustain this allegation of the bill, and it is denied by the answer. The threat must be carried back to the conversation between the defendant and Goodwin, in the presence of his wife, respecting the forged certificate; and this was about six years before the deed was executed. And this circumstance is relied on, to show that this mortgage was extorted from Mrs. Goodwin. The forgery, as it was improperly called, had been fully exposed, in the action of slander brought by Goodwin; so that no apprehension, on that score, could have been felt by Mrs. Goodwin. Her husband lived about five years after the threat; and it appears, if, until the time of his death, he did not continue on terms of particular intimacy with the defendand, there seems to have been no hostility between them. And can it be supposed, that the conversation could have so operated on the mind of Mrs. Goodwin, six years afterwards, as to extort from her the deed in question? The facts of the case authorize no such conclusion.

Did the defendant exercise any influence over the mind of Mrs. Goodwin, which can affect the contract? That he relied on the repeated assurances given by her to indemnify him, is clear. During the lifetime of her husband, he does not appear to have resorted to any means to compel payment; and after the death of Goodwin, he did not obtrude himself into the house of mourning, as a creditor. He was there, but to perform the office of a comforter; and there is no evidence, which shows any improper anxiety on his part to secure his debt. Until a short time before the execution of the mortgage deed, so far as the history of the case is known, Mrs. Goodwin was the first to introduce the subject; and on one occasion expressed no small anxiety to give the indemnity. It was not until the covenant was found to be invalid, that he became *active in the business; and then, it would seem, that he introduced the subject in [*255 the most delicate manner. On being informed of the invalidity of the covenant, she expressed a perfect willingness to give the mortgage. The mortgage does not cover the entire estate of Mrs. Goodwin; so that, by giving it, she did not strip herself of the means of support.

It seems, that some time after the mortgage was executed, on being told that the defendant would distress her, she expressed a determination to dispute the deed; but on being assured by the defendant, that during her life, he should not embarrass her, by pressing the claim, she became perfectly satisfied. This dissatisfaction seems to have been excited by one of the

persons named as complainant. That the defendant should have felt some anxiety to secure the claim, was very natural. It was money which came into his hands, as the guardian of his child, whose mother was deceased. But there was no part of the defendant's conduct, either before or after the death of Goodwin, which shows a disposition to exercise a fraudulent or improper influence over Mrs. Goodwin in this matter. She acted voluntarily ; and, so far as appears in the evidence, free from any influence that goes to impeach the contract.

In taking the defeasance from the office of the scrivener, the defendant seems to have had no improper design. He borrowed it from the clerk in the office ; probably, and most likely, forgot to return it. He returned it, since the commencement of this suit ; which he would not have done, had he taken the paper with a dishonest or fraudulent intention.

The motive which led Mrs. Goodwin to give this indemnity, was highly honorable to her feelings as a wife, a Christian, and friend. She had property of her own. She saw that her friend had been injured by the fraudulent conduct of her husband ; and whilst she threw a mantle over the imperfections of her husband, she endeavored to repair the injury he had done.

We come now to consider the fourth ground taken by the complainants ; which is, that from the relation which existed between the defendant and Mrs. Goodwin, she could make no valid contract with him. He was her pastor and agent. After her embarrassments commenced, at the request of her trustee, the defendant did undertake the settlement of her affairs ; to which service he seems to have been prompted by the kindest feelings towards her. We cannot suppose, that this agency, which was *in fact undertaken, after the mortgage was executed, could vitiate any contract. About the time the mortgage was executed, and before that time, he seems to have had no special agency in the business of Mrs. Goodwin.

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But he is represented to have been her pastor. Some years before the mortgage deed was signed, Mrs. Goodwin did belong to the church under the charge of the defendant ; but this relation had ceased long before the death of Goodwin : but if this relation existed in fact, it is not charged in the bill. Does the profession of a clergyman subject him to suspicions which do not attach to other men? Is he presumed to be dishonest? It would, indeed, exhibit a most singular spectacle, if this court, by its decision, should fix this stain on the character of a class of men, who are generally respected for the purity of their lives, and their active agency in the cause of virtue. They are influential, it is true ; but their influence depends upon the faithfulness and zeal with which their sacred duties are performed. Acquainted as we are with the imperfections of our nature, we cannot expect to find any class of men exempt from human infirmities. But why should the ministers of the gospel, who, as a class, are more exemplary in their lives than any other, be unable to make a contract with those who know them best and love them most? Their influence, by precept and example, does more to reform the actions of men, and restrain their vicious inclinations, than all the institutions of society. And yet we are called upon to denounce this whole class, and hold them incapable of making a contract with those who are under their pastoral charge, and who, like Mrs. Goodwin, are distinguished for their piety. Why not give them the same measure of right

which is enjoyed by others? If any minister should become a traitor to his master, and disgrace his high and holy calling, by using, for fraudulent purposes, his influence over the weak or unwary, the laws affords a remedy; and the proceedings in this case show, that the disposition will not be wanting to bring him to an account.

Upon a deliberate consideration of the facts and circumstances of this case, we are of the opinion, that the decree of the circuit court ought to be affirmed, with costs.

Decree affirmed.

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*John Briscoe and others *v.* The President and Directors of the Bank of the Commonwealth of Kentucky. [*257

Constitutional law.—Bills of credit.

On the 29th of November 1820, the legislature of Kentucky passed an act, establishing a bank, by the name of "The Bank of the Commonwealth of Kentucky;" the first section of the act declared, the bank should be established, "in the name and behalf of the Commonwealth of Kentucky," under the direction of a president and twelve directors, to be chosen by the legislature; the second section enacted, that the president and directors should be a corporation, capable of suing and being sued, and of purchasing and selling every description of property; the third section declared the bank to be exclusively the property of the commonwealth; the fourth section authorized the issuing of notes; and the fifth declared the capital to be $2,000,000; to be paid by all moneys afterwards paid into the treasury for the vacant lands of the state, and so much of the capital stock as was owned by the state in the Bank of Kentucky; and as the treasurer of the state received those moneys, he was required to pay them into the bank. The bank had authority to receive money on deposit, to make loans on good personal security, or on mortgage; and was prohibited increasing its debts beyond its capital; limitations were imposed on loans, and the accommodations of the bank were apportioned among the different counties of the state. The bank was, by a subsequent act, authorized to issue $3,000,000; and the dividends of the bank were to be paid to the treasurer of the state; the notes of the bank were issued in the common form of bank-notes; in which the bank promised to pay to the bearer, on demand, the sum stated on the face of the note. The pleadings excluded the court from considering that any part of the capital had been paid by the state; but in the argument of the case, it was stated, and not denied, that all the notes which had been issued, and payment of which had been demanded, had been redeemed by the bank. By an act of the legislature of Kentucky, it was required, that the notes of the bank should be received on all executions, by plaintiffs, and if they failed to indorse on such execution, that they would be so received, further proceedings on the judgment were delayed for two years. The Bank of the Commonwealth of Kentucky instituted a suit against the plaintiffs in error, on a promissory note, for which the notes of the bank had been given, as a loan, to the makers of the note; the defendants in the suit claimed, that the note given by them was void, as the same was given for the notes of the bank, which were "bills of credit" issued by the state of Kentucky, against the provisions of the constitution of the United States, which prohibits the issuing of "bills of credit" by the states of the United States and that the act of the legislature of Kentucky, which established the bank, was unconstitutional and void. The act incorporating the Bank of the Commonwealth of Kentucky, was a constitutional exercise of of power, by the state of Kentucky; and the notes issued by the bank were not bills of credit, within the meaning of the constitution of the United States.

The definition of the terms "bills of credit," as used in the constitution of the United States, if not impracticable, will be found a work of no small difficulty.

*The terms, bills of credit, in their mercantile sense, comprehended a great variety of evidences of debt, which circulate in a commercial country; in the early history of banks, it seems, their notes were generally denominated "bills of credit;" but in modern times, they have lost that designation, and are now called either bank-bills, or bank-notes. But the inhibitions of the constitution apply to bills of credit, in a limited sense. [*258

Briscoe v. Bank of Kentucky.

Description of the bills of credit which were issued in the early history of the colonies, afterwards the United States of America. Craig *v.* State of Missouri, 4 Pet. 410, cited.[1]

The definition of a bill of credit, which includes all classes of bills of credit emitted by the colonies and states, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

If the legislature of a state attempt to make the notes of any bank a tender, the act will be unconstitutional; but such attempt could not affect, in any degree, the constitutionality of the bank. The act which related to the receiving the notes of the Bank of the Commonwealth of Kentucky was not connected with the charter.

The federal government is one of delegated powers; all powers not delegated to it, or inhibited to the states, are reserved to the states or to the people.

A state cannot emit bills of credit, or, in other words, it cannot issue that description of paper to answer the purposes of money, which was denominated, before the adoption of the constitution, bills of credit; but a state may grant acts of incorporation, for the attainment of these objects, which are essential to the interests of society; this power is incident to sovereignty, and there is no limitation on its exercise by the states, in respect to the incorporation of banks, in the federal constitution.

At the time of the adoption of the constitution, the "Bank of North America," and the Massachusetts Bank, and some others, were in operation; it cannot, therefore, be supposed, that the notes of these banks were intended to be inhibited by the constitution, or that they were considered as "bills of credit," within the meaning of that instrument; in many of their most distinguishing characteristics, they were essentially different from bills of credit, in any one of the various forms in which they were issued. If, then, the powers not delegated to the federal government, nor denied to the states, are retained by the states or the people; and by a fair construction of the terms "bills of credit," as used in the constitution, they do not include ordinary bank-notes; it follows, that the power to incorporate banks to issue these notes may be exercised by a state.

A uniform course of action, involving the right to the exercise of an important power by the state government, for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised.

A state cannot do that which the federal constitution declares it shall not do; it cannot "coin money." Here is an act inhibited in terms so precise, that they cannot be mistaken; they are susceptible but of one construction. And it is certain, that a state cannot incorporate any number of individuals and authorize them to coin money; such an act would be as much a violation of the constitution, as if money were coined by an officer of the state, under its authority; the act being prohibited, cannot be done by a state, directly or indirectly. The same rule applies to bills of credit issued by a state.

To constitute a bill of credit, within the constitution, it must be issued by a state, on the faith of the state, and designed to circulate as money; it must be a paper which circulates on the credit the of state; and so received and used in the ordinary *business of life. The individual or committee who issue it, must have power to bind the state; they must act as agents, and, of course, not incur any personal responsibility, nor impart, as individuals, any credit to the paper. There are the leading characteristics of a bill of credit, which a state cannot emit; the notes issued by the Bank of the Commonwealth of Kentucky have not these characteristics.

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When a state emits bills of credit, the amount to be issued is fixed by law; as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are

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[1] See note to Craig *v.* Missouri, 4 Pet. 410. Since the publication of that volume, the supreme court has decided, that the general government has power to issue and re issue treasury notes, as currency, and to make them a legal tender, as well in time of peace as in time of war. The validity of the legal tender acts, in the earlier cases, was asserted, as a power necessary for the carrying on the government, in time of war, in other words, as a war measure; but this ground is now abandoned and the general power of the United States to issue a paper currency, is established as constitutional law. Juilliard *v.* Greenman, 110 U. S. 421. See the strong dissenting opinion of Justice FIELD, in that case, in which he says, "there have been times, within the memory of all of us, when the legal tender notes of the United State were not exchangeable for more than half of their nominal value: the possibility of such depreciation will always attend paper money; this inborn infirmity, no mere legislative declaration can cure."

issued on the credit of the state, which, in some form, appears upon the face of the notes, or by the signature of the person who issues them.

No sovereign state is liable to be sued, without her consent; under the articles of confederation, a state could be sued only in cases of boundary. It is believed, that there is no case where a suit has been brought, at any time, on a bill of credit, against a state; and it is certain, that no suit could have been maintained, on this ground, prior to the constitution.

The case of Craig *v.* State of Missouri, 4 Pet. 410, is not authority to sustain the claim that the notes of the Bank of the Commonwealth were bills of credit; the decision in that case applied to obligations of an entirely different character.

There is no principle decided by this court, in the case of Craig *v.* State of Missouri, which at all conflicts with the views presented by the court in this case. Indeed, the views of the court are sustained and strengthened, by contrasting the present case with that. Bank of the United States *v.* Planters' Bank of Georgia, 9 Wheat. 904, and Bank of the Commonwealth *v.* Wister, 2 Pet. 315, cited.

ERROR to the Court of Appeals of the state of Kentucky. In the Mercer circuit court, of the state of Kentucky, the president and directors of the Bank of the Commonwealth of Kentucky, on the 15th of April 1831, filed a petition of debt, stating that they held a note upon the defendants, George H. Briscoe, Abraham Fulkerson, Mason Vannoy and John Briscoe, in substance, as follows, to wit:

"2048 Dollars, 37 cents. One hundred and twenty days after date, we jointly and severally promise to pay the president and directors of the Bank of the Commonwealth of Kentucky, or order, 2048 dollars, 37 cents, negotiable and payable at the branch bank at Harrodsburg, for value received. Witness our hands, this 1st of February 1830.

G. H. BRISCOE,
A. FULKERSON,
MASON VANNOY,
JOHN BRISCOE."

*The defendants appeared and filed the following pleas: "The [*260 defendants, after craving *oyer* of the note, and the same being read to them, say, that the note was executed on no other or further consideration than that of another note which had been previously executed by them to the plaintiffs, for a certain sum, negotiable and payable at the branch of the said bank at Harrodsburg, and that the note so previously executed, was executed by them on no other or further consideration than that of the renewal of another note of the like tenor; and the defendants aver, that previous to the time of executing the note last mentioned, the legislature of the commonwealth of Kentucky, in the name and on behalf of the said commonwealth, by an act which passed on the 29th of November 1820, established a bank, the capital stock of which was declared to be $2,000,000, which said capital stock the said bank never received, or any part thereof, as these defendants aver; that by the provisions of said act, the president and directors of the said bank, and their successors in office, were declared and made a corporation and body politic, in law and fact, by the name and style of 'The President and Directors of the Bank of the Commonwealth of Kentucky;' that also, by said act, the president and directors of the said bank were, illegally, and contrary to the provisions of the constitution of the United States, empowered and authorized, for and on behalf of the said commonwealth, and upon her credit, to make bills of credit, to wit, bills or

notes to an amount not exceeding $2,000,000, signed by the president and countersigned by the principal cashier, promising the payment of money to any person or persons, his, her or their order, or to the bearer; and the said bills or notes were so made, illegally, in violation of the said constitution, to emit, issue and circulate through the community, for its ordinary purposes, as money; that under the authority of the said act of the legislature, and in violation of the said constitution of the United States, the said president and directors had, before the date of the note last aforesaid, for and on behalf of the commonwealth, and on her credit, made various bills of credit, to wit, notes of various denominations, in amount from one to one hundred dollars, signed by the president of the said bank, and countersigned by the principal cashier, promising, therein and thereby, to pay the person in each note mentioned, or bearer, on demand, the amount therein mentioned in money, and were transferrible on delivery; and that for the purpose of circulating said notes through the community, for its ordinary porposes
*261] *as money, the legislature of the said commonwealth, by an act passed on the 25th of December, in the year 1820, had, amongst other things, provided and declared, in substance, that upon all executions of *fieri facias* which should be thereafter issued from any of the courts of the said commonwealth, indorsed, that notes on the Bank of Kentucky or its branches, or notes on the bank of the Commonwealth of Kentucky or its branches, 'might, by the officer holding such execution, be received from the defendant in discharge thereof;' such executions, so indorsed, should only be replevied and delayed in their collection for the space of three months; but that all executions of *fieri facias*, which should thereafter be issued from any of the courts of the said commonwealth, without any indorsement for the reception of notes on the Bank of Kentucky or its branches, or notes on the Bank of the Commonwealth of Kentucky or its branches, should be replevied and delayed in its collection for the space of two years, or, if not so replevied, that property levied upon under the same should be sold upon a credit of two years. The said president and directors, for the like purpose, and with the like intent, afterwards, to wit, on the ——— day of ——— (that being the date of the note executed by the defendants last above mentioned), did, for and on behalf of the said commonwealth, for her benefit, and on her credit, illegally, and contrary to the said constitution of the United States, emit and issue the notes or bills of credit, so made as aforesaid, by the president and directors of said bank, to the amount of $2048.37, by loaning at interest, and delivering the same to the defendant Briscoe. And the defendants in fact aver, that the only consideration for which the note last above mentioned was executed by them, was the emission and loan of the said bills of credit, so made and issued as aforesaid to said Briscoe, by the plaintiffs, who are the president and directors of the bank aforesaid; wherefore, they say, that the consideration of the said last above mentioned note, executed by them, was illegal, invalid and in violation of the constitution of the United States; and that each of the notes thereafter executed by them as aforesaid, by way of renewal as aforesaid, of the said last above-mentioned note, was also founded upon the illegal, invalid and insufficient consideration aforesaid, and none other; and this they are ready to verify and prove; wherefore, they pray judgment, &c.

"And the defendants, for further plea in this behalf, say, that the plain-

tiffs, their action aforesaid against them ought not to have and *maintain, because they say, that the only consideration for which the note in the petition mentioned was executed, was the renewal of a note which had been previously executed by them to the plaintiffs, for the sum of $2048.37, negotiable and payable at the branch of the Bank of the Commonwealth of Kentucky, located at Harrodsburg. And they aver, that previous to the date of the note, so renewed as aforesaid, the plaintiffs, under the provisions, and by the authority of the act of the legislature of the commonwealth of Kentucky, establishing the Bank of the Commonwealth of Kentucky, approved the 29th day of March 1820, and contrary to that provision of the constitution of the United States, which inhibits any state from emitting bills of credit, had, on behalf of the said commonwealth, and upon her credit, made various bills of credit, signed by the president of said Bank of the Commonwealth of Kentucky, and countersigned by the principal cashier therein; and thereby promising to pay to the person in each of said bills mentioned, or bearer, on demand, the respective amounts in each of said bills expressed, in money; and the said bills so made and signed by the said president and cashier, the plaintiffs, afterwards, to wit, on the day of the date of the note last aforesaid, for the purpose of circulating the said bills of credit, so as aforesaid made, through the community, as money, did, for and on behalf of the said commonwealth, and for her benefit, and upon her credit, illegally, and contrary to the aforesaid provisions in the constitution of the United States, emit and issue said bills of credit, so made as aforesaid, to the amount of $2048.37, of the said bills, by loaning and delivering the same to the defendant, Briscoe, at interest, reserved and secured upon said loan, for the benefit of the said commonwealth, at the rate of six per centum per annum upon the amount aforesaid; and the defendants, in fact, aver, that the only consideration for which the note last above mentioned was executed by them, was the emission and loan of the said bills of credit, so issued as aforesaid, by the plaintiffs to the defendant, Briscoe. And so they say, the consideration of the said last-mentioned note was illegal, invalid, and in violation of the constitution of the United States; and that the consideration of the note sued on, executed by these defendants, in renewal of the said last-mentioned note as aforesaid, is likewise illegal, invalid, and contrary to the constitution of the United States; and this they are ready to verify and prove; wherefore, they pray judgment, &c."

To these pleas, the plaintiffs demurred, and the defendants joined *in the demurrer. The circuit court of Mercer county gave judg- [*263 ment for the plaintiffs; and the defendants appealed to the court of appeals of Kentucky. In the court of appeals, the following errors were assigned by the appellants. 1. The court erred in sustaining the demurrer of the defendant in error, to the first plea of the plaintiffs in error. 2. The court erred in sustaining the demurrer to the second plea. 3. The decision of the court upon each demurrer, as well as in rendering final judgment against plaintiffs in error, is erroneous and illegal. On the 5th day of May 1832, the court of appeals affirmed the judgment of the circuit court. That court delivered the following opinion:—

"We are called upon in this case, to re-adjudicate the question of the constitutionality of the Bank of the Commonwealth; and its right to maintain an action upon an obligation given in consideration of a loan of its

notes. We consider this question as having been settled in the case of *Lampton* v. *The Bank*, 2 Litt. 300. If it be true, as contended in argument on behalf of the appellants, that the question is presented on the face of the charter, that case has been incidentally recognised and confirmed by a hundred cases that have since passed through this court. The case of *Craig* v. *Missouri*, 4 Peters, has been relied on, as ruling this. We do not think that it does; they are distinguishable in at least one important and essential particular." The appellants prosecuted this writ of error.

The case was argued by *White* and *Southard*, for the appellants; and by *B. Hardin* and *Clay*, for the appellees.

White, for the plaintiffs in error.—The suit is brought on an instrument, alleged to be void, as the consideration given for it was a currency prohibited by the constitution of the United States. It was given for the notes of the Bank of the Commonwealth of Kentucky; and the question which is presented by the record, and which is now to be decided by this court is, whether the law of the state of Kentucky establishing the bank, was not a violation of the provision in the constitution of the United *States, *264] which prohibits the states of the United States from issuing "bills of credit." The case is one of great importance, and the decision of this court upon it, is looked for with deep solicitude. It was before the court at a former term, and was then argued at large. The court directed a re-argument.

The facts on which the plaintiffs in error rely, are fully established by the pleadings. The pleas in the court of Mercer county, state the nature of the institution established by the act of incorporation; and that it had no funds provided for the payment of the notes issued by it; and that the funds provided by the law were never paid to the bank. The plaintiffs demurred generally; and thus the facts stated in the pleas, are admitted. The unconstitutionality of the law is stated in the pleas, and the court of appeals of Kentucky decided on the question thus presented; the case is then fully within the provisions of the 25th section of the judiciary act of 1789.

It will be proper to establish the jurisdiction of the case, before proceeding to the other matters involved in it. The plaintiffs assert, that the charter of the bank is a violation of the constitution of the United States. It is the exercise of a claim by the state of Kentucky, to establish a corporation; which, for the uses of the state, and for its exclusive benefit, and profit, has the authority, by its charter, to issue bank-notes, and to circulate them as money. This, the plaintiffs in error asserted, in the court in which the suit was brought against them, and in the court of appeals, was issuing bills of credit by the state, and in direct conflict with the prohibition of the constitution. The repugnancy of the charter, a law of the state, to the constitution, was alleged, and the decision was against the allegation. The courts of Kentucky, the plaintiffs in error say, misconstrued the constitution, by the decision. The court of appeals expressly say, they are called upon to adjudicate on the constitutionality of the law; meaning, certainly, the constitutionality of the law, as it was alleged to be in opposition to the constitution of the United States. All the decisions of this court on the question of jurisdic-

tion, sustain the right of the court to decide on the questions brought up by this writ of error. These decisions were carefully reviewed at the last term, in the case of *Crowell* v. *Randell*, 10 Pet. 368, a reference to that case, is sufficient to sustain the jurisdiction now asserted.

*Upon the question, whether this court has decided, that a corporation, such as that which is the defendant in error, in this case, [*265 can have a constitutional existence, for the purposes for which it was enacted, has not been decided; it is submitted, that no such decision has been made. The case of the *Planters' Bank of Georgia*, 9 Wheat. 904; contains no such decision. In that case, the state of Georgia had but a part of the stock of the bank; the bank had an actual capital, and was conducted for the benefit of the whole stockholders. This court held, that a state might become a stockholder, with other stockholders, in the institution; and that by so doing, the bank did not become exempt from suits, on the suggestion that the suit was against the state of Georgia. Nor did the decision of the case of *Wister* against the same defendants, as in this case, determine that the Bank of the Commonwealth was a constitutional body, because the court sustained a suit against the bank. The charter provides, that the bank may sue, and may be sued. The action of the court in that case, was in harmony with the law. If the state of Kentucky was, as she certainly was, and now is, the only party interested in the bank; yet a suit authorized by her own law could be brought against the bank. The bank has, by its charter, a right to take mortgages for debts due by it; and under a judgment against it, those mortgages might be made subject to an execution or a judgment, obtained against the bank. The process of execution would not, and need not, go against the state.

The question of the constitutionality of the bank, and of the right it had, under the act establishing it, to issue the bills for which the note upon which this suit was given, is now first presented to the court. While it is asserted, that the decision of this court, in the case of *Craig* v. *State of Missouri*, 4 Pet. 439, will in all respects sustain the position taken by the plaintiffs in error, that the notes of the Commonwealth Bank are bills of credit; it is admitted, that in that case, the bills of credit issued by the state of Missouri, were different from those issued by the defendants. The obligations of the state of Missouri bore interest; a circumstance to which great importance was assigned by Mr. Justice Thompson, who delivered a dissenting opinion in that case.

The Commonwealth Bank of Kentucky was established in 1820, during a period of great pecuniary distress; for which it was, by those who created it, expected to afford relief. While it was declared to be founded on funds provided for it, or assigned to it, by the *state, none were [*266 delivered to it. The act declared, that certain lands might be paid for by the notes of the bank; it directed the property which the state held in another bank, then in great embarrassment, and which had suspended payment, should be paid to the Bank of the Commonwealth; but the Bank of the Commonwealth had no control over the land, and the property of the state in the old Bank of Kentucky was never made available to the business of the new bank. Thus, the bank had no funds, and all the officers were appointed by the state. They were the agents of the state, to conduct the business of the bank, for the benefit of the state. Its capital was,

nominally, $2,000,000 ; and notes purporting a promise to pay certain sums, were issued and put in circulation, in the form of loans ; the state having the profit of the interest charged on the loans. As no funds were in possession of the bank, these notes were taken on the faith and on the credit of the state, exclusively and only.

The intervention of a corporation, by which the notes were issued, did not affect the character of the transaction. If they had been put into circulation by a state officer, it would not be denied, that the state issued them ; but there is no substantial or valid difference between such a mode of managing the issues, and that adopted by chartering the bank. The notes were in fact made a tender. The law of Kentucky obliged the plaintiff in an execution, to receive them in satisfaction of his judgment, or to submit to a deferred result of his proceedings against his debtor. The property of the defendant was to be taken at an appraisement, or it could not be sold for a considerable period, if the notes of the Bank of the Commonwealth were refused, when tendered in satisfaction of the debt. Thus, the notes of the Commonwealth Bank were in all respects the same, in substance, as they were in form, "bills of credit," prohibited by the constitution of the United States.

The promise to pay, was the promise of the state of Kentucky, by its agent, the president and cashier of the bank ; the notes or bills were circulated as money, and they might also, in effect, be made a tender in some cases. It is not essential, that the notes should be a tender, to make them bills of credit. The court are referred to the 44th number of the Federalist, for the views of Mr. Madison, as to the nature of the constitutional provision against the issue of bills of credit ; and as to the construction of the provision in the constitution. Bills of credit and paper money are synonymous. The abuse of paper money, during the difficulties of the revolutionary war, and the *ruin which its extravagant issue produced, were the causes of the constitutional prohibition.

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It is not intended to place the charters of banks, derived from state laws, having a capital furnished by the stockholders, or the notes of such banks, in question, in this case. They may rest in safety on other principles ; and the practical construction, given by the states of the Union to the provision of the constitution which is under examination in this case, may put all questions of the validity of such charters at rest.

What is a bill of credit, within the meaning of the constitution? Our courts seem to have considered the interpretation of these terms a matter of some difficulty. "The term 'bill of credit' seldom occurs in the books," says Judge HUGER, in delivering the opinion of the constitutional court of South Carolina, in the case of *James Billis* v. *The State*, January term 1822 (2 McCord 15) ; and the learned judge adds, "but when used, it is always synonymous with letter of credit, and this appears to be its only technical signification." In the case of *Craig* v. *Missouri*, 4 Pet. 442, the late distinguish and lamented associate of this court, Mr. Justice JOHNSON, says, "the terms 'bills of credit' are in themselves vague and general, and at the present day, almost dismissed from our language." In the same case, Mr. Justice THOMPSON says, "the precise meaning and interpretion of the terms 'bills of credit,' has nowhere been settled ; or, if it has, it has not fallen within my knowledge." 4 Pet. 447. Mr. Justice MCLEAN declares,

"it will be found somewhat difficult to give a satisfactory definition of 'a bill of credit.'" p. 452.

It would be the height of presumption, in the face of such authorities, to say, there is no difficulty; nevertheless, we may entertain a strong conviction that the terms have a clear and precise meaning. It is evident, that the meaning of the term used in our own constitution, is most naturally to be sought for, first, in our own history. Yet, on the arguments of the question heretofore, only two historical references have been made. We propose to submit references from the history of each state; not merely to show what "bills of credit" were, but what evils resulted from them. The past mischief is an essential part of the interpretation of the future remedy. By learning what and whence *the country suffered, we shall learn what the convention intended to prevent. [*268

Mr. White, submitting to the court a printed argument on the part of the plaintiffs, prepared by Mr. Wilde and himself, after the former arguments of the case; went into a particular examination of the proceedings of the different colonies, afterwards the states of the United States, in relation to the issuing of bills of credit, or obligations for the payment of money, for the use of the several colonies and states; citing from the legislative acts, and from historical works, the provisions of the laws on the subject, and the actions of the governments of those states, in reference to such measures. It was shown by these references, that Massachusetts, New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia had resorted to measures to supply a temporary, and sometimes, a long-continued currency, by issuing "bills of credit," "paper bills of credit," "paper bills, called bank-bills."

Nor was the issuing of bills of credit, before the adoption of the constitution, confined to the issues of states; but the term was employed to designate the paper money emitted by congress. The resolutions of congress authorizing the different emissions, were cited from the journals of congress. The issues commenced on the 22d June 1776, and they exceeded $450,000,000. They ceased to circulate as money, on the 31st May 1781; although afterwards bought on speculation, at various prices, from $400 in paper for one dollar in specie, up to one thousand for one. On the 18th September 1786, congress resolved that no payments of requisitions on the states should be received in bills of credit, or in anything but specie. They also resolved, that bills of credit should not be received for postage, and that postage should be paid on the letters when put into the office. 4 vol. Journ. of Cong. 698–9. The effects of this system of paper money were ruinious to the whole community. Specie was driven out of circulation, and all property was placed in confusion, and great deterioration in value. The common intercourse of business was suspended, or carried on with distrust and suspicion. Barter was introduced, and the impediments to all transactions of exchange, became almost insuperable.

It is contended, that bank-bills and bills of credit are, in every important particular, substantially and essentially the same. *Mr. White then proceeded to examine the different colonial and state laws, for the [*269 emission of bills of credit; asking the court, before the same was made, to note the material points of distinction supposed to exist between bank-bills

and bills of credit. He said they were: 1. Bank-bills are not issued directly by the state. 2. They are not issued on the mere credit of the state. 3. A certain fund is pledged for their redemption. 4. They are not legal tender. 5. They are payable in specie.

The court are to remark the character of the bills provided for by the different acts intended to be cited. In reference, especially, to those points of supposed distinction, it will be found: 1st. That the bills of credit were issued no more directly by the state, than the bills of the Commonwealth Bank of Kentucky. 2d. That the bills of credit were very frequently not a legal tender. 3d. That the bills of credit were sometimes payable (nominally) in specie. 4th. That the bills of credit were rarely issued on the mere credit of the state. 5th. And that, almost always, a certain fund was pledged for their redemption. If the court, by this scrutiny, find such distinctions disappear; as no others have been taken, it will result, that, essentially and substantially, the bills of the Commonwealth Bank of Kentucky and bills of credit, are the same. And by making it in reference to each act as it is read, the trouble of instituting a comparison of each law on each point, afterwards, will be spared both to the court and counsel.

Mr. White then cited the various acts of the several states, providing for the issuing of such "paper money," "obligations," "bills of credit," or "bank-bills," and "notes," and "treasury notes." If it be contended, then, he said, that the notes of the Commonwealth Bank of Kentucky are not bills of credit, because they are not issued or emitted directly by a state, we answer: 1st. That in every instance, the ante-revolutionary bills of credit were prepared, signed and issued by a committee, commissioners or trustees. 2d. That as a state can act only through her agents, it follows, what she does through her agents she does herself. 3d. We avail ourselves *270] of the forcible expressions of one of the *learned judges of the court, in the case of *Craig* v. *Missouri* (Mr. Justice JOHNSON), who, though dissenting from the judgment of the court in that case, on other points, was in our favor on this.

"The instrument (the constitution) is a dead letter, unless its effect be to invalidate every act done by the states, in violation of the constitution of the United States. And as the universal *modus operandi* by free states, must be through their legislature, it follows, that the laws under which any act is done, importing a violation of the constitution, must be a dead letter. The language of the constitution is, 'no state shall emit bills of credit;' and this, if it means anything, must mean, that no state shall pass a law which has for its object an emission of bills of credit. It follows, that when the officers of a state undertake to act upon such a law, they act without authority; and that the contracts entered into, direct or incidental, to such their illegal proceedings, are mere nullities." "This leads to the main question: Was this an emission of bills of credit, in the sense of the constitution? And here the difficulty which presents itself, is to determine whether it was a loan, or an emission of paper money; or perhaps, whether it was an emission of paper money, under the disguise of a loan." "There cannot be a doubt, that this latter view of the subject must always be examined; for that which it is not permitted to do directly, cannot be legalized by any change of names or forms. Acts done *in fraudem legis*, are acts 'in violation of law.'" (4 Pet. 441.)

It cannot, we presume, be doubted, that the constitution was intended to prohibit all those paper substitutes for money, whatever were their particular forms or shades of difference, which had, before that time, gone by the general name of bills of credit. It intended to make this a hard-money government; perhaps, entirely so; certainly, so far as the states were concerned. If, by omitting some, and inserting others, of the forms, peculiarities, properties or attributes of the different bills of credit issued before the adoption of the constitution, one could be formed dissimilar in many important particulars from any which had ever yet been issued; we humbly contend, notwithstanding such variation, it would still be a bill of credit, within the meaning of the constitution. May we not ask, then, in what essential particular do the the bills of the Commonwealth Bank differ from the ante-revolutiouary bills of credit? *The latter were issued or "emitted," to answer the purposes of money; a circulating medium, [*271 a measure of value, and an instrument of exchange. So were the former. Do the bills of credit pledge a particular fund for their payment? So do the Commonwealth Bank. The bills of credit were receivable in all debts due the public. So were the notes of the Commonwealth Bank. The bills of credit were sometimes, though not always, a legal tender. The bills of the Commonwealth Bank were a qualified tender. If the plaintiff did not receive them, his execution was stayed. The bills of credit were issued through the instrumentality of agents, for the benefit of the colony. The bills of the Bank of the Commonwealth were issued by agents, appointed by the state, for the benefit of the state.

Upon the term "emitted," there cannot, in this case, be raised a question. With respect to a loan-office certificate, which might, perhaps, be *bonâ fide* given upon an actual loan, as the authentic evidence of the creditor's right, and of the state's obligation, a question might be raised, whether such an instrument could be said to be "emitted," as a bill of credit is emitted, that is, to act as a substitute for, and perform the functions of money. But that the bills of the Commonwealth Bank were so intended, does not admit of a doubt. It is so expressed in the preamble.

If it be contended, as by the constitutional court of South Carolina, that this is not a bill of credit, because a particular fund is pledged and set apart for the redemption of the bills, we answer: 1st. These funds are the revenues of the state; the pledge is the faith of the state. These resolve themselves, at last, into the credit of the state. Credit is given to her, because of her faith and revenue. If she break her faith, or squanders her revenue, she loses her credit. 2d. Almost all the ante-revolutionary bills of credit had funds pledged for their redemption. Lands or taxes were always set apart as a sinking fund. Yet the bills of credit, so secured, were found as mischievous as the rest, and in the constitution, there is no exception; the denunciation is general as to all bills of credit.

The other distinctions taken at different times are: That these are not to be considered bills of credit, because they are redeemable on *demand. The term of the credit cannot make a difference, whether [*272 it be a day, ten days, or a year. The promise to pay is the essence of the contract. It is the promise which obtains credit, and credit is given to the promise. The bills of credit issued by many of the colonies before the revolution, were, in fact, payable on "demand." They admitted the

debt to be due by the colony. The bill was to be as money, to the amount of its contents, and to be accepted in payment, &c. See forms of these bills in the Laws of Connecticut, 1709, 8 Ann., p. 145; Laws of Rhode Island, 1710, 9 Ann., p. 60; Laws of Massachusetts, 1702, 1 Ann., p. 171; Laws of Pennsylvania, 1709, 8 Ann., pp. 230, 231.

We have now shown that, substantially and essentially, bills of credit and bank-bills are the same. We have shown that all the supposed distinctions are fallacious. That bank-bills are issued by agents of a state, and bills of credit were issued by agents of the states, which can never act but by agents; and the only difference is, that the agents are called by different names. That the bills of credit were not always a legal tender; that they were not issued on the mere credit of the state; that they had almost always a fund to support them; and that they were frequently payable in specie.

The prohibition in the constitution was intended to secure the future against the evils of the past. The remedy was intended to be co-extensive with the mischief. It was intended to reach not names merely, but things also. The object was not merely to prohibit those particular kinds of paper currency, which had heretofore been issued or emitted by the colonies or states; but everything which, up to that time, had borne the name, or which should thereafter possess the character, assume the place, and be within the principle and mischief of bills of credit.

Still it is contended, the terms are not identical: it is said, we have not shown that bank-bills and bills of credits have ever been used as synonymous or convertible terms. We have shown, that the things are the same. But it is insisted, that the names are different. It will be shown, then, that there is no difference even in name; that bank-bills and bills of credit are, or at least were, once, synonymous. The requisition is somewhat hard, but we will attempt it. *Bank-bills are bills of credit. It is not necessary that on the face of the note, it shall be called a bill of credit. In its form, it is a promissory note. The paper money, before the adoption of the constitution, was not on its face called a bill of credit, it was in various terms, a promise to pay money; but in all the legislative acts creating them, they are called bills of credit. It is demonstrated, therefore, that, in order to make a particular instrument a bill of credit, it need not be so denominated on its face.

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But the bank-bill is, in form, a promissory note. Where do you find promissory notes called "bills of credit?" Promissory notes and bills of exchange, or negotiable paper, generally, as it appears from Malyne, were originally called bills of debt, or bills obligatory. They were called bills, though, from the form given, it is evident they were notes. They were denominated bills of debt, as being evidence of indebtedness. But, subsequently, either because they were not always evidence of debt, but were generally on time, they came to be called bills of credit. They were also called bills obligatory; though it is apparent, from the form and context, that they were not sealed. Indeed, the seal belonged to the common law, rather than the law-merchant. Its use was for those who could not write; which merchants usually could do, though barons could not. The constitutional court of South Carolina, then, are mistaken, when they say "the term 'bill of credit' seldom occurs in the bonds, but when used, is always syn-

onymous with letter of credit; and this appears to be its only technical signification." 2 McCord 15.

Some old books do, indeed, give the form of a letter of credit, which they call a bill of credit. Postlethwaite's Dict., tit. Bill of Credit; 4 Com. Dig. tit. Merchant, F. 3. But Malyne gives a similar form, and calls it, what it has always since been called—a letter of credit, not a bill; while the term "bill of credit" might, with the least industry, have been found by the constitutional court in a hundred places. McPherson's Annals of Commerce, vol. 3, p. 612, in the library of congress. "This year (1683), Dr. Hugh Chamberlain, a physician, and one Robert Murray, both great projectors, made a mighty stir with their scheme of a bank, for circulating bills of credit, on merchandise to be pawned therein, and for lending money to the industrious poor, on pawns, at six per cent. interest; yet it came to nothing." Mr. White referred to a number of authorities in mercantile treatises, *and historical and other works; to show the origin of bills of credit. Many of these treated of bank-bills, bills of exchange, [*274 promissory notes, bills obligatory, and instruments of that description, "as bills of credit." They were substituted for specie, for convenience, and often to supply a deficiency of specie. Proceeding in the argument, he said:

By this time, it appears to us, we have gone far towards showing that bank-bills are not merely, substantially and essentially, bills of credit; but that they are identically the same. Bills of credit is the old name for bank-bills. The longer name has worn out of use, from a philosophical principle in language, which seeks conciseness, perpetually. Men of business never use three words, habitually, when the same thing can be expressed by two.

Our proofs, however, are not exhausted. Let us interrogate the banks themselves. What are their bills called in those charters, from whence they derive the right to issue them? The 28th section of the first charter of the Bank of England, 5 & 6 William and Mary, c. 20, § 28, speaks of the paper to be circulated by the bank, as "bills obligatory or of credit." The charter of the Bank of Pennsylvania of 1793, uses the same terms. In the charter of "the New Jersey Manufacturing Company," granted in 1823, the terms "obligatory or of credit," are used. In the charter of the Bank of Virginia, 2 Revised Code 73, § 13, "bills obligatory or of credit," are mentioned. So also, the same terms are employed in charters of banks in North, and in South Carolina. The terms, "bills obligatory or of credit," are employed in the charter of the Bank of Augusta, granted by Georgia. Prince's Dig. 32. So also, in the charter of the "Planters' Bank" (Ibid. 39); and in that of "The State Bank" (Ibid. 43); the terms are used in reference to the paper issues of those institutions.

If it be contended, that these terms refer to bills under the seal of the banks, and to letters of credit given by them; the answer is obvious. There are no other clauses in their charters which can be tortured into an authority to issue bills at all. If "bills obligatory and of credit" do not signify bank-notes, the banks have been issuing notes without any authority whatever. Judicial decisions have treated the notes for the payment of money as bills of credit; 2 McCord 16–18; *Craig* v. *State of Missouri*, 4 Pet. 425.

With respect to the third point of the appellees—that the bank

*may be unconstitutional, and yet the appellants bound to pay their note; the answer is obvious. A contract made contrary to law is an act *in fraudem legis.* It is consequently void, and will never be enforced in the courts of that country whose laws are attempted to be evaded. This principle is so well settled, as to be stored away among the established maxims of jurisprudence. The case of *Hannay* v. *Eve*, 3 Cranch 247, is as strong a one as can be well imagined; *Craig* v. *Missouri* only follows up that decision. 4 Pet. 425.

B. Hardin, for the defendants in error, stated, that he was present when the law was passed by the legislature of Kentucky; and although he did not approve of it, he was a witness to all that took place at the time of its enactment. There had been large importations of goods into the United States, after the late war with Great Britain; and many persons in Kentucky had become embarrassed, by having made large purchases of those goods. In this state of things, remedies and expedients were resorted to, which, like all quack medicines, failed in their effects; and left the disease where they found it, or in a worse condition. It has been said, that the old colonial laws which provided for the issuing of a paper currency, were resorted to by those who drew the law establishing this bank. This, most probably, was not the fact. The framers of the law intended to provide for the issuing of paper by the bank; and they used language which would carry their object into effect; they did not know of those laws; certainly, they did not resort to them. The purpose of the legislature, in establishing the bank, was to give to it a substantial capital, competent to discharge all the liabilities it might assume; a capital as sufficient as could be provided for any institution for banking purposes. By the ultimate redemption of all of the paper of the bank, the sufficiency of the capital was proved. This is fully shown by the provisions of the 17th section of the law. The lands of the state, east of the Tennessee river, a large and a valuable body, which, by the agreed line between the states of Kentucky and Tennessee, amounted to about 2,000,000 of acres, and also other lands of great value, owned by the state, were made liable for the notes of the bank. In money, these lands were worth from $5,000,000 to $6,000,000. All the interest the state
*278] had in the old Bank of Kentucky, was pledged, by *the law, for the redemption of the obligations of the bank. The amount of paper allowed to be issued, was not equal to that permitted to other banks, in proportion to the security given for such issues. The objection to a want of capital of this bank is, therefore, without foundation; for an equal capital or property equal in amount as a security for the operations of the institution, has not, in any instance, been exceeded.

It is said, the paper of the bank fell below par. This is not in the record; and if that fact should be allowed to have an influence, other matters should be introduced. The value of the notes was diminished by the conduct of the borrowers of the bank; who had used them at par for their private purposes, and who had used them for their full value. No measures, which could bring the notes into discredit, were attributable to the bank; and the amount of the paper issued was constantly in progressive diminution, by its being destroyed when paid in for taxes and for lands. The laws of the state directed that the notes of the bank should be received for the

public lands, in the same manner, and as of the same value as the notes of other banks, paying gold and silver. The receivers of the proceeds of the sales of the bublic lands, south of the Tennessee, were directed to take the notes of the bank for lands. Pamphlet Laws of Kentucky of 1824, § 8. Under the operation of these provisions, there was received for taxes, and for lands, by the bank, and by the old State Bank of Kentucky, the notes of the Bank of the Commonwealth, to the amount of nearly $6,000,000, which were cancelled and burned. In this manner, almost the whole of the issues of the bank have been returned to it; and it is believed, that before the suit now before the court was brought, all the paper, with the exception of about $40,000, had been returned to the bank. Paper of the bank, to the amount of about $40,000, cannot be found, and is supposed to be irretrievably lost. Thus, all the notes, with the exception of those lost, have been redeemed.

By numerous sucessive acts, the legislature of Kentucky directed that the notes of the bank, as they were redeemed, should be burned, and this was done; cited, Session Laws of Kentucky, of 1825, 1826, 1827, 1830, 1832. After all the notes were thus satisfied, or redeemed by other banks established under charters from the state, the public lands, which had been pledged for them, were distributed for school and road purposes.

*The objections to the charter, on the ground of there having been no capital provided for the bank, does not, therefore, exist; and the question which is alone presented for the consideration of the court, is, whether the bank was constitutional, as the state of Kentucky was the only corporator. It differs from many other banks in this only; the state alone is the corporator, or stockholder. In many other banking institutions, states are joint stockholders and corporators. [*277

In the charter of the Bank of the Commonwealth, there is no pledge of the faith of the state for the notes issued by the institution. The capital only was liable; and the bank was suable, and could sue. The bank was sued; and in the case of *Bank of the Commonwealth* v. *Wister*, 4 Pet. 431, this court held, that as against the corporation, the suit was well brought. If it is unconstitutional for a state to be a corporator, how can she be a corporator for a part of the capital of the bank? If the state cannot alone be a corporator to issue paper, she cannot be in part such; and the constitution of the United States is violated, as well by the issue of notes for one dollar, as for one thousand; by the issue of notes, of which a state is one among many of the corporators bound to pay them, as well as if she had alone become bound for their payment. What is the difference between the state being a corporator, or taking a *bonus* for establishing a bank; and authorizing the corporation so erected, to issue notes? The sale of a charter by a state, for a *bonus*, is the sale of the privilege to issue notes; which, if the state had not, she could not grant; she gives the bank thus established power to issue notes for her benefit; a benefit she has secured in advance, by the payment of the *bonus* to her.

It is submitted, that if the notes of the Bank of the Commonwealth are "bills of credit," and the issue of them was prohibited by the constitution of the United States, the notes of all state banks are equally prohibited. Before this question is approached, it is desirable to place it before the court, on its true grounds. The provisions of the constitution are:—"No state

shall enter into any treaty, alliance or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make anything but gold or silver coin a tender ; pass any bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts ; or grant any title of nobility." Art. I., § 10. *The powers granted to the government of the United *278] States, of coining money, are exclusive ; so are the powers to establish post-offices and post-roads ; and in addition to the grant of these powers, there are the express inhibitions to the states, which forbid their coining money, making tender laws and issuing bills of credit.

It is claimed, that making them a tender, is a portion of the character of a bill of credit, as the same was intended by the constitution. Each prohibition is separate. If the states could make anything a tender but gold and silver coins, all would be confusion. What was meant by "a bill of credit," is not stated in the constitution, and is thus left undefined ; we must look for the meaning of the terms elsewhere. We must look to the uses of the terms in past times ; and on this search, we find great difficulties, from their different application to different obligations for the payment of money, and the peculiar characteristics of those obligations, when issued by states or political communities. We look to colonial legislation, and to the practices of states ; and we are unable to ascertain from these, the true sources of information, with accuracy, what those who framed the constitution intended. Sometimes, the bills issued under state or colonial authority were made a tender, and sometimes they were not. This is said by Mr. Chief Justice MARSHALL, in the case of *Craig* v. *State of Missouri*. In the first issue of bills of credit by Massachusetts, they were not made a tender in payment of debts ; afterwards, this character was expressly given to them. In South Carolina, they were made a tender. 2 Ramsay's Hist. of South Carolina, 164.

But there was a universal feature in all the bills of credit, issued before the formation and adoption of the constitution of the United States. The faith of the state, or of the government which issued them, was always pledged for their redemption. This was ever the fact. Another feature and characteristic of these bills of credit was, that the state always issued them in its sovereign capacity, and no capital was pledged for their redemption. They were never issued by, or in the name of, a corporation. The bills of the Commonwealth Bank were issued by a corporation, subjected to suits, and capable of suing.

This is the first time this court has been called upon to fix the precise meaning of the words of the constitution under consideration ; and they are now, by their decision, to save or take from the states a *little of *279] their remaining sovereignty ; and at the same time preserve and faithfully guard the constitutional rights of the Union. The court, in exercising their powers, will do so, as sound judges and lawyers ; and as sound statesmen and politicians. The plaintiffs in error ask to impose restraints on the states, which will deprive them of powers essential to their prosperity, and to the business of their citizens.

In order to arrive at a true construction of the constitutional provision, it is proper to look at the mischiefs proposed to be remedied by its introduction into the instrument. These were the excessive issues of paper, and authorizing them to be made a tender. The great evil was making the

bills a tender; without this, it was a voluntary act to accept and to refuse them; and no injury, but such as was freely consented to, could ensue. This should be the test of a bill of credit, as intended by the constitution. A state can borrow money; and give a note or bond, or a certificate, transferrible, for the sum borrowed. The amount of the notes or bonds given for a loan made to the state, may be determined by her and the lenders; and they may circulate as the holders think proper. The form may be precisely the same as that of any other bank-note or bond, or evidence of debt; and she may pledge her faith and her property for the payment of such engagements. If notes or bonds given by a state are not made a tender, they will not be said to be bills of credit.

Another part of the case is deserving of the consideration of the court. The notes given to the bank by her debtors, and by the law authorizing them to be taken, are made payable absolutely. Suppose, the bank to be unconstitutional, yet the notes given by individuals, and held by the bank, must be paid. They were given for value, by those who gave them; and they used, for the purpose of purchasing lands, the notes received by them from the bank. This was a valuable consideration for the contract, and imposes an obligation to pay the notes, independently of any other matter. Whatever is a benefit to one, or an injury to another, is a consideration.

This court has no jurisdiction of the case, under the 25th section of the judiciary act. The question of the consideration given by the bank for the notes, and the question of the constitutionality of the law, were both before the court of appeals. That court could have given the judgment which was given, without deciding the constitutional question. The construction of the constitution of the United States was not necessarily involved in the judgment given in this *cause. This is an essential feature in every case brought here under the judiciary act of 1789. [*280

Clay, also of counsel for the defendants in error, said, he was gratified by the learning and research of the counsel for the plaintiffs. He had gone into an investigation of commercial, historical and statutory authorities, which were highly interesting; but were not considered, by him, essential to the decision of the case before this court.

He had, when the bank was established, concurred with many others, who were, with him, citizens of the state of Kentucky, in the opinion, that it was impolitic and inexpedient; and its inexpediency is now generally admitted. But among those who promoted the establishment of the institution, none went further than some of those who now come before this court to ask to be relieved from the obligations they entered into with it; and for which they received and used the notes of the bank. Those notes have all been redeemed; they fully answered the purpose of those who borrowed them. They were of value to them; they solicited them from the bank, and voluntarily received them. It is doubted, if the cause of morals would be most promoted, by allowing a release from their contracts, of those who are before the court; or by sustaining the bank, even if it is unconstitutional.

The old Bank of Kentucky had a capital of $1,000,000; one-half of which was reserved by the state, which the state afterwards paid for.

Besides this property of the state, lands were pledged, and taxes were payable in the notes of the Bank of the Commonwealth. Loans on mortgage of real estate were authorized; and these mortgages became a substitute for real property, and could be made liable for the debts of the bank. The bank had also extraordinary powers for the collection of debts due to it. Thus, full provision was made for the preservation of the solvency of the institution.

The depreciation of the paper of the bank was gradual, and afterwards became very great. But it is proper to state, that the credit of the paper afterwards rose, and became equal to par; and in credit as good as that of the notes of any other moneyed institution; so it continues. The depression of the value of the notes of the Bank of the Commonwealth, was similar to that of all other banks which suspended specie payments. It was not greater than the notes of other banks, in similar circumstances.

*281] Two questions are presented in this case. *1st. Were the notes issued by the state of Kentucky? 2d. If so issued, are they bills of credit, within the meaning of the constitution of the United States? The plaintiffs in error must establish both of these propositions; if they do not sustain both, they will fail in their application to the power of this court. The constitution requires both properties to be features in the note which formed the consideration of the obligation upon which the suit was brought against the plaintiffs in error.

1. The state of Kentucky did not issue these notes, they were issued by a corporation. This point has been already decided in the case of *Wister*, 2 Pet. 318. The defence set up in that suit was, that the bank and the state of Kentucky were the same, and that the state was alone the defendant in the suit. That being so, the suit could not be maintained, and the court had no jurisdiction. They very question in the case was the identity of the bank and the state; and whether the emissions of notes were by the state or by the bank. This is expressly declared by Mr. Justice JOHNSON, in the opinion of the court.

It is not important, in considering this case, to inquire what portion of the sovereign power of the state was given to the bank, by the appointment by the state of the officers who conducted it. The number of the officers was of no consequence. If the argument of the plaintiffs in error is good as to the delegation of all the power, it is good as to part; as, if the state is represented by the officers of the bank in any extent, it will be sufficient, so far as this point is under consideration, to make the state the actor in the operations of the institution. The defendants in error must show, and they can do so, that the issues of the bank were not those of the state. It is contended, that the whole of the operations of the bank were those of a corporation, acting under the law of its creation; and managing funds provided and set apart by distinct and positive appropriations, for the security of its operations; in which the state was not acting or interfering.

It is said by the plaintiffs in error, that the issues of the notes by a corporation created by a state, is but an indirect action by the state, of that, which the constitution of the United States prohibits to be done, directly. This is not admitted. If the position assumed is true, all banks incorporated by states are obnoxious to the same censure, for all derive their powers under state laws; and if the *rule asserted can be stretched to *282]

include the Bank of the Commonwealth, it will take in all banks; it will operate to the same extent on all. The argument of the counsel for the plaintiffs in error goes to show that all state banks are unconstitutional. But you cannot stop at state banks. Other obligations for the payment of money form a part of the circulating medium. Are not bills of exchange authorized by state laws, and their payment enforced by state laws? They are thus brought into circulation, and they form a part of the currency of the community. So, the notes of a private individual owe their credit to the laws of the state in which they are issued, as those laws compel their payment by the maker. Thus, these issues are founded on state laws. The argument then goes too far. It should stop at the plain intention of the constitution; and at the object it proposed to accomplish.

What are the principles and the rules which should govern the court in this case? This court, in the *Georgia Case*, say, that only such a violation of the constitution as is plain and palpable, should call into action its powers under the provisions of the instrument. The language of the constitution is that which is in common use, well understood by the community and known to those upon whom it was intended to operate; nor should the aid of foreign laws or usages be called on for its interpretation. This is not necessary, and would involve the proper understanding of it, in difficulty and in doubt. The constitution is to be construed with a view to these principles. The proper and certain interpretation will be adopted, whatever will be the consequences. Courts have sustained an interpretation of laws which had been given to them, although they have regretted their obligation to do so. Will not this court limit the constitution to its plain meaning, and its evident interpretation? If viewing its provisions by these rules, defects are found in it, the court has no power to remedy them; but ample powers for the purpose are provided in it. The application of the rules which are applied to the construction of statutes, is protested against. The constitution is not to be interpreted by such rules; and the framers of the instrument, and the people when they adopted it, did not intend to subject it to the exercise of the same powers of interpretation, which courts properly exercise over legislative enactments.

The constitution prohibits the issuing bills of credit by states, and *this does not apply to corporations, nor to any other issuing but by [*283
the sovereign action of a *state*. This is the clear and plain language of the constitution; and confined to the action of a state, there is no difficulty. In the case of *Craig* v. *State of Missouri*, the issues were by the state, by its officers specially and expressly authorized and commanded to issue the paper. Whatever doubts were entertained upon the question whether the issues were bills of credit, none existed, that the paper was that of the state. No person responsible or suable was put forth, when the obligations were given.

The counsel for the plaintiffs has failed to show that the notes of the Bank of the Commonwealth were issued by the state of Kentucky. The notes were the notes of a corporation. The name of the state is not mentioned in them. The corporation only binds itself for their payment; the funds of the corporation were only answerable for the redemption of this pledge. How, then, can it be said, they were issued by the state, and that they were

bills of credit of the state? Nothing appears in their language, nothing in the emission of them, to sanction such an assertion.

If a state owns the whole or a part of the capital of a bank, she may be a corporator. It cannot be said, that she may be a corporator for part of the capital stock, and cannot be for the whole. On what principle can this limitation be established, and shall it be ascertained? A bank may be constitutional, and its operations legal, until a state shall take an interest in its capital; and its unconstitutionality will begin and be complete, when a state shall assume the full ownership, by a fair purchase of the stock of its whole capital. Such a change of character cannot be sanctioned; it can never take place. The fact that a state may own a part of the capital of a bank, as was held by this court in the case of *Planters' Bank of Georgia;* that a state may become a corporator in a bank; is decisive of the right of a state to make herself a sole operator. The decision of this court in the case last referred to, and in the case of *Wister,* cited from 2 Peters, has closed all doubt upon this point.

Are the notes of the Commonwealth Bank bills of credit? The argument and the authorities relied upon by the counsel for the plaintiffs in error, have been listened to with profound and anxious attention, for the purpose of finding a definition of a bill of credit. This has been done without success. *The definition which is submitted to the court, on the part of the defendants in error, which, if any can be given, seems to approach nearer to the meaning of the constitution than any other which has been offered, is, that it is a bill resting on credit alone, with no other basis to support it. The forms of bills of credit have varied; but the faith of the state was always pledged for their redemption or payment. The convention which formed the constitution of the United States had the evils of the paper currency, issued during the revolutionary contest, before it; and the provision was introduced in reference to those evils, and to the state of things which they produced. Under these views, they intended, by a bill issued on credit, one for the payment of which there is no adequate provision; resting on public faith for its redemption. But if we cannot get a definition, we can look at what were the properties of the paper currency of the revolution, and see if they were the same as the notes of the Commonwealth Bank of Kentucky. 1. That currency was issued by and in the name of the states, individually, or by congress. 2. It performed the office of money, or of a circulating medium. 3. There existed no compulsory power to enforce its payment. 4. There was no adequate provision for its redemption; and, in fact, it was not redeemed. All the mischiefs of a paper currency are prevented, that can exist, if the payment of it in gold or silver may be enforced; and nothing of this kind existed in reference to the revolutionary bills of credit.

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If the notes of the Commonwealth Bank were of this description, the defence will be abandoned. They were money, and they performed the offices of money. They were subjected to the power to compel their payment, by an appeal to the tribunals of the estate; and, as was done in *Wister's Case,* by a successful appeal to the courts of the United States. The paper issued by the bank is described in the 17th section of the act of the assembly. It was expressly declared, that all the notes should be redeemable in gold and silver. In the first section of the act, the bank is declared

to be a corporation, capable of suing and of being sued, and of being compelled to pay their notes, undeniably, in gold or silver. In every instance of the revolutionary and ante-revolutionary paper, there was an inadequacy of *funds. These statements show, individually, that there was no coincidence between the notes of the bank, or the bills of credit of [*285 the revolution; except only that both performed the office of money. These are bank-notes, redeemable, and redeemed, by specie, and payable on demand, and they are not bills of credit. Such notes as these were, are the representatives and evidence of specie; and such a note is like a check for the payment of money. But bank-notes were not the paper of the revolution; and the words of the constitution do not comprehend them. It is, then, clearly established, that those notes were not bills of credit, and were not affected by the constitutional prohibition.

It is not true, that the states which issued the bills of credit before the adoption of the constitution, could be sued for those bills. The citizens of other states could institute suits, but not their own citizens; and thus the limited liability of those states is not a feature like that which existed in the notes of the Commonwealth Bank. The larger portion of all the bills of a state would be held by its own citizens, and as to that portion, no liability to suit existed. The Commonwealth Bank of Kentucky is, like the banks of other states, created for the benefit of the state and its citizens; and having provision made for the full payment of its obligations, and subjected to suits; and all its bills and notes have been redeemed. Although, when other banks suspended specie payments, their notes were, temporarily, bills of credit; yet the liability of the bank to suits for the sums due by them, gave them a distinct character.

The day will be disastrous to the country, when this court shall throw itself on the ocean of uncertainty, and adopt an interpretation of the prohibition of the constitution which will apply to a constructive bill of credit. The large and prosperous commercial operations of our country are carried on by bills of exchange, notes, and bank-notes, redeemable in specie, and on which suits may be brought, should they not be paid according to their tenor. The credit of all such bills may be brought into question, should the court decide this case against the defendants. Keep to the plain meaning of the terms of the constitution, and do not seek, by construction, to include in its prohibitions such paper as that which is brought into question in this case, and all will be safe.

Southard, for the plaintiffs in error.—There are two questions, which it is not proposed to discuss. *They are, 1. Has the court jurisdiction [*286 of the case? The plea, in words, denies the constitutionality of the law of Kentucky, creating the bank. The jurisdiction of the court is therefore apparent upon the record, and the case in 10 Pet. 368, carefully and clearly reviews all the decisions on this point. 2. If the law be unconstitutional, is the contract void? It is understood, that the opinion of the court in *Craig* v. *Missouri*, was nearly unanimous, in affirming the illegality of such contract. I cannot persuade myself that it is proper, for me, to attempt to sustain by argument, what this court has so recently decided. To suppose that it will alter its opinion, from year to year, or change its decisions upon such question, when there happens to be a change of its

members, would not be respectful to such a tribunal; but it would, if it were true, justify the application to our country, of the truth, *misera est servitus, ubi lex aut vaga aut incognita est.*

Nor shall I postpone my argument to combat the allegations of fraud and wrong against my clients. Such charges are easily thrown out, and are not unfrequently used to aid in legal discussions, although very inappropriate to such discussions. They cannot, here, be met by evidence and explanations; cannot be persuasive and controlling upon the judgment of this court; and are no more applicable, in this case, than in all others, where a defendant has received money, and, for just cause, refuses to refund it. They might easily be retorted on the adverse party, but I do not feel the necessity of doing it. There is enough in the constitution and laws to justify my clients in claiming the judgment of the court, and to them I apply my observations.

I am to maintain, that the law of the state, entitled "an act to establish the Bank of the Commonwealth of Kentucky," approved 29th November 1820, was a violation of the constitution of the United States; and its bills were bills of credit, within the prohibition of the constitution. There are two provisions in the constitution which are connected with, and control this subject. The one gives power to congress; the other restrains the power of the states. Art. 1, § 8, pl. 5: "Congress shall have power, &c., to coin money, regulate the value thereof, and of foreign coins; and fix the standard of weights and measures:" and pl. 6 adds, "to provide for the punishment of counterfeiting the securities and current coin of the United States." This gives the power to the Union. *The 10th section of same article declares, that no state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contracts; or grant any title of nobility. This restrains the authority of the states.

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The phraseology and form of expression in these clauses of the constitution deserve attention. They are similar, both in the grants of power to one portion of our government, that of the Union; and the restrictions upon the other, that of the states. And as the phraseology and form of expression are the same, the construction must correspond. Each power and each restraint is separate and distinct from the others; although they were combined in the same sentence, simply, because they were of the same nature and character. Thus, "congress may coin money;" this is one power, substantive and different from the rest. "May regulate the value thereof, and of foreign coins," is another power; "may fix the standard of weights and measures," is still another. Each may be exercised without the rest. Congress may coin money, without regulating the value of foreign coins, or fixing the standard of weights and measures; so it may do either one or both of the two latter, without the former. They are, and were intended to be, separate acts of the government; one or all of which might be performed, at such times and under such conditions, as the discretion of those who administered it should select. The nature of the acts and the form of expression, both require this understanding and construction of the instrument. The same remark applies to the restrictions upon the states, in the 10th

section. Taking the part of it which is directly involved in this discussion, we see that they may "not coin money." That is one power, which, as independent states, they possessed, before their union; but which is now denied to them. They may not "emit bills of credit." That is another power antecedently possessed and exercised by them, which is now forbidden. They may not "make anything but gold and silver coin a tender in payment of debts." That is a third power, frequently practised, but now prohibited. These powers, though of the same general character, and affecting *the same interests, were separately used by the states. They might coin [*288 money, without emitting bills of credit, or making anything but specie a legal tender. They might and did emit bills of credit, without coining money or creating a legal tender. They might, if they had so chosen, have created a legal tender, without coining money or issuing bills of credit. The acts were distinct in their nature, and separately performed; but two, or all of them, might have been performed at the same time, and by the same act of legislation. The framers of the constitution, thus regarding them, united them in one sentence; bnt clearly restrained each of them, whether combined or disunited, in the action of the states; and they framed their prohibition in the same mode and form as they granted the correlative powers to the general government.

In construing the instrument, therefore, we must apply the same principles to both clauses. We must keep the acts separate; and the rules which we apply to the grants, we must apply also to the restrictions. If, in the authority to coin money and regulate the value of coins, we find full and exclusive control on the subject given to congress; we must also find in the restrictions, complete restraint from the exercise on the part of the states. The propriety of this might be enforced, and be illustrated, by various examples in the constitution itself. To coin money, then, is one power; to emit bills, a second; to make a tender, a third: in their nature, and in the language of the constitution, distinct and independent of each other. And the restrictions upon the states apply to each as a separate act, or exercise of power.

The court will perceive my object. The powers to emit bills of credit, and to make a tender, have been treated, in argument, as if they were one and the same thing; and it has been urged, that the emission of bills of credit which was forbidden, was that emission only which was connected with, and received its character from, the fact, that the bills were made a tender; and that unless they were made a tender, their emission was not forbidden. There is nothing in the words and phraseology of the constitution, nor in the nature of the acts, to justify or sustain the argument. A state may violate one or both of these restraints, and its legislation will be void, because unconstitutional. It may issue bills, and yet not require that they shall be received in payment of debts. It may not issue bills, and yet may require something like specie to be received, by its *citizens, in discharge of debts. Both [*289 would be improper, and equally so. In practice, the two acts have not been the same. Previous to the revolution, all the states issued bills of credit. In a proportion of the cases, they were not made a tender. A reference to the books, on this point, has been made, and need not be repeated. This court, in 4 Pet. 435, stated the fact with historical accuracy. The general government has also issued bills, without making them a tender. The

treasury notes of the war of 1812, were bills of credit, but they were not a tender. The government had authority to issue them; its necessities justified their emission. But it did not require that they should be received by the people of the United States in payment of debts. Will it be seriously debated, that they were not, therefore, bills of credit; and that, if the states had issued them, they would have been constitutional?

The plea in the case before the court, puts in issue the constitutionality of the whole law; and, if it be found to violate either of the prohibitions, it must be declared void. It could not authorize the issuing of bills of credit by the state; nor could it make either the bills issued, or anything else, but specie, a legal tender.

That the view presented is in conformity with the opinions of those who best understood the constitution in its early days, I refer to the Federalist, 193; the number written by Mr. Madison. If a different opinion is conveyed in his letter to Mr. Ingersoll, which I do not admit, it can only be regretted; and we must appeal from the inattentive commentator, to the constitutional lawyer, sitting in judgment, when every faculty is awake. I refer also to *Craig* v. *Missouri*, 4 Pet. 434, where the chief justice, for the court, draws the clear distinction; and the dissenting judges do not deny it.

I might, then, consider myself as already relieved from one difficulty which has been interposed in this cause. But I venture to urge a further consideration. The separation of all these powers of coining; issuing bills; making legal tenders; fixing standards; and the bestowal of them on the Union, to the total exclusion of the states; was indispensably necessary to accomplish the great ends for which the constitution was formed. Its leading object was to make the people, one people, for many purposes; and especially as to the currency. One, so far as to the high immunities and privileges of free citizens are concerned. One, in the rights of holding, *290] purchasing *and transferring property. One, in the privilege of changing domicil and residence at pleasure. One, in the modes and means of transacting business and commerce. It intended to break down the divisions between the states; so far, if you please, and so far only, as to remove all obstacles to intercourse and dealing between their respective citizens. To do this, one currency was necessary. The dollar and the eagle of Georgia, must be the dollar and the eagle of Maine. That which would purchase property or pay a debt in Virginia, must purchase property or pay a debt in Massachusetts. Hence, the power of creating and regulating the currency was given to the Union, and withdrawn from the states. One power, the common will of the whole, is to decide what that currency shall be. Congress shall coin money—the states shall not. Congress shall regulate the value of coins, domestic and foreign—the states shall not. The authority is fully and absolutely given to the Union, without restriction or limitation. The states can do nothing which shall interfere with the establishment of a uniform, common currency, and with a uniform standard of value—a standard which every citizen is to have, no matter where he resides, or with whom he deals; which the resident of each state shall employ in his transactions with those of every other state.

This transfer of power to the united body was indispensable. Before the revolution, there was no common currency, or standard of value; except as the colonies were subject to those of the mother country. During the

confederation, there was none—none established and regulated by competent authority. Each state, with an unrestricted will, made one for itself. To do this was one of the attributes which they assumed, when they declared themselves independent. It is, indeed, a natural, inalienable, indispensable attribute of sovereignty, in all nations, civilized and savage. How the states exercised it, during the confederation, in the first moments of their national existence, is matter of interesting, but not of necessary, inquiry in this stage of the argument. But when they passed from confederation to union, their right, in this respect, necessarily ceased. A confederation might, a union could not, exist, with the power exercised according to the will or caprice of the different members. The confederacies of Greece, Holland, Switzerland, Germany and others, had existed, with such exercise. The Union required one currency to place all its citizens on the same platform —to obviate *innumerable causes of dissatisfaction and dislike—to give to the common government the authority which was absolutely [*291 indispensable to enable it to accomplish the great and benevolent purposes for which it was created. Hence, the power conferred upon it is *exclusive.* To reason safely, we must keep this in view : and as the restrictions upon the states are meant as the guards of that power, we must so construe them as not to permit them to encroach upon or interfere with the power. The power and the guards must stand together, and may not destroy each other.

What then is the power to create and regulate a currency for the Union? It is, to establish by law, that which all shall receive, as money ; which shall pass, at a fixed value, in all the transactions of society, and having the national sanction, that nothing created by others, shall interfere to defeat it. It is to make a legal tender. To establish the material and the standard by which all contracts shall be governed ; which do not themselves provide otherwise by agreement between the parties. To prescribe what the debtor may be compelled to pay in satisfaction of his debt, and what the creditor shall receive from him. Such a currency was altogether proper and indispensable, under a system which for the first time in the history of free governments, established it as a fundamental principle, that " the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It was impossible to carry out this principle without it.

Congress, in 1789, immediately after the government commenced, passed a law in relation to certain foreign coins, and by a long chain of acts, familiar to the court, and ending in 1834, from time to time, regulated them, as convenience, discretion and the condition of our own coinage required. In 1792, they established a mint, and cautiously prescribed the coins which should be made, the standard by which they were governed, and the value at which the citizens of the Union should receive them. This law created a currency for the Union. It has been called *constitutional* currency. It is constitutional, because the law creating it was authorized by the constitution ; but it is not so, in that sense alone. The constitution authorized congress to create a *legal* currency, and this is its proper designation—legal currency, or money current by law. Congress might have created a legal currency, *not of gold and silver. They issued treasury notes, and chartered a bank. They had the power to make the treasury and [*292 bank-notes a legal currency, a lawful tender, because the power is without

restriction in the constitution. But it would have been most injudicious and inexpedient; an exercise of discretion, unjustifiable then, and which will not, and ought not, to be exhibited hereafter. Power and duty are not always the same. Policy and power are often opposed.

The court will remark, that I do not labor to define, but I desire to distinguish between currency and money, or circulating medium. Legal currency is what the government, by rightful authority, declares shall pass at a fixed value, in the transactions of society, as gold and silver here; money or circulating medium is that which passes by consent and agreement, or otherwise, in contracts and business transactions. It may be gold and silver or bills of credit, or even promissory notes, which are received as discharges of debts. The former, in all countries, is small in amount, in ours not more than from seventy-five to eighty millions; the latter, if all kinds are embraced, reach probably to nearly one thousand millions. The former is the standard and regulator of the latter. The former is entirely under the disposal of the general government; and it was the avowed purpose of the constitution to prevent the states from interfering with it. The latter is not prohibited to them. But it was that they might not touch the former, or do that which should destroy it, that the prohibition of bills of credit was inserted. They were money currency, if they had the credit and faith of the state stamped upon them; and their circulation would interfere, injuriously, with the common intercourse and obligations of the various parts of the Union with each other.

Among the circulating medium are to be found, the common bank-bills, issued by corporations, as state banks, and promissory notes issued by individuals; as by Morris and Nicholson, of former times; and the Nashville firm, and others of more recent date. They are not legal currency; no man is compelled to receive them for debts due, or on contracts. No man's right to refuse them can be questioned. No law requires them to pass current; it is matter of convention. They are bills of credit of individuals or corporations, and are received on the faith and credit of those who issue, and at the hazard of those who receive them. They form, by assent of parties, a substitute for current money; but have no legal validity as such. Indi-
*293] *viduals and corporations may issue them; and those with whom they deal may receive them, without violation of the constitution and laws, unless they are forbidden to do so. But it is precisely such which the Union intended to prevent the separate states from emitting, on their own faith and credit. And for most obvious reasons, as will presently be further seen.

It is not my purpose to contest the constitutionality of the bills issued by individuals, or by banking incorporations, who have authority by their charters to issue them. I do not concur in the printed argument which has been handed to the court, so far as it seems to declare, that all these state banks are unconstitutional; nor is it necessary for my argument, or my cause, that I should agree to that position. The states have power to create corporations; to invest them with the right to issue promissory notes, on such terms, and with such security, as shall seem proper; to place them, in this respect, on the footing of individuals. But the states have not the power to make the notes issued by them current money, or compel their citizens

to receive them. This would be an assumption of the authority which has been solemnly vested in the Union alone.

The duty of congress is to create and to protect a common currency of the Union. The power to create, embraces the power to regulate, and the means of regulation. The means and the character of this regulation, need not be explained at this stage of the argument. But it will be found, that the admission of the right of the states to create banks, will afford an argument in denial of the right of the states themselves to issue paper on their own credit. Why should these notes be received and used as a part of the circulating medium? Solely from the unavoidable scarcity of current money? The country requires more circulation than specie can possibly afford. They are necessary for the business of society. The same apology existed for treasury notes, and notes of a bank of the United States. Bills of credit, at all times, have this justification, no other; and they may be received, but must not be legalized as currency, by the general government. No public agent of the Union, no representative ought to recognise them as currency, by any act of legislation. I urge, then, that congress has the entire control of the currency, and with it, as a necessary consequence, the power to regulate the circulating medium; and that, until there is an absolute restriction by competent authority, ordinary bank-bills are a tolerated, legal *and constitutional part of the circulating medium; but no part of the legal currency. [*294

This view of the constitution can, by no possibility, create difficulty, or trespass on the rights of the states. The rule as to them is, that they cannot issue bills which shall rest on their own funds and credit, and circulate as money by governmental authority. There is no necessity for them to do it; all the duties which remain to them as governments, can readily be performed without it. The great causes which have always created, and in all countries, the necessity for this exertion of power, have been removed from their action. Those causes had connection with, and sprung from, the intercourse, peaceful or hostile, with other nations; almost universally from war. The Bank of England was created to enable that nation to carry on a war with its great rival. Massachusetts, Connecticut, New York and New Jersey issued their first bills, to obtain aid in the struggle in Canada. South Carolina raised by that process the means to carry on her war against the Indians; and both the state and confederate bills were issued to sustain the war of Independence. But all foreign intercourse is taken away from the states; they wage no foreign or Indian wars; they need not, therefore, the power, in case of such difficulties, to resort to this expedient. While in war, it is unnecessary, in peace, it would produce disastrous consequences. If they were to issue such bills, they would draw a direct distinction between their own citizens and those of other states: and if they were rejected or discredited by other states, or by the Union, distrust and dissatisfaction would ensue, and the Union itself be weakened and endangered.

Bank-bills, or promises to pay, by incorporations or individuals, depend for their circulation on the faith reposed in, or, in other words, on the credit of, those who issue them. And it matters not whether the promise to pay is on demand, or at a future day, or at the discretion or convenience of the payee. The time of payment has nothing to do with their character as bills of credit. A bill, to pay when presented, is no more a bill of credit, than if

it fixes a day when it is to be paid, as a year, or six months hence. It still rests on the credit of the maker. This is so, even if a fund is mentioned by which it may be secured or protected. In private cases, funds are seldom specified. In public, almost always. It was so, generally, though not universally, in the bills of credit of the states, before and during the revolution. But whether with or without a *fund, the credit is and must be
*295] given to the individual or party who makes the promise; and who, by that promise, binds himself to satisfy the holder for the amount. In this respect, there is no difference between the makers; whether private citizens, corporations or states. We look to the person who is bound to see the bill paid; and it is his bill of credit. It is not the agent who may sign; it is not the substitute, but the principal. And if he be found, the bill is the credit; the trust is his, and upon him.

Banks generally issue bills payable on demand; they often issue notes, post-notes, payable at a future day, sometimes bearing interest, and sometimes not. Yet they are still their notes; their bills of credit; they are circulating medium. So, the government issued treasury notes, payable at a future day, and bearing interest. They were the bills of credit of the government; and their circulation, as a medium, depended on the credit of the government. So also, if a state, by its agents, issue bills, for which the agent is not individually responsible, but which must be paid out of funds provided by the states; it is not the bill of the agent, but of the state. The form is nothing; who is to pay, and out of whose funds is the payment to be made, is the decisive matter. Now, if a state, by its agents or otherwise, issue bills which pass as money, they pass, not on the credit of the agent, but of the state itself. If that credit be disgraced and rejected, it is not the agent who feels and suffers, but the state. If the bills are refused by other states, or impeded by the general government, the state is affected; her separate sovereignty is impeached. Imputation is cast, by her equals, and by the Union, on her credit and solvency. Hence, will instantly arise a train of the evils to a Union like ours, which will strike the mind, without the aid of description or argument. The constitution designed to prevent such results; this court will not counteract that design. But this is not all; these bills are the money of the citizens of the state; if other citizens of the Union reject it, private conflict immediately arises; and this strange exhibition is made in a Union among one people, that a part have one currency, another part another. And the citizens of the state which emits have two governments, one of which they may pay in one medium, and the other they must satisfy in a different medium; the cities of other states are compelled to avoid all dealing with them, or receive what is not current where they reside. This train of reflection deserves consideration, when the meaning
*296] of the constitution is sought. *Those who made it, were not blind to such effects. The great principle is, that the Union has the power over the common currency. The states cannot interfere, and upon their faith, credit, sovereignty, establish anything which is to have that character. They may authorize their citizens to issue bills, but they may not give those bills any portion of their power or authority, or credit. The moment they do this, they become invested with a new character; they become public money; national, so far as a state is national; separate, so far as a state has

separate and independent existence. They create a currency of their own, different from that which is currency elsewhere.

It has been supposed, that this grant of power to the general government arose from the evils which the states had inflicted on themselves by paper money, and was intended to guard them from a repetition of these evils. These were great and appalling; their history is one of imposition and oppression; and they doubtless led the states to a willingness to surrender the power: but it was not so much to create a guardianship over the states, and prevent state and local, as confederate difficulties, that the provision was inserted in the constitution. The remedy for pre-existing and for prevention of future evils was the power conferred on congress; and that power was sufficient for its object, if it had been wisely exercised. But this is not the place to point out and secure its proper management; difficulties and inconveniences in the formation and administration of laws, are not for this tribunal.

The positions resulting from the preceding suggestions appear to be, 1. Congress alone can establish and regulate the currency. 2. States may create corporations which, like individual citizens, may issue bills of credit. 3. These may be received or rejected, at will, by the citizen. 4. Congress may determine how far they shall be treated as currency—as a tender. 5. In doing this, they must make the currency uniform.

If these principles have been explained, we may inquire further into the guards which are provided to prevent their violation. They are two: the states, in virtue of their funds, credit and sovereignty, are not to emit bills, nor make a tender of anything but gold and siver. *Both these had been done by the colonies and by the states, in innumerable instances; [*297 some producing incalculable evils, others rather beneficial than injurious. In New Jersey, for example, her bills had been so regulated and secured, although they amounted to, nearly, if not quite two millions of dollars, that their credit and payment were protected; and the evils felt by her people, were rather from the paper money of the confederacy, than from her own: and this may in part account for her vote on some questions relating to this provision of the constitution. 4 Elliot's Debates 137.

The prohibition is in the most absolute terms. "No state shall emit bills of credit." It did not so stand in the draft of the constitution reported by the committee. There, it was conditional. "No state, without the consent of the legislature of the United States, shall emit bills of credit." 4 Elliot's Debates 123. The condition was expunged; the prohibition is peremptory. It is so also as to coining money and making a tender; the other two acts which might interfere with the general powers granted to congress. And it is apparent, that one of them is no more taken away than the others. The states have the same right to coin money, as to emit bills.

These bills and paper money were one and the same thing. The paper money of the colonies and of the new states were called bills of credit; simply because issued by the authority of the states, created by them, and which they were bound to redeem. This requires no argument or reference to authority, because it is admitted fully by the adverse counsel, and is not denied. The paper money was the bills of credit, and there was no other. Now, if all bills of credit are forbidden, then all paper money is forbidden

If there be any exception, it is to be shown by those who maintain the validity of the state issues. Whatever the states were in the habit of issuing is then prohibited. What were they? I shall not refer to the multitude of acts which have been cited, and to which the court have references. They were all of one character; having one object, and one substance. They were signed by state officers, commissioners, committees, by persons who were agents of the state, and acted for the state, not for themselves.

The court cannot but be familiar with Story's Commentary on the Constitution; which gives the most clear, condensed and accurate view of these bills, their nature and effects, which is within the *compass *298] of my reading. I use it as one of my guides in this argument. 3 Story's Com. 222. They were promises by the agent that the state would pay the amount mentioned, on demand, or at a fixed day. They had a fund provided for their redemption, which those who authorized them considered sufficient to secure their payment; generally taxes, or some portion of the revenue belonging to the state. The sufficiency of this fund was of no importance, as to their character as bills of credit. It almost always failed, except in case of the state to which I have before referred; but in all cases, the resort was to the funds and the credit of the state. They were permitted to pass as the citizens should estimate them; or they were forced into circulation by legislative command, by tender laws. They were circulated as money, and in every instance which can be found, they promised payment in gold and silver, in specie, or in current money, which meant gold and silver. In all cases, they were bills of credit and paper money; and the states cannot now emit anything in their resemblance, or having their object. In all their forms, they were within the mischief to be remedied. See *Craig* v. *Missouri*.

The adverse counsel, to enable the bills of the Commonwealth Bank to escape the denunciation, have given us four tests, by which they are to be tried; and without which, they are not to be taken as bills of credit, within the meaning of the constitution. These are—

1. That they were issued by and in the name of the state. A more true description would be, that they were issued by officers or agents of the state, for and on behalf of the state. The form given in 4 Pet. 453, was general. It was the certificate of the officer; the promise that the state would pay. I admit, that the person signing them must be an officer or agent of the state, and promise for the state; he must represent the state, but the form in which he does it, is of no importance. "Due at the treasury of the state 20 dollars," and signed by the person authorized to sign it; is as much a bill on the credit of the state, as if the most precise form was used. And it matters not what the treasury or place where it is to be paid, is—a bank, or the treasurer's house. It is the place where funds of the state are kept; and that is the treasury, call it by what name you will. It does not cease to be the treasury, because you call it a bank. And if the promise is made by the agent, that he will pay, it does not thereby cease to be binding on the state; if the *money out of which he was to pay, *299] is the money of the state, and not his own. Forms cannot conceal the substance of the transaction, nor divert its obligation from the real debtor.

2. That they were to supply the place of a circulating medium. There

is, in this case, no object in debating this test. It is emphatically admitted, that the notes in question were designed to circulate as money, and supply its place.

3. There was no compulsory process to enforce payment. Is is not perfectly apparent that there was, in all these cases, the same process as upon all other contracts by the state? Besides, when the provision was inserted in the constitution, the states could be sued. This was the early doctrine, and the constitution was amended to take away the suability of states. But to relieve this present case from the application of this test, it must be shown, that the officers or agents who have been interposed between the holder of the notes and the state itself, can be sued, and compelled to pay, whether the state will it or not. A suit against them is mockery, unless the judgment can be enforced against those who own the funds. When the law is examined, the value of this effort to evade the constitution will be apparent.

4. That for the bills of credit, before the constitution, no adequate provision was made for their redemption. This was not believed to be the case, at the time of any of the emissions. A fund was almost always provided. Whether sufficient or not, was matter of opinion; and they only were to judge of its sufficiency, who authorized them. It was to arise from taxes, excises, imposts, specified property, from some source of revenue to the state. That they were found to fail, does not alter the fact. It will scarcely be pretended, that the character of the paper, as bills of credit, depended on the accuracy of judgment of those who set apart the sinking fund. Much less would that character be changed, if the fund should unexpectedly fail. This would convert them into bills of credit, according as the value of the fund was enhanced or depreciated. The counsel will find it difficult to sustain this position, by any reference to history; and if the insufficiency of the fund is to be decided by the depreciation of the paper resting upon it; which is the only test which we or this court can apply; then the defendant in error can have little hope. The notes of the Commonwealth Bank depreciated fifty per cent., notwithstanding the fund provided for them.

The result of these tests is, that the qualities of the paper in question cannot be confined to the points urged against us. Their true description is, paper money—bills resting on the funds, faith and [*300 credit of the state—issued by agents of the state, promising that they shall be paid, whether out of a specific fund or not; having the same means to enforce payment as other contracts of the state, and designed to pass as money, to relieve the wants of the government, or its citizens.

It will at once be perceived, that neither this description, nor any argument now urged, can interfere with, nor be made to deny the right of a state to borrow money and give its acknowledgment of the debt. If it be honestly and truly a loan, and the acknowledgment intended to secure its payment, no objection exists. The bills of credit of the colonies were not loans, nor certificates of loans. They were the paper money—the circulating medium of the times. It is the business of a court to look at the real object; and mere matters of form, or the name by which any paper or instrument is called, will not, with them, decide its character. If a state, not in debt, not wanting money to discharge its obligations, issues notes

admitting that it owes, and does this to relieve its citizens and create money for circulation, shall the finesse succeed? Shall the constitution of the Union be overthrown by chicanery; and by mere names given to acts? Or rather, shall it not operate upon the acts themselves, and be enforced according to its obvious import and meaning? This is a matter not to be reasoned before this court.

I am now prepared to examine the law of Kentucky creating the Bank of the Commonwealth, and to apply its provisions to the constitution. It will be found to authorize the emission of bills which have every characteristic of the bills of credit of former days. Its preamble developes its object, and the mode of accomplishing it. It is in these words: "Whereas, it is deemed expedient and beneficial to the state, and the citizens thereof, to establish a bank, on the funds of the state, for the purpose of discounting paper, and making loans for longer periods than has been customary, and for the relief of the distresses of the community; therefore, be it enacted," &c.

The object was not to borrow money for the state. This cover, which was unsuccessfully attempted in *Craig* v. *Missouri*, cannot be resorted to here. The government of Kentucky had no debt; no necessity to borrow money to supply her wants. The object was the relief of the distresses of the community; the mode of relief, was to make loans to them of money, *301] with which to *pay debts and make purchases. Her motive was similar to that which produced all the old paper money. She had not as good an apology as Massachusetts and the other colonies had, at the commencement of the eighteenth century. They issued their bills, to enable them to raise the forces with which to fight the battles of the country; or to pay them, on their return from their gallant, but often unsuccessful enterprises. Their motive was to pay a debt of the government; to meet its obligations. Here, it was to provide money for the people of the state.

The mode of providing relief was by a bank; to issue money in the precise form of all other bank paper, and to answer the purposes of all other bank paper. And it was no new mode of issuing bills of credit. There is one example, and that not the least objectionable among the multitude, of its use before this. South Carolina, I think, in the war with the Tuscaroras, adopted this very mode; created a bank, and issued paper money. See 1 Hist. of S. C. 204. The two are alike in all essential particulars; and yet no man has ever supposed, that the notes of the South Carolina Bank were not the kind of bills of credit which are admitted here, in argument, to be paper money and to be unconstitutional.

The provisions of the law and its supplement show, that the plan was to equalize this money, as money, among the people. The 11th section divides the capital among the counties, in proportion to their taxes. The 21st section, and the supplement, p. 165, creates a branch of the bank, in each judicial or congressional district. The 18th section prescribes the amount which should be loaned, and that it shall not be for longer than one year; nor be loaned for any purpose but to pay debts and purchase stock and produce. In plain words, it was money; money issued and loaned by the bank, to be used as money.

It is not my purpose to deny the duty of the government of the state to

use all appropriate and constitutional means to relieve the people, when under such distress as was then felt; bnt to deny the right to use the means then adopted. The Bank of Kentucky had been created many years before, and the state was one-half owner of the stock. During the war of 1812, it, like others, suffered. It stopped specie payment, by order of the government; and was in that condition, when, in 1817, the state chartered more than forty new banks, requiring them to make their capital of specie, or of notes of the Kentucky Bank. They failed, as might have been expected; and *in 1819, their charters were taken away. The pressure and distress of the community were almost insupportable. The virtue [*302 and talents of her best citizens were put in requisition; and during the sitting of the legislature in Frankfort, they met in the capitol, in the hall of legislation, to devise the proper means of relief. If I have the history correctly, one of my learned adversaries (Mr. Clay) was there; and, as he has done on so many other occasions, gave to the members of the legislature, and his other fellow-citizens, the counsels of true wisdom. But they were not to create such a bank as that now under consideration; the constitutionality of which was, at that day, denied by a large proportion of the ablest citizens of the state. The legislature adopted other, and, as I insist, unconstitutional advice; and created money for the relief of the people; the money whose legality we contest.

The inquiries at once meet us, whose money was it? by whom was it issued? on whose credit did it rest? by whom was the fund for its redemption owned? An answer to these questions must settle our controversy. If the fund belonged to the state; if the credit was that of the state; if those who issued it were the mere agents of the state, without personal interest or responsibility; then it was the money of the state; the bills were bills of credit, emitted by the state, and fall within the constitutional denunciation. It is susceptible of demonstration, that the state, and not the corporation, was everything. The corporation was not to provide relief of itself. It was but the instrument used by the state to effect its object, by its own means and resources. The corporation was the mere form of her action; and if this form shall be found sufficient to cover and legalize the act, the constitution is, on this point, not worth the parchment on which it is written. It does not require even ordinary ingenuity, to enable every state to trample upon and defy it, whenever interest or caprice may dictate.

1. Then, as to the stockholders. § 1. "That a bank shall be, and the same is, hereby established, in the name and on behalf of the commonwealth of Kentucky, &c." § 3. "The whole capital of said bank shall be exclusively the property of the commonwealth of Kentucky, and no individual or corporation shall be permitted to own, or pay for any part of the capital of said bank." § 5. The capital stock of said bank shall be two millions of dollars (increased by supplement 22d December 1820, to three millions of dollars), to be raised and paid in the following manner, to wit: "All moneys *hereafter paid into the treasury for the purchase of the vacant lands of the commonwealth; all moneys hereafter paid into the treasury [*303 for the purchase of land-warrants; all moneys which may hereafter be raised for the sale of the vacant lands, west of the Tennessee river, and so much of the capital stock owned by the state in the Bank of Kentucky, as may belong to the state, after the affairs of said bank shall be settled up,

with the profits thereof, not heretofore pledged or appropriated by law; shall be exclusively appropriated to the making up the capital stock of said bank;" the treasurer, as he should receive money from these sources, to pay it over to the cashier, &c. § 24. All the interest arising from the loans and discounts, which may be made by the said bank, after the payment of the necessary expenses, shall constitute and be considered as part of the annual revenue of the state, and subject to the disposition of the legislature. § 28. The treasurer was to furnish $7000 to procure plates, &c., to put the bank into operation. § 35. "That the notes of the present Bank of Kentucky shall be receivable in payment of all debts due the bank hereby established, and the revenue of this commonwealth, unappropriated at the close of the present session of the general assembly; also, the revenue hereafter collected, which may remain in the treasury, unappropriated, annually, shall constitute a part of the capital stock of said institution, and shall be paid over to the cashier of the bank, by the treasurer; subject to such appropriations as may be made from time to time by law."

Preliminary to the particular examination of the character of the paper issued by the bank, under this charter, and to a further discussion of the case; it is important to call the attention of the court to the state of the questions in this case, as they are presented by the pleadings. In no propriety can the cause be decided, but upon them; and the court will, therefore, look to them with their accustomed care and discrimination, before the decision is pronounced.

The pleas of the defendants, in the courts of Kentucky, are, that no capital was furnished to the bank by the state of Kentucky; while the pleas refer to the provision in the charter, which direct the payment of the proceeds of certain lands, and that the funds of the state in the Bank of Kentucky, shall be paid over to the Bank of the Commonwealth, they aver that nothing was ever paid. They also aver, that the whole of the profits of the bank belonged to the state, and were received by the state. The
*304] plaintiffs demurred to *these pleas, and thus they admit every and all the facts set forth in them. The case is, therefore, on the pleadings: a bank was established for the sole and exclusive benefit of the state of Kentucky, for the exclusive profit of the state; and no capital was furnished by the state, none was paid into the bank. The state appointed the officers of the bank, and they issued notes in the form of bank-notes. These notes were circulated as money, and were the consideration for the note on which this suit was brought. The law directed, that certain funds should be handed over to the corporation, which were to form the capital, but the law was not complied with. The credit of the state, pledged by the provisions of the charter, directing the appropriation of these funds, was, therefore, the only pledge for the redemption of the bills of the bank. If the case would stand in a more favorable aspect, had the proceeds of the public lands, and the funds of the state in the Bank of Kentucky, been actually handed over to the president and directors of the Bank of Commonwealth, and thus have become a capital, answerable for the debts of the institution; this is not the case before the court. The pleas of the defendants allege the contrary, and the demurrer admits the truth of the allegations. Even had those funds been so appropriated, if any such existed, and this court

does not know they did exist; still these appropriations would have been revocable by the legislature of the state.

Where is the controlling power over the state, to prevent, by subsequent legislation, the withdrawal of all the funds, at any subsequent period, and for any purpose the legislature should direct. Could the state of Kentucky have been called upon, for impairing the obligation of these contracts? Before what tribunal could such a claim have been preferred. Thus, the faith of the state was alone the basis of the bills of the bank, and the pledge for their redemption. A faith, it is not intended to impeach, or to question. The argument has no such purpose or design.

To proceed with the general argument. By the provisions of the law, it is clear:—1st. That the bank was established in the name, and on behalf of the state. Not in the name, nor on behalf of the corporation, or any of the men belonging to or composing it. The state was the only stockholder; the only one interested in it. 2d. That all the stock, funds, profits of the bank, belonged to the *state; were, in fact, the property, the revenue, the treasure and the treasury of the state. 3d. That the state had absolute [*305 control over this property; could appropriate every dollar of it at pleasure; and by the 29th section, it had the power, from time to time, to alter and change the very constitution of the bank which nominally held it. 4th. No individual, not even the president and directors, owned one cent of the capital stock, or could receive, in any form, the slighest profit from it; or regulate and dispose of it otherwise than according to the pleasure of the legislature. It is impossible to conceive a more perfect property. The corporation owned nothing. It used nothing, except as the agent and representative of the state.

Under these circumstances, can it be pretended, that notes issued upon this property, and secured by it, were the notes of the bank, and not of the state? They circulated on the faith and credit of the fund, or of the owner of the fund. To call them the notes of the corporation, is a gross perversion of the plainest truth. They were the notes of the state, and actually issued out of the treasury of the state. The covering is too thin for judicial eyes. In the whole history of bills of credit, there is not one case more bald, so far as funds and credit are concerned.

But it has been argued, that the funds were vested in the corporation, and that they were ample to secure the payment of the notes, which were payable in gold and silver; and the corporation might be sued. How were they vested in the corporation? The president and directors were, by the 2d section, made a corporation, "able and capable in law, to have, purchase, receive, possess, enjoy and retain, to themselves and their successors, lands, rents, tenements, hereditaments, goods and chattels, of what kind, nature or quality soever, and the same to sell, grant, alien, demise and dispose of." But when or how was their capacity in this respect satisfied or used? Were the lands from which the capital was to arise ever transferred to them? Was the state's capital in the Bank of Kentucky? Never! The corporation never owned either. It was not intended that they should. The capital was to be created out of their profits, after the wants of the state were supplied. They never owned any of the property. Even the profits which might arise under the loans and the mortgages by which they were to be secured, was, after payment of the necessary expenses, to be "subject to

the disposition of the legislature." See § 24. *And their whole capacity of acquiring and holding property, was to be "subject, nevertheless, to the rules, regulations, restrictions and provisions in this act." In other words, subject to the absolute control of the legislature; subject to the wants of the government; subject to the annual appropriations by law. None of the property was ever vested in the corporations, as owners, but only as agents or trustees of the state: trustees, too, compelled to act at all times, not by the covenants in the trust, but by the command of the *cestui que trust.*

As to the value and sufficiency of the fund, but little need be said. It is, at best, proved only by allegations of counsel; founded upon no evidence before the court. The lands were most uncertain in their proceeds; they might, or might not, produce funds to pay the notes, or form a capital. And they might at any moment have been transferred by the state, or given up; as is the fashion of the day, elsewhere, to actual settlers. The capital of $500,000 in the Bank of Kentucky, and its profits, were, if possible, in a worse condition. It was previously incumbered by law, according to my recollection, to two-thirds of its amount; and was liable to further burdens. The bank had stopped payment; and its very incompetency occasioned the charter of this bank.

But if the fund was so ample, why did the notes depreciate? They fell, as the court has been informed, fifty per cent.; and were at that point, when they were loaned to the plaintiffs in error. The truth on this point is, that the bank never had any funds. It went into operation, before any part of the capital was or could be paid in; and issued its notes, and took its mortgages and other securities from the borrowers. It was created on the 29th November 1820, and went into operation 1st May 1821; and never, during its existence, received, from any quarter, a hundredth part of the three millions which it was authorized to emit. The position of the pleadings, as has been said, determines this fact. The plea denies that the capital was real, or the fund sufficient, and the demurrer admits the truth of the allegation; and it makes, in this, no admission contrary to the truth. The bank never had any capital except its own notes; its own promises to pay: and these, it is quite too absurd to regard as constituting capital, or giving ability to pay gold and silver.

Again, the promise was to pay gold and silver; and the promise might be, and has been, enforced. In this respect, these notes are only equal to all former bills of credit. They all, without exception, promised, *in
*307] substance, to pay gold and silver; they bore this undertaking on their face. But did they do it? Was it not the promise, and the failure to perform, that covered them with the mantle of fraud and imposition, and created the bitter denunciation of the people, and the constitutional prohibition of their government? And if this bank paid gold and silver, how happened it that its notes depreciated so enormously? It ran the career of all its predecessors.

The reference to the payment enforced by this court, is to the case of *Commonwealth Bank* v. *Wister*, in 2 Pet. 324. This was the case of a deposit, not of the loan of its notes. It was the payment of money received; not of gold and silver for its promises, its bills of credit. And if, after judgment and execution, it had declined to pay, out of what would

the money have been made? Of the property of the president and directors? This could not have been touched. Of the capital of the bank? It had no existence. Of the profits? These might have been appropriated by the state, and removed out of the way even of the process of this court. Could the creditor take the lands; the stock of the Kentucky Bank; the money in deposit? He would have come, at last, to depend, as in all other like cases, on the honor and faith, and credit of the good commonwealth of Kentucky. He might have found himself in possession of a right, without a remedy, In this respect, the promises of this agent of the commonwealth stand precisely on the ground of the old bills of credit. They were protected by funds quite as respectable and as safe as these. And some of those of the old congress were better; for the court will recollect, that in one instance, it pledged all the colonies.

The next argument which I am called to consider, has relation to the persons by whom the notes or bills were issued. It is said, that they must be officers of the state; and I understand it to be admitted, at least, not denied, that if these notes had been issued by the governor, auditor, treasurer, or a commissioner or commissioners, appointed, as of old times, for the purpose, and to act for the state, they might be regarded as bills of the state; and, of course, bills of credit. Upon what principle, does this admission rest? The officers named, the governor, auditor and treasurer, are not officers for this purpose. If they sign and issue bills, it is not in virtue of their offices; it is no part of their official duty: but they do it, as a special duty, assigned to them by law. Might not the same duty be assigned to any other persons in the state, and they represent and be *its agents, precisely in the same sense, and with the same binding obligation on their principal? It would puzzle ingenuity to define the distinction. [*308

In answer, then, to the objection, I maintain, that the president and directors of the Commonwealth Bank were the special officers, the selected agents of the state for this duty. They were appointed annually by the legislature, as all other officers were. § 1 of principal act, page 35, and § 3 of supplement, page 166. They gave bonds, not to the corporation, but to the state, as other officers do. They took an oath of office, like others. They were required to keep minutes or records of their acts, to be laid before the legislature, their creators, or before any committee of that body (§ 16), that their official conduct might be known; and they were removable by the resolution of the legislature. They were made a corporation, that is, united into one body, that they might sue and be sued. But this was solely to enable them to act as the officer or agent of the state; not to give them a right act for themselves or others, or to give any interest in the property, or any rights other than the treasurer or auditor might have had. Suppose, the treasurer of the state, for the time being, had been commanded, and been made a corporation, to issue these notes and perform these duties, and to sue and be sued; what would have been his character, and how would the notes have been regarded? He would have been the officer of the state still, and the notes, the notes of the state. I demand, then, to have the difference explained, if judgment is to be pronounced against the plaintiffs in error, and the constitutionality of this law affirmed by this tribunal. The duty which these officers had to discharge was little more than to issue the notes from what the law calls "small change," to

any amount up to $100, and take security for them (§ 4, and § 16 and 17 of sup. page 170) ; to keep the treasury, and to account for the profits. And all this, not for themselves, but for the state. Their loans were to be only to the government and citizens of Kentucky ; and these loans were to be negotiable and payable as money. § 22.

But there is still another feature which makes this law unconstitutional. The money issued was made a tender by § 20. The *securities taken *309] for loans of this money, are to be considered as of record from their date, and have priority of all mortgages and conveyances not previously recorded. The property might be sold in sixty days, and bought in ; the debts for this money thus became debts of superior dignity, and were to be first paid. The notes were to be received for taxes and dues to government, and for county levies, for officers' fees and salaries. And by an act of 25th December 1820, which may be regarded as contemporaneous with the charter, executions were suspended for two years, unless the creditor would indorse thereon that these notes would be received in payment ; and if a sale took place, it must be with a credit of two years. The law thus enforced the receipt of these bills of credit as legal currency. The constitution intended by its prohibition to forbid all interference with the legal currency. A stay for two years, made it a tender for two years. The power which could do this for two, could do it for twenty years. But my object in referring to these provisions is, to draw from them the character which the state meant to give to the money. It clearly regarded these notes as money ; and meant to make them a legal currency among its citizens, in virtue of its own powers and credit, the precise object of all the old laws authorizing bills of credit. When did any state do this in regard to bills of corporations or individuals? Had they been the property of the corporation, would they have been thus protected? Would it not have been a gross violation of that plain provision of the constitution, that forbids the impairing of contracts? Indeed, if the two acts of 29th November, and 25th December, can be regarded as contemporaneous, and parts of the same system, that provision of the constitution applies to this law with irresistible force.

The attempt has thus been made to investigate the meaning of the constitution and the provisions of the law of Kentucky, and compare them ; and the result which seems to have been reached is respectfully submitted. The constitution of the United States forbids a state to issue bills resting upon its funds and credit ; and is not to be evaded by mere finesse, and forms and names. It looks to the substance. The notes of the Commonwealth Bank were the notes of the state, issued by its officers, for the state ; relying for redemption on the property and faith of the state ; and circulated for the profit of the state, and not of the bank, or of any individual citizen. The law then was in violation of the constitution, and is void.

But does the case rest on argument and illustration? It has already *been decided. I have regarded the case of *Craig* v. *Missouri*, as *310] conclusive of the judgment of this court upon the question involved here. Not only is that judgment, as pronounced by Chief Justice MARSHALL, clear and explicit ; but the grounds assumed by the dissenting judges confirm the principles now advocated. That case is before the court, and I can hope to add nothing to its force ; but I may suggest that the grounds of doubt with the dissenting judges do not exist in this case

I am unable to perceive a distinction between the cases, which will justify the condemnation of the Missouri paper, and the support of that of Kentucky; unless it be, that the former was signed and issued under the authority of the law, by persons called auditor and treasurer; and the latter was signed and issued under the authority of law, by persons called the Commonwealth Bank of Kentucky—a distinction without a difference. Both were by agents of the state, acting for the state; and the acts were thus acts of the state. I am yet to understand how a state can do that by a corporation, which it cannot do by other agency. Is that be the principle, its annunciation from a tribunal of justice, will give new light upon constitutional law to the people of this country.

I have presented the argument, and do not now turn aside to inquire into the conduct of the state, or the gains she may have made by the issuing and burning of her paper. If she had taken mortgages on the lands of all her citizens, for her depreciated paper, and brought them all to her granaries, as Joseph did in Egypt, it is a matter to be settled between her and them. If she has made money out of them, they must seek the appropriate satisfaction. Nor do I detain the court by balancing moral results between her issue of depreciated paper, and the plaintiffs in error refusing to pay still more, after they have already paid more than what they received was worth. The only morality which is to be regarded in argument, before, or in its decision, by this high tribunal, is that prescribed by the constitution and laws of the country. It is, in this day, the safe morality, everywhere. I ask for their vindication, and fear no consequences.

The disastrous day which my most eloquent opponent depicted, will be found, not when any constitutional restraint shall be enforced either on individuals or states; but when the commands of the constitution shall be disregarded; and this last sheld for its protection shall show itself too weak to bear the weapons which are hurled *against it. Believing that that time has not yet arrived, I confidently anticipate its support, by the [*311
judgment of the court in favor of the plaintiffs in error.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court, by a writ of error from the court of appeals of the state of Kentucky, under the 25th section of the judiciary act of 1789. An action was commenced by the Bank of the Commonwealth of Kentucky, against the plaintiffs in error, in the Mercer circuit court of Kentucky, on a note for $2048.37, payable to the president and directors of the bank; and the defendants filed two special pleas, in the first of which *oyer* was prayed of the note on which suit was brought, and they say that the plaintiff ought not to be have, &c., because the note was given on the renewal of a like note, given to the said bank; and they refer to the act establishing the bank, and allege, that it never received any part of the capital stock specified in the act; that the bank was authorized to issue bills of credit, on the faith of the state, in violation of the constitution of the United States. That, by various statutes, the notes issued were made receivable in discharge of executions, and if not so received, the collection of the money should be delayed, &c.; and the defendants aver, that the note was given to the bank on a loan of its bills, and that the consideration, being illegal was void. The second plea presents, substantially, the same facts. To both the pleas,

a general demurrer was filed; and the court sustained the demurrer, and gave judgment in favor of the bank. This judgment was removed, by appeal, to the court of appeals, which is the highest court of judicature in the state, where the judgment of the circuit court was affirmed; and being brought before this court by writ of error, the question is presented, whether the notes issued by the bank are bills of credit, emitted by the state, in violation of the constitution of the United States.

This cause is approached, under a full sense of its magnitude. Important as have been the great questions brought before this tribunal for investigation and decision, none have exceeded, if they have equalled, the importance of that which arises in this case. The amount of property involved in the principle, is very large; but this amount, however great, could not give to the case the deep interest which is connected with its political aspect.

*312] *There is no principle on which the sensibilities of communities are so easily excited, as that which acts upon the currency; none of which states are so jealous, as that which is restrictive of the exercise of sovereign powers. These topics are, to some extent, involved in the present case. It does not belong to this court to select the subjects of their deliberations; but they cannot shrink from the performance of any duty imposed by the constitution and laws.

The definition of the terms bills of credit, as used in the constitution, is the first requisite in the investigation of this subject; and if this be not impracticable, it will be found a work of no small difficulty. Even in standard works on the exact sciences, the terms used are not always so definite as to express only the idea intended. In works on philosophy, there is, generally, still less precision of language. But in political compacts, more is often left for construction, than in most other compositions. This results, in a great degree, from the elements employed in the formation of such compacts; certain interests are to be conciliated and protected; the force of local prejudices must be met and overcome; and habits and modes of action the most opposite are to be reconciled. This was peculiarly the case, in the formation of the constitution of the United States. And instead of objecting to it, on account of the vagueness of some of its terms; its general excellence, both as it regards its principles and language, should excite our admiration.

The terms bills of credit, in their mercantile sense, comprehend a great variety of evidences of debt, which circulate in a commercial country. In the early history of banks, it seems, their notes were generally denominated bills of credit; but in modern times, they have lost that designation; and are now called, either bank-bills, or bank-notes. But the inhibition of the constitution applies to bills of credit, in a more limited sense.

It would be difficult to classify the bills of credit, which were issued in the early history of this country. They were all designed to circulate as money, being issued under the laws of the respective colonies; but the forms were various, in the different colonies, and often in the same colony. In some

*313] cases, they were payable with interest, in others, without *interest. Funds arising from certain sources of taxation were pledged for their redemption, in some instances; in others, they were issued without such a pledge. They were sometimes made a legal tender, at others, not. In some instances, a refusal to receive them operated as a discharge of the debt; in

others, a postponement of it. They were sometimes payable on demand; at other times, at some future period. At all times, the bills were receivable for taxes, and in payment of debts due to the public; except, perhaps, in some instances, where they had become so depreciated as to be of little or no value. These bills were frequently issued by committees, and sometimes by an officer of the government, or an individual designated for that purpose.

The bills of credit emitted by the states, during the revolution, and prior to to the adoption of the constitution, were not very dissimilar from those which the colonies had been in the practice of issuing. There were some characteristics, which were common to all these bills; they were issued by the colony or state, and on its credit. For in cases where funds were pledged, the bills were to be redeemed at a future period, and gradually, as the means of rememption should accumulate. In some instances, congress guarantied the payment of bills emitted by a state. They were, perhaps, never convertible into gold and silver, immediately on their emission; as they were issued to supply the pressing pecuniary wants of the government, their circulating as money was indispensable. The necessity which required their emission, precluded the possibility of their immediate redemption.

In the case of *Craig* v. *State of Missouri*, 4 Pet. 410, this court was called upon, for the first time, to determine what constituted a bill of credit, within the meaning of the constitution. A majority of the judges, in that case, in the language of the chief justice, say, that "bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." A definition so general as this, would certainly embrace every description of paper which circulates as money. Two of the dissenting judges, on that occasion, gave a more definite, though, perhaps, a less accurate meaning, of the terms bills of credit. By one of them, it was said, "a bill of credit may, therefore, be *considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged [*314 for the payment of the bill." And in the opinion of the other, it is said, "to constitute a bill of credit, within the meaning of the constitution, it must be issued by a state, and its circulation, as money, enforced by statutory provisions. It must contain a promise of payment by the state, generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the state; not that it will be paid on presentation, but that the state, at some future period, or a time fixed or resting in its own discretion, will provide for the payment." These definitions cover a large class of the bills of credit issued and circulated as money, but there are classes which they do not embrace; and it is believed, that no definition, short of a description of each class, would be entirely free from objection; unless it be in the general terms used by the venerable and lamented chief justice. The definition, then, which does include all classes of bills of credit emitted by the colonies or states, is, a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

Having arrived at this point, the next inquiry in the case is, whether the notes of the Bank of the Commonwealth were bills of credit, within the

meaning of the constitution. The first section of the charter provides, that the bank shall be established, in the name and behalf of the commonwealth of Kentucky, under the direction of a president and twelve directors, to be chosen by joint ballot of both houses of the general assembly, &c. The second provides, that the president and directors of the bank, and their successors in office, shall be a corporation and body politic, in law and in fact, by the name and style of the president and directors of the Bank of the Commonwealth of Kentucky, and shall be capable, in law, to sue and be sued, to purchase and sell every description of property. In the third section it is declared, that the stock of the bank shall be exclusively the property of the commonwealth of Kentucky, and that no individual shall own any part of it. The fourth section authorizes the president and directors to issue notes, &c.; and in the fifth section, it is declared, that the capital stock *shall be two millions of dollars, to be paid as follows: "All *315] moneys hereafter paid into the treasury for the purchase of the vacant land of the commonwealth; all moneys paid into the treasury for the purchase of land-warrants; all moneys received for the sale of vacant lands, west of the Tennessee river, and so much of the capital stock owned by the state in the Bank of Kentucky:" and as the treasurer of the state received these moneys from time to time, he was required to pay the same into the bank. The bank was authorized to receive moneys on deposit, to make loans on good personal security, or on mortgages; and by the ninth section, the bank was prohibited from increasing its debts beyond double the amount of its capital. Certain limitations were imposed on loans to individuals, and the accommodations of the bank were to be apportioned among the different counties of the state. The president was required to make a report to each session of the legislature. The notes were to be made payable in gold and silver, and were receivable in payment of taxes and other debts due to the state. All mortgages executed to the bank, gave to it a priority. By a supplementary act, it was provided, that the president and directors might issue three millions of dollars. In 1821, an act was passed, authorizing the treasurer of the state to receive the dividends of the bank. The notes issued by the bank were in the usual form of bank-notes, in which the Bank of the Commonwealth promised to pay to the bearer on demand, the sum specified on the face of the note.

There is no evidence of any part of the capital having been paid into the bank; and as the pleas, to which the demurrers were filed, aver that no part of the capital was paid, the fact averred is admitted on the record. It is to be regretted, that any technical point arising on the pleadings should be relied on in this case; which involves principles and interest of such deep importance. Had the bank pleaded over, and stated the amount actually paid into it by the state, under the charter; the ground on which it stands would have been strengthened. As the notes of the bank were receivable in payment for land and land-warrants, and perhaps, constituted no inconsiderable part of the circulation of the state, the natural operation would be, for the treasurer to receive the notes of the bank, and pay them over to it, as *a part of its capital. This would be to the bank equal to a *316] payment in the notes of other banks, as it would lessen the demand against it; leaving to the bank the securities on the original discounts. The notes of this bank, as also the notes of the bank of Kentucky, by an act

of the legislature, were required to be received in discharge of all executions by plaintiffs; and if they failed to indorse on the executions, that they would be so received, further proceedings on the judgment were delayed two years.

On the part of the plaintiffs in error, it is contended, that the provision in the constitution, that "no state shall coin money," "emit bills of credit," or "make anything but gold and silver coin a tender in payment of debts," are three distinct powers which are inhibited to the states; and that if the bills of the Bank of the Commonwealth were substantially made a tender, by an act of the legislature of Kentucky, it must be fatal to the action of the bank in this case. It is unnecessary to consider, on this head, whether the above provision of the act of the legislature, making these notes receivable in discharge of executions, is substantially a tender law; as such a question, however it might arise on the execution, cannot reach the obligation given to the bank. If the legislature of a state attempt to make the notes of any bank a tender, the act will be unconstitutional; but such attempt could not affect, in any degree, the constitutionality of the bank. The act referred to in the present case, was not connected with the charter of the bank. So far as this act has a bearing on the bills issued by this bank, and may tend to show their proper character, it may be considered.

But the main grounds on which the counsel for the plaintiffs rely, is, that the Bank of the Commonwealth, in emitting the bills in question, acted as the agent of the state; and that, consequently, the bills were issued by the state. That, as a state is prohibited from issuing bills of credit, it cannot do indirectly, what it is prohibited from doing directly. That the constitution intended to place the regulation of the currency under the control of the federal government; and that the act of Kentucky is not only in violation of the spirit of the constitution, but repugnant to its letter. These topics have been ably discussed at the bar, and in a printed argument on behalf of the plaintiffs.

That by the constitution, the currency, so far as it is composed of *gold and silver, is placed under the exclusive control of congress, is clear; and it is contended, from the inhibition on the states to emit [*317 bills of credit, that the paper medium was intended to be made subject to the same power. If this argument be correct, and the position that a state cannot do indirectly, what it is prohibited from doing directly, be a sound one; then, it must follow, as a necessary consequence, that all banks incorporated by a state are unconstitutional. And this, in the printed argument, is earnestly maintained; though it is admitted not to be necessary to sustain the ground assumed for the plaintiffs. The counsel of the plaintiffs, who have argued the case at the bar, do not carry the argument to this extent. This doctrine is startling, as it strikes a fatal blow against the state banks; which have a capital of near $400,000,000, and which supply almost the entire circulating medium of the country. But let us, for a moment, examine it dispassionately.

The federal government is one of delegated powers. All powers not delegated to it, or inhibited to the states, are reserved to the states, or to the people. A state cannot emit bills of credit; or, in other words, it cannot issue that description of paper, to answer the purposes of money, which was denominated, before the adoption of the constitution, bills of credit.

But a state may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty ; and there is no limitation in the federal constitution, on its exercise by the states, in respect to the incorporation of banks. At the time the constitution was adopted, the Bank of North America, the Massachusetts Bank, and some others, were in operation. It cannot, therefore, be supposed, that the notes of these banks were intended to be inhibited by the constitution ; or that they were considered as bills of credit, within the meaning of that instrument. In fact, in many of their most distinguishing characteristics, they were essentially different from bills of credit, in any of the various forms in which they were issued.

If, then, the powers not delegated to the federal government, nor denied to the states, are retained by the states or the people ; and by a fair construction of the terms bills of credit, as used in the constitution, they do not include ordinary bank-notes ; does it not follow, *that the power to *318] incorporate banks to issue these notes may be exercised by a state? A uniform course of action, involving the right to the exercise of an important power by the state governments, for half a century—and this, almost without question—is no unsatisfactory evidence that the power is rightfully exercised. But this inquiry, though embraced in the printed argument, does not belong to the case, and is abandoned at the bar.

A state cannot do that which the federal constitution declares it shall not do. It cannot coin money. Here is an act inhibited in terms so precise that they cannot be mistaken ; they are susceptible of but one construction. And it is certain, that a state cannot incorporate any number of individuals, and authorize them to coin money ; such an act would be as much a violation of the constitution, as if the money were coined by an officer of the state, under its authority. The act being prohibited, cannot be done by a state, either directly, or indirectly. And the same rule applies as to the emission of bills of credit by a state. The terms used here are less specific than those which relate to coinage. Whilst no one can mistake the latter, there are great differences of opinion as to the construction of the former. If the terms in each case were equally definite, and were susceptible of but one construction, there could be no more difficulty in applying the rule in the one case than in the other.

The weight of the argument is admitted, that a state cannot, by any device that may be adopted, emit bills of credit. But the question arises, what is a bill of credit, within the meaning of the constitution? On the answer of this, must depend the constitutionality or unconstitutionality of the act in question. A state can act only through its agents ; and it would be absurd to say, that any act was not done by a state, which was done by its authorized agents. To constitute a bill of credit, within the constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life. The individual or committee who issue the bill, must have the power to bind the state ; they must act as agents, and, of course, do not incur any *319] personal responsibility, nor impart, as individuals, any *credit to the paper. These are the leading characteristics of a bill of credit, which a state cannot emit.

Were the notes of the Bank of the Commonwealth, bills of credit, issued by the state? The president and directors of the bank were incorporated, and vested with all the powers usually given to banking institutions. They were authorized to make loans on personal security, and on mortgages of real estate. Provisions were made, and regulations, common to all banks; but there are other parts of the charter which, it is contended, show that the president and directors acted merely as agents of the state. In the preamble of the act, it is declared to be "expedient and beneficial to the state, and the citizens thereof, to establish a bank on the funds of the state, for the purpose of discounting paper and making loans for longer periods than has been customary; and for the relief of the distresses of the community." The president and directors were elected by the legislature. The capital of the bank belonged to the state, and it received the dividends. These and other parts of the charter, it is argued, show, that the bank was a mere instrument of the state, to issue bills; and that, if, by such a device, the provision of the constitution may be evaded, it must become a nullity.

That there is much plausibility and some force in this argument, cannot be denied; and it would be vain to assert, that on this head, the case is clear of difficulty. The preamble of the act to incorporate the bank, shows the object of its establishment. It was intended, to "relieve the distresses of the community;" and the same reason was assigned, it is truly said, for the numerous emissions of paper money, during the revolution, and prior to that period. To relieve the distresses of the community, or the wants of the government, has been the common reason assigned for the increase of a paper medium, at all times and in all countries. When a measure of relief is determined on, it is never difficult to find plausible reasons for its adoption. And it would seem, in regard to this subject, that the present generation has profited but little from the experience of past ages. The notes of this bank, in common with the notes of all other banks in the state, and indeed, throughout the Union, with some *exceptions, greatly depreciated. This arose from various causes then existing; and which, [*320 under similar circumstances, must always produce the same result.

The intention of the legislature in establishing the bank, as expressed in the preamble, must be considered, in connection with every part of the act; and the question must be answered, whether the notes of the bank were bills of credit, within the inhibition of the constitution.

Were these notes issued by the state? Upon their face, they do not purport to be issued by the state, but by the president and directors of the bank. They promise to pay to bearer, on demand, the sums stated.

Were they issued on the faith of the state? The notes contain no pledge of the faith of the state, in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.

But these funds, it is said, belonged to the state; and the promise to pay, on the face of the notes, was made by the president and directors, as agents of the state. They do not assume to act as agents, and there is no law which authorizes them to bind the state. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a state emits bills of credit, the amount to be issued is fixed by

law, as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the state, which in some form appears upon the face of the notes, or by the signature of the persons who issue them.

As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the state. The capital, it is true, was to be paid by the state; but in making loans, the bank was required to take good securities; and these constituted a fund, to which the holders of the notes could look for payment, and which could be made legally responsible. In this respect, the notes of this bank were essentially different from any class of bills of credit which are believed to have been issued.

The notes were not only payable in gold and silver, on demand; but there was a fund, and, in all probability, a sufficient fund, to redeem *them. This fund was in possession of the bank, and under the con- *321] trol of the president and directors. But whether the fund was adequate to the redemption of the notes issued, or not, is immaterial to the present inquiry. It is enough, that the fund existed, independent of the state, and was sufficient to give some degree of credit to the paper of the bank. The question is not, whether the Bank of the Commonwealth had a large capital or a small one, or whether its notes were in good credit or bad; but whether they were issued by the state, and on the faith and credit of the state. The notes were received in payment of taxes, and in discharge of all debts to the state; and this, aided by the fund arising from notes discounted, with prudent management, under favorable circumstances, might have sustained, and, is believed, did sustain, to a considerable extent, the credit of the bank. The notes of this bank which are still in circulation are equal in value, it is said, to specie.

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had, in his power, the means of enforcing it. The bank could be sued; and the records of this court show, that while its paper was depreciated, a suit was prosecuted to judgment against it, by a depositor; who obtained from the bank, it is admitted, the full amount of his judgment, in specie.

What means of enforcing payment from the state had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the state. But was a state liable to be sued? In the case *Chisholm's Executors* v. *State of Georgia*, in 1792, it was decided, that a state could be sued before this court; and this led to the adoption of the amendment of the constitution, on this subject. But the bills of credit which were emitted, prior to the constitution, are those that show the mischief against which the inhibition was intended to operate. And we must look to that period, as of necessity we have done, for the definition and character of a bill of credit. No sovereign state is liable to be sued, without her consent. Under the articles of confederation, a state could be sued only in cases of boundary. It is believed, that there is no case where a suit has been brought, at any time, on bills of credit, against a state; *322] and it is certain, that *no suit could have been maintained, on this ground, prior to the constitution.

In the year 1769, the colonial legislature of Maryland passed an "act for

emitting bills of credit;" in which bills to the amount of $318,000 were authorized to be struck, under the direction of two commissioners, whom the governor should appoint. These persons were to be styled, "commissioners for emitting bills of credit;" by that name to have succession, to sue or be sued, in all cases relative to their trust. The commissioners were authorized to make loans on good security, to draw bills of exchange on London, under certain circumstances; and they were authorized to re-issue the bills issued by them. In the year 1712, it is stated in Hewit's History of South Carolina, the legislature of that colony established a public bank; and issued 48,000*l.*, in bills of credit, called bank-bills; the money was to be lent out at interest on landed or personal security. The bills emitted under these acts are believed to be peculiar, and unlike all other emissions under the colonial governments. But a slight examination of the respective acts will show, that the bills authorized by them, were emitted on the credit of the colonies; and were essentially different from the notes in question. The holders of these bills could not convert them into specie; they could bring no suit. The Maryland bill was as follows: "This indented bill of six dollars, shall entitle the bearer hereof, to receive bills of exchange, payable in London, or gold and silver, at the rate of four shillings and six pence per dollar for the said bill, according to the directions of an act of the assembly of Maryland." Dated at Annapolis; signed by R. Conden and J. Clapham.

If the leading properties of the notes of the Bank of the Commonwealth were essentially different from any of the numerous classes of bills of credit, issued by the states or colonies; if they were not emitted by the state, nor upon its credit, but on the credit of the funds of the bank; if they were payable in gold and silver, on demand, and the holder could sue the bank; and if, to constitute a bill of credit, it must be issued by a state, and on the credit of, the state, and the holder could not, by legal means, compel the payment of the bill; how can the character of these two descriptions of paper be considered as identical? They were both circulated as money; but in name, in form, and in substance, they differ.

*It is insisted, that the principles of this case were settled in the suit of *Craig* v. *State of Missouri*. In that case, the court decided, [*323 that the following paper, issued under a legislative act of Missouri, was a bill of credit, within the meaning of the constitution: "This certificate shall be receivable at the treasury, or any of the loan-offices of the state of Missouri, in the discharge of taxes or debts due to the state, in the sum of ——— dollars, with interest for the same, at the rate of two per cent. per annum from the date." By the act, certificates in this form, of various amounts, were issued, and were receivable in discharge of all taxes or debts due to the state, and in payment of salaries of state officers. Four of the seven judges considered that these certificates were designed to circulate as money, that they were issued on the credit of the state; and consequently, were repugnant to the constitution. These certificates were loaned on good security, at different loan-offices of the state; and were signed by the auditor and treasurer of state. They were receivable in payment of salt, at the public salt-works, "and the proceeds of the salt-springs, the interest accruing to the state; and all estates purchased by officers under the provisions of the act, and all the debts then due, or which should become due to the state,

were pledged and constituted a fund for the redemption of the certificates;" and the faith of the state was also pledged for the same purpose.

It is only necessary to compare these certificates with the notes issued by the Bank of the Commonwealth, to see that no two things which have any property in common, could be more unlike. They both circulated as money, and were receivable on public account; but in every other particular, they were essentially different. If, to constitute a bill of credit, either the form or substance of the Missouri certificate is requisite; it is clear, that the notes of the Bank of the Commonwealth, cannot be called bills of credit. To include both papers under one designation, would confound the most important distinctions; not only as to their form and substance, but also as to their origin and effect.

There is no principle decided by the court in the case of *Craig* v. *State of Missouri*, which at all conflicts with the views here presented. Indeed, the views of the court are sustained and strengthened, by contrasting the present case with that one. The state of Kentucky is the exclusive stock-
*324] holder in the Bank of *the Commonwealth; but does this fact change the character of the corporation? Does it make the bank identical with the state? And are the operations of the bank the operations of the state? Is the bank the mere instrument of the sovereignty, to effectuate its designs? And is the state responsible for its acts? The answer to these inquiries will be given in the language of this court, used in former adjudications.

In the case of the *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, the chief justice, in giving the opinion of the court, says, "it is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself; and takes the character which belongs to its associates and to the business which is to be transacted. Thus, many states of the Union who have an interest in banks, are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as it respects the transactions of the bank; and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act." "The government becoming a corporator lays down its sovereignty, so far as respects the transactions of the corporation; and exercises no power or privilege which is not derived from the charter. The state does not, by becoming a corporator, identify itself with the corporation."

In the case of the *Bank of the Commonwealth of Kentucky* v. *Wister*, 3 Pet. 318, the question was raised, whether a suit could be maintained against the bank, on the ground, that it was substantially a suit against the state. The agents of the defendants deposited a large sum in the bank; and when the deposit was demanded, the bank offered to pay the amount in its own notes, which were at a discount. The notes were refused, and a suit

was commenced on the certificate of deposit. A judgment being entered against the bank, in the circuit court of *Kentucky, a writ of error was brought to this court. In the court below, the defendant [*325 pleaded to the jurisdiction, on the ground, that the state of Kentucky alone was the proprietor of the stock of the bank; for which reason, it was insisted, that the suit was virtually against a sovereign state. Mr. Justice JOHNSON, in giving the opinion of the court, after copying the language used in the case above quoted, says, "If a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit; which violation of the constitution, no doubt, the state here intended to avoid." Can language be more explicit and more appropriate than this, to the points under consideration? This court further say, "the defendants pleaded to the jurisdiction, on the ground, that the state of Kentucky was sole proprietor of the stock of the bank, for which reason it was insisted, that the suit was virtually against a sovereign state. But the court is of opinion, that the question is no longer open here. The case of the *United States Bank* v. *Planters' Bank of Georgia* was a much stronger case for the defendants than the present; for there, the state of Georgia was not only a proprietor, but a corporator. Here, the state is not a corporator; since, by the terms of the act, the president and directors alone constitute the body corporate, the metaphysical person liable to suit." If the bank acted as the agent of the state, under an unconstitutional charter, although the persons engaged might be held liable, individually; could they have been held responsible as a corporation? It is true, the only question raised by the plea was, whether the bank could be sued, as its stock was owned by the state? But it would be difficult to decide this question, without, to some extent, considering the constitutionality of the charter. And, indeed, it appears, that this point did not escape the attention of the court; for they say, "if a state imparted any of its sovereign attributes to a bank in which it was a stockholder, it would hardly be possible to distinguish the paper of such a bank from bills of credit;" and this, the court say, "the state in that case intended to avoid." These extracts cover almost every material point raised in this investigation. They show that a state, when it becomes a stockholder in a bank, *imparts none of its attri- [*326 butes of sovereignty to the institution; and that this is equally the case, whether it own a whole or a part of the stock of the bank.

It is admitted by the counsel for the plaintiffs, that a state may become a stockholder in a bank; but they contend, that it cannot become the exclusive owner of the stock. They give no rule by which the interest of a state in such an institution shall be graduated; nor at what point the exact limit shall be fixed. May a state own one-fourth, one-half, or three-fourths of the stock? If the proper limit be exceeded, does the charter become unconstitutional; and is its constitutionality restored, if the state recede within the limit? The court are as much at a loss to fix the supposed constitutional boundary of this right, as the counsel can possibly be. If the state must stop short of owning the entire stock, the precise point may surely be ascertained. It cannot be supposed, that so important a constitutional principle as contended for exists without limitation. If a state may own a part of the stock of a bank, we know of no principle which prevents

it from owning the whole. As a stockholder, in the language of this court, above cited, it can exercise no more power in the affairs of the corporation, than is expressly given by the incorporating act. It has no more power than any other stockholder to the same extent.

This court did not consider, that the character of the incorporation was at all affected by the exclusive ownership of the stock by the state. And they say, that the case of the *Planters' Bank* presented stronger ground of defence, than the suit against the Bank of the Commonwealth. That in the former, the state of Georgia was not only a proprietor, but a corporator; and that, in the latter, the president and directors constituted the corporate body. And yet in the case of the *Planters' Bank*, the court decided, the state could only be considered as an ordinary corporator, both as it regarded its powers and responsibilities.

If these positions be correct, is there not an end to this controversy? If the Bank of the Commonwealth is not the state, nor the agent of the state; if it possess no more power than is given to it in the act of incorporation; and precisely the same as if the stock were owned by private individuals, how can it be contended, that the notes of the bank can be called bills of credit, in contradistinction from the notes of other banks?

*327] *If, in becoming an exclusive stockholder in this bank, the state imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold hold it; how can it be said to emit bills of credit? Is it not essential to constitute a bill of credit, within the constitution, that it should be emitted by a state? Under its charter, the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the shere of its corporate powers; and can no more transcend them than any other banking institution. The state, as a stockholder, bears the same relation to the bank as any other stockholder.

The funds of the bank, and its property of every description, are held responsible for the payment of its debts; and may be reached by legal or equitable process. In this respect, it can claim no exemption under the prerogatives of the state. And if, in the course of its operations, its notes have depreciated, like the notes of other banks, under the pressure of circumstances; still it must stand or fall by its charter. In this, its powers are defined; and its rights, and the rights of those who give credit to it, are guarantied. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case.

We are of the opinion, that the act incorporating the Bank of the Commonwealth, was a constitutional exercise of power by the state of Kentucky: and consequently, that the notes issued by the bank are not bills of credit, within the meaning of the federal constitution. The judgment of the court of appeals is, therefore, affirmed, with interest and costs.

THOMPSON, Justice. (*Concurring.*)—I concur in that part of the opinion of the court which considers the bills issued by the bank, as not coming under the denomination of bills of credit, prohibited by the constitution of the United States, to be emitted by the states. The two great infirmities which attended the bills of credit which circulated as money, and come

within the mischief intended to be guarded against by the constitutional prohibition, were, the want of some real and substantial fund being provided for their payment and redemption, and no mode provided for enforcing payment of the same.

It is true, that in many, and perhaps in most cases, where they *were issued, provision was made for the redemption of the bills; so far as the promise of the state, through the medium of taxation, [*328 might be said to provide the means for payment; but this was illusory, and could in no way be enforced. The bills were always signed by some person, who, upon their face, appeared to act in the character of agent of the state; and who could not, of course, be made personally responsible for their payment; and the state was not suable, under the old confederation, nor under the present constitution, even before the amendment in that respect, by citizens of the same state; and those would most likely be the persons who would be the principal holders of the bills issued by the state, of which they were citizens. There being, therefore, no means of enforcing payment of such bills, their credit depended solely upon the faith and voluntary will of the state; and were, therefore, purely bills of credit. But that is not the situation or character of the bills of the bank in question. There is an ample fund provided for their redemption; and they are issued by a corporation which can be sued, and payment enforced in the courts of justice, in the ordinary mode of recovering debts.

If I considered these bank-notes as bills of credit, within the sense and meaning of the constitutional prohibition, I could not concur in opinion with the majority of the court, that they were not emitted by the state. The state is the sole owner of the stock of the bank; and all private interest in it is expressly excluded. The state has the sole and exclusive management and direction of all its concerns. The corporation is the mere creature of the state, and entirely subject to its control; and I cannot bring myself to the conclusion, that such an important provision in the constitution may be evaded by mere form.

Baldwin, Justice. (*Concurring.*)—It has so happened, that I am the only member of the court, who composed one of the majority in the case of *Craig* v. *Missouri*, and now concurs with the majority in this case, in affirming the judgment of the court of appeals; in this respect, my situation is peculiar, as well as in another particular. After an argument in the former case, two of the judges died; of the remaining five, three were of opinion, that the paper issued by the state of Missouri were bills of credit, and two of a contrary opinion; on the argument in 1830, there were two judges present, who had not before sat in the cause, and on whose opinion the result depended. If they agreed with the minority, the judgment was, of course, confirmed; if they divided, it was reversed; so that the one who joined the three made the judgment of the court: this was my case; agreeing in opinion with the three who were for reversing, I concurred in the judgment and general course of the opinion and reasoning of the court, though my opinion was formed on grounds somewhat different. It was my intention to have assigned my reasons, in a separate opinion, but as it was the first term of my sitting in the court, the business was new and pressing, and want of time prevented it; but at my suggestion, a clause was added to the

opinion prepared by the chief justice, which would enable me afterwards to show the reasons of my judgment, should a similar question occur. In this case, too, I fully concur in the judgment rendered, yet not in the course of reasoning or the authority on which the opinion of the court is based; so that my position is as peculiar in this as it was in *Craig* v. *Missouri;* and in one respect, is in marked contrast with that of the other three judges who sat in that case. The judge who was in the majority then, and now dissents, was and is of opinion, that the paper emitted in both cases came within the restriction of the constitution, as bills of credit; two, who then dissented, and are now in the majority, were and are of opinion, that the papers in neither case are bills of credit, so that no imputation of inconsistency can rest upon them. With me, it is different; my judgment has led me to different results in the two cases, and therefore, it cannot be deemed improper for me to explain the reasons why, though forming one of the majority in both cases, I stand in some measure alone. A judge who now dissents, may find reasons therefor, in the opinion delivered in *Craig* v. *Missouri;* those who now concur, may rest on their dissenting opinions in that case; but the same course of reasoning and deduction which shows the consistency of others, may lead to a very contrary conclusion as to mine. These considerations must be my apology for the course now taken.

In *Craig* v. *Missouri*, the subjects of controversy, were certificates signed and issued by the auditor and treasurer, pursuant to a law of that state, which were, on their face, receivable at the treasury, for taxes and debts due the state, bearing interest at the rate of two per cent. per annum. One-tenth the amount of said certificates were directed to be withdrawn, annually, from circulation; they were made a legal tender for all salaries and fees of office, in payment for salt to the lessee of the public salt-works, at a price to be stipulated by law, and for all taxes due the state, or to any county or town therein. They were to be loaned on personal security, by joint and several bonds, bearing interest; the proceeds of the salt-springs, the interest accruing on the bonds, all estates purchased under the law, all debts due or to become due to the state, were pledged and constituted a fund for their redemption, and the faith of the state was also pledged for the same purpose. It seemed to a majority of the court, to be impossible to disguise the character of this paper, or to change its nature or effect, by substituting the word *certificate* on its face for the word *bill;* the change was only in name, the thing was the same. Connected with the law under which the paper was issued, it was a bill, note or obligation, emitted by the state, with the avowed purpose of circulating as money, for all the purposes referred to in the law; the funds and faith of the state were pledged for its payment, with interest from its date, and it was made a legal tender in payment of certain debts to individuals, and of taxes to towns and counties. No member of the court was more clearly of opinion, that these self-called certificates were bills of credit, to all intents and purposes, and that that part of the constitution which declared, that no state should emit them, would be a dead letter, if they were not held to be within it, than I was. On this subject, my opinion went to the full extent of that which was delivered by the chief justice, and has been fully confirmed by subsequent reflection.

There was between the concurring judges and myself, no other difference

of opinion, or in the reasons of our respective judgments, than in the definition of a bill of credit, which is thus given in the opinion (4 Pet. 432): "To emit bills of credit conveys to the mind the idea of issuing paper, intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day; this is the sense in which the terms have been always understood. If the prohibition means anything; if the words are not empty sounds, it must comprehend the emission of any paper medium by a state government, for the purpose of common circulation." To this broad definition, I could not assent; in my opinion, no paper medium could be deemed a bill of credit emitted by a state, unless it contained on its face, or the law under which it was emitted gave, a pledge of its faith or credit for its redemption; nor then, unless it was made a legal tender in the payment of some debts to individuals. Though the opinion is silent as to the pledge of the faith of the state being a requisite to constitute a bill of credit, and negatives the necessity of the paper being made a legal tender; yet these matters entered into the character of the paper, and were a part of the case before the court, as appears in the opinion (4 Pet. 432–3). The first sentence in the latter page, shows the ground on which my opinion turned; the paper was a tender, and the faith of the state was pledged. This last clause was added to the opinion, at my request: "It also pledges the faith and funds of the state for their redemption."

Thus, there was a prefect union of opinion between the judges who composed the majority, on the whole case presented for judgment, as well in the result, as the course of reasoning which led to it; the only variance was as to the requisites of a bill of credit. Three judges holding that "any paper medium, emitted by a state government, for the purpose of common circulation," filled the constitutional definition of a bill of credit, while one judge held, that there were two additional requisites; that the emission should be on the credit of the state, and the paper declared a legal tender. But as the certificates or bills, taken in connection with the law directing their emission, contained all the requisites to constitute bills of credit, on the most limited construction which could be given to the constitution, there could be no other difference of opinion than in the reasons for judgment. Had the opinion and reasoning been applied to the whole case, to paper not only emitted by a state for common circulation, but emitted on its faith and credit expressly pledged, and made a tender, the reasons would have been in perfect accordance with the views of the majority and their judgment. But though this was requested by me, the opinion was confined to only a part of the case on the record, taking no notice, in the reasoning, of the pledge of the faith of the state, in direct terms, or giving to it any declared effect in fixing the character of the paper. If this pledge had not appeared on the certificate, or in the law, my opinion would have been for affirming the judgment of the state court; and as three judges held, that even with this pledge, the certificates were not bills of credit, it is evident, that the judgment of this court depended on this part of the law.

With this explanation, the case of *Craig* v. *Missouri*, so far from being an authority in favor of the proposition, that it is not necessary to constitute a bill of credit, that the faith of the state should be pledged for its payment, it must be taken as negativing it, by the opinion of four judges. On the other hand, four judges were of opinion, that it was not necessary

that the certificates should have been made a legal tender for any purpose, in order to make them bills of credit. Thus understood, I adhere to the decision of the court in that case, as it was judicially before it on the record; and yet retaining the same opinion now, which I then expressed to the judges, I cannot feel myself precluded from acting on it in this case, because the opinion of the court, as delivered, did not take the same course as mine, in leading the majority to the conclusion they formed. To now abandon the deliberate result of my best judgment, formed and expressed in that case, which has been confirmed on the successive arguments in this, would look more like yielding to a train of reasoning on a part of a case, than respecting the judgment of the court on the whole record. It would also place me in a position of inextricable difficulty, to now surrender my judgment to the same reasoning and illustrations, which failed to convince me seven years since, the more especially, when the intervening investigation which it has been my duty to make on this subject, has led my mind to the conclusion it first formed.

With these remarks, the profession will understand the reason why I concurred in the judgment of the court in this, and the former case; in that, the faith of the state of Missouri was pledged for the payment of the paper which she emitted, and made a legal tender; in this, Kentucky has not pledged her faith to redeem the notes of the bank, nor made them a legal tender in payment of a debt. I also concur with the opinion of the court in this case, that these notes cannot be deemed to have been emitted by the state, and have no desire to add any views of my own on this part of the case, my object being to defend my own peculiar position as to the definition of a bill of credit, according to the true interpretation of the first sentence of the tenth section of the first article of the constitution. It is in these words: "No state shall enter into any treaty of alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, or *ex post facto law*, or law impairing the obligation of contracts, or grant any title of nobility."

In analysing this sentence, it is apparent, that these restrictions on the states relate to three distinct subjects. 1. To those on which the constitution had granted express powers to the federal government—to make treaties, grant letters of marque and reprisal, coin money. 2. To those on which the constitution made no grant of any power, by either express words, any necessary implication, or any reasonable interpretation—to emit bills of credit, make anything but gold and silver coin a legal tender in payment of debts, or pass any law impairing the obligation of contracts. 3. To those subjects on which the 9th section of the first article had imposed the same restriction on the United States and congress, as the tenth section did on the separate states—to pass any bill of attainder, *ex post facto* law, or grant any title of nobility. On the last class of cases, any comment is useless; there has never been any difference of opinion as to the meaning of a bill of attainder, or a title of nobility; and though there have been doubts as to the meaning of an *ex post facto* law, they have long since been settled, so that we can safely assume, that as to those parts of the ninth and tenth sections of the first article, the meaning of the constitution is as plain and definite as its language.

By referring the terms to a standard of admitted authority, from which they have been adopted in the constitution, they become as intelligible as if their settled definition had been added by the convention which framed the instrument. What the standard of definition shall be, depends on the term used; if it is one of common use, in the ordinary transactions of society, and so applied, it shall be taken in its common ordinary acceptation by those who use the term; if it relates to any particular art, science or occupation, its meaning is its common understood sense, according to the usage and its acceptation among men so employed. If it is a term appropriate to the common or statute law, or the law of nations, it must be taken as intended to be applied according to its established definition as a known legal term. Hence, the term bill of attainder, means the conviction of a person of a crime by legislative power; an *ex post facto* law, is one which makes an act criminal which when committed was no offence; a title of nobility, is a term which defines itself. Thus, the terms used to as the third clase of cases, have been considered as defined by a reference to their understanding in a legal sense.

In passing to the first class of cases, it will be found, that the terms treaty, alliance, confederation, and letters of marque and reprisal, when referred to the law of nations, are perfectly defined; so is the term coin money, when referred to the words, in their common acceptation or their legal sense. There is no ambiguity in the words; taken separately or in connection, as a term or phrase, they require no other interpretation than is to be found in the known and universally-received standard by which they are defined, nor can they be taken in any other sense, or by any other reference, unless there appears from the context, or other parts of the same instrument, an obvious intention to use and apply them differently from their ordinary or legal acceptation. These are the established unvarying rules of interpretation which assign a meaning to language, that requires explanation not contained in the words themselves; the want of certainty is cured by a reference to that which is certain, and when any word, term or phrase has acquired a definite meaning, its use, without explanatory words, is always deemed to be so intended. With the universal consent of every statesman and jurist, the terms used in these two classes of cases, in the tenth section, with the exception of an *ex post facto* law, have been received and taken according to their known definition, by municipal or national law, and common understanding; and there is now the same common assent to the meaning of an *ex post facto* law, as settled by the repeated adjudications of this court. The same rules have also been applied to all other parts of the constitution, in which terms of known import are used, as the writ of *habeas corpus*, trial by jury, &c. No man ever doubted, that they were used according to their definition by the common law, or that the words taxes, commerce, money, coin, were used and must be taken in their ordinary meaning and acceptation. It is, indeed, a universal rule, applied to all laws, supreme or subordinate, to all instruments of writing, all grants or reservations of power, property, franchise or immunity, and all contracts; that the words and language used shall be interpreted by such reference, accordingly as the subject-matter is made certain by their legal or commonly-received definition or acceptation. There is another rule of interpretation, equally universal, that the whole instrument shall be examined,

to ascertain the meaning of any particular part or sentence, so as to avoid any discrepancy, and the same standard be applied to all its terms, and every word which can bear upon its intention, referring each to the appropriate subject to which it relates, the standard is furnished for the interpretation. Thus the word *bill* has a meaning depending on the subject-matter to which it is applied; a *bill of credit* refers to the payment of money; a *bill of attainder* refers to the conviction of an offence by a legislature; so of the word *law*, an *ex post facto* law refers to one which inflicts a punishment; a law impairing the obligation of a contract, refers to *money* or *property* due or owned in virtue of a *contract*.

Taking it, then, as an undoubted proposition, that the same rules of interpretation must be applied to all parts of the tenth section, taken in connection with the whole constitution, as one instrument of writing, I shall endeavor to ascertain what is the meaning of the terms used in reference to the second class of cases. The first term is "no state shall emit bills of credit." That by *state* is meant a state of this Union, there can be no doubt. Next comes the word *emit*, which, referring to bills of credit, means an emission of paper; a putting off, putting out, putting forth, or issuing bills by a state, for the payment of money, at some time, by some person, and on credit. The time of payment, the fund out of which it is payable, the faith or credit reposed in, or pledged by, those who emit it, depends on the law under which the state made or authorized the emission. Then comes the term *bills of credit*, without any reference or explanatory words; but as it necessarily relates to the payment of money, the word *bill* must be taken as a paper, containing some evidence that a certain sum is due, to the person to whom it was emitted or issued, or by whom it was held. It is a word of legal import, as well defined as any in the English language, according to the subject-matter to which it is applied. "A *bill* is a common engagement for money given by one man to another; when with a penalty, it is a penal bill, when without one, it is a single bill" (Toml. L. D. 230); "and it is all one with an obligation, saving that it is commonly called a bill, when in English, and an obligation, when in Latin. But now, by a bill, we ordinarily understand a single bond, without a condition; by an obligation, a bond with a penalty and condition" (Cow. L. I. tit. Bill; 5 Day's Com. Dig. 191, Obl. A.); or according to the definition of Ch. Baron Comyn, "a single bill is when a man is bound to another by bill or note, without a penalty." (Ibid. 194, C.)

A *bill of credit* is also a well-known term of the law; in its mercantile sense, it means, a letter addressed by one merchant to another, to give credit to the bearer, for money or goods, such letter being in the nature of a bill of exchange, is called a bill, and so treated. (Beawes, L. M. 483; s. p. 5 Day's Com. Dig. 131, Merchant, F. 3.) When the word *bill* refers to paper emitted by a bank, there will be found a most marked adherence to the distinction between an obligation and a bill, as appears in the clause of the original charter of the Bank of England, read by plaintiffs' counsel. "That all and every bill or bills obligatory and of credit, under the seal of the said corporation, made or given to any person or persons, shall and may, by indorsement thereon, &c., be assigned," &c. 5 W. & M. c. 20, § 29 (3 Ruff. 563). So, in the 26th section of the same act, "the corporation shall not borrow or give security by bill, bond, covenant or agreement, under

their common seal," &c. (Ibid.) ; the word bill denotes a sealed paper, either a bill obligatory, which is an obligation, or a bill of credit, which is a single bill ; or if they are taken as synonymous, the words of the act are expressly confined to sealed bills, which require indorsement to make them assignable. Taking the term bills obligatory and of credit, under the common seal of the corporation, to be what they are declared in the charter, they are, in their legal sense, and in common acceptation, the bills of the bank, or bank-bills, issued under their seal. This leads to another distinction between the different kinds of paper issued by the bank, worthy of all observation in the present case ; the notes issued by the bank were not under its common seal ; they were payable to bearer, on demand, and passed from hand to hand, by delivery merely, without indorsement. They can, therefore, in no just sense, be deemed bills of credit under seal, requiring a special act of parliament to to make them assignable ; and so well was this known and fully understood, that we find throughout the extended charter to the bank in 8 & 9 Wm. III., bank-bills and bank-notes are referred to in the same marked contradistinction which exists between a sealed bill, assignable only by indorsement, and an unsealed note, payable to bearer and transferrible by delivery only.

In providing for enlarging the capital of the bank, the subscribers were authorized to pay one-fifth of their subscription "in bank-bills or bank-notes, which have so much money *bonâ fide* resting due thereupon," &c. (3 Ruff. 657, § 23.) The same words, "in bank-bills or bank-notes," are three times repeated in the 25th section, and are carried through the whole act. In the 36th section, the discrimination is too strongly marked to admit of any possible doubt ; in this section, it is declared, "that the forging or counterfeiting of any sealed bank-bill, made or given out in the name of the said governor and company, for the payment of any sum of money ; or of any bank-note, of any sort whatever, signed for the said governor and company of the Bank of England, &c., shall be felony." (Ibid. 659.) The act of 3 & 4 Ann., c. 9, is also most explicit in its provisions, which embrace all notes in writing, signed by any person, "or the servant or agent of any corporation," payable to order or bearer, and puts them on the footing of inland bills of exchange, according to the custom of merchants, but neither in terms or by construction, can be applied to bills under seal (4 Ruff. 180), or has ever been attempted to be so applied or constructed. We must, therefore, take the term, bills of credit, when applied to the paper issued by a bank, to mean an instrument under its corporate seal, payable to some person, and assignable by indorsement, and not a note payable to order or bearer, and transferrible as an inland bill of exchange, according to the universal acceptation of the term in England.

There is another class of bills of credit, in England, known by the name of exchequer bills, which are issued by the officers of the exchequer, when a temporary loan is necessary to meet the exigencies of government. They were first termed *tallies of loan*, and orders of repayment, charged on the credit of the exchequer in general, and made assignable from one person to another. (5 W. & M. c. 20, § 39 ; 3 Ruff. 566.) By a subsequent act, the officers of the treasury were authorized to cause bills to be made forth, at the receipt of the exchequer, in such manner and form as they shall appoint, &c., and to issue the same to the uses of the war ; they

were made receivable for all taxes and money due at the exchequer, bore an interest, a premium was given for giving them circulation, the nation was security for their payment (See 8 & 9 Wm. III., c. 20, § 63–6, 3 Ruff. 667–8 ; 7 Ann., c. 7, § 22, 4 Ruff. 345 : 9 Ann., c. 7, *passim*, 4 Ruff. 431) ; and they were called bills of credit. 3 Ruff. 679. Such is the nature of the three classes of bills of credit, in England, whether they are letters or bills of credit of merchants, in the nature of a bill of exchange, the bills obligatory or of credit or of a bank, or exchequer bills ; they all partake of the same character, and are the bills of credit of the person, corporation or government which emits, makes forth, issues or puts them into circulation. The name given to the paper, its form, or the mode of giving it currency or circulation, is immaterial ; its substance consists in its being an engagement to pay money at a future day, and that its payment rests on the security, faith, credit or responsibility of those who put it into circulation, pledged on the face of the bills of individuals and corporations, and the law of the nation which emits or issues them. Bills of credit were viewed in the United States in the same way, before the adoption of the constitution, and immediately afterwards. That the definition of a *bill*, by the common law and common acceptation, is the same here as in England, and has ever been so accepted, is a proposition which needs only to be asserted ; the same reasoning also attaches to a letter of credit, in a mercantile sense, and the same distinction which has been shown to exist there, between bank-bills and bank-notes, was in the most explicit manner recognised, during the revolution.

On the 31st December 1781, congress passed an ordinance to incorporate the subscribers to the Bank of North America, and recommended to the legislatures of the several states, to pass such laws as were necessary to give the ordinance full operation, agreeable to the resolutions of congress on the 26th May preceding. 7 Journ. Cong. 197, 199. In the proceedings of that day, we have the plan of the bank which was then approved ; in the 12th article, it is provided, "That the bank-notes, payable on demand," shall by law be made receivable in every state, for duties and taxes, and by the treasury of the United States as specie ; congress also resolved, that they should be received in payment of all debts due the United States, and recommended to the states to make the counterfeiting bank-notes capital felony. 7 Journ. Cong. 87, 90 ; 26 May 1781. Pursuant to this recommendation, Pennsylvania passed an act to prevent and punish the counterfeiting the bank-bills, and bank-notes of the bank, made or to be made or given out. (18th March 1782 ; Pamph. Laws 11.) In 1783, Delaware passed an act to punish the counterfeiting the bank-bills, and bank-notes of the bank. (2 Laws Del. 773.) But the law of Massachusetts, passed the 8th March 1782, contains the most unequivocal evidence, that the distinction between bank-bills and bank-notes was well known and understood, for it copies the 36th section of the act of 8 & 9 Wm. III., before referred to, "that if any person shall counterfeit any sealed bank-bill or obligation made or given out for or in the name of the said P. D. & Co., for the payment of any sum of money ; or any bank-note of nay sort whatever, signed for or in the name of the said P. D. & Co." Thomas's Laws Mass. 187. In all these acts, the words note, bill or obligation, are put in the same contradistinction from each other, which the common law assigns to them, and so are the acts of congress for chartering

the Bank of the United States, which were patterned from the acts of parliament chartering the Bank of England.

By the ninth fundamental article of the charter of 1791, it is provided, that "the total amount of the debts which the said corporation shall at any time owe, whether by bond, bill, note or other contract, shall not exceed, &c." (1 U. S. Stat. 194; S. P. 8th article of charter of 1816, 3 Ibid. 272.) In the 13th article, the 29th section of the 5 W. & M., c. 20, chartering the Bank of England, is copied, declaring that "the bills obligatory and of credit, under the seal of the said corporation," &c., shall be assignable by indorsement, &c. And bills or notes issued by the corporation, signed by the president and countersigned by the cashier, promising the payment of money, to any person or his order, or to bearer, though not under the seal of the corporation, shall be as binding on them as on a private person, and be negotiable by indorsement if payable to order, or by delivery only if payable to bearer (1 U. S. Stat. 195; S. P. 12th article of charter of 1816, 3 Ibid. 272); thereby adopting the provisions of the 3 & 4 Ann., c. 9, before referred to, as to notes.

In the twelfth article of the charter of 1816, there is this proviso, "that said corporation shall not make any bill obligatory, or of credit, or other obligation under its seal, for the payment of a less sum than five thousand dollars." In the 17th section, we find the paper issued by the bank placed in contradistinction, no less than five times, by the denomination of bills, notes or obligations, and the same distinction is made throughout the acts of 1791 and 1816. It is also carried into the acts of 1798 (omitting the word obligation), by which the counterfeiting of any bill or note, issued by order of the president, directors and company of the bank, is made a felony. (1 U. S. Stat. 573); the act of 1807 (2 Ibid. 423), and the 18th and 19th sections of the act of 1816 (3 Ibid. 275), in each of which the words bill and note are used to refer to the two kinds of paper, the word bill being used in its comprehensive sense, as a known legal term, embracing bills, bonds, obligations of all kinds, when under the corporate seal, according to their settled and unvaried acceptation.

In considering the third species of bills of credit which are issued by the government, I will first refer to their definition by parliament, as the best evidence of the meaning and acceptation of the term in England, and as it was adopted in the United States. The authority for issuing tallies, orders or bills, from the exchequer, and the manner of doing it, are pointed out in the acts of 5 W. & M., c. 20; 8 & 9 Wm. III., c. 20, before referred to, and 8 & 9 Wm. III., c. 28; 3 Ruff. 677–9; also in Gilbert's Hist. Exch. 137. When money is paid into the exchequer for debts due, or on a loan to the government, the teller who receives it gives a bill for the amount, which is an exchequer bill, or a bill of credit; a substantial definition of which will be found in the 11th section of the 8 & 9 Wm. III., c. 28; 3 Ruff. 679. "Provided also, that this act, or anything herein contained, shall not extend to alter or change any method of receipts or payments by bills of credit in the exchequer, allowed, or to be allowed by parliament," referring evidently to two species of such bills which are issued from the exchequer, according to the prescribed mode of accounting for all moneys paid. A bill of credit given to a debtor who pays his debt, is merely the evidence of its payment; but a bill of credit given to one who lends money on the credit of the exche-

quer, allowed to be pledged by act of parliament, is a bill made forth on the credit of the government, who is a debtor to the holder for the amount, with interest thereon, as directed by the law.

It is evident, that the constitution did not intend to prevent the emission by a state, of a bill of credit of the first description, which in effect would be no more than a receipt for a debt due the state; it clearly refers only to that class of bills of credit which were emitted by a state, for the purposes declared in the law authorizing them to be emitted and put into circulation. Taken in this sense, the term bill of credit, will be found to have been as well defined in the United States, before the adoption of the constitution, as it was in England, or as the term bill of credit, in reference to bank-bills, had been, there and here, from the time when the first charter of a bank was granted.

By the ninth article of the confederation, congress were authorized "to borrow money or emit bills on the credit of the United States;" but unless nine states consented, could not "coin money," nor emit bills, nor borrow money on the credit of the United States. By article twelve, all bills of credit emitted, moneys borrowed, and debts contracted, by or under the authority of congress, &c., shall be deemed a charge against the United States; for payment and satisfaction whereof, the said United States, and the public faith, are hereby solemnly pledged. (1 U. S. Stat. 6–7.)

If there is certainty in language, it would seem to be in this, as a definition of a "bill of credit," and was evidently copied in the tenth section of the first article of the constitution; the prohibition against any less than nine in number of states acting on certain subjects is in the precise words, "nor coin money," "nor emit bills;" if it is asked what bills, the answer is, "bills on the credit of the United States, bills of credit emitted by the authority of congress on a pledge for the public faith." By substituting *state*, for "United States in congress assembled," the meaning of the words is identical and cannot be mistaken, when they are transferred into the constitutional prohibition; "no state shall coin money, emit bills of credit," means bills on the credit of the state. Plain words must be perverted by something inconsistent with reason, if they mean anything else; if they do not refer to bills emitted on the credit of the state, we must be informed on whose credit. It must be that of an individual, a corporation, or of the United States; those who assert such a proposition, can have no respect for the constitution or its framers. Yet they can in no other way evade the obvious meaning of plain words; the prohibition was intended, and does prohibit a state from emitting bills, on its own credit, and not on any other credit. The prohibition is confined to a state, to an emission by a state, of bills of credit, emitted on the faith of a state, which can be pledged only by the law of a state, and no more exquisite torture can be inflicted on plain words, than in the endeavor to make them mean more, mean less, or mean anything else than the credit of a state. When we look to the names affixed to the articles of confederation, and the constitution; when we consider that the former, after being long discussed in congress, and approved by that body, was submitted to the state legislatures, who deliberated nearly four years, before its adoption, and that every word, phrase and sentence was fully discussed and most anxiously considered, it cannot be considered as a bold or rash assertion, that the framers of both instruments compre-

hended the language they used, said what they meant, meant what they said, and stamped upon their work an impress of intention, which they at least designed should be intelligible to all capacities.

If the definition of a bill of credit, as given in both instruments, is not authoritative, I know of none higher to which to appeal, as a more certain standard of political or judicial truth. In following such leaders, in a path which they have plainly marked, I feel perfectly conscious of avoiding that disrespect for the solemn muniments of title on which the Union rests, which would be a cause of severe self-reproach, if, in this tribunal, I should rest my judgment on any contradictory authority. As, however, it cannot derogate from the respect due to the framers of those instruments, or the instruments themselves, to refer to authority subordinate only to that of state legislatures who made the confederation, and the people of the several states who ordained the constitution, in affirmance of the definition of bills of credit, as given by all, I shall refer to the resolutions of the old congress, and the acts of the new immediately after the adoption of the constitution.

By the third section of the act of July 1790, making provision for the debt of the United States, among other evidences of debt which were to be received as subscription to the proposed loan were the following: "Those issued by the commissioners of loans, in the several states, including certificates given pursuant to the act of congress of the 2d January 1779, for bills of credit of the several emissions of 20th May 1777, and 11th April 1778; and in the bills of credit issued by the authority of the United States, at the rate of one hundred dollars in the said bills for one in specie." (1 U. S. Stat. 139.) The general term bills of credit, as used in the act of 1790, are defined in the resolutions of congress on the days respectively referred to. 20th May 1770: "Resolved, that the sum of 5,000,000 of dollars, in bills on the credit of the United States, be forthwith emitted, under the direction of the board of treasury." 3 Journ. 194. 11th April 1778: "Resolved, that 5,000,000 of dollars be emitted in bills of credit, on the faith of the United States." "That the thirteen United States be pledged for the redemption of the bills of credit now ordered to be emitted." 4 Journ. 149. 2d January 1779: In the preamble and resolutions of this day, bills of credit are thus referred to. The United States have "been under the necessity of emitting bills of credit, for the redemption of which the faith of the United States has been pledged." "That any of the bills emitted by order of congress, &c." "That the bills received on the said quotas," &c. "That the following bills be taken out of circulation; namely, the whole emissions of 20th May 1777, and 11th April 1778." 5 Journ. 5–6.

When, therefore, we find, that in the confederation, the acts and resolutions of congress, these various terms are used as synonymous, all referring to the same species of paper, as well known and defined as the term coin, money, or any other term, could be, and the same term, bills of credit, used in the constitution, it is not a little strange, that those who framed the instrument, should be supposed to have used it in a different sense, without adding some words denoting such intention. That the term being adopted without explanation, was intended to be taken with the same meaning which had been so long and universally accepted, would, on any other than a constitutional question, be deemed conclusive evidence of their intention, cannot be doubted. If the term could admit of two interpretations, the mem-

bers of the convention would adopt that which comported with the meaning given to the term by themselves, while members of congress, before, as well as after the adoption of the constitution, rather than any other standard of interpretation to be found elsewhere. These reasons are strengthened by a reference to other parts of the constitution, the terms of which are copied from the articles of confederation, as to coin money, regulate the value thereof, borrow money on the credit of the United States, fix the standard of weights and measures, and numerous others, apparent on inspection.

As the constitution was intended to be a supreme fundamental law, and bond of union, for ages to come, it was of the last importance, to use those terms in the grant, or prohibition of power, which had acquired a precisely defined meaning, either in common acceptation, or as terms known to the common, the statute, or the law of nations, and infused, by universal consent, into the most solemn acts of congress, and the alliance of the confederation, which expressed the sense in which the whole country understood words, terms and language. The framers of the constitution did not speak in terms known only in local history, laws or usages, nor infuse into the instrument local definitions, the expressions of historians, or the phraseology peculiar to the habits, institutions or legislation of the several states. Speaking in language intended to be "uniform throughout the United States," the terms used were such as had been long defined, well understood in policy, legislation and jurisprudence, and capable of being referred to some authoritative standard meaning; otherwise, the constitution would be open to such a construction of its terms as might be found in any history of a colony, a state, or their laws, however contradictory the mass might be in the aggregate. If we overlook the language of acts and instruments which express the sense in which it is understood by all the states, and seek for the true exposition of the constitution in those which speak only for one state, we have the highest assurance, in the course and range of the argument in this case, that certainty cannot be found in the almost infinite variety of laws which had been passed by the states in relation to the emission of paper money. Nor is there more certainty in referring to the opinions of statesmen and jurists, in debates in conventions, or legislative bodies, or political writers, or commentators on the constitution, among all of whom there is a most irreconcilable contradiction and discrepancy of views, on every debatable word and clause in the constitution, the result of which has been strongly exemplified in the argument of the cases at this term, depending on its true interpretation. Whether the remark made in the senate of the United States, by a profound and eminent jurist, in a debate on a most solemn constitutional question, is particularly applicable to the mass of what has been offered to the court as authority in this case, or not, yet its general practical truth must be admitted. "If we were to receive the constitution as a text, and then to lay down in its margin the contradictory commentaries which have been made, and which may be made, the whole page would be a polyglot, indeed. It would speak in as many tongues as the builders of Babel, and in dialects as much confused, and mutually as unintelligible."

Fully convinced that the constitution is best expounded by itself, with a reference only to those sources from which its words and terms have been adopted, I have always found certainty, and felt safety, in adhering to it as the text of standard authority to guide my reasoning to a correct judgment.

In expounding it by opinion, or on the authority of names, there is, in my opinion, great danger of error; for, when it is found, that from the time of its proposition to the people, to the present, the wisest and best men in the nation, have been, and yet are, placed foot to foot on all doubtful, and many plain, propositions in relation to its construction, it is as difficult as it would be invidious, to select as a consulting oracle, any man or class of statesmen or jurists, in preference to another.

On the question involved in this case, of what are bills of credit, my judgment is conclusively formed on the authority herein referred to; if it is not conclusive, I have neither found, or have been directed to that which is paramount, or, in my judgment, at all co-ordinate, or to be compared with it. Resting on this authority, it was my deliberate opinion, that the certificates issued by a law of Missouri, pledging the faith of the state for their redemption, were bills of credit, prohibited by the constitution. On the same authority, and as the result of subsequent researches, it is now my most settled conviction, that the notes of the Commonwealth Bank of Kentucky, are not bills of credit, emitted by the state of Kentucky, inasmuch as the state has pledged neither its faith nor credit, for their payment. And the notes not being payable at a future day, nor issued on any credit as to time, either on their face, or by the law under which they were issued, but directed to be paid on demand, in gold or silver, they were not emitted to obtain a loan to the state, or to meet its expenditures, and cannot be deemed its bills of credit. On a careful consideration of the mischiefs against the recurrence of which the constitution interposed this prohibition, of its language, the bearing of the three phrases on each other, their evident spirit, and the meaning deducible therefrom, I cannot abandon my first impression, that one requisite of a bill of credit is, that it be made a tender in payment of debts.

The crying evils which arose from the issue of paper money by the the states, cannot be so well described as they are in the language of the constitution. The emission of bills of credit by the states, making them a tender in payment of debts, impaired and violated the obligation of contracts. The remedy is an appropriate one, reaching both the cause and effect, by three distinct prohibitions; no state shall emit bills of credit, make anything a tender but gold and silver, nor pass any law impairing the obligation of contracts. Thus, the remedy covers the whole mischief, and goes beyond it, if supplied literally to its full extent; the mere emission of bills of credit was no evil; if no law coerced their circulation or reception by individuals, they are as harmless as certificates of stock, emitted on a voluntary loan to the state, which are admitted not to be the prohibited bills of credit. So long as they were not made a tender, they could produce no evils, not common to all paper, whether of a state, a corporation or individual, which, by common consent, passes from hand to hand in the ordinary transactions of life. To prevent the circulation of such a medium, it was not necessary to call into action the high power of the constitution; the evil would cure itself; when the paper ceased to pass by consent, it would pay no debt, nor lead to the violation of any contract. The prohibition could not have been intended to prevent the people from taking as money, what would answer all the purposes of money in the interchanges of society, nor to deprive them of the exercise of their free will; on the contrary, it was made to prevent the coercion of their free will by a tender

law, and leave them free to enforce the obligation of their contracts for the payment of money, and the enjoyment of their property.

In the construction of all laws, we look to the old law, the mischief and the remedy, and so expound it, as to suppress the mischief, and advance the remedy; no just rule of interpretation requires a court to go further, by applying the remedy to a case not within the mischief, unless the words of the law are too imperative to admit of construction. I know no class of cases to which the rule is more appropriate, than those embraced within those prohibitions of the constitution on the exercise of powers reserved by the states, over subjects on which congress have no delegated power; there can be no collision between the laws of a state and the laws of the Union, as there would be, where a state would legislate on those subjects that had been confided to congress or any department of the federal government. Taking the first class of cases in the tenth section, relating to treaties, letters of marque and reprisal, and coining money, which are subjects over which the constitution grants express powers, as an example, it is evident, that to make the prohibition effectual to the object in granting the powers, it must be total, so as to exclude the exercise of any power by a state over the subject-matter. From the nature of these subjects, there can be no concurrent power in the two governments; hence we find, that the first two were, even by the article six of confederation, expressly prohibited to the states, without the consent of the United States. The same reasons apply to the third, because the express power in congress to coin money, regulate the value thereof, and of foreign coin, coupled with the prohibition to a state to coin money, is a decisive expression of the intention, that it shall not exercise the power, as in the case of a treaty, or a letter of marque and reprisal. The evils to be guarded against had not existed under the confederation; the states separately had not made treaties, granted letters of marque or reprisal, nor coined money, in violation of those articles; the evils were wholly prospective, but were to be apprehended, if any doubt whatever could be raised on the terms of grant of those powers. Hence the prohibition.

Touching the third class of cases, bills of attainder, *ex post facto* laws, and titles of nobility, they were not subjects of any delegated powers to congress; but as they were opposed to the whole spirit of the people, and the constitution, it annulled all power, state and federal, to do these things; and the prohibition is, in its nature and object, absolute and illimitable. But the second class of prohibited cases, emitting bills of credit, tender laws, and those impairing the obligation of contracts, are widely different; the evils had existed, did exist, and must recur, if not prevented. Congress could not legislate on these subjects, much less control the states, on whom the powers of parliament, in all their transcendency, as well as the prerogative of the crown, devolved by the revolution. 6 Wheat. 651; 8 Ibid. 584. Each state has the power of emitting bills of credit, of passing tender laws (4 Pet. 435), and exercised both, by annulling contracts and grants, the right to do which could not be contested by any authority. 4 Wheat. 643, 651. These were the acts which called aloud for the remedy given by the prohibitions, to prevent their recurrence, which would have been certain, if it had not been made.

This court has declared the intention of the constitution on the subject

of contracts. "It was intended to correct the mischiefs of state laws, which had weakened the confidence between man and man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements; to guard against a power which had been extensively abused, and to restrain the legislature in future from violating the rights of property. It protected contracts respecting property, under which some person could claim a right to something beneficial to himself; and since the clause must, in construction, receive some limitation, it ought to be confined to the mischiefs it was intended to remedy. Not to authorize a vexatious interference with the internal concerns or civil institutions of a state; to embarrass its legislation in the regulation of internal government, or to render immutable those institutions, for these purposes, which ought to vary with varying circumstances. The term contract must be understood in a more limited sense, so as not to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice." *Dartmouth College Case*, 4 Wheat. 428–9. "The principal was the inviolability of contracts. The plain declaration that no state shall pass any law impairing the obligation of contracts, includes all laws which infringe the principle the convention intended to hold sacred, and no further. It does not extend to the remedy to enforce the obligation of a contract; the distinction between them exists in the nature of things, so that without impairing the obligation, the remedy may be modified as the state may direct." *Sturges* v. *Crowninshield*, 4 Wheat. 200. It is also a principle declared by this court, that the prohibition does not extend to the passage of a state law, which does not affect contracts existing when the law was enacted, which operates only on the obligation of posterior contracts (*Ogden* v. *Saunders*, 12 Wheat. 369); and no exposition of the constitution is better settled, or commands more universal assent, than that the prohibition does not extend to the passage of retrospective, unjust, oppressive laws, or those which divest rights, antecedently vested, if they do not directly impair the obligation of a contract (2 Pet. 411–13; 3 Ibid. 289; 8 Ibid. 110); and that "the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and exclusive taxation, as well as against unwise legislation generally." 4 Pet. 563.

Let these principles of constitutional law be applied to the construction of the clause against emitting bills of credit, as they have been applied to the clause concerning the obligation of contracts; the conclusion seems to me inevitable; that the same construction, which imposes a limitation to the corrective remedy against the future violation of the sanctity of contracts, which it was the great object of the prohibition to protect, should be extended with, at least, as much liberality, to limit the operation of that clause of the same article, which prohibits an evil which by no possibility could impair the obligation of a contract, without a tender law. The mischiefs of a mere emission of bills of credit, are trivial in their consequences, compared with the effect of tender laws; their combined effect is to violate a contract: surely, then, the restriction on a state, ought not to be construed more rigidly against an act, which cannot of itself produce the mischief intended to be remedied, than a law which wholly annuls a contract.

If each clause is taken according to an universal rule, that laws should be construed *subjectam materiam*, the lesser evil requires the more gentle corrective; but in assigning to the emission of bills of credit, without their being made a tender, a more restrictive meaning than to the direct violation of a contract, we act on the inverse rule. The protection is lessened in the same proportion as the danger is increased; the greater the mischief, the milder and less efficient is the remedy; reason and established principles alike require, that a prohibition should be limited, so far as can be done, without producing the mischief intended to be remedied, and expanded, so far as is necessary to correct it. The construction must be according to the subject-matter of the law, strict or liberal, as the nature of the case requires, and the object to be effected will be defeated or accomplished, *ut res magis valeat quam pereat;* that which will effectuate all the objects of the prohibition cannot be too narrow, that which goes beyond the express word, or necessary implication, to effect an object not within the mischief, must be too broad.

On the same rule which confines the prohibition as to contracts, to state laws passed affecting existing contracts, and excluding from the protection of the constitution, all posterior contracts; a law making bank-notes a legal tender in payment of debts contracted after the passage of the law, would not be within the prohibition. On the same principle by which an unjust, oppressive, retrospective law, or one which divests vested rights, is held not to impair the obligation of a contract *per se*, it must be held, that a mere emission of bills of credit is not within the mischiefs intended to be corrected. There is no more danger in the exercise of this power, at the discretion of the legislature, than in these unrestrained powers, to modify the remedy to enforce the obligation of a contract, which this court hold not to be affected by the prohibition. There is, in the nature of things, the same distinction between bills emitted, which are not made a tender, and those which are a tender, as between the remedy and the obligation of a contract; nay, the distinction is more marked. The obligation of a contract, without an effective remedy to enforce it, would be "a name," and not "a thing;" the word obligation would be an "empty sound," and the protection of the constitution a solemn mockery. Yet if it is held to prohibit the emission only of bills of credit which were not a tender, it would prevent none but imaginary evils, and leave real practical ones unredressed. To emit the notes of an individual or a private corporation, for the purposes of circulation, would be productive of the same evils as the bills of credit of a state; the mischief does not depend on who is the owner of the stock pledged for its payment, or on whose credit they are received in circulation. Yet it is conceded by counsel, and agreed by all the judges, that bank-notes are not within the prohibition, though they are as much "paper money," "paper medium," as the bills of credit of a state. Why, then, should the prohibition extend to the mere emission of the latter, and not to the former species of paper money, when neither are a tender in payment of debts? What good reasons can be assigned, why the constitution did not prohibit the emission of both, if it prohibits one, and on what ground does the discrimination rest? It cannot be, that there is less danger, in having the paper medium of the country based on the funds, faith and credit of the state, which can by taxation, levy a contribution *ad libitum*, on all the property

of all its citizens, for its redemption (4 Wheat. 428 ; 4 Pet. 563), than when a bank emits it on the mere credit of their corporate stock. Nor that a state will more readily sport with and abuse its plighted faith, than a corporation, an individual, or a banking association.

These questions are not unworthy the consideration of those who hold that it is not necessary to bring bills of credit within the prohibition, that they may be made a tender in payment of debts. That all "paper intended to circulate through the community, for its ordinary purposes as money, which paper is redeemable at a future day, the emission of any paper medium by a state government, for the purpose of common circulation," though not made a tender, and though the faith, funds or credit of the state are not pledged for its redemption, are bills of credit. They are also worthy of notice by those who hold that paper emitted by the officers of a state, under the authority of a law, which paper is of the precise character above defined, which is made a tender, and for the redemption of which the funds and faith of the state are both most solemnly pledged, in the law directing its emission, are not bills of credit within the prohibition. It will not suffice, that a disclaimer is made of its extension to bank-notes, or a declaration that they are not included within the mischiefs, without assigning the reasons, or referring to the authority on which the discrimination is made, on just principles of construction. For myself, I rest on the most solemn adjudications of this court, as well prior as subsequent to the case of *Craig* v. *Missouri*, settling the rules and principles on which the most important prohibition in the tenth article has been construed ; and in applying them to the clause now in question, find abundant authority for holding it necessary, that bills of credit be made a tender in payment of debts, to come within the prohibition. Taking my definition of bills of credit of a government, from acts of parliament, of the old and new congress, the articles of confederation, and the constitution, I held, in *Craig* v. *Missouri*, that certificates emitted by a state, for circulation, payable in future, on the faith and funds of the state, which certificates were made a tender, were prohibited as bills of credit. On the same authority, I now hold, that the notes in question are not such bills of credit, because not emitted by the state, not made a tender in payment of any debts to individuals, nor the faith or general funds of the state pledged for their redemption. And further, on the authority of acts of parliament, of the old congress, of state legislatures before the adoption of the constitution, and acts of congress since, and of the common law, I make the distinction between the bills of credit, issued under the seal of a bank, and bank-notes payable to bearer, on demand, and hold, that the latter can, by no just definition, or legal construction, come within the prohibition. I have resorted to these sources of information, as the fountain of constitutional law, and have found in them abundant cause of justification of the opinions which I formed in the former case, and adhere to in this.

The plaintiffs have relied much upon the pleadings in this record, as presenting the question in controversy in an aspect different from what it would have been, if the averments of the plea had been denied by a replication, instead of being admitted by a demurrer. These averments are in the first plea. 1. That the state, by the law establishing the bank, declared that the capital stock thereof should be $2,000,000. 2. "But which capital stock the said bank never received, or any part thereof, as these defendants aver."

From the admission of these averments, it is contended, that inasmuch as the capital stock was not made up and paid into the bank by the state, pursuant to the declaration contained in the law, the faith and credit of the state was legally, virtually and morally pledged, to provide this amount of capital, as a fund for the redemption of the notes issued by the bank. And that having violated this pledge, the state was bound, and, if suable, was compellable to pay them; whereby the notes of the bank became bills of credit of the state, as effectually as if they had been emitted on an express pledge of its faith or credit for their redemption.

The first averment is founded on the law of incorporation, and is an averment of mere matter of law as to which it is among the oldest and best-settled rules of pleading, that the law will not suffer an averment of that to be law, which is not law; such averment or pleading is to no effect or purpose, though admitted by demurrer. Plowd. 168 *a*; 170 *b*. On an inspection of the law, it appears, that this averment refers only to the section which declares what the amount of the capital shall be; but the plea wholly omits any reference to the section which specifies the items which shall compose that capital, as a fund for the redemption of the notes. It is the proceeds of the lands belonging to the state, its surplus revenue, the stock of the state in the Bank of Kentucky, and the securities taken by the bank, on a loan of its notes to individuals. The mode of redemption was, in making these notes receivable in payment for lands, taxes, debts due the state, the Bank of Kentucky, and the Bank of the Commonwealth. This was the only pledge given by the state, and it is not averred in the pleas, that this pledge was in any way violated, by any refusal to receive the notes for any such purposes; on the contrary, it is admitted, that they were always so received; consequently, the state has faithfully kept its faith, as entire as it was pledged by the law. This part of the plea, therefore, is to no purpose or effect, so far as it avers that to be law which is not law.

The notes of the bank constituted no part of its capital; while they remained on hand, they were worthless to the bank; when loaned out, they became the evidence of a specie debt, due by the bank on demand, to the holder; the securities taken for repayment, were part of the capital for their redemption. But as they were taken only for the precise amount of the notes loaned, the amount of debt due by and to the bank was equal, with only this difference, that the bank paid no interest on their notes, while they received interest on their loans; the accretion of interest, therefore, was the only means of increasing the capital, by the issue of their notes. If they were burnt, according to the direction of the law, after they had performed their function, in their reception, as payment by the state, or the bank, it was no loss to the bank which issued them; or if the notes were returned to the bank, by the state treasurer, or the Bank of Kentucky, they were as useless, as capital, as before they were first issued. In re-issuing them, their operation was the same, adding nothing to the capital; indeed, the proposition is self-evident, that a bank-note is not a fund for its own payment; a debt due by a bank, is not a part of the capital stock, pledged for the payment of the debt.

It thus appears, that by the terms and necessary operation of the law, though the term capital stock is used in the law, the thing which was made the capital was the proceeds of lands, taxes, debt and bank-stock; and as

the law and constitution regard things, and not names, such must be taken to be the spirit, substance and effect of the law of incorporation. Hence, the second averment is of a fact wholly immaterial, since it was no part of the law, that the capital should ever be received by the bank, in any other manner than the one pointed out, which was in fact the only manner in which it could be received; that is, as a fund for the redemption of its notes. In virtue of this law, purchasers of land, and debtors of the state, or banks, had the option of making payment in specie, the notes of other banks, or of the Commonwealth Bank; they would, of course, pay in that medium which was the easiest, and cheapest to be obtained, which must have been the notes of the Bank of the Commonwealth, or they would never have been issued. So that the inevitable effect of the law, and the emission of these notes on loan, was to make their receipt in payment, the means of their redemption, in addition to the securities on which the loan was made, and precluded any reasonable probability, or even possibility, that the proceeds of the pledged funds would be paid into the coffers of the bank, in specie, or the notes or other banks, unless the notes of the Commonwealth Bank were more valuable, or more difficult to be obtained than either. That such a consummation was in the contemplation of the legislature, or can be assumed by the court, in order to give effect to the plea, is a proposition too extravagant to have been made by counsel; if this assumption is not made, that the state was bound by the law to make up the capital stock of the bank, by the actual receipt of the pledged funds, then there can be no pretence of its reception having a material averment. Had this second averment been put in issue, and found for the defendant, the court must have rendered a judgment for the plaintiff *non obstante veredicto*, if he was otherwise entitled to judgment, on the ground that the issue was on an immaterial fact. 1 Pet. 71.

STORY, Justice. (*Dissenting.*)—When this cause was formerly argued before this court, a majority of the judges, who then heard it, were decidedly of opinion, that the act of Kentucky, establishing this bank, was unconstitutional and void; as amounting to an authority to emit bills of credit, for and on behalf of the state, within the prohibition of the constitution of the United States. In principle, it was thought to be decided by the case of *Craig* v. *State of Missouri*, 4 Pet. 410. Among that majority was the late Mr. Chief Justice MARSHALL; a name never to be pronounced without reverence. The cause has been again argued, and precisely upon the same grounds as at the former argument. A *majority of my brethren, have now pronounced the act of Kentucky to be constitutional. [*329 I dissent from that opinion: and retaining the same opinion which I held at the first argument, in common with the chief justice, I shall now proceed to state the reasons on which it is founded. I offer no apology for this apparent exception to the course which I have generally pursued, when I have had the misfortune to differ from my brethren, in maintaining silence; for, in truth, it is no exception at all, as upon constitutional questions I ever thought it my duty to give a public expression of my opinions, when they differed from that of the court.

The first question naturally arising in the case is, what is the true interpretation of the clause of the constitution, that "no state shall emit bills of credit?" In other words, what is a bill of credit in the sense of the constitu-

tion? After the decision of the case of *Craig* v. *State of Missouri*, I had not supposed, that this was a matter which could be brought into contestation, at least, unless the authority of that case was to be overturned; and the court were to be set adrift from its former moorings. The chief justice, in delivering the opinion of the court upon that occasion, in answer to the very inquiry said, "to emit bills of credit, conveys to the mind the idea of issuing paper, intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day; this is the sense in which it has been always understood." Again, "the term has acquired an appropriate meaning; and bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." Again, "if the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a state government, for the purposes of common circulation." One should suppose that this language was sufficiently exact and definite to remove all possible doubt upon the point; and it has the more weight, because it came from one, who was himself an actor in the very times when bills of credit constituted the currency of the whole country; and whose experience justified him in this exposition.

But, it seems, that this definition is not now deemed satisfactory, or to be adhered to; and a new exposition is sought, which, in its predicaments, shall not comprehend the bills in question. The arguments of the learned counsel for the bank, on the present occasion, have, as it appears to me, sought for a definition, which shall exclude *any perils to their case; *330] rather than a definition founded in the intention and language of the constitution. It appears to me, that the true nature and objects of the prohibition, as well as its language, can properly be ascertained only by a reference to history; to the mischiefs existing, and which had existed when the constitution was formed; and to the meaning then attached to the phrase "bills of credit," by the people of the United States.

If we look into the meaning of the phrase, as it is found in the British laws, or in our own laws, as applicable to the concerns of private individuals or private corporations, we shall find that there is no mystery about the matter; and that when bills of credit are spoken of, the words mean negotiable paper, intended to pass as currency or as money, by delivery or indorsement. In this sense, all bank-notes, or, as the more common phrase is, bank-bills, are bills of credit They are the bills of the party issuing them, on his credit, and the credit of his funds, for the purposes of circulation as currency or money. Thus, for example, as we all know, bank-notes payable to the bearer (or, when payable to order, indorsed in blank), pass in the ordinary intercourse and business of life, as money; and circulate and are treated as money. They are not, indeed, in a legal and exact sense, money; but, for common purposes, they possess the attributes, and perform the functions of money. Lord MANSFIELD, in *Miller* v. *Rice*, 1 Burr. 457, speaking on the subject of bank-notes, observed, "that these notes are not like bills of exchange, mere securities, or documents for debts, and are not so esteemed; but are treated as money, in the ordinary course and transactions of credit and of business, by the general consent of mankind; and on payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes." And, indeed, so much

are they treated as money, that they pass by a will which bequeaths the testator's cash, or money, or property.

In confirmation of what has been already stated, it may be remarked, that in the charter of the Bank of England, in 5 & 6 William & Mary, c. 20, § 28, an express provision is made, by which the bill or bills obligatory, and of credit, of the bank, are declared to be assignable and negotiable. Similar expressions are to be found in the many acts of the American states, incorporating banks; as has been abundantly shown in the citations at the bar. (*a*) *The reason is obvious, why they are called bills of credit; they are intended to pass as currency or money; and they are issued [*331 on the credit of the bank, or of other persons who are bound by them. Not but that there is a capital fund or stock for their redemption; for, in general, all banks have such a fund: but that the credit is still given to the corporation, and not exclusively to any particular fund. Indeed, in many cases (as in Massachusetts), the private funds and credit of the corporators, are by law, to a limited extent, made responsible for the notes of banks.

Such then being the true and ordinary meaning applied to bills of credit, issued by banks and other corporations, that they are negotiable paper, designed to pass as currency, and issued on the credit of the corporation, there is no mystery in the application of the same terms to the transactions of states. The nature of the thing is not changed; the object of the thing is not changed, whether the negotiable paper is issued by a corporation or by a state. *Mutato nomine, de te fabula narratur.* A bill of credit, then, issued by a state, is negotiable paper, designed to pass as currency, and to circulate as money. It is distinguishable from the evidence of debt issued by a state for money borrowed, or debts otherwise incurred; not merely in form, but in substance. The form of the instrument is wholly immaterial. It is the substance we are to look to; the question is, whether it is issued, and is negotiable, and is designed to circulate as currency. If that is its intent, manifested either on the face of the bill, or on the face of the act, and it is in reality the paper issue of a state; it is within the prohibition of the constitution. If no such intent exists, then it is a constitutional exercise of power by the state. This is the test; the sure, and, in my judgment, the only sincere test, by which we can ascertain whether the paper be within or without the prohibition of the constitution. All other tests, which have hitherto been applied, and all other tests which can be applied, will be illusory, and mere exercises of human ingenuity, to vary the prohibition, and evade its force. Surely, it will not be pretended, that the constitution intended to prohibit names, and not things; to hold up the solemn mockery of warring with shadows, and suffering realities to escape its grasp? To suffer states, on their own credit, to issue floods of paper money, as currency; and if they do not call them bills of credit, if they do not *give them the very form and [*332 impress of a promise by the state, or in behalf of the state; in the very form, so current, and so disastrous in former times; then they are not within the prohibition. Let the impressive language of Mr. Chief Justice

(*a*) See the acts establishing the Bank of New York, 1791; the Bank of Albany, in New York; the Bank of Pennsylvania, 1793; the Bank of New Jersey, 1823; the Bank of Baltimore, 1795; the Bank of Virginia; the State Bank of North Carolina, 1810; the Bank of Georgia; the Bank of Kentucky, &c.

MARSHALL on this very point, in the case of *Craig* v. *State of Missouri* (a voice now speaking from the dead), let it convey its own admonition, and answer to the argument. "And can this (said he) make any real difference? Is the proposition to be maintained, that the constitution meant to prohibit names, and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded, by giving a new name to an old thing? We cannot think so."

But the argument need not be rested here. The question here is, not what is meant by bills of credit, in a mere theoretical sense. But I trust, that I shall abundantly show, that the definition which was given in the case of *Craig* v. *State of Missouri*, and the definition which I maintain, is the true one; stripped of all mystery, and all extraneous ingredients, is the true one, confirmed by the whole history of the country; and that the true meaning of bill of credit was just as well known and understood from the past and the passing events, at the time of the adoption of the constitution, as the terms, *habeas corpus*, trial by jury, process of impeachment, bill of attainder, or any other phrase to be found in the technical vocabulary of the constitution. And I mean to insist, that the history of the colonies, before and during the revolution, and down to the very time of the adoption of the constitution, constitutes the highest and most authentic evidence to which we can resort, to interpret this clause of the instrument; and to disregard it, would be to blind ourselves to the practical mischiefs which it was meant to suppress, and to forget all the great purposes to which it was to be applied. I trust, that I shall be able further to show, from this very history, that any other definition of bills of credit than that given by the supreme court in the case of *Craig* v. *State of Missouri*, is in opposition to the general tenor of that history; as well as to the manifest intention of the framers of the constitution.

Before I proceed further, let me quote a single passage from the Federalist, No. 44; in which, the writer, in terms of strong denunciation and indignation, exposes the ruinous effects of the paper money *of the *333] revolution (universally, in those days, called by the name of bills of credit, for there was no attempt to disguise their character); and then adds, "in addition to these persuasive considerations, it may be observed, that the same reasons which show the necessity of denying to the states the power of regulating coin, prove with equal force, that they ought not to be at liberty to substitute a paper medium instead of coin." This passage shows the clear sense of the writer, that the prohibition was aimed at a paper medium, which was intended to circulate as currency; and to that alone.

But it has been said, that bills of credit, in the sense of the constitution, are those only which are made, by the act creating them, a tender in payment of debts. To this argument, it might be sufficient to quote the answer of the chief justice, in delivering the opinion of the court in the case of *Craig* v. *State of Missouri*. "The constitution itself" (said he) "furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit; not to bills of credit of a particular description. That tri-

bunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantial prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations; independent of each other, which may be separately performed; both are forbidden. To sustain the one, because it is not also the other; to say, that bills of credit may be emitted, if they be not a tender of debts; is in effect, to expunge that distinct, independent prohibition, and to read the clause, as if it had been entirely omitted. We are not at liberty to do this."

But independently of that reasoning, the history of our country proves that it is not of the essence of bills of credit, it is not a part of their definition, that they should be a tender in payment of debts. Many instances, in proof of this, were given in the opinion so often alluded to. Not a single historian upon this subject alludes to any such ingredient, as essential or indispensable. It has been said (and it has never been denied), that the very first issue of bills of credit, by any of the colonies, was by the province of Massachusetts, in 1690. The form of these bills was: "This indented bill of ten shillings, due from the Massachusetts colony to the possessor, shall be, in value, equal to money, and shall be accordingly *accepted by the treasurer and receivers subordinate to him, in all public payments, and [*334 for any stock at any time in the treasury." Then followed the date and the signatures of the committee authorized to emit them.(a) They were not made a tender in payment of debts, except of those due to the state. In 1702, 3 Ann., c. 1, another emission of bills of credit for 15,000*l.* was authorized in the same form; but they were not made a tender by the act; and the then duties of impost and excise were directed to be applied to the discharge of those bills, as also a tax of 10,000*l.* on polls and estates, real and personal to be levied and collected, and paid into the treasury, in 1705. A subsequent act, passed in 1712, made them a tender in payment of private debts. In 1716, act of 3 Geo. I., c. 6, a further emission of 150,000*l.* in "bills of credit," was expressly authorized to be made in the like form; to be distributed among the different counties of the province, in a certain proportion stated in the act; and to be put into the hands of five trustees in each county, to be appointed by the legislature, to be lent out by the trustees on real security in the county, in certain specified sums, for the space of ten years, at five per cent. per annum. The mortgages were to be made to the trustees, and to be sued for by them; and the profits were to be applied to the general support of the government. These bills were not made a tender. Now, this act is most important, to show that the fact, that the bills of credit were to be let out on mortgage, was not deemed the slightest degree material to the essence of such bills. An act for the emission of bills of credit, not materially different in the substance of its provisions, had been passed in 1714, 1 Geo. I., c. 2. Another act for the emission of 50,000*l.*, in bills of credit, was passed in 1720, 7 Geo. I., c. 9, containing provisions nearly similar; except that the trustees were to be appointed by the towns, and the pro-

[1] See 3 Story's Com. on the Constitution, 231, note 2.

fits were to be received by the towns, and a tax of 50,000*l.* on polls and estates, was authorized to be raised to redeem the same.

In 1720, the colony of Rhode Island issued bills of credit, nearly in the form of the Massachusetts bills; and they were made a tender in payment of all debts, excepting special ones; and similar bills were issued in 1710 and 1711. In 1715, another issue was authorized, to be lent out by trustees and committees of towns, on mortgage, for ten years. There *is no *335] clause in the act declaring them a tender. The same year, another emission was authorized. In 1709, the colony of Connecticut authorized an emission of bills of credit in a similar form; appropriating a tax for their redemption. There was no clause making them a tender. Numerous other acts of the like nature were passed between that period and 1731; some of which made them a tender, and others not. In 1709, the colony of New York issued bills of credit, in a form substantially the same; and they were made a tender in the payment of debts, and these bills were to bear interest. Many other emissions of bills of credit were, from time to time, authorized to be made in similar forms; they were generally made a tender; and generally, funds were provided for their due redemption.

In 1722, the province of Pennsylvania issued bills of credit, in a form not substantially different from those of the New England states; which were delivered to trustees, to be loaned on mortgages, on land or ground-rents; and they were made a tender in payment of all debts. Other emissions, for like purposes, were authorized by subsequent laws. In the year 1739, an emission of bills of credit was authorized by the state of Delaware, for similar purposes, and in a similar form, to be loaned on mortgages. They were made a tender in payment of debts, and a sinking fund was provided. In 1733, Maryland authorized an emission of bills of credit, to the amount of 90,000*l.*, to be issued by and under the management of three commissioners or trustees, who were incorporated by the name of "The Commissioners or Trustees for emitting Bills of Credit;" and by that name might sue and be sued, and sell all real and personal estate granted them in mortgage, &c. These bills of credit, with certain exceptions, were to be lent out, on interest, by the commissioners or trustees, at four per cent., upon mortgage or personal security; and a sinking fund was provided for their redemption, &c., and they were made a tender in payment of debts. Another emission was authorized in 1769; and two commissioners were appointed to emit the bills, to be called "Commissioners for emitting Bills of Credit;" and by that name to have succession, and to sue and be sued. These bills also were to be lent out by the commissioners, on security; and a fund was provided for their redemption. These bills were not made a tender.(*a*)

*In Virginia, bills of credit were issued as early as 1755, under *336] the name of treasury notes; which bore interest, and were made a

(*a*) I have been favored with a sight of one of the original bills issued under the act of Maryland, 1769. It is as follows: "This indented bill of six dollars, shall entitle the bearer hereof to receive bills of exchange, payable in London, or gold and silver, at the rate of four shillings and six pence sterling, per dollar, for the said bill; according to the direction of an act of assembly of Maryland, dated at Annapolis, this 4th day of March, A. D. 1770. R. Conden, J. C. Clapham." These gentlemen were doubtless, the commissioners appointed under the act.

tender in payment of debts. Emissions were subsequently made at other periods, and especially in 1769, 1771 and 1773. These three last were not made a tender. In 1778, another emission of them was authorized, which were made a tender; and a fund was pledged for their redemption. Many other issues were subsequently made, which were a tender. What demonstrates that these treasury notes were deemed bills of credit, is the fact, that by an act passed in 1777, ch. 34, it was made penal for any person to "issue or offer in payment any bill of credit, or note, for any sum of money, payable to the bearer;" and that the act of 1779, ch. 24, makes it a felony for any person to steal any bill of credit, treasury note, or "loan-office certificate of the United States, or any of them;" and that the act of 1780, ch. 19, after reciting, that the exigencies of the war requires the emission of paper money, &c., authorizes the emission of new treasury notes, and proceeds to punish with death any person who shall forge "any bill of credit or treasury note, to be issued by virtue of this act." In 1748, North Carolina authorized the emission of bills of credit, which were made a tender, and a fund was provided for their redemption; and many subsequent emissions were authorized, with similar provisions.

In 1703, South Carolina first issued bills of credit. They were to bear an interest of twelve per cent. Funds were provided for their redemption. They do not seem originally to have been made a tender. Many other acts for the emission of bills of credit were, from time to time, passed by the colony; some, if not all of which, were made a tender. One of these acts, passed in 1712, was of a peculiar nature; but as I have not been able to procure a copy of it, I can only refer to it as it is stated by Hewitt (1 Hewitt's Hist. of S. Car. 204); who says, "At this time, the legislature thought proper to establish a public bank, and issued 48,000*l.* in bills of credit, called bank-bills, for answering the exigencies of government, and for the convenience of domestic commerce. This money was to be lent out at interest, on landed or personal security; and according to the tenor of the act for issuing the same, it was to be sunk gradually by 4000*l.* a year, which sum was ordered to be paid annually by the borrowers into the hands of the commissioners appointed for that purpose." [*337 In 1760, Georgia authorized an emission of bills of credit to be lent out at interest, and mortgages were to be taken by the commissioners. These bills were made a tender. Subsequent acts for issuing bills of credit were passed; but it is not necessary to recite them.

Congress, during the revolutionary war, issued more than $300,000,000 of bills of credit. The first issue was in 1775, and the confederated colonies were pledged for their redemption. None of the bills of credit issued by congress were made a tender; probably, from the doubt whether congress possessed the power to make them a tender. The form of those first issued was as follows: "This bill entitles the bearer to receive ——— Spanish milled dollars, or the value thereof, in gold and silver, according to the resolutions of congress." The last emission was made in 1780, under the guarantee of congress. and was in the following form: "The possessor of this bill shall be paid ——— Spanish milled dollars, by the 31st of December 1786, with interest, in like money, at the rate of five per cent. per annum, by the state of ———, according to an act of the legislature of the state of ———, the —— day of —— 1780." The indorsement by con-

gress was, "The United States insure the payment of the within bill, and will draw bills of exchange, annually, if demanded, according to a resolve of congress of the 18th of March 1780." These bills were expressly required by congress to issue on the funds of the individual states established for that purpose; and the faith of the United States was pledged for their payment. They were made receivable in all public payments.

I will close this unavoidably prolix, though, in my judgment, very important review of the history of bills of credit in the colonies, and during the revolution, with a reference to the act of 24 Geo. II., c. 53 (1751), for regulating and restraining the issues of paper money in New England. That act, in its prohibitory clause, expressly forbids the issue of "any paper bills, or bills of credit, of any kind or denomination whatsoever," except for certain purposes, and upon certain specified emergencies; and constantly speaks of "paper bills, or bills of credit," as equivalent expressions; thus demonstrating that the true meaning of bills of credit was paper emitted by
*338] the state, and intended to pass as currency; or, in other *words, as paper money. It further requires, that the acts authorizing such issues of "paper bills or bills of credit," shall provide funds for the payment thereof; and makes provisions for cases where such "paper bills or bills of credit" had been loaned out on security; and declares, that "no paper currency or bills of credit," issued under the act, shall be a legal tender in payment of any private debts or contracts whatsoever.

This historical review furnishes a complete answer to every argument which has been used on the present or on former occasions; which made the nature of bills of credit depend upon any other quality, than the simple one of being for money, and negotiable, and designed to pass as paper money or paper currency. When it is said, that it is of the essence of "bills of credit," that they should be a legal tender, we find that many of them never were a tender. Nay, that the enormous issues by the revolutionary congress were altogether stripped of this quality. When it is said, that to constitute bills of credit, their circulation as money must be enforced by statutable provisions; we find, that in many cases, from the very nature and character of the acts, no such compulsory circulation was contemplated. They did not, in their form, generally, contain any express promise on the part of the state to pay them, whether funds were provided or not; and the same form was used in both cases. There was, indeed, in my judgment, in every case, an implied obligation and promise of the state to pay them, whether funds were provided or not. When it is said, that it is not a bill of credit, unless credit is given to the the state on its own express promise to pay, and not when the paper is only declared to be receivable in payment of debts due to the state; that there must be a promise to pay, and not merely a promise to receive; we find, that the very first issues of bills of credit were of this very character, and contained no promise; and yet the colonial legislatures appropriated to them the very name, as their true designation. When it is said, that a bill which is payable on demand, is not a bill of credit; nor a bill which contains no promise to pay at a future day; we find, that on their face, nearly all the colonial issues were without any limitation of time, and were receivable in payments to the state, immediately upon their presentation; though funds for their redemption were not provided, except *in futuro*. The issues by congress were, with a

single exception, without any limitation of time as to payment, and were to be paid in gold or silver.

*The emission of 1780, already stated was to be paid at a future time. But congress made no express promise to pay any of their other issues; they simply pledged the colonies for their redemption; and yet congress called them bills of credit. When it is said, that bills of credit cannot bear interest, for that disqualifies them for a paper currency; we find, that in point of fact, such bills were issued, both by the colonies and by the revolutionary congress; and indeed, since, by the United States, n the form of treasury notes. When it is said, that bills of credit are such only as are issued upon the mere credit of the state, and not bottomed upon any real or substantial fund for their redemption; we find, that in most cases, the colonial bills of credit were issued upon such funds; provided by the very terms of the acts. The statute of 24 Geo. II., c. 53, also, in terms, applies the very phrase, not only to bills resting on the mere credit of the state, but also to bills having suitable funds provided for their redemption. It goes further, and prohibits the colonies, in future, from issuing such bills, without providing suitable funds. In short, the history of bills of credit in the colonies, conclusively establishes, that none of these ingenious suggestions and distinctions, and definitions, were or could have been in the minds of the framers of the constitution. They acted upon known facts, and not theories; and meant, by prohibiting the states from emitting bills of credit, to prohibit an issue, in any form, to pass as paper currency or paper money, whose basis was the credit, or funds, or debts, or promises of the states. They looked to the mischief intended to be guarded against in the future, by the light and experience of the past. They knew that the paper money, issued by the states, had constantly depreciated, whether funds for its redemption were provided or not; whether there was a promise to pay, or a promise to receive; whether they were payable with or without interest; whether they were nominally payable *in præsenti*, or *in futuro*. They knew that whatever paper currency is not directly and immediately, at the mere will of the holder, redeemable in gold and silver, is, and for ever must be liable to constant depreciation. We know the same facts as well as they. We know, that the treasury notes of the United States, during the late war, depreciated fifty per cent.; that during the period of the suspension of specie payments, by our private banks, at the same period, though with capitals supposed to be ample, their bank-bills sunk from fifteen to twenty-five per cent. below their nominal value. The bills of this very Bank of the Commonwealth *of Kentucky, of whose solid and extensive capital we have heard so much, were admitted at the argument, to have sunk fifty per cent. from their national value. The framers of the constitution could not, without irreverence (not to use a stronger phrase), be presumed to prohibit names and not things; to aim a blow at the artificial forms in which paper currency might be clothed, and leave the substance of the mischief untouched and unredressed; to leave the states at liberty to issue a flood of paper money, with which to inundate the community, upon their own sole credit, funds and responsibility; so always, that they did not use certain prescribed forms of expression. If the states were to possess these attributes in ample sovereignty, it was worse than useless, to place such a prohibition in the front of the constitution. It was holding out a solemn

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delusion and mockery to the people, by keeping the faith of the constitution to the ear, and breaking it to the sense. My judgment is, that any such interpretation of the constitution would be as unsound, as it would be mischievous. The interpretation for which I contend, is precisely that which was maintained by this court in the case of *Craig* v. *State of Missouri;* where all these ingenious suggestions, distinctions and definitions, to which I have alluded, were directly overruled. I might, indeed, have spared myself some labor in these researches, if I had not considered that case as in some measure assailed in the present decision; if, indeed, it is not shaken to its very foundation.

The next question in the case is, whether the act of Kentucky establishing this bank, is unconstitutional, by authorizing an emission of bills of credit, in the shape of the bank-bills or notes of that bank, within the prohibition of the constitution. The argument is, that the state cannot do that indirectly, which it cannot, consistently with the constitution, do directly; and that the bank corporation is here the sole and exclusive instrument of the state; managing its exclusive funds, for its exclusive benefit, and under its exclusive management. Even this obvious principle, that the state cannot be permitted indirectly to do, what it is directly prohibited to do by the constitution, has been denied on the present occasion; upon what grounds of reasoning, I profess myself incapable of comprehending. That a state may rightfully evade the prohibitions of the constitution, by acting through the instrumentality of agents, in the evasion, instead of acting in its own direct name, and thus escape from all its constitutional obligations, is a doctrine to which I can never subscribe; and which, for the honor of the country, for the good faith and integrity * of the states, for the cause of
*341] sound morals, and of political and civil liberty, I hope may never be established. I find no warrant for any such doctrine in the case of *Craig* v. *State of Missouri*, either in the opinion of the court, or in that of the dissentient judges.

The other part of the argument, from which the conclusion is drawn, that the act is unconstitutional, requires a more extended consideration. But before proceeding to that, it is proper to notice the statement at the bar, that the point of the constitutionality of this act has been already decided by this court. If so, I bow to its authority. I am not disposed to shake, even if I could, the solemn decisions of this court, upon any great principles of law; and, *à fortiori*, not that which respects the interpretation of the constitution itself. But I shall require proof, before I yield my assent that the point has been so decided. The case relied on is the *Bank of the Commonwealth of Kentucky* v. *Wister*, 2 Pet. 318. In my judgment, that case justifies no such conclusion. It was not even made or suggested in the argument; it was not touched by the judgment of the court. What was that case? Wister brought a suit in the circuit court of the United States in Kentucky, against the bank, to recover a sum deposited in the bank. The bank filed a plea to the jurisdiction of the court; alleging that the bank was a body corporate, established by an act of the legislature of Kentucky, and "that the whole capital stock of the said corporation, is exclusively and solely the property of the state, and that the state, in her political sovereign capacity as a state, is the sole and exclusive and only member of the corporation." The court decided, that the suit was rightfully brought against the

corporation, and was within the jurisdiction of the circuit court. Why? Because the court were of opinion, that though the corporation was created by the state, the state was not even a member of the corporation. "The president and directors alone (said Mr. Justice JOHNSON, in delivering the opinion of the court), constitute the body corporate, the metaphysical person liable to suit. Hence, by the laws of the state itself, it is excluded from the character of a party, in the sense of the law, when speaking of a body corporate." And in confirmation of this view of the matter, a passage was cited from the opinion in the *United States Bank* v. *Planters' Bank of Georgia*, 9 Wheat. 904. The learned judge then said, and this is the comment, on which so much reliance has been placed—"To which it may be added, that if a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly *possible to distinguish the issue of the paper of such banks from a direct issue [*342 of bills of credit, which violation of the constitution no doubt the state here intended to avoid." Now, this language imports, at most, only that a case might have existed, which would have been a violation of the constitution but which was admitted not to be the case before the court; that is, where the state imparted its sovereign attributes to the corporation. The court do not say, that the constitution of the United States had not been violated, by the issue of the bank-bills; for that question was never presented for their consideration: but only say, that the state did not intend to violate the constitution, and did not intend to communicate its sovereign attributes. Neither the facts of the case, nor the declaration, nor the plea to the jurisdiction, in any manner, raised or could raise any such question. The corporation, as such, was capable of suing and being sued, by the laws of Kentucky. However proper, then, the language might have been, as an admonition of the danger to the bank, if their ground of objection to the jurisdiction was maintainable; it did not commit the court in the slightest manner to any definite opinion as to the constitutionality of its issues of bank paper.

Let us now proceed to the consideration of the charter of the bank, and ascertain whether it is a mere agent of the state, and what are the powers and authorities which are given to it as to the issues of bank-bills. The act of 1820 declares, in the first section, that a bank shall be and thereby is established, in the name and on behalf of the commonwealth of Kentucky," under the direction of a president and twelve directors, to be chosen by the legislature, from time to time, by joint ballot of both houses. The second section declares the president and directors a corporation, by the corporate name, &c., conferring on the corporation the usual powers. The third section declares, that the whole capital stock of the bank shall be exclusively the property of the commonwealth of Kentucky; and no individual or corporation shall be permitted to own or pay for any part of the capital of the bank. The fourth section declares, that the president and directors shall have power to issue notes, not under the denomination of one dollar, nor over one hundred dollars, signed by the president, and countersigned by the cashier. These bills or notes are, by subsequent sections, authorized to be made payable to order or to bearer, and to be negotiable accordingly; and they are declared to be receivable at the treasury, and by public officers, in all payments of taxes and other debts to the state, and for county levies;

and are to *be payable and redeemable in gold and silver. The capital stock of the bank is to consist of $2,000,000, to be raised and paid as follows: all moneys paid into the treasury for the purchase of vacant lands of the state, and so much of capital stock owned by the state in the Bank of Kentucky (which it seems had then stopped payment) as may belong to the state, after the affairs of that bank were settled up, with the profits thereof not heretofore pledged or appropriated by law. And the treasurer of the state was required, from time to time, as he received moneys, on any of these accounts, to pay them to the bank. By other sections, the bank was authorized to discount bills of exchange and notes, and to receive deposits, and to loan money on mortgage on real estate, distributing their loans in certain proportions among the citizens of the different counties; and the interest arising from all loans and discounts, after payment of expenses, was to be considered as part of the annual revenue of the state, and subject to the disposition of the legislature. The notes of the Bank of Kentucky were also receivable in payment of all debts due to the Commonwealth Bank.

Such are the principal provisions of the charter. It is clear, therefore, that the bank was a mere artificial body or corporation, created for the sole benefit of the state; and in which no other person had or could have any share or interest. The president and directors were the mere agents of the state, appointed and removable at its pleasure. The whole capital stock to be provided, consisted of the proceeds of the public lands and other property of the state, which should be paid over to the bank, from time to time, by the treasurer of the state. The public lands themselves, and the other funds, were not originally conveyed to or vested in the corporation; but were left in the free possession of the state itself. The president and directors had no interest whatsoever in the institution, but only had the management of it, subject to the control of the state. They were not personally liable for non-payment of any of the bills or notes, or debts of the bank; but only for their personal misconduct in any excess of issues or debts beyond double the amount of the capital stock. The state was entitled to all the profits. And though the bills and notes of the bank were declared payable in gold and silver, it seems, that no human being was made directly responsible for the payment; not the president and directors in their private capacity, for they contracted no personal responsibility; and not the state (as we have been told at the argument), because the state had not, in its *own name, promised to pay them: nay, it is said, that these bills and notes were not even issued on the credit of the state.

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Another thing is quite clear; and that is, that as the bank existed for the sole benefit of the state, and all its officers were appointed by the state, and removable at its pleasure, the state possessed an unlimited power over the corporation. The whole funds possessed by it, whether they were capital stock, or debts, or securities, or real estate, or bank-notes, belonged in fact to the state. The state was the equitable owner; and might, at any time, without any violation of the rights of the corporation, which was its own exclusive agent, resume and appropriate these funds to itself, and might, at its own pleasure, repeal and annihilate the charter; and by its sovereign legislative act, become, *ipso facto*, the legal owner, as it was, in fact, the equitable owner of the property and franchise. I know of no principle of law, or of the constitution, which would have been violated by such

a course; for it would have been only conferring upon the equitable owner the legal title to his own estate and property, and resuming, on the part of the principal, the funds and the business confided to his agents.

The bills or notes of the bank were to circulate as currency. That is so palpable, on the face of the charter, as not to have been even questioned at the argument. They were, then, stripped of mere technical forms, the bills of the state, issued by the agent of the state, on the exclusive funds of the state, for the benefit and profit of the state; to circulate as currency within the state, and without any other responsibility than that of the state. In what respect then do they differ from bills of credit of the state? I can perceive none.

In the first place, it is said, that they were not issued on the credit of the state; and that the state is not responsible, directly or indirectly, for their payment. I confess, until I heard the argument at the bar, I had not supposed, that any such proposition would be maintained, or could be maintainable. If these bills were not issued on the credit of the state, on whose credit were they issued? It is said, that they were issued on the credit of the corporation; and what is the corporation? A mere metaphysical being, the creature and agent of the state, having no personal existence, and incapable, *per se*, of any personal responsibility. The president and directors constituted that corporation, and were its sole members; and they were not personally liable. The official legal entity, called the president and directors, might be sued. But what then? The capital stock was *not [*345
vested in them, so as to be liable to be taken in execution, in a suit against them. Could a creditor of the corporation seize or sell the public land, on his execution against them? No one pretends that. Suppose, the state should choose, as it well might, to assume the whole agency and funds of the corporation to itself; could the creditor have any redress against the state? It is admitted, that he could not have any redress, because the state is not suable.

It is said, that the bills are not taken on the credit of the state; because the state has not promised, in terms, to pay them. If it had so promised, the state not being suable, the holder could here have no redress against the state. But I insist, that, in equity, and in justice, the bills must be treated as the bills of the state; and that if the state were suable, a bill in equity would lie against the state, as the real debtor; as the real principal: and I say this upon principles of eternal justice, and upon principles as old as the foundations of the common law itself. How can it be truly said, that these bills were not taken on the credit of the state? Were they not to be paid out of the proceeds of the public lands, and other property of the state? Were they not receivable in payment of debts to the state, for the very reason that they were the issues of the state, for its own benefit? And was not credit given to the state, upon this very ground? It has been said at the argument, that funds were provided for the payment of the bills, by the provisions of the charter; and therefore, no credit to the state, *ultra* these funds, can be inferred. But surely, the case of the old colonial bills of credit answers that position. They had funds assigned for their redemption; they, in many cases, had mortgages upon loans authorized to be made, as they are in the present charter; and yet the legislature called them bills of credit. The colonists did not promise to pay them; and yet

they deemed them their bills of credit. Why? Because, in truth and in fact, and not upon any metaphysical subtleties and fictions, they were issued upon the general credit of the state; and if the funds pledged fell short of the payment, the state was bound to redeem them. The argument on this head assumes the very matter in controversy. It assumes that the state never, directly or ultimately, held itself out as responsible for the payment of the bills; but that the holder trusted, and trusted exclusively, to the funds provided for him in the charter. Now, I deny this inference altogether. Because a state assigns funds for the payment of its debts or bills, does it follow, that the holder trusts exclusively to those funds? *346] When a creditor takes a pledge, *or has a security for payment of his debt, does he thereby exonerate the debtor from all personal responsibility? If the agent is authorized to pledge certain funds of his principal for the payment of the debt, does that exonerate the principal from all personal liability? No such doctrine has ever yet been established, to my knowledge, in any code of law; and, least of all, in the common law. On the contrary, it is, at the common law, held incumbent on those who insist that there has been any exclusive credit given to a fund, to establish the fact, by clear and irresistible proofs.

Suppose, in this very case, the corporation had circulated, as it had a right to do, its own bank-bills to the amount of $5,000,000; and the funds assigned by the state, and the funds in the hands of the corporation had been wholly inadequate to redeem them; would not the state have been bound in reason, in justice and in equity, to pay the deficiency? Would a court of equity, for a moment, tolerate any private person to escape, under such circumstances, from his own responsibility for the acts and conduct of his agent, fully authorized by him? Would it not say, *qui sentit commodum, sentire debet et onus?* Would it be consistent with good faith, for a state to proclaim that it was not bound by the solemn obligations of its own agents, acting officially for its own exclusive benefit and interest, and upon its own funds, to the payment of debts thus justly and honestly contracted? I put these questions, because it seems to me, that they can be answered only one way; and that is, by affirming the positive responsibility of the state, *in foro justitiæ*. The citizens must be presumed to trust, in all such cases, to the general credit and good faith of the state; and not merely to the fund contemplated or provided for their redemption. So, in similar cases, the colonies understood their own obligations: so the continental congress, and so the United States have constantly understood their own obligations. Although a fund may have been provided for payment of their bills of credit; although those bills of credit contained no direct promise of the state; although they purported, in form, to be the acts of trustees, or commissioners, or committees acting under the authority of the state; yet they well understood, that the general credit of the state, for the redemption of the bills, was necessarily implied; and that without that silent necessary pledge, the bills could not, and would not, have circulated at all; except upon compulsion, and by irresistible power of the government.

It is obvious, that whether a state be suable or not, cannot constitute *347] *a test, whether an instrument of currency issued by or on behalf of a state, be a bill of credit or not. It may be a bill of credit, although

the state is not suable thereon; as was, in fact, the case with all the ante-revolutionary bills of credit; for the colonies never were suable. On the other hand, the state may expressly allow itself to be sued on an instrument issued on its behalf; and yet it may not be a bill of credit. As, for example, a state may authorize suits to be brought for debts due by itself; and if it should issue, through its officers, a certificate of loan for money borrowed; if it were not intended to pass as currency, it would not be a bill of credit.

But it is said, that here the state was not only not suable on these bank-bills, but that the corporation itself was expressly suable, under the charter, and the promise to pay was made by the corporation; and the promise being made by the corporation, it, in effect, excludes any obligation on the part of the state. There is no magic in words. What was this corporation, in fact? A mere legal entity; a mere agent of the state, existing for the state, with funds belonging to the state, and dealing wholly upon the credit which these bills derived from the state. The persons who were president and directors for the time being, were not (as I have already said) personally liable for the payment of those bills. The metaphysical personage only was liable; and the promise, if it is not to be treated as a mere delusion and phantom, was the promise of the state itself, through that personage. Suppose, the state had authorized its treasurer, in his official capacity, and without any personal liability, to issue these very bank-bills, saying, "I, A. B., as treasurer, promise to pay," &c., and the whole proceeds of these bills were to be for the benefit of the state, and they were to be paid out of the funds of the state, in the treasury; could there be a doubt, that the state would, in truth, be the real debtor? That they would be issued on its credit? That the state would, in conscience, in common honesty, in justice, be responsible for their payment? If this would be true, in such a case, I should be glad to know, in what respect that case substantially differs from the one before the court. It is precisely the very case, and in the same predicament, as the bills of credit issued by Maryland in 1733 and 1769. There, the commissioners were created a corporation, and were to issue the bills, and were authorized to sue and be sued; and no one ever dreamed, and least of all, the state itself, that they were not the bills of credit of the state. If a state can, by so simple a device as the creation of a corporation, as its own *agent, emit paper currency on its own funds, and thus escape the solemn prohibitions of the constitution, the prohibition is a dead letter. It is worse than a mockery. If we mean to give the constitution any rational interpretation on this subject, we must look behind forms and examine things. We must ascertain for whose benefit, on whose credit, with whose funds, for what purposes, of currency or otherwise, the instrument is created, and the agency established. Whether it be the issue of a treasurer of a state, or of a corporation of a state, or of any other official personage, must be wholly immaterial. The real question must be, in all cases; whether, in substance, it is the paper currency of the state? [*348

But it has been argued, that if this bank be unconstitutional, all state banks, founded on private capital, are unconstitutional. That proposition, I utterly deny. It is not a legitimate conclusion from any just reasoning applicable to the present case. The constitution does not prohibit the emission of all bills of credit, but only the emission of bills of credit by a state:

and when I say, by a state, I mean by or in behalf of a state, in whatever form issued. It does not prohibit private persons, or private partnerships, or private corporations (strictly so called) from issuing bills of credit. No evils, or, at least, no permanent evils, have ever flowed from such a source. The history of the country had furnished no examples of that sort, of a durable or widely-extended public mischief. And if any should exist, it would be within the competency of the state legislatures to furnish an adequate remedy against such issues by private persons. In point of fact, prohibitions now exist in many states against private banking, and against the issue of private bank-paper, with the intent that it shall pass at currency. The mischief was not there; it had never been felt in that direction. It was the issue of bills of credit, as a currency, authorized by the state, on its own funds, and for its own purposes, which constituted the real evil to be provided against. The history of such a currency constituted the darkest pages in the American annals, and had been written in the ruin of thousands, who had staked their property upon the public faith; always freely given, and but too often grossly violated. The great inquiry, at the adoption of the constitution, was not whether private banks, corporate or incorporate, should exist; not whether they should be permitted to issue a paper currency or not; but whether the state should issue it on its own account. The anxious inquiry then was, *quis custodiet custodes?* The answer is found in the
*349] *constitution. But it has, in my judgment (though I am sure my brethren think otherwise), become a mere name. *Stat nominis umbra.*

The states may create banks, as well as other corporations, upon private capital; and so far as this prohibition is concerned, may rightfully authorize them to issue bank-bills or notes as currency; subject always to the control of congress, whose powers extend to the entire regulation of the currency of the country. When banks are created upon private capital, they stand upon that capital; and their credit is limited to the personal or corporate responsibility of the stockholders, as provided for in the charter. If the corporate stock, and that only, by the charter, is made liable for the debts of the bank, and that capital stock is paid in; every holder of its bills must be presumed to trust exclusively to the fund thus provided, and the general credit of the corporation. And in such a case, a state owning a portion of the funds, and having paid in its share of the capital stock, is treated like every other stockholder; and is understood to incur no public responsibility whatsoever. It descends to the character of a mere corporator, and does not act in the character of a sovereign. That was the doctrine of this court, in the *United States Bank* v. *Planters' Bank of Georgia*, 9 Wheat. 904. "It is (said the court on that occasion), we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." In the present case, the legislature expressly prohibited any partnership, or participation with other persons in this bank. It set it up, exclusively upon the capital of the state, as the exclusive property of the state, and subject to the exclusive management of the state, through its exclusive agents. It acted, therefore, in its sovereign character and capacity; and could not, even for an instant, even in intendment of law, divest itself in the transactions of the bank of that character and capacity.

I have not thought it necessary, in the views which I have taken of this

case, to resort to the state of the pleadings, though they fortify every portion of the reasoning which I have endeavored to maintain. One of the averments in the first plea is, that the president and directors of the bank were illegally authorized, "for and on behalf of the commonwealth, and upon her credit, to make bills of credit, to emit bills or notes, to an amount not exceeding ——— millions *of dollars, &c., and when so made, &c.; to emit, issue and circulate through the community, for its ordinary [*350 purposes, as money." The plea goes on to allege, that the president and directors had, before the date of the note sued on, "for and on behalf of the commonwealth of Kentucky, and on her credit, made various bills of credit, viz., notes of various denominations, in amount, from one dollar to one hundred dollars, &c., promising, therein and thereby, to pay the person on each note mentioned, or bearer, on demand, the amount therein mentioned, in money, and were transferrible by delivery." The demurrer admits the truth of these averments; and upon technical principles of pleading, I do not see how their conclusiveness in the present question can be avoided. But I do not rely on the state of the pleadings. I found my judgment upon the principles presented by the admitted state of the facts, that these bank-bills are bills of credit, within the true intent and meaning of the constitution; that they were issued by, and in behalf of, the state; upon the credit of the state; by its authorized agents; and that the issue is a violation of the constitution.

I am conscious, that I have occupied a great deal of time in the discussion of this grave question; a question, in my humble judgment, second to none which was ever presented to this court, in its intrinsic importance. I have done so, because I am of opinion (as I have already intimated), that upon constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent. I have another and strong motive—my profound reverence and affection for the dead. Mr. Chief Justice MARSHALL is not here to speak for himself; and knowing full well the grounds of his opinion, in which I concurred, that this act is unconstitutional; I have felt an earnest desire to vindicate his memory from the imputation of rashness, or want of deep reflection. Had he been living, he would have spoken in the joint names of both of us. I am sensible, that I have not done that justice to his opinion, which his own great mind and exalted talents would have done. But with all the imperfections of my own efforts, I hope that I have shown, that there were solid grounds on which to rest his exposition of the constitution. *His saltem accumulem donis, et fungar inani munere.*

Judgment affirmed, with costs.

*Edward Livingston's Executrix, Appellant, *v.* Benjamin Story.

Contract of antichresis.—Prescription.—Equity practice.

On the 25th July 1822, Livingston applied to, and obtained from Fort & Story, a loan of $22,936, on the security of a lot of ground in New Orleans, on which stores were then being built; this sum was received, part in cash, part in a promissory note, and $8000 were to be paid to the contractor for finishing the stores on the lot. The property was conveyed by Livingston to Fort & Story, by a deed of absolute conveyance; and he received from F. & S. a counter-letter, by which they promised to reconvey the property to him, if, on or before the 1st of February 1823, he paid them $25,000; by the counter-letter, on payment of the loan, the property was to revert to L.; if not, it was to be sold by an auctioneer of the city of New Orleans, and the residue of the proceeds of the same paid to L.; the money advanced by F. & S., with the interest and the expenses, being first deducted; the agreement for building the stores was transferred by L. to F. & S., and they agreed to pay the $8000, as the work proceeded, in instalments. On the 1st of February 1823, the buildings had not been completed, and F. & S. agreed, that the payment of the sum due on that day should be postponed until the 2d June 1823; the sum of $25,000, to be increased to $27,000, being at the rate of eighteen per cent. per annum, for four months, and the residue, for expenses of selling the property at auction, &c.; an agreement was made, that if the amount named should not be paid on the 1st of June 1823, the property should be sold at auction, and after the repayment of the sum of $27,500, the expenses of sale, &c., the residue should be paid to L.; by the same agreement, the counter-letter was to be delivered up, and the record of it cancelled. On the 2d of June, the money not being paid by L. to F. & S., it was agreed, that if, on or before the 5th of August 1823, the sum due, with interest, at eighteen per cent. annum, to amount to $27,860.76, should not be paid by L. to F. & S., the lot, and all the buildings, should become the full and absolute property of F. & S.; the money was not paid; and F. & S. protested, as they had done on the 4th of February, for non-compliance with the agreement to pay the money agreed to be paid. From this time, F. & S. continued in possession of the lot and the buildings, until the death of Fort, in 1828; when S. purchased the share which had belonged to F., and he continued to hold the property. The evidence in the case showed, that after July 1822, the contractor did not apply the $8000 to the completion of the stores on the property; and although F. & S. knew that he was so neglecting to apply the funds, they continued to pay over the same to him, in weekly payments, according to the contract. In 1832, L. having become a citizen of New York, filed bill in the district court of the United States for the eastern district of Louisiana, claiming to have the property held by S. reconveyed to him, on the payment to S. of the sum due to him, and interest on the same, deducting the rents and profits of the estate; or that the same should be sold according to the terms of the counter letter; and after the payment to S. of the amount due to him, with interest, the same deductions having beenmade, that the balance remaining from the sale should be so paid to him. After much inquiry and *delib-
*352] eration, and a comparison of the civil code of Louisiana with the civil law from which it derives its orgin, and with which it is still in close connection, we have come to the conclusion, that the original contract and counter-letter, constituted a pledge of real property; a kind of contract especially provided for by the laws of Louisiana, denominated "an *antichresis*;" by this kind of contract, the possession of the property is transferred to the person advancing the money; that was done in this case; in case of failure to pay, the property is to be sold by judicial process, and the sum which it may bring, over the amount for what it was pledged, is to be paid to the person making the pledge. In this case, a provision was made for a sale by the parties, upon the failure of payment; but this feature of the contract is rather confirmatory of the contract and counter-letter being an *antichresis*, than otherwise; for it is, at most, only a substitution by the parties of what the laws of Louisiana require. The decree of the court was in conformity to those principles.

Under the law of Louisiana, there are two kinds of pledges; the pawn, and the *antichresis*. A thing is said to be pawned, when a movable is given as a security: the *antichresis* is when the security given consists in immovables.

The *antichresis* must be reduced to writing; the creditor acquires by this contract the right of reaping the fruits or other rewards of the immovables given to him in pledge; on condition of deducting, annually, their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt; the creditor is bound, unless the contrary is agreed on, to pay

the taxes, as well as the annual charges of the property given to him in pledge; he is likewise bound, under the penalty of damages, to provide for the keeping and necessary repairs of the pledged estate; and may lay out, from the revenues of the estate, sufficient for such expenses.

The creditor does not become proprietor of the pledged immovables, by the failure of payment at the stated time; any clause to the contrary is null: and in that case, it is only lawful for him to sue his debtor before the court, in order to obtain a sentence against him, and to cause the objects which have been put into his hands to be seized and sold.

The debtor cannot, before the full payment of his debt, claim the enjoyment of the immovables which he has given in pledge; but the creditor, who wishes to free himself from the obligations under the *antichresis*, may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables.

The doctrine of prescription, under the civil law, does not apply to this case, which is one of pledge; and if it does, the time before the institution of this suit had not elapsed, in which, by the law of Louisiana, a person may sue for immovable property.

The 23d rule of this court, for the regulation of equity practice in the circuit courts, is understood by this court to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction; and especially, to those founded on any personal disability, or personal character of the party suing; or to any pleas, merely in abatement. The rule does not allow a defendant, instead of filing a formal demurrer or a plea, to insist on any special matter in his answer; and have also the benefit thereof, as if he had pleaded the same matter, or had demurred to the bill; in this respect, the rule is merely affirmative of the general rule of the court of chancery; in which, matters in abatement, and to the jurisdiction, being preliminary in their nature, must be taken advantage of by a plea, and cannot be taken advantage of in a general answer; which necessarily admits the right and capacity of the party to sue.

*Appeal from the District Court for the Eastern District of Louisiana. The case, as stated in the opinion of the court, was as follows: [*353

The complainant, the appellant's testator, on the first day of February 1834, filed a bill in equity in the district court of Louisiana, in which he stated himself to be a citizen of the state of New York, against Benjamin Story, a citizen of the state of Louisiana.

The bill charged, that some time previous to the 22d of July 1822, the complainant, being in want of money, applied to the defendant and John A. Fort for a loan, offering as a security a lot in the city of New Orleans, on which a building, intended for stores, had been begun; that the defendant and Fort agreed to loan him $22,936; of which a part only was paid in cash, part in a note of John A. Fort, and $8000 of which was afterwards agreed, between himself, the defendant and Fort, to be paid by Story & Fort, to one John Rust, a mechanic, who had contracted with the complainant, to complete the stores. That to secure the money borrowed, complainant conveyed to Fort & Story the lot of ground mentioned, and that, contemporaneously with the deed of sale, they executed, on their part, an instrument in writing, called a counter-letter, by which they promised, on the payment of $25,000, on or before the 1st day of February 1823, to reconvey to the complainant the property which he had conveyed to them. The complainant further charged, that of the sum of $25,000 to be paid by him on the 1st of February, a part of it was made up by a charge of interest at eighteen per cent. per annum, upon the amount of $22,936, actually advanced to him, and to be paid on his account to Rust, by Fort & Story.

The complainant also transferred his written contract with Rust to the defendant and Fort, rendering himself responsible for the proper employment of the $8000; and which was to be paid Rust in weekly payments, by the defendant and Fort. Rust, on his part, consented to the transfer of his

contract, and accepted Fort & Story in the place of the complainant. The stores were to be completed by Rust, by the 1st of November 1822, in a workmanlike manner; and all the materials, except those already provided, were to be found by Rust; and in his contract, he renounced all claim or *privilege upon the building beyond $8000, which was to be paid him by Fort & Story, for the complainant. The deed and counter-letter, and agreement with Rust, are in notes, A, B and C.

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(A) Deed. In the city of New Orleans, state of Louisiana, on this 25th day of July 1822, and in the forty-seventh year of the Independence of the United States of America, before me, Hughes Lavergne, a notary-public, duly commissioned and qualified, in and for the city and parish of New Orleans, residing therein, and in the presence of the subscribing witnesses hereinafter named, personally appeared Edward Livingston, of this city, counsellor-at-law, who declared to have granted, bargained and sold, and doth by these presents grant, bargain and sell, with all lawful warranty, unto John A. Fort and Benjamin Story of this city, merchants, here present and accepting, all that parcel of ground situated on the batture of the suburb St. Mary, between Common and Gravier streets, measuring eighty-two feet, fronting Common street, one hundred and twenty-six feet or thereabouts, fronting Tchoupitoulas street, one hundred and forty-six feet or thereabouts, fronting New Levee street; and bounded on the other side by the lot of ground belonging to Messrs. Livermore, Morse, and Miller and Pierce, containing one hundred and twenty feet or thereabouts, the said parcel of ground sold, together with the buildings, improvements, and all other appurtenances to the same in any wise appertaining or belonging, without any exception or reserve; the said purchasers declaring that they are perfectly acquainted with the premises, and do not wish for any further description of the same. The above-described property belongs to the said vendor, by virtue of the compromise entered into between him and the heirs of Gravier, by act before Carlisle Pollock, notary-public of this city, under date of the 3d of May 1818, and is free of mortgage, as appears by the recorder's certificate, delivered this day, and hereunto annexed. This sale is made for and in consideration of the sum of 25,000 dollars, which price the said vendor acknowledges to have received from the said purchasers, out of the presence of the undersigned notary and witnesses, renouncing the exception *non numerata pecunia*, and giving by these presents to the said purchasers a full and entire acquittance and discharge of the said sum of 25,000 dollars. In consequence of which payment, the said vendor doth hereby transfer and set over unto the said purchasers, all his rights of property on the above parcel of ground and buildings thereon; consenting that they should take immediate possession of the said premises now sold, to have, hold, use and dispose of the same, as fully belonging to them by virtue thereof. This done and passed, in my office, in the presence of John Baptiste Desdunes, junior, and Charles Janin, witnesses, residing in this city, who, together with me, the said notary, have signed this act, after the same had been fully read and understood. The contracting parties having previously signed.

(B) Counter-Letter. Whereas, the said Edward Livingston, by act before H. Lavergne, notary-public, hath this day sold and conveyed to said Fort & Story, a certain lot of ground, situated on the batture, in front of the Faubourg St. Mary, and designated as lot No. 1, on the plat thereof deposited in the office of the said notary, together with all the buildings and improvements thereon, for the sum of twenty-five thousand dollars in cash: Now, be it known, and it is the true intent and meaning of the parties to said deed of sale, that if the said Edward Livingston shall pay and reimburse to said John A. Fort and Benjamin Story, the aforesaid sum of twenty-five thousand dollars, on or before the 1st day of February 1823, then and in that case, the said Fort & Story stipulate and bind themselves to reconvey the said property above described, to said Edward Livingston. And in case of non-payment

*The complainant charged, that soon after the transaction, he left New Orleans; and that when he returned to it, he found that Fort & Story had paid to Rust $8000, on his account, but that little or nothing had been done toward the completion of the stores; so that if the property had been sold on the first of February, according to the terms of the counter-letter, it would not have *produced any thing like its full value. That under these circumstances, he applied to Fort & Story for further time, [*356 which they would not consent to, but on certain conditions; which were, that the property should be advertised for sale, on the 22d of June 1823; that the sum due them should be increased from $25,000 to $27,500; which was so increased by the addition of $1500 as interest, at eighteen per cent. for five months, $800, for auctioneer's commissions, $50, for advertising, and $150, arbitrarily added by the said Fort & Story. The complainant stated, that being entirely at the mercy of Fort & Story, he consented to those terms, and executed a paper accordingly. (a)

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of the said sum of twenty-five thousand dollars, on or before the day as above stipulated, then the said Fort and Story covenant and agree to cause the said property to be sold at public auction, by one of the licensed auctioneers of this city, after twenty days' public notice, on the following terms, to wit, twenty-five thousand dollars in cash, and the residue in equal payments one and two years: the purchaser given satisfactory indorsed notes and special mortgage on the property, until final payment. The said residue, after deducting the costs attending the sale, to be delivered over to the said Edward Livingston. And the said Edward Livingston, on his part, having taken cognisance of this agreement, declares himself to be perfectly satisfied and contented therewith, and gives his full and free assent to the terms of sale and all the conditions as above stipulated.

(C) Agreement with John Rust. It is hereby agreed, between Edward Livingston and John Rust, as follows: First, That the said John Rust engages, for the price hereinafter mentioned, to finish the sixteen stores now commenced and brought up to the ground floor, situated at the corners of Tchoupitoulas, Levee and Common streets according to the plan and elevation signed by them and delivered to the said Edward Livingston; except that the said stores, instead of three, are to be only two stories high, to be covered in terrass. The whole to be finished by the 1st day of November next, in a workmanlike manner; and all the materials, except those already provided, to be found by the said John Rust. And the said Edward Livingston agrees to pay to the said John Rust eight thousand dollars, in weekly payments of six hundred and sixty-six dollars each, during the progress of the work. And the said John Rust declares that he renounces any kind of claim or privilege upon the said building beyond the said eight thousand dollars to be paid as aforesaid.

Know all men, by these presents, that I, Edward Livingston, for myself and my representatives, do hereby transfer and assign the within contract to John A. Fort and Benjamin Story, they complying with the stipulations on my part therein contained; and John Rust being here present, consents to the said transfer, and accepts the said John A. Fort and B. Story, in the place of Edward Livingston. Dated 25th of July 1822. I do further agree to allow the said weekly payment of six hundred and sixty-six dollars to be charged to me, rendering myself responsible for the proper employment thereof, by the said John Rust.

(a) "Agreement between Edward Livingston, and John A. Fort and Benjamin Story of the other part, as follows: 1st. The sale of lot No. 1, on the batture, with the buildings thereon, to be postponed until the 2d of June next. 2d. On that day it shall be sold by McCoy & Company, unless sooner redeemed, after being advertised

The bill further stated, that the complainant, on the 2d of June, in order to obtain a delay of sixty days, was forced to consent to sign a paper, by which it was agreed, that the debt should be augmented to the sum of $27,830.76; and that if the same was not paid on the 5th of August, then the property should belong to the said Fort & Story without any sale.(a)
*357] But there was no clause by which *he should be discharged from the payment of the sum so borrowed as aforesaid, whereby he would have been liable to the payment of the sum so advanced, in case the property had fallen in value; and the bill stated, that on the 5th day of August, above mentioned, the said Fort & Story demanded, by a notary, the full sum of $27,830.76, which included the charge of $800 for auctioner's commissions for selling, although no sale had taken place, and all the other illegal charges

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in the Courier de la Louisiane, in French; and the Orleans Gazette, in English, from the 1st day of May previous to the sale. 3d. The conditions for the sale shall be $27,350 cash, and the residue at one and two years with special mortgage; but in this sum is included $850, at which the auctioneers' commission, and charges of advertisement are calculated, which shall be deducted or redueed to what they shall really amount to, if payment be made before the 1st of June. 4th. The overplus, after deducting the cash payment, is to be delivered to Edward Livingston. 5th. The counter-letter, executed by Messrs. Fort & Story, shall be delivered up, and the registry thereof annulled, immediately after the signature of this agreement, made by duplicates, this 4th day of March 1823.

(a) In the city of New Orleans, state of Louisiana, on the 2d day of June 1823, the forty-seventh year of the independence of the United States of America, before Mr. Hughes Lavergne, notary-public, duly commissioned and qualified, in and for the city and parish of New Orleans, residing therein, and in the presence of the undersigned witnesses hereinafter named, personally appeared, Edward Livingston, counsellor-at-law, of this city, on the one part, and John A. Fort and Benjamin Story, of this city, merchants, of the other part, which said appearance declared, that this being the day agreed on by contract, between Edward Livingston and the said Fort and Story, for the sale, at auction, of lot No. 1, situated on the batture, in the front of Fauxbourg St. Mary; and the said Edward Livingston having requested that said sale might not take place, for his own accommodation, the said Fort and Story, have agreed to the said Livingston's request, on the following conditions, to wit: that on or before the 5th day of August, he, the said Livingston, shall pay to the said Fort and Story, the whole amount of the consideration-money paid by them for the said lot, that is to say, the sum of $27,830.76, and also any other sum they may be under the necessity of paying for the preservation of the said property; then the lot and buildings to revert to the said Livingston, and to become his property; and in case the said Livingston should fail, on the day above mentioned, to wit, the 5th day of August next, to pay to the said Fort and Story the sums above specified, then and in that case, the said lot with all the buildings thereon, are to become the full and absolute property of the said Fort and Story; and the said Livingston hereby engages thereupon to surrender and cancel all and every writing or other document, in relation to said property, that may give to him any equity of redemption or other right to the same premises, it being the true intent and meaning of the parties, that in case of failure of payment, as aforesaid, that said lot, with all the buildings and appurtenances to the same belonging, are to vest in said Fort and Story a full title in fee-simple for ever. Thus done and passed in my office, on the day, month and year above written, in the presence of J. B. Desdunes, junior, and Charles Janin, witnesses, residing in this city, and requested to be present, who, together with the parties, signed this act, as well as me the said notary, after the same had been fully read and understood.

above stated; and on non-payment, protested for damages and interest on the said sum, thereby showing their intention to hold him responsible for the sum demanded, if the premises should, by any accident, become insufficient in value to pay the same. Fort & Story remained in possession of the said premises, until the death of the said John A. Fort, which took place some time in the year 1828; after his death, the said Benjamin Story took the whole of the said property, by some arrangement with the heirs of the said John A. Fort, and was and ever since had been, in the sole possession thereof; and the bill charged, that the said John and Benjamin, in the lifetime of the said John, and the said Benjamin, after the death of the said John, had received the rents and profits of the said property, to the amount of at least $60,000; and that the complainant was advised, and believed, that he had a right to ask and recover from the said Benjamin Story, the possession of the said property, and an account of the rents and *profits [*358
thereof, the said conveyance of the same from the complainant having been made on a contract for the loan of money, and although in the form of a sale, in reality, only a pledge for the repayment of the same; the act by which he agreed to dispense with the sale being void and of no effect in law.

The bill also prayed, that an account might be taken, under the direction of the court, between the complainant and the defendants to the bill, in which the complainant agreed he should be charged: 1st. With such sum as should be shown to have been advanced to him or paid on his account under the loan made to him on the 25th day of July 1822, with the interest which he agreed to pay, of eighteen per cent. per annum, to be calculated upon each advance from the time it was made, until the 5th of August 1823, and after that time at legal interest. 2d. With all reasonable expenditures judiciously made and incurred by the said John and Benjamin, in building, repairing and safe-keeping of the said property, and that the complainant be credited in such account with all such sums as the said John and Benjamin, or either of them, had received, or might, if they had used due diligence and care, have received, from the said property; and that, in such account, the rents and profits be applied as the law requires: first, to the payment of the sums necessarily incurred in building and repairing; secondly, to the payment of interest on the sums which should appear to have been advanced on the said loan; and thirdly, to the discharge of the principal of the said loan. And that if, on said account, it should appear that there was a balance due him, as he hoped to be able to show will be the case, that the said Benjamin Story be decreed to pay the same to him, and to surrender the said property to him; and that if any balance should be found due from the complainant, that the said B. Story might be decreed to deliver the said property to him, on his paying or tendering to him the said balance; and that he might have such other relief as the nature of his case might require. That he, the said Benjamin Story, in his own right, and also as executor of the last will and testament of the said John A. Fort, or in any other manner representing the estate of the said John A. Fort, might be summoned to answer this bill; the complainant averring that he was a citizen of the state of New York, and that the said Benjamin Story was a citizen of the state of Louisiana, and then resided in New Orleans.

*The protests, made at the request of John A. Fort and Benjamin [*359

Story, on the non-payment of the money stipulated to be paid by Edward Livingston, on the 1st of February 1823, stated, that on that day the notary had requested from Edward Livingston, payment of the sum of $25,000, and was answered, that "he could not immediately pay the sum due to Fort & Story, but that he hoped soon to be able to do it." The answer to the demand made, stated in the protest of the 5th of August 1823, to have been given by Edward Livingston was, "that owing to the very extraordinary scarcity of money, he was prevented repaying the money he had borrowed from Messrs. Fort & Story at this time, but was willing to allow them the same interest, at eighteen per cent., with good personal security, in addition to the real property they now have, for the renewal of the obligation for six months."

On the 17th of February 1834, Benjamin Story appeared to the bill, and demurred to the same; alleging for cause of the demurrer, that the case made in the bill was not such a one as entitled the claimant in a court of equity of the state of Louisiana, to any discovery touching the matters contained in the bill, or any other matters, or any relief; and that by complainant's own showing in the said bill, the heirs of John A. Fort, who was therein named, were necessary parties to the said bill; as much as it was therein stated, that all the matters of which he complain, were transacted with the defendant and John A. Fort, whose widow, the present Mrs. Luzenburg, was the sole heir and residuary legatee.

The district court sustained the demurrer, and dismissed the bill, on two grounds: 1st. That this is not a suit that can be maintained in its present form, in a court of the United States, sitting in Louisiana. 2d. That a material party is omitted in the bill. The complainant appealed to the supreme court, and at Jannary term 1835, the decree of the district court was reversed, and the case remanded for further proceedings. (9 Pet. 632.)

On the 15th of December 1835, Benjamin Story filed in the district court of Louisiana, an answer, on oath, to the original bill, in which he said, that he did not admit, but if it were the fact, required proof, that the complainant was a citizen of the state New York; that at the time of the transaction mentioned in the bill, and for a long time thereafter, he was a citizen of the state of Louisiana, and one of her senators in the senate of the United States; and if he had ceased to be a citizen *of that state, *360] the defendant knew not when or how, and called for the proof.

And the defendant, further answering, said, that he expressly denied, that on or about the 25th July 1822, he and John A. Fort agreed to lend to the complainant the sum of $22,936, or any other sum. That he expressly denied, that at any time, he either jointly with the said Fort, or separately, ever agreed to lend to the said complainant any sum of money whatever, as alleged in the bill of complainant. That so far from there having been any loan intended by the parties, the defendant stated, that the negotiation for the sale of the said lot, commenced between John A. Fort and Nathan Morse, Esq., since deceased, the latter acting for the said complainant; and that one of them informed the defendant that the complainant wished to raise money on mortgage; but the defendant peremptorily and expressly refused to advance any money whatever to the complainant on mortgage. That during the progress of the negotiation, the

complainant having learned that the defendant was to be interested in the purchase, and was to make the principal payments, mentioned to the defendant, that he would prefer obtaining money by mortgage on the property, rather than make a sale of it; and the defendant again repeated to him his refusal, and insisted upon a sale being made to him.

As evidence of the understanding of the parties, and of the real nature of the transaction, certain communications which had been addressed by the alleged agent of Mr. Livingston to John A. Fort and Story, were annexed to the answer.(*a*)

*The sale was agreed to, and an act was passed on the 25th of July 1822, containing the clause of *non enumerata pecunia*. The answer referred to the different documents which were stated and referred to in the complainant's case. The money not being repaid, as was provided in the counter-letter on the 2d of February 1823, no sale of the property was made by auction, because of the request of the complainant; and on the 4th of March, they made another agreement (note *ante*, p. 356), by which they agreed to postpone the sale of the property, until the 2d of June 1823; and the said Edward Livingston, in consideration of allowing him such additional chance to repurchase the said lot and buildings, or obtain some person to purchase it, agreed to pay to them a compensation therefor, as is in said agreement stipulated; and in this agreement, it was covenanted between the parties, that the counter-letter should be annulled and given up, so that there then existed between the parties the absolute bill of sale, and this stipulation of 4th of March 1823. And finally, the 2d day of June 1823, having arrived, and Edward Livingston would not pay the price of said property, nor was there any offer therefor, at his request, an agreement was entered into before H. Lavergne, a notary-public, whereby the said Edward Livingston requested that the sale might not take place, for his accommodation, and the said Fort & Story agreed thereto, on the following conditions: that on or before the 1st day of August 1823, the said Edward Livingston should pay the said sum of $27,830.76, and any further sum by them expended for the care and preservation of said property, and that then the said lot and buildings were to become the property of said Livingston; and in case the said Livingston should fail, on the 5th August 1823, to pay to the said Fort & Story the sums above specified, then the said lot, with the buildings thereon, were to become the full and absolute property of Fort & Story, and the said Livingston engaged thereupon to surrender and cancel all and every writing or other document in relation to said property, that might [*361

(*a*) To John A. Fort, Esq., Present.—Messrs. John A. Fort and Story will oblige Mr. Livingston by sending in writing, their definitive terms, that is—What sum will they give in cash; what sum they retain in their own hands to appropriate towards the building; what sums, and at what periods, they give their notes; that they must have an absolute sale of the lot and buildings free from all incumbrances, and a transfer of the contract, and are to be put in immediate possession; the property to be returned in case the money is refunded punctually, at the expiration of —— months.

To Mr. John A. Fort, Present.—Messrs. Fort and Story are requested to meet at Lavergne's office, corner of Royal and St. Louis street, this day, at 12 o'clock, for the purpose of completing the arrangements for the batture.

Friday, 26th July. (Signed) N. Morse.

give to him any equity of redemption or other right to the said promises; it being in said act expressly stated, that it was the true intent and meaning of the parties, that in the case of failure of payment as aforesaid, said lots, with all the buildings and appurtenances to the same belonging, were to vest in said Fort & Story a full, free, and absolute title in fee-simple for ever.

*362] *The answer denied, that at the time of the purchase, the property was worth more than the money Fort & Story paid for it, and that any loan of money was made; but it was an absolute sale, with power to redeem, which was twice extended to the complainant, and was finally closed by the last agreement; and on the 5th of August 1823, a demand was made, and payment refused; whereby all clauses of redemption were annulled, by articles 93 and 94 of the act then in force in Louisiana, and the property became absolutely and irrevocably the property of Fort & Story. The answer also denied, that the property had become as valuable as was represented by the complainant; and it stated, that on the 10th of March 1832, he, the respondent, by a purchase from the widow of John A. Fort, now Mrs. Luzenburg, became to owner of the moiety of the property which had belonged to John A. Fort, for which the sum of $50,000 was to be paid. A liability by Mrs. Luzenburg and her husband to repay this money, in case of eviction, was alleged to exist under the laws of Louisiana, and that the purchaser had a right, under those laws, to call on the vendor, to assist in his defence; "and the respondent submits to the court, whether by the proceedings having been instituted in the district court of the United States, Mrs. Luzenburg is to be precluded from claiming and defending the ownership, when, being vendor, she is interested in the case." The answer prayed a citation to the widow of John A. Fort, who intermarried with Dr. Luzenburg; that they might appear and defend the sale, and abide by any decree of the court.

To the answer, was annexed a statement of the moneys paid and received, on account of the estate, by the respondent and John A. Fort. The sums paid for the estate from July 26th, 1822, to May 27th, 1817, amounted to $51,537.20, the interest at ten per cent., which is $26,261.12; total $77,796.32; the sums received, up to January 26th, 1829, amounted to $29,705.69—interest $7073.18—total $36,778.87. The answer claimed the benefit of the proscription of five or ten years, under the laws of Louisiana, as constituting a bar to the suit.

*363] *Afterwards, on the 14th of March 1836, the defendant filed an amended answer, stating, that Mary C. Luzenburg, the widow of John A. Fort, deceased, had, since the filing of the original answer, set up a claim to the moiety of the estate in controversy, and had instituted a suit in the judicial district court of the state of Louisiana, against the respondent, for the purpose of vacating the contract by which he became invested with a title to the interest of which Fort died possessed, and to recover the same from him; and as the claim was not admitted, but in the event of the success of the appellant, she and her husband would be liable to the respondent, and consequently, the rights of the respective parties could not be fully, fairly and finally decided, unless Luzenburg and wife be made parties to this suit; the amended answer prayed they might, by the complainant, be made parties to the bill. A copy of the bill of Mrs. Luzenburg to the judge of

the district court of the first judicial district of the state of Louisiana, was annexed to the amended answer. It alleged a sale of the moiety of the property which belonged to John A. Fort, to have been made to Benjamin Story, on the 10th of March 1832, for $50,000 ; when in truth and in fact, the said moiety was worth $100,000.

The testimony of two witnesses was taken in open court. Hughes Lavergne, the notary before whom many of the documents in the case had been executed, deposed, "Mr. Nathan Morse came to his office, accompanied by Mr. Story, at the period named, for the purpose of making the sale above referred to. Mr. Morse appeared in this transaction to be the legal adviser of Messrs. Story & Fort ; at this time, Mr. Livingston was, and had been for some time, a member of the New Orleans bar, of great practice and celebrity, and it was not probable, that Livingston would employ a lawyer to advise him. Cross-examined by the defendant's counsel to the question, if deponent did not know that Mr. Morse was the financial agent of Mr. Livingston? He answered, that he did not know that he was. Money was very scarce in New Orleans, in 1822.

H. Lockett, Esq., the agent of Mr. Livingston, deposed, that the complainant had not been in Louisiana since 1829 ; that he had written to deponent often, that he had changed his domicil to New York ; he had property there and voted there. Cross-examined—deponent stated, that Mr. Livingston was the *senator from Louisiana, until the year 1831, when he was appointed secretary of state at Washington ; it was then that [*364
Mr. Livingston changed his domicil to the state of New York ; deponent never saw Mr. Livingston in New York, as he had never been there ; but he had received letters, and still received letters from E. Livingston, dated and post-marked New York.

On the 3d of June 1836, the district court made a decree, that the bill of the complainant should be dismissed. The complainant, Edward Livingston having died, his executrix was made a party to the proceedings, and she prosecuted this appeal.

The case was argued by *White*, for the appellant ; and by *Crittenden* and *Clay*, for the appellee.

White, for the appellant.—An attempt is made by the appellee to raise up a question of jurisdiction in this case. If the right of Mr. Livingston to sue in the court of the United States in Louisiana, resting upon his having been a citizen of that state, when the suit was commenced, is contested ; the exception should have been presented to the district court of the United States in Louisiana, by a plea to the jurisdiction. Proof could then have been regularly given, that he became a citizen of New York in 1831, and continued such until his death, in 1836. Proof of this is in the record.

The whole of this attempt is made to cover the real character of this transaction ; and it is sought to make it a sale of the property, and not a loan, as the penalties of usury are heavy, under the laws of Louisiana. The facts of the case show, that it was a loan by John A. Fort and Benjamin Story, to Mr. Livingston ; of this the court will be fully satisfied. Nothing is so common under the civil law, as to make a deed of absolute transfer of real estate, and to take an agreement from the lender of the money, to secure whom the deed is made, which is called "a counter-letter." This is an

advantage to the borrower; it puts him in possession of the evidence of the real nature of the transaction, and gives him full power over the deed of conveyance. The counter-letter is the contract between the parties. In this case, it contradicts the answer of the defendant to the plaintiff's bill. He says, it was an absolute sale of the land; that is entirely disproved by the counter-letter. The counter-letter shows it was not a sale, but *a loan on the security of the real estate; and the law of Louisiana takes charge of the borrower, and will not allow him, under the pressure of his difficulties, to surrender the protection the law gave him. A sale by an auctioneer, or a judicial sale, is required; and this the borrower cannot relinquish.

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The purpose of the lenders was to embarrass the borrower, and thus prevent the redemption of the property. The stores were not completed, as they ought to have been; and as the contractor, Rust, should have been obliged, by Fort & Story, to complete them; they having an assignment of the contract for their completion; nothing was done by them. Had the contract with Rust been insisted upon, and the stores completed, ample means to pay the whole sum borrowed, would have been in possession of Mr. Livingston. The extravagant interest which was made a part of the consideration for the loan, would have been fully paid; and this most willingly. The appellant has no wish to escape from the payment of that interest; and he has instructed his counsel not to ask anything which will prevent its allowance, according to the agreement. The property, at the time of action, was far greater in value than the amount loaned by Fort & Story. In 1832, it was worth $100,000. It is now of much greater value; and all the appellant asks, is, that she may be allowed to repay to the lenders, all they advanced, all they expended, and the legal interest on the amount, since the debt became payable; taking back the estate, and having the advantage of the proceeds of it, since that time. No injustice will be done by this settlement; and all parties should be satisfied with it.

This was not a conditional sale of property by Mr. Livingston. It was a pledge of real estate, which cannot be enforced by a sale of the pledge, without a judicial proceeding. This is what, in the civil law of Spain, is called *antichresis.*

The code of law prevailing in Louisiana, is difficult to be understood. It has grown up since the first establishment of the province. Originally, it was adopted by a proclamation of Governor O'Riley, in 1768; and was afterwards confirmed by the king of Spain. This was the *Corpus juris Civilis,* and the *Partidas,* and the *Recopilacion de Leyes de las Indias.* The French inhabitants of the province became dissatisfied, and *Les Coutumes de Paris* were declared to furnish the rules of practice—the principles of the established laws to remain in full force. *This was the state of things, when the United States acquired the territory; and great embarrassments arose, on the introduction of the provisions of the laws of the United States, and the forms of proceedings under the same. A code was prepared by authority of the legislature of the state, which is called the civil code, and is, in most of its provisions, the Code Napoleon; and allows the Spanish laws to prevail, in all cases to which they will apply.

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By the civil laws of Spain, the transaction was an *antichresis;* and by these laws, Mr. Livingston was to be treated as a minor, and could, by no

act of his, change the contract, far less, dissolve or annul it. (Civil Laws of Spain, translated by Johnson, 149, 156.) "A pledge must be sold by some judicial process. The right of property in a pledge cannot be transferred, except by some judicial proceeding, whatever may be the stipulations between the parties." (Ibid. 159.) The counter-letter stipulates that the surplus shall go to Mr. Livingston. (Civil Code of La. art. Pledge, tit. 22, art. 3100.) In article 3143, Civil Code of Louisiana, will be found the regulations relative to unremovables pledged, called *antichresis;* and article 3146 declares, that any clause which passes the property of a debtor, on a failure to pay, is inoperative and void. At common law, the mortgagee may become the owner of the property by a release of the equity of redemption; but the civil law does not allow this.

Mr. White then read to the court, an argument prepared by Mr. *Hunt*, of New Orleans, who was the counsel for Mr. Livingston, in the district court of Louisiana; to show the character of the loan, by the laws of the state of Louisiana, derived as they are from the laws of Spain and of France; and contended, that by the provisions of the law, the property was pledged, not sold. Cited, 4 Kent's Com. 135–6; Civil Code, 362, ch. 5, art. 91; Ibid. 344; 2 Ves. 405; Poth. Sale, art. 362; 5 Mass. 109; 9 Wheat. 489; Civil Code, 446, tit. Pledge, art. 25; 12 Seirry 20; 13 Ibid. 223; 7 Ibid. 872; 1 Mart. (N. S.) 417; Civil Code, 408, art. 12–13; 2 Mart. (N. S.) 21–4. The authorities referred to in this argument, show that the whole transaction was one protected by the law.

The protests which Fort & Story made on the non-payment of the sum borrowed, were intended to destroy the credit of the borrower; and thus prevent his obtaining from other sources the funds required for the redemption of the property. *In the case cited from 2 Mart. (N. S.) 21–4, the court will find the opinion of Judge PORTER, showing that a [*367 right to land pledged, cannot be acquired, without some judicial proceeding; and so all measures to destroy the rights of the original owner of the property, will be of no avail. Once a mortgage, always a mortgage; cited, 4 Mart. 3, as to the nature and effect of a counter-letter.

Crittenden, for the defendant.—This is a suit in chancery which has heretofore been before this court. After it was remanded, the Louisiana court proceeded to enforce the decision of this court. The defendant filed his answer to the complainant's bill, to which the complainant replied, and the cause was tried on its merits, and the court dismissed the bill, with costs, from which this appeal is prosecuted.

The case attempted to be made out by the complainant, in his bill, is, that he made a loan of the defendant and a certain Fort, was to give them an exorbitant interest; and as a security for the repayment of the money advanced to him, that he conveyed the lot, which is the subject of controversy, in New Orleans, in mortgage. On the contrary, the defendant denies, peremptorily and positively, that the transaction was a loan; and avers, that he and his associate, Mr. Fort, absolutely refused to make any loan to the complainant. He denies, that the conveyance of the lot in dispute is a mortgage. He alleges, that the lot was purchased by him and his associate, of the complainant; with a privilege secured to him of re-purchasing it by a given day. That this privilege, although extended from time to time,

was never exercised by him; and that the lot, therefore, became the absolute property of the defendant and his associate. The whole controversy, so far as the merits are concerned, turns upon the fact, whether the parties to the transaction intended a sale of the property, or a loan; and the conveyance of the lot as a security for the reimbursement of that loan.

The complainant sues as a citizen of the state of New York, and the defendant denies that he was a citizen of that state at the time of the commencement of the suit. The proof attempted on this point by the complainant is irregular, and not to be regarded.

With the exception of that testimony, all the evidence is documentary. The transaction originated in an absolute conveyance of the property,
*368] *with a separate instrument, called a counter-letter, both under date of the 25th July 1812; and by their terms, it was to have been consummated on the 1st of February 1823; but at the instance of Livingston, and in virtue of new agreements, materially variant from the first, this consummation was deferred to the 2d of June, and then to the 5th of August 1823. By these new agreements, the counter-letter of the 25th of July 1822, was annulled; and it was finally settled between the parties, that if Livingston paid the sum specified, on or before the said 5th of August 1823, the property should "revert to said Livingston, and become his property;" and that if he should fail to pay by that day, then that said lot and appurtenances to be the "absolute property of the said Fort & Story;" the said Livingston to surrender and cancel every "writing or document that might give him any equity of redemption, or other right to the said premises: it being the true intent and meaning of the parties" that, in case of the failure of payment, &c., the said lot and appurtenances "are to vest in the said Fort & Story a full title in fee-simple for ever."

The main question in the cause turns upon the law of Louisiana, where the civil law prevails, and where they have no code of equity, nor of common law, except as it has been introduced, in a very limited extent, since the annexation of Louisiana to the United States. 1st. The first question will be as to Mr. Livingston's right to maintain a suit in the district court of the United States for Louisiana. Should that be decided affirmatively, the second, and most important, question is, was the original transaction between the parties, the case of a loan, or of a *bonâ fide* sale? 3d. A minor question may arise, as to the parol testimony admitted, contrary to the usages of courts of equity, at the trial of the suit.

It is denied, that the court had jurisdiction of the case; as Mr. Livingston was, at the time the suit was brought, a citizen of Louisiana. The answer denies his citizenship, and the proof which was given on the part of Mr. Livingston, by no means shows he had ceased to belong to Louisiana. The appellees have full right to raise the question of jurisdiction here. Jurisdiction was denied in the district court, and evidence given upon the question. The court will look at that evidence. If there is no jurisdiction,
*369] the court will dismiss the cause. Having *been brought into question, and the whole of the testimony appearing which was given to establish it, this court will consider the point as regularly before them. *Brown* v. *Keene*, 8 Pet. 115. It is known, that when Mr. Livingston became the secretary of state, he was a citizen of Louisiana. While at the city of Washington, he could not acquire the right of a citizen in any other

state; although it is admitted, that a residence at Washington, in the public service, could not affect his citizenship in the state from which he came. He could only become a citizen of New York, by actual residence there; and this did not take place, until after he filed the bill in this case, in the district court of the United States for the eastern district of Louisiana. As to jurisdiction, cited, *Brown* v. *Keene*, 8 Pet. 115.

The appellee, in this case, is protected by time. This suit was not brought until ten years after the transaction between the parties was closed. Civil Code of Louisiana, 302. The allegation of the operation of the act of limitation is in the case, and the court will regard it.

Upon the merits of the case, the question will be, whether the arrangement between Mr. Livingston, and Fort & Story, was a sale of the property or a pledge. The appellee asserts it to have been originally a conditional sale; which afterwards was made absolute by Mr. Livingston, who had a perfect right to make it such. The provisions of the civil law, and of the Louisiana code, which have been referred to by the counsel for the appellant, apply to mortgages. If this was a case of mortgage, then the ability of the mortgagor to change it, and relinquish his right to have a judicial sale of the property, may exist. It is difficult, under the common law, to distinguish between a conditional sale and a mortgage. What this is, must be decided by the code, and by the decisions of Louisiana. The counter-letter speaks of the deed from Mr. Livingston, as a conveyance; and the recital admits the transaction to be a sale. The purpose of the counter-letter was to secure a re-conveyance. If the civil law allowed Mr. Livingston the ability to cancel the counter-letter, the evidence to show that he did so, and waived his right of redemption, is conclusive. The authorities cited by the counsel for the appellant, apply to admitted mortgages; and they have no application to this transaction, which never was a mortgage. *But if it had been such, still the right to release the equity of redemption existed; and under the civil law, that right may, by agreement, be extinguished. Civil Code of Louisiana, 472. [*370

The civil code of Louisiana of 1808, was in force when this transaction took place. The provisions which apply to it, will be found in pages 344, and in 272, 274. The contract comes within the definitions of a conditional sale, in the articles referred to. A sale is, where one agrees to give a thing or property for a particular sum of money. This was a sale; but subject to an expressed condition, which suspended its operation for a certain time, within which the vendor had a right, expressly reserved, to cancel it. The papers all show it was such a sale. It is nowhere called a mortgage, or a security for money loaned. The counter-letter does not contain an engagement to repay the money received from the purchaser of the property. The deed is absolute. The only stipulation is that of Fort & Story, to re-convey the property; but there is no obligation on the part of Mr. Livingston, to repay the money he had received. It is essential, that there should have been such an agreement, to constitute a loan. Both parties, in the case of a loan, are bound; one to receive the money, when offered, the other to repay it, according to the agreement. It would be vain to search for such provisions in the instruments executed by the parties. They import anything but such an arrangement.

But if, originally, it was not a sale, it afterwards became such. The

surrender of the counter-letter, and the subsequent agreement of the parties converted it into an absolute transfer of the estate ; and this, after all the indulgence which Mr. Livingston had asked, had been fully conceded to him. The postponement from the 4th of March 1823, was made at the instance of Mr. Livingston, and on entering into the agreement ; which, after a further postponement from June to August, in the same year, he terminated, with his free and full consent—gave up all his right or claim on the property. The rights of Fort & Story thereby became absolute and irrevocable.

It is contended, that although this agreement was made, yet by the civil law, it was of no avail, and was void. If this is not the law, then the agreement must have full effect. The court must be satisfied, that this is the law of Louisiana ; and unless they are so satisfied, the decree of the district court will be affirmed. The authorities referred to by the counsel for the appellant, if they have any application, apply to loans on mortgage, and
*371] they may show *that, in case of a mortgage, such agreements are void. They can have no other application. It is true, that once a mortgage always a mortgage ; but certainly, a party may give up his right of redemption. Code of Louisiana, 472. Mortgages may be extinguished by paction or agreement. This is a paction or agreement. By the original agreement between the parties, the property was to be put up to sale ; but Mr. Livingston afterwards gave this up, considering that this would be more advantageous than to offer the property for sale. Mr. Livingston was fully competent to do this ; and yet it is contended by the appellant, that by some law of Louisiana, the power to do so is taken away.

If the transaction was a sale on condition, then it is not asserted, that Mr. Livingston had no power to make it absolute. The civil code of Louisiana is explicit to this effect. The very form of a sale, on condition, has been adopted in this case. The deed is an absolute and complete transfer ; the counter-letter declares the conditions of the sale. This, by the civil code, is a paction, by which the vendor reserves the right to take back the property ; and in the instrument, the very terms of the law are adopted. May I not sell my property, on a condition that if I do not repay the money named, the estate shall be sold by auction ; the proceeds of the sale to repay the same, and I to receive the residue ? This may be done by our laws. Courts of chancery have sought to make such a transaction between parties, more than they intended it to be ; but the law of Louisiana will not allow this : tit. Mortgage, art. 1, 452 ; art. 6, 452. Under the law of Louisiana, no conditional mortgage can exist between parties, except that which is expressly stipulated. None can be inferred from anything but the express agreement of the parties. Authorities will sustain these positions : 1 Mart. (N. S.) 522, 528.

Strong apprehensions have prevailed in Louisiana, that in consequence of the decisions of this court, in cases from the district of Louisiana, the laws of Louisiana are not to govern the cases which may be brought here ; but that they are to be decided by the chancery law of other states, and by the chancery laws of England. This is an error in those who entertain such apprehensions. The courts of the United States adopt the forms of proceed-
*372] ing in chancery *cases, where they are brought into those courts, but they will apply the laws of the place to contracts made under them.

It has been said, that the Civil Code of Louisiana is but a part of the law of that state, and that they have there, in full application, the *Corpus Juris Civilis*, and the *Partidas* of Spain. Whatever system of laws prevailed before 1808, after that time, the laws then established alone prevailed. After that time, we are not to look to the laws of Spain, or of any part of the continent of Europe. In the formation of the code then adopted, such of the provisions of those laws as were approved, were taken from them; and Louisiana having a right to make her laws, did thus make them. No other code now exists.

By the law then established, the transaction in this case was a contract of sale on condition; and the time for the performance of the condition is not, by the law, permitted to be extended. After the time fixed, no redemption can take place. Possession of the property was given, when the sale was made, and has continued from that time. This is stated in the bill. The possession shows the character of the arrangement, and proves that no mortgage, but a sale only, was intended. The fact that it was a loan of money, and not a sale, is asserted in the bill; and in the answer, this is denied, and it is asserted by the respondent to have been a sale. No proof to support the allegations in the bill is given, and the facts in the answer are to stand, until disproved. This is the rule in chancery.

But if evidence were required to show that the negotiation was as represented by the respondent, it will be found in the notes which were written, before it was concluded. Mr. Moss asks what sum Fort & Story will give for the property, to be redeemed by Mr. Livingston.

The allegation of the increased value of property is not supported by evidence. The bill filed by the widow of Fort is no part of the case. But whatever may be the present value of the property, it can have no influence in the cause. Suppose, the property was now worth one-half of what it was in 1823, could the respondent apply to the district court of Louisiana, and after making a sale at auction, claim from the legal representatives of Mr. Livingston, the deficiency? This right should be found in the proceedings in favor of the defendant; or it cannot exist in favor of the representatives of Mr. Livingston.

* *Clay*, also of counsel for the appellee.—This case stands before the court under no favorable appearances. A transaction, closed in [*373
1823; finally closed; without an expression of dissatisfaction; and in harmony with the written agreements between the parties; is brought up, ten years afterwards, and a claim is made to put aside all that was then considered completed. Mr. Livingston was in Louisiana for many years after 1823, in New Orleans; and no suit was instituted by him to avoid that he had done, and no complaint made by him. The situation of Mr. Livingston, his profound legal knowledge, and his professional experience, gave him every opportunity of knowing the import and effect of the instrument executed by the parties. On the other hand, the purchasers of the property were ignorant of the law, were merchants, not knowing the effect of these instruments. They took them to be what they imported; and trusted to them upon a plain construction of their terms.

The first question in the case is, by what law is it to be tried? The case shows the high and august character of this court. Accustomed to

the rules of the common law, and to the principles and practice adopted in courts of equity, they are called upon, from a distant state, to expound laws different from those which their deep studies have made familiar to them; and a knowledge of which, and their eminence as jurists, learned in the common law, and the law of equity, have given them the high positions they hold.

The effect of the decree in this case, when it was formerly before the court, was no more than to give to the district court of the eastern district of Louisiana chancery jurisdiction over the cause. The plan of the constitution of the United States, was not to create or apply any laws, in the states of the Union, in the courts of the United States, in cases brought before those courts, other than the established laws of the state; but to give a right to administer those laws in the cases legally brought before those courts. In cases brought from any state to this court, the only power the court has, is to apply the laws of the state; and in this case, the law of Louisiana will be applied. It is essential to secure confidence in the court, that this shall always be done.

In looking at this case, under the laws of Louisiana, the court will find, that there are no laws which impose penalties on usury; and although the civil code declares the rate of interest in certain *cases, and in par- *374] ticular contracts; it does no more. These provisions will not be filled up by penalties.

It was, in the district court of Louisiana, presented on new pleadings, and the facts as exhibited in the defendant's answers, in the contracts between the parties, and on the oral evidence, are now, for the first time, to be considered by this court.

The question of jurisdiction, from the citizenship of the parties, was brought before that court, and the evidence does not show that the complainant, when the bill was filed, was a citizen of any other state than Louisiana. This court will now consider this question. If, according to the strict rules of pleading, under the common law, and the practice of courts of chancery, a plea in abatement should have been filed, this is not required by the civil law, and it will not be now insisted upon. A suggestion of a want of jurisdiction is always in time; and even the principles applied in chancery cases, shall govern in the final decision of this cause, the practice of the courts of the United States, in Louisiana, are, by the acts of congress, to be conformable to the rules of practice in the state courts.

As to the merits of the case: all the allegations of the great value of the property, are without any evidence to support them. If, at the time of the transaction, the property was of greater value than the sum the defendant and Fort agreed to pay for it, this could have been, and should have been, proved. No testimony was offered on this subject; and the conclusion is, that such was not the fact. If afterwards it became of greater value, it did so, in consequence of the improvements made upon it by the purchasers, by the expenditure of their capital upon it; and by the rise of property in value from the great prosperity of the city of New Orleans. But if the value of the estate is to be determined by this court, and is essential to the disposition of the case; the court have evidence before them, which entirely contradicts all the assertions of the appellant. The accounts rendered by the appellee, show that no proceeds of the prop-

erty, which will justify or sustain the allegations of such value, have come into his hands. This is the best testimony which the case admits of; and the appellant has not attempted to contradict the statements in these accounts.

The liberty of purchasing property, and the privilege of disposing of it, are among the highest we enjoy. May they not be *exercised in the manner which those who acquire, or will dispose of, property, [*375 think proper, and on such terms as may be agreed upon? May not a loan of money on property to-day, be converted into a sale to-morrow, for the money borrowed? Nothing in the laws of Louisiana to prevent this has been shown, and no such provisions exist. While courts may have looked into transactions of this kind with a jealous scrutiny, to prevent usury; they have not claimed the powers to make void an absolute sale, made by a person fully competent to act, and who deliberately acted in making the sale; and this, where no evidence has been offered to show that the full value of the property sold was not paid. The whole argument of the appellant assumes that the transaction was that of a loan; and this in direct opposition to the other evidence in the case. It assumes, that it was a loan on the property by Fort & Story; and being such, the law of Louisiana deprived the borrower of the right to change the transaction, and make it a sale. To support this position, the law prevailing in Louisiana has been referred to, without success.

White, in reply, insisted, that there was evidence in the case which fully proved that Mr. Livingston was, when the bill was filed, a citizen of the state of New York. He became a citizen of that state, when he ceased to be a senator from the state of Louisiana; and his residence in the district of Columbia, while acting as secretary of state, did not affect or impair his New York citizenship. He asked, if an exception to the jurisdiction of this court, on the allegation that the appellant could not sue in the district court of the United States of Louisiana, could be admitted; when it did not appear, that the question of citizenship had been made before the judge of that court?

As to the operation of the act of limitation, no such point was made in the court below. If it had been presented, the law of Louisiana would not have sustained it. Cited, Civil Code, art. 1082, 1084, art. 67, page 486, tit. Prescription. In 3 Mart. 458, the law on this subject is found. Prescription does not apply to pledges, and is always interrupted by judicial proceedings; and it does not run until twenty years. Cited, as to Prescription, or Action of Nullity, Civil Code, 722, 1084.

The argument for the appellant has been mistaken by the counsel for the defendant. It has not been said, that this is the case of a mortgage. *Possession of the property mortgaged, does not, expressly, nor does it ever, in Louisiana, pass with the execution of the instrument; this [*376 was not then a mortgage. Was it an absolute sale? The demand of the money, at the several succeeding periods when it became payable, and the protests at each period, even at the last, when by the surrender of the counter-letter, and the new agreement, the transaction had assumed a new aspect, show, that it was always considered and treated as a loan. The only right Fort & Story acquired by the last agreement, was the right to

procure from a competent court a decree of sale; this decree they could not legally obtain, until the complainant was legally put in default, by the sentence of a court. The complainant was never put in legal default; no legal demand was made; no sale ordered. The property remains the property of Livingston, in pledge.

The contract was usurious, by the law of Louisiana. Interest on a judicial proceeding is five per cent.; bank interest is six per cent.; and conventional interest may be ten per cent. No one can recover on a contract, where the interest exceeds ten per cent. In this case, the contract, being usurious, was tainted and corrupted throughout. The transaction not being one of mortgage, not being a conditional sale, or an absolute sale, after the surrender of the counter-letter, what is it? This is shown in the laws of Louisiana. Under that law, as under the civil law, the security is one of the highest order, and one under the peculiar guardianship of the law. The contract being made, is to be carried out according to its original terms, and no other. If the amount loaned is not repaid, the lender must adopt the course which was originally agreed upon; and which he stipulated to pursue. He can only sell the property by a judicial sale; and from the sale receive the sum due to him. This is called an *antichresis*, by the civil code; and all its characteristics and its incidents are well defined, established and declared. Cited, Civil Code, art. 974, 984.

The nature of the *antichresis* is, that the lender has the property in his possession, and receives the profits. These go towards paying all expenses to which he may be subjected, and discharging the interest on the loan. The rule of the civil law, both in Louisiana, and wherever it prevails, is, once a pledge, always a pledge. Cases have existed, and the rules of the law have been applied to them, in which *as many as one hundred *377] years have elapsed since the transaction was commenced. 13 Seirey 223. The stipulation which was afterwards entered into, that the title to the pledge should become absolute, and become a title in fee-simple, was void and null by the civil code; and by the decisions of the courts of Louisiana. Civil Code of 1808, art. 25, tit. Pledge; Code Napoleon, art. 20, 88. It is here said, the creditor cannot sell the immovable property pledged, in default of payment, or by the consent of the contracting party. The code of Louisiana is borrowed from this article. Under this article, the French courts have proceeded, and have held that a creditor cannot sell the pledged article, with the consent of the debtor. 12 Seirey 20; 13 Ibid. 233; 7 Ibid. 872. Cited 1 Mart. (N. S.) 417; 2 Ibid. 22, 24, 17; 3 Ibid. 17, 168; Pothier on Pledges; Pothier on Mortgages, ch. 4, tit. Security.

The court will apply the law, which is thus established, to the case before them. The appellant asks a restoration of the property, on the restoration of the sum loaned, and the interest, including all costs and expenses. This is reasonable. It has been shown, that this may be, and has been done, after one hundred years; and in the case before the court, little beyond ten years had passed, before the claim, which is now before the court, was made. By the decree which the court are asked to give, the defendant will sustain no injustice. The appellant, as was said in the argument in chief, does not place the claim on the law of usury. He asks, that all the interest he agreed to pay, shall be allowed to the defendant; and this being allowed, and all the capital advanced repaid, the property is asked for;

or that a sale of the same shall be made, and the residue of the proceeds paid over, after all that the defendant is entitled to shall have been fully reimbursed to him.

WAYNE, Justice, delivered the opinion of the court.—The legal question to be decided in this case, depends altogether upon the facts disclosed in the bill, answers and documentary evidence on the record. The complainant charges, that some time previous to the 25th July 1822, being in want of money, he applied to the defendant, and John A. Fort, for a loan, offering as security, a lot on the batture of the suburb St. Mary, between Common and Gravier streets, in New Orleans, on which a building intended for stores, had been *begun; that the defendant and Fort had agreed to lend [*378
him $22,936, of which a part only was paid in cash, part in a note of John A. Fort, and $8000 of which was, afterwards, agreed between himself, the defendant, and Fort, to be paid by Story & Fort, to one John Rust, a mechanic; who had contracted with complainant, to complete the stores; that to secure the payment of the money borrowed, complainant conveyed to Fort & Story the lot of ground mentioned; and that contemporaneously with the deed of sale, they executed on their part, an instrument in writing, called a counter-letter, by which they promised, on the payment of $25,000, on or before the 1st day of February 1823, to reconvey to the complainant the property which he had conveyed to them. The complainant further charges, that of the sum of $25,000 to be paid by him on the 1st of February, a part of it was made up by a charge of interest, at 18 per cent. per annum, upon the amount of $22,936 actually advanced to him, and on his account to Rust, by Fort & Story. The complainant also transferred his written contract with Rust, to the defendant and Fort, rendering himself responsible for the proper employment of the $8000 by Rust, and which was to be paid Rust, in weekly payments, by the defendant and Fort. Rust, on his part, consented to the transfer of his contract, and accepted Fort & Story in the place of complainant. The stores were to be completed by Rust, by the first of November 1822, in a workmanlike manner, and all the materials, except those already provided, were to be found by Rust; and in his contract, he renounced all claim or privilege upon the building, beyond the $8000 which was to be paid him by Fort & Story, for the complainant. For the deed of sale from Livingston to Fort & Story—the counter-letter to Livingston—Rust's contract, and the transfer of it—all of the same date, see documents, A, B, C (*ante*, p. 354). The complainant further charges, that soon after the transaction, he left New Orleans, and that when he returned to it, he found that Fort & Story had paid to Rust $8000 on his account; but that little or nothing had been done towards the completion of the stores; so that if the property had been sold on the 1st of February, according to the terms of the counter-letter, it would not have produced anything like its full value. That under these circumstances, he applied to Fort & Story for further time to make the *payment of the sum [*379
loaned, which they would not consent to, but on the following conditions: that the property should be advertised for sale on the 2d of June 1823; that the sum due them should be increased from $25,000 to $27,500; which was so increased, by the addition of $1500 as interest, at eighteen per cent. for four months, $800 for auctioneers' commissions, $50 for advertising

and $150 arbitrarily added by the said Fort & Story. The complainant states, that being entirely at the mercy of Fort & Story, he consented to those terms, and executed a paper accordingly (*ante*, p. 356). On the 2d June, the complainant being still unable to repay the actual sum advanced to him, and the additions made by the charge of interest at eighteen per cent., &c., he applied to Fort & Story for a further extension of the time of sale, which they consented to, for two months longer, to the 5th of August, by which his debt to them was augmented to $27,830.76 ; he agreeing, in writing, that if, on the last-mentioned day, he should fail to pay $27,830.76, then the lot and all the buildings thereon were to become the full and absolute property of Fort & Story (*ante*, p. 356). The day came, and the complainant did not pay. The defendant had him protested, as he had before done on the 4th of February, for his non-compliance with his agreement to pay the sum of $25,000: and on that of the 5th of August, for his non-compliance with his agreement to pay $27,830.76 ; and for all damages, costs and charges, and interest, suffered or to be suffered by the said Fort & Story. The defendant and Fort, after this, continued in possession of the lot and buildings, until the death of Fort, which took place in 1828 ; and after the death of Fort, the defendant Story retained or took possession of the property, by an arrangement with the heirs of Fort. It is to be remembered, that the possession of the property was given by Livingston to Fort & Story, on the 22d of July 1822, when the deed of sale and counter-letter were executed.

Here, it is proper, for a full understanding of the transaction between these parties, to set out, what were the rights of Livingston, and obligations of Fort & Story to Livingston, growing out of the counter-letter, and continued by them, on the subsequent agreement, *until that of the 2d of June ; when it was stipulated by Livingston, that if he failed to pay on the 5th of August, the property was to become absolute in them.

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The counter-letter, after reciting that Livingston had sold and conveyed to them the lot, buildings and improvements, for the sum of $25,000 in cash, declares it to be the true intent and meaning of the parties to said deed of sale, that if Livingston shall pay and reimburse to Fort & Story, $25,000, on or before the 1st of February 1823, then Fort & Story stipulate and bind themselves to reconvey the property to Livington. And in case of non-payment, at the stipulated time, then Fort & Story " covenant and agree to cause the said property to be sold at public auction, by one of the licensed auctioneers of this city, after twenty days' public notice, on the following terms, to wit, $25,000 in cash, and the residue in equal payments, at one and two years ; the purchasers giving satisfactory indorsed notes, and special mortgage on the property, until final payment. The residue, after deducting the costs attending the sale, to be delivered over to the said Edward Livingston." When the first extension of the time of payment was given, we find, substantially, the clause of the kind just recited. It will be well to give it in terms.

Agreement between Edward Livington and John A. Fort and Benjamin Story : 1st. The sale of lot No. 1, on the batture, with the buildings thereon, to be postponed until the 2d of June next. 2d. On that day, it shall be sold by McCoy & Co., unless sooner redeemed, after being advertised in the Courier de la Louisiane, in French, and the Orleans Gazette, in English, from the 1st day of May previous to sale. 3d. The conditions of the sale

shall be $27,350 cash, and the residue at one and two years, with special mortgage; but in this sum is included $850, at which the auctioneers' commission and charges of advertisement are calculated, which are to be deducted or reduced to what they shall really amount to, if payment be made before the 1st of June. 4th. The overplus, after deducting the cash payment, is to be delivered to Edward Livingston. 5th. The counter-letter, executed by Messrs. Fort & Story, *shall be delivered up, and the registry thereof annulled, immediately after the signature of this [*381 agreement, made by duplicate, &c.

The defendant begins his answer, by denying the right of the complainant to sue in the district court of the United States for the eastern district of Louisiana, on account of both being citizens of the same state; equivalent to a denial of the jurisdiction of the court over the case. He then denies, positively and repeatedly, that Fort and himself, either jointly or separately, ever agreed to lend the complainant $22,936. So far from any loan having been intended by the parties, he says, the negotiation for the sale of the lots began between Fort and Nathan Morse (the latter of whom he states as having acted for the complainant), and that one of them informed him that the complainant wished to raise money on mortgage; that he peremptorily refused to advance any money to the complainant on mortgage. That this refusal was afterwards made by him to the defendant himself; and for a confirmation of his refusal and understanding of the parties, he refers to two notes of Morse, as a part of his answer, both of them addressed to Fort; the first dated the 13th of July, and the other on the day the conveyance of the lot was made to himself and Fort, by Livingston. (*ante*, p. 360). He then states the sale of the lot to himself and Fort; refers to the deed of sale; and, generally, declares himself and Fort have paid more than the price agreed on for the property so purchased. He then admits the execution, by himself and Fort, on the day of the sale, of an instrument in writing, giving to Livingston the power to redeem; whereby, upon the payment of $25,000, on or before the 1st of February, they were to reconvey the property to Livingston; and if he failed to pay, that Fort & Story were to sell the property so acquired and purchased, and if it brought more than $25,000, that they would give the surplus to the complainant. The answer then contains the failure of Livingston to pay; the extension of time to him by another agreement, to the 2d of June, on which they agreed to postpone the sale; and that Livington was to give them a compensation for the additional chance which the time allowed gave him to repurchase the lot. Upon this agreement the defendant relies, to prove an absolute bill of sale of the property to himself and Fort, at the time of its execution; because the fifth and last clause of it annulled the counter-letter. The defendant recites the second failure of Livingston to pay; the *further extension of time [*382 to him, to the 5th of August, and Livingston's stipulation (*ante*, p. 356), by which, on Livingston's failure to pay $27,830.76, and any further sum that Fort & Story may be under the necessity of paying for the care and preservation of the property; the lot and buildings were to become the full and absolute property of Fort & Story; and Livingston's obligation to surrender and cancel all and every writing or other document in relation to the property, that may give him any equity of redemption, or other right in the premises; it being the true intent and meaning of the parties, that

in case of failure of payment, the lot and buildings, and appurtenances, are to vest in Fort & Story a full title in fee-simple, for ever. The defendant insists, that Livingston was the guarantor of Rust, for the application of the $8000 to the completion of the buildings. He then relies upon the 93d and 94th articles of the Civil Code of Louisiana, then in force in the state; to give himself and Fort an absolute and irrevocable title to the property, on Livingston's failure to pay on the 5th of August. The articles relied on are: "The time fixed for redemption must be rigorously adhered to, it cannot be prolonged by the judge;" and "if that right has not been exercised, within the time agreed on by the vendor, he cannot exercise it afterwards; and the purchaser becomes irrevocably possessor of the thing sold." He reiterates his denial of any loan, or that time was given to Livingston to repay a loan; but that the extension of time was to enable Livingston to repurchase, or to effect the sale of the property; and that the increase of the sum from $25,000 to $27,830.76, was the sum demanded by them as the consideration of their waiver of their right to have the sale made at the time the money was payable. The defendant denies the deduction of interest at eighteen per cent. per annum, or any other.

To the second interrogatory in the bill, he answers, that, at the time of the purchase, he paid Livingston, in a check on the United States Bank, $12,006.57; in a note of John A. Fort, in favor of defendant, due and paid November 25th, 1822, $2764.83; and to Nathan Morse, Esquire, the attorney of Edward Livingston, $1000; which sum, Morse stated to Story, he considered ought to have been paid him by Livingston, for effecting a sale of the property. To the fourth *interrogatory, which is, if Fort & *383] Story did not consent to postpone the sale of the property to the second of June, and did not exact, as a condition of such postponement, that the counter-letter should be cancelled, and that the complainant should pay the sum of $2500, in addition to the $25,000; and whether the sum of $2500 was not made up of interest, charged for four months, at 18 per cent. per annum, of $800 auctioneers' commission, $50 for advertising, and an arbitrary sum of $150, the defendant answers, that Fort and himself did consent to postpone the sale; but that he does not know, except from the act, how the additional sum stipulated to be paid by them was composed; nor does he recollect any memorandum containing the items of the additional sum.

In an exhibit by the defendant, we, however, have a more precise state- of the sum paid to Livingston.

July 26th, 1822,	Cash paid E. L. - -	$12,006	57	
27th, "	J. A. Fort's note, payable 25th Nov. - - - -	2,764	83	
Sept. 10th, "	Cash paid John Rust at sundry times - - - -	8,000	00	
	Interest - - - -	2,228	60	—$25,000

Thus, substantially confirming the allegation of the complainant, that the sum of $25,000 expressed on the deed of sale, as the consideration for the purchase, was made up in part of an amount of interest upon that sum, deducted by Fort & Story, contemporaneously with the execution of the deed of sale and counter-letter. There is this difference, too, between the answer of the defendant and the exhibit, that it appears, from the latter,

the sum of $1000 paid to Morse, which the defendant, in his answer, alleges to have been paid by him as a part of the consideration for the lot, or on account of Livingston, was not paid to Morse until the 12th of February 1824; more than six months after the time when the defendant considered himself and Fort to have acquired a full and absolute title to the property, from the failure of Livingston to pay on the 5th of August preceding. Upon this item of money paid to Morse, we remark, that the letters of Morse (*ante*, p. 360), do not prove Morse to have been the agent of Livingston in negotiating the transaction between the parties; but rather that he was, if not altogether the agent of Fort & Story, the agent of both *the parties: and that the defendant, without consulting Livingston, graduated the compensation of Morse by his own ideas of the service rendered by him; and chose to pay Morse $1000, after he considered Livingston had forfeited his right to redeem the property. The answer and exhibit are contradictory upon this point; but the latter being more detailed and certain, it forces the conclusion to which we have come as regards that item. We must remark, too, that the answer and exhibit are also contradictory in a more essential particular, as regards the interest alleged to have been deducted from the $25,000, at the time the deed of sale was executed; the exhibit stating the fact of interest being then deducted, and the answer denying that 18 per cent. interest was deducted, or any other. [*384

Soon after the transaction of the 25th of July 1822, the complainant left New Orleans, and did not return to it until after the time within which Rust was to have had the buildings completed. They were not finished, however; and this incident deserves a passing notice. The defendant and Fort had required an assignment of Rust's contract to them; indeed, it is of the same date with the deed of sale and counter-letter, and seems to have been made by Livingston and Rust for them. It was transferred, with Rust's consent, they undertaking to make weekly payments to him of $666, during the progress of the work, to the amount of $8000; and Livingston rendering himself responsible for the proper employment of the money by Rust. In a short time, however, the defendant admits, that he discovered Rust misapplying the money to some other contract; and that, upon remonstrating with him against such conduct, Rust persisted in a declaration of his intention to expend the money otherwise than in the execution of his contract. Under these circumstances, what should the defendant and Fort have done? We think, good faith with Livingston, as they had made themselves his agent to disburse $8000 for a particular object, to which they had become parties, by the transfer of the contract, required from them, in Livingston's absence, to have stopped further payments to Rust, notwithstanding Livingston's responsibility for the proper employment of the money; for Rust's obligation to them, under the transferred contract, was, to have the stores finished by the 1st of November; and as they held the funds to be applied to that object, they should have withheld them from Rust, when he declared his intention not to do so, and had ceased to work upon the *buildings. Rust's conduct was as much a breach of his contract with them, as it was with Livingston; and they should have protected themselves and Livingston, which they could easily have done. Instead of this being done, the defendant admits, he continued the [*385

weekly payments to Rust, after he had discovered the misapplication of the money; and that but $1000 of the $8000 were applied to the buildings. They neither protected themselves nor Livingston: and it cannot be disguised, that the misapplication of the money was much more fatal to Livingston than themselves; for the buildings being unfinished in November, Livingston was deprived of any further resources from them, to aid him in redeeming the property on the 1st of February, by paying the money advanced by them. This incident gave Livingston a strong claim upon the defendant for an extension of time; and we cannot but remark, that it has a bearing in favor of the allegation of the complainant, that by the contract of July 1825, an absolute sale was not intended. Is it reasonable to suppose, that the defendant and Fort, if an absolute sale had been intended, would have calmly seen the misapplication of $8000 from what they deemed their property, and taken Livingston as a security, upon his general responsibility for Rust; when the defendant himself declares, he would not have loaned Livingston money on any account? The consequence of this misapplication of $7000 by Rust, was to take so much from Livington's ability to redeem the property. The complainant, however, does not pray to be discharged from this sum, on a settlement of the transaction with the defendant; and therefore, the payment to Rust, of $8000, must be allowed to be a charge against Livingston.

We do not deem it necessary to make a further synopsis of the bill and answer. They are contradictory in several points; but a careful examination of them, and of the documents and exhibits attached to the answer, has enabled us to fix the legal character of the transaction, throughout, under the laws of Louisiana; whatever may have been the designs of the parties upon each other, or their individual intentions, when the contract was made, on the 25th of July 1822. The law of Louisiana controls the controversy between these parties; and the first, indeed, only question, to be determined, is, what was the legal character of the contract between them, from the execution of the first papers to the last, on the 2d of June 1823?

*386] *The defendant's counsel do not contend, that it was an absolute sale. The defendant's answer shows it was not. He admits Livingston's power to redeem, and their obligation to reconvey, as expressed in the counter-letter. For although the conveyance of the 25th of July 1822, is, in form, a positive sale, yet, the counter-letter explains its nature as fully as if it were inserted in that conveyance. Executed, as it was, at the same time, it is a part of the contract; a separate clause, modifying and explaining the other clause, states the deed of sale; the two must be construed together. The Civil Code of Louisiana says, "all clauses of agreements are interpreted the one by the other, giving to each the sense which results from the entire act." Civil Code, 1808, p. 270, § 5, art. 61. It can make no difference whether these clauses be on one piece of paper, or on two pieces; whether there be two separate instruments, or one instrument containing the substance of the two. The Civil Code of Louisiana does not require that the stipulation of parties, relative to a sale of property, should be in one instrument. They are to be reduced to writing, and the parts necessarily make up the entire contract; in this regard, corresponding with the rule in equity, which makes a defeasance attach itself to a conveyance, absolute in the first instance, converting the latter into a mortgage, as it is

expressed by Chancellor KENT, in (4 Kent's Com. 135) treating of mortgages. "The condition upon which the land is conveyed is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument; and if the deed be absolute in the first instance, and the defeasance be executed subsequently, it will relate back to the date of the principal deed, and connect itself with it, so as to render it a security, in the nature of a mortgage." We do not mean to be understood, as applying this rule, to make, under the laws of Louisiana, a constructive mortgage out of an absolute conveyance or deed of sale, on account of some other paper explaining or controlling the first; but have used it only as an illustration, that by the law of Louisiana, a contract of sale, and a power to redeem, need not be in one instrument.

The contract of the 25th of July 1822, not being an absolute sale then, what is it? It is either a conditional sale, *vente a rémeré* (sale with the right of redemption), a mortgage, or a pledge. The defendant's counsel say it is the first, a conditional sale, *vente a rémeré*. We will use their language. They say, it is a contract of sale, not a *pure and simple sale, but a sale with conditions, and a right or power of redemption [*387 annexed, *vente a rémeré;* that the right and power of redemption stipulated for in this case, is in exact conformity with the provisions of the same code of 1808, in form and substance, and identifies it still farther as a sale, *vente a rémeré*. That is defined to be "an agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold, by returning the price paid for it" (Civil Code 245); and the provision of the code regulating the right of redemption, or that "the time fixed for redemption must be rigorously adhered to, it cannot be prolonged by the judge;" and, "if that right has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold;" just as at common law and in equity, in the case of an absolute sale, with an agreement for a repurchase, the time limited for the repurchase must be precisely observed, or the vendor's right to reclaim his property will be lost. 1 Poth. on Sale 183; 1 Ves. 405.

But in this instance, there was no sale corresponding to the *vente a rémeré*, unless other provisions in the counter-letter than Livingston's right to redeem, shall be altogether disregarded. By the counter-letter, Fort & Story covenant with Livingston, upon his failure to pay, that the property shall be sold at auction, and that the residue of what it might bring, over the sum which they claimed, should be paid to Livingston. Upon failure to pay, the land and buildings did not become the property of Fort & Story. The failure to pay only gave to them the right to have it sold, according to the terms prescribed, for their own reimbursement. Had the contract been a *vente a rémeré*, the land would have become their absolute property; for the code is, "if the right to redeem has not been exercised within the time agreed on by the vendor, he cannot exercise it afterwards, and the purchaser becomes irrevocably possessed of the thing sold." The exclusion of that irrevocable possession by Fort & Story, in the counter-letter, upon Livingston's failure to pay, destroys so principal and effective a provision of the *vente a rémeré*, that the law will not permit us to consider the contract to have been one of that kind.

The question then recurs, what was the nature of the contract of the

25th July 1822? It is not a mortgage, because no property in the soil, nor right of possession, is given by the contract of mortgage, *by the *388] law of Louisiana. By that law, a mortgage is defined to be "a contract, by which a person affects the whole of his property, or only some part of it, in favor of another, for security of an engagement; but without divesting himself of the possession thereof." In this instance, possession accompanied the execution of the deed, and has continued in the defendant. It was a part of the contract, and a feature of it entirely inconsistent with a mortgage, under the laws of Louisiana. The contract then, being neither a sale upon condition, with a power to redeem annexed, a *vente a rémeré;* we must seek further in the laws of Louisiana, to establish its legal character. After much inquiry and deliberation, and a comparison of the Civil Code of Louisiana with the civil law from which the former derives its origin, and with which it is still in close connection, we have come to the conclusion, that the original contract and counter-letter constituted a pledge of real property; a kind of contract, especially provided for by the laws of Louisiana, denominated an *antichresis.* By this kind of contract, the possession of the property is transferred to the person advancing the money. That was done in this case. In case of failure to pay, the property is to be sold by judicial sentence; and the sum which it may bring over the amount for which it was pledged, is to be paid to the person making the pledge. In this case, a provision was made for a sale by the parties, upon the failure of payment; but this feature of the contract is rather confirmatory of the contract and counter-letter being an *antichresis,* than otherwise; for it is, at most, only a substitution by the parties of what the laws of Louisiana require; and what we think the law requires to be done by itself, through the functionaries who are appointed to administer the law. But upon this point, let the law speak for itself.

The Civil Code of Louisiana says, "the pledge is a contract, by which the debtor gives something to his creditor as a security for his debt." Tit. 20, art. 3100. "There are two kinds of pledges; the pawn and *antichresis.*" "A thing is said to be pawned, when a movable thing is given as security; the *antichresis* is, when the security given consists in immovables." Tit. 20, art. 3102. "The *antichresis* shall be reduced to writing. The creditor acquires by this contract, the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt." Art. 3143. *"The creditor is *389] bound, unless the contrary is agreed on, to pay the taxes as well as the annual charges of the property given to him in pledge. He is likewise bound, under the penalty of damages, to provide for the keeping, and useful, and necessary repairs of the pledged estate, and may levy out of the revenues of the estate sufficient for such expenses." Art. 3144. "The creditor does not become proprietor of the pledged immovables, by failure of the payment at the stated time; any clause to the contrary is null; and in this case, it is only lawful for him to sue his debtor before the court, in order to obtain a sentence against him, and to cause the objects which have been put in his hands to be seized and sold." Art. 3146. "The debtor cannot, before the full payment of the debt, claim the enjoyment of the immovables which he has given in pledge. But the creditor, who wishes to

free himself from the obligations mentioned in the preceding articles, may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables." Art. 3145.

These appear to us to be equitable provisions, affording ample security to the creditor, and fully protecting the rights of the debtor. Especially protecting the latter from a rapacious creditor, who might otherwise push his debtor's necessities into a relinquishment of all his rights in such a contract; to make himself the proprietor of the thing pledged, upon the failure of the debtor to pay. This is a high species of security, over which the law watches benignantly; because, though one of choice and convenience, very frequently, it is commonly the resort of distress in the last alternative, when all other means of raising money have failed. It was this high species of security, that Fort & Story received from Livingston; or their contract cannot be comprehended within any of the provisions of the Civil Code of Louisiana. If anything else, it is a contract unknown to the laws of that state. We class it with the *antichresis;* not because the instrument between the parties provides specifically in every particular for the rights and obligations of parties to the *antichresis;* but because it does so, in the main and substantial requisites of such a contract, and from those main and substantial particulars in this contract, being irreducible to any other kind of contract provided for by the laws of Louisiana. The property was put into the possession of Fort & Story; they looked to it to reimburse them, upon the failure of Livingston to pay; upon that failure, it did not, from the terms of the counter-letter, become *theirs absolutely; as, we see, would have been the case, if it had been a *vente a rémeré.* It was to be sold at public auction; and if a sale should be made for more than they had advanced, the residue was to be paid to Livingston. But no such sale could be made, without a judicial sentence; such a decree was not obtained; no sale was made: so the parties stood under the contract on the 1st of February, when Livingston first failed to pay, as they did when it was first entered into. It is therefore plain, that Fort & Story acquired no absolute property in the lot and buildings, under the contract of the 25th of July 1822; and if they did not, it was only a pledge or *antichresis* for their ultimate reimbursement. [*390

We now proceed to inquire, whether the *antichresis* was converted into a sale, by the annulment of the counter-letter, after the 1st of February 1823, under the agreement of the 4th of March. It appears by the document (*ante*, p. 356), that the complainant did, on the last-mentioned day, execute a paper annulling the counter-letter of the 25th July. But supposing the first to have been so annulled; was not the second, in effect and in terms, another instrument of the same kind, only extending the time for redemption, upon consideration of Livingston's paying a larger sum than the $25,000 originally expressed in the first deed of sale; and providing still for a sale, in the event of Livingston failing to pay a second time, and giving to him the residue, if any should remain, after they were reimbursed. Consequently, until the 2d of June, the pledge continued. Livingston, under the agreement of the 4th March, could, by paying the money at any time, on or before the 2d of June, have prevented the sale; and if a sale was made, he was entitled to the overplus.

The defendant, in his answer, says, that he and Fort agreed with Living-

ston to postpone the sale until the 2d of June, for which Livingston agreed to pay them a compensation, &c. ; that he had until the 2d of June to redeem, but did not do so ; and then the property was to have been sold, &c. Thus showing, that the property in his possession continued to be a pledge ; and in case of Livingston's not paying, that a sale was to be made, notwithstanding the annulment of the counter-letter. But for what purpose was the counter-letter annulled? Clearly, because an increased sum was to be paid to Fort & Story by the second agreement ; and not because it was the intention of the parties to alter, substantially, their respective rights in the property. The counter-letter, the agreement to sell at a fixed day, and after reimbursing the defendant and Fort, *to deliver the surplus proceeds of the sale to Livingston ; the prolonged agreement to sell, after annulling the first counter-letter, without any renunciation of Livingston's right to the overplus, as set forth in defendant's answer ; prove conclusively, to us, that Story regarded the contract to be, what it is really made by the law of Louisiana, a contract of pledge ; a security for money advanced upon property. We think it was, in its inception, an *antichresis ;* and that it continued so, until the 2d day of June 1823. Did it, after that time, retain its original character?

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The agreement of the 2d of June recites, "that it being the day fixed upon by the contract between Livingston, and Fort & Story, for the sale at auction of the lot, &c.; and Livingston having requested that the sale might not take place, for his own accommodation ; on condition that Fort & Story would assent to that request, Livingston agreed to increase the sum due to them to $27,880.76 (which they deem the whole of the consideration-money paid by them for said lot), and to pay the same on the 5th of August, then next, and any further sum that they may be under the necessity of paying for the care or preservation of the property ; in which case, the property should revert to Livingston. But if he should fail to make such payment, on the 5th of August, the said lot should become the absolute property of Fort & Story ; it being declared to be the true intent of the parties, in case of failure of payment, that the said lot, with all the buildings thereon, are to vest in Fort & Story, a full, free and absolute title, in fee-simple, for ever."

Such an instrument as this would have the effect to vest in Fort & Story an absolute title in the property, if it were not positively controlled by the law of Louisiana. We must administer the law as it is ; and having established that the original transaction was an *antichresis*, and continued so, up to the 2d of June, it was not in the power of the parties to give to it such a character, as to vest, by the act of Livingston, an absolute title in Fort & Story. "In the language of the Code, 1808, tit. Pledge, art. 28, already cited, the creditor does not become proprietor of the pledged immovables, by failure of payment at the stated time ; any clause to be contrary is null :" and in this case, it is only lawful for him to sue his debtor, before the court, in order to obtain a sentence against him, and to cause the objects which have been put into his hands in pledge, to be seized *and sold." If such a clause had been inserted in the original agreement, it would have been void. Can it be more valid, because subsequently introduced in a paper having a direct relation to the first contract ; and which was intended to alter its character into something which the law prohibits, when

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it determines the original contract to be one of pledge? We think not. Such an allowance to a creditor would be a precedent, giving to all creditors, in cases of pledges, the power to defeat the benevolent vigilance of the law, preventing them from becoming proprietors of the debtor's property, unless by a decree of the court. We think it immaterial, whether such covenant be in the original agreement, or in a subsequent instrument. In either case, the law is express; the creditor does not become the proprietor, by the failure of the debtor to pay; any clause to the contrary is null.

It would be difficult to find a case more clearly illustrating the wisdom of this rule, than that under our consideration. Story & Fort advanced to Livingston $22,936, and took possession of the lot; looking to Livingston, in the first instance, for reimbursement, and on his failure to pay, to a sale of the lot. Livingston being unable to pay at the time fixed, applied for an extension of time; it is granted, but only upon condition of an addition of $2500 to his debt, for a delay of four months; thus creating a debt of $27,500, in ten months, upon an advance of $22,771.40. This increase, the exhibit attached to the defendant's answer proves was not on account of expenditures upon, or in the care of the property; for that account shows the disbursements of the defendant, in the care of the property, up to the 5th of August 1823, did not amount to $400. When the 2d of June came, Livingston was still unable to pay, and asked for a further extension of time; it was granted; but by another addition to the debt, or to the amount for which the property was already incumbered; and only upon condition that, upon a third failure, the property was to vest absolute in Fort & Story. This final result is what the law of Louisiana intended to prevent, in cases of pledge; and we know not a case to which it can be more fairly applied. In the enforcement of the law, in this case, we are pleased to find authorities for doing so in the courts of Louisiana. We refer to the cases of *Williams* v. *The Schooner St. Stephens*, 1 Mart. (N. S.) *417; and the *Snydics of Bermudez* v. *Hanez & Milne*, 3 Mart. 17, 168. [*393

In regard to the plea of prescription, urged in the defendant's answer, we think it inapplicable to a case of pledge; and if it be so, then that plea cannot prevail in this case, because the time had not elapsed, which the law of Louisiana gives to a person to sue for immovable property.

It now only remains for us to dispose of the defendant's protest, in the beginning of his answer, against the jurisdiction of the court in this case. The 23d rule of this court, for the regulation of equity practice in the circuit courts, has been relied on, to show that it is competent for the defendant, instead of filing a formal demurrer or plea, to insist on any special matter in his answer; and have the same benefit thereof as if he had pleaded the same matter, or had demurred to the bill. This rule is understood by us to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. In this respect, it is merely affirmative of the general rule of the court of chancery; in which matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea; and can not be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue. *Wood* v. *Mann*, 1 Sumn. 506.

In this case, the judgment of the court below is reversed, and a decree will be entered accordingly.

BALDWIN, Justice. (*Dissenting.*)—When this case was before the court at a former term, I dissented from the judgment then rendered, being of opinion, that the case ought to be decided by the law of Louisiana, not the code of equity adopted from the English system into the jurisprudence of the United States, as the court then decided. As the civil law was admitted to have been in force in that province, before its cession to the United States, and remained afterwards the basis of the jurisprudence of the state, with only such modifications as were made by their local laws ; I felt it to be the duty of this court to administer it, as it does the law of other states, "precisely as the state courts should do." 2 Pet. 656 ; 5 Ibid. 400. It is
*394] admitted, that in the code of the civil law, there is no *discrimination between the law and equity jurisdiction of its courts, either in the principles or mode of proceeding ; the process and rules of judgment are the same, without regard to the nature of the right asserted or the remedy sought. This contradistinction exists only in the jurisprudence of England, and the states which have adopted it ; nor can it exist elsewhere, unless the common law prevails. The jurisdiction of courts of equity, separately from those of common law, is a necessary part of the common law ; though the forms of proceeding are borrowed from the civil law, yet the principles and rules of decision are those of the law of England, by which the judge is as much bound as in a court of law. By the adoption of its forms, an English court of chancery no more adopts the civil law, as a code of system of jurisprudence, superseding the common law, than it does the decrees of the Emperor, in place of acts of parliament. Both systems remain as distinct, as if the modes of proceeding differed as much as the two systems ; and though the civil law forms are better adapted to equity proceedings than those of the common law, there is another incompatibility between the two systems. The separation of cases in law from those in equity, is a necessary incident of the common law ; one part of the system cannot be engrafted on the civil law, without the other : of consequence, the introduction of the equity part of the common law into a state which has adopted the civil law, necessarily displaces it ; and introduces a system of jurisprudence wholly at variance therewith. This conclusion is the result of the opinion and reasoning of the court, which is applied to all civil causes in the courts of the United States, in that state (9 Pet. 656–7) ; for if the English system of equity is in force, because there is no court of equity ; the whole common law is also in force, because there is no court of law, contradistinguished from equity ; on this ground alone, my objections to the former decision were insuperable.

By the third article of the Louisiana treaty, the inhabitants are guarantied "in the free enjoyment of their liberty, property and the religion which they profess." (8 U. S. Stat. 202.) "That the perfect inviolability and security of property is among these rights, all will assert and maintain. (9 Pet. 133.) "An article to secure this object, so deservedly held sacred in the view of policy, as well as of justice and humanity, is always required, and is never refused. (12 Wheat. 535; 6 Pet. 712; 8 Ibid. 86–8.) "According to the established principles of the laws of nations, the laws of a conquered

or ceded country, remain in force, *till altered by the new sovereign." (9 Pet. 747.) This principle was recognised by congress by the 11th section of the act of 1804, organizing the government of Louisiana; the 4th section of the act of 7th March; and the 9th section of the act of 3d March 1805. "The laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified or repealed by the legislature." (2 U. S. Stat. 286, 322, 332.) Congress extended none of the provisions of the judiciary or process acts to Louisiana; and instead of reserving to themseves the power of altering the local laws by those acts, expressly declared that power to be in the local legislature. These were solemn pledges, which the legislative power of the United States had never attempted to violate; nor, in my opinion, could violate, without disregarding the faith of the treaty; to my mind, a guarantee of property is inconsistent with the abrogation of the laws under which property is acquired, held and regulated, and the consequent substitution of a code, to which the people were utter strangers. Satisfied, that if there could be a power to change the laws of a ceded country, it was in the legislative, and not the judicial department of the government, I considered these provisions of the acts of congress to be as imperative on this court, as any other laws were, or could be.

A reference to the terms of the process act of 1792, will show, that it could not apply to a state in which the civil law prevailed; for it directs the modes of proceeding "in suits at common law," and "in those of equity, and maritime and admiralty jurisdiction, according to the rules," &c., which belong to courts of equity, and to courts of admiralty, as contradistinguished from courts of common law. (1 U. S. Stat. 276.) These terms necessarily exclude its application to a system, in which there was no such contradistinction; but in the act of 1824, the term is peculiarly appropriate to the law of Louisiana: "That the mode of proceeding in all civil causes, &c." (4 Ibid. 62.) The reason was obvious; there was but one mode of suing, whatever may be the cause of action. Congress thus declared, that the laws of the state regulating the practice of their courts, shall be the rule in the courts of the United States therein; so it had been for twenty years, and the state practice was confirmed, subject to such rules as the district judge might make. So it was construed and declared by this court in 1830. "If no such rule had been adopted, the act of congress made the practice of the state the rule for the *court of the United States. Unless then, such a special rule existed, the court was bound to follow the general [*396 enactment of congress on the subject and pursue the state practice." *Parsons* v. *Bedford*, 3 Pet. 445; s. p. *Parsons* v. *Armor*, Ibid. 424. In *Duncan* v. *United States*, the court, after reciting the act of 1824, are still more explicit. "This section was a virtual repeal, within the state of Louisiana, of all previous acts of congress which regulated the practice of the courts of the United States, and which come within its province. It adopted the practice of the state courts of Louisiana, subject to such alterations as the district judge might deem necessary to conform to the organization of the district court, and avoid any discrepancy with the laws of the Union. 7 Pet. 450. "As the act of 1824 adopted the practice of the state courts; before this court could sanction a disregard of such practice, it must appear, that by an exercise of the power of the district court, or by some other means, the

practice had been altered. On a question of practice, under the circumstances of the case, it would seem, that the decision of the district court as above made, should be conclusive. How can the practice of the court be better known or established, than by its own solemn adjudication on the subject?" Ibid. 451–2.

The act of 1828 is still more conclusive, when taken in connection with the decision of this court on the process act of 1792.* "In order to understand the bearing which the instruction moved for, has upon the cause, it is necessary to remark, that the state of Ohio was not admitted into the Union till 1802; so that the process act of 1792, which is expressly confined in its operation to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state. But the district court of the United States, established in the state, in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction, with power to create a practice for its own government." 1 Pet. 612.

This decision was made in 1828; and the same view was taken five years afterwards, in *Duncan* v. *United States*. "Nor did the act (of 1792) apply to those states which were subsequently admitted into the Union. But this defect was removed by the act of the 19th of May 1828, which placed all the courts of the United States on a footing in this respect, except such as are held in the state of Louisiana." 7 Pet. 451. This act *397] uses the same terms as the process act of 1792, in referring *to cases in law, equity and admiralty; and so would not be applicable to Louisiana. Congress however, did not leave this matter open to any doubt; the fourth section is peremptory: "That nothing in this act contained, shall be construed to extend to any court of the United States, which is now established, or which may hereafter be established, in the state of Louisiana. (4 U. S. Stat. 282.)

There is no phrase so potent as this, "nothing in this act shall be so construed:" it has not only the effect of an exception, a limitation or proviso; it is a positive and absolute prohibition against any construction by the judicial power, by which the thing prohibited shall be sanctioned. The effect of these words, in the 11th amendment of the constitution, has been adjudged by this court to annul all jurisdiction over cases actually pending therein, past, present and future; though the constitution had expressly given jurisdiction in the very case. 3 Dall. 382–3; 6 Wheat. 405–9. "A denial of jurisdiction forbids all inquiry into the nature of the case." 9 Wheat. 847. "The constitution must be construed, as it would have been, had the jurisdiction of the court never been extended to it." Ibid. 858; s. p. 9 Ibid. 206–7, 216; 12 Ibid. 438–9.

No construction, therefore, can be put on the act of 1828, which will make it applicable to the practice of Louisiana; how, then, this court could apply the act of 1792, in direct opposition to the subsequent acts of 1804, 1805, 1824 and 1828, was, and is, to me, a matter of most especial surprise. The provisions of the acts of 1792 and 1828, so far as they refer to the rules, &c., of courts of law, and of equity jurisdiction, as contradistinguished from each other, are identical; it was, therefore, perfectly nugatory, to exclude Louisiana from the operation of the act of 1828, and leave the act of 1792 in force within that state. It was worse than idle; it

it was a solemn mockery, a legislative farce, a trifling with the people of that state, after a uniform course of legislation for twenty-four years, on a subject upon which all people are peculiarly sensitive—their local laws, usages and customs.

Accustomed to the civil law, the first settlers of Louisiana, their decendants and emigrants thereto, cling to it, as we of the old states do, and our ancestors did, cling to the common law, as a cherished inheritance. Had congress declared, in 1804, what this court did in 1835; or had there been a fifth section to the act of 1828, enacting that the process act of 1792 was in force in Louisiana, it may well be imagined, what would have been the state of public *opinion. No such imputation rests on the legislative department, as would be fastened on its faith, if, in either their first [*398 or last act, in professing to maintain and protect the people in their property, according to the plighted faith of the treaty of cession, had been to deprive them of their laws, and force a foreign system upon them. Nor for more than forty years after the act of 1792, and thirty years after the acquisition of Louisiana, had there been an intimation from this court, that that act applied to the courts of the United States within it, either as a territory, or a state of the Union; the contrary had been declared and adjudged. In 1828, it was decided, that this act applied only to the states then composing the Union. 1 Pet. 612. The declaration was repeated in 1833 (7 Ibid. 451); and to leave no room even for discussion, this court, at the same time, held, that the act of 1824 was a virtual repeal of all previous acts of congress on the subject. Ibid. 650. When this case came up, in 1835, it had been decided by this court, that the act of 1792 never was in force in the new states, and that it was repealed as to Louisiana; the act of 1828, which applied to the other new states, was expressly prohibited from being applied to Louisiana; yet the act of 1792 was declared to be in force then.

If I am capable of comprehending this decision, it repeals five acts of congress; directly overrules three previous solemn decisions of the court; revives an act which had been repealed; extends to Louisiana a law which never applied to any other new state; and overthrows everything which carries with it legislative or judicial authority. As a precedent, it is of the most alarming tendency; no question, in my opinion, can be settled, if this was an open one in 1835. Congress may legislate, and this court adjudicate in vain, if the acts of the one, and the judgments of the other, are thus to be contemned. My respect for both, forbids my assent to such a course, or my acquiescence in a principle which must absolve judges from their obligation to follow the established rules of their predecessors, in the construction of laws, and the settled course of the law.

Having entirely dissented from a rule laid down by this court in *Green* v. *Lessee of Neal*, 6 Pet. 299, wherein the majority of the court put and answer the question, "Would not a change in the construction of a law of the United States by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the last exposition of a local law, by the state court?" *That the principle of "*legis posteriores priores contrarios abrogant*," is sound, when applied to legislative acts, all admit; [*399 but it is an innovation upon all rules, to apply it, as a general rule, to the

exposition of statutes, which have received a settled construction by a court of the last resort. It is an assumption of legislative power, and a reversal of the established principle, that judges cannot amend or alter the law, but must declare what it is; and from the very nature of such a rule, as is laid down in *Green* v. *Neal*, the law can never be settled, so as to be binding on the judges of this court; as is most clearly illustrated in this case.

In 1835, there had been three solemn decisions, either of which was conclusive, that the act of 1792 was not in force in Louisiana; and there had been an uninterrupted course of practice in the district court of the United States, sanctioned by acts of congress and this court, for more than thirty years. One judge only dissented, in the case of *Parsons* v. *Bedford;* but it was, because, in his opinion, the court did not adhere, with sufficient strictness, to the state practice. 3 Pet. 452. In the cases in 1 Pet. 612, and 7 Ibid. 450, the court appear to have been unanimous; all the judges had then concurred in opinion on the very point which arose at the former argument; and the act of 1828 was a direct legislative sanction of the judgment of the court in the former case, being adopted to cure the defect of the non-application of the act of 1792 to the new states. There were but five judges present, who took part in the former decision, two of whom dissented; so that the case was determined by only three judges. I do not mean to assert, that the effect of a judgment depends on the mere number of judges who concur in it; but I do assert, most distinctly, that such a decision does not settle the law, in opposition to three previous solemn and unanimous adjudications. If the question, thus decided, remained open, there is, to my mind, neither reason, precedent nor principle, to sanction the doctrine that any judge is bound by the last decision, when he is not bound by former ones. When three last decisions can be overruled, it is strange that one cannot be. The decision of 1833 was the last, before another was made. The act of 1792 was then declared to have been repealed, and never to have been in force in Louisiana; yet no respect was paid to it, or the one in 1830 or 1828; neither of them were thought deserving of even a passing notice, or the most remote reference to them. The act of 1828 was treated
*400] in the same manner, as alike unworthy of attention. *Had any other department or officer of the government, any circuit or district court of the United States, or any state court, thus drawn a sponge over these acts of congress, and our repeated decisions upon them, it would have been justly deemed a disregard of the constituted authorities.

I freely admit, that a court may and ought to revise its opinions; when, on solemn and deliberate consideration, they are convinced of their error. It is often done, though never without the fullest investigation; even then, one decision does not settle the law; when they are contradictory, the matter is open for future research. There is no more certainty that a last opinion is more correct than the first. Generally speaking, a construction of a law, nearest the time of its passage, is most respected, and is adhered to, though there may be doubts about it, on the principle of "*stare decisis.*" But it is believed to be unprecedented, to consider a subsequent decision that omits any reference to prior ones, and from some cause overlooks them, though they are in point, and by a court of the last resort, as having settled the law. If, however, such is the rule, it necessarily follows, that it can only

remain until another last decision shall be made, restoring the old law, or making a new version of it.

A judge who, in 1835, was at liberty to make a last construction of a law, is certainly as free in 1837, as he was two years before. The very principle of this case is, that prior decisions, though unanimous, are not binding; the next, in point of time, by a divided court, can then be of no more authority; and *à fortiori*, one such opinion cannot outweigh three contrary ones, unless every last decision has the same effect, whenever a present majority may think fit to make one. To such a principle, I can never yield assent, unless in the last judgment of this court, all prior ones have been fully considered; the more especially on such a subject as is involved in this case, in which we were called on to repudiate the laws of a state of this Union, and substitute therefor, by judicial power, a system equally repugnant to the habits, the customs and the choice of the people. In introducing into Louisiana that part of the law which constitutes the law and practice of courts of equity, the other part of the same system, being commitant, cannot be excluded; if it is to be done, or can be done, it is only by the legislative power.

These were my reasons for dissenting from the judgment heretofore rendered in this cause; they still operate on my mind, in their full force; they are, indeed, strengthened by the judgment now *given; which seems to me as repugnant to the former, as that was to all former ones, and the existing laws. [*401

The controversy between these parties is respecting real property of great value; the plaintiff claims it, subject to a payment of a certain sum of money; the defendant claims it as his own absolutely, by purchase from the plaintiff, pursuant to several contracts made according to the forms of the law of Louisiana. The suit was commenced by a bill in equity, according to the form of process adopted to such courts; and contrary to the practice of the district court, from the first organization of a territorial government in Louisiana, in 1804, till the filing of the bill in 1834. A demurrer was put in, assigning two causes. 1. That plaintiff had not set out such a case as entitled him to any discovery or relief, in any court of equity in the state. 2. That by the bill, it appeared, that the transaction complained of, was between the plaintiff on one side, and the defendant and one Fort on the other, whose heirs were not made parties (9 Pet. 6, 36); that this was necessary by the law and practice of Louisiana, was admitted. It was not a matter of mere form or practice, that the heirs of Fort should be made parties; the transaction was a joint one. Story had purchased from Fort, and paid him a large sum of money for his interest in the property. To Story, therefore, it was highly important, that when the original transaction was to be unravelled, he should not alone be held answerable to the plaintiff, and be compelled to reconvey, without his partner being compelled to contribute. By the law of the state, he had a right to this protection; it was equitable too, that the plaintiff should be compelled to call into court all the parties who had been concerned; to the defendant, it was but justice, that he should not be put to his remedy against his associate, and the consequences be visited on him alone. This right to have the heirs of Fort brought in, was absolute, had the plaintiff sued in the mode prescribed by the law and practice of the state; it was a substantial benefit to Story, of which he could have been deprived in no other way, than

on abrogation of the established course of proceeding, then in force in the state. This was done by the court, in overruling the demurrer on both points; they declared that the process act of 1792 applied to the case; and as the defendant, at the time of filing the bill, was the only person claiming or possessing the property, none other need be made a party. 9 Pet. 658–9. By the terms of this act, "the forms and modes of proceeding in suits in
*402] equity, &c., which *are to be pursued in the federal courts, is not confined to the mere process employed;" it is to be "according to the principles, rules and usages, which belong to courts in equity," &c. (1 U. S. Stat. 276.) When it is recollected, that there is no statute in England which defines the jurisdiction of these courts, or prescribes their course, the whole law or code of equity jurisprudence is necessarily made up of its own "principles, rules and usages," which make it a system, as contradistinguished from that which prevails in courts of law. When, too, we look to its adoption by the judiciary and process acts, it is at once apparent, that its effects go far beyond forms and practice; if it is in force in Louisiana, it does not stop at substituting an English bill, for a civil-law petition; the whole law of equity, as a distinct code, necessarily accompanies it, by the very words of the act of 1792. So it must have been understood by the court, or they would have directed the heirs of Fort to be made a party to "a bill of equity;" as they must have done, had the proceeding been by petition. On this point, their language is most explicit, in using the very words of the act of 1792. "And that in the modes of proceeding, that court was required to proceed according to the principles, rules and usages, which belong to courts of equity, as contradistinguished from courts of law." 9 Pet. 655. So again, "as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rules of decision, its jurisdiction in Massachusetts" (and of course, in Louisiana), "must be the same as in other states." Ibid. 656. And if no such laws and rules applicable to the case exist in Louisiana, then such equity powers must be exercised according to the principles, usages and rules of the circuit courts of the United States, as regulated and prescribed for the circuit courts in the other states of the Union. Ibid. 660. There can, therefore, be no mistake, in considering, that the whole system of English equity jurisprudence henceforth is the law of Louisiana, both in form and substance (see p. 659), if the judgment first rendered in this case is the settled law of the land.

In its present aspect, then, the suit must be taken as a bill in equity, to be decided on, and by, the same principles, rules and usages, which would form the law of equity in a circuit court of any other state. In so viewing this case, there seems to be insuperable objections to the relief prayed for in the bill, even on the plaintiff's own showing, and the documents referred to.

*403] *The first contract between the parties was, in form, an absolute sale, in July 1822, for the consideration of $25,000; of even date there was a defeasance or counter-letter, stipulating for a reconveyance, on payment of that sum, in February 1823, and in case of non-payment, the property to be sold. In March 1823, an agreement was made, extending the time till June, stipulating the terms. The sale was postponed, at

plaintiff's request, and a new agreement made, whereby he was to pay Fort & Story $27,830, on the 5th of August, otherwise the property was to be absolute in them, and the defeasance to be cancelled, so as to bar any equity of redemption ; the declared intention being "to vest in Fort & Story a full title, in fee-simple, for ever." The plaintiff not paying the money, the defeasance was cancelled ; and Fort & Story remained in the possession and enjoyment of the property. In his bill, the plaintiff alleges, that the original transaction was a loan of money, for the security of which the contracts were executed ; and rests his whole case upon that allegation ; he avers no fraud or unfairness on the part of Story or Fort, no ignorance of his rights, or of any fact or matter in any way material to him, when the subsequent agreements were made. His only equity is, in averring, that the property was worth more than the sum he had received, his inability to repay it, owing to the great pressure for money in 1822 and 1823, the non-application of $7000, which sum was to have been expended in improvements on the property ; and that it was worth $120,000 at the time of suit brought in 1834. In such a case, a court of equity would look for the equity of the case, in the acts of the plaintiff, in March, June and August 1823 ; and if not satisfied that the release of all right of redemption, and the agreement that the right of Fort and Story should become absolute in fee-simple, was made in ignorance by the plaintiff, or by fraud or imposition by the defendant, the plaintiff could have no standing in court. Admitting the first contract to have been a mortgage, the parties voluntarily changed its nature, on the application of the plaintiff ; his object was to avoid a sale, and to gain time till the pressure subsided ; but finding it continuing, he preferred making the transaction an absolute sale, rather than expose the property to a public sale, during the pressure.

If better terms could have been obtained than were offered by Fort & Story ; or if the averment in the bill, that it was worth *$60,000, in 1823, was true, it is incredible, that the plaintiff should have been so [*404 desirous of keeping it out of the market ; or that he would have entered into the agreement of June, if he could have obtained a better price from others. Be this, however, as it may, the mere inadequacy of price is of no consequence in equity ; courts will never set aside a contract on this ground, if it is free from all other objections : the agreements of March and June were solemn, deliberate and executed according to the solemnities of the civil law ; and were binding by all the rules and principles of the English system of equity. By that law, Mr. Livingston was not a minor, deemed incapable of managing his own affairs ; neither is ignorance of the law or facts of his own case, imputable to him ; and he shows in his bill no reason why he should not be bound by his contracts, or why he should have them annulled.

As a mortgagor, in the first instance, a court of equity would protect him against any unfair release of his equity of redemption to the mortgagee ; yet, if fairly made, it would be as valid as if he had conveyed it to a third person. So far from any equity arising to him from the rise in the value of the property from 1323 till 1834, it is, in my opinion, a strong circumstance in favor of the defendant, who advanced his money, during a severe pressure, when he could have purchased this property at auction, at a rate below its estimated value, proportioned to the demand for money, or

have purchased from others. This ground of relief, however, entirely fails, when we consider the answer of the defendant; he denies the whole equity of the bill, as well as every allegation on which it rests; the answer is responsive to the bill, is full and explicit; and the plaintiff has not disproved one fact or averment contained in it; nor proved any one matter averred in his bill. It is distinctly denied, that the original transaction was a loan; that the property was worth more than the sum to be paid for its reconveyance, or to prevent a sale; the non-application of the $7000 is accounted for in a manner which throws on the plaintiff all its consequences; and shows it to have been by his own acts, and those of the person for whom he was surety to the defendant. These circumstances alone, would take from him any standing in a court of equity, in England, or any circuit court of a state.

Another view of the case is equally conclusive, on an inspection of the bill, answer and exhibits. The plaintiff did not rest his case on the documentary evidence; he averred the transaction to have been different from what was expressed *in the written agreement; and called for the *405] aid of a court of equity to compel the defendant to disclose the real nature and character of the original contract, and the true intention of the parties, on his oath. By this, he made the answer to the bill and interrogatories evidence; it is directly responsive, full and positive, and supported by evidence of the most satisfactory kind; the written application of the plaintiff's agent to Fort & Story, on the 13th July, preceding the first agreement. See *ante*, p. 360. No attempt was made by the plaintiff, to prove the averment, that a loan was intended; so that there was nothing in the case which could vary the terms of the writing. The only original contract, was, then, the conveyance; and the defeasance or counter-letter in connection, as one agreement, the terms, of which show its legal character to be a conditional sale, and not a mortgage, when tested by the rules of equity as recognised by this court.

To make such a transaction a mortgage, it is indispensable to show that the party receiving the money was bound to repay it; unless it clearly appears, from the evidence, that a loan was intended; and that the form of a sale was adopted as a cover for usury. The principal and interest must be secure; there must be a remedy against the person of the vendor or the borrower, and clear proof that he was liable. 7 Cranch 236–7; 9 Pet. 445–54. If it is not proved by extrinsic evidence, that a loan was intended, and the party bound to repay it, it matters not how extravagant the terms of repurchase may be; the redemption must be on the day stipulated; or the estate vests absolutely, if the principal was at hazard. Ibid. 455, 459. Inadequacy of price is not a circumstance which will convert a conditional sale into a mortgage (7 Cranch 241); and if the party makes no claim to the property, while the other is in possession, making valuable improvements on it, without any notice of an intention to assert a right of redemption, a court of equity will not aid him. Ibid. 240.

In the counter-letter, Mr. Livingston is not bound to repay the money; Fort & Story had no remedy against him; had the property sold for, or been worth, less than the sum advanced, the loss was theirs. There is an averment in the bill, that the plaintiff was liable; but it is expressly denied by the answer, and the plaintiff has not offered a spark of evidence to contra-

dict it; the protest made in August was not to found an action; but was made as authentic evidence of the fact of non-payment, and to silence the pretensions of the plaintiff, as is expressly sworn to in the answer. It *is also positive, as to the value of the property as the time, and afterwards. "This deponent was repeatedly offered, after 1823, by John [*406 A. Fort, the half of the property, at cost and charges; which he refused, considering the property not worth it. It has been only the rise of all property in that part of the city where it is situated, that has saved them from loss."

Should it be thought worthy of inquiry, why they should pay for the property more than it was worth, in 1822 or 1823, the answer is at hand. By the contract, $8000 of the money was to be expended in improvements, which would have been so much added to the value of the property; the plaintiff was security that this sum should be so applied by Rust: trusting to this guarantee, Fort & Story advanced the $8000 to Rust, who misapplied it in the manner stated in the answer to the interrogatories of the bill. In the answer, it is also stated, that plaintiff represented that a quantity of joists and iron-work had been found for the buildings then erecting; but, on inquiry, defendant found, they had not been paid for, and he and Fort had been compelled to purchase them at a cost of $1370. This sum, added to the $7000 misapplied by Rust, was a diminution of the value of the property more than $8000 below what it would have been, if the plaintiff had fulfilled his guarantee, and made good his representation; and the work done would be worthless, unless the buildings had been made tenantable. Fort & Story had no option but to submit to this loss, inasmuch as they had confided in the plaintiff, that he would do what he was engaged to, without holding him personally bound to repay them the $25,000; $8300 of which was lost to them in the manner stated. To save themselves, they were thus compelled to advance this sum, to put the buildings in the state they were stipulated for, when they made the agreement. Under such circumstances, no court of equity could have considered the transaction a mortgage, or the plaintiff as entitled to any relief.

On another ground, the plaintiff's case was divested of all semblance of equity. He had laid by eleven years, after he had voluntarily cancelled the counter letter, and surrendered the property, by an absolute title in fee-simple, during which time he had given no notice of any claim on his part, or any intention to assert a right of redemption; when Fort & Story, to his knowledge, were making costly *improvements, under the full belief [*407 that they owned it; as the plaintiff had solemnly engaged that they should own and hold it. He waited till all risk was out of the question, when the speculation was a certain great one; and, in his own good time, comes into a court of equity, demanding a re-conveyance, and offers to allow to Story five per cent. per annum for the use of his money: but refusing even to make the heirs of Fort a party; though the plaintiff knew, and stated in his bill, that Story, relying on his contract, had purchased out his interest at a large advance. For this delay, the bill assigns no reason or excuse, nor can any be found in the whole record; none has been offered in argument, none can exist to which any court of equity would listen, while it respected the principles laid down by this court, at the same term in which this cause was first before it.

"A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence. When these are wanting, the court is passive, and does nothing: *laches* and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court. The same doctrine has been repeatedly recognised in the British courts, as will abundantly appear from the cases already cited. It has also repeatedly received the sanction of the American courts, &c. And it has been acted upon in the fullest manner by this court, especially in," &c. *Piatt* v. *Vattier*, 9 Pet. 416–17.

With submission, then, it must be asked, why this principle should not be applied to this case? There can be none which calls more loudly for it; it is a fundamental rule by which all courts of equity act; it is an essential part of that system of equity, which in this very case, this court, two years ago, held to be in force in Louisiana; as well in the principles and rules of decision, as in matters of practice, furnishing the law of the case, in place of the local law which was then suppressed. In Louisiana, ten years is a positive bar, by limitation, when the law is applied; the principle of analogy, therefore, would apply to a shorter period than in other states, where the time of limitation is twenty years. In such a case, and circumstanced as this case is, the lapse of eleven years, wholly unaccounted for, would be as fatal to the plaintiff's claim in any court of equity, *in *408] England, in any of the states, or in this court; as if it had continued for any period, however long. The same question may be put as to the rules and principles on which equity acts, or would act, in annulling contracts like those of March, June and August 1823; also as to the established rules in deciding on what is a conditional sale or a mortgage, as likewise declared at the same time. 9 Pet. 445, &c.

One answer has been given to all questions which can be put, if this case is to be decided by the English system of equity jurisprudence, as adopted by the process act of 1792, and declared to be a part of the law of Louisiana in 1835. It is now most solemnly adjudged, that this case is not to be determined by "the principles, rules and usages of courts of equity, as contradistinguished from courts of law;" that it depends on, and is governed by the Louisiana law of *antichresis* or mortgage; by which no length of possession, no amount expended in improvements, no *laches* of a mortgagor, however incompatible with every principle of common justice or English equity, can bar a redemption, without a sale. Nay, this law, by the decree as now made, declares Mr. Livingston to be a minor, under a pupilage so strict, that his contracts, in relation to this property, are mere paper and pack-thread; and his pledged faith, that Fort & Story should hold and enjoy it, idle wind; because no sale was made, on account of his repeated and most urgent efforts to prevent it. He, too, the distinguished jurist who revised and compiled codes for Louisiana, and was deeply versed in all the details of its laws, asks this court to give him the benefit of this law of *antichresis*, as the only ground on which it can give him a decree for property, without irretrievably compromitting that which he deemed far more valuable—his character.

Fort & Story did not intend to pay their money on such a contract as an *antichresis.* Mr. Livingston did not intend to mislead or deceive them, by persuading them to waive a sale, which, under such a contract, was indispensable to bar his right of redemption ; he did not cancel the counter-letter, and pledge himself that his equity of redemption was for ever extinguished, knowing that the law incapacitated him from doing it. Fort & Story never contemplated that their only right to the property, was only a pledge upon it, for their money and legal interest ; nor could it have entered into their minds, that by indulging Mr. Livingston, in avoiding a public sale, they were thereby giving him the sole benefit of their capital, expended in the *purchase and improvements, as well as the appreciation in value of the property, That an *antichresis* was ever in their [*409 minds, cannot be pretended ; or that he knew that the contract was of that nature, and intended to avail himself of it, if a change of times should make it his interest to do so, when the property rose to a sufficient value, while he held out to Fort & Story that their title was perfect—is incredible. He must have been as ignorant of the law as they were, and both have intended the transaction as a conditional sale ; in such a case, a court of equity would so reform the contract, as to make it conform to the real intention of both parties.

On the other hand, if they intended the contract to be a conditional sale, and he intended it to be a mortgage, there is a fatal bar to this case. It was laid down by this court, in 1835, that where the contract was in terms a conditional sale, it would not be turned into a mortgage, or the money be deemed a loan ; unless the intention to do so was mutual. 9 Pet. 450. That it was not so in this case, is manifest from the conduct of the defendant, and his positive oath in his answer ; which decidedly negative any mutuality of intention.

There are, then, the following distinct grounds of defence, on equitable principles, to the plaintiff's bill. 1. He has failed in adducing any evidence, competent to vary the terms of the original contract. 2. He has shown no ground for annulling the subsequent contracts, or why they are not binding on him in equity. 3. All the averments in the bill are positively denied by an answer, directly responsive, which remains uncontradicted, without an attempt to disprove any part of it, or to support the bill. 4. The plaintiff was never bound to repay the money ; and the defendant incurred the whole risk of a depression in the value of the property. 5. The defendant never intended to enter into a contract of loan or mortgage. 6. The plaintiff is barred by the lapse of time and acquiescence, without notice.

If then the decree of this court, at this term, had been rendered in accordance with those "principles, rules and usages of a court of equity," which they adjudged two years before, to be the law of the case, the decree of the court below must have been affirmed ; yet is now reversed, because the local law, which was wholly repudiated then, is applicable now. Herein there seems to me an utter discrepancy between the two decrees of this court. In 1835, the practice and law of Louisiana was displaced by the practice and law of equity ; by the rules of which the demurrer was overruled, when it must have been sustained, if the act of 1792 had not been in force in that *state. In 1837, the forms and modes of proceeding in equity are retained ; which deprive the defendant of the benefit of the law [*410

of the state, compelling a plaintiff who sues for the redemption of mortgaged property, according to the law of *antichresis*, to join all the original parties; in consequence whereof, the plaintiff retained his standing in court, which he must otherwise have lost. The law of equity, having thus performed its appointed office, is, in its turn, displaced by the state law, and ceases to be a rule of decision; the law of *antichresis* is then brought in, to perform the final office of annulling the contracts of the parties; taking the property from the defendant, and awarding it to the plaintiff. Now, if the law of *antichresis* must govern this case, it is by sheer, dry, legal right; as destitute of any equity as it is contrary to its most sacred principles, when applied to such a case as this; by every rule of its action, equity calls on the plaintiff to show "conscience" in his claim; "good faith" in his conduct; and reasonable diligence in pursuing his rights, before it moves one step. Let the record answer how these calls have been met.

In his bill, the plaintiff holds the defendant to the most strict rules of accounting, as a trustee or agent; he offers to pay legal interest (which is five per cent.) on the money due in August 1823; say $28,000; which, for eleven years at the time of filing the bill, amounts to $15,400: so that defendant would be entitled to a credit, in account, of $43,400, from which must be deducted $29,700, he had received for rents up to 1829; and at the rate stated, he would be indebted to the plaintiff in 1834. The plaintiff would then regain a property, stated in his bill to be worth $120,000, and by Mrs. Fort to be $200,000, and by the use of the defendant's money; while Story is left to seek his remedy against her for the $50,000, paid her in 1832, for her share. In his offer, the plaintiff omits any credit to the defendant, for taxes on the property, or compensation as his bailiff and receiver, for collecting the rents of the buildings erected with his own money, as it now seems, for the plaintiff's use, on an interest of five per cent. in New Orleans. This is the conscience of the case. Its good faith can be ascertained by the stipulations and solemnly declared intentions of the plaintiff, in the contracts of March and June 1823; the cancellation of the counter-letter; and after an utter silence for eleven years, then, for the first time, asserting the contract to be *an *antichresis;* with a perpetual right of redemption, till a sale was made by its authority. Reasonable diligence would seem to consist in the plaintiff's pleasure; eleven years must be held not to be "a great length of time," under the circumstances of this case; or the utter silence, and want of notice for this period, must be held not to be an "acquiescence" in the defendant's right. It has been a truly fortunate result for the plaintiff, that with a case not substainable by either the practice or law of Louisiana, or by the rules and principles of a court of equity, separately, he has been able to attain his object at one term, by one law, and at another term, by the other; so happily applied, as to meet the exigencies of his case at both terms. Had the one law been made the rule of decision on the whole case, I might have acquiesced in the result; as it is, I am constrained to dissent from the whole course of proceeding; as, in my settled judgment, in direct conflict with the acts of congress, as well as the repeated and most solemn adjudications of this court.

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I have not examined into the law of *antichresis* in Louisiana, for the want of the necessary books; conceding, however, that it is as the court has considered it, it gives the plaintiff a sheer legal right, for the violation

of which a court of equity is not the proper *forum* to resort; the right being in contravention of the fundamental principle of such courts, the remedy must be in a court which decides by the rules and principles of the civil law; to which code alone such a contract is known.

There is one other matter, on which I also dissent from the opinion of the court; which has too important an effect on the rules of pleading and practice in suits in equity, to be passed unnoticed; and is in my opinion, a dangerous innovation, unsupported by principle or precedent. From the preceding view of this case, it is apparent, that if Mr. Livingston had been a citizen of Louisiana, he could have sued only in the court of the state; his proceedings must have been according to its practice and laws, by which he must have made Mrs. Fort a party. Admitting his right to the property to be what this court have held it, it would have placed the defendant in a very different position from that in which he now stands, without the least injury or inconvenience to the plaintiff. Mrs. Fort would have been compelled to refund the rents she had received, which, by the decree, the defendant must pay; together with the $50,000 she received from him, with the accruing interest; as well as the loss sustained by receiving only five per cent. on their capital; and *probably, paying to banks eight or ten per cent. as is usual in Orleans. See 3 Wheat. 146. By suing in a [*412 court of the United States, the plaintiff, by the aid of the process act of 1792, has protected Mrs. Fort, and thrown the whole loss on Mr. Story; leaving him the chances of a suit with her, in place of the certain remedy that a state court would give him. To him, it was no matter of form, practice or mode of proceeding, whether he was sued in the one or the other court; it may be, that his whole indemnity from Mrs. Fort depended on it: to the plaintiff, it mattered not, so that he obtained the benefit of the law of *antichresis*, which the state court was bound to administer, as much as the court below was. The measure of justice to him was the same in both courts. It was by being a citizen of New York, that this court enabled the plaintiff to overrule the demurrer; by the application of the process act of 1792, the law of the case was changed; so that it was a most important fact in its bearing on the merits of the cause, not one affecting the form of proceeding in the suit. It was averred in the bill, that the plaintiff was a citizen of New York: the defendant, in his answer, says, "that he does not admit, but if it be the fact, requires proof that the complainant is a citizen of the state of New York; that at the time of the transaction mentioned in the bill, and for a long time thereafter, he was a citizen of the state of Louisiana, and one of her senators in the congress of the United States; and if he has ceased to be a citizen of that state, the defendant knows not when, or how, and calls for proof." To this part of the answer, an exception was made, because the objection came too late, after a demurrer had been overruled. The exception was overruled, and the general replication was filed. On the hearing, one deposition was read on the part of the plaintiff, to prove the fact; but in my opinion, it failed to do so. This, however, was not deemed material by the court; who held, that the averment of citizenship could be controverted in no other way than by a plea in abatement: and that not having done so, the defendant was too late in reserving the denial till he answered; applying to the case the same rule which prevails as to pleas to the jurisdiction of a court of equity.

Had this been a suit by petition, according to the practice of the state, a denial of the citizenship or alienage could have been made in the answer, after a plea in bar, and the cause ordered for trial; it was so decided by this court in 1833, declaring, that "the courts of Louisiana do not proceed by the rules of the common law;" "their *code is founded on the civil law, and our inquires must be confined to its rules." 7 Pet. 429. This plea was offered, after issue joined on a plea in bar, and after the argument had commenced; the court might admit it, and the court might also reject it; it was in the discretion of this court to allow or reject this additional plea. Ibid. 432. In 1 Pet. 612, it was decided, that a district court in a new state had "power to create a practice for its own government." The practice of the state courts, adopted by the district judge of Louisiana, has been always recognised by this court, and acted on. 6 Pet. 198; 7 Ibid. 429–30; 8 Ibid. 303. In *Brown* v. *Keene*, this very objection was taken in the answer, and considered by the court. 8 Ibid. 112, 115.

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Such being the established practice of the court below, sanctioned by this court, and the act of 1824, the plaintiff would have been bound to prove this averment, and considered himself so bound by the attempt to do it; but this court has relieved him, by expunging the state practice, and substituting what they assume to be the equity practice of courts of chancery in England. The consequence of which is, that the defendant is not allowed to deny by his answer, a fact averred in the bill, unless by a plea in abatement, in which he takes on himself the burden of disproving it: of course, if he fails in doing so, the averment must be taken to be true, without any proof offered by the plaintiff to sustain it. That this decision of the court is as repugnant to its own principles, often declared, and to the rules of pleading in equity cases, as it is to the recognised practice of the court below, is clear to my mind. By the 18th rule prescribed by this court, "for the practice of the courts of equity of the United States;" "the defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the court, demur or plead to the whole bill, or part of it; and he may demur to part, plead to part, and answer to the residue," &c. 7 Wheat. xix. By the 23d rule, "the defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer; and have the same benefit thereof, as if he had pleaded the same matter or had demurred to the bill." Ibid.

When this case was before this court, two years ago, this was their language: "It is an established and universal rule of pleading in chancery, that a defendant may meet a complainant's bill by several modes of defence. He may demur, answer and plead to different parts of a bill." 9 Pet. 658.

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Such were the rules of equity then. *There must have been a great change in equity practice since, if a defendant may not now deny in his answer any averment in the bill, or call for proof of any fact averred, as to which he has not sufficient knowledge, to be safe in admitting or denying it. When he answered this bill, there was no rule of this or any court of equity, by which the averment of citizenship was exempted from the special rules of this court, or "the established and universal rule of pleading in chancery:" it was not a privileged allegation, but like all others material to the plaintiff's standing in court, he was bound to prove it, when called on by an answer, which did not admit, or put it in issue by a denial.

It is hard, indeed, on the defendant, that he suffers under the adoption of a rule unknown to the law or practice of equity; when he put in his answer, his counsel looked to the existing rules, after he found that the rules of the state practice had been superseded; and must have felt safe in following those which had been laid down as universal, in that opinion which fastened the equity code of England on the state and people of Louisiana. They had a right to confide in its future administration, according to the rules and principles promulgated by that tribunal, which, by its own power, imposed it on them. It has been held by this court, for more than forty years, that an express averment of citizenship is necessary to enable a citizen of one state to sue in the federal court of another; that it is a special privilege, conferred by the constitution and the judiciary act, to which the plaintiff must show his right by the record; that the averment must be positive, and not in the alternative (8 Wheat. 112); that it must be in the body of the bill, and does not suffice that it is in the title or caption; that it is not only a fatal defect after a final decree; but it is deemed so important that the judges feel bound to notice it, though counsel do not. 8 Pet. 148.

When the whole action of a court of equity on a bill, which does not, in its body, contain this averment in positive terms, is thus a mere nullity, and a final decree does not cure the defect, it is a most strange conclusion, that it cannot be denied by the answer, or the plaintiff be put to its proof; that as one of the *allegata* of the bill, it is indispensable, while as one of the *probata*, it is immaterial. As the defect goes to the jurisdiction of the court, it would seem consonant to reason, as well as to law, that if the averment of the fact was material, its truth was equally so; yet if the doctrine of the court is sound, the defendant cannot put the plaintiff on proof of it, or make it a matter in issue, on which he can adduce negative evidence. By *putting the defendant to his plea in abatement, the court seem to me to have overlooked its requisites. Such a plea must be on oath; [*415 and it must give the plaintiff a better writ or bill, by pointing out how he ought to sue: such are its requisites in a suit of law or equity. 1 Day's Com. Dig. 151; 1 P. Wms. 477; Beames 92–3; 1 Ves. sen. 203–4.

The requisites of all pleas in equity are also overlooked. A plea must set up matter not in the bill; some new fact as a reason why the bill should be delayed, dismissed or not answered; or the plea will be overruled. Mitf. 177–9; Beames 2–7; 2 Madd. 346 (Am. ed.).

The nature and effect of a plea to the jurisdiction of a court of equity, are also wholly misapprehended. It does not deny the plaintiff's right to relief, or that the bill does not contain matter proper for the cognisance of a court of equity; but it is made on the ground, that the court of chancery is not the proper one to decide it; it admits the jurisdiction of equity, but asserts that some other court can afford the remedy. Mitf. 180; Beames 57. This must be done by matter set up in the plea; because the court of chancery, being one of general jurisdiction in equity, an exception must be made out by the party who claims an exemption, in order to arrest its jurisdiction. Mitf. 186; Beames 57, 91; 1 Vern. 59; 2 Ibid. 483; 1 Ves. sen. 264. This objection must be by plea, and cannot be taken by demurrer; it must show what court has cognisance of the case; that it is a court of equity, and can give the plaintiff a remedy; if no circumstance can give jurisdic-

tion to the court of chancery, then no plea is necessary ; a demurrer is good. Mitf. 123–4 ; Beames 100–1 ; 1 Atk. 544 ; 1 Saund. 74 ; 1 Dick. 129 ; 3 Bro. C. C. 301 ; 2 Ves. sen. 357.

From this view of a plea to the jurisdiction of the court of chancery in England, it must be manifest, that there is and can be no analogy between its jurisdiction and that of a circuit or district court, sitting as such ; the former, being general, attaches to every case not brought within an exception, by matter specially pleaded, showing that the case is cognisable in some inferior court of equity, competent to give the relief prayed ; the latter is special, and limited to the cases specially enumerated, within which the plaintiff must bring himself, by averment and proof of the necessary fact. A denial of this fact does not oust an existing general jurisdiction ; it puts in issue the only fact which can give the court cognisance of the case : no fact or matter, not in the bill, is set up by way of avoidance or delay, or as a reason for not answering ; nothing is put in issue *but the truth of the allegation, in which the plaintiff claims a right and privilege denied to the citizens of Louisiana. He has claimed, and the court have granted him, a much higher privilege than that of merely suing in a federal court ; he is exempted from the obligation of suing, according to the law and practice of the state ; the benefit of the equity code of England is given to him, and the defendant deprived of the right secured to him by the law of the state, that of having the heirs of his former partner made a party. The plaintiff's privilege is the defendant's oppression ; the plaintiff is a favored suitor ; not because he is a citizen of New York, in truth or in fact, but merely because he says in his bill that he is ; and the defendant must submit to all the consequences of the averment being true, unless he will also consent to undergo the perils and inflictions of a plea in abatement. We have seen what its requisites are : now let them be applied to this case, and the consequences of such a plea. It must be on oath, the fact is not within his knowledge ; he swears to a negative of a fact asserted in the bill, whereby he is compelled to incur the risk of perjury. As pleas in abatement in the court of chancery are governed by the same rules as in a court of law (1 Ves. sen. 203 ; Beames 89–90), there is another rule worthy of notice : " If the plaintiff take issue on a plea in abatement, and it be found against the defendant, then final judgment is given against him." 2 Saund. 111 *a*, note 3, and cases cited. He must, therefore, incur the danger of a final decree against him, if he does not make out his negative issue ; his plea must be overruled, because it sets up new matter not in the bill. He must give the plaintiff a better writ or bill, by showing that some other court of equity has cognisance of the case ; this is impossible, in Louisiana, in which there is no such court : his plea is then bad, because he cannot comply with the requisites, unless it is incumbent on him to do it, in the only possible way left him. He can set up new matter, by averring that the plaintiff is a citizen of some other state than New York or Louisiana, and thus give the plaintiff a better bill; for then the same court would have jurisdiction, so that the plea would be nugatory, and subject the defendant to all the consequences which he sought to avoid. The reason given for the rule of pleading, in chancery, shows its entire inapplicability to a suit in a federal court. " The reason of this is, that in suing for his right, a person is not to be sent everywhere to look for a jurisdiction ; but must be told

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what other court has jurisdiction, or what other writ is proper for him, and this is matter *of which the court, where the action is brought, is to judge." 1 Ves. sen. 203. The plaintiff knows his own residence. [*417

It would be the most perfect anomaly in pleading, to draw up a plea to the jurisdiction of the court of chancery, in the English form, and apply it to a bill in equity in a circuit court of the United States, so as to meet the averment of citizenship of the plaintiff, according to the present decision of this court. Its exhibition to an equity pleader in Lincoln's Inn, who would read our constitution, the judiciary act, the rules and decisions of this court, would not fail to cause him to admire it as an improvement in the science of pleading. For myself, I am utterly unable to comprehend, that the denial of an averment of a fact in a bill, can be deemed a plea of any kind, unless it is the general issue, or a special issue on that fact; to be a plea in abatement, or in bar, every rule of pleading in law or equity requires that it should set up some matter not in the bill. And I can imagine no greater departure from the practice and principles of equity, than to deprive a defendant of the right of denying a fact stated in the bill, unless by exposing himself to the perils, and incurring the consequences of a plea in abatement. If the decision now made, remains the law of the court, the rule must be carried out to all its consequences. Equity pleading is a science; its settled rules form an admirable system; but an innovation upon them would produce the most crying injustice. To my mind, there cannot be a case which can more forcibly illustrate the dangerous effects than the present, when the record is examined, and its judicial history compared, throughout its progress to its present state, with the acts of congress, the rules of practice, and decisions of this court.

For these reasons, I feel constrained to express my dissent to the whole course of the court in this case; whether it is tested by the practice and law of Louisiana, or the English system of equity, it is an entire departure from both, if I can understand either. The transition from the one system to the other, in the different stages of the cause (each operation to the manifest prejudice of the defendant), tends, in my opinion, to the worst of all consequences—utter uncertainty in the administration of the law in Louisiana. If the legislative or judicial authority of the Union could command any respect, the process act of 1792 never did or could apply to that state; if both are overruled by one decision, it cannot be expected, that the solemn adjudications of this court will hereafter be deemed better evidence of its rules of practice, or the principles of equity, than they have been *in their bearing on the present case. [*418

My opinion on the general equity and merits of the case is as much at variance with that of the court, as it is on the subjects to which my attention has been mainly directed; I have forborne an examination of this part of the case, for obvious reasons. Whether the property in question, however valuable, shall be held by the plaintiff, or defendant, is a matter of small concern, compared with the consequences which must follow from the decrees rendered, if the opinions and reasoning of the court must henceforth be taken as the established law.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and

was argued by counsel: On consideration whereof, it is ordered and adjudged, and decreed, that the decree of the said district court, dismissing the bill of the complainant, be and the same is hereby reversed and annulled; the court being of opinion, that the transaction of the 25th of July 1822, between John A. Fort, Benjamin Story and Edward Livingston, was a loan to the said Edward Livingston, secured by a pledge, denominated an *antichresis*, in the law of Louisiana. And it is hereby further ordered, adjudged and decreed, that the cause be sent back for further proceedings in the court below, with directions that the cause be referred to a master, to take an account between the parties. And it is hereby further ordered, adjudged and decreed, that in taking said account, there be allowed to the defendant all advances which shall be shown to have been made by him, or paid on account of the loan made to Edward Livingston, on the 25th day of July, in the year 1822, with the interest which the said Edward Livingston agreed to pay, of eighteen per cent. per annum, to be calculated upon cash advances, from the time it was made, until the 5th of August 1823, and after that time, at legal interest. And further, that in taking said account, the defendant be allowed all reasonable expenditures made by the defendant and John A. Fort, in building, repairing and safe-keeping of the property pledged by the said Edward Livingston, to secure the loan made to him on the 25th day of July 1822, and that the complainant be credited in such account with all such sums as the defendant, or John A. Fort, or either of them, have received from the said property; and that in taking such account, the rents and profits be applied, first, to the payment of the sums *419] necessarily *incurred in building and repairing; secondly, to the payment of the interest on the sums which shall appear to have been advanced on the said loan, or in the improvement of the lot; and thirdly, to the discharge of the principal of the said loan. And if, on taking said account, it shall appear that there is a balance due to the complainant, it is hereby further ordered, adjudged and decreed, that the defendant pay to the complainant such balance, within six months from the time of entering the final decree in the cause, and shall surrender and reconvey the said property to the complainant, or such person or persons as shall be shown to be entitled to the same. And if, upon the taking of said account, it shall be found that any balance is due from the estate of the said Edward Livingston, deceased, to the defendants, it is hereby further ordered, adjudged and decreed, that on paying or tendering to the defendant the said balance, he shall deliver up the possession, and reconvey to the person or persons who shall appear to be entitled to the same, the property so pledged, to secure the aforesaid loan. And it is further ordered, adjudged and decreed, that in case a balance shall be found due to the defendant, and shall not be paid within six months after a final decree of the district court, then the said property shall be sold, at such time and on such notice as the said court shall direct; and that the proceeds be first applied to the payment of the balance due the defendant, and the residue thereof be paid to the complainant.[1]

[1] For further proceedings in this cause, see 12 Pet. 339, and 13 Id. 359. The plaintiffs eventually recovered the property in dispute, and the sum of $32,958.18, found due to them, by the report of a master, on a settlement of the accounts between the parties.

TANEY, Ch. J., having been of counsel in this cause, did not sit in the same.

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*The Proprietors of the CHARLES RIVER BRIDGE, Plaintiffs in error, *v.* The Proprietors of the WARREN BRIDGE and others. [*420

Constitutional law.—Protection of corporate franchises.—Competing bridge charters.

In 1650, the legislature of Massachusetts granted to Harvard College, the liberty and power to dispose of a ferry, by lease or otherwise, from Charlestown to Boston, passing over Charles river; the right to set up a ferry between these places had been given by the governor, under the authority of the court of assistance, by an order dated November 9th, 1636, to a particular individual; and was afterwards leased successively to others, they having the privilege of taking tolls regulated in the grant; and when, in 1650, the franchise of this ferry was granted to the college, the rights of the lessees in the same had expired; under the grant, the college continued to hold the ferry, by its lessees, and receive the profits therefrom, until 1785, when the legislature of Massachusetts incorporated a company to build a bridge over Charles river, where the ferry stood, granting them tolls; the company to pay to Harvard College 200*l.* a year, during the charter, for forty years, which was afterwards extended to seventy years; after which the bridge was to become the property of the commonwealth. The bridge was built, under this charter, and the corporation received the tolls allowed by the law; always keeping the bridge in order, and performing all that was enjoined on them to do. In 1828, the legislature of Massachusetts incorporated another company, for the erection of another bridge, the Warren bridge, over Charles river, from Charlestown to Boston, allowing the company to take tolls; commencing in Charlestown, near where the Charles river bridge commenced, and terminating in Boston, about 800 feet from the termination of the Charles river bridge; the bridge was to become free after a few years, and had actually become free. Travellers, who formerly passed over the Charles river bridge, from Charlestown square, then passed over the Warren bridge; and thus the Charles River Bridge company were deprived of the tolls they would have otherwise received; the value of the franchise granted by the act of 1785, was thus entirely destroyed. The proprietors of the Charles river bridge filed a bill in the supreme judicial court of Massachusetts, against the proprietors of the Warren bridge, first, for an injunction to prevent the erection of the bridge, and afterwards for general relief; stating that the act of the legislature of Massachusetts authorizing the building of the Warren bridge, was an act impairing the obligations of a contract, and therefore, repugnant to the constitution of the United States; the supreme court of Massachusetts dismissed the bill of the complainants; and the case was brought by writ of error to the supreme court of the United States, under the provisions of the 25th section of the judiciary act of 1789. The judgment of the supreme judicial court of Massachusetts, dismissing the bill of the plaintiffs in error, was affirmed.

The court are fully sensible, that it is their duty, in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests (chartered property), with the utmost caution; guarding, *so far as they have power to do so, the rights of property, at the same time, carefully abstaining from any encroachment [*421 on the rights reserved to the states.

The plaintiffs in error insisted on two grounds, for the reversal of the judgment or decree of the supreme court of Massachusetts: 1. That by the grant of 1650, Harvard College was entitled, in perpetuity, to the right to keep a ferry between Charlestown and Boston; that the right was exclusive, and the legislature had no right to establish another ferry, on the same line of travel, because it would infringe the rights of the college and those of the plaintiffs, under the charter of 1785. 2. That the true construction of the acts of the legislature of Massachusetts, granting the privilege to build a bridge, necessarily imported, that the legislature would not authorize another bridge, and especially a free one, by the side of the Charles river bridge; so that the franchise which they held would be of no value; and that this grant of the franchise of the ferry to the college, and the grant of the right of pontage to the proprietors of the Charles river bridge, was a contract which was impaired by the law authorizing the erection of the Warren bridge. It is very clear, that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs, in claiming under either of these rights, must place

themselves on the ground of contract: and cannot support themselves upon the principle, that the law divests vested rights. It is well settled, by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights; and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. Satterlee *v.* Matthewson, 2 Pet. 413, cited.

The ferry-right which was owned by Harvard College, was extinguished by the building of the Charles river bridge; the ferry, with all its privileges, was then at an end for ever, and a compensation in money was given in lieu of it.

As the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one, with the privileges of the other; there is no rule of legal interpretation, which could authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the other; the charter of the bridge is a written instrument, and must speak for itself, and be interpreted by its own terms.

The grant to the bridge company is of certain franchises, by the public, to a private corporation, in a matter where the public interest is concerned; there is nothing in the local situation of this country, or in the nature of our political institutions, which should lead this court to depart from the rules of construction of statutes, adopted under the system of jurisprudence which we have derived from the English law; no good reason can be assigned, for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception.

Public grants are to be construed strictly. In the case of the United States *v.* Arredondo, 6 Pet. 736, the leading cases on this subject are collected together by the learned judge, who delivered the opinion of the court: and the principle recognised, that in grants by the public, nothing passes by implication. Jackson *v.* Lamphire, 3 Pet. 289; Beaty *v.* Knowler, 4 Ibid. 165; Providence Bank *v.* Billings, Ibid. 514, cited.

In the case of the Providence Bank *v.* Billings, 4 Pet. 514, Chief Justice Marshall, speaking of the taxing power, said, "as the whole community is interested in retaining it undiminished, that community has a right to insist, that *its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." *422]

The case now before the court, is, in principle, precisely the same; it is a charter from a state; the act of incorporation is silent in relation to the contested power; the argument in favor of the proprietors of the Charles river bridge is the same, almost, in words, with that used for the Providence Bank; that is, that the power claimed by the state, if it exists, must be so used as not to destroy the value of the franchise they have granted to the corporation; the argument must receive the same answer. And the fact, that the power has been already exercised so as to destroy the value of the franchise, cannot in any degree affect the principle; the existence of the power does not, and cannot depend upon the circumstance of its having been exercised or not.

The object and the end of all government is, to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created; and in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power; because, like the taxing power, the whole community have an interest in preserving it undiminished; and when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, "that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, was not confined to the taxing power, nor is it so limited in the opinion delivered; on the contrary, it was distinctly placed on the ground, that the interests of the community were concerned in preserving undiminished, the power then in question; and whenever any power of the state is said to be

surrendered or diminished, whether it be the taxing power, or any other affecting the public interest, the same principle applies and the rule of construction must be the same. No one will question, that the interests of the great body of the people of the state, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget, that the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation.

The act of incorporation of the proprietors of the Charles river bridge, is in the usual form, and the privileges such as are commonly given to corporations of that kind; it confers on them the ordinary faculties of a corporation, for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take. This is the whole grant; there is no exclusive privilege given to them over the waters of Charles river, above or below their bridge; no right to erect another bridge themselves, nor to prevent other persons from erecting one; no engagement from the state, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may *diminish the amount of its income. Upon all these subjects, the charter is silent; and nothing is [*423 said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges; no words are used, from which an intention to grant any of these rights can be inferred; if the plaintiffs are entitled to them, it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.[1]

Amid the multitude of cases which have occurred, and have been daily occurring, for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for; and this court is called upon to infer it from an ordinary act of incorporation containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, where there must have been so many occcasions to give rise to it, proves, that neither states, nor individuals, nor corporations, ever imagined that such a contract can be implied from such charters; it shows, that the men who voted for these laws never imagined that they were forming such a contract; and if it is maintained that they have made it, it must be by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. The court cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity.

Let it once be understood, that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awaking from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in rail-roads and canals upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy; we shall be thrown back to the improvements of the last century; and be obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements, which are now

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[1] See notes to the case of Dartmouth College *v.* Woodward, 4 Wheat, 518. It is settled, at this day, that the grant of the right to erect a toll-bridge across a river is not necessarily exclusive. Mohawk Bridge Co. *v.* Utica and Schenectady Railroad Co., 6 Paige 554; Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44. But a provision in the charter, that it shall not be lawful for any person or persons to erect any other bridge, within two miles, either above or below that of the corporation, amounts to a contract, which the legislature cannot violate, by a subsequent grant to another company. Chenango Bridge Co. *v.* Binghamton Bridge Co., 3 Wall. 51. But the grant of an exclusive right to maintain a toll-bridge, within certain limits, is not violated by the grant of a right of ferry, within the same limits. Parrott *v.* City of Lawrence, 2 Dill. 332. And in Pennsylvania, it has been held, that a legislative grant of an exclusive right to maintain a ferry, may be repealed, unless founded upon a valuable consideration. Johnson *v.* Crow, 87 Penn. St. 184. So, it has been determined, that the grant of a ferry right to a public municipal corporation is not a contract, and therefore, the legislative may, at any time, repeal the grant. East Hartford *v.* Hartford Bridge Co., 10 How. 511. See Fanning *v.* Gregoire, 16 Id. 524.

adding to the wealth and prosperity, and the convenience and comfort of every other part of the civilized world.

Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, affirmed.

ERROR to the Supreme Judicial Court of Massachusetts. The plaintiffs in error were a corporation created by an act of the legislature of the state of Massachusetts, passed on the 9th of March 1785, entitled "an act for incorporating certain persons for the purpose of building a bridge over Charles river, between Boston and Charlestown, and supporting the same, during forty years." The preamble of the act stated, "whereas, the erecting a bridge over Charles river, in the place where the ferry between Boston and Charlestown is now kept, will be of great public utility, and Thomas Russell, Esq., and others, have petitioned this court for an act of incorporation, to empower them to build the same bridge," &c. The act authorized taking certain
*424] tolls, prescribed the size of the *bridge, and fixed certain regulations by which it would not be permitted to impede the navigation of Charles river; and enjoined certain things to be done, by which the bridge should be kept in good order, and fitted for constant and convenient use. The fifth section of the act provided, "that after the said toll shall commence, the said proprietors or corporation, shall annually pay to Harvard College or university, the sum of two hundred pounds, during the said term of forty years; and at the end of the said term, the said bridge shall revert to, and be the property of, the commonwealth; saving to the said college or university, a reasonable and annual compensation for the annual income of the ferry; which they might have received, had not said bridge been erected."

The bridge was erected under the authority of this act; and afterwards, on the 9th of March 1792, in an act which authorized the making a bridge from the western part of Boston to Cambridge, after reciting that the erecting of Charles River bridge was a work of hazard and public utility, and another bridge in the place proposed for the West Boston bridge, might diminish the emoluments of Charles River bridge; therefore, for the encouragement of enterprise, the eighth section of the act declared, "that the proprietors of the Charles River bridge shall continue to be a corporation and body politic, for and during the term of seventy years, to be computed from the day the bridge was first opened for passengers."

The record contained exhibits, relating to the establishment of the ferry from Charlestown to Boston, at the place where the bridge was erected; and also the proceedings of the general courts of Massachusetts, by which the ferry there became the property of Harvard College. Some of these proceedings, *verbatim*, were as follows:

"A Court of Assistance, holden at Boston, Nov. 9th, 1630. Present, the Gov'nr, Dep'y Gov'r, Sir Richard Saltonstall, Mr. Ludlow, Capt. Endicott, Mr. Coddington, Mr. Pinchon, Mr. Bradstreet. It is further ordered, that whosoever shall first give in his name to Mr. Gov'nr, that hee will undertake to sett upp a ferry betwixt Boston and Charlton, and shall begin the same, at such tyme as Mr. Gov'r shall appoynt: shall have 1d. for every person, and 1d. for every one hundred weight of goods hee shall so transport."

*"A court holden at Boston, November 5th, 1633. Present, the
*425] Governor, Mr. Ludlow, Mr. Nowell, Mr. Treasu'r, Mr. Coddington,

S. Bradstreet. Mr. Rich. Brown is allowed by the court to keepe a fferry over Charles ryver, against his house, and is to have 2d. for every single person hee soe transports, and 1d. a piece, if there be two or more."

"Att the Gen'all Court, holden at Newe Towne, May 6th, 1635. Present, the Gov'nr, Deputy Gov'nr, Mr. Winthrop, sen'r, Mr. Haynes, Mr. Humphrey, Mr. Endicott, Mr. Treasu'r, Mr. Pinchon, Mr. Nowell, Mr. Bradstreete and the deputies: It is ordered, that there shall be a fferry sett upp on Boston syde, by the Wynd myll hill, to transport men to Charlton and Wenesemet, upon the same rates that the fferry-men att Charlton and Wenesemet trans port men to Boston."

"A Generall Courte, held at Newtowne, the 2d day of the 9th mo. 1637. (Adjourned until the 15th, present.) Present, the Governor, Deputy Gov'nr, Mr. John Endicott, Mr. Humfrey, Mr. Bellingham, Mr. Herlakenden, Mr. Stoughton, Mr. Bradstreete and Increase Nowell: The fferry betweene Boston and Charlestowne, is referred to the Governor and Treasurer, to let at 40*l.* pr. A., beginning the 1st of the 10th mo., and from thence for three years."

"At a General Court of elections, held at Boston, the 13th of the 3d mo., A. 1640. Present, the Governor, &c. Mr. Treasurer, Mr. Samuel Sheapard and Leift. Sprague, have power to lett the ferry between Boston and Charlestown, to whom they see cause, when the time of Edward Converse is expired, at their discretion.

'At a session beginning the 30th of the 8th mo. 1644. It is ordered, that the magistrates and deputies of ye co'rte, their passage over the fferries, together with their necessary attendants, shall be free, not paying any thing for it, except at such ferries as are appropriated to any, or are rented out, and are out of the countries' hands, and there it is ordered that their passages shall be paid by ye country."

Further extract from the colony records, filed by the plfs.

"At a General Court, &c. 7th day 8th mo. The ferry betweene Boston and Charlestown is granted to the Colledge."

"At a Generall Courte of elections, begunne the 6th of May *1646. [*426
In answer to the petition of James Heyden, with his partners, ferry-men of Charlestown, and for the satisfaction of all other ferry-men, that there may be no mistake who are freed, or should be passage free, and how long: It is hereby declared, that our honored magistrates, and such as are, or from time to time, shall be chosen to serve as deputyes at the Generall Court, with both their necessary attendants, shall be passage free over all ferryes; and by necessary attendants, wee meane a man and a horse, at all times during the term of their being magistrates or deputyes, but never intended all the familyes of either at any time, and that ye order neither expresseth nor intendeth any such thing.

"Att a third session of the Generall Courte of elections, held at Boston, the 15th of October 1650. In answer to the petition of Henry Dunster, president of Harvard Colledge, respecting the hundred pounds due from the country to the college, and rectifying the fferry rent, which belongs to the college: It is ordered, that the treasurer shall pay the president of the

college the some of one hundred pounds, with two years forbearance, as is desired; and forbearance till it be paid out of this next levy, that so the ends proposed may be accomplisht; and for the ferry of Charles Towne, when the lease is expired, it shall be in the liberty and power of the president, in behalfe and for the behoofe of the College, to dispose of the said ferry, by lease, or otherwise, making the best and most advantage thereof, to his own content, so as such he disposeth it unto performe the service and keep sufficient boates for the use thereof, as the order of the court requires."

The case of the plaintiffs in error is thus stated in the opinion of the court: It appears from the record, that in the year 1650, the legislature of Massachusetts granted to the president of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf, and for the behoof of the college; and that under that grant, the college continued to hold and keep the ferry, by its lessees or agents, and to receive the profits of it, until 1758. In that year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries over Charles river, and the public advantage that would result from a bridge; and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between
*427] *Boston and Charlestown was then kept. Pursuant to the petition, the legislature, on the 9th of March 1785, passed an act incorporating a company by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter, the company were authorized to erect a bridge "in the place where the ferry is now kept;" certain tolls were granted, and the charter was limited to forty years from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of the term, the company were to pay two hundred pounds, annually, to Harvard College; and at the expiration of the forty years, the bridge was to be the property of the commonwealth; "saving, as the law expresses it, to the said college or university, a reasonable annual compensation for the annual income of the ferry, which they might have received, had not the said bridge been erected." The bridge was accordingly built, and was opened for passengers, on the 17th June 1786. In 1792, the charter was extended to seventy years from the opening of the bridge, and at the expiration of that time, it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds; and have performed all the duties imposed on them by the terms of their charter.

In 1828, the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over the Charles river. The bridge is only sixteen rods, at its commencement, on the Charlestown side, from the commencement of the bridge of the plaintiffs, and they are about fifty rods apart, at their termination on the Boston side. The travellers who pass over either bridge, proceed from Charlestown square, which receives the travel of many great public roads, leading from the country; and the passengers and travellers who go to and from Boston, used to pass over the Charles river bridge, from and through this square, before the erection of the Warren bridge.

The Warren bridge, by the terms of the charter, was to be surrendered to the state, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll. When the original bill in this case was filed, the Warren bridge had not been built; and the bill was filed, after the passage of the law, *in order to obtain an injunction to prevent its erection, and for general relief. [*428

The bill, among other things, charged, as a ground for relief, that the act for the erection of the Warren bridge impaired the obligation of the contract between the state of Massachusetts and the proprietors of the Charles river bridge; and was, therefore, repugnant to the constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had been so far completed, that it had been opened for travel; and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed, that foot passengers could pass, but denied that any persons but the workmen and superintendents had passed over, with their consent.

In this state of the pleadings, the cause came on for a hearing in the supreme judicial court for the county of Suffolk, in the commonwealth of Massachusetts, at November term 1829, and the court decided, that the act incorporating the Warren bridge, did not impair the obligation of the contract with the proprietors of the Charles River bridge; and dismissed the complainant's bill. The complainants prosecuted this writ of error.

The case was argued by *Dutton* and *Webster*, for the plaintiffs in error; and by *Greenleaf* and *Davis*, for the defendants.

Dutton, for the plaintiffs.—This case comes before the court upon the bill and answer, amended bill and answer, exhibits, evidence, &c., contained in the record. The plaintiffs, in their several bills, after setting forth the grants made to them by the acts of 1785 and 1792, and their compliance with the terms and conditions of them, complain, that the defendants are about to construct, and have constructed, a bridge between Charlestown and Boston, so near to the plaintiffs' bridge as to be, in contemplation of law, a nuisance to it; and they, therefore, pray that the defendants may be enjoined, &c. The defendants justify, under the authority of an act passed on *the 12th of March 1828, establishing the Warren bridge corporation. The plaintiffs allege, that this act of the legislature, under [*429 which the defendants justify themselves, impairs the obligation of a contract, and is, therefore, unconstitutional and void. The defendants, in their answer, deny this; and the issue raised by these pleadings, and the only one of which this court has jurisdiction, is, whether the said act of March 12th, 1828, does, or does not, impair the obligation of a contract.

Such being the state of the pleadings, and such the only issue which this court can try, I shall endeavor to maintain this single proposition, viz: The act of the legislature of Massachusetts, passed on the 12th of March 1828, establishing the Warren bridge corporation, is repugnant to the 10th section of the 1st article of the constitution of the United States, which prohibits a state from passing any law impairing the obligation of contracts.

In the discussion of this proposition, many topics will come under examination; all, however, connected with it, and all resulting in the affirmance or denial of it.

By the preamble to the plaintiff's charter, which was passed on the 9th of March 1785, incorporating the plaintiffs, it appears, that the bridge is to be erected "in the place where the ferry between Boston and Charlestown is now kept;" and by the 5th section of the act, it is provided, that "after the said toll shall commence, the said proprietors or corporation, shall annually pay to Harvard College or university, the sum of 200*l.*, during the said term of forty years." The plaintiffs' charter, therefore, upon its face, shows that certain transactions took place between the legislature, the college and the grantees. The ferry that belonged to the college is to be extinguished, and a bridge is to be erected in its place; an obligation is imposed upon the grantees to pay to the college the sum of 200*l.* annually; and there is a recognition of a right in the college to compensation for the loss of the ferry, after the plaintiffs' charter has expired.

All this leads to an examination of the ferry, and its legal history, as it appears by various colonial ordinances; together with the nature and extent of such a franchise, at common law. *On the 9th November 1630, [430] the colonial government make an offer of a ferry to any one who will undertake to set it up, between Boston and Charlestown, and fix the rates of ferriage, &c. On the 5th of November 1633, Richard Brown is allowed to keep a ferry over Charles river, against his house, and the rates are there stated. It does not appear, where this ferry was, nor whether it was ever set up. On the second day of the 9th month, 1637, this ordinance was passed. "The ferry between Boston and Charlestown is referred to the governor and treasurer to let, at 40*l.* per annum, for three years." On the 13th of the 3d month, 1640, it is referred to Samuel Shephard and others, to let the ferry between Boston and Charlestown, when the time of Edward Converse is expired, &c. On the 7th of the 8th month, the ferry was granted to the college in these words: "The ferry between Boston and Charlestown is granted to the college." By this ordinance, which, with others, relating to ferries, will be found in the 58th and 57th pages of the record; it appears, that the lease to Converse was about to expire, and that there was, at that time, no other ferry in existence between Boston and Charlestown.

At a session of the court, held on the 30th of the 8th month, 1644, it is provided, that magistrates, with their necessary attendants, shall have free passage over all ferries that have not been granted or leased to any; and their passage shall be paid by the country. On the 6th of May 1646, an ordinance was passed, explaining the foregoing ordinance, and declaring what is intended by necessary attendants, for the satisfaction of the ferrymen; and making magistrates passage free, over all ferries. This ordinance exempts magistrates at all ferries, contrary to the act of 1644; and is the only one, during a period of 45 years, which, in the smallest degree, affects the income of the ferry. Whether the amount to be charged to the country was found to be too trifling to keep an account of, or whether the exemption at all ferries was claimed by the magistrates, after royal example, and as being the representatives of the royal authority, does not appear.

It appears by the ancient charters, that the college was incorpor- [*431] ated in May 1650. *Various acts were passed, confirming the original

grant to the college, both before and after the act of incorporation. By the ordinance of 1642 (Ancient Charters, p. 77), the "revenue of the ferry between Boston and Charlestown," was given to the college. In the act passed on the 15th October 1650, it is provided, that for the ferry to Charlestown, when the lease is expired, it shall be in the liberty and power of the president, in the behalf and for the behoof of the college, to dispose of the said ferry, by lease or otherwise, making the best and most advantage thereof, to his own content, &c. The act passed on the 18th October 1654, speaks of the "ferry formerly granted to the college;" and the act of 27th June 1710, speaks of the "profits and revenues of the said ferry being granted to Harvard College, in Cambridge." Thus it appears, that the original grant of this ferry, in 1640, was confirmed in 1642, in 1650, in 1654 and in 1710.

Various acts regulating ferries were passed by the colonial government, and several regulating the ferry between Boston and Charlestown. They relate to the duties of the ferrymen, the convenience of the ferry ways, the number of boats, &c. The act passed in 1781, provides, that whenever the corporation of Harvard College shall make any alteration in the rates of ferriage, they shall publish the rates by them established. In 1713, there was a project for building a bridge, where the ferry was kept, and a committee was appointed by the corporation of the college, to "insist on the right which the college hath in and to the profits of the said ferry;" and the government, at the same time, appointed Dr. Clark, to confer with the president and fellows upon the affair of a bridge in place of the ferry. Thus, then, it appears, that the college held this ferry for 145 years, with all the common-law rights of ferries; subject only to such regulations as the colonial and state governments saw fit, from time to time, to make. First, the ferry itself was granted; afterwards, its profits, revenues, &c. If one grants the profits of his land, the land itself passeth. Comyn, tit. Grant, E. 5.

In order to understand the nature and extent of this franchise, resort must be had to the common law; and this has been uniform, *from the time of Henry VI. to the present time. It is also the law of this [*432 country, except in cases where it can be shown that it has been overruled by adjudged cases, or modified by statute. In the Termes de la Ley 338, a ferry is called a liberty, by prescription, or the king's grant, to have a boat for a passage upon a great stream, for carrying of horses and men for reasonable toll. It is called an incorporeal hereditament, and is either founded in grant, or prescription, which supposes a grant. In the one case, the extent of the franchise is ascertained by usage; in the other, by the terms of the grant. 2 Dane's Abr. 683; *Stark* v. *McGowan*, 1 Nott & McCord 387. It may belong to the government, to a corporation, or to an individual; the property may be private, though the use is public. In 10 Petersd. 53, it is said, that these franchises, which are various, may be "vested either in the natural person, or bodies politic; in one man, or in many; but the same identical franchise that has been granted to one, cannot be bestowed on another, for that would prejudice the former grant." Also, 13 Vin. Abr. 512.

In a note to the case of *Blisset* v. *Hart*, Willes 512, it is said: "A ferry is *juris privati juris*; it is a franchise, that no one can erect without the king's

license; and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected, without license, the crown has a remedy by *quo warranto;* and the former grantee, by action." If the ferry be not well repaired, it is popular, and in the nature of a highway, &c. It is to be reformed by presentment or information. This differs from the case of mills, bake-houses, &c., which are grounded on customs, and of a private nature. Hardr. 163.

Every owner of a ferry must have a right to land, to take in his passengers. He need not own the soil, but he must have a right to use it. 12 East 330; 6 Barn. & Cres. 703. The general doctrine is laid down in 22 Hen. VI. 15–16. "If I have a ferry by prescription, and another is erected so near as to impair my ferry, it is a nuisance to me; for I am bound to sustain and repair the ferry for the use of the king's lieges; otherwise, I may be grievously amerced." In Roll. Abr. 140, Nuisance G, line 20, the same doctrine is stated with reference to a fair or market. Hale, in a note to Fitzherbert's Nat. Brev. 428, says: "If the *market be on the same day, it shall be intended a nuisance; but if it be on a different day, it shall not be so intended; and therefore, it shall be put in issue, whether it be so or not." Citing, 11 Hen. IV. 5–6. If a ferry be erected with license, another cannot erect a ferry to the nuisance of it. Com. Dig. tit. Piscary, B. He states the same doctrine in another place: "tit. Action on the Case for Nuisance, A." "So, if one erect a ferry so near my ancient ferry." 3 Bl. Com. 3, 219; 1 Nott & McCord 387.

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It is the usual practice, in England, to issue the writ of *ad quod damnum*, before the patent for a fair or market is granted. But as the execution of this judicial process does not, and cannot, always ascertain what will be the effect of the proposed market or fair; the doctrine seems to be well settled, that in case it does prove to be injurious to any existing market or fair, the patent may be repealed, upon proof of the fact. In other words, the writ of *ad quod damnum*, executed, is not conclusive. 6 Mod. 229; 2 Vent. 344; 3 Lev. 220; Hale, de Port. Maris, Hargrave's Tracts 59; Com. Dig. Patent, F. 4–7; 1 Wms. Saund. note 4, p. 72; 2 Inst. 406. It is thus stated by Chitty, in his Prerogatives of the Crown, ch. 10, § 2: it is most important to remember, that the king does not grant a market or fair, without a writ of *ad quod damnum* being first executed; even if that be done, the crown cannot enable a subject to erect a market or fair so near to that of another person, as to affect his interest therein, &c.

The owners of ferries are under liabilities and obligations, which may be enforced against them by individuals, or the public. Their franchises are declared to be *publici juris;* and the law gives a remedy in all cases of negligence or injury, by presentment, information or action on the case. *Payne* v. *Partridge*, 2 Salk. 718; Willes 512; 3 Salk. 198. They have also rights which can be maintained at law, by action on the case for a disturbance; by action of assize; by distress; &c. 2 Wms. Saund. 114; 4 T. R. 666; 2 Dane's Abr. 683; Bac. Abr. tit. Distress, F. pl. 6; Cro. Eliz. 710; 6 T. R. 616; *Huzzey* v. *Field*, 2 Cr. M. & R. 432.

All these franchises, as of fairs, markets, ferries and bridges, are *founded on good and sufficient consideration; such as the expenditure of money in establishing and maintaining them, for the convenience and safety of the public. They are all *publici juris*, and from the rights,

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liabilities and duties of which they are compounded, results the notion of property in them. The toll, or right to demand and receive money for the use and enjoyment of these franchises, of which the toll is part and parcel, is recognised as property, and protected as property, both by the law of England, and of this country. A grant of these vests in the grantee a beneficial interest, which may be demised, leased or mortgaged. Poph. 79; Moore 474; *Webb's Case*, 8 Co. 92; Gunning on Tolls 106, 110; 6 Barn. & Cres. 703; 5 Ibid. 875; 3 Maule & Selw. 247; 1 Crompt. & Jerv. 57; in the Exchequer, p. 400. The franchise of a bridge or turnpike may be taken on execution in payment of debt, by the law of Massachusetts. In *Chadwick's Case*, an action was brought at common law, and sustained by the court, for compensation for the loss of his ferry, by the erection of a bridge. 2 Dane's Abr. 686; also Judge Putnam's opinion, 7 Pick.

As to the local extent of this franchise of a ferry, an attempt has been made to limit it to the ferry-ways; and the case of *Ipswich* v. *Brown*, Sav. 11, 14, is cited; where it is said, that a "ferry is in respect of the landing-place, and not in respect of the water, that the water may be in one, and the ferry in another;" it is also said in this case, that the owner of the ferry must own the soil on both sides. This last part of the case is expressly overruled in 6 Barn. & Cres. 703. And as to the other part of the case, it means nothing more than this, that a ferry must have ferry-ways or landing places. The case in Hardr. 162, was this; one owning land on both sides of the Thames, set up a ferry, three quarters of a mile from an ancient ferry, at Brentford. A bill was brought in the exchequer to suppress it, as coming too near a monopoly. The reporter adds, *sed quære de ceo;* for contrary, to the books of 22 Henry VI., and to precedents in like cases in this court. Afterwards, another bill being filed for the same matter, the court, on the 7th of April, Lord HALE presiding in it, decreed, that the new *ferry should be suppressed, and that the defendants should not have liberty to use any ferry-boat to the annoyance of the plaintiff's [*435 ancient ferry. 2 Anstr. 608.

In the case of the *Newburgh Turnpike Company* v. *Miller*, 5 Johns. Ch. 101, the principle is clearly stated and applied. The plaintiffs in this case, had erected a bridge, as part of their road, across the Wallkill; the defendants erected another free bridge, eighty yards distant; purchased a strip of land adjoining the bridge, and had a road laid out by commissioners as a public highway, for the purpose of avoiding the toll-gate of the plaintiffs. KENT, Chancellor, said: The *quo animo* is not an essential inquiry in the case; whatever may have been the intention of the defendants, the new road and bridge do directly and materially impair the use and value of the plaintiff's franchise. No rival road, bridge, ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration by which individuals are invited to expend money upon great expensive and hazardous public works, such as roads, bridges; and to become bound to keep them in constant and good repair, is the grant of a right to an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means. Also cited, *Ogden* v. *Gibbons*, 4 Johns. Ch. 150.

It appears from the Ancient Charters of the colony of Massachusetts,

p. 110–11, that the same notions of an exclusive right in ferries prevailed there, that have always prevailed in England. For, as early as 1641, near the time when the "ferry between Boston and Charlestown was granted to the college," this ordinance was passed: "It is ordered by this court, and the authority thereof, that whosoever hath a ferry granted, shall have the sole liberty of transporting passengers," &c. Here is a direct assertion of an exclusive right in the owners of a ferry; and is worthy of notice as a contemporaneous exposition; and can it be reasonably doubted, that Edward Converse, under his lease from the government, of "the ferry between Boston and Charlestown," had the sole and exclusive right of transporting passengers between those *termini?*

*436] All, therefore, which the plaintiffs claim in the case at bar, is an *exclusive right between Boston and Charlestown; and if they have any exclusive right, it must have some local extent beyond the ferry-ways, or the planks of the bridge; otherwise, it would not be exclusive. If any one, at his pleasure, could have lawfully carried passengers from Boston to Charlestown, and landed them within two feet of the ferry-ways of Converse, he would not have had the sole right of carrying between those points. No other ferry or bridge could be erected between those *termini*, without "being near, in a positive sense;" which is the form of expression in which Chief Justice PARKER lays down the rule; without being so near, in the language of Blackstone, as to draw away the custom of the elder ferry or bridge; or without producing, in the language of Chancellor KENT, ruinous competition. With this extent, therefore, the college held the ferry on the 9th of March 1785, when the act passed, making the plaintiffs a corporation for the purpose of erecting a bridge in the place where the ferry was kept; and the view we take of this transaction is this, that the corporation created by this act became the assignees, in equity, of this franchise, or it was surrendered to their use by operation of law. 2 Thomas' Co. Litt. 553; 6 Barn. & Cres. 703.

A bridge, in place of the ferry over Charles river, is deemed by the legislature to be a matter of public utility; and they are disposed to grant a liberal charter to such persons as are willing to undertake so hazardous an enterprise. The college are ready to part with their ferry for an annuity, equal to their then income; and Thomas Russell and his associates, are willing to make the first experiment in this country, of throwing a bridge, 1500 feet in length, over navigable waters, for the tolls to be granted to them, for the period of forty years. The ancient ferry, then, is to be extinguished; which could not be done without the authority of the government, nor without the consent of the college. 3 Mod. 294. The petitioners are to pay 200*l.* annually, to the college, for forty years, as a compensation for the loss of the ferry; and to this agreement the college became a party, by its assent given at the time, and its subsequent acceptance of the annuity. The right to keep up a ferry at this place is extinguished, but the beneficial

*437] interest of the college is not; for in the act, there is a *"saving to the college of a reasonable and annual compensation for the annual income of the ferry."

It is said, that the government seized the franchise of the ferry. If this were so, then it passed with the grant of a right to build a bridge, "in the place where the ferry was kept;" agreeable to the doctrine in *Palmer's*

Case, Poph. 78 ; 9 Co. 26 ; 10 Ibid. 64–5. But there is no evidence that the government did, or intended to, seize the franchise, as private property, for public use, in the exercise of the eminent domain. There was no necessity or motive for doing this ; because the petitioners for the bridge had agreed to pay the college for the surrender of their ferry for the forty years ; and their act of incorporation confirmed and executed that agreement. The whole transaction shows, that it was a matter of previous arrangement between the three parties ; and the terms and conditions of the bargain were made obligatory of the act.

Now, it is obvious, that if the government had given the college an authority to build a bridge, "in the place where the ferry kept ;" it would have the same local extent of franchise that the ferry had. Or, if the proprietors of Charles River bridge had first purchased the ferry of the college, and afterwards had obtained a charter to build a bridge, "in the place where the ferry was kept ;" the result would have been the same. The beneficial interest vested in the owners of the ferry and of the bridge, is the same, to wit, a right to demand and receive a certain rate of toll from all persons passing from one town to the other ; the place the same ; the object the same ; the mode only different.

The power of regulating all these franchises, which are *publici juris*, is in the government. It is an incident of sovereignty. In the case of ferries, it extends to the number and place of the ferry-ways, the number and kind of boats, the times of putting off from each side ; reaching to all those details which concern the convenience and safety of passage and transportation. In the case of a bridge, this power of regulation in the government is exerted, at the time the charter is granted. The place where the bridge is to be built ; its dimensions, materials, lights, draws and other details, are prescribed and settled by the act : and the government act upon the corporation, by holding them to a strict performance of all the dutes imposed.

*The charter of 1785 and its extension in 1792 : The first grant was of a right to build a bridge over a navigable river. It was an [*438 exercise of the sovereign power of the state over certain public rights. By the severance of the empire, and the consequent independence of the states, all public property and public rights vested in the states, as successors to the crown and government of the parent country. The power of Massachusetts, in the year 1785, was, therefore, as ample and complete over these as it had ever been before the separation. Such rights as these have always been held in England by grant or prescription, exclusively as private property ; such as fisheries in arms of the sea ; ferries and bridges over navigable rivers or arms of the sea, subject only to such regulations as public convenience required. In grants that abridge public rights, it is generally held, that a consideration must be shown. Hargrave's Law Tracts, "*De Jure Maris*," 18–36 ; Angel on Tide Waters 106–7. In *Carter* v. *Murcot*, 4 Burr. 2162, Lord MANSFIELD says, "on rivers not navigable, the proprietors of the adjoining land own *ad filum medium aquæ ;* not so in arms of the sea ; but if he can show a right by grant, or prescription, which supposes a grant, he may have an exclusive right in an arm of the sea or navigable river." In the following cases the same doctrine is clearly laid down. 4 T. R. 439 ; 2 Bos. & Pul. 472 ; 1 T. R. 669 ; 1 Mod. 105 ; 4 T. R. 668. Such is the law of England.

It is the law of Connecticut. In 1 Conn. 382, the court say, "that the right of fishing, by the common law, in the ocean, in arms of the sea, and in navigable rivers, below high-water mark, is common to all; and the state only can grant exclusive right. The public may grant an exclusive right of fishing in a navigable river; and if it may be granted, it may be prescribed for." It is the law of New York. See *People* v. *Platt*, 17 Johns. 195. It is the law of Massachusetts. In 6 Mass., Chief Justice PARSONS states the common-law doctrine, and the alterations it has undergone since the first settlement of the country. *Commonwealth* v. *Charlestown*, 1 Pick. 180. With regard to riparian owners of land upon streams, not navigable, the *common law has not been modified; they own, as in England, to the middle of the stream. But with regard to the owners of land bounding on the sea-shore, or arms of the sea; they own, by the law of Massachusetts, to low-water mark, where the tide does not ebb more than one hundred rods; though, by the common law, they could hold only to high-water mark, for all below belonged to the king. Yet they might hold by grant or prescription against the king. 1 Mass. 231; 17 Ibid. 289; 4 Ibid. 140; Angel on Tide Waters; 4 Mass. 522. An act of the legislature of Massachusetts, touching public property or public rights, has the same force and effect as an act of parliament in England. There is, then, no restraint or limitation upon the power of the grantor over the subject-matter of this grant; none in the constitution of Massachusetts; none in the act itself, that interferes with the possession of an exclusive right by grantees.

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The rule of construction applicable to this charter: It was said by a learned judge, in the court below, that the general rule of law was, that in governmental grants, nothing passed by implication. Where, I would ask, is any such general rule to be found? Not in the books, surely; nor can it be inferred from adjudged cases. All those cited in support of the rule are cases of crown or prerogative grants; and these, as strongly intimated by Chief Justice EYRE, 2 H. Bl. 500, stand on a different footing from grants by acts of parliament. But with regard even to these crown grants, where the royal prerogative is entitled to the most indulgence, and where the grant is made at the suit of the grantee, there are a variety of cases where valuable rights, privileges and franchises pass by necessary implication. Bac. Abr. tit. Prerogative, F. 2; Plowd. 366–7; *Rex* v. *Twine*, Cro. Jac. 179; 9 Co. 30; Dyer 30; Sav. 132; 1 Vent. 409; *Whistler's Case*, 10 Co. 64–5.

The general rule is thus laid down by Chitty on Prerogative, ch. 16, § 3, p. 391. In ordinary cases, between subject and subject, the principle is, that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor; who is presumed to use the most cautious words for his own advantage and security: but in the case of the king, whose grants chiefly flow from his royal grace and bounty, the rule is otherwise; and crown grants have at all times *been construed most favorably for the king, where a fair doubt exists as to the real meaning of the instrument. But there are limitations and exceptions even to this rule: 1st. No strange or extravagant construction is to be made in favor of the king; if the intention be obvious, royal grants are to receive a fair and liberal interpretation. 2d. The instruction and leaning shall be in favor of the subject, if the grant show that it was not made at the solicitation of the grantee;

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but *ex speciali gratia, certa scientia, et mero motu regis.* 10 Co. 112; Com. Dig. Grant, C. 12. 3d. If the king's grants are upon a valuable consideration, they shall be construed strictly for the patentee. The grants of the king, when valid, in general, bind him, though without consideration, as subjects are bound by their grants: ch. 16, § 5.

There are cases, in which it is said, that when those things, which are said to be parcel of the flowers of the crown, such as the goods of felons, waifs, estrays, &c., come into the king's posssession, they are merged in the crown, and do not pass, without express words; but even these will pass, if they can be made certain by reference. The case of *The Banne*, which has been cited, is explained by Justice BAYLEY in this way, in the case of the *Duke of Somerset* v. *Fogwell*, 5 Barn. & Cres. 875. There is, then, no foundation in law for the supposed analogy between crown grants in England, and grants by legislative acts in this country. But if the act of 1785 were subjected to the strictest rules applicable to crown grants, it would be entitled to a liberal construction for the grantees; for it is upon a good, a valid, an adequate, and a meritorious consideration. The state of Massachusetts is as much bound by necessary implication in its grants, as individuals are. This is decided in the case of *Stoughton* v. *Baker*, 4 Mass. 522.

The true notion of prerogative in this country, is well stated by PARSONS (*arguendo*), in 1 Mass. 356, as distinguished from prerogative in England. In England, prerogative is the cause of one against the whole; here, it is the cause of all against one. In the first case, the feelings, the vices, as well as the virtues, are enlisted against it; in the last, in favor of it: and therefore, here it is more important that the *judicial courts should take care that the claim of prerogative should be more strictly watched. [*441

In the opinion of a learned judge in the court below, we are told, that if the king makes a grant of lands, and the mines therein contained, royal mines shall not pass: and why not? Because, says the same authority, the king's grants shall not be taken to a double intent; and the most obvious intent is, that they should only pass the common mines, which are grantable to a common person. That is, the grant shall not draw after it what can be separated, and what is not grantable to a common person, but is a special royalty, a crown inheritance: and yet this case, and others like it, are cited in support of the pretended rule, that in governmental grants, nothing passes implication.

What is the consideration of the case, in the grant at bar? The grantors themselves furnish the highest evidence of its merit. In the act incorporating the proprietors of West Boston bridge, in the year 1792, they say, "Whereas, the erection of Charles River bridge was a work of hazard and public utility, and another bridge in the place proposed for the West Boston bridge, may diminish the emoluments of Charles River bridge; therefore, for the encouragement of enterprise," &c. It was hazardous, for no attempt at that time had been made to carry a bridge over tide-waters; and so doubtful were the subscribers of its stability, that a number of them insured their interest in it. The hazard was all their own; and so great was it thought to be, that upon the breaking up of the ice, persons assembled on the shore to see it carried away. It has stood, however, against time and the elements; it has stood against everything but legislation. It was opened with processions, and every demonstration of a general rejoicing; and was

considered, at the time, as an enterprise of great patriotism, as well as of utility.

This charter is to receive a judicial construction, and the words of grant are to be subjected to a judicial analysis. What relations do the words raise? What rights are extinguished; what required; and what covenants are implied? In the case of *Fletcher* v. *Peck*, 6 Cranch 87, the grant in that case is said to be a contract executed; the rights of the grantor are said to be for ever extinguished; and a contract implied, never to re-assert his right; but none of these things appear upon the face of the deed. *It is said, there is a mode of writing with sympathetic ink, which cannot be read till it is held up to the light. So, words of grant, must be held to the light of judicial interpretation. When the relations which the words give rise to, are unfolded, the rights that are extinguished, and the rights that are acquired, and the covenants that are implied, all become clear and legible.

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In examining the charter of 1785, I shall consider: 1st. What is granted by express words? 2d. What, by necessary implication?

In the third section of the charter, are these words: "And be it further enacted by the authority aforesaid, that, for the purpose of reimbursing the said proprietors the money expended, or to be expended, in building and supporting the said bridge, a toll be and hereby is granted and established, for the sole benefit of the said proprietors." Upon the authorities already cited, and upon the strong reason of the case, these words vest, absolutely, in the grantees, a franchise, without condition and without reservation; and this franchise is property, recognised as such, and protected as such, both by the the law of England and by the law of this country. In order, then, to make this protection which the law affords, available, it must be exclusive to some extent; enough, at least, to keep down ruinous competition. All this is conferred upon and vested in the proprietors of Charles River bridge, by these few words of the charter.

In 1 Crompt. & Jerv. 57, and 400, in the exchequer, it appears, that a charter was granted to the Corporation of Stamford, in 2 Ann., c. 13, with a right to take toll, without saying how much. Chief Baron ALEXANDER says, "We think that where a grant of tolls is found in a charter, the word ought to have some meaning, and the charter some operation; and that it can receive operation only by being construed to mean a reasonable toll." He goes on to say, "if we were to decide against this charter, upon the principles contended for, we should shake the security of a vast mass of property, which has been enjoyed, undisturbed, for perhaps ages."

Again, it is declared expressly, that this toll shall continue for and during the period of forty years. What is the meaning of this limitation? The bridge is to remain, and be delivered to the government, in good repair, at the end of the term. If the corporation are merely tenants at will of this franchise; if the legislature can eject *them at pleasure; if they can rightfully shorten the term, when they please, and as much as they please, the limitation to forty years expressed in the charter, becomes absurd and contradictory. It must, however, be construed to mean something; and it can have no reasonable or consistent meaning, but that of an absolute, unconditional grant of tolls for forty years. Again, the maintenance of the bridge, and the annuity to the college, run with the charter; and the grant of tolls is made, in express words, for these two objects. Here,

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then, are two obligations imposed by the charter; one to support the bridge, which amounts, upon an average, to about $5000 a year; and the other to pay to the college 200*l.* a year; and a toll is granted as the means, and the only means, of fulfilling these obligations; and yet the legislature, the grantors of this charter, claim and exercise the right of wholly withdrawing these means from the corporation, by an indirect act, and leaving these obligations upon them in their full force. Does not this, if anything can, impair the obligation of a contract?

Whence is derived the power or the right to do this? Is it to be found in the charter? No! That grants a toll for forty years, absolutely, without condition or reservation. What, then, is the nature of this mysterious power of the government, that can lawfully resume its own grants; destroy its own contracts; disregard the obligations of good faith; and trample upon every principle of equity and justice?

In the case of *Wales* v. *Stetson*, 2 Mass. 146, Chief Justice PARSONS says, "We are also satisfied, that the rights legally vested in this or in any corporation, cannot be controlled or destroyed, by any subsequent statute; unless a power for that purpose be reserved to the legislature, in the act of incorporation." This case, like the one at bar, was a grant of a franchise; and here we have the solemn judgment of the supreme court of Massachusetts, upon its inviolability, in the absence of any such reserved power. In the case of the *East India Company* v. *Sandys*, 7 State Trials 556, it appears, that there was this condition inserted in the charter, "that if it should hereafter appear to his majesty, or his successors, that *that* grant, or the continuance thereof, in whole or in part, should not be profitable to his majesty, his heirs and successors, or to this realm, it should, after notice &c., *be void." Thus, it appears, that even in the opinion of Lord Chief Justice JEFFREYS, no feeble supporter of royal prerogative, a [*444 charter could not be repealed or annulled, unless a power for that purpose was reserved in it to the grantor.

Thus far the case at bar stands upon the very words of the grant; upon the legal and obvious construction of the act itself, without resort to those necessary implications which arise from the nature of the grant.

2. What is granted by necessary implication? The general rule of law is thus laid down in Co. Litt. 56 *a*, "When the law doth give anything to one, it giveth impliedly whatsoever is necessary for the taking and enjoying the same." *Case of the Mines*, 1 Plowd. 317. "For the ore of gold and silver is the king's; and if it is, the law gives him means to come to it, and that is by digging; so that the power of digging is incidental to the thing itself." If one grant to another all the minerals in a certain parcel of land; the grantee has a right to go upon the land, and dig, and carry away the ores.

In one thing, all things following shall be included: lessee of land has a right of way on lessor's land; grantee of trees, growing in a close, may come upon the land to cut them, &c. Finch 45, Rule 100. The grant of a thing carries all things included, without which the thing granted cannot be had. Hob. 234; also *Saunders's Case*, 5 Co. 12; *Lifford's Case*, 11 Ibid. 52; and 1 Wms. Saund. 322.

Upon these authorities, the only question is, are tolls necessary or essential to the enjoyment of this franchise? Just as necessary and essential as air is to the support of animal life. They are part and parcel of the fran-

chise itself; its very essence, substance and life. What is our franchise, without tolls? It is compounded of certain rights and certain obligations. The rights are, to be a corporation, with the usual powers incident to corporations; such as the right to have a common seal; to sue and be sued; to maintain a bridge over navigable waters; to demand toll of all persons passing over the bridge, &c. The obligations are, to maintain the bridge at an expense of $5000 a year; to pay Harvard College 200*l.* a year; and to deliver up the bridge in good repair, at the end of forty years.

*445] *The rights are without value, utterly barren and fruitless; the obligations are oppressive and lasting as the charter. Yet a learned judge, in the court below, says, "that a trader or innholder, has as good a right to be protected in the enjoyment of the profits of his store or inn, as the plaintiffs have to be protected in the enjoyment of their tolls." Is a trader's shop or a taverner's license a franchise?

Since the first Wednesday of March last, the Warren bridge has been free; and the necessary consequence has followed, viz., the entire destruction of the plaintiffs' franchise. One thing more remains to be done, and then the work will be finished. The attorney-general will be directed to file a *quo warranto* against the corporation, for a non-compliance with some of its public duties, and a decree of forfeiture of the franchise will be obtained. This must inevitably happen, unless it can be presumed, that this corporation will continue to maintain the bridge, at their own private expense, for the public accommodation. The government will then have got into their possession two bridges, without the expenditure of a dollar: one having been paid for out of the fruits of the franchise of Charles River bridge; and the other obtained by a decree of forfeiture, for not complying with its obligations. In the meantime, the proprietors of Charles River bridge may well look upon the proceedings of the government with amazement. But a few years since, and they held a property in this franchise, which cost them $300,000; and where is it now? "They are charged with no fault, neglect of duty or breach of any condition; no judicial process has ever been issued against them; and yet, without a cent of compensation, they are stripped of this property by the mere force of legislation. By what transcendental logic, can such a result be justified, upon any principles of law, equity or good faith?"

Among the various pretences that have been put forth in justification of the act complained of, is this, to wit, that the charter is nothing more than a license to obstruct navigable waters. In 15 Vin. Abr. 94, License, E, it is said, if a certain time is limited, it is not revocable, though the thing is not done. License executed is not countermandable. The same law is, if one license me and my heirs to come and hunt in his park, it is necessary for me

*446] to have this license in writing; for *something passes by the license, in perpetuity; but if the license be to me, to hunt once in his park, this is good, without writing, for no inheritance passes. 11 Hen. VII. p. 9. There is a great diversity between a license in fact, which giveth an interest, and a license in fact, which giveth only an authority or dispensation; for the one is not to be countermanded, but the other is. A license is revocable unless a certain time is fixed. *Sir William Webb* v. *Paternoster*, Poph. 151; *Taylor* v. *Waters*, 1 Taunt. 374; *Liggins* v. *Inge*, 5 Moore & Payne 712. So it appears, that if a license is in writing to one and his heirs,

it is not revocable; 2d. If it passes an interest, it is not revocable; and 3d. If it is for a time limited, it is not revocable. The case at bar embraces all these: it is in writing; it passes an interest; and is for a time limited. The grant to the proprietors of the Charles River bridge, both by express words and by necessary implication, vests in them absolutely, a franchise, a beneficial interest, for forty years; and this interest consists of a right to levy money, according to certain fixed rates, upon the line and course of travel between Charestown and Boston.

But it is said, that a line of travel is uncertain, and cannot be defined; that it often changes, according to the exigencies of society And this, to some extent, is doubtless true; and it is also true, that from the changes that are constantly taking place in human affairs, a bridge or ferry may be subjected to incidental injuries. It sometimes happens, that a consequential damage may be suffered by one, arising out of the lawful use of property by another. The grant of the West Boston bridge and of the canal bridge, affected in some degree the income of Charles River bridge; but these were between different *termini*, opening new avenues into the country, and giving better accommodation to a large amount of population. They were grants of similar franchises, called for by public exigencies; and not directly and apparently, intentionally interfering with former grants. The revival of Winnisemmit ferry has somewhat diminished the travel through Charlestown; but it is between Boston and Chelsea, and is coeval with the ancient ferry between Boston and Charlestown. Whatever damage, therefore, is suffered, arising from the changes or progress of society; from political or commercial arrangements; from the natural course of business or industry, is regarded, *and must be borne, as merely incidental. But the voluntary, direct and fatal action of the government upon its own former [*447
grant, is not incidental, and does not belong to cases of consequential damage.

The facts in the case at bar are peculiar, and distinguish it from all other cases of a similar nature. The abutments of the two bridges are 260 feet apart on the Charlestown side; and the avenues to them meet in Charlestown square, at the distance of about 400 feet from the abutments. On the Boston side, the abutments of the two bridges are about 900 feet apart, and the avenues to them meet in Boston, at the distance of about 1400 feet. The distance from Charlestown square to all the business parts of Boston, over these bridges, is within a few feet the same; so that the same accommodation is afforded by both bridges. Now, as all the roads leading into and from Charlestown, terminate, or cross each other, in this square, it follows, that all the travel which now goes over the Warren bridge would, with equal convenience, have gone over Charles River bridge, if that had been the only avenue between Boston and Charlestown. The new bridge has connected no new line of travel with the old; it has not shortened the distance between the two *termini*, nor given any other additional accommodation, than two parallel bridges give over one. Of the necessity of two bridges, some judgment may be formed from this fact: about 3000 foot passengers passed over Charles River bridge in one day, and about 750 vehicles of all descriptions, as appears by the record; about 80,000 foot passengers, and 4000 vehicles go over London bridge every day. The travel, therefore, from Charlestown to Boston is a unit; it is now, and always has been, and always must be, the same line of travel. The grant of the Warren

bridge, therefore, which, while it was a toll bridge, diverted two-thirds of this travel from Charles River bridge, and since it has become free, diverts the whole, is a grant of the same franchise. It is, in its effect and operation, the entire destruction of property, held by an older title; the resumption of a grant, which this court has declared to be a contract executed; by which the rights of the grantor are for ever extinguished, and a covenant implied on his part never to re-assert his rights. But in the case at bar, the grantor has re-asserted his right over this franchise; and has thus impaired the obligation of his contract.

*448] A learned judge in the court below, in commenting upon the *extent of the franchise of the bridge, remarks, that it is either confined to the planks, or in other words, has no local extent; or else, extends to the old bridge in Cambridge, a distance of some three or four miles. Now, it is a little remarkable, that the proprietors of the Charles River bridge, do not now, and never have claimed any such local extent; all they have ever claimed, or do now claim, is an exclusive right between Charlestown and Boston. Yet, in order to make the claim odious, it is represented as extending over the whole river. But how does the learned judge get at this conclusion, that the extent of this franchise is either everything or nothing? Not, surely, from the declarations of the proprietors, for they have uniformly limited their right in the manner stated; not from the books of common law, for in them, the rule is stated with great uniformity and precision, and runs through the whole current of authorities, from Hen. VI. to the present time. The rule of the common law is, that if a rival market, bridge or ferry, is erected so near an existing one as to draw away its custom, essentially to impair its value, materially to diminish its income or profits; near in a positive sense, so near as to produce ruinous competition, &c., it shall be deemed a nuisance.

But it is asked, what and where are the boundaries of these rights? And because they cannot put their finger on the precise spot in the river, where private right ends and public right begins, they have no right at all; because the common law does not, unhappily, furnish a pair of compasses to measure the exact local extent of this franchise, it has no extent at all; because it does not cover the whole river, it is confined to the width of the bridge. Does the law, or do learned judges, deal with nuisances on land in this way? How near to a dwelling-house may one establish a noisome or unwholesome manufactory? Does the common law measure the distance, and say, here it shall be deemed a nuisance; and there it shall not? And how is it to be determined, whether it be a nuisance or not, but by the fact? It is a matter of evidence, and is to be proved like any other fact. Is the atmosphere filled with a noxious effluvia? Are the comfort and value of the dwelling impaired by this establishment? Then it is a nuisance, whether it be at the distance of ten rods or half a mile. So, in the case at bar, it is the fact, rather than the distance, that is to determine whether a rival bridge

*449] is a nuisance or not. Does it greatly impair the value *of the elder franchise? Does it essentially diminish its profits? Does it wholly ruin it? These are all matters of evidence; facts to be proved; and courts and juries, in the exercise of a sound discretion upon all the facts and circumstances of each particular case, will give a reasonable protection to the property in these franchises, by giving them a reasonable extent.

But it is argued, that when the charter of Charles River bridge was extended for thirty years, in the year 1792, notice was given to all the world, by a legislative act, that the proprietors had no exclusive right; and that inasmuch as they took their extended charter, with this notice, it is now too late to set up any such right. The act incorporating the proprietors of the West Boston bridge, was passed on the 9th of March 1792; and in the 8th section of that act, it is enacted, that the proprietors of Charles River bridge shall continue to be a corporation and body politic, for and during the term of seventy years, to be computed from the day that said Charles River bridge was completed and opened for passengers, subject to all the conditions and regulations prescribed in the act, entitled "an act, incorporating certain persons for the purpose of building a bridge over Charles river, between Boston and Charlestown, and supporting the same during the term of forty years; and during the aforesaid term of seventy years, the said proprietors of Charles River bridge shall and may continue to collect and receive all the toll granted by the aforesaid act for their use and benefit." There is then a proviso, that the proprietors shall relinquish the additional toll on the Lord's day, and shall continue to pay the annuity to the college, &c.

This extension of the charter of Charles River bridge was made, as set forth in the preamble to the grant. Whereas, the erection of Charles River bridge was a work of hazard and utility, and another bridge in the place proposed for the West Boston bridge, may diminish the emoluments of Charles River bridge, therefore, &c. The notice referred to, is contained in the report of a committee, to whom had been referred the petition for the West Boston bridge, and the remonstrance of Charles River bridge, and is in these words: "The committee further report, that after attending to the memorial of the proprietors of Charles River bridge, and hearing them fully on the subject, they are of the opinion, that there is no ground to maintain that the act incorporating the proprietors for the purpose of *building a bridge from Charlestown to Boston, is an exclusive grant of the [*450 right to build over the waters of that river." Such is the opinion of a committee; and supposing it to have been adopted by the legislature, it would then be the opinion of that body, and nothing more. How, then, can this opinion affect or control the rights of the proprietors, held by them under a former grant? If, instead of being an opinion merely, it had been a declaratory act; still all the rights vested in the proprietors, by their charter of 1785, would have remained in full force and effect; and the charter of 1792 is merely a continuance of the first, with all its rights, &c., and subject to all its obligations. As this declaration of the legislature makes no part of the act of 1792, all the rights which belonged to the proprietors in 1785, belonged to them equally in 1792. If such a declaration had been inserted in the act itself, extending the term to seventy years, and the act had been accepted, the proprietors might have been bound by it.

But the import and meaning of this opinion have been mistaken. It does not deny any claim made by the plaintiffs, but is entirely consistent with it. It does not deny, that the proprietors have an exclusive right between Boston and Charlestown; but does deny, that they have an exclusive right over the whole river. There was a petition before this committee for another bridge; not from Charlestown to Boston, but from Cambridge to Boston;

and the committee say to the remonstrants, your exclusive right does not extend to Cambridge, a distance of two miles; it is not an "exclusive right to build over the waters of Charles river;" but inasmuch as the proposed bridge may affect your emoluments, we recommend an extension of your charter. It was seen, that the proposed bridge would cause a consequential damage to Charles River bridge; and it was on that ground, that the proprietors appealed to the equity of the legislature; and it was on that ground alone, as they expressly declare, that the legislature granted an extension of their charter for thirty years.

In the following cases, an exclusive right in ferries is fully maintained. *Churchman* v. *Tunstal*, Hardr. 162; *Tripp* v. *Frank*, 4 T. R. 666; *Chadwick's Case*, 2 Dane's Abr. 683. The case of *Huzzey* v. *Field*, recently decided in the exchequer, is reported in 2 Cromp. Meeson & Rosc. 432; and also in the 13th No. Law Journal, 239. In this case, Lord ABINGER reviews the whole doctrine in relation to this franchise; beginning with the earliest *451] cases, and confirming all the principles which are necessary to *the support of the case at bar. The case of the *Islington Market*, 2 Cl. & Fin. 513, in which the opinion of the nine judges is given upon a series of questions touching the franchise of a market, put to them by the house of lords, reviews and confirms all the doctrines advanced in support of the plaintiffs' claim in this case; and shows, most conclusively, what the law of England is at this present time. The law there is, essentially and truly, now, what it was three centuries ago, in relation to all these franchises; and unless it can be shown, that this law has been overruled by adjudged cases, or modified by statute, it is now the law of this country.

Much has been said, in the course of this controversy, of monopolies, and exclusive privileges; and these have been fruitful themes of declamation. And what is a monopoly, but a bad name, given to anything for a bad purpose. Such, certainly, has been the use of the word in its application to this case. It is worth a definition. A monopoly, then, is an exclusive privilege conferred on one, or a company, to trade or traffick in some particular article; such as buying and selling sugar or coffee, or cotton, in derogation of a common right. Every man has a natural right to buy and sell these articles; but when this right, which is common to all, is conferred on one, it is a monopoly, and as such, is justly odious. It is, then, something carved out of the common possession and enjoyment of all, and equally belonging to all, and given exclusively to one. But the grant of a franchise is not a monopoly, for it is not part or parcel of a common right. No man has a right to build a bridge over a navigable river, or set up a ferry, without the authority of the state. All these franchises, whether public property or public rights, are the peculiar property of the state. They belong to the sovereign, and when they are granted to individuals or corporations, they are in no sense monopolies; because they are not in derogation of common right.

But it is said, that the legislature has a right, in its discretion, to grant ferries, bridges, turnpikes, and rail-roads, whenever public convenience requires it; and that of this convenience or necessity, they are the exclusive judges. I state the proposition as broadly as it has ever been laid down, because I have no wish to avoid its just consideration. It is admitted, then, that the legislature has a general authority over these subjects; but it is

nevertheless a limited authority. It *is not omnipotent, like that of the British parliament, but is subjected to many restraints and limitations. A state legislature can do wrong, and has done wrong; and this court has corrected their errors, and restored the rights which had, inadvertently, of course, been invaded or taken away. The people, in forming their constitutions of government, have imposed many restraints upon the exercise of the legislative power. They have inserted in many of their constitutions, certain fundamental principles, which were intended to limit or wholly withdraw them from the power of the legislature. They cannot abridge the liberty of speech or of the press; pass *ex post facto* laws; suspend the writ of *habeas corpus;* or take private property for public use, without compensation. These limitations and restraints upon the exercise of legislative power, in Massachusetts, are imposed by its own constitution.

There are restraints imposed by the constitution of the United States upon all state legislation; and one very important restraint, a disregard of of which, in the opinion of the plaintiffs, has brought this cause before this court; is, that no state shall pass any law impairing the obligation of contracts. The power conferred on this court, by the constitution of the United States, of controlling, in certain specific cases, state legislation, has given, and was intended to give, in the language of this court, "a bill of rights to the people of each state." The exercise of this ultimate conservative power, constitutes one of the highest functions of this court. The wise men who framed this constitution, clearly discerned, in the multiform operations of human passions and interests, the necessity for some calm controlling power; and in conferring it upon this court, they exhibited the most profound wisdom, guided by human experience.

The legislative power is restrained and limited by the principles of natural justice. In the case of *Calder* v. *Bull*, 3 Dall. 388, Judge CHASE says, "There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property, for the protection whereof government was established. An act of the legislature, for I cannot call it a law, contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, *in governments established on express compact, and on republican principles, must be determined by the nature of [*453 the power on which it is founded. A few instances will be sufficient to explain what I mean. A law that punishes a citizen for an innocent action, or in other words, which, when done, was in violation of no existing law; a law that destroys or impairs lawful private contracts; a law that makes a man a judge in his own case; or a law that takes property from A. and gives it to B.: it is against all reason and justice, for a people to intrust a legislature with such power; and therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them: the legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all their citizens, in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into

guilt, nor punish innocence as a crime ; nor violate the right of an antecedent lawful private contract, or the right of private property."

In the case of *Fletcher* v. *Peck*, 6 Cranch 135, the court say, when, then, a law is in its nature a contract ; when absolute rights have vested under that contract ; a repeal of that law cannot divest those rights ; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community. It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power ; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized, without compensation. To the legislature, all legislative power is granted ; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

Regarding the practical operation and effect of the Warren bridge charter upon the rights and property of the plaintiffs, the case at bar comes clearly within the scope of the remarks cited from Dallas and Cranch. In point of fact, it takes the property of the plaintiffs, and gives it to the public. It is, in its operation, an act of confiscation. It violates all those distinctions of right and wrong, of justice and *injustice, which lie *454] at the foundation of all law, and of all government ; and if men were to deal with each other as this act deals with the plaintiffs, the very frame-work of our civil polity would be broken down ; all confidence would be destroyed ; and all sense of security for the rights of persons and property would be lost.

Again, the legislative power is restrained and limited by its own former grants. In Chitty's Prerogatives of the Crown, page 132, he says : "It is a principle of law, that the king is bound by his own and his ancestors' grants ; and cannot, therefore, by his mere prerogative, take away vested rights, immunities or privileges." The same identical franchise which has been granted to one, cannot be granted to another. The grant of a franchise is as much a grant of property, as a grant of land ; and if a grant of a franchise can be resumed or annulled, so can a grant of land. Both are portions of the public property ; both vest in the grantees a property, a beneficial interest ; and in both, the grant is a contract executed.

Since this suit has been pending, a very important case has been decided in the supreme court of appeals in the state of Maryland. It is the case of the *Canal Company* v. *Railroad Company*, 4 Gill & Johns. 1. The canal company's was the prior grant. Surveys of the route for each of these great internal works had been made ; and it was found, that they approached so near each other at a place called the Point of Rocks, that there was not room enough for both, between the rocks and the river. In making these surveys, the railroad company had preceded the other company ; they had located their route ; purchased and condemned the land necessary for their purpose ; when their progress was arrested by an injunction, at the instance of the canal company, who found it to be impracticable to construct their canal by the side of the railroad. And the question was, which had the prior right ; and the court, in a very elaborate opinion, decided it in favor of the prior grant. This case is before

the court, and many of the points discussed and determined in the case, are among the important points to be decided in this.

Within all these distinctions, there was, and always will be, ample room for the legislature to provide every convenience and accommodation that public exigencies may require. And this can be done, without resuming former grants, or taking private property without compensation. They might have seized the plaintiffs' franchise in the exercise of *the [*455
eminent domain. All the property in the state, under whatever title it may be held, may be thus taken for public use, but upon the simple condition of making a reasonable compensation for it. The legislature, however, did not proceed, in the exercise of this high power, to provide for the public accommodation, but they took the property without paying for it. Or, they might have accepted the offer of the plaintiffs, as set forth in their memorial on the 20th page of the record. By a vote of the proprietors, the corporation offered, if the legislature would give them the necessary authority, to make the avenues to the bridge of any given width; to construct a circular draw, so that passengers should not be delayed, when vessels were passing through; to make the bridge itself as much wider as should be deemed convenient; to construct a spur bridge, and even to build a new bridge; thus submitting the whole matter to the judgment of the legislature, and pledging themselves to do all and whatsoever they should authorize and direct them to do, in providing for the public accommodation. This offer was declined, and no reasons given; and it is admitted, that they were not absolutely bound to accept it, or to give reasons for their refusal; but it is certainly open to such inferences as the facts of the case will warrant.

But it is repeated, again and again, that the legislature had found the fact, that the convenience of the public required another avenue from Charlestown to Boston. What then? Does the finding of this fact, justify any and all sorts of legislation? Is it any excuse or justification for the resumption of a franchise, for the annihilation of a vast amount of property without compensation? The fact may be made the basis of legislation, but affords no excuse for unjust or unconstitutional legislation. In the case of the *Islington Market*, before cited, the house of lords found the fact, that public convenience required an enlargement of the old market, or the establishment of a new one. A bill was pending for a new market, and the house of lords, instead of proceeding to pass the act, thought it proper to put a series of questions relating to the matter, to the nine judges; they inquired of the judges, what was the law; what they could do touching this market, consistently with the existing rights of others? The answers are given at large; and if the law, which is there declared to be the law of England, had been applied to the plaintiff's case, when the *act [*456
establishing the Warren bridge was pending, it never would, and never could, have passed.

But the legislature proceeded to authorize the bridge to be built, and granted a toll, out of which the whole expense was to be paid. Accordingly, the bridge was built, and paid for out of the tolls received. That being done, the functions of the legislature ceased. They had provided another avenue, and paid for it; and there their duty to the public ended. Was it a matter of common convenience, or of public necessity, that the govern-

ment, after paying for the bridge out of the tolls, should put $20,000 a year into the public treasury, or which is the same thing, give it to the public? Is any man bold enough to vindicate the act upon this ground? With the same right, the government might have repealed the plaintiffs' charter, or passed an act requiring the tolls to be paid into the public treasury. The indirect way in which the franchise has been destroyed, does not alter the principle; for what cannot lawfully be done directly, cannot be done indirectly. The sole basis of the proceeding was, that public convenience required another bridge, and it was justified by its advocates, on this ground alone; the moment, therefore, that the government began to fill its coffers from the tolls, it lost its original character, and assumed a new one. It then became a matter of speculation and profit, and not of public convenience or necessity.

After all, the government have entirely failed to accomplish their only lawful purpose, to wit, providing some further accommodation for the public travel; for there is, at this moment, but one travelled avenue between Boston and Charlestown. Since the Warren bridge was made free, all the travel is over that bridge; to which, if we now add the increase of travel for the last twelve years, and the amount drawn from the other bridges, it will be found, that the travel over this one bridge is nearly double what it ever was over Charles River bridge. Yet the inconveniences and dangers of passing over Charles River bridge, twelve years ago, were so great, that the legislature, out of tender regard for the safety of the people, granted another avenue. Now, though there is nearly twice as much travel over this new avenue, no inconvenience is experienced; and no complaint is made.

The ground upon which the plaintiffs have always rested their cause, was this: that their rights and their duties were commensurate; *they have always claimed an exclusive right between Charlestown and Boston; and they have always stood ready to fulfil all the obligations which that right imposed. Such is the law of England, with regard to these franchises, as it is clearly stated in the cases of *Tripp* v. *Frank*, *Huzzey* v. *Field*, already cited in relation to ferries; and the cases of *Prince* v. *Lewis*, 5 Barn. & Cres. 363, and *Mosely* v. *Walker*, 7 Ibid. 40, in relation to markets. The memorial of the plaintiffs is founded upon this reciprocity of rights and duties; and all the English cases go upon the principle, that the extent of the one, is the measure of the other.

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I do not go into any argument, to prove that the plaintiffs' charter is a contract; but merely refer the court to the following cases. *Fletcher* v. *Peck*, 6 Cranch 87; *New Jersey* v. *Wilson*, 7 Ibid. 164; *Terrett* v. *Taylor*, 9 Cranch 49; 4 Wheat. 516; 8 Ibid. 84; Ibid. 50.

But it is said, that if the legislature of Massachusetts has taken private property for public use, without compensation, the remedy is in the courts of the state. It is possible, that the case here supposed, may happen; although it is not the case at bar. Whatever may be the abuses of legislative power; whatever injuries may be inflicted upon the rights of persons or of property; still, if the obligation of a contract is not impaired, or some one of the specific provisions of the constitution of the United States, imposing restraints and prohibitions upon the states, is not violated, this court has no jurisdiction. 2 Pet. 412–13. If property held under a grant from the state is taken, in the exercise of the eminent domain, provision for compensation

is always made in the act: and in such cases, no questions can arise; as the property is taken by a paramount authority and paid for. But if property thus held, is taken, and no compensation is provided, it does give this court jurisdiction; because this grant is declared to be a contract executed; the rights of the grantor are said to be for ever extinguished, and a covenant implied, never to re-assert them. When, therefore, this property thus held, is resumed or destroyed by the grantor; the obligation of the contract is impaired, the implied covenant is broken, and the jurisdiction of this court attaches.

Now, what is the aspect of the case at bar, in relation to this matter? What issues do the pleadings present for the decision of this court? The allegation in the plaintiffs bill is, that the act of 12th March 1828, is repugnant to the constitution of the United States; because it impairs the obligations of a contract. The defendants in *their answer deny this; and thus the only issue is formed upon which this court can found a [*458 decree. The plaintiffs nowhere affirm, that private property has been taken for public use, by the state, in the exercise of the eminent domain; nor do the defendants allege it, nor do the court below; on the contrary, Chief Justice PARKER says, 7 Pick. 530, that there will be a decree against the plaintiffs, in order that they may avail themselves of the right secured to them by the constitution and laws, of a revision by the supreme court of the United States; where it is highly proper that this question, depending, as I think it does, mainly upon the constitution of the United States, should be ultimately decided." The decree of the court below also asserts, that no private property has been taken for public use.

It is also apparent, from the act itself, that the legislature did not intend to seize the franchise of the plaintiffs, by virtue of the eminent domain; for they made no provision, in the act, for compensation. Now, it is the settled law of Massachusetts, that in all cases where private property is taken for public use, provision for compensation must be made in the act itself. But in the case at bar, it appears, that the legislature carefully avoided the open and avowed intention of exerting this high power, confided to them by the constitution, by making provision for the compensation, only in cases where real estate should be taken. The constitution says, that where property is taken for public use, compensation shall be made; the legislature say, in this act, that where real estate is taken, compensation shall be made. Now, this franchise of the plaintiffs is not real estate, although it is property; and by this exclusion of the word property, it is most manifest, that the legislature did not intend, and did not, in fact, seize the franchise as private property, for public use. They proceeded on the ground of right to make the grant in question, without compensation; this right is denied, on the ground that it resumes or destroys a former grant, and thus impairs the obligation of a contract. This, then, presents the issue, and the only one of which this court has jurisdiction.

It is admitted, that the right of eminent domain is an incident of sovereignty, and cannot be alienated. And it is also admitted, that all the property of the citizens of the state is liable to the exercise of this paramount authority. No matter by what title it is held, it is all alike subject to be taken for public use. The exercise of this power, however, is restricted by an express provision in the state *constitution, that compensa- [*456

tion shall be made. This fundamental law is inserted in the constitution of the United States, as well as in that of many of the states; and the following cases show how fully this principle has been recognised and acted upon, by the judicial tribunals of the country. 2 Dall. 304; 9 Cranch 43; 2 Pet. 655; 1 Kent's Com. 425; 2 Johns. Ch. 162; 12 Mass. 468; 7 Ibid. 395.

The doctrine of consequential damages, sometimes referred to in the court below, can have no application to the case at bar; except on the ground that the grant of the Warren bridge does not impair the former grant; or if it does, that the plaintiffs are not entitled to compensation. In making the grant, it is assumed, that the legislature merely granted what was its own; and if the plaintiffs have suffered by the exercise of a lawful power, it is a case of *damnum absque injuria*, for which the law gives no remedy. This argument, as applied to the case in the court below, by a learned judge, assumes the whole matter in dispute, and need not, therefore, be further pursued; but I would merely ask, whether any case can be found, to which this doctrine has been applied in justification, in which the consequential injury has been not partial and incidential, but total.

It has been often repeated, that the plaintiffs have received more than $1,000,000, in the course of about fifty years; and it is urged, that this is a sufficient consideration for building and maintaining the bridge; and that no injustice is done, by cutting off twenty years of the term. Even a learned judge in the court below, says, that the consideration should be in "some measure adequate." And is not a good, a valid, a meritorious consideration, in some measure adequate? Was it not, at the time of the contract, fully adequate? And can one of the parties rescind it now, because it has turned out to be more beneficial than was anticipated by either?

I will not further trespass upon the patience of the court, by showing that an inquiry by a committee of the legislature, is not equivalent to a writ of *ad quod damnum* executed, which is a judicial process; because I have already shown, that, even such a process, in England, is not conclusive upon the rights of the parties. If, therefore, it were equivalent, it would settle nothing; but it has no resemblance to it, and is not worthy of further notice.

Upon the validity of this act of the 12th of March 1828, this court have now to pronounce a final judgment, which must decide *the title to a vast amount of property. This property has been held under a grant from the state, for nearly half a century; it has been bought and sold in open market, under the eye of the government; it has been taken in payment of debts and legacies; distributed in every form, in the settlement of estates, without notice, or even a suspicion, that the title was bad. It has been, for many years, sought for as a safe and profitable investment, by guardians, trustees, charitable institutions, and such other persons as are obliged to intrust their property to the management of others, in whom they place confidence. And yet, these owners of this property, who have purchased, or taken it, at its market value, and who have not received more than the legal interest of their money, are represented as odious monopolists, exacting enormous profits upon a capital which has been repaid to them over and over again. The original stockholders are all dead; or, if any of them are still living, the property has long since passed out of their hands; but if they were now living, and holders of this property, they would not have

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gained more, nor so much, by their purchase, as those who bought real estate at that period, and kept it till the present time. At length, however, the grantor finds that these owners have no good title to this property; and without judicial process or inquiry, confiscates the whole to the use of the public.

But the principles to be established by the judgment of the court, in this case, will decide the title to more than $10,000,000, in the state of Massachusetts alone. If that judgment shall decide, that the legislature of Massachusetts has the constitutional power to pass the act in question; what and where is the security for other corporate property? More than $4,000,000 have been invested in three rail-roads, leading from Boston, under charters granted by the legislature. The title to these franchises is no other, and no better, than that of the plaintiffs. The same means may be employed to accomplish the same ends; and who can say, that the same results will not follow? Popular prejudice may be again appealed to; and popular passions excited, by passionate declamations against tribute money, exclusive privileges, and odious monopolies; and these, under skilful management, may be combined, and brought to bear upon all chartered rights, with a resistless and crushing power. Are we to be told, that these dangers are imaginary? That all these interests may be safely confided to the equity and justice of the legislature? That a just and paternal regard for the rights of *property, and the obligations of good faith, will always afford a reasonable protection against oppression or injustice? I [*461 answer all such fine sentiments, by holding up the charter of Charles River bridge; once worth half a million of dollars, and now not worth the parchment it is written upon.

I have as much respect for, and confidence in, legislative bodies, as reason and experience will warrant; but I am taught by both, that they are not the safest guardians of private rights. I look to the law; to the administration of the law; and above all, to the supremacy of the law, as it resides in this court, for the protection of the rights of persons and property against all encroachment, by the inadvertent legislation of the states. So long as this court shall continue to exercise this most salutary and highest of all its functions, the whole legislation of the country will be kept within its constitutional sphere of action. The result will be general confidence and general security.

I have thus attempted to satisfy the court, that by virtue of an assignment in equity, or a surrender at law, of an ancient ferry, and the act of 1785, incorporating the plaintiffs, a franchise or beneficial interest was, absolutely, and without condition or reservation, vested in them, for the time limited; and the franchise so vested is recognised as property, and protected as property, both by the law of England and of this country; that, in order to make this protection available, it must, of necessity, have some local extent, sufficient, at least, to keep down ruinous competition; or, in other words, that it must be exclusive between Charlestown and Boston. That the grants of 1785 and 1792, constituting the charter of the plaintiffs, being made on good, valid, adequate and meritorious considerations, are entitled to a liberal construction for the grantees; that these grants, according to the decisions of this court, constitute a contract; that the act of March 12th, 1828, establishing the Warren bridge corporation, impairs the obligation of

this contract, by resuming this franchise, and divesting the plaintiffs of this property, without compensation : and that their only remedy is in this court, under the constitution of the United States.

Greenleaf, for the defendants, argued—1st. That the present situation of the cause presented insuperable objections to any decree in favor of the plaintiffs. The Warren bridge, which is the subject of complaint, has now become the property *of the commonwealth, by the terms of the original charter. The defendants were merely authorized to indemnify themselves, for the cost of the erection of the bridge, by collecting tolls, for a period not exceeding six years from the commencement. They were afterwards constituted the agents of the commonwealth, by special statues, to receive tolls for its use, two years longer ; but those statutes having expired, the bridge has become free.

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The general objects of the plaintiffs' bill are, first, to obtain reimbursement of the tolls already diverted from their bridge, and received at the Warren bridge ; and secondly, to prevent the use of the latter, as a public way. In the decision of this cause, this court will exercise no larger jurisdiction than was possessed by the supreme judicial court of Massachusetts ; and will render no other decree than ought to have been rendered by that tribunal. It is well known, that the people of that state, in the grant of equity powers, have manifested great reluctance, and a decided preference for the common-law remedies ; intending to preserve the jurisdiction of the common law, "in all cases where that is capable of affording substantial and adequate relief." 6 Pick. 397. Now, for the mere diversion of tolls, there is "a plain, adequate and complete remedy at law," by an action on the case ; and therefore, by the rules which the courts of that state have prescribed to themselves, there is none in equity. The only ground on which this part of the claim could be sustained in equity, would be, by charging the defendants as trustees. But it has been held in Massachusetts, that the equity powers of the supreme judicial court extend only to cases expressly designated by statute (6 Pick. 395); and that no trusts were cognisable there, except those arising under deeds, and which are expressly declared in writing. *Dwight* v. *Pomeroy*, 17 Mass. 327 ; *Safford* v. *Rantoul*, 12 Pick. 233; *Given* v. *Simpson*, 5 Greenl. 303.

The only ground, therefore, on which the court can deal with the tolls, is, that having possession of the bill for the purpose of injunction, it may extend its decree over all the incidental equities of the cause. But this court can make no decree which can relieve the complainants, because there are no parties before it capable of obeying an injunction. The bridge having become the property of the state, these defendants have neither right nor power to prevent the use of it as a way. The commonwealth is the only party whose rights are to be affected by whatever decree may be made in regard to the bridge ; and no injunction can be issued against one not party *to the suit. *Fellows* v. *Fellows*, 4 Johns. Ch. 25. The general doctrine of equity is, that all who are necessary to the relief, or are materially interested in the subject-matter, must be joined. *Sangosa* v. *East India Company*, 2 Eq. Cas. Abr. 170 ; *Davoue* v. *Fanning*, 4 Johns. Ch. 109 ; 2 Madd. Ch. 179. It is true, that the interest of other persons, not parties, is no valid objection, where the court can make a decree, as

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between those already before it, without affecting the rights of those who are not called in. *Mallow* v. *Hinde*, 12 Wheat. 193; *Ward* v. *Arredondo*, 1 Paine 410. It is also true, that if the absent parties in interest are without the jurisdiction of the court, it will, in some cases, in its discretion, proceed without them; provided their rights are separable from those of the defendants, and will not be irrevocably concluded by the decree. *West* v. *Randall*, 2 Mason 190, 196. But if the rights of such absent parties are inseparably connected with those of the parties present, no decree will be made till they are called in. Mitford's Pl. 133, 146; *Wiser* v. *Blachly*, 1 Johns. Ch. 437. And this court has declared, that it will not make a final decree upon the merits of a case, unless all the persons, whose interests are essentially affected, are made parties to the suit; though some of those persons are not within the jurisdiction of the court. *Russell* v. *Clarke*, 7 Cranch 69, 98. The fact that the absent party in interest is a sovereign state, makes no difference. The language of the court in *Osborn* v. *United States Bank*, 9 Wheat. 738, does not apply to a case like the present; but only to that of a public officer who has collected money for the state, which he still holds, and has been notified not to pay over; the constitutionality of the exaction being denied. But however that doctrine might apply to the tolls received, if that subject were cognisable in equity by the supreme judicial court of Massachusetts; it cannot apply to the bridge itself, which is real property, not belonging in equity to these plaintiffs; and is, in no sense, in the hands of the defendants. To retain jurisdiction here, is to sue the state, and virtually to effect a judicial repeal of the constitutional provision on this subject. The court, by its decree, can only affect so much of the bridge as constitutes the nuisance complained of; and this is, not the existence of the bridge, in its present position, but the use of it as a way. Such a decree these defendants cannot execute; and it, therefore, can afford the plaintiffs no relief.

2. The ferry, of which the plaintiffs claim to be assignees, extended no farther than the landing places, and was subject to the control of *the state. The policy of Massachusetts, from its first settlement, has [*464 been, to retain all ferries within its own control; the ferryman having nothing but a license to take tolls, during the public will. The well-known principles and sentiments of the pilgrims, were strongly opposed to everything in the shape of monopoly. Hence, as early as 1635, after a ferry had been set up by Brown, between Boston and Charlestown, another ferry, as it is termed, but between the same landing places, was ordered to be set up, to be kept by a person, resident in Boston; clearly showing, that in the estimation of the general court, the existing ferryman had no exclusive rights there. In 1641, the limits of all ferries were expressly defined by statute, as extending from the place where the ferry was granted, "to any other ferry-place, where ferry-boats use to land;" and in the same year, an act was passed, in the nature of a constitutional declaration, that no monopolies should be granted or allowed in the colony. With this declaration before them, and with such principles in view, the legislature, in 1650, confirmed the ferry-rent to the college; meaning not to repeal the acts of 1641, but to permit the college to receive such tolls as might be collected at the ferry, subject to any further order of the legislature. On the same principles, successive statutes were passed, in 6 Wm. & M.; 8 Wm. III.; 4 Geo. I.;

13 Geo. I.; and 33 Geo. II.; regulating this and other ferries; and authorizing the court of sessions to set up ferries, in any place whatever, at its discretion. If, then, it be true, that the history and situation of a state may be resorted to, in order to expound its legislative intentions, as was said in *Preston* v. *Browder*, 1 Wheat. 115; and that charters are to be expounded, as the law was understood, when the charters were granted (2 Inst. 282); it was never the intention of the legislature, in permitting this ferry to be set up, to grant anything more, than the right to run boats from one landing to the other, during its pleasure, and subject to its control. The ferry-right was co-extensive only with the obligations of the boatmen; who were bound, merely to convey from one landing to the other. In the exercise of this right of the state, it has granted toll bridges, at pleasure, in the place of nearly, or quite, every ancient ferry in the commonwealth; to the utter annihilation of the ferry, and without indemnity to the ferrymen. No claim has ever been set up, except by these plaintiffs, adverse to the public right.

The argument, that the ferry franchise extends so far as to put down all
*465] injurious competition, is erroneously applied in this case; *as it supposes the opening of a new avenue, by the state, to be a mere private competition. The authorities on this subject apply only to a private ferry, set up without license. *Yard* v. *Ford*, 2 Saund. 172; *Ogden* v. *Gibbons*, 4 Johns. Ch. 160; *Stark* v. *McGowen*, 1 Nott & McCord 387; *Newbury Turnpike Co.* v. *Miller*, 5 Johns. Ch. 101; *Blissett* v. *Hart*, Willes 508. In the present case, the public not being accommodated, the legislature has merely done its duty in providing for the public convenience, which the plaintiffs had not the legal power to do. *Mosley* v. *Walker*, 7 Barn. & Cres. 40, 55; *Macclesfield* v. *Pedley*, 4 Barn. & Ad. 397.

3. But whatever may have been the extent of the ferry, it never passed to the plaintiffs, but was taken by the state, for public use; and was thereby extinguished, in the paramount rights of the sovereign power, by which it was resumed. 17 Vin. Abr. 83, Prerog. I. b; 4 Ibid. 163; Prerog. X. c. 5; *King* v. *Capper*, 5 Price 217; *Atty. Gen.* v. *Marquis of Devonshire*, Ibid. 269. The documents in the case negative the idea that the transaction of 1785 amounted to a purchase of the franchise from the college; the object of the tolls being declared to be not only an indemnity to the plaintiffs, but for a revenue to the college. It is no purchase from the college, because the legal evidence, a deed, is wanting. *Rex* v. *North Duffield*, 3 M. & S. 247; *Peter* v. *Kendall*, 6 Barn. & Cres. 703.

4. Neither the grant of the ferry, whatever it was, nor the plaintiffs' charter, contained anything exclusive of the public right to open a new avenue in the neighborhood of Charles River bridge; for in a public grant, nothing passes by implication. The right thus said to be parted with, is one which is essential to the security and well-being of society; intrusted to the legislature for purposes of government and general good; and such rights are never presumed to be conveyed or restricted. Nothing passes by a charter or legislative grant, except well-known and essential corporate powers, where a corporation is created; unless it is contained in express words. *Rex* v. *Abbott of Reading*, 39 Edw. III. 21; 17 Vin. Abr. 136, Prerog. E. c. 5; 8 Hen. IV. 2; *Ford & Sheldon's Case*, 12 Co. 2; *Chancellor, &c. of Cambridge* v. *Walgrave*, Hob. 126; *Stanhop* v. *Bp. of Lincoln*, Ibid. 243; *Case of Mines*,

1 Plowd. 310, 336–7; *Case of the Royal Fishery of the Banne*, Dav. 149, 157; *Case of Customs*, Ibid. 45; *Atty-Gen.* v. *Farmen*, 2 Lev. 171; Finch's Law 100; *Blankley* v. *Winstanley*, 3 T. R. 279; *King* v. *Capper*, 5 Price 258; Ibid. 269; *Parmeter* v. *Gibbs*, 10 Ibid. 456–7; *Stourbridge* * *Canal* v. *Wheeley*, 2 B. & Ad. 792; *Leeds & Liverpool Canal* v. *Hustler*, [*466 1 B. & Cres. 424; *Dock Co.* v. *La Marche*, 8 Ibid. 42; *The Elsebe*, 5 Rob. 155, 163; *The Joseph*, 1 Gallis. 555; *Jackson* v. *Reeves*, 3 Caines 303, 306; *McMullen* v. *Charleston*, 1 Bay 46–7; *Zylstra* v. *Charleston*, Ibid. 382; 2 Cranch 167; *Wilkinson* v. *Leland*, 2 Pet. 657; *Lansing* v. *Smith*, 4 Wend. 9. The cases where the king's grant has received a construction like a private grant, are all cases of grants of his private property; and not of things held as sovereign, in right of his crown. Upon this ground, the plaintiffs' charter gave them a franchise co-extensive with the bridge itself; it authorized them to erect a bridge, and to take tolls of such persons as might pass over it; but nothing more.

5. If a contract to that effect should be implied, it would be void for want of authority in the legislature to make such a surrender of the right of eminent domain. Every act of a public functionary is merely an exercise of delegated power, intrusted to him by the people, for a specific purpose. The limits of the power delegated to the legislature, are to be sought, not only in the constitution, but in the nature and ends of the power itself, and in the objects of government and civil society. 6 Cranch 135; 3 Dall. 387–8; 1 Bay 62. And the acts of legislators are the acts of the people, only while within the powers conferred upon them. 6 Cranch 133. Among the powers of government, which are essential to the constitution and well-being of civil society, are not only the power of taxation, and of providing for the common defence, but that of providing safe and convenient ways for the public necessity and convenience, and the right of taking private property for public use. All these are essential attributes of sovereignty, without which no community can well exist; and the same necessity requires, that they should always continue unimpaired. They are intrusted to the legislature, to be exercised, not bartered away; and it is indispensable, that each legislature should assemble, with the same measure of sovereign power, that was held by its predecessors. In regard to public property, the power of the legislature to alienate it, is conceded. The limitation now contended for, extends only to those sovereign powers which are deemed essential to the constitution of society. In regard to these, any act of the legislature, disabling itself from the future exercise of its trust for the public good, must be void; being, in substance, a covenant to desert its paramount duty to the people. Such, it is apprehended, would be a covenant not to erect a fortress on a *particular tract of land sold; or not to provide ways for the public travel, however great the necessity, either in a particular place, [*467 or for a specified time. It is not necessary, that such exclusive contracts be made, in order to induce men to adventure in a new and hazardous undertaking for the public good; for, upon the positive assurance of remuneration, in some other form, capital and enterprise can always be commanded.

The true distinction between those acts of future legislatures which may, and those which may not, be restrained, is conceived to lie, not in the kind of legislation, whether general or special, but in the nature of the power proposed to be restrained. Thus, a covenant not to erect a fortress on a

particular spot, is a covenant in restraint of special legislation; yet it would manifestly be void. And by a similar enumeration and description of particular places, the right to provide railroads, bridges and canals, in every part of the state, might be alienated to individuals. The example of land exempted from taxation is not to the purpose; such exemption is presumed to be purchased by the payment of a sum in gross, instead of an annual tax, which all are bound to pay. The owner of the land does not buy up a portion of the sovereign power; he only pays off, at once, a debt which was due by instalments. Other examples are given, in the agreement not to charter another bank, and the like. But these contracts do not abridge any powers essential to civil society. The state must be governed and defended; and the people must have facilities for common travel; and to these necessities, the power of each legislature must be adequate. But the existence of a bank is not of similar necessity; it stands wholly upon considerations of policy and convenience.

The existence of some limit to the exercise of powers thus delegated in trust, and their inalienable nature, is no new doctrine; but is familiar to public jurists. Domat, Pub. Law, book 1, tit, 6, § 1, par. 12, 14, 16; Puffend. *de Jure Nat. et Gent.*, lib. 8, cap. 5, § 7; 17 Vin. Abr. Prerog. M. b. pl. 20; Chitty on Prerog. 385; *Atty-Gen.* v. *Burridge*, 10 Price 350. The same doctrine has been recognised here, in the case of political corporations. *Presbyterian Church* v. *City of New York*, 5 Cow. 538; *Goszler* v. *Georgetown*, 6 Wheat. 593; *Auburn Academy* v. *Strong*, 1 Hopk. Ch. 278.

6. The grant of the charter of Warren bridge is no breach of any contract with the plaintiffs, they having originally accepted their charter, subject to the paramount right of eminent domain; and *having, also, in 1792, accepted its extension, with a distinct submission and assent to an express assertion, on the part of the state, of a right to make new grants, at its discretion. All property held by individuals, is charged with the *jus publicum*, which belongs to all men. Hale, de Port. Mar. cap. 6; 10 Price 460. One branch of this *jus publicum* is the right of way, to be designated by the legislature. This is said to be one of the principal things which ought to employ the attention of government, to promote the public welfare and the interests of trade; and that nothing ought to be neglected to render them safe and commodious. Vatt. b. 1, ch. 9, § 101, 103; Domat, b. 1, tit. 8, § 1, 2. The power to do this, is as much inherent and inalienable, as the right of taxation; which, it is said, resides in the government, and need not be reserved expressly, in any grant of property or franchises, to individuals or corporations. *Providence Bank* v. *Billings*, 4 Pet. 560, 561, 563. Ferries, turnpikes, railroads, toll bridges and common roads, are equally public ways; differing only in the manner of their creation. Each act of location is an exercise of sovereign power; and the easement thus acquired is paid for by the people; either directly, from the public chest, or indirectly, by tolls. But the laying out of a common road has never been supposed to violate the charter of a neighboring turnpike, however it may impair its tolls; nor has the establishment of one kind of public road, whether by charter or otherwise, ever been considered as an injury, in legal contemplation, to another of a different kind. And if not to another of a different kind, why should it be to another of the same kind? If a turn-

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pike may be rendered useless by a railroad, or a common highway, why not by another turnpike? *Beekman* v. *Saratoga Railroad Co.*, 3 Paige 45; *Irvin* v. *Turnpike Co.*, 2 P. & W. 466; *Green* v. *Biddle*, 8 Wheat. 88–9. This court has never gone so far as to hold the statute of a state void, as violating its implied contract; the cases to this point are all ones of express contract. *Vanhorne* v. *Dorrance*, 2 Dall. 320; *Fletcher* v. *Peck*, 6 Cranch 87; *New Jersey* v. *Wilson*. 7 Ibid. 164; *Terrett* v. *Taylor*, 9 Ibid. 43; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Green* v. *Biddle*, 8 Ibid. 1. On the contrary, this court has refused to imply a contract, in a case similar in principle to the present; and has declared, that where there is no express contract, the remedy of the party was in the wisdom and justice of the legislature. *Jackson* v. *Lamphire*, 3 Pet. 289; *Providence Bank* v. *Billings*, 4 Ibid. 563; *United States* v. *Arredondo*, 6 Ibid. 729.

*But this point stands not on general reasoning alone. By stat. 33 Geo. II, the courts of sessions in Massachusetts were expressly [*469 authorized to establish ferries, in all places, at their discretion. This is a clear assertion of the public right to make new avenues, by water, wherever public convenience may require; and the statute was in full force in 1785, when the plaintiffs received their charter, and is to be taken into the elements of its exposition. It continued in force, in 1792, when West Boston bridge was chartered; and the same provision was revised and re-enacted in 1797, and continued in force, in 1828, when the charter of Warren bridge was granted. If, then, it was lawful to establish one kind of public avenue, by the side of the plaintiffs' bridge; it was equally lawful to establish any and every kind. If any doubts could arise on this point, it is made clear, by reference to the transactions of 1792. The plaintiffs, at that time, remonstrated against the grant of the charter of West Boston bridge, on the ground of their exclusive right; first, as purchasers of the ferry; and secondly, by their charter of 1785. The whole subject was referred to a committee of the legislature, before whom all parties were fully heard. The great question was, whether the legislature had a right, at its discretion, to make new avenues over Charles river to Boston; and whether the plaintiffs' charter gave them any exclusive privileges. The committee reported strongly in favor of the right of the state, and against the existence of any exclusive right in the plaintiffs; but recommended an extension of the term of continuance of the plaintiffs' charter, on grounds of public expediency, as a mere gratuity; and it was done.

The extension of the charter, together with this contemporaneous exposition, the plaintiffs accepted in the same year; and again in 1802, without protest or objection. It is absurd, to suppose, that the legislature intended to grant exclusive privileges, in the same breath in which their existence was denied. The general principle that the legislative history of the passage of a statute furnishes no rule for its exposition, is admitted. But it applies only to the exposition of statutes as such. Private statutes, regarded as contracts, are to be expounded as contracts; in which all the *res gestæ*, or surrounding circumstances, are to be regarded. The report of the committee, therefore, was a contemporary document between the same parties, relating to the same subject-matter; and in a case between private persons, it would be received, in equity, either to interpret or reform the agreement. *If the acts of parties expound their intentions, *much more a [*470

solemn transaction like this. (*Blankley* v. *Winstanley*, 3 T. R. 279 ; *Gape* v. *Handley*, Ibid. 288 note ; *Hunter* v. *Rice*, 15 East 100 ; *Saville* v. *Robertson*, 4 T. R. 720.) *Cooke* v. *Booth*, Cowp. 819, asserts the same doctrine, though its application to express covenants has been denied. The charter, extended on these principles, and coupled with such declarations, was accepted by the plaintiffs, in 1802, unconditionally, and without objection. On the application for Canal bridge, in 1807, the plaintiffs again opposed the grant, and were again heard ; and the state again denied their exclusive right, and asserted its own, to open avenues at its discretion. And the plaintiffs again, in 1826, in a more solemn manner, accepted the renewed charter ; without any denial of the right asserted by the state.

It is objected, that the state, by an act which annihilates the plaintiffs' tolls, has virtually resumed its own grant. To this it is replied, that the principle which forbids the resumption of one's own grant, does not apply to the exercise of the eminent domain. Thus, a turnpike road may be appropriated, to make a canal. *Rogers* v. *Bradshaw*, 20 Johns. 735. It is further objected, that though the original outlays may have been reimbursed, with interest, from the tolls ; yet that the act of 1828 has ruined the property of subsequent innocent stockholders, who have made their investments at a high price. But all such are purchasers with notice. The statute of 33 Geo. II., was fair notice, beforehand, of the public right to open new avenues, over waters, at discretion. This right, in regard to bridges over Charles river, was expressly asserted in 1792 ; it was acted upon in the subsequent grant of the Middlesex canal ; it was again expressly asserted in 1807, upon the granting of the charter of the canal bridge ; and was more recently acted upon in the charter of the Lowell railroad.

7. If the plaintiffs have sustained any damages, not anticipated, nor provided for, they are merely consequential, for which no remedy lies against these defendants ; nor is it a case for the interference of this court ; but it is only a ground of application to the commonwealth of Massachusetts. That the defendants were mere public agents, in the erection of Warren bridge, was conceded in the argument of this cause, in 6 Pick. 388. And it is equally clear, that the remedy, at common law, for the damages of which the plaintiffs complain, if the act of the defendants were unjustifiable, must have been by an action on the case, and not in trespass. For the gravamen is, *not that their property has been directly invaded ; but that an act has been done, in another place, in consequence of which the income of that property is reduced ; their damages, therefore, are strictly consequential. In regard to such damages, the constitution of Massachusetts, art. 10, has already received an authoritative exposition, in *Callender* v. *Marsh*, 1 Pick. 418, deciding, that to those damages, it does not apply. So, in Pennsylvania, *Shrunk* v. *Schuylkill Navigation Company*, 14 Serg. & Rawle 71, 83 ; and in New York, *Varick* v. *New York*, 4 Johns. 53. Statutes enabling agents to effect a great and beneficial public object, ought to be benignly and liberally expounded, in favor of those agents. *Jerome* v. *Ross*, 7 Johns. Ch. 328. And they, therefore, are held not liable for any consequential damages, resulting from acts done under and within the terms of a statute. *Spring* v. *Russell*, 7 Greenl. 273 ; *Custis* v. *Lane*, 3 Munf. 579 ; *Lindsay* v. *Charleston*, 1 Bay 252 ; *Stevens* v. *Middlesex Canal*, 12 Mass. 468 ; *Rogers* v. *Bradshaw*, 20 Johns. 744–5 ; *British Cast Plate*

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Manufacturers v. *Meredith*, 4 T. R. 794 ; *Sutton* v. *Clarke*, 1 Marsh. 429 ; s. p. 6 Taunt. 29 ; 6 Pick. 406. It is only when agents exceed the powers conferred on them by the act, that they become trespassers. *Belknap* v. *Belknap*, 2 Johns. Ch. 463 ; *Shand* v. *Henderson*, 2 Dow P. C. 519. If the property is taken for public use, the state is bound to make compensation, and trespass does not lie. If it is consequentially impaired in value, by the prosecution of public works, it is *damnum absque injuria*, at law ; and addresses itself only to the consideration of the legislature.

If here is no violation of contract, the question whether a state law violates a state constitution, is not to be raised in this court. *Jackson* v. *Lamphire*, 3 Pet. 289. There are cases, in which it has been gratuitously thrown out, that the constitutional right to trial by jury extends to cases of property taken for public uses. *Perry* v. *Wilson*, 7 Mass. 393 ; *Callender* v. *Marsh*, 1 Pick. 418 ; *Vanhorne* v. *Dorrance*, 2 Dall. 304. But each of these cases stood on other grounds ; and in neither of them, was this the point necessarily in judgment. In other cases, it has been held, that this constitutional right applies only to issues of fact, in the ordinary course of civil and criminal proceedings. *Livingston* v. *New York*, 8 Wend. 85 ; *Beekman* v. *Saratoga and Schenectady Railroad Company*, 3 Paige 45. No state has gone so far as to hold, that the money must be paid, before the title of the owner is divested. On the contrary, in *Massachusetts, in the location of roads, the title of the owner is divested, as [*472 soon as the return is accepted ; though the amount of compensation may be litigated for years. In Kentucky, in certain cases, a private bond is held sufficient to effect a similar purpose (*Jackson* v. *Winn*, 4 Litt. 327) ; and in Pennsylvania, it is effected by the mere giving of a right of action ; whether against the state (*Evans* v. *Commonwealth*, 2 Serg. & Rawle 441 ; *Commonwealth* v. *Shepard*, 3 P. & W. 509); or against a private corporation. *Bertsch* v. *Lehigh Coal and Navigation Company*, 4 Rawle 130. Now, the faith of the state, pledged expressly in its constitution, is at least as valuable as any right of action, whether against an individual, or the state itself ; and ought to be equally effectual to divest the title of the owner.

The general principle of public law is, that any private property may be taken for public use, or may be destroyed, or private rights sacrificed, whenever the public good requires it. This eminent domain extends over all the acquisitions of the citizen, and even to his contracts and rights of action. Grotius, *de Jure Belli, &c.*, lib. 2, c. 14, § 7 ; and lib. 3, c. 19, §§ 7, 14, 15 ; and c. 20, § 7 ; Vatt. b. 1, c. 20, § 244 ; Puffend. *de Jure Nat. &c.*, lib. 8, c. 5, § 7 ; Bynkershœck, *Quæst.* lib. 2, c. 15, ¶ 2, 3, 6, 10 ; 3 Dall. 245. All these writers agree, that compensation ought to be made ; but no one has intimated that the taking is not lawful, unless the compensation is simultaneously and especially made or provided for. On the contrary, they all suppose, that the property is first taken, and afterwards paid for, when, and as soon as, the public convenience will permit ; and this, without regard to the urgency of the cause for which it was taken ; nor, whether in war or peace. It is obvious, that in a large proportion of the public exigencies, the compensation must necessarily be provided for, after the property is taken. *Commonwealth* v. *Fisher*, 1 P. & W. 465. Our constitutional provisions on this subject, seem nothing more than express recognition of the

right to compensation ; and were probably inserted, in consequence of the arbitrary impressments of property, made during the war of the revolution. 1 Tucker's Bl. Com. part 1, app'x, 305. The passage in 1 Bl. Com. 138–9, amounts only to this, that the legislature obliges the party to sell, and fixes the price. 4 T. R. 797. But the constitution applies to property directly taken, and not to cases where its value is only consequentially impaired ; and so it has been expounded by Massachusetts, in her general road laws,
*473] and in all her charters *for public ways, whether bridges, roads or canals. The residue of the subject of eminent domain, not having been touched by the constitution, remains among the great principles of public law, having an imperative force on the honor and conscience of the sovereign ; and the objection is not to be tolerated, in a court of law, that a sovereign state, in the exercise of this power, will not do what justice and equity may acquire. *Tippets* v. *Walker*, 4 Mass. 597 ; *Commonwealth* v. *Andre*, 3 Pick. 224 ; 2 Dall. 445.

If Massachusetts has taken the property of the plaintiffs for public use, her honor is solemnly pledged, in her constitution, to make adequate compensation. If their rights have been sacrificed, for higher public good, the laws of nations equally bind her to restitution. From these obligations she could not seek to escape, without forfeiting her *caste*, in this great family of nations. Her conduct in this matter has been uniformly dignified and just. The plaintiffs have never yet met her, except in the attitude of stern and uncompromising defiance. She will listen with great respect, to the opinion and advice of this honorable court ; and if her sovereign rights were to be submitted to arbitration, there is, doubtless, no tribunal to whose hands she would more readily confide them. If she has violated any contract with the plaintiffs, let them have ample reparation by a decree. But if not; and they are merely sufferers by the ordinary vicissitudes of human affairs, or by the legitimate exercise of her eminent domain, let it be *presumed* here, that a sovereign state is capable of a just regard to its own honor, and that it will pursue, towards its own citizens, an enlightened and liberal policy.

Let it not be said, that in the American tribunals, the presumption and intendment of law is, that a state will not redeem its pledges, any further than it is compelled by judicial coercion ; that it is incapable of discerning its true interests, or of feeling the force of purely equitable considerations ; and that its most solemn engagements are worth little more than the parchment on which they are written. Let such a principle be announced from this place, and it is easy to foresee its demoralizing effects on our own community. But proclaim it to Europe, and we shall hear its reverberations, in tones louder than the thundering echoes of this capitol ; with the bitter taunt, that while the unit monarch of the old world, is the dignified representative of national honor, the monarch multitude of the new, is but the very incarnation of perfidy.

*474] *Davis*, also of counsel for the defendants.—I approach this case with unaffected diffidence and distrust of my capacity to aid my employers, or enlighten the court. It has been long pending ; has excited great interest ; has drawn to its investigation, the intellect and learning of many distinguished men and eminent jurists. The whole ground has been

so thoroughly explored, that little is left untouched which is worthy of examination, or can excite curiosity. If others had not exhausted the subject, my worthy and learned associate has brought such untiring industry into the case, that nothing remains to me, but a method of my own, less perfect than his; and a mere revision of the subject under that arrangement. Both parties are corporations; both created by the state legislature; both claim rights across a navigable river; both, therefore, claim something from the eminent domain of the state. The plaintiffs claim to be first in time, and for that reason, to override the defendants' title. They assert an exclusive right over the river; which greatly affects the public, as well as the defendants. The question to be decided is, therefore, one of grave moment; because it involves great interests and rights in Massachusetts, and possibly, principles which may affect the prosperity and convenience of other densely populated communities.

The value of property on the part of the plaintiffs has been stated, here, to be $500,000. Their bridge, costing originally about $46,000, has grown into this importance, from the large annual income, having yielded to the proprietors, as the plaintiffs state, over $1,200,000; and advanced from 100*l.* a share, to $2000.

The question in one form is, has the commonwealth so parted with its sovereign right over this river, and vested it in the plaintiffs, that they shall continue these exactions, and the public be without further accommodation, whatever may be the inconveniences, until their charter expires; and for ever after, if the plaintiffs have the right to the ferry, as they contend; for upon their view of the case, the ferry will revert to the college, and the tolls be continued, after the charter of the bridge company expires. If the people of the commonwealth have thus parted with their *sovereign rights to corporators, and are thus tied down, so that new ways cannot be opened for their accommodation, it is matter of profound regret. [*475

The learned counsel for the plaintiffs, in opening the case, seemed studious to have it understood by the court, that the actual parties in interest, are the plaintiffs and the commonwealth; and I have no objection to this view of the case; for the public interest, I agree, far transcends in importance the property involved. The public, therefore, may be said to stand on one side, and the plaintiffs on the other. On one side, then, are the rights to private property, sacred and inviolable, so far as they can be established; but claimed in the form of a burdensome tax on the public, and therefore, entitled to no favor beyond strict right. On the other, stands the public, complaining that they are the tributaries to this great stock of private wealth, and subjected to inconveniences still more burdensome, from the want of suitable accommodations for intercommunication across the river, if this bridge is to be shut up; and denying that such claims of exclusive right can be justly or lawfully set up by the plaintiffs. This public, in the argument, has been represented as devoid of natural justice, selfish, avaricious, tyranical.

Some things are certain, in this conflict of opinion. We all know that the sole control and power over this navigable water, was once in the public. It was theirs, and how far have they been divested of it? If it has gone out of the public, and is in the plaintiffs; they must show to what extent, and show it clearly; for such rights, as I shall prove, do not pass by

presumption, but upon some decided expression of public assent. The loss of tolls, which has been earnestly dwelt upon, has no tendency to prove it. The great increased value of the bridge, has no tendency to prove it. The severe hardship, which has been a prominent feature of the argument, does not prove it. All these matters are by no means inconsistent with the right to establish other ways across the river; and therefore, only prove that the plaintiffs are making less money, not that their rights are invaded.

*476] *I will then examine their allegations in the bill, and the arguments by which they claim to establish their conclusions. 1. They set up an exclusive right to the travel between Boston and Charlestown, come from where it may. 2. They aver, that the act of 1828, under which the defendants claim, is incompatible with, and repugnant to, their vested rights, and doth impair the obligations of contract; and is, therefore, void, by the constitution of the United States. 3. They aver that the legislature is restrained from revoking or annulling its own grant, or divesting title, except where it takes property for public use; and then it can only do it under the provisions of the bill of rights of the commonwealth, which requires, that compensation shall be made in such cases; and they further aver, that their property is taken, and no provision for compensation is made, and therefore, the act of 1828 is void.

The case has been chiefly argued under the second and third heads. The first raises a question under the constitution of the United States. That instrument provides in the fifth amended article, that no state shall pass a law impairing the obligation of contracts. The plaintiffs call the act of 1785, under which they claim, a contract; and argue, that the act of 1828 impairs their grant, and as it is done by legislation of the state, the act of 1828 is void. The second raises a question under the tenth article of the bill of rights of Massachusetts; a question very proper for the courts of Massachusetts; but as I shall contend, not brought here by this writ of error; but finally settled there, and beyond the reach of this jurisdiction, as the bill of rights does not, and cannot, constitute any part of the act of 1785, and therefore, is no part of the supposed contract. These two issues do not entirely harmonize in another respect. One denies absolutely the right to take for public use, the property of the plaintiffs, because the state cannot, even in the exercise of its eminent domain, divest this right of property. The other admits the right to take for public use, by making compensation. I shall examine both, and the arguments urged in support of them.

To make out these issues, they contend: 1. That they are the grantees of the college, in and to the ferry between Boston and Charlestown.

*477] *2. That the state authorized the erection of their bridge, by the act of 1785; in which there is an implied covenant not to divert the travel, by new ways. 3. That these two titles vest in them a control over Charles river, to exclude injurious competition, which right they hold to be irrevocable; but if revocable, then the act which authorizes the interference must provide compensation for all loss occasioned by the diversion of travel.

In examining these positions, I shall—1. Deny that they are the grantees of the college, or have any interest in the ferry. 2. I shall deny that they have any covenant or engagement, express or implied, by the act of

1785, authorizing them to claim damages for a diversion of travel by a new and authorized way ; and shall also attempt to prove that no legislative body can perpetually alienate its sovereignty in regard to making ways for the public convenience ; so that a new way may not, at any time, when the public exigency demands it, be laid over any property whatever, whether belonging to individuals, or to corporations created by legislative acts, and whether it be real estate or a franchise, unless the state has agreed, in express terms, to exempt such property. 3. I shall maintain, that the power to provide ways for the public, resides, of necessity, always, in the commonwealth ; is part of the sovereignty ; and all property is held subject to the exercise of that right ; which is a condition annexed to all title to property, whether derived from the state, or from individuals. 4. I shall maintain, that taking property in pursuance of this sovereign right, is not, in itself, an act impairing the obligation of contracts, but consistent with it ; for the property is held subject to this right ; and all the party can demand, is compensation, under the bill of rights. 5. I shall maintain, that this court has no jurisdiction over the question of compensation for property taken for a way ; unless the party can show that he holds it under the state, and the state has expressly agreed not to take it for that purpose, without providing compensation ; for in all other cases, the party relies on our bill of rights, and this court is not the tribunal to expound that instrument.

In maintaining these positions, I am constrained to examine most of the grounds assumed in the very elaborate argument of the opening counsel ; though I have a conviction which I cannot surrender, *that all this labor upon the ferry will be a useless effort, for the plaintiffs can never succeed in establishing any kind of equitable or legal claim to it. Following, however, the order designated, I will first look to this ferry, and inquire—1. What rights belonged to the ferry ? 2. Are these rights vested in the plaintiffs? 3. If they are, do they tend to establish the claim now set up over the waters of the river ? [*478

This ferry lies in grant, and we must go to the ancient colonial ordinances, to ascertain its extent, and the probable meaning and intent of the colonial government, which is to be gathered from them. They are as follows :—

Orders relating to Charlestown ferry, extracted out of the old book in the council chamber, Anno 1630. It is further ordered, that whosoever shall first give in his name to Mr. Gouvernour, that he will undertake to set up a ferry between Boston and Charlestown, and shall begin the same, at such time as Mr. Gouvernour shall appoint, shall have one penny for each person, and one penny for every hundred weight of goods he shall so transport. Page 65.

1631. Edward Converse hath undertaken to set up a ferry betwixt Boston and Charlestown, for which he is to have two pence for every single person, and one penny a piece, if there be two or more. Page 80.

1633. Mr. Richard Brown is allowed by the court to keep a ferry over Charles river, against his house, and is to have two pence for every single person he so transports, and one penny a piece, if there be two or more. Page 105.

1635. It is ordered, that there shall be a ferry set up on Boston side, by

Windmill Hill, to transport men to Charlestown and Winnesimet, upon the same rates that the ferry-men at Charlestown and Winnesimet transport men to Boston. Page 150.

1637. The ferry between Boston and Charlestown is referred to the governor and treasurer, to let, at forty pounds per annum, beginning the first of the tenth month, and from thence for three years. Page 204.

1638. Edward Converse appearing, was admonished to be more careful of the ferry, and enjoined to man two boats, one to be on the one side, and the other on the other side, except the wind were so high that they were forced to put four men to man one boat, and *then one boat to serve, only he is enjoined to pay Mr. Rawson's fine, and so is discharged. Page 223.

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1640. Mr. Treasurer, Mr. Samuel Shepherd and Lieut. Sprague have power to let the ferry between Boston and Charlestown, to whom they see cause, when the time of Edward Converse is expired, at their discretion. Page 276.

1640. The ferry between Boston and Charlestown is granted to the college. Page 288.

Such are the principal acts or ordinances of the court of assistants, and the general court, in regard to this ferry; and I shall ask the court to gather the intent of these public functionaries from this record, and the contemporaneous history.

In 1630, the colony, under the distinguished, and I may say, illustrious, John Winthrop, governor, came over; and not being satisfied with Salem, where their predecessors had located, they came up to the head of the bay, or to what is now the harbor of Boston. Here they found the peninsula of Charlestown, formed by Charles river on the west and south-west, and Mystic river on the north-east, projecting into the harbor from the north-west to the south-east; and the peninsula of Boston projecting towards it from the south-west to the north-east, and formed by Charles river on the north and west; which spreads above the point into a large basin, discharging itself between these peninsulas and the bay or harbor of Boston, on the other side. Winthrop, with his friends, occupied these two peninsulas; and in Boston, was established under him, the colonial government of the company, which, in truth, was only a company of adventurers in trade and speculation, so far as the charter went. Out of this humble beginning, has sprung the commonwealth, and, I might almost say, this federal government itself. Thus situated, intercommunication between these two places was indispensable; and hence it is, that while the smokes of only a few log cabins ascended from the spot where a great city and a large town have since risen up, the subject of a ferry came thus early under consideration. And in giving construction to these simple ordinances, it is a fair inquiry, whether the colonists were providing for present emergencies—means suitably adapted to that end; or were, as the plaintiffs contend, making a perpetual exclusive grant of the right of travel over Charles river, for all time to come.

The first act, in 1630, makes no grant to any one, but proposes to have a ferry "set up." *In 1631, a ferry was set up by Edward Converse, and the toll established. In 1633, Richard Brown is allowed to keep a ferry over Charles river, against his house, &c. Here is the first evidence

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of a specific location, "over the river against his house;" that is, what they call a ferry, was over or across the river, from bank to bank, opposite to Brown's house—a way merely. In 1635, a ferry was set up from Windmill hill, in Boston, to Chelsea; and another from Boston to Charlestown, to run on the same line or way as the one already set up, only it was to belong to Boston, instead of Charlestown. Thus, one ferry was granted upon another; if these ordinances are to be treated as perpetual grants, and if the word *ferry* carries a franchise, then one franchise upon another. They show rather what is intended by the words *set up*, and that they simply authorized the running of a boat from place to place. In the first act, any person giving in his name, was to set up a ferry; Converse did set it up. The thing set up, then, was not by public act, but by individual act. This shows the limited sense in which the word ferry is used. After the location, in 1833, it is called *the ferry*. In 1637, the ferry is referred to the governor and treasurer to let. Mr. Savage testifies, that he had seen the original, or what he believed to be such, of a memorandum of agreement, or lease, in this year, signed by Converse, which begins thus: "The governor and treasurer, by order of the general court, did demise to Edward Converse, the ferry between Boston and Charlestown, to have the sole transporting of passengers and cattle from one side to the other, for three years," &c. Now, the demise is of "the ferry between Boston and Charlestown," but he is to have the sole transporting, &c. The term *ferry*, as then understood (for this instrument is in the handwriting of the governor), did not carry any sole or exclusive right to travel and transportation; but it was necessary to insert other strong and express terms, to convey that right. This is another proof that the word had not the enlarged signification now given to it. In 1640, the treasurer, Mr. Sprague and Mr. Shepherd, were authorized to let the ferry. Thus far, there had been but two kinds of action on the part of the colony; first, to establish a ferry, and second, to lease and regulate it. There were plainly no privileges or exclusive rights appended to it, but they speak of it as a thing to be set up by another; and when leased, they gave for a limited *period, certain well-defined privileges to go with it; but those privileges were [*481 not embraced in what was called the ferry, but stood separate and distinct from it, and were at an end with the lease. In the same year, 1640, the record says, "The *ferry* between Boston and Charlestown is granted to the college."

This is the charter—the whole title of the college. What, by fair construction, is granted? The ferry—nothing more—the thing set up. No privileges such as are specifically enumerated in the lease of Converse—no line of travel, such as is now claimed—no covenant not to divert travel, or not to establish other ways, or not to impair the income. There is nothing which looks at such privileges. It is a ferry—a naked ferry. What is a ferry? All the books, Tomlin, Dane, Woolrych, Petersdorff, &c., define it to be a highway, and the word, *ex vi termini*, means no more. The term *ferry*, therefore, in and of itself, implies no special privileges, such as are often connected with a ferry by special grant or prescription. The colonists so understood it; and in making a charitable gratuity to the college, had no purpose of placing the control of the ferry, or the waters of the river, beyond their reach. The income, they doubtless meant, should go to the college;

but they actually retained the possession and management till 1650, and always determined the rate of tolls, and how the public should be accommodated.

The doctrine of ferries, as found in the English books, and applied to this case, is full of confusion and uncertainty; so much so, that the plaintiffs have, under it, varied and remodelled their claims of right; reducing them from the whole river, to the travel between Boston and Charlestown; and before I have done, I shall ask them again, what is the extent of their claim, and where the authority which defines that extent? Let us look at the cases, and see how the doctrine stands.

1. The old class of cases, in which is found the doctrine that "you cannot impair my franchise or my ferry," and "I may exclude all injurious competition;" and which has been many times repeated in the argument, with great apparent approbation; asserts rights which I will show cannot be maintained in England, or anywhere, at this day; the monopoly is too bold for even a government of privileges. There was, therefore, a necessity for narrowing down a doctrine so repugnant to all improvement, and so inconvenient to all who had occasion to travel. The principle was, if one owning an old ferry, could show that a new ferry or way, however *remotely, *482] diverted travel, or caused a diminution of tolls, an action would lie, and the new ferry or way was held a nuisance. This gave rise to the doctrine set up in *Yard* v. *Ford*, 2 Saund. 172, *Blissett* v. *Hart*, Willes 508; and in the case of *Sir Oliver Butler*, 3 Lev. 320. Here, the distinction was taken, and appears since to have been adhered to, that one setting up a ferry, without license from the king, would be liable for any injury happening to an old ferry thereby; whereas, if he had first obtained a license, he would not have been liable. Those who acted under a license, were placed on a different footing from those who acted without, although the license was procured without paying any compensation to the old ferry. A careful analysis of these cases will produce this result. The conclusion then is, that under a license, granted after an *ad quod damnum*, a ferry may be continued, though injurious, so far as to entitle the owner of an old ferry to damage, if no license had been granted. The cases of *Blissett* v. *Hart*, and *Sir O. Butler*, fully maintain this conclusion. The *ad quod damnum*, which gives, of course, no damage, has been manifestly used to evade the rigorous old rule, and to narrow down the franchises of ferries, markets, &c., under a return upon such writs, that new ferries, or new markets may be granted, because the public need them, and the old ones will not be greatly injured thereby. The reporter, in *Butler's Case*, alleges, that the new market was granted, because the public convenience demanded it. It is, I agree, absurd to return no damage, when there is damage. But if this be not so, why is a license a protection? for if a ferry is, where it does no injury, then it needs no protection. The idea of protection, therefore, necessarily implies, that without the license, the party would be liable, because he does injury. The process of *ad quod damnum* and license, is, therefore, used as a shield against the liability, and to cut down this kind of franchise.

Next came the doctrine in *Tripp* v. *Frank*, 4 T. R. 666, which struck more effectually at the doctrine of the old ferry franchises, and brought them into comparatively circumscribed limits. The plaintiff, claiming all the travel from Kingston to Barton on the Humber, sued the defendant for

transporting persons from Kingston to Barrow, some distance below Barton, on the same side of the river. The travel from Kingston to Barrow, had usually passed through Barton, and therefore, went by the plaintiff's ferry. He prescribed and established his right to all the travel between Kingston and Barton; and maintained, that under the old authorities, *which forbid the right to set up injurious competition, or to impair the [*483 ferry of another, he was entitled to damage; for if the defendant had not transported passengers directly to Barrow, they would have passed over to Barton, in the plaintiff's boats, and therefore, he lost his toll. His line of travel, as it is here called, was broken, and a part of it diverted. But the court nonsuited the plaintiff, on the ground, that he had only an exclusive right between Kingston and Barton. They disregarded the circumstance, that his accustomed travel was lessened, and his tolls diminished. This, therefore, was an unequivocal inroad upon the doctrine, that one shall not set up injurious competition against another, or impair his ferry; for it is undeniable, that the toll was diminished, and the value of the ferry lessened. The franchise which formerly reached all injurious competition, was here limited to an exclusive right between the two towns where the landing places were. This was a most material modification of the old doctrine; and was so considered in a late case in the court of exchequer by Baron PARKE.

The next case of importance, for I pass over many where the learning of the courts has been put in requisition, is a late case in the court of exchequer, reported in 2 Cr. M. & R. 432; and introduced to the notice of the court by the plaintiff's counsel. Here, again, the learned barons took time to advise and consider what the law relating to ferries was. After a fresh research, it is declared, that the franchise consists in an exclusive right between place and place, town and town, ville and ville; and the competition must be brought to bear on these points, or it is lawful. Hence, the defendant was justified in landing a person at Hobbs's Point, a place intermediate between Nayland and Pembroke, though near the latter place, and the passenger was going to Pembroke. This was no infringement of plaintiff's ferry between Nayland and Pembroke. This is the case, as I remember it from a hasty perusal. What are we to gather from it? Would a ferry from London to Southwark, across the Thames, be from place to place, town to town, or ville to ville, so that the vast population on each bank could have no other accommodation? What connection have the arbitrary lines of towns, or cities or parishes, with the public travel or the public accommodation? From one county to another, in most of the United States, is from place to place; for these are the smallest political organized communities in many states. Two counties may stretch up *and down a [*484 river, upon opposite banks, many miles; and is any ferry to have an exclusive franchise, the whole of the distance, because the two places stretch so far? This, and all the authorities cited, are only so many proofs of a constant struggle on the part of the courts, to ascertain what the franchise of a ferry is in law; and to bring it down to more limited dimensions than the old cases assigned to it. Am I not justified, then, in declaring, that the doctrine is manifestly confused and vacillating; and that the courts, without much seeming ceremony, have modified the law to suit the temper of the times, and to appease the just complaints of the public. But if the law is

to undergo change, I prefer it should be in our own courts, and adapted to our condition. Let it be done here, instead of in king's bench, or the exchequer.

This, however, is not the course to pursue, for it furnishes no safe and sound principle to rest upon. It seems to me, if we analyze prescription, on which all these English rights rest, for all the cases of ferries will be found to lie in prescription; we shall find a ground of interpretation of right, which will be satisfactory, and show that these cases have no tendency to establish the doctrine contended for by the plaintiffs. They cite them to prove that a ferry has, as appurtenant to it, a franchise which excludes injurious competition from the waters above and below it. I have already shown, that the term *ferry* has no such extended signification; and I will now show, that these cases do not conflict with that position, and that they furnish nothing to aid this notion of constructive and implied rights; but every ferry is limited strictly to what is granted, without the aid of implication.

Prescription and grants in writing, differ only in the mode of proof. The writing proves its own contents, and the extent of the grant is gathered from the terms employed to express the meaning. Prescription is allowed to take the place of a writing supposed to be lost. Equity permits the party to produce evidence, to prove what he has claimed, what he has enjoyed, and how long; and if the period of enjoyment be sufficient, the law presumes that he had a writing which has been lost, that would, by its contents, prove a grant co-extensive with the proof. In the case of *Tripp* v. *Frank*, for example, the plaintiff proved that he had an exclusive right to transport all travellers passing between Kingston and Barton. The law, *485] therefore, presumed, that if his written title could have been *produced in court, it would, in so many words, have given him such an exclusive right. Cases of prescription, therefore, afford no countenance to implied or constructive rights; but stand on precisely the same footing as titles which lie in writing. Usage can never enlarge or diminish title, for one is not obliged to exercise all his rights, to preserve them; nor does usurpation, in theory, enlarge right. The usage only goes to show what the law supposes to have been written. Before, then, the plaintiffs can use these cases of prescription to establish implied franchises, they must show that the lost title is not to be held to be commensurate with the proof; but something is implied, beyond what is supposed to be written. This they will find it difficult to accomplish. It follows, from this, if I am correct in the reasoning adopted, that ferries, *eo nomine*, have no particular privileges belonging to them. They are what authors define them to be, water highways; and each franchise is more or less extensive, according to the terms of the grant creating it. It may be very limited or very broad. The confusion in the English cases, does not arise from any uncertainty in this principle; but from the uncertainty of proof, where the right lies in prescription.

With these explanations, which I fear have been unnecessarily minute, I come to the inquiry: what was granted to the college? And I answer, the ferry; the same thing set up in 1681, by Converse; the way over the river, againt the house of Brown, established in 1633; a road from bank to bank; for this all a ferry over the river means. It was an accommodation

adapted to a few inhabitants in the wilderness. If the franchise was broader, where does it extend to? The terms of the grant indicate no privileges up or down stream. Will the plaintiffs tell us, where their bounds are? Do they know? Is there any rule of implication which assigns them any privileges which they can define? If there is, then, I call on them to put down the boundaries; to show the court the limits. It is not enough, to show that the terms of the grant, if literally and strictly construed, may, under possible circumstances, render their property of little or no value. This only proves they may have made a bad contract, but has no tendency to establish in them undefined and unmeasured rights.

*Let it be remembered, that the plaintiffs, in 1792, remonstrated against the grant of West Boston bridge, alleging that it would [*486 divert half their tolls; and the opening counsel said, they got compensation for the erection of this bridge, which was from Cambridge Port to Boston. Again, they remonstrated against Canal bridge, alleging it interfered with their franchise, and this ran from Lechmere's Point to Boston. Now they say, their franchise does not reach either of these bridges, but is limited to Boston and Charlestown; and the case of *Huzzey* v. *Field*, is quoted to sustain it. This is certainly proof, very conclusive, that the law has been so uncertain, that the plaintiffs have not been able to show the extent of their own rights, as they understand them, or to make uniform claims. Understanding the old cases as I have represented them, they asserted the right to arrest all injurious competition; and as the English courts have cut down the privilege of franchise, from time to time, so their claims have diminished, till they lie between Boston and Charlestown alone.

But it is said, the franchise must be reasonable; and what it reasonable? They deemed it reasonable to assert an exclusive privilege, and to deny the right to open any new ways over the tide-water of Charles river which might divert any travel which would otherwise reach them. Opposition to all new bridges has been deemed reasonable. But why is any enlargement of the grant reasonable? What you give to the ferry, you take from the public; and the public cannot spare it, without inconvenience. In a word, is it reasonable, or right, to traverse the regions of conjecture in this matter? To make laws which shall assign boundaries to this franchise, when the plaintiffs can show no manner of title to what they set up?

They urge that Warren bridge is a clear interference, because it takes away their tolls. So is West Boston and Canal bridges, for the same reason; for the travel would go over the plaintiffs' bridge, if these competitors were away. The proof is no more decisive in the Warren, than in the other bridges. The diversion of travel is not evidence of wrong. The English cases cited, clearly show that; see *Tripp* v. *Frank*. The wrong, if any, consists in invading the plaintiffs' grant. And I again ask them, if they affirm, as they do, that we are on it, to point out its bounds. Show us some certain evidence that we are trespassers; you once contended that West *Boston bridge would be a nuisance, because it would, as it did, take half [*487 your travel; you urged the same argument against Canal bridge, which had the same effect; but you now admit them both to be lawful, because they are not on your franchise. This admission not only proves that you are uninformed as to the rights you claim, but that a great portion of your

accustomed travel may be lawfully diverted. I, therefore, again repeat, that the diversion of travel is, of itself, no evidence of a trespass on your rights. You must, therefore, produce some other proof that your franchise reaches our bridge, than the loss of tolls. You do not show it by the terms of the grant, nor by any established rule of construction, which authorizes such an implied right. It is not the business of courts to make or alter contracts, but to interpret them. Is there anything in the words, "the ferry between Boston and Charlestown is granted to the college," which looks like granting an exclusive control over Charles river, or any part or portion of it, except the way or line of that ferry? I shall hereafter adduce conclusive proof to show, that in England, contracts of this character are rigidly construed in favor of the public, and against corporators. No countenance is given to implication, beyond what is made manifest by the clearest and most explicit terms. *Stourbridge Canal Co* v. *Wheeley*, 2 Barn. & Ad. 792. The franchise of the ferry, then, which has been interposed against all improvements across Charles river, when brought to the scrutiny of law, will be found to be a very limited right, confined to the path of the boats across the river.

This reasoning is strongly corroborated by the condition of the colony, at the time of the establishment of the ferry, as I have already suggested. As a further proof of public sentiment, the colonists, in 1641, almost simultaneously with the grant to the college, and before it took effect (for the college was not incorporated till 1650), passed an act prohibiting all monopolies, except for inventions. The great and wise policy of Massachusetts, in respect to free highways, was established in 1639; and with modifications, has been continued to this time. Anc. Ch. 126, 267; Laws of Mass. 178, ch. 67. Under these acts, a power to construct free ways has at all times been exercised so largely, that Massachusetts owes to it the best roads that can be found in any state in the Union; and they have, at all times, *been established, regardless of turnpikes, bridges, canals, railways or any other improvements. The consequence has been, as is well known, that many of the turnpikes have been abandoned to the public. Such has been the action of public sentiment, and such its results; and this is the first instance in which the right to establish new ways has been questioned.

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All these considerations lead to one conclusion, which is, that neither the language of the grant, nor the great current of public opinion, give any countenance to the claims set up by the plaintiffs, founded on this ferry, for an exclusive franchise extending up and down the river. The late lamented and distinguished chief justice of Massachusetts, in his opinion, in 7 Pick., in this case, expresses his convictions strongly on this point; that the ordinance did not give an exclusive right between the two towns, to the ferry, and in construing it, that the contemporaneous history ought to be considered, as it tends to explain the probable intent of the colony.

If, then, the court confine themselves to the language and the existing circumstances, both of the country and the college, at the times of adopting the several ordinances, they will probably arrive at the following conclusions, as distinctly indicated in the case. The colonists meant to establish a ferry, suited to the then emergencies of the country; but not to establish a broad franchise. They needed a public seminary for the education of youth, and found, by the income of this ferry, they could aid this object. They, therefore, meant to secure the revenue of the ferry, as a gratuity to

the college, but nothing more. And while they did this, they intended to retain in themselves the unqualified right to control, manage, regulate and govern the ferry at pleasure. To make the income much or little; and to make just such provision for the public travel as they might deem expedient. This is the conclusion which is forced upon the mind, by reading the numerous acts upon the subject. The college was then esteemed the child of the government; and that government manifestly considered itself standing in that relation, with the power to exercise parental authority. Now, what effect the court will give to this state of things, in law, remains to be seen; but there is little difficulty in understanding the actual relation of the parties.

One thing, I apprehend, however, is clear; namely, that neither the ordinances, nor the history, afford any evidence of an intent to create *such a franchise as is now claimed. If, therefore, the plaintiffs have this ferry right, it cannot aid their present claims. They grasp at [*489 too much—all the river; or if not, they can assign no limits, either by the law or the facts. The public is not to be deprived of its sovereignty over a navigable river, upon such indefinite, uncertain pretensions.

But suppose, we are erroneous in all this reasoning, in regard to the franchise of ferries; then I propose another objection for the solution of the plaintiffs. The doctrine applicable to ferries, belongs to ferries alone, among highways. It is feudal in its origin, and has never been applied to turnpikes, bridges, canals, railways, or any other class of public ways. I have attentively observed the progress of this case, and the learning and laborious research of the plaintiffs brought to its aid. No books, ancient or modern, seem to be left unexplored. Even foreign periodicals, fresh from the press, are on the table; and yet they have shown the court no case where this doctrine which they set up, has been applied to any class of ways, except to ferries. The *Chesapeake and Ohio Canal Company* v. *Baltimore and Ohio Railroad Company*, in Gill & Johnson, has been quoted; but surely not for the purpose of showing an exclusive franchise, for these works are allowed to run side by side, actually infringing upon each other, though direct competitors. England is covered with canals, railways, bridges, &c.; but not a case has been adduced, applying this doctrine to them; and the honor of extending a feudal right to such works is saved for the courts here, if it is to be maintained at all. These feudal rights are well known to have originated in the very spirit of cupidity; which aggregated to itself all privileges which increased the mass of wealth in the feudal lords, at the expense of the public. These rights grew up to be law, from the force of circumstances; but it is hardly worth while, at this day, to enlarge such provisions, or to push ourselves ahead of Great Britain, in giving sanction to them. Under this notion of special privileges, the same doctrine extended to mills, markets, &c. Whoever had a market or a mill might keep down injurious competition. We have clearly thrown the law as to markets and mills overboard; for no such privileges exist in Massachusetts: and the doctrine of constructive franchises in ferries ought to follow. *It is emphatically the doctrine of privilege against public right; I speak [*490 of those vague, indefinite appendants and appurtenants which are said to belong to ferries, by construction and implication; not of what is granted in terms, or by necessary and irresistible implication. This doctrine ought

not to be received, unless it is the imperative law of the land, and can be shown to be so, beyond all doubt; and this the plaintiffs have failed to establish.

I come now to a very important inquiry in regard to this ferry. Are the plaintiffs the owners of the right, be it what it may? If they are not, it is a question of no importance, whether the franchise is broad or narrow. The facts here, will, if I do not mistake their character, relieve the court from all embarrassment. I agree with the plaintiffs' counsel, that the commonwealth has the power and the right to take any property for public use; and therefore, also agree with them, that she had a right to take the ferry for the site of a bridge. How could the plaintiffs controvert this proposition, when their bridge is on the ferry ways, and the ferry path under it? But it by no means follows, if the commonwealth had the right to take for the public use a franchise, that she has granted it to the plaintiffs. This must depend on proof. Let us see, what the franchise is claimed to be, and what has been done with it.

It is asserted by the plaintiffs, that the franchise was an exclusive right to transport persons, &c., between Boston and Charlestown. This is an interest issuing from the realty. It is a possessory right, so far as the right to exclude transportation across the river goes; though I am aware that it is incorporeal. I seems to me, therefore, by the laws of Massachusetts that it could only be transferred by deed. Anc. Ch. 18; Laws, 1783, ch. 37. Courts of equity have no power to construe away these provisions. But the plaintiffs have no deed. Again, they have no vote or act of the college corporation, or any of its officers, implying any purpose or thought of conveying this interest. Again, the plaintiffs produce no vote or act of their own, evincing any desire on their part to become the owners of the ferry. The petition for their charter is among the papers, and it does not even name the college; but passing over its head, as not worth regarding, it asks for the right to build a bridge "in the place where the ferry is now kept."

*491] There is nothing in the cases to show, that the *thought of owning the ferry, ever entered the minds of the petitioners. They had no difficulty in demanding a grant of the ferry-ways themselves, for the site of a bridge, without proposing any compensation for it. Those great and sacred private rights, which now figure so largely in this case, seem to have been no serious obstacle to the introduction of a more convenient way; but a change of interest has, probably, wrought a change of opinion.

There is, then, no evidence of any purpose on the part of the college to sell, or of the plaintiffs to buy; and if the property has been transferred, it has been done, without the act or the assent of either party. This would seem difficult, if not impossible; still, it is strenuously insisted upon, because the act of 1785 requires the plaintiffs to pay out of their tolls 200*l.* a year to the college. This, it is said, is a good consideration, and draws after it, in equity, the title to the ferry franchise. The conclusion is not apparent from the premises. If being required to pay 200*l.* a year, makes them the owners of the ferry; then why is not the corporation of West Boston bridge an owner, for they are required to pay 400*l.* a year to the college? Canal bridge would also come in for a share, as they too, if my memory serves me, were required to pay something. The plaintiffs would probably object to these copartners. But is there any foundation for this pretended con-

sideration? Who has paid it? Let the facts answer! The legislature granted a toll for passing the bridge, so liberal, not to say extravagant, that for an outlay of $46,000, the plaintiffs have received a return of over $1,200,000, as they admit; and their shares, which cost 100*l.*, have been sold for $2000. The 200*l.* a year have, therefore, been paid by a tax upon the public travel, collected by the plaintiffs, under the authority of the legislature. The tolls appear to have been set very high, to cover this expense, and to give the plaintiffs an early indemnity; as the public might have occasion to make new ways, and diminish the amount of travel. This contingency was doubtless in view, when the rates were established. There can, therefore, be no reasonable ground for saying the plaintiffs have ever paid a cent of compensation. It would be extraordinary, if they, without any conveyance, or any purpose to convey, and without any consideration, could set up a title to a valuable property.

But they suggest further, that the state has conveyed the ferry *franchise to them. The act of 1785 will be searched in vain for the intimation of any such purpose. Moreover, the state has no [*492 power to take the property of one, and convey it to another. They may condemn so much as is necessary for public use, but nothing more. To test this matter, suppose, the bridge were taken away, can the plaintiffs set up a ferry? I think no one can hesitate what answer to give. They are authorized to maintain a bridge, and no other kind of way. The conclusion of he matter is, that the legislature authorized the plaintiffs to set up a bridge upon the ferry-ways, and took upon themselves to quiet the college, which neither assented or dissented, but relied on the commonwealth, which had always been its great patron and protector, that eventual injustice should not be done to it.

The learned judges, three to one, reached, substantially, this result, in Massachusetts. It is, therefore, plain, that the plaintiffs are not grantees of the ferry, and have not, and never had, any interest therein. The ferry franchise, therefore, whatever it may be, is of no importance to the decision of this case, as the plaintiffs can claim nothing under it. The plaintiffs having failed to show any contract in regard to the ferry, and the legislature having passed no law touching the ferry, for the act of 1828 does not name or allude to it; nothing has been done by the state to impair the obligation of a contract, or to violate the constitution of the United States. The discussion, however, may not be wholly useless, as some principles have been examined, that are applicable to other parts of the case.

I shall now proceed to examine the act of 1785, under which the plaintiffs acquire the right to build the bridge, and all other rights which they have. This act is so barren in those provisions which are necessary for a feudal franchise, that a great effort has been made to build up a claim upon the vague doctrine of ferry rights. Nothing is more reluctantly surrendered than inordinate profits. The provisions of this act are, substantially, as follows: § 1, creates a corporation: § 2, provides for its organization: § 3, gives a toll for forty years: § 4, relates to the dimensions, &c., of the bridge: § 5, gives 200*l.* a year to the college: These are all the provisions.

They had a right granted for what they asked, namely, to erect a bridge in the place where the ferry was then kept, and to take toll *of [*493

such as passed over. This is all the franchise provided for in the act; there is not a word about any other rights and exclusive privileges. Nothing restraining the power to make new bridges; no covenant, that there shall be no diminution of travel, or diversion of it; no line of travel guarantied —nothing said of the travel between the two towns; not a word about making compensation, if any of their property should be taken for public use. You will look in vain for any such provisions; and if the plaintiffs have any such rights, growing out of this act, they must be implied, for they are not secured by express stipulations. Here, the question recurs, what is the rule of construction applicable to such acts? I shall ask attention to but one authority: the case of *Stourbridge Canal Co.* v. *Wheeley*, 2 Barn. & Ad. 792, to which I have referred. Lord TENTERDEN says: Such an act, that is, an act of parliament incorporating the plaintiffs to make a canal, is a bargain between the public and the adventurers, the terms of which are contained in the act. He affirms, that the rule of construing such acts is well established to be in favor of the public, and against the adventurers; which is exactly opposed to the rule so elaborately laid down by the learned counsel in this case. His lordship distinctly and emphatically declares, that whatever is doubful or ambiguous, or whatever is capable of two constructions, must be construed favorably for the public, and against the adventurers. This case seems to run on all four with the one under consideration, in many of its features—both sets of plaintiffs are corporators, created by acts of legislation; both own ways, and each claims a franchise. The general characteristics are, therefore, alike; and clearly the rules of law applicable to both, and regarding the construction of the charters, ought to be alike; and if so, the plaintiffs can take nothing but what is clearly and distinctly granted to them, either in words, or by plain and necessary inference. The question, then, arises, is it a necessary and irresistible inference, from the terms of this act—a thing so plain as to admit of no doubt—that the legislature did intend to grant to the plaintiffs a roving franchise, to which they can assign no limits; which, in 1792, was above West Boston bridge, but is now limited to Boston and Charlestown? If the plaintiffs cannot give body and shape to the thing to be inferred, if they cannot assign to it limits; in a word, if they cannot tell what it is; how can it be said to be either a plain or a necessary inference? It can neither be the one nor the other; and the very doubt thrown over it, forbids the making of the inference, according
*494] to the principles so clearly asserted *by Lord TENTERDEN. Implication cannot go beyond what is certain and irresistibly necessary; especially, where an act is capable of an obvious construction, consistent with its general purpose, without such implication. This act is of that character. The legislature granted the right to construct and maintain a bridge, and to take tolls for forty years; but this right of taking toll does not go beyond the privilege of demanding it of such persons as voluntarily pass over. This is all that is guarantied, and these rights have not been touched. Whether another bridge should be erected, so near as to divert the travel, is a matter which they did not bind themselves not to do, but retained in themselves the right to exercise their discretion, as they pleased; in case, in their judgment, the public needed new accommodations. They asserted the right, and diverted nearly half the travel, when West Boston bridge was set up; again, when Canal bridge was set up; again, when

Prison Point bridge was set up; and lastly, when Warren bridge was erected.

The commonwealth has, nevertheless, exercised this power sparingly; and only when pressed by strong emergencies. The plaintiffs asked, in their petition, to be indemnified for their expenses, and they have been suffered to go on, until they have been remunerated in a most princely manner. The commonwealth having, at all times, the right to set up interfering bridges, has foreborne to do it, in a most becoming spirit of liberality, and little merits the denunciations now loaded upon her. Such seems to me to be the plain import, and the obvious meaning of the act, and no forced construction or implication is necessary, to ascertain the rights of the parties. The plaintiffs seem to suppose, a diversion of travel is an invasion of their property. This is a mistake. They have no property in travel, for nobody is obliged to travel over their bridge; and they now admit, that bridges may be erected anywhere, except between Boston and Charlestown, however much travel they may divert. They affirm that a grant of toll for forty years means nothing, unless it be absolute and unconditional, securing the travel. Might it not be granted on the express condition that other bridges should be erected, if deemed expedient? Not granting away a power, is equivalent to retaining it; and the legislature never surrendered the right to build new bridges. The plaintiffs have, therefore, enjoyed their privileges, subject to this right. Their tolls have been diminished; but neither by wrong, nor any violation of their rights under the act; *nor has any injustice been done to the corporation, as I purpose to [*495
prove, before I leave this point.

But they again claim a reasonable construction. Why is not this construction reasonable? The plaintiffs make less money; but are they not indemnified? Would it be more reasonable, to permit them to exact an endless tribute, and to subject the public to other great inconveniencies and delays in their business? What were the large tolls granted for, unless to give a speedy indemnity, that the public might have new accommodations, when needed? What would be the plaintiffs' judgment of what is reasonable? They told you, in 1792, it was an unqualified control over all the important portion of the river. You must not, they said, impair our bridge. Any construction would be deemed unreasonable, which should diminish the toll.

Again, it is said, there are stockholders who are great sufferers, having bought in at $2000 a share. I will not deny this, for I am uninformed as to the holders of stock; but I will prove that this consideration is entitled to little weight, even in equity; for I will show that the commonwealth gave the most unequivocal notice, to all persons, of her construction of the act of 1785; and when she renewed it in 1792, she placed upon record a solemn and public legislative declaration, that she acknowledged no such rights vested by that act, as are claimed here. In 1792, Oliver Wendall and others petitioned for leave to erect what is called West Boston bridge, about a mile above the plaintiffs' bridge. The plaintiffs sent in their remonstrance, objecting, that it would impair their property, by reducing their tolls one-half. The petition and remonstrance were committed to a joint committee of both houses, who heard evidence and counsel in behalf of the parties; and after a most full investigation, they reported in favor of the new

bridge. This report was so amended by the two houses, as eventually to contain all the provisions of the act of 1792 ; and in this form, is was accepted by both houses. In this report, thus adopted as the basis of this law, is contained this declaration :—"There is no ground to maintain, that the act incorporating the proprietors for the purpose of building a bridge from Charlestown to Boston, is an exclusive grant of the right to build over the waters of that river ; but considering the erection of Charles River bridge was a work of magnitude and hazard, and that great benefits have arisen to the public *from the success of that enterprise," &c. ; "it *496] is reasonable and proper, that a further time of thirty years be granted to said proprietors, to receive and collect, for their benefit, the toll now established by law for passing said bridge," &c. The legislature being apprised of the broad claim set up, on the trial before the committee, took this occasion to say, in connection with the extended grant of tolls, that the plaintiffs had no such rights ; and that in giving the extension, they meant to give countenance to no such thing, but simply to reward, most liberally, a commendable spirit of enterprise. When the charter of the defendants was granted, in 1828, the forty years had expired ; and the plaintiffs had entered upon the extended period provided for, by the act of 1792, or the charter of West Boston bridge company.

This declaration, and the passage of this law, being concurrent acts, the meaning of the legislature cannot be mistaken. They put their explicit denial, upon the right to raise implied covenants not to erect new bridges ; and declare, that they extend the right of tolls, because, among other reasons, the plaintiffs had no such exclusive privilege. The plaintiffs have accepted the provision for them in the act of 1792 ; claim the benefits of it, and plainly ought to be bound in equity by this exposition. It was a distinct notice to all persons, who were, or might be, concerned in the property, that the denial of the right of the state to make new bridges, would not be regarded ; and whatever might, by construction, be their privileges, under the act of 1785, its renewal in 1792, was on condition, that no such pretension against the power of the state should be set up.

It has been said, that this is only found in the report, and is not, therefore, obligatory. But to this, I answer, that the report was the subject of distinct, deliberate legislation, in both branches. It was accepted by both, acting in their constitutional capacity ; it is part of the records and files. The law is only an echo of it, embodying the matter in the accustomed forms of legislation. We offer this report, not to explain away or to alter any provisions of the act, but to refute an inference made on presumption ; to negative an implied engagement which is attempted to be enforced ; to show that the legislature did not mean what the plaintiffs attempt to force upon us by construction ; and, most assuredly, it is competent for this pur- pose ; it is competent to overthrow a presumption which it positively *497] *refutes. It is, therefore, conclusive upon the plaintiffs ; and has the same restraining effect on their presumptions, that it would have if it had been embodied in the act. How can they, then, show the effect of it ? The counsel replies, that they do not claim a franchise extending to West Boston bridge, for they only claim between Boston and Charlestown ; and there is no distinct larger claim set up in their remonstrance of 1792. If they did not consider the West Boston project an interference, why did they remon-

strate; and why represent that it would take away half their travel, and ask a refusal of the grant desired by the petitioners? But suppose, if you can, that they really did not mean to assert that such a bridge would be an interference, the declaration, which is an answer to the remonstrance, only becomes the more pointed and explicit; for it is then saying, in so many words, you have no exclusive rights between Boston and Charlestown, and we admonish you of it, and renew your charter, with the express understanding that you are to so consider it. View it, then, in any aspect in which it may be presented, and the declaration still stands unshaken, and cannot be construed away. It clings everywhere, as a condition of the renewal, not to be explained away. What right, then, have the purchasers of stock to complain? They are bound to notice the terms of the charter, and to regard its provisions; and surely, ought not to demand relief from an inconsiderate or rash contract, at the expense of the public.

But the court has been asked, with considerable emphasis, if the plaintiffs would have accepted a charter, with power left in the legislature to erect bridges at pleasure? The answer has already been given. They did accept it, after all the deliberation they saw fit to make, and with this unequivocal notice before them. We ask, in turn, if the legislature would have granted to any company such privileges as they claim, if the privileges had been set forth in plain and intelligible language in the act? Would they have given an exclusive right over the river to any body? The answer is again at hand. No sooner were such claims set up, than they denied their validity, and refused to recognise them. They again, in 1807, when Canal Bridge company was incorporated, renewed the declaration against them, in a formal manner; and again, when Warren bridge was established. They have, at all times, earnestly protested against all such claims. The views of the legislators *and of the people are not doubtful on this point; they have not misled the plaintiffs by silence, or for a moment favored their pretensions. [*498

But much is said of the hardship. Their property, which is of great value, it is said, is rendered worthless; it has been taken from them and given to others. Here the plaintiffs mistake their rights, and reason from false premises. They suppose, they had a property in the public travel, when they had none. There cannot be any property in public travel, because no one is under any obligation to pay toll, unless he passes the bridge, and that is an optional act. If the act of 1785 imposes no restrictions upon the legislature, and they had a right to authorize the new bridge; then nothing is taken from the plaintiffs, if all the travel passes over it. All that can be said is, that while the legislature forbore to exercise its lawful rights, they made a vast deal of money, by an exclusive enjoyment; and now they make less, not because anything is taken from them which was theirs by contract or grant, but because a lawful competition is set up. Their case of hardship differs in nothing from those of frequent occurrence.

Suppose, A. sells to B. a tavern, having a large custom, and makes conveyance. A. then erects another house near by, and the custom follows him, whereby B. is ruined. B. has no remedy, unless A. has covenanted expressly not to do this act. Again, one has a tavern, store or other place of business, dependent on public travel for its custom; a new road is established, which diverts all travel from it, and renders this property worthless; the owner

has no remedy, but must bear the loss with what patience he may. These are matters of frequent occurrence; and present cases of much greater hardship than the plaintiffs are called upon to endure; for they have reaped too rich harvests to be great sufferers. The owners of real estate on the avenues to their bridge, will, if the travel is discontinued, or greatly impaired, probably, suffer more severely than the plaintiffs; but what remedy have they? The plaintiffs, therefore, if they should hereafter receive less tolls, will be in no extraordinary position. It will doubtless turn out that their property is far from worthless, as it may be applied to other uses. But what if there is hardship? Is that to be relieved, by making a new contract here, or by altering an old one? Shall the commonwealth, to relieve the plaintiffs, be made a party to stipulations that she never entered into? This would be more unjust, than any losses *or inconveniences which can occur to the plaintiffs. Presumptions got up to relieve hardship, are too often the parents of the greatest injustice.

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The plaintiffs seem to think it is incredible, that any of the large privileges which they have enjoyed, should rest on the forbearance of the commonwealth. They treat the idea that they should hold anything at her will, as preposterous. To be at the mercy of the state is absurd; and so irreconcilable with just reasoning, that it is not to be entertained, in giving construction to this act of 1785. We must arrive, they think, at any conclusion but this; though the very terms of the act force us into this position. Either the state or the plaintiffs have the control of this river; and whoever has, excludes the other from a sole enjoyment. In order to free themselves from control, the plaintiffs would bring the state to their feet, and place her at their mercy. This would be the measure of justice meted out by their construction. I will leave it to the court to determine, which would be the most becoming posture, and which would best subserve the ends of public justice—to place the plaintiffs at the mercy of the state, or the state at their mercy. They demand, when they say they have a right to exclude injurious competition, that the travel shall be arrested on the north bank of the river, and driven by circuitous and inconvenient ways over their bridge, and shall, in addition, pay tribute perpetually; not to indemnify for the enterprise, but to add to the mass of wealth already accumulated. If the state is tied down to this burden, be it so; but let us see decisive proof of it. Let it not be by presumptions or implications. If the plaintiffs wish for equity, let them do equity; that is a first principle. Let them frankly admit, that they had notice of the limited terms on which their act was renewed in 1792; and not try to shut that all-important fact out of sight.

The honor of the state is untarnished, and her reputation fully vindicated. There has been much false rumor in this matter; much mistake and unjust imputation. The state has made no attempt to resume her grants, or to seize private property, by violent and revolutionary measures, for public use. She has not acted arbitrarily, illiberally or ungenerously toward any one; but, on the contrary, has forborne to use her lawful power, until she saw those who had done a valuable public service, not only reimbursed, but enriched in a manner surpassing all ordinary acquisitions. She then listened to *the demand of the public for further accommodations, and not till then. There is no blot upon her escutcheon, nor stain on her garments, in this matter. In proof of this, I fearlessly

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assert, that the counsel are mistaken when they say, that a decision in favor of the defendants will be fatal to future enterprise. This case has stood decided in their court for several years, and the history of Massachusetts can exhibit no period that will compare with it in investments for internal improvements. Confidence in the integrity and good faith of the state never stood higher, nor did capitalists ever go forward with greater resolution and courage. I feel, therefore, justified in affirming, that the honor and faith of the state is untarnished, and she stands blameless in her conduct.

I come, then, to the conclusion, for all these reasons, that the act of 1785 is incapable of the construction put upon it by the plaintiffs: That its meaning is plain, and it gives no franchise beyond the bridge: That in 1792, this construction was given to it by the legislature, and it was then extended thirty years, upon condition that it should be so construed: That the stockholders can complain of no injustice, for $46,000 has returned them over $1,200,000; and if any one is a loser, by giving a great price for the stock, he must impute it to his negligence, in not regarding the construction given by the legislature to the act: That the rule adopted by the legislature, and the rule of the common law, are concurrent; and therefore, if the notice should be ruled out of the case, it will not change the result.

All this, I contend, is in full accordance with the policy of the state. 1st. Her system of free road laws has, at all times, been active, and by its operation has rendered many turnpikes worthless. 2d. The statute books will show that numerous bridges have been granted, at or near old ferries, without compensation. 3d. Railways and canals have been granted, in many directions, regardless of old franchises, or of their injurious consequences to old lines of travel; but of this more hereafter. Since, therefore, nothing is taken from the old bridge by the law of 1828, but the proprietors are left in full possession and enjoyment *of everything granted to them; and since their only complaint is of a diversion of travel, and a consequent diminution of tolls, I am not able to perceive, that they have any contract which have been violated, or had its obligation impaired: and therefore, the constitution of the United States has not been violated. The act of 1828 does not rescind, alter or modify any of the provisions of the act of 1785; but leaves the plaintiffs in the full enjoyment of them, and in the undisturbed control of their bridge. [*501

I will now answer, more particularly, some of the arguments of the learned counsel. Most of the reasoning is founded on premises which will fail, if we have sound views of the law; or is designed to overthrow positions which we have never assumed. He says, for example, that the legislature has no power to resume a grant. Our answer is, that they have not attempted it; and therefore, that question is not raised in the case. We contend for no such power. What they claim as their property was never granted to them; and the mistake is, that they do not own what they suppose has been taken away. They must establish their title, before they talk about the resumption of grants, and the taking away of their property. They must remember, that this right of property is the very matter in litigation; and one of the great points to be settled is, whether they show any title that can stand the test of legal scrutiny. If they do, we do not claim it, without an equivalent.

It is said, the franchise is to be ascertained by the facts, and is to be reasonable. It seems to me, that it is to be ascertained, as Lord TENTERDEN says, by the terms of the bargain; and these are to be found in the act. What is deemed reasonable, we have seen, is co-extensive with the selfish desires of making money. When the plaintiffs depart from the act, they can find no standard for what is reasonable. To-day, the exclusive claim is between Boston and Charlestown; yesterday, it embraced Canal bridge; and the day before, West Boston bridge. If the plaintiffs can show no rule to settle reasonable limits, how can they hope the court will relieve them from the embarrassment? When we go in search of what is not apparent in the act, we grope in the dark; and hence, the well-established rule laid down in *Stourbridge Canal Company* v. *Wheeley*, that you shall not build up claims on presumption. The plaintiffs could find no authority to rest upon for making Boston and Charlestown the boundaries of their franchise, until they *fell upon the late case, in the exchequer, of *Huzzey* v. *Field*. *502] What assurance have we, when the law as to ferries shall again come under consideration, that it will not receive a new modification, and their franchise then take new boundaries?

But again, another and different rule is laid down by the counsel, which undoubtedly is considered reasonable; though in its application it rests on quite different principles. The counsel, in treating of what is reasonable, asks, how do you settle what is a nuisance, where the air is corrupted? Not by bounds, not by distance or measure; but wherever the noxious atmosphere is, there is the nuisance: so with the plaintiffs' case, where the injury is, there is the nuisance; whatever takes away their tolls, invades their franchise; for this is the injury of which they complain. This view brings us back at once to the old doctrine—"you shall not impair my franchise;" and proves in the most conclusive manner, that all the bridges above theirs are nuisances, for the travel which passes over them would chiefly go over their bridge, if the others were closed up. It is too plain, that the learned counsel, in his able argument, has, whenever he has expounded the law, or undertaken to show what is reasonable, fallen back upon this rule, as the only resting-place he can find. He began, by saying, what is reasonable must be ascertained by the facts; and ended by showing, that the only fact necessary to be inquired into, is, does the injury complained of, lessen the tolls? If it does, it impairs the franchise, and is a nuisance. If this is to be the end of the inquiry, the reasonableness or unreasonableness of the franchise set up, is not a matter of investigation. The inquiry is not into that fact, but whether the tolls are diminished. And, I think, this will be found to be the only standard the plaintiffs have ever set up. Indeed, if you admit that some injury may be lawfully done, where is the limit? Let us then dismiss this wandering inquiry after a reasonable franchise, and go back to the act of 1785, and hold to that, instead of building up a new contract; for the plaintiffs have professedly ceased to claim a right to put down all competition that lessens their tolls.

It is admitted, says the counsel, that the legislature has the control over public ways; and their judgment, as to the necessity for them, is final and conclusive. But he adds, that it is not like the British parliament, omnipotent, for this court has a right to correct its errors. *The power *503] of this court, allow me to say, also, is not omnipotent; and it can

acquire no jurisdiction over an act of the legislature, unless such act impairs the obligation of contract. I may add, speaking it with great deference and respect, that while I repose great confidence in this tribunal, I feel no cause for distrust in those of our commonwealth. I, therefore, do not feel that we are unsafe, without such a corrective; as we, in truth, are safe, in most matters upon which our courts adjudicate. I can see no more impropriety or hazard in resting final jurisdiction there, than here; for I am not aware of any proneness there to error or excess, which demands a corrective. Indeed, it cannot be desirable, nor it is the purpose of the federal constitution, to carry this jurisdiction over the constitutions and laws of the states. The system would manifestly be insupportable; and I shall, before I leave the case, attempt to show, that the jurisdiction of this court does not reach this case, because it falls exclusively within the constitution and laws of Massachusetts. I shall endeavor to make it appear, even if property has been taken for public use, it is no violation of contract to do it; and the question of compensation must be decided, finally, by our own court.

Again, the learned counsel says, "the legislature is limited by the principles of natural justice;" and I agree that it ought to be, and that it ought not to take property without compensation; but the constitution of the United States nowhere gives this court a right to inquire, whether the legislature, and the state courts have disregarded the principles of natural justice. I would respectfully ask, if this court is to be the corrective in such cases? But I am not willing the reproach of violating the principles of natural justice, should rest on the state. Did the state ask the plaintiffs to build the bridge? Did she ask them to accept the act, after it was made a law? They sought the privilege, and accepted the act, after taking all the time they desired to consider its provisions; and have had, and may continue to have, the full benefit of them. The supposed violation of natural justice does not consist in interfering with the provisions of the act; but in refusing to recognise claims not enumerated in it—rights unauthorized by it—privileges not intended to be granted We cannot find in the act certain provisions of which they claim the benefit. Is it a violation of natural justice, to refuse them the right to add what they please to the act?

Again, they state to the court, to prove their disposition to accommodate the public, that they proposed to the legislature to enlarge the *bridge and the avenues, and to make other alterations, to meet the public [*504 emergencies; and so they did: but is it not too plain, that this offer came when they must have known it could not be accepted? They had contested the right to build a new bridge, again and again, before committees, and the legislature. The corporation voted to make the proposals, on the 25th of February, and the law was approved on the 12th of March following. There is little doubt, therefore, that they were made, after the report of the committee, and during the pendency of the bill before the legislature. It is hardly reasonable to suppose, that propositions made, thus apparently with reluctance, and in that late stage of the proceeding, could be any otherwise viewed, than as measures for delay—than as counter-plans to defeat the measure. But whether that be so or not, they came too late. But further, it seems, they considered themselves as having no authority to erect suitable accommodations for the public. They could not enlarge the bridge, nor the avenues, if insufficient for the travel, without a grant of power from the

legislature. Is this consistent with the claim of exclusive right over the river? If the court will look into the cases quoted, in regard to markets, it would be found, that the public are under no obligation to respect the franchise, unless suitable accommodation for the business is afforded; and that the exclusive right, and the obligation, go together. Is it true, that the plaintiffs hold this exclusive privilege, and yet have no power to open a way suited to the public travel? Does not this limitation of power prove a limited franchise? Their power to enlarge does not reach beyond the planks of the bridge; and why? Because the act of 1785 will carry them no further. By what rule, then, will it carry their franchise further? If they can imply a franchise; then may they imply a power to enlarge, but this I think they will not venture upon, since they admit, the act of 1785 gives no countenance to it.

These are some of the leading arguments which remained unnoticed, and I shall not detain the court longer in pursuing this kind of inquiry, for I shall occupy more of their time, if I follow out the various positions taken, in an argument of nearly three days, than I think myself justified in consuming. I will, therefore, pass to the next great division of the case, which constitutes, in the pleadings, the second issue. If we are right in the legal positions we have assumed, our labor *here is unnecessary, for
*505] the plaintiffs have no case; but as we cannot know how the minds of the court will run in this matter, we must investigate the point. The question is, if property has been taken for public use, under the act of 1828, and no compensation has been made, is it a violation of the rights of the plaintiffs, so as to impair the obligation of contract, and thus conflict with the constitution of the United States?

I shall contend, that whatever may be the constitution and laws of Massachusetts, and whatever obligations they may impose on the legislature, to provide compensation, where property is taken for public use; the omission to do it, in the act of 1828, is no violation of a contract, which impairs its obligation, within the meaning of the constitution of the United States; and therefore, this court has no jurisdiction in the matter.

To establish this conclusion, I shall attempt to maintain the following positions: 1. That the power to provide public highways, is an attribute of sovereignty, necessarily residing at all times in a state. This is apparent; for without this power, all intercommunication would be interrupted, and each person confined in matter of right to his own estate. It is an element of sovereignty, as much as the power of taxation; and political organization cannot exist without it. 2. This power necessarily implies the right to take private property for public use. The territory of a state is owned by individuals, and roads must run over this territory; therefore, they cannot be authorized, against consent, with the right to appropriate private property to public use. The alternative is, that the government must have this power, or the public can have no roads. 3. All property in Massachusetts, including franchises, is held and enjoyed, subject to this right of sovereignty, resting upon it as an incumbrance. I know of no property in the state exempted from his liability; and in *Commonwealth* v. *Breed*, 4 Pick. 460, the court allege, that it has always been taken, when needed, be it what it may; and mentions, as illustrative of the extent of this right, that the legislature have, at pleasure, obstructed navigable rivers, which are

public highways. The plaintiffs' bridge was built upon the very ways of the ferry, and the court in 7 Pick. considers this as lawful. This right is co existent with the colony, and so far as my knowledge extends, has never been questioned. The legislature are the *sole and final judges of the necessity of taking property in this manner; on the ground, that [*506 it is their duty, as the representatives of the people, to provide for the public wants. Ibid. 4. As this right to provide ways lies among the elements of government, and has always been exercised, and asserted in its broadest terms; it follows, that the right to take private property for this purpose, is equally broad; and that the mere taking and appropriation of it to public use, can never, of itself, impair the obligation of contract, or violate the constitution of the United States; for the fundamental laws of the state authorize the taking, and all property is always held on condition that it may be so taken and applied. The right rests as an incumbrance upon it, as much as the right of taxation. This principle is sustained, if it needs authority, in *Providence Bank* v. *Billings*, 4 Pet. 514; where it is said, in substance, that if a franchise be taxed to its ruin, by the very power that created it, this is no violation of contract, for the right to tax is an abiding public right covering all property. To refuse to make compensation, may violate the constitution of Massachusetts, but not of the United States.

The right to make war, to impose embargoes and non-intercourse acts, to change public policy, to regulate intercourse with foreign countries, and to do and perform many other things—all which may subject the people to great hazards and losses—has never, and can never, be questioned, whatever may be their influence upon trade or individual property. But however disastrous such acts may be, and whatever losses may be sustained, the citizens are without remedy. These mutations make one poor, and another rich; but they are incident to the social and political condition of mankind. Public policy, and public laws, cannot be made to bear upon all alike. New ways, for example, must be provided. In doing this, the property of one, which is not touched, is nearly ruined, by being abandoned by the travel, while that of another is benefited by the passage of the new way over it. But all who hold property, hold it subject to the right to make these changes, for the public good demands it; and the right to do it, must, I think, stand unquestioned. It is one of those attributes of sovereignty, which must be constantly exercised; and such property, be it what it may, must be taken, as is necessary to meet the exigencies of the public for ways.

It is plain, therefore, that no property is exempt from this liability *to be taken, unless the state has agreed to exempt it; and it may well be doubted, whether the legislature of a state has any authority [*507 to bind the state to a contract to exempt property from this liability beyond the pleasure of the state. This power bears a strong resemblance to the taxing power; and in *Providence Bank* v. *Billings* the right to perpetually exempt property from taxation, is considered doubtful. If the sovereign right to make roads, can be alienated as to a small territory, it may be as to a large; and thus the state might, by legislative power, be dispossessed of one of its most necessary and essential powers for ever. The sovereignty of a state seems to me to be an unfit matter for bargain and sale, *in*

perpetuum; and hence, the right is acknowledged, whenever the public exigency demands it, to lay new ways over ways already granted, as in the case before us, by compensating for the property taken.

When a way is laid over property, but two questions can arise; is the property exempt from liability to this public burden? and is compensation provided for such as is taken for public use? The first of these questions is not raised in this; for it is not urged, that the defendants' bridge touches anything exempt from being taken for public use. The second, as I have intimated, I shall, by and by, attempt to prove, does not fall within this jurisdiction, but belongs to the local courts.

The plaintiffs raise another question, which I must first consider, for it meets me here in its natural order: they allege, that the act of 1828 impairs the obligation of contract, and therefore, violates the constitution of the United States; and this they must establish, before they can give this court jurisdiction. I come, therefore, to the fifth inquiry, has the state agreed to make compensation to the Charles River bridge company, for the privilege of running another bridge or way across the river, which diminishes their tolls? If the state has made such a contract, let her abide by it; if not, then let the plaintiffs show some right to bring us here. No such provision can be found in the act of 1785; nor is there anything in the act, which would lead one to suppose, that any such purpose, was, or could have been, within the intent or meaning of the legislature. It would, therefore, be a forced, unnatural inference. But under the rule of construction applicable to such acts, I deny the right of the court to raise an implication, which is not a clear and necessary inference from the terms of the act. If the infer-
*508] ence be at all *doubtful, or if the act is fairly capable of another construction, then the implication cannot be raised. I submit to the court, with much confidence, that such an obligation does not spring naturally from the language or general tenor of the act; and one can scarcely fail to be confirmed in that opinion, when he turns to the bill of rights, prefatory to the constitution of Massachusetts; and there finds, in the 10th article, provision made for compensation in cases where property is taken for public use. The plaintiffs, if they thought of the matter at all, doubtless relied on this provision in the fundamental law. They had no motives, then, for other provisions in the act; for the constitution of the United States was not made or ratified till 1789, four years subsequent to the passage of the act of 1785. It seems to me hardly to admit of a doubt, that when the act of 1785 was passed, all relied on the bill of rights for indemnity, in case public emergency called for an appropriation of the franchise for public use.

This being the state of things, I will inquire, first, what provision has been made to satisfy the constitution of Massachusetts? and second, whether that of the United States has been violated? On the first point, I will only add to what has been said, that I shall not contend, that where property is taken for public use, the bill of rights does not impose a peremptory obligation to compensate for it.

The act of 1828 provides an indemnity for all real estate taken for the bridge. The plaintiffs complain, that a part of their franchise is taken. What is it? An incorporeal hereditament, but issuing from real estate—a right to exclude other interfering ways. Now, if they have such a right spreading over the river, in the nature of an easement, and can show that the

new bridge is within their limits, why is not a sufficient remedy provided by the act? Is it because they cannot define this franchise, or give any reasonable account of its dimensions, that they omitted to put in their claim for damages? If the new bridge does not touch this right, then, by the laws of Massachusetts, they can have no claim for damage, however much they may suffer.

The doctrine is well settled in *Callender* v. *Marsh*, and many other cases; and the rules applied to the bill of rights are these: Where property is actually taken for public use, there the party injured may have his damage. Where property is not touched, however much the owner may *suffer, [*509
he has, under the bill, no remedy, for nothing is taken for public use; and it is *damnum absque injuria;* what is merely consequential, is, therefore, without remedy. If the right of exclusion does not reach up the river, above the new bridge, then the defendants are not liable, whatever may be the diversion of tolls; for they do not touch the property of the plaintiffs. I have shown, I trust, very clearly, that a diversion of tolls is not necessarily, of itself, any invasion of the plaintiffs' rights. They admit this, because they now admit that Canal bridge and West Boston bridge were both lawfully erected, and yet both diverted tolls to the extent of travel over them. Nothing is more plain, than that they have no property in the travel, or any line of travel; for if they had, these diversions from their line would be aggressions upon their rights. There cannot be a property in what one neither has in possession, nor any right to reduce to possession. The plaintiffs can compel no one to go over their bridge. The injury, therefore, which the plaintiffs sustain, if any, is because the defendants have come within the limits of their franchise, and erected a bridge, and caused a diversion of toll, which, under these circumstances, must be unlawful. Our answer to this is, that they have utterly failed to establish any such exclusive right or title, as the act of 1785 gives no countenance to it; and they are forbid making such an unnecessary and unnatural implication of right. The damage which they suffer, then, is merely consequential, and falls within the principles of the case of *Callender* v. *Marsh*, 1 Pick. 416.

But suppose, we are erroneous in this reasoning, and the new bridge actually falls within their exclusive right, and thus becomes unlawfully injurious; how is the case brought within the jurisdiction of this court? I repeat, the plaintiffs must show a violation of the constitution of the United States, before they can make this jurisdiction attach. They allege, that the act of 1828, being an act of the state, impairs the obligation of a contract, and therein violates the constitution of the United States; because it forbids the making of such a law. But what contract does it impair? What obligation does it violate? I have heard much discussion about the injuries sustained by the plaintiffs, in consequence of the act of 1828; but have they pointed out the contract, or the obligation of a contract, which has been violated? If so, where is it? The contract, if any, is the act *of 1785. [*510
It is a contract with the state itself; but this, in no respect, changes the character of the case; for the constitution is no more applicable to a contract with the state, than to any other contract. What has the state undertaken to do, which it has refused to do? What has it agreed not to do, which it has done? I hope the court will look into the act, and see if they can find any provision there which has been violated. The state authorized the erec-

tion and continuance of a bridge, and the right to take toll, during the period of seventy years. It has not revoked, annulled or altered any of these powers. It has not disturbed their possession or right to take toll; it has not altered a letter of the act. But it is urged, that the state has authorized the erection of a bridge which greatly diminishes the tolls; and this is true; and the question here is, did she agree not to do it, in and by the acts of 1785 or 1792? If so, point out the agreement. The state, it is admitted on all hands, has an undoubted right to make new bridges, even if they do destroy the franchises of other bridges; but when she takes property for public use, she must compensate for the damage. And where arises the obligation to do this? Not in the act of 1785 or 1792, but in the bill of rights; here lies the obligation, and nowhere else. There is nothing in the act of 1785 in regard to the duty of compensation.

The question here arises, is the bill of rights a part of the contract? If it is not, I humbly contend, that this court cannot entertain jurisdiction, for its jurisdiction reaches only the constitution and laws of the United States; and this case cannot be brought under that constitution, unless a contract can be shown, which is impaired by the act of 1828. The laws and constitutions of the states belong solely to the state courts to expound. *Jackson* v. *Lamphire*, 3 Pet. 280. The bill of rights is part of the constitution of Massachusetts; and is not, and cannot be, any part of a contract, unless expressly made so by agreement. The laws of a state may be used to expound and explain, but never to supersede or to vary a contract. *Ogden* v. *Saunders*, 12 Wheat. 213; 3 Story's Com. 249. If this provision of the bill of rights should be added to the act of 1785, it would both supersede and vary the contract from what it now is. These principles seem to be settled, beyond question. I consider it also well settled, that a contract with a state stands on ground in no respect differing from all other contracts; and the constitution of *the United States has, in its provisions, no reference specially to such contracts. The state is bound by no higher obligation to abstain from violating its own contracts by law, than to abstain from violating all other contracts. All citizens stand on the same footing in this respect, with the same measure of redress, and the same extent of rights. If the bill of rights can be engrafted upon this contract as a condition, because it was a public law, of which all must take notice, when the act of 1785 was passed; then, for the same reason, it becomes a condition of every contract; and whoever has his property taken for public use, may appeal to this court, and it would thus open its jurisdiction to revise a very extensive branch of jurisprudence, hitherto considered as exclusively belonging to the states. Is the court prepared for this? Did the framers of the constitution anticipate it? Will the public be satisfied with it? Not only matters of this kind will be brought here, but many other things. Why may not one who claims a right to vote in Massachusetts, and is denied the privilege, claim that the obligation of contract is impaired, for his right rests on the constitution? Why may not all officers whose qualifications, prescribed by the constitution, are drawn in question, and the rights they claim denied to them, come here for redress? Why may not a judge, who is legislated out of office, by taking away his salary, appeal to this court? Such a construction would open an alarming jurisdiction, and make this court preside over the constitution and laws of the

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states, as well as those of the United States; for this would be the result of making the constitution a part of contracts; the road laws alone, would take more than the whole time of the court. But I will not dwell on this aspect of the case, for this pretension has not been set up; and I am sure, the decisions of this court are decisive of the question.

What then becomes of the jurisdiction, even admitting that the act of 1828 did violate the bill of rights? Is it not plain, that no contract or obligation of a contract is impaired, and therefore, that the constitution of the United States does not reach the case? The courts of Massachusetts have acted upon the matter, and whether for good or evil, right or wrong, their decision is final.

I might add, that where property is taken for public use, it is not taken under, or by virtue of, any contract, but in the necessary exercise of a great and essential element of sovereignty. It is a right *that necessarily rides over all property, and can never be questioned. It is the duty of every government to make compensation, where it is taken; and Massachusetts has made what she deems adequate and suitable provision, by her fundamental law, and it is no part of the business of this government to inquire into the sufficiency or insufficiency of that provision, nor what exposition is put upon it by her courts. The thing does not lie in contract, but in public law; and this court has never gone further than to declare private acts, contracts. Public acts, in the nature of things, cannot be contracts, but a rule of action. [*512

This case, therefore, bears little, if any resemblance to *Fletcher* v. *Peck*, *New Jersey* v. *Wilson*, or *Dartmouth College* v. *Woodward*. In all these cases, and in all the others quoted, the parties affected held rights under private acts, which the states of Georgia, New Jersey and New Hampshire attempted, respectively, to repeal, after rights had vested. The question raised in each case was, whether a state, where it had conveyed property and rights to an individual, could annul its own act. If a state, for example, conveys land to an individual, nothing can be more absurd, than to suppose it can annul its title and resume the property; for such grants are irrevocable. So also, in the case of *Sturges* v. *Crowninshield*, it was decided, that if one promises to pay money to another, a state cannot, by a law, release him from his contract, without payment. In all these cases, there is a manifest impairing of the obligation of contract; for the whole benefit is taken away, and the contract abrogated.

But in this case, it is admitted, that the state has a right to take any property whatever, for highways; and, that the franchise of Charles River bridge is as liable as any other property to be seized for this purpose. The taking, therefore, for public use, is no wrong. It is no violation of the act of 1785, for it has always been held under that act, subject to this right. If it has been taken, therefore, that act is both right and lawful; for it is consistent with the contract, instead of a breach of it. The only matter which can be complained of, is, that no compensation has been made. This right to compensation does not spring up under the contract, but is derived from public law. The bill of rights alone gives it; and on that alone can the claim be sustained, if sustained at all. Over that branch of law, I repeat, this court has *no jurisdiction, and redress must be sought in the tribunals of Massachusetts, and in no other place. Such is the necessary [*513

result, if property has been taken. On this point, therefore, we discover no error which can be corrected here.

But the plaintiffs are in no worse condition, and have no higher claim to indemnity, than a large class of citizens who suffer by public improvements. Railroads, perhaps, generally, supersede the highways near them ; and render stages, wagons and other property, to a great extent, less valuable. They frustrate the views, and lessen the income of all who depend on the public travel for patronage and support. The business of large communities, and the value of real estate, is seriously diminished, but there could be no indemnity for such losses. It is a mere misfortune, for such persons have no right over, or interest in, the public travel, which can be the subject of legal claim. The public convenience demands such improvements, and they are not to be obstructed from such causes.

I must be permitted, before I leave this subject, to declare distinctly, that it is no part of my purpose to urge any change or modification of the laws ; nor to advance the opinion, that the strong arm of the public may seize individual property, and sacrifice it to the public convenience. I am aware, that much has been said of this case ; and that it has been said, there is no ground for the defence to standon, short of a revolution of principles which will unsettle private rights, and subject them to public caprice. I am not unconscious of the dangers which surround such doctrines ; and I am equally sensible of the folly of urging vested rights, as they are denominated, to such extremes as to make them felt as grievous burdens, and onerous inconveniences, by the public. Many of the feudal institutions which still have acknowledged force in England, have been repudiated there ; and I cannot think, there is much wisdom in attempting to engraft any of them upon our institutions, beyond where they have been distinctly recognised to be the law of the land. But while I say this, I am fully impressed with the vital importance of giving steady, unceasing protection to private rights. The great elements of public liberty lie in the firm protection of private rights. The great end of political association, in a free government, is to obtain a firm, unwavering protection of our persons and honest earnings. If a government fails to do this, it is of little value ; for we scarcely want it for any other purpose. Liberty consists chiefly in freedom from arbitrary restraint and exactions ; and no one can feel *more sincerely anxious *514] for the preservation of these great principles, than I do. I am fully sensible, that the constitution and the laws are the shield under which we take shelter. They are our place of refuge—the sanctuary to which we must cling, if we would preserve public liberty. I am not, therefore, for laying rude hands upon them ; I am not for tearing away these great barriers of right. I wish it, therefore, to be distinctly understood, that I place our case within the pale of the law, and invoke no violence in its aid. I ask for no new principles or rules, but for a fair and just exposition of the laws ; and this, I know, is all we shall obtain.

Our case stands on what is called, by this court, a contract ; and I only contend that this contract, when construed by the rules of law, as I understand them, after careful research and consideration, will sustain no such exclusive rights and privileges as the plaintiffs claim. I see no great constitutional question involved in this matter ; for it is not a matter of constitutional law, whether the act of 1785 gives a wide, or a narrow franchise,

but a simple inquiry into the meaning of that act. The case involves nothing else. If I do not mistake the weight of authority, I have shown that, in England, such grants are strictly construed, in favor of the public. This is the rule in a grant of privileges and monopolies; and I hope the public here is entitled to as favorable a consideration. All I ask is, that this rule shall be applied to the act of 1785. It is due to public justice, and public policy, that it should be. I can see no objection to it, while I do see much to object to in the opposite course. I have never had but one opinion in this matter, and all investigation has tendered to strengthen it. Some may suffer by a decision in favor of the defendants, and this I regret; but it affords no reason whatever, for establishing unsound rules of construction, or for denying to the public the accommodation of a lawful way.

Webster, for the plaintiffs in error,(*a*) stated, that the question before the court was one of a private right, and was to be determined by the fair construction of a contract. Much had been said, to bring the claims of the plaintiffs in error into reproach. This course of remark does not affect their right to their property, if this court shall consider that property has been *taken from them by proceedings which violate a contract; and in a case where this court has a constitutional right to interpose for its protection and restoration. [*515

It is said, that the proprietors of Charles River bridge have been repaid for the advances made by them in building the bridge. But this is not the question upon which the court has to decide; it is a question of contract; and if so, where is the necessity to inquire whether the plaintiffs have laid out a million, or nothing? If there was a contract, the question is not, what was the amount of profit to be derived from it, but what were its provisions; however advantageous to those with whom it was made. It is a contract for the annual receipt of tolls, for a specified period of time; and it is said, the state, which, by its law, brought the company into existence, by allowing these tolls, may break the contract, because the amount of the tolls is large; and by a legislative act, say, that, for a portion of the time granted, the contract shall not be in force!

The case has been argued before; once in the superior court of the state of Massachusetts, and once in this court; and without any disrespect to the counsel who argued it before the present hearing, it has been exhibited on new and enlarged grounds. It has been said, in the argument, that the right of eminent domain cannot be granted away by a legislative act; and if granted, the same may be resumed, against the express terms of the grant. The necessity of the existence of this right in a sovereign state, has been asserted to be shown, by a reference to many cases; as the grant of a right to construct a turnpike, which, if it gave an exclusive right of making all communications between two places, to a corporation, or to an individual, would operate to prevent the introduction of improved modes of intercourse, as by railroads; and thus be most extensively injurious to the interests and stay, to a fatal extent, the prosperity of the community. The

(*a*) The reporter was disappointed, in what he believed a well-founded expectation of receiving a full statement of Mr. Webster's argument, made out by himself, or his notes, from which, with other aids, he could have given the argument more at large.

plaintiffs in error deny this position. They hold, that the obligation of a contract is complete ; and that other means than by its violation, may protect the interests of the community. Such a violation of a contract would be fatal to the confidence of the governed in those who govern ; and would destroy the security of all property, and all rights derived under it.

The localities of the two bridges, the Charles River bridge, and the Warren bridge, are well understood by the court. They accommodate the same line of travel, and either of them furnishes *all the convenience, and *516] all the facilities the line of travel requires. That one is sufficient, is shown by the fact, which is not denied, that since the Warren bridge has become free, all travellers pass over it, and no tolls are received by the proprietors of the Charles River bridge. When the act authorizing the Warren bridge was passed, and the company was about to erect the bridge, the plaintiffs applied to the superior court of Massachusetts for an injunction to prevent the work going on. This was refused, on the ground that nothing had been done by the company which presented the question of the unconstitutionality of the law. Before the Warren bridge was in the actual receipt of tolls, the bill now before the court was filed ; and afterwards, a supplement bill, the proprietors of the Warren bridge being in the actual receipt of tolls ; claiming that the charter under which they acted was a violation of the contract of the state, with the proprietors of the Charles River bridge, and was, therefore, against the constitution of the United States. The case is now before this court, on this question.

It is said, that Boston has many of such bridges as that constructed by the plaintiffs. This must necessarily be so ; Boston is an exception in the ocean ; she is almost surrounded by the waters of the sea, and is approached everywhere, but in one part, by a bridge. It is said, that those numerous bridges have given rise to no litigation. This is so, but the just inference is, that by no one of these has a right been interfered with. In fact, in all the cases where rival bridges, or bridges affecting prior rights, have been put up, it is understood, that there have been agreements with those who were or might be affected by them. This was the case with West Boston bridge. It was purchased by those who sought to make a free bridge which would interfere with it. It has been said, in argument, that the ferry franchise, which was the property of Harvard College, was seized by the legislature, when they authorized the erection of the Charles River bridge. But this was not so. A compensation was allowed for the use of the franchise, or its interruption ; and no objection was ever made to it by that institution. The just inference is, that a previous agreement had been made with the college; and that the sum annually paid by the proprietors of Charles River bridge, was entirely satisfactory to that corporation.

Mr. Webster then went into an examination of the circumstances *517] *which had attended the erection of other bridges from the main land to Boston ; and he contended, that in all the cases, compensation had been made to those who were injuriously affected by them. In the case of the Cambridge bridge, the legislature, in the act authorizing it, extended the charter of the proprietors of the Charles River bridge, as a compensation for the erection of another bridge. This was a compensation for the tolls taken by diverting the line of travel. In none of these cases, was there an appeal to prerogative, and to its all-superseding powers. The history of the Warren

bridge exhibits an entirely different state of things. It was undertaken on different principles, and under a different temper. It began with a clamor about monopoly! It was asserted, that the public had a right to break up the monopoly which was held by the Charles River bridge company; that they had a right to have a free bridge. Applications were frequently made to the legislature, on those principles, and for that purpose, during five years, without success; and the bill, authorizing the bridge, when it was first passed by the legislature of Massachusetts, was rejected by the veto of the governor. When the charter was actually granted, it passed the legislature by a majority of as many members as there were hundreds in the body.

If it had not been for the provision in the constitution of the United States, under which the plaintiffs now ask for the protection of this court, it is believed, the law would not have been enacted. Members of the legislature consented to the law, on the ground, that if it interfered with chartererd rights, this court would set it aside. The argument was, that if the law was a violation of the charter, it would be of no avail. Thus it passed. But since its passage, there is an appeal to the right of eminent domain to sustain it. It is said, take care! You are treading on burning embers! You are asking to interfere with the rights of the state to make railroads, and modern improvements, which supersede those of past times by their superiority! You prevent the progress of improvements, essential to the prosperity of the community! It would then appear, that the existence of the provision of the constitution of the United States, which this court is now called upon to apply, has been the whole cause of the injury done to the plaintiffs, by the passage of the law authorizing the Warren bridge. But for the belief that the rights of plaintiffs would be restored, by the appeal to that provision, the law would not have existed.

*The learned gentleman who first argued the case for the defendants, went the whole length of asserting the power of the legislature [*518 to take away the grant, without making compensation. The other gentleman asks, if the plaintiffs are not yet satisfied with exactions on the public? What are exactions? They are something unjust. The plaintiffs have taken tolls for passing the bridge; but this they had a right to do by their charter. It is said, the tolls were oppressive; but is it oppression, when the right was given by the charter to take them, as the stipulated income for capital laid out under the charter? It is said, that the public are on one side, and the plaintiffs are on the other; that if the case is decided one way, a thousand hands will be raised, to one, should the decision be different; but this is not correct. The public sentiment, in this case, is not on one side. It is not with the defendants. The representatives of Boston never voted for the Warren bridge; they thought there were existing vested rights, which ought not to be disregarded. The city of Boston would have purchased the right of the Charles River bridge, if they had been asked. The property, or stock in the bridge, was dispersed through the community; it was not a monopoly.

The honor of Massachusetts will stand unblemished in this controversy. The plaintiffs impute no dishonor to her, or to her legislature. Massachusetts only wants to know if the law in favor of the Warren bridge, has infringed upon the vested rights of the plaintiffs; and if this is so, she will promptly make compensation. The plaintiffs say, the act authorizing the

Warren bridge has violated the constitution of the United States; and if this court shall so declare, the state of Massachusetts will do full justice to those who have been injured by her authority.

The counsel for the defendants have said, that the plaintiffs have sustained no loss but that of their golden prospects. They have lost all their property; a property worth $300,000 before the new bridge was built, and now not worth $30. The rights of the plaintiffs are no monopoly. They are the enjoyment of the property for which they had paid in advance; and which, by a contract made by the law, they were entitled to enjoy for twenty years yet to come. They are called rapacious monopolists, when they claim to hold what they have purchased. Those who have assailed this
*519] property, have taken it from them—have *taken all from them, without compensation. Where, and with whom, is the rapacity to be found in the transaction?

The provisions of the law of Massachusetts against monopolies, are taken from the English statutes of James I. They were so taken, for it follows that statute in terms, and contains the same exceptions in favor of useful inventions. Thus, the Massachusetts law is the same with that of England, which has never been considered as extending to such cases as this before the court. The language of the law is "monopolies;" but this is a "franchise," and not a monopoly; and thus the clamor which was raised has no application to the property of the plaintiffs in error. It is unjust, and without application.

The record presents the only questions in the case. What are they? The original bill was filed in 1828, and after the answer of the defendants was put in, the amended bill was filed, only to put in issue the questions of law and fact presented in the original bill. The courts of Massachusetts proceeded in this case according to the equity rules of this court; and this case is fully exhibited, so that the whole of the issues of law can be decided here. The original bill founded the rights of the plaintiffs: 1st. On the act of the legislature of Massachusetts of 1785. 2d. On the purchase, by the plaintiffs, of the ferry-right, which had belonged to Harvard College. 3d. On the consideration paid for the charter to build the bridge, and the prolongation of the charter for twenty years, by the act of 1792. The plaintiffs say, the act for the erection of the Warren bridge violates the constitution of the United States; and that the act takes the property of the plaintiffs for public use, without making compensation for it. They rest on their charter. The defendants, in their answer, do not say the property has been taken for public use, but they rest on their charter: and they say, that the legislature had a right to pass the act, as it does not infringe the property of the complainants. This presents the question, whether the constitution of the United States is violated? There is no other issue made on this record.

This state of the pleadings excludes much of the matter which has been presented by the counsel for the defendants. They do not present the ques-
*520] tion of eminent domain. The plaintiffs might have *presented that question, in the court of Massachusetts. They might have said, that their property was taken by the law, for public use; and was taken under the right of eminent domain. This would have been a Massachusetts question; and one which could not have been brought before this court. It is

admitted, that if the legislature of Massachusetts takes private property for public use, under the power of eminent domain, this court cannot take cognisance of the case. If the case had been so put, before the superior court of Massachusetts, that court could have decided, that the complainants were entitled to compensation, and that the defendants were bound to make it. It is the law of this court, that the parties must be confined to the questions on the record. The only issue here is, the question whether the defendants have infringed the rights of the plaintiffs, and have violated the constitution of the United States.

While this case was in progress through the courts of Massachusetts, and depending in this court, it appeared that one-half of the tolls of the plaintiffs' bridge was taken away. Now the whole tolls are gone! This has occurred since the Warren bridge has become a free bridge. The legislature of Massachusetts have given to the plaintiffs the right to the franchise of a bridge at Charlestown; and the question is, whether this is such a right as that it can be violated or infringed? The franchise is a thing which lies in grant, and is, therefore, a contract; and if, by the charter to the Warren bridge, it has been infringed, it comes within the prohibition of the constitution relative to contracts. The question is, whether the plaintiffs had such a franchise? This is the only question in the record.

A preliminary objection to the right of this court to proceed in this case, has been made, on the suggestion, that the case is one against the state of Massachusetts; as the state of Massachusetts is now the only party interested in the cause, the bridge having become her property; and it is said, against the state, this court can grant no relief. A state cannot be brought into this court, in a suit by individuals, or a corporation. The state is not a party to the cause. The bill is against the persons who built the Warren bridge; and it is from them relief is sought and required; and those persons stand as trespassers, if the law, under which the acted, is unconstitutional. But after a suit is lawfully commenced, it goes on against all who afterwards make *themselves parties to it. There is no effect on the rights of the plaintiffs, by a change of this kind, as a wrongdoer [*521 cannot excuse himself by parting with his property.

The plaintiffs ask a decree against the proprietors of the Warren bridge, John Skinner and others; and a decree is asked against no others. The question which is raised by the objection to the jurisdiction of this court in this case, is, whether the court can proceed in a case in which a state has an interest? This cannot be asserted with success. If such were the law, the exclusion of jurisdiction would extend to all cases of lands granted by the United States; for in cases of such grants, if no title has been given, the United States are bound to make compensation. Such a doctrine would overrule the judicial structure of the government, and prevent the administration of its most important functions.

This question has been decided in this court, in the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 557. This is precisely the same question with that in the case referred to. The state of Ohio claimed the money in the hands of Osborn, as a tax on the funds of the Bank of the United States, imposed by an act of the legislature of the state. The state of Massachusetts claims the tolls of the bridge, derived from a law of the state. This court, in the case cited, expressly declare it to be one in which the state is a party.

So, in *Fletcher* v. *Peck*, where Georgia had declared a deed given by the state for lands, void; but the parties to the case were those on the record, although the decision directly vacated the proceedings of the legislature of Georgia, yet the court had jurisdiction. In this case, no judgment will be pronounced against the state of Massachusetts. On these pleadings, if the constitutional question were out of the case, could any action of the court affect the state? She is, in fact, no party in this cause. She cannot be a party, to blow up a suit, and not be subjected to its final result. Suppose, a state should coin money, congress would not prohibit its being done; it is prohibited by the constitution, and a law could not do more. Could the law be carried into effect? Proceedings under it would be brought before this court, by an action against the agents of the state, or by a suit against the party issuing it, or making a contract for the money so coined. If you cannot, by a suit against an individual, question the unconstitutional acts of a party, the whole of the powers *of the constitution, upon its great and vital provisions for the preservation of the government, are defeated.

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It has been said, the court can do no justice to the parties who have sought its protection, because the superior court of Massachusetts has only a limited jurisdiction in cases of equity. It is admitted, that the equity jurisdiction of the courts of Massachusetts is limited; but it has all the jurisdiction over the subject, to which its powers extends, as any other court of equity. The law of Massachusetts gives full equity powers to the court, in all cases which are made subject to its jurisdiction. 6 Pick. 395. The law of 1827 gave this jurisdiction in all cases of waste and nuisance. This bill prays for general relief. This court may abate the nuisance, and decree a repayment of the tolls; and do all in the case, that, according to law and equity, may appertain to it. In equity, a court may enjoin against the nuisance, and decree a compensation.

But all this discussion about the power of the court of Massachusetts to make a suitable decree, has no place here. This court can, in their decree, declare, whether the act of 1828 does impair the contract of 1785. This is all the court can do; and it is nothing to them, what will be done in the case, by the court to which the case will be remanded. In conformity with the provisions of the judiciary act of 1789, this court remands a case, when further proceedings are necessary in the court from which it may have been brought; when nothing else is required in that court, this court will give a final judgment. In this case, the court are bound down by the record, to the single question of the validity of the law, under which the defendants acted.

To proceed to the main questions in the cause:

1. The plaintiffs claim to set up a bridge, exclusively, between Boston and Charlestown; or, if they are not entitled to this, they claim to put down all such other bridges as interfere with the profits and enjoyments of their privileges. It is not contended, that the *termini* include or exclude all within the place. Every person must keep so far off, as not to do a direct mischief to the plaintiffs' rights. The plaintiffs say, that the ferry-right gave them the privilege of excluding rivals. That by the charter, they have a franchise which gives them rights, which cannot be violated by the proceedings of a subsequent legislature. *It is in vain to attempt to

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derive anything from the ferry-right, if it is what the defendants say it is. They say that a ferry is a path over a river; and that the English law relating to ferries never was in force in Massachusetts. This position is denied by the plaintiffs. In support of this assertion, they give a bead-roll of ferries which have been taken away; and bridges built where they before existed. This is statement.

The law of Massachusetts has always been the common law of England. Is there any authority for the contrary, in any of the decisions of her courts? There may be such, but it is hoped not, and it is believed not. Have the ancient fathers of the profession of the law—the Parsons, the Sedgwicks, the Danes, taught other doctrine? Has the contrary been sustained by these men—by their opinions? In the case referred to by the counsel for the defendants, a distinguished lawyer of Massachusetts allowed a ferry-right according to the common law of England. Every judge in Massachusetts has held a ferry-right to be an indefeasible inheritance—a vested right, like any other property. Let us see, if this is not the fact.

But before this is done, a reference will be made to acts in the early history of Massachusetts, which are on the record. There is a grant of a ferry for twenty-one years. "At a generall corte held at Boston, 7th day of 8th month, 1641. It is ordered, that they that put boats between Cape Ann and Annisquam, shall have liberty to take sufficient toale, as the court shall think meete." Is this the grant merely of a path across the river? So also, there is a grant of an inheritance in a ferry, on condition that it shall be submitted to the general court. This grant is contemporaneous with the grant of the ferry over Charles river.

"At a generall corte of election, at Boston, the 10th of the 3d month, A. 1648. Upon certain information given to this generall corte, that there is no fferry kept upon Naponset ryver, between Dorchester and Braintree, whereby all that are to pass that way, are forced to head the river, to the great prejudice of townes that are in those partes, and that there appears no man that will keepe it, unlesse he be accommodated with house, land and a boate, at the charge of the country: It is therefore ordered, by the authority of this corte, that Mr. John Glover shall, and hereby hath, full power given him, either to grant it to any person or persons, for the tearme of seaven yeares, *so it be not in any way chargeable to the country, or else to take it himselfe and his heires, as his own inheritance for [*524
ever; provided, that it be kept in such a place, and at such a price, as may be most convenient for the country, and pleasant to the general courte."

In the record, there is a copy of a grant of a bridge over Charles river, near Watertown; the terms of which are, on the condition of making the bridge, the tolls are granted for ever. This was in 1670.

This is the early statute law of Massachusetts. The later acts of the legislature are of the same character. The instances of such legislation were cited from 7 Pick. 446–8, 511, 521, 523. In all these cases, the judges hold the common law of England as to ferries to be the law of Massachusetts; and that a ferry is an indefeasible interest, and a franchise and property.

Mr. Webster then stated a number of cases, in which, when a bridge had been erected in a place of an existing ferry, compensation had been made to the owners of the ferry. He insisted, that upon these authorities,

a ferry was as much a property, as much the object of legal protection, as anything known to the laws of the land.

The plaintiffs obtained their property as a purchase of some extent up and down the river. It is not required now to determine how far the purchase extended; for the rival bridge erected by the defendants, is alongside of the Charles River bridge, and is an interruption to the profits derived from it. It is not necessary now to fix the limits of the franchise. That the interference is direct and certain, is not denied. Difficulties may arise hereafter in fixing these limits, but it is not necessary to go to a distance to establish them, before a certain, and admitted inference, shall be examined.

It is submitted, that, in London, no bridge has been erected over the river, without compensation having been made to those whose interests may have been injured. The evidence of this will be found in many works on the subject. Those treatises show the minute attention of the British parliament, in all cases in which private rights may be affected by the enactment of a statute. All persons who may be interested, have notice from parliament of the application; and compensation is made, where any injury is done.

It is said, that the distinguished honor of maintaining principles which will arrest the progress of public improvements, is left to the plaintiffs in this case. This is not so. All that is asked, is, that the franchise shall be protected. Massachusetts has not made any *improvement of her own, although she has subscribed liberally to those which have been undertaken by individuals and corporations. In all these cases, private rights have been respected; and except in the case now before the court, Massachusetts has kept her faith. Recent and previous acts by her legislature show this. In every case, but this, compensation has been made in the law, or provided for.

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The plaintiffs do not seek to interrupt the progress of improvements, but they ask to stay revolution; a revolution against the foundations on which property rests; a revolution which is attempted on the allegation of monopoly: we resist the clamor against legislative acts which have vested rights in individuals, on principles of equal justice to the state, and to those who hold those rights under the provisions of the law.

It is true, that before the legislature, the rights of the plaintiffs were examined, and still the Warren bridge charter was given; but the decision of a committee of the legislature was not a judicial action. The plaintiffs have a full right to come before this court, notwithstanding their failure before the legislature.

In reply to some remarks of the counsel of the defendants, Mr. Webster stated, that the proceedings in England under writs of *ad quod damnum*, did not affect private rights. The writ of *ad quod damnum* issues for the honor of the king. It issues before a grant is made, and for the protection of the king. Private persons may claim the protection of the law in favor of their rights, notwithstanding such a proceeding. Questions of nuisance, are always questions of fact, and must be tried by a jury; but no jury can assess the amount of injury, until the facts are ascertained. These principles are sustained in 3 Bl. Com. 219.

Is it the liberal construction of charters to interrupt them against the rights of individuals—against the enactments of the law? The course has

been, to construe them in favor of the grantees, and to enlarge their provisions for his benefit. The whole of the course is changed, if an opposite principle is adopted. But the plaintiffs ask no more than a fair judicial construction of the law; no more is required, but what they are entitled to, under a judicial interpretation of it.

It has been said, in the argument for the defendants, that although the holder of a franchise may maintain an action against a stranger who interferes with it, without a license; he may not, against one who has a license from the state. This is without authority. If he *can claim against [*526
a stranger, it is because of his property in the franchise, and this will protect him in proceeding against any one. This right is complete against all, and the state can give no privilege to interfere with it.

In the case of *Bonaparte* v. *Camden and Amboy Railroad Company*, Mr. Justice BALDWIN, sitting in the circuit court of New Jersey, says: "The privilege of exemption of the principal is not communicated to the agent, though the principal is a state which cannot be sued at law or in equity; and the agent, a public officer acting in execution of the law of the state, and the subject-matter of the suit was money actually in their treasury, in the custody of the defendant for the use of the state." Bald. 217.

The proprietors of the Charles River bridge purchased the ferry franchise from Harvard college, and it became their property, for the purpose of erecting a bridge upon its site, with all the rights and advantages to be derived from it. It was purchased, and the consideration for it was the annual payment of the sum of 200*l*. This, by the charter, was to be absolutely paid; and no accident to the bridge, no deficiency of tolls, will excuse the non-payment of the sum so stipulated to be paid. Suppose, while the bridge was building, it had been profitable to use the ferry, would not the tolls have belonged to the proprietors of the Charles River bridge? There is no ground to suppose, the college meant to retain anything out of the franchise. Nothing appears, which will authorize the supposition, that the state meant to take a transfer of the franchise, or any part of it; and allowed the use of it to the bridge, to the extent of putting up the abutments, at the places where the ferry was carried on. The bridge is the successor of the college, in the franchise; the company purchased it, to its full extent, and the state, by the charter, ratified the purchase.

The erection of the bridge was an undertaking of great hazard, and the result of the effort to construct it, was considered exceedingly doubtful. It cannot, therefore, be supposed that the franchise was to be diminished, and its enjoyment to be limited. Nothing of this is expressed, and nothing so unreasonable can be implied. It is in evidence, on the record, that the college was a party to the building of the bridge. The president stated, that the college had assented to it. According to the course of decisions in Massachusetts, the franchise was an indefeasible inheritance. In that state, the *management of ferries was with the general court. As to this [*527
franchise, from 1640 to 1785, it was respected by the local authorities of Middlesex and Sussex. It would then appear, that it was held under a legislative grant, which transcended all other rights.

The franchise which was obtained from the college, was not extinguished by compact; and it cannot, therefore, be disturbed by any action of the

legislature. It is deemed important, and is the truth of the case, to consider the rights of the Charles River bridge company, in connection with those of the college. The college had, and still have, an interest in it; and the use of the franchise by the company is essential to all the purposes, and to more than those for which it was held by the college. The pontage furnished by the bridge, was the substitute for the passage by the ferry; and it was not, therefore, only for location at the place where the bridge was built, that the rights of the college were obtained; all the privileges enjoyed as a part of the ferry franchise were acquired. When the bridge was put up on the same place as the ferry had been, and for all the ends of the ferry, it is but just and reasonable, that the extent of the right shall be in the hands of the bridge company, equal to that which it was when held by the college. The views which have been taken, fully show that the state of Massachusetts made, in the full and rightful exercise of her legislative powers, a grant to the proprietors of the Charles River bridge, and the grant was a contract. As such, by no subsequent legislation, could it be impaired; a right vested, cannot be divested. Cited, 2 Dall. 297, 304; 9 Cranch 52; *Green* v. *Biddle*, 8 Wheat. 1; *Fletcher* v. *Peck*, 6 Cranch 136. If a power of revocation existed, it was no contract. The state cannot make such a contract; as the power of revocation is incompetent to will the existence of a contract. Can a stronger case be imagined, than that which gave rise to the controversy in *Fletcher* v. *Peck?* The contract had been made in fraud; in morals, it was just to burn it; in policy, it was equally so, as a large part of the domain of the state of Georgia was granted for no adequate consideration. But this court decided, in that case, that the legislature of Georgia had no power to annul the grant; and the grant was maintained by the judgment of this court.

The difficulty in which this case is involved, and upon which the defendants expect success, arises from considering two things alike, which are different. The power of making public grants, because *the interests
*528] of the community require they should be made, and the right of eminent domain. Where property is taken for public purposes, compensation is given; this is the exercise of eminent domain. The legislature are not the judges of the extent of their powers; and the question now before the court is, whether they had the power which has been exercised in this particular case. By the act of the legislature, authorizing the Warren bridge, two injuries were done to the plaintiffs: first, by the damage they sustained from a rival bridge; secondly, the infringement of their right of pontage. The toll had been originally granted for forty years, and this excluded rivalship. By the interruption of the receipt of their full tolls, the proprietors of the bridge sustained heavy losses; and by the erection of the Warren bridge, now a free bridge, their beneficial right of pontage has been destroyed. In these, have the contract of the state of Massachusetts been broken. Thus the case is entirely within the provision of the constitution of the United States.

What is the meaning of the assertion, that in a grant by a government, nothing passes by implication? How is it, in grants of land? Does a patent from the United States carry less than a grant by an individual? They are the same—a grant of "land" carries "mines." The principle, that nothing passes by implication, arose in early times, when the grants of

the crown were greater than now ; when they were made to favorites, and the power was abused—and when their extravagance induced courts to restrain them to their words. Hence the insertion of "*mero motu*" "*certa scientia*:" hence the principle, that the grant of one thing shall not carry another. The doctrine that nothing can be carried by implication in a royal grant, does not apply to grants by parliament, or of franchises (2 H. Bl. 500): no case but one from 2 Barn. & Ald. 792, has been cited, to sustain the position. That case is not authority here. But if the whole of that case is taken together, it is in favor of the plaintiffs in this cause. The decision is right ; although there is too much strictness in some of the opinions of Lord TENTERDEN. Franchises are complex in their nature, and all that may be necessary for their enjoyment, must pass with them, although things separate do not pass ; whatever is incident to them, does not require implication, to pass such incidents. Thus, the grant of the ferry to the college, gave the right to take tolls ; to keep boats : cited, 1 Nott & McCord 393.

*It has been said, that this may be good law as to individuals, but that it will not operate in the case of a state : authorities for this position ar required. If a grantee of a franchise can sustain an action against an individual, for an injury to his property, or an interference with his property, why may he not, against the grantee of the government, who thus interposes? The case is stronger against the government, than against a stranger. The government has received the consideration for the grant ; and there is an implied obligation to protect the enjoyment of it. Ferries are property. They may be seized for rent ; they may be devised by will ; they may be sold : and yet it is said, the government may take them away from their proprietors, for their grantors. Let us see some principle which will allow such property to be taken ; and which yet regards private property, and respects private rights and public faith. The right of a ferry carries tolls ; and it also carries, for its protection, the principles of justice and of law, that the grantee may keep down injurious competition. It is vain to give him one, without the other ; both must be given, or none is given. The grant is intended as a benefit, as a remuneration for risks, and for advances of capital, not as a mere name. The ordinary means of compensation for such advances are not sufficient ; the franchise necessarily implies exclusive and beneficial privileges. [*529

It was under this law of ferries, the plaintiffs took their charter. They considered, that under it, they held the whole extent of the ferry franchise. There was then but one ferry between Charlestown and Boston. It had the whole ferry-rights, and this they acquired ; this they have paid for. If a grant refers to another grant, it carries all which is contained in both. But suppose, there had been no reference to any other ; it would carry the same rights, and to the same extent, or more. The expense of erecting a bridge, and keeping it in order, is much greater than that attending the setting up and keeping in order a ferry. The promotion of public accommodation is no reason for taking away a privilege, held under a legal grant. It cannot be done unjustly to the rights of others ; these rights must be respected. The income derived from these rights shall not be diminished. Suppose, the bridge had been erected, without an act of the legislature to authorize it ; would a subsequent act protect it? How can a grant to A. be

lawfully impaired, or injuriously affected, by a subsequent grant *to B., which interferes with the enjoyment of the prior grant? Once granted, always granted.

What position would a judicial tribunal assume, that would construe a grant differently, according to the parties to it. Can you raise an implication against it, and not do so against the government? Implication is construction—construction is meaning—and when a thing is in the deed, it is the meaning, and force and purpose of the instrument. If the parties are changed, these cannot be changed. To allow another bridge to be built, was to take away the tolls of the first bridge. In support of the position, that this was a violation of the rights of the plaintiffs, the opinions of all the judges of the court of Massachusetts, from which the case is brought, are appealed to. They all say, that the charter granted by the legislature is binding on it, and cannot be impaired; and they say, that, to whatever extent the grant goes, it must be supported. 2 Mass. 146. But the Warren bridge does impair the charter, for it takes away the tolls. What then becomes of the reserved rights of the legislature? This is a solemn adjudication of the court of Massachusetts. Then, there is no reservation.

There is implication in government grants. This has been so held in Massachasetts. 4 Mass. 522. It is also the law of this court. *Dartmouth College Case*, 4 Wheat. 518. The court below held, in this case, that whatever was granted belonged to the grantee; that the ferry at Charlestown was granted to the college, and that the law of England relating to ferries, prevails in Massachusetts; that nothing can be taken for public use, without compensation; that public grants are always to be so construed as to convey what is essential to the enjoyment of the thing granted, and cannot be superseded, or the grant impaired. In support of these positions, Mr. Webster read parts of the opinions of the judges of the superior court of Massachusetts, delivered in this case.

The proposition is stated, that grants of the character of this which is held by the plaintiffs, contain a power of revocation. This cannot be. Being grants, they cannot be treated or considered as mere laws; being grants, they are contracts. In this case, the grant was intended to be beneficial to the grantees, and it contained a covenant that it should continue for forty, and afterwards for seventy years. For this a consideration was paid, and is now paid, to the public, by the large expenditure for constructing the bridge; to Harvard college, by the sum of 200*l.* annually. But the legisla-
*531] ture *have now done everything to make the grant unproductive—to deprive the holders of all advantage from it.

Necessarily, the grant to the proprietors of the Charles River bridge contained a guarantee of their enjoyment of the privileges contained in it. Any other construction would be against every principle upon which the rights of property, derived from public acts, rests. Suppose, after the grant of a ferry, with a right to take tolls, and the establishment of it by the grantee, at the expense of boats, a free ferry had been erected at the same place, or so contiguous as to destroy the profits of the first ferry, by a ruinous competition; would this be proper? It is said, that still the right to take tolls remains in the first franchise. This is true; and it is then inquired, what injury has been done? No franchise, it is said, is taken away; all the rights granted remain; the tolls remain. It is true, the counsel for

the defendants admit that all will pass over the free ferry; but yet they say the toll-dish of the first grantees is not touched by the hands of those who have opened the free ferry; the notice of the rates of tolls to be paid, yet remains. But to all this the plaintiffs oppose the simple fact. Under the plaintiffs' grant of a franchise, they possess the constitutional right to keep down all competition, during the whole time of the charter. This has been established by an unbroken chain of authorities, for many years; and this applies to all grants alike, here, as well as in England. It is a franchise; and every dollar of toll taken at the Warren bridge, since its erection, and the temporary use as a toll bridge, is a part of the legal and proper profits of our franchise; and thus the guarantee, conveyed in grant (as guarantees are interpreted by the Massachusetts courts), has been broken.

Mr. Webster then went into a further examination of the argument of the counsel for the defendants, and into a notice of the observations which had fallen from them in the defence. The plaintiffs, it is said, have received compensation enough; their profits have been already very large; they have had a reasonable compensation. This is not so. Nothing is reasonable but the fulfilment of the contract; it is not reasonable, that one party should judge for themselves, as to compensation; and depart from the terms of the contract, which is definite and plain in its meaning.

There was no extinction, it is argued, of the franchise. The answer is, that the act authorizing the second bridge expressly extends the charter, adding thirty years to it; and recites the consideration *the public had received for the same. In this, there is a guarantee that the state [*532 shall pass no law to impair the contract. It is not true, that we can have no property in the line of travel, if by that, is meant, in the franchise granted by Gov. Winthrop and others, the right of transporting passengers from Boston to Charlestown. The franchise is valuable, because the transportation was concentrated at the points at which the plaintiffs' bridge was erected. The construction of the grant to us, which we demand, it is said, is not valuable. The plaintiffs say otherwise, and the issue is with this court.

It is held up as a cause of alarm, that the plaintiffs claim a perpetual right to this franchise; and that when the charter of their bridge has expired, they will fall back upon their claim to the ferry. We do no such thing. When that time comes, it becomes the property of the state again. Theirs then it is, "King, Cawdor, Glamis, all!" And it were to have been wished, that the defendants could have been content to wait until that time had arrived.

The analogies of the rights of a tavern, a street, a mill, &c., have been put in the course of the argument for the defence. But all these were false analogies; they were not franchises; not in the grant of the government.

Then, there is a long argument, based on the alleged policy of Massachusetts, in regard to public highways. There is nothing, Mr. Webster argued, in the situation of such matters, in that state, requiring the adoption of any particular line of policy. The roads are numerous and excellent, and no trouble is experienced in maintaining them so. There are no cases requiring any peculiar policy, nor any great or broad power to be exercised over them.

This particular case, formed an exception to the usual caution exercised

by Massachusetts, is legislating upon matters of this kind. Ever since this act passed, nay, within these two years, the legislature has granted a charter to a company for the erection of "The Hancock Free Bridge," near the West Boston bridge, from Boston to Cambridge; between that avenue and Canal bridge, lower down. The act prescribes the width; the obligation to attend the draw, &c.; makes the bridge a free one; the corporation to keep it in order, &c. For all this, they look for their compensation in the advanced value of their contiguous property. And in this very act, that corporation are directed to make compensation to all owners of real estate, whose property is liable to injury by the erection of the said bridge; *appraisers
*533] are to be appointed, according to a mode pointed out in the act, and if not made according to their appraisement, then by the decision of a jury of the country. And a section of the act provides, that its provisions are to be void, if, before a certain period, the proprietors of the West Boston bridge shall sell out their bridge, according to the estimate of appraisers to be appointed by the parties. The language is, if such proprietors, "will sell out their bridge and franchise." Now, can this be set off by metes and bounds, as required of us, in relation to our "franchise?" And so much for the "policy" and understanding of the legislature of Massachusetts, as to franchises!

Again, it is pretended and argued, that the plaintiffs have not always been uniform in the interpretation of their own rights. On the contrary, answered Mr. Webster, this same right was set up, on building the bridge, to the franchise of the ferry, and was then acknowledged; and the same principle has ever since been recognised and acted upon, by the legislature, and by the plaintiffs.

And there was one other subject, which, though it had no bearing upon the case at bar whatever, had been made a great deal of, in the argument of defendants' counsel. Some observations upon it had been advanced, by way of connecting it with the case, of so novel a kind, as to require, however, some notice. And this was, that in chartering the Warren bridge, the legislature did but exercise its power over the eminent domain of the state. This power is described as being inalienable, and that the state cannot abandon it; nor by its own covenant or grant, bind itself to alienate or transfer it in any way. That it cannot tie up its hands in any wise, in regard to its eminent domain. In the course of the arguments for the defendants, one of their honors (Mr. Justice STORY), had put a case to the learned counsel (Mr. Greenleaf), like the following: Suppose, a railroad corporation receive a charter at the hands of the state of Massachusetts, in which an express provision was inserted, that no other road should be granted, during the duration of the charter, within ten miles of the proposed road. The road is built and opened. Did he hold, that, notwithstanding that covenant, a subsequent legislature had the power to grant another road, within five rods of the first, without any compensation, other than the faith, thus given by their charter, of the state of Massachusetts? And the learned counsel had replied that he did so say, and did so hold! This struck him, as it must have struck the court, as most startling doctrine.

*Mr. *Greenleaf* here stated, that in such a case, the faith of the
*534] state of Massachusetts was pledged to indemnify the parties, by mak-

ing full compensation for whatever property the state might take, and for all the injury which should be done to private rights. It would not be presumed by this court, that the faith of the state would be broken.

Mr. Webster proceeded to say, that the first question he wished to put, in relation to the position of the defendants' counsel, was, how can this power of eminent domain, as thus construed, be limited to the two sides, merely, of the road? Why should it not fall upon the road itself, and no compensation follow to the grantees? It is all alike part and parcel of the same "eminent domain." And so, in the case at bar, if that power gives the right to erect another bridge beside our own, why does it not give an equal right to take the latter, also?

Eminent domain is a part of sovereignty, and resides in the sovereign—in the people; what portion of it is granted to the legislature, belongs to them; and what is not granted, remains with the people. Is not the power of eminent domain as well restricted as any other power? It is restricted by the constitution of the state, which contains a surrender of it to the government erected by that constitution. It may be as well regulated and restrained by provisions in the constitution, as any other power originally in the people; and its exercise must be according to such provisions. It is necessary to have a clear idea of what this same power of eminent domain actually is. What, then, do the counsel for the defendants mean, when they say that the state cannot transfer its eminent domain? They certainly do not mean its domains, its territory, its lands? And here he cited the case of the government land in the west and north-west, as a proof that that could not be the meaning of the counsel. They were the eminent domain, in one sense, of the country; and in that sense, the government can and does pass them away. But the other sense was, the power, rule, dominion of the state over its territory. These two ideas must not be blended in this investigation. The power of the state over its eminent domain, means the power of government over property, public or private, under various rules and qualifications. What is meant by the government's inability to part with its eminent domain? It can part with the thing, and reserve the power over it, to the extent of those qualifications already adverted to. Taking public or private property *for public benefit, by the state, is an exercise of the power of the state over its eminent domain; but [*535 granting a franchise is not an exercise of that power. Cited, Vatt. p. 173, § 244; p. 70, § 45.

The legislature may grant franchises. This is done by its sovereign power. What may it do with those franchises? What power has it over them, after they have been granted? It may do just what it is limited to do, and nothing more. It is restrained by the same instrument which gave it existence from doing more. The question is, what restrictions on this power are found in the constitution of Massachusetts; and by a reference to it, the limitation of legislative powers will be found. The power may be exercised by taking property, on paying for it. In the constitution, it is expressly declared, that property shall not be taken by the public, without its being paid for. In Baldwin's Circuit Court reports, it is said, that it is incident to the sovereignty of every government, that it may take private property for public use; but the obligation to make compensation is con-

comitant with the right. *Bonaparte* v. *Camden and Amboy Railroad Company*, Bald. 220.

How, then, can this ground, which has been taken for the defendants, be maintained? The whole pleadings show, that the right of eminent domain was not involved in this case, when before the court of Massachusetts. It is too late now to present it. There is no allegation, that the property of the plaintiffs have been taken, and compensation made for it. The defendants seem to say, that if the property of the proprietors of the Charles River bridge has been taken under the right of eminent domain, the case is without a remedy. But this is denied. The taking under the privilege of eminent domain, is limited by the provision, that compensation shall be made. Nor is it true, that the legislature may not part with a portion of its right of eminent domain. Thus, in *Wilson's Case*, the right to tax lands in the state of New Jersey, was surrendered by the legislature. *State of New Jersey* v. *Wilson*, 7 Cranch 164.

In conclusion, Mr. Webster said, the plaintiffs have placed their reliance upon the precedents and authority established by this honorable court, in the course of the last thirty years, in support of that construction which secured individual property against legislative assumption: and that they now asked the enlightened conscience *of this tribunal, if they have not succeeded in sustaining their complaint, upon legal and constitutional grounds: if not, they must, as good citizens of this republic, remain satisfied with the decision of the court.

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Taney, Ch. J., delivered the opinion of the court.—The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may, no doubt, be seriously affected in their pecuniary interests, by any decision which the court may pronounce; and the questions which have been raised as to the power of the several states, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible, that it is their duty, in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests, with the utmost caution; guarding, so far as they have the power to do so, the rights of property, and at the same time, carefully abstaining from any encroachment on the rights reserved to the states.

It appears, from the record, that in the year 1650, the legislature of Massachusetts granted to the president of Havard College "the liberty and power," to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf, and for the behoof, of the college; and that under that grant, the college continued to hold and keep the ferry, by its lessees or agents, and to receive the profits of it, until 1785. In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles river, and the public advantages that would result from a bridge; and praying to be incorporated, for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant

to this petition, the legislature, on the 9th of March 1785, passed an act incorporating a company, by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter, the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to *forty years from the first opening of the bridge for passengers; and from the time the toll commenced, until the expiration of this term, the company were to pay 200*l.*, annually, to Harvard College; and at the expiration of the forty years, the bridge was to be the property of the commonwealth; "saving (as the law expresses it) to the said college or university, a reasonable annual compensation, for the annual income of the ferry, which they might have received, had not the said bridge been erected." [*537

The bridge was accordingly built, and was opened for passengers on the 17th of June 1786. In 1792, the charter was extended to seventy years from the opening of the bridge; and at the expiration of that time, it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of 200*l.* and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles river. This bridge is only sixteen rods, at its commencement, on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart, at their termination on the Boston side. The travellers who pass over either bridge, proceed from Charlestown square, which receives the travel of many great public roads leading from the country; and the passengers and travellers who go to and from Boston, used to pass over the Charles River bridge, from and through this square, before the erection of the Warren bridge.

The Warren bridge, by the terms of its charter, was to be surrendered to the state, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren bridge had not been built; and the bill was filed, after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged as a ground for relief, that the act for the erection of the Warren bridge impaired the obligation of the contract between the commonwealth and the proprietors of the Charles River bridge; and was, therefore, repugnant to the the constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had then been so far *completed, that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge has been so far completed, that foot passengers could pass; but denied, that any persons but the workmen and the superintendents had had passed over, with their consent. In this state of the pleadings, the cause came on for hearing in the supreme judicial court for the county of [*538

Suffolk, in the commonwealth of Massachusetts, at November term 1829; and the court decided, that the act incorporating the Warren bridge, did not impair the obligation of the contract with the proprietors of the Charles River bridge, and dismissed the complainants' bill; and the case is brought here by writ of error from that decision. It is, however, proper to state, that it is understood, that the state court was equally divided upon the question; and that the decree dismissing the bill, upon the ground above stated, was pronounced by a majority of the court, for the purpose of enabling the complainants to bring the question for decision before this court.

In the argument here, it was admitted, that since the filing of the supplemental bill, a sufficient amount of toll had been reserved by the proprietors of the Warren bridge to reimburse all their expenses, and that the bridge is now the property of the state, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River bridge, has by this means been entirely destroyed. If the complainants deemed these facts material, they ought to have been brought before the state court, by a supplemental bill; and this court, in pronouncing its judgment, cannot regularly notice them. But in the view which the court take of this subject, these additional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argu d on that ground, and the controversy has been for a long time depending, and all parties desire a final end of it; and as it is of importance to them, that the principles on which this court decide should not be misunderstood; the case will be treated, in the opinion now delivered, as if these admitted facts were regularly before us.

A good deal of evidence has been offered, to show the nature and extent of the ferry-right granted to the college; and also to show the rights claimed by the proprietors of the bridge, at different times, *by virtue of their charter; and the opinions entertained by committees of the legislature, and others, upon that subject. But as these circumstances do not affect the judgment of this court, it is unnecessary to recapitulate them.

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The plaintiffs in error insist, mainly, upon two grounds: 1st. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "The Proprietors of the Charles River Bridge;" and that under, and by virtue of this transfer of the ferry-right, the rights of the bridge company were as exclusive in that line of travel, as the rights of the ferry. 2d. That independently of the ferry-right, the acts of the legislature of Massachusetts, of 1785 and 1792, by their true construction, necessarily implied, that the legislature would not authorize another bridge, and especially, a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the state; and that

the law authorizing the erection of the Warren bridge in 1828, impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us (being a writ of error to a state court), the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle, that the law divests vested rights. It is well settled, by the decisions of this court, that a state law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract. In *Satterlee* v. *Matthewson*, 2 Pet. 413, this court, in speaking of the state law then before them, and interpreting the article in the constitution of the United States which forbids the states to pass laws impairing the obligation of contracts, uses the following language: "It (the state law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, *or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument" (the constitution of the United States). And in another passage in the same case, the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is, certainly, no part of the constitution of the United States, which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law, upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were re-affirmed in this court, in the late case of *Watson and others* v. *Mercer*, decided in 1834 (8 Pet. 110): "As to the first point (say the court), it is clear, that this court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact, that it divests antecedent vested rights of property. The constitution of the United States does not prohibit the states from passing retrospective laws, generally, but only *ex post facto* laws." [*540

After these solemn decisions of this court, it is apparent, that the plaintiffs in error cannot sustain themselves here, either upon the ferry-right, or the charter to the bridge; upon the ground, that vested rights of property have been divested by the legislature. And whether they claim under the ferry-right, or the charter to the bridge, they must show that the title which they claim, was acquired by contract, and that the terms of that contract have been violated by the charter to the Warren bridge. In other words, they must show, that the state had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case.

The nature and extent of the ferry right granted to Harvard College, in 1650, must depend upon the laws of Massachusetts; and the character and extent of this right has been elaborately discussed at the bar. But in the view which the court take of the case before them, it is not necessary to express any opinion on these questions. For, assuming that the grant to Harvard College, and the charter to the bridge company, were both contracts, and that the ferry-right was as extensive and exclusive as the plain-

tiffs contend for; still they *cannot enlarge privileges granted to the bridge, unless it can be shown, that the rights of Harvard College in this ferry have, by assignment, or in some other way, been transferred to the proprietors of the Charles River bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college, before the bridge was built.

It has been strongly pressed upon the court, by the plaintiffs in error, that these rights are still existing, and are now held by the proprietors of the bridge. If this franchise still exists, there must be somebody possessed of authority to use it, and to keep the ferry. Who could now lawfully set up a ferry, where the old one was kept? The bridge was built in the same place, and its abutments occupied the landings of the ferry. The transportation of passengers in boats, from landing to landing, was no longer possible; and the ferry was as effectually destroyed, as if a convulsion of nature had made there a passage of dry land. The ferry, then, of necessity, ceased to exist, as soon as the bridge was erected; and when the ferry itself was destroyed, how can rights which were incident to it, be supposed to survive? The exclusive privileges, if they had such, must follow the fate of the ferry, and can have no legal existence without it; and if the ferry-right had been assigned by the college, in due and legal form, to the proprietors of the bridge, they themselves extinguished that right, when they erected the bridge in its place. It is not supposed by any one, that the bridge company have a right to keep a ferry. No such right is claimed for them, nor can be claimed for them, under their charter to erect a bridge; and it is difficult to imagine, how ferry-rights can be held by a corporation, or an individual, who have no right to keep a ferry. It is clear, that the incident must follow the fate of the principal, and the privilege connected with property cannot survive the destruction of the property; and if the ferry-right in Harvard College was exclusive, and had been assigned to the proprietors of the bridge, the privilege of exclusion could not remain in the hands of their assignees, if those assignees destroyed the ferry.

But upon what ground can the plaintiffs in error contend, that the ferry-rights of the college have been transferred to the proprietors of the bridge? If they have been thus transferred, it must be by some mode of transfer known to the law; and the evidence relied on to prove it, can be pointed out in the record. How was it transferred? It is not suggested, *542] that there ever was, in point of fact, a deed of *conveyance executed by the college to the bridge company. Is there any evidence in the record, from which such a conveyance may, upon legal principle, be presumed? The testimony before the court, so far from laying the foundation for such a presumption, repels it, in the most positive terms. The petition to the legislature, in 1785, on which the charter was granted, does not suggest an assignment, nor any agreement or consent on the part of the college; and the petitioners do not appear to have regarded the wishes of that institution, as by any means necessary to insure their success. They place their application entirely on considerations of public interest and public convenience, and the superior advantages of a communication across Charles river, by a bridge, instead of a ferry. The legislature, in granting the charter, show, by the language of the law, that they acted on the prin-

ciples assumed by the petitioners. The preamble recites, that the bridge "will be of great public utility;" and that is the only reason they assign, for passing the law which incorporates this company. The validity of the character is not made to depend on the consent of the college, nor of any assignment or surrender on their part; and the legislature deal with the subject, as if it were one exclusively within their own power, and as if the ferry-right were not to be transferred to the bridge company, but to be extinguished, and they appear to have acted on the principle, that the state, by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry; because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place; and upon that principle, they proceed to make a pecuniary compensation to the college, for the franchise thus taken away: and as there is an express reservation of a continuing pecuniary compensation to the college, when the bridge shall become the property of the state, and no provision whatever for the restoration of the ferry-right, it is evident, that no such right was intended to be reserved or continued. The ferry, with all its privileges, was intended to be for ever at an end, and a compensation in money was given in lieu of it. The college acquiesced in this arrangement, and there is proof, in the record, that it was all done with their consent. Can a deed of assignment to the bridge company, which would keep alive the ferry-rights in their hands, be presumed, under such circumstances? Do not the petition, the law of incorporation, and the consent of the college to the pecuniary provision made for it, in perpetuity; all repel the notion of an assignment of its rights to the bridge *company, and prove that every party to this proceeding intended, that its franchises, whatever they were, should be resumed by the state, and be no longer held by any individual or corporation? With such evidence before us, there can be no ground for presuming a conveyance to the plaintiffs. There was no reason for such a conveyance; there was every reason against it; and the arrangements proposed by the charter to the bridge, could not have been carried into full effect, unless the rights of the ferry were entirely extinguished. [*543

It is, however, said, that the payment of the 200*l.* a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest; and by substitution, upon chancery principles, to be clothed with all their rights. The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls, which the company were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this incumbrance, as well as to every other expenditure to which the company might be subjected, under the provisions of their charter. The tolls were to be collected from the public, and it was intended, that the expense of the annuity to Harvard College should be borne by the public; and it is manifest, that it was so borne, from the amount which it is admitted they received, until the Warren bridge was erected. Their agreement, therefore, to pay that sum, can give them no equitable right to be regarded as the assignees of the college, and certainly, can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not

easy to perceive, how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege, and had not been resumed by the state, for the purpose of building a bridge in its place.

Neither can the extent of the pre-existing ferry-right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow, that because the legislative power of Massachusetts, in 1650, may have granted to a justly-favored seminary of learning, the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place.

*544] The fact that such a right *was granted to the college, cannot, by any sound rule of construction, be used to extend the privileges of the bridge company, beyond what the words of the charter naturally and legally import. Increased population, longer experience in legislation, the different character of the corporations which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the state in this respect; and as the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation, which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs. Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises, by the public, to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In the case of the *Proprietors of the Stourbridge Canal* v. *Wheeley and others*, 2 B. & Ad. 793, the court say, "the canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this—that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could

*545] well be imagined, for giving to the *canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly

secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held, that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle, where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter, in one of the states, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned, for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction, in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging *these privileges by implication; and construing a statute more unfavorably [*546
to the public, and to the rights of community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established. In the case of the *United States* v. *Arredondo*, 8 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court; and the principle recognised, that in grants by the public, nothing passes by implication. The rule is still more clearly and plainly stated in the case of *Jackson* v. *Lamphire*, 3 Pet. 289. That was a grant of land by the state; and in speaking of this doctrine of implied covenants, in grants by the state, the court use the following language, which is strikingly applicable to the case at bar: "The only contract made by the state, is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do, or not to do, any further act in relation to the land; and we do

not feel ourselves at liberty, in this case, to create one by implication. The state has not, by this act, impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius, and gave it to one not claiming under him; neither does the award produce that effect; the grant remains in full force; the property conveyed is held by his grantee, and the state asserts no claim to it." The same rule of construction is also stated in the case of *Beaty* v. *Lessee of Knowler*, 4 Pet. 168, decided in this court in 1830. In delivering their opinion in that case, the court say: "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."

But the case most analogous to this, and in which the question came more directly before the court, is the case of the *Providence Bank* v. *Billings*, 4 Pet. 514, which was decided in 1830. In that case, it appeared, that the legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the state, that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, *547] a law *was passed, imposing a tax on all banks in the state; and the right to impose this tax was resisted by the Providence Bank, upon the ground, that if the state could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said, that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court, the late chief justice states the principle, in the following clear and emphatic language. Speaking of the taxing power, he says, "as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." The case now before the court is, in principle, precisely the same. It is a charter from a state; the act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River bridge, is the same, almost in words, with that used by the Providence Bank; that is, that the power claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised, so as to destroy the value of the franchise, cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said, that in the case of the Providence Bank, this court were speaking of the taxing power; which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it

was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in *preserving it undiminished. [*548
And when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, "that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court, was not confined to the taxing power, nor is it so limited, in the opinion delivered. On the contrary, it was distinctly placed on the ground, that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power, or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question, that the interests of the great body of the people of the state, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition, for seventy years. While the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take: this is the whole grant. There is no exclusive privilege given to them over the waters of Charles river, above or below their bridge; no right to erect another bridge themselves, nor to prevent other persons from erecting one, no engagement from the state, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects, the charter is silent; and *nothing is said in it about a line [*549
of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred; if the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred, from the words by which the grant is made.

The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River bridge, nor make

the way to it, or from it, less convenient. None of the faculties or franchises granted to that corporation, have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property, enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complainant; for it is not pretended, that the erection of the Warren bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show, that the legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated, that contract, by the erection of the Warren bridge.

The inquiry, then, is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none; no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question: in charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to Providence Bank. The whole community are interested in this inquiry, and they have a right to require
*550] that the power of promoting their *comfort and convenience, and of advancing the public prosperity, by providing safe, convenient and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state; unless it shall appear by plain words, that it was intended to be done.

But the case before the court is even still stronger against any such implied contract, as the plaintiffs in error contend for. The Charles River bridge was completed in 1786; the time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren bridge, the proprietors of Charles River bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges and franchises of the company, must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company, to build a bridge over Charles river; furnishing another communication with Boston, and distant only between one and two miles from the old bridge. The first six sections of this act incorporate the proprietors of the West Boston bridge, and define the privileges, and describe the duties of that corporation. In the 7th section, there is the following recital: "And whereas, the erection of Charles River bridge was a work of hazard and public utility, and another bridge in the place of West Boston

bridge may diminish the emoluments of Charles River bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River bridge, and to continue it for the term of seventy years from the day the bridge was completed; subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing, that the state did not suppose, that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem, that the legislature were especially careful to exclude any inference that the extension was made upon the ground of *compromise with the bridge company, or as a compensation for rights impaired. On the contrary, words are cautiously employed [*551 to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given, because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated, might diminish the emoluments they had expected to receive from it.

It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles river which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the state. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter, an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found, where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required, and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer it from the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the state, to make such a contract.

Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, rail-

roads have rendered the turnpike roads on the same line of travel so entirely
*552] useless, that the *franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the state. Amid the multitude of cases which have occurred, and have been daily occurring, for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it, from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves, that neither states, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows, that the men who voted for these laws, never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts, on the part of the states, and of property in a line of travel, by a corporation, if it would now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach, without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood, that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awakening from their sleep, and
*553] calling *upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless,

indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another, had been made, no rail-road or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

Many other questions, of the deepest importance, have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question, involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it. Some questions, also, of a purely technical character, have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record, to bring out the great question in contest; and it is the interest of all parties concerned, that the real controversy should be settled, without further delay: and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding, in which the parties have brought it before the court.

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

*McLean, Justice.—This suit in chancery was commenced in the [*554
suprime court of Massachusetts, where the bill was dismissed, by a decree *pro formâ*, the members of that court being equally divided in opinion; and a writ of error was taken to this court, on the ground, that the right asserted by the complainants, and which has been violated, under the charter of the respondents, is protected by a special provision in the federal constitution.

The complainants' right is founded on an act of the legislature of Massachusetts, passed March 9th, 1785, which incorporated certain individuals, and authorized them to erect a bridge over Charles river, a navigable stream between Boston and Charlestown, and an amendatory act, passed in 1791, extending the charter thirty years. As explanatory of this right, if not the ground on which it in part rests, a reference is made to an ancient ferry, over the same river, which was held by Harvard College; and the right of which was transferred, it is contended, in equity, if not in law, to the bridge company. The wrong complained of, consists in the construction of a new bridge, over the same river, under a recent act of the legislature, within a few rods of the old one, and which takes away the entire profits of the old bridge.

The act to establish the Charles River bridge required it to be constructed within a limited time, of certain dimensions, to be kept in repair, and to afford certain specified accommodations to the public. The company were authorized to charge certain rates of toll; and they were required to pay, annually, 200*l.* to Harvard College. The first charter was granted for forty years. The facts proved in the case show that a bridge of the description required by the act of 1785, was constructed within the time limited; that

the annual payment has been made to the college; and that, in every other respect, the corporation has faithfully performed the conditions and duties enjoined on it.

It is contended, that the charter granted to the respondents, violates the obligation of that which had been previously granted to the complainants; and that, consequently, it is in conflict with that provision of the constitution which declares, that no "state shall pass any law impairing the obligation of contracts."

In the investigation of this case, the first inquiry which seems naturally *555] *to arise is, as to the nature and extent of the right asserted by the complainants. As early as the year 1631, a ferry was established across Charles river, by the colonial government of Massachusetts Bay. In 1640, the general court say, "that the ferry is granted to the college." From this time, the profits of the ferry were received by the college, and it was required, by various statutes, under certain penalties, to keep certain boats, &c., for the accommodation of the public. This duty was performed by the college; and it continued to occupy the ferry until the Charles River bridge was constructed.

From the above act of the general court, and others which have been shown, and the unmolested use of the ferry for more than 140 years, by the college, it would seem, that its right to this use had received all the sanctions necessary to constitute a valid title. If the right was not founded strictly on prescription, it rested on a basis equally unquestionable. At the time this ferry was established, it was the only public communication between Boston and Charlestown. These places, and especially the latter, were then small; and no greater accommodation was required than was afforded by the ferry. Its franchise was not limited, it is contended, to the ferry-ways; but extended to the whole line of travel between the two towns.

It cannot be very material to inquire, whether this ferry was originally public or private property; or whether the landing places were vested in the college, or their use only, and the profits of the ferry. The beneficial interest in the ferry was held by the college, and it received the tolls. The regulation of the ferry, it being a matter of public concern, belonged to the government. It prescribed the number of boats to be kept, and the attendance necessary to be given; and on a failure to comply with these requisitions, the college would have been subjected to the forfeiture of the franchise, and the other penalties provided by statute. Was this right of ferry, with all its immunities, transferred to the Charles River bridge company?

It is not contended, that there is any express assignment of this right, by deed or otherwise; but the complainants claim, that the evidence of the transfer is found in the facts of the case. Before the charter was granted, the college was consulted on the subject; as soon as the bridge was con- *556] structed, the use of the ferry ceased; *and the college has regularly received from the complainants the annuity of 200*l.* This acquiescence, it is contended, taken in connection with the other facts in the case, goes to establish the relinquishment of the right to the ferry, for the annual compensation required to be paid under the charter. That there was a substitution of the bridge for the ferry, with the consent of the college, is evident; but there seems to have been no assignment of the rights of the ferry. The original bridge charter was granted for forty years; at the expiration

of which period, the property of the bridge was to revert to the commonwealth, "saving to the college a reasonable and annual compensation for the annual income of the ferry, which they might have received, had not said bridge been erected." Had the bridge been destroyed by fire or otherwise, there was no investiture of right to the ferry in the complainants, that would have enabled them to keep up the ferry, and realize the profits of it. On the destruction of the bridge, the college, it is presumed, might have resumed all the rights and responsibilities attached to the ferry. At least, it is very clear, that these rights and responsibilities would not have devolved on the complainants. They stipulated to afford a different accommodation to the public. If, then, these rights could not have been claimed and exercised by the complainants, under such circumstances; how can they be considered as enlarging, or in any way materially affecting, the franchise under the charter of 1785?

That the franchise of a ferry, at common law, and in the state of Massachusetts, extends beyond the landing places, is very clear from authority. 10 Petersd. 53; 13 Vin. 513; Willes 512 note; 12 East 330; 6 Barn. & Cres. 703; Year Book, Hen. VI. 22; Roll. Abr. 140; Fitzh. 428 n; Com. Dig. Market, C. 2; Piscary, B.; Action on the Case, A.; 3 Bl. Com. 219; 1 Nott & McCord 387; 2 Saund. 172; 6 Mod. 229; 2 Vent. 344; 3 Lev. 220; Com. Dig. Patent, F. 4–7; 2 Saund. 72, n. 4; 2 Inst. 406; Chit. Prerog. 12, ch. 3; 10, ch. 2; 3 Salk. 198; Willes 512; 4 T. R. 666; Saund. 114; Cro. Eliz. 710.

The annuity given to the college was a compensation for the profits of the ferry; and shows a willingness by the college to suspend its rights to the ferry, during the time specified in the act. And if, indeed, it might be construed into an abandonment of the ferry, still it was an abandonment to the public, on the terms specified, for a better accommodation. *The bridge was designed not only to answer all the purposes of the ferry, [*557 but to enlarge the public convenience. The profits contemplated by the corporators, were not only those which had been realized from the ferry, but such as would arise from the increased facilities to the public.

If there was no assignment of the ferry franchise to the complainants, its extent cannot be a matter of importance in this investigation; nor is it necessary to inquire into the effect of an assignment, under the circumstances of the case, if it had been made. There is no provision in the act of incorporation, vesting the company with the privileges of the ferry. A reference is made to it merely with the view of fixing the site of the bridge. The right and obligations of the complainants must be ascertained by the construction of the act of 1785.

This act must be considered in the light of a contract, and the law of contracts applies to it. In one sense, it is a law, having passed through all the forms of legislation, and received the necessary sanctions; but it is essentially a contract, as to the obligation imposed by it, and the privileges it confers.

Much discussion has been had at the bar, as to the rule of construing a charter or grant, and many authorities have been referred to on this point. In ordinary cases, a grant is construed favorable to the grantee, and against the grantor. But it is contended, that in governmental grants, nothing is taken by implication. The broad rule, thus laid down, cannot be sustained

by authority. If an office be granted by name, all the immunities of that office are taken by implication. Whatever is essential to the enjoyment of the thing granted, must be taken by implication. And this rule holds good, whether the grant emanate from the royal prerogative of the king, in England, or under an act of legislation, in this country. The general rule is, that "a grant of the king, at the suit of the grantee, is to be construed most beneficially for the king, and most strictly against the grantee;" but grants obtained as a matter of special favor of the king, or on a consideration, are more liberally construed. Grants of limited political powers are construed strictly. Com. Dig. tit. Grant, E. 5; 2 Dane's Abr. 683; *Stark* v. *McGowan*, 1 Nott & McCord 387; Poph. 79; Moore 474; 8 Co. 92; 6 Barn. & Cres. 703; 5 Ibid. 875; 3 M. & S. 247; Hargrave 18–23; Angel on Tide Waters 106–7; 4 Burr. 2161; 4 T. R. 439; 2 Bos. *& Pul. 472; 1 T. R. *558] 669; 1 Conn. 382; 17 Johns. 195; 3 M. & S. 247; 6 Mass. 437; 1 Ibid. 231; 17 Ibid. 289; Angel 108; 4 Mass. 140, 522; Plowd. 336–7; 9 Co. 30; 1 Vent. 409; Cro. Jac. 179; Dyer 30; Saville 132; 10 Co. 112; Com. Dig. Grant, 9, 12; Bac. Abr. tit. Prerog. 2; 5 Barn. & Cres. 875; 1 Mass. 356.

Where the legislature, with a view of advancing the public interest by the construction of a bridge, a turnpike-road, or any other work of public utility, grants a charter, no reason is perceived, why such a charter should not be construed by the same rule that governs contracts between individuals. The public, through their agent, enter into the contract with the company; and a valuable consideration is received in the construction of the contemplated improvement. This consideration is paid by the company, and sound policy requires, that its rights should be ascertained and protected, by the same rules as are applied to private contracts.

In the argument, great reliance was placed on the case of the *Stourbridge Canal* v. *Wheeley and others*, 2 Barn. & Ald. 792. The question in this case was, whether the plaintiffs had a right to charge toll in certain cases; and Lord TENTERDEN said, "the canal having been made under the provisions of an act of parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act." This is relied on to show, that nothing is taken, under such a grant, by implication or inference. His lordship says, the right must be clearly given —he does not say expressly given, which would preclude all inference. In another part of the same opinion, his lordship says, "Now, it is quite certain, that the company have no right, *expressly* given, to receive any compensation, except the tonnage paid for goods carried through some of the locks on the canal, or the collateral cuts; and it is, therefore, incumbent upon them to show that they have a right, *clearly* given, by inference, from some of the *other clauses." May this right be shown by *inference*; *559] and is not this implication? The doctrine laid down in this case, is simply this: that the right to charge the toll, must be given expressly, or it must be clearly made out by inference. Does not this case establish the

doctrine of implication, as applied to the construction of grants? Is it not the right to pass by-laws incident to a corporation? A right cannot be claimed by a corporation, under ambiguous terms; it must clearly appear to have been granted, either in express term, or by inference, as stated by Lord TENTERDEN.

A corporate power to impose a tax on the land of the company, as considered in the case of *Beaty* v. *Lessee of Knowler*, 4 Pet. 168, must, in its nature, be strictly construed; and so, in all cases where corporate powers in the nature of legislation, are exercised. In that case, the directors were authorized to impose a tax, under certain circumstances; and the court held, that they had no power to impose the tax, under other circumstances.

Charles river being a navigable stream, any obstructions to its navigation, by the erection of a bridge, or any other work, would have been punishable, unless authorized by law. By the act of 1785, the complainants were authorized to build the bridge, elect their officers, &c., and charge certain rates of toll. The power to tax passengers, was the consideration on which the expense of building the bridge, lighting it, &c., and keeping it in repair, was incurred. The grant, then, of tolls, was the essential part of the franchise. That course of reasoning which would show the consideration to consist in anything short of this power to tax, and the profit arising therefrom, is too refined for practical purposes. The builders of the bridge had, no doubt, a desire to increase the public accommodation; but they looked chiefly to a profitable investment of their funds; and that part of the charter which secured this object, formed the consideration on which the work was performed.

But it is said, there was no exclusive right given; and that, consequently, the legislature might well cause another bridge to be built, whenever, in their opinion, the public convenience required it. On the other hand, it is insisted, that the franchise of the bridge was as extensive as that of the ferry; and that the grant of this franchise having been made by the legislature, it had no power to grant a part of it to the new bridge. [*560
*That this part of the case presents considerations of great importance, and of much difficulty, cannot be denied. To inquire into the validity of a solemn act of legislation is, at all times, a task of much delicacy; but it is peculiarly so, when such inquiry is made by a federal tribunal, and relates to the act of a state legislature. There are cases, however, in the investigation of which such an inquiry becomes a duty; and then no court can shrink, or desire to shrink, from its performance. Under such circumstances, this duty will always be performed with the high respect due to a branch of the government, which, more than any other, is clothed with discretionary powers, and influenced by the popular will.

The right granted to the Charles River bridge company, is, in its nature, to a certain extent, exclusive; but to measure this extent, presents the chief difficulty. If the boundaries of this right could be clearly established, it would scarcely be contended by any one, that the legislature could, without compensation, grant to another company the whole, or any part of it. As well might it undertake to grant a tract of land, although an operative grant had been previously made for the same land. In such a case, the second grant would be void, on the ground, that the legislature had parted with the entire interest in the premises. As agent of the public, it had passed the

title to the first grantee; and having done so, it could convey no right by its second grant. The principle is the same in regard to the question under consideration. If the franchise granted to the complainants extended beyond the new bridge, it was as much above the power of the legislature to make the second grant, as it would be to grant a part of a tract of land for which a patent had been previously and regularly issued. The franchise, though incorporeal, in legal contemplation, has body and extension; and having been granted, is not less scrupulously guarded by the principles of law, than an interest in the soil. It is a substantive right in law, and can no more be resumed by the legislature, when once granted, than any other right.

But would it not be unsafe, it is suggested, for the judicial authority to interpose and limit this exercise of legislative discretion? The charter of the Warren bridge, it is said, was not hastily granted; that all the circumstances of the case, year after year, were duly examined by the legislature; and at last, the act of incorporation was passed, because, in the judgment of *561] the legislature, the public *accommodation required it; and it is insisted, that the grant to the complainants was necessarily subject to the exercise of this discretion.

It is, undoubtedly, the province of the legislature to provide for the public exigencies, and the utmost respect is always due to their acts; and the validity of those acts can only be questioned judicially, where they infringe upon private rights. At the time the Charles River bridge was built, the population of Boston and Charlestown was small in comparison with their present numbers; and it is probable, that the increase has greatly exceeded any calculation made at the time. The bridge was sufficient to accommodate the public; and it was, perhaps, believed, that it would be sufficient, during the time limited in the charter. If, however, the increased population and intercourse between these towns and the surrounding country, required greater accommodation than was afforded by the bridge, there can be no doubt, that the legislature could make provision for it.

On the part of the complainants' counsel, it is contended, if increased facilities of intercourse between these places were required by the public, the legislature was bound in good faith to give the option to the Charles River bridge company, either to enlarge their bridge, or construct a new one, as might be required. And this argument rests upon the ground, that the complainants' franchise included the whole line of travel between the two places. Under this view of their rights, the company proposed to the legislature, before the new charter was granted to the respondents, to do anything which should be deemed requisite for the public accommodation. In support of the complainants' right, in this respect, a case in referred to in 7 Barn. & Cres. 40; where it is laid down, that the lord of an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses, situated within the limits of his franchise; and also to 5 Barn. & Cres. 363. These cases show, that the grant to the lord of the market is exclusive; yet, if the place designated for the market is made too small by the act of the owner, any person may sell in the vicinity of the market, without incurring any responsibility to the lord of the market.

*562] Suppose, the legislature had passed a law requiring the *complainants to enlarge their bridge, or construct a new one, would they have been bound by it? Might they have not replied to the legislature, we

have constructed our bridge of the dimensions required by the charter; we have, therefore, provided for the public all the accommodation which we are bound to give? And if the legislature could not require this of the complainants, is it not clear, that they cannot assert an exclusive claim to the advantages of an enlarged accommodation? In common with our citizens, they submitted propositions to the legislature, but they could urge no exclusive right to afford any accommodation beyond what was given by their bridge. When the Charles River bridge was built, it was considered a work of great magnitude. It was, perhaps, the first experiment made to throw a bridge of such length over an arm of the sea; and in the construction of it, great risk and expense were incurred. The unrestricted profits contemplated, were necessary to induce or justify the undertaking. Suppose, within two or three years after the Charles River bridge had been erected, the legislature had authorized another bridge to be built alongside of it, which could only accommodate the same line of travel. Whether the profits of such a bridge were realized by a company or by the state, would not the act of the legislature have been deemed so gross a violation of the rights of the complainants, as to be condemned by the common sense and common justice of mankind? The plea, that the timbers or stone of the new bridge did not interfere with the old one, could not, in such a case, have availed. The value of the bridge is not estimated by the quantity of timber and stone it may contain, but by the travel over it. And if one-half or two-thirds of this travel, all of which might conveniently have passed over the old bridge, be drawn to the new one, the injury is much greater than would have been the destruction of the old bridge. A re-construction of the bridge, if destroyed, would secure to the company the ordinary profits; but the division or destruction of the profits, by the new bridge, runs to the end of the charter of the old one. And shall it be said, that the greater injury, the diversion of the profits, may be inflicted on the company, with impunity; while for the less injury, the destruction of the bridge, the law would give an adequate remedy?

I am not here about to apply the principles which have been long established in England, for the protection of ancient ferries, markets, *fairs, [*563
mills, &c. In my opinion, this doctrine, in its full extent, is not adapted to the condition of our country. And it is one of the most valuable traits in the common law, that it forms a rule of right, only in cases and under circumstances adapted to its principles. In this country, there are few rights founded on prescription. The settlement of our country is comparatively recent; and its rapid growth in population, and advance in improvements, have prevented, in a great degree, interests from being acquired by immemorial usage. Such evidence of right is found in countries where society has become more fixed, and improvements are in a great degree stationary. But without the aid of the principles of the common law, we should be at a loss how to construe the charter of the complainants, and ascertain their rights.

Although the complainants cannot fix their franchise, by showing the extent of the ferry-rights; yet, under the principles of the common law, which have been too long settled in Massachusetts, in my opinion, to be now shaken, they may claim their franchise beyond the timbers of their bridge. If they may go beyond these, it is contended, that no exact limit can be

prescribed. And because it may be difficult, and perhaps, impracticable, to designate with precision the exact limit, does it follow, that the complainants' franchise is as narrow as their bridge? Is it more difficult to define, with reasonable certainty, the extent of this right, than it is, in many other cases, to determine the character of an offence against the laws, from established facts? What shall constitute a public or private nuisance? What measure of individual wrong shall be sufficient to convict a person of the latter? And what amount of inconvenience to the public shall constitute the former? Would it be more difficult to define the complainants' franchise, than to answer these questions? And yet publlic and private nuisances are of daily cognisance in courts of justice.

How have ferry-rights, depending upon the same principles, been protected for centuries, in England? The principles of the common law are not applied with that mathematical precision, of which the principles of the civil law are susceptible. But if the complainants' franchise cannot be measured by feet and inches, it does not follow, that they have no rights. *564] In determining upon facts which establish rights or wrongs, *public as well as private, an exercise of judgment is indispensable; the facts and circumstances of each case are considered, and a sound and legal conclusion is drawn from them.

The bridge of the complainants was substituted for the ferry; and it was designed to accommodate the course of travel between Boston and Charlestown. This was the view of the legislature, in granting the charter, and of the complainants, in accepting it. And if it be admitted, that the great increase of population has required the erection of other bridges than that which is complained of in this suit, over this arm of the sea, that can afford no protection to the defendants. If the interests of the complainants have been remotely injured by the construction of other bridges, does that give a license to the defendants to inflict on them a more direct and greater injury? By an extension of the complainants' charter, thirty years, an indemnity was given and accepted by them for the construction of the West Boston bridge.

The franchise of the complainants must extend a reasonable distance above and below the timbers of their bridge. This distance must not be so great as to subject the public to serious inconvenience, nor so limited as to authorize a ruinous competition. It may not be necessary to say, that for a remote injury, the law would afford a remedy; but where the injury is ruinous, no doubt can exist on the subject. The new bridge, while tolls were charged, lessened the profits of the old one about one-half, or two-thirds; and now that it is a free bridge by law, the tolls received by the complainants are merely nominal. On what principle of law, can such an act be sustained? Are rights acquired under a solemn contract with the legislature, held by a more uncertain tenure than other rights? Is the legislative power so omnipotent in such cases, as to resume what it has granted, without compensation? It will scarcely be contended, that if the legislature may do this, indirectly, it may not do it directly. If it may do it through the instrumentality of the Warren bridge company, it may dispense with that instrumentality.

But it is said, that any check to the exercise of this discretion by the legislature, will operate against the advance of improvements. Will not a

different effect be produced? If every bridge or turnpike company were liable to have their property wrested from them, under an act of the legislature, without compensation, could much value be attached to such property? Would prudent men expend their funds in making such improvements? *Can it be considered as an injurious check to legislation, that private property shall not be taken for public purposes, without [*565 compensation? This restriction is imposed by the federal constitution, and by the constitutions of the respective states.

But it has been urged, that the property of the complainants has not been taken, as the tolls in anticipation cannot be denominated property. The entire value of the bridge consists in the right of exacting toll. Is not this right property, and cannot its value be measured? Do not past receipts and increased intercourse, afford a rule by which future receipts may be estimated? And if the whole of these tolls are taken, under an act of the legislature, is not the property of the complainants taken? The charter of the complainants has been compared to a bank charter, which implies no obligation on the legislature not to establish another bank in the same place. This is often done; and it is contended, that for the consequential injury done the old bank, by lessening its profits, no one supposes that an action would lie, or that the second charter is unconstitutional. This case bears little or no analogy to the one under consideration. A bank may wind up its business, or refuse its discounts, at the pleasure of its stockholders and directors. They are under no obligation to carry on the operations of the institution, or afford any amount of accommodation to the public. Not so with the complainants. Under heavy penalties, they are obliged to keep their bridge in repair, have it lighted, the gates kept open, and to pay 200*l.* annually to the college. This the complainants are bound to do, although the tolls received should scarcely pay for the oil consumed in the lamps of the bridge.

The sovereign power of the state has taken the tolls of the complainants, but it has left them in possession of their bridge. Its stones and timbers are untouched, and the roads that lead to it remain unobstructed. One of the counsel in the defence, with emphasis, declared, that the legislature can no more repeal a charter, than it can lead a citizen to the block. The legislature cannot bring a citizen to the block; may it open his arteries? It cannot cut off his head; may it bleed him to death? Suppose, the legislature had authorized the construction of an impassable wall, which encircled the ends of the bridge, so as to prevent passengers from crossing on it. The wall may be as distant from the abutments of the bridge as the *Warrenbridge. Would this be an infringement of the plaintiffs' franchise? On the principles contended for, how could [*566 it be so considered? If the plaintiffs' franchise is limited to their bridge, then they are not injured by the construction of this wall; or, at least, they are without remedy. This wall would be no more injurious to the plaintiffs than the free bridge. And the plaintiffs might be told, as alleged in this case, the wall does not touch your bridge. You are left in the full exercise of your corporate faculties. You have the same right to charge toll as you ever had. The legislature had the same right to destroy the plaintiffs' bridge by authorizing the construction of the wall, as they had by authorizing the construction of a free bridge. In deciding this question, we are not to consider what may be the law on this subject in Pennsylvania, Mary-

land, Virginia or Ohio; but what it is in Massachusetts. And in that state, the doctrine has been sanctioned, that associations of men to accomplish enterprises of importance to the public, and who have vested their funds on the public faith, are entitled to protection. That their rights do not become the sport of popular excitement, any more than the rights of other citizens. The case under consideration forms, it is believed, a solitary exception to this rule; whether we look to the action of the legislature, or the opinions of the distinguished jurists of the state, on the bench, and at the bar.

The expense of keeping up the bridge, and paying the annuity to the college, is all that is left by the state to the complainants. Had this been proposed, or anything which might lead to such a result, soon after the construction of the complainants' bridge, it is not probable, that it would have been sanctioned; and yet it might as well have been done then as now. A free bridge then, could have been no more injurious to the plaintiffs than it is now. No reflection is intended on the commonwealth of Massachusetts, which is so renowned in our history, for its intelligence, virtue and patriotism. She will not withhold justice, when the rights of the complainants shall be established.

Much reliance is placed on the argument, in the case reported in 4 Pet. 560, in which it was decided, that a law of the state of Rhode Island, imposing a tax upon banks, is constitutional. As these banks were chartered by the state, it was contended, that there was no implied obligation on the legislature not to tax them. That if *this power could be exercised, it might be carried so far as to destroy the banks. But this court sustained the right of the state to tax. The analogy between the two cases is not perceived. Does it follow, because the complainants' bridge is not exempt from taxation, that it may be destroyed, or its value greatly impaired by any other means? The power to tax extends to every description of property held within the state, which is not specially exempted; and there is no reason or justice in withholding from the operation of this power, property held directly under the grant of the state.

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The complainants' charter has been called a monopoly; but in no just sense can it be so considered. A monopoly is that which has been granted without consideration; as a monopoly of trade; or of the manufacture of any particular article, to the exclusion of all competition. It is withdrawing that which is a common right, from the community, and vesting it in one or more individuals, to the exclusion of all others. Such monopolies are justly odious, as they operate not only injuriously to trade, but against the general prosperity of society. But the accommodation afforded to the public by the Charles River bridge, and the annuity paid to the college, constitute a valuable consideration for the privilege granted by the charter. The odious features of a monopoly do not, therefore, attach to the charter of the plaintiffs.

The 10th article of the declaration of rights in the constitution of Massachusetts provides: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." And in the 12th article, it is declared, that, "no subject shall be deprived of his property, immunities, privileges or estate, but by the judgment of his peers or the law of the land." Here is a power, recognised in the sovereignty, and as incident to it, to apply pri-

vate property to public uses, by making for it a just compensation. This power overreaches every other, and must be exercised at the discretion of the government; and a bridge, a turnpike-road, a tract of land, or any other property, may be taken, in whole or in part, for public purposes, on condition of making compensation.

In the case of *Chadwick* v. *The Proprietors of the Haverhill Bridge*, reported in Dane's Abr. 683, it appears, that a bridge was built under a charter, within forty yards of the plaintiff's ferry, and over the same water. By an act of the legislature, commissioners were authorized to ascertain the damages sustained by the *plaintiff; but he preferred his action at law, which was prosecuted, and adequate damages were recovered. [*368 It is true, this matter was referred to arbitrators; but they were men of distinguished legal attainments and great experience; and they, after determining that the plaintiff could sustain his action, assessed the damages. This award was sanctioned by the court. Under the circumstances of this case, at least as great a weight of authority belongs to it, as if the decision had been made by a court on the points involved. The case presented by the complainants is much stronger than Chadwick's; and if he was entitled to reparation for the injury done, no doubt can exist of the complainants' right.

In the extension of the national road through the state of Ohio, a free bridge was thrown across a stream, by the side of a toll bridge, which had some ten or fifteen years of its charter to run. The new bridge did not in the least obstruct the passage over the old one; and it was contended, that as no exclusive right was given under the first grant, the owner of the toll bridge was entitled to no compensation. It was said, on that occasion, as it has been urged on this, that the right was given, subject to the discretion of the legislature, as to a subsequent grant; and that the new bridge could not be objected to by the first grantee, whether it was built under the authority of the state or federal government. This course of reasoning influenced a decision against the claimant, in the first instance; but a reconsideration of his case, and a more thorough investigation of it, induced the proper authority to reverse the decision, and award an indemnity for the injury done. The value of the charter was estimated, and a just compensation was made. This, it is true, was not a judicial decision, but it was a decision of the high functionaries of the government, and is entitled to respect. It was dictated by that sense of justice which should be felt on the bench, and by every tribunal having the power to act upon private rights.

It is contended by the respondents' counsel, that there was not only no exclusive right granted in the complainants' charter, beyond the timbers of the bridge; but the broad ground is assumed, that the legislature had no power to make such a grant; that they cannot grant any part of the eminent domain, which shall bind a subsequent legislature. And a number of authorities were cited to sustain their position: 1 Vatt. ch. 9, § 101; 4 Litt. 327; Domat, book 1, tit. 6, § 1; 17 Vin. 88; Chit. on Prerog. 81; 10 Price 350; Puff. *ch. 5, § 7; 5 Cow. 558; 6 Wheat. 593; 20 Johns. 25; Hargrave's Law Tracts 36; 4 Gill & Johns. 1. If this doctrine be sustainable, as applied to this case, it is not perceived, why an exception should be made in favor of the plaintiffs, within the timbers of their bridge. It is [*569

admitted, that their grant is good to this extent; and if the legislature may grant a part of the eminent domain to this extent, why may it not go beyond it? If it may grant any part of the eminent domain, must not the extent of the grant be fixed at its discretion? In what other mode can it be determined, than by a judicial construction of the grant?

Acts of incorporation, when granted on a valuable consideration, assume the nature of contracts; and vested rights under them are no more subject to the legislative power than any other vested rights. In granting the charter to the Charles River bridge company, the legislature did not divest itself of the power to grant similar charters. But the thing granted passed to the grantee, and can no more be resumed by the legislature, than it can resume the right to a tract of land which has been granted. When land is granted, the state can exercise no acts of ownership over it, unless it be taken for public use; and the same rule applies to a grant for a bridge, a turnpike-road, or any other public improvement. It would assume a bold position, to say, that a subsequent legislature may resume the ownership of a tract of land, which had been granted at a preceding session; and yet the principle is the same in regard to vested rights, under an act of incorporation. By granting a franchise, the state does not divest itself of any portion of its sovereignty; but to advance the public interests, one or more individuals are vested with a capacity to exercise the powers necessary to attain the desired object. In the case under consideration, the necessary powers to construct and keep up the Charles River bridge were given to Thomas Russell and his associates. This did not withdraw the bridge from the action of the state sovereignty, any more than it is withdrawn from land which it has granted. In both cases, the extent of the grant may become a question for judicial investigation and decision; but the rights granted are protected by the law.

It is insisted, that as the complainants accepted the extension of their charter in 1792, under an express assertion of right by the legislature to make new grants at its discretion, they cannot now object to the respondents' charter. In the acceptance of the extended charter, the complainants
*570] are bound only by the provisions of that *charter. Any general declarations, which the legislature may have made, as regards its power to grant charters, could have no more bearing on the rights of the complainants, than on similar rights throughout the state. There was no reservation of this power in the prolonged charter, nor was there any general enactment on the subject. Of course, the construction of the charter must depend upon general and established principles.

It has been decided by the supreme court of New York, that unless the act making the appropriation of private property for public use, contain a provision of indemnity, it is void. Where property is taken under great emergencies, by an officer of the government, he could hardly be considered, I should suppose, a trespasser; though he does not pay for the property, at the time it is taken. There can be no doubt, that a compensation should be provided for, in the same act which authorizes the appropriation of the property, or in a contemporaneous act. If, however, this be omitted, and the property be taken, the law unquestionably gives a remedy adequate to the damages sustained. No government which rests upon the basis of fixed laws, whatever form it may have assumed, or wherever the sovereignty may

reside, has asserted the right, or exercised the power, of appropriating private property to public purposes, without making compensation.

In the 4th section of the act to establish the Warren bridge, there is a provision, that the corporation shall make compensation for any real estate that may be taken for the use of the bridge. The property of the complainants, which was appropriated under the new charter, cannot strictly be denominated real estate ; and consequently, this special provision does not reach their case. In this respect, the law must stand as though no such provision had been made. But was the complainants' property appropriated, under the charter granted to the respondents, for particular purposes? If the new bridge were deemed necessary, by the legislature, to promote the general convenience, and the defendants were consequently authorized to construct it, and a part of the plaintiffs' franchise were granted to the defendants ; it was an appropriation of private property for public use. It was as much an appropriation of private property for public use, as would have been an appropriation of the ground of an individual, for a turnpike or a railroad, authorized by law.

By the charter of the Warren bridge, as soon as the company should be reimbursed the money expended in the construction of the bridge, the expenses incurred in keeping it up, and five per cent. *interest, per annum, on the whole amount, the bridge was to become the property [*571 of the state ; and whether these sums should be received or not, it was to become public property, in six years from the time it was completed. The cost of construction, and the expenses, together with the five per cent. interest, have been reimbursed, and in addition, a large sum has been received by the state from the tolls of this bridge. But it is now, and has been since March last, it is admitted, a free bridge.

In granting the charter of the Warren bridge, the legislature seem to recognise the fact, that they were about to appropriate the property of the complainants for public uses, as they provide, that the new company shall pay annually to the college, in behalf of the old one, 100*l*. By this provision, it appears, that the legislature has undertaken to do what a jury of the country only could constitutionally do—assess the amount of compensation to which the complainants are entitled. Here, then, is a law which not only takes away the property of the complainants, but provides, to some extent, for their indemnity. Whether the complainants have availed themselves of this provision or not, does not appear, nor is it very material. The law in this respect, does not bind them ; and they are entitled to an adequate compensation for the property taken. These considerations belong to the case, as it arises under the laws and constitution of Massachusetts.

The important inquiry yet remains, whether this court can take jurisdiction, in the form in which the case is presented. The jurisdiction of this court is resisted, on two grounds. In the first place, it is contended, that the Warren bridge has become the property of the state, and that the defendants have no longer any control over the subject ; and also, that the supreme court of Massachusetts have no jurisdiction over trusts.

The chancery jurisdiction of the supreme court of Massachusetts, is admitted to be limited ; but they are specially authorized, in cases of nuisances, to issue injunctions ; and where this ground of jurisdiction is sustained, all the incidents must follow it. If the law incorporating the

Warren bridge company was unconstitutional, on the ground that it appropriated to public use the property of the complainants, without making compensation, can there be any doubt, that the supreme court of Massachusetts had jurisdiction of the case? And having jurisdiction, is it not clear, that the whole matter in controversy may be settled by a decree, that the defend-
*572] ants shall *account to the complainants for moneys received by them after they had notice of the injunction.

It is also insisted, that the state is the substantial party to this suit, and, as the court has no jurisdiction against a sovereign state, that they can sustain no jurisdiction against those who act as agents under the authority of a state. That if such a jurisdiction were asserted by this court, they would do indirectly, what the law prohibits them from doing directly. In the case of *Osborn* v. *Bank of the United States*, 9 Wheat. 733, this court says, "the circuit courts of the United States have jurisdiction of a bill in equity, filed by the Bank of the United States for the purpose of protecting the bank in the exercise of its franchises, which are threatened with invasion and destruction, under an unconstitutional state law; and as the state itself cannot be made a defendant, it may be maintained against the officers and agents of the state who are appointed to execute such law." As regards the question of jurisdiction, this case, in principle, is similar to the one under consideration. Osborn acted as the agent, or officer, of the state of Ohio, in collecting from the bank, under an act of the state, a tax or penalty unconstitutionally imposed; and if, in such a case, jurisdiction could be sustained against the agent of the state, why can it not be sustained against a corporation, acting as agent, under an unconstitutional act of Massachusetts, in collecting tolls which belong to the plaintiffs?

In the second place, it is contended, that this court cannot take jurisdiction of this case, under that provision of the federal constitution, which prohibits any state from impairing the obligation of contracts, as the charter of the complainants has not been impaired. It may be necessary to ascertain, definitely, the meaning of this provision of the constitution; and the judicial decisions which have been made under it. What was the evil against which the constitution intended to provide, by declaring, that no state shall pass any law impairing the obligation of contracts? What is a contract, and what is the obligation of a contract? A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement, sanctioned by moral and legal principles. The evil which this inhibition on
*573] the states was intended to *prevent, is found in the history of our revolution. By repeated acts of legislation, in the different states, during that eventful period, the obligation of contracts was impaired. The time and mode of payment were altered by law; and so far was this interference of legislation carried, that confidence between man and man was well nigh destroyed. Those proceedings grew out of the paper system of that day; and the injuries which they inflicted were deeply felt in the country, at the time the constitution was adopted. The provision was designed to prevent the states from following the precedent of legislation, so demoralizing in its effects, and so destructive to the commercial prosperity of a country.

If it had not been otherwise laid down, in the case of *Fletcher* v. *Peck*,

6 Cranch 125, I should have doubted, whether the inhibition did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which this provision was intended to guard, as from the language of the provision itself. An executed contract is the evidence of a thing done; and it would seem, does not necessarily impose any duty or obligation on either party to do any act or thing. If a state convey land which it had previously granted, the second grant is void; not, it would seem to me, because the second grant impairs the obligation of the first, for, in fact, it does not impair it; but because, having no interest in the thing granted, the state could convey none. The second grant would be void in this country, on the same ground that it would be void in England, if made by the king. This is a principle of the common law; and is as immutable as the basis of justice. It derives no strength from the above provision of the constitution; nor does it seem to me to come within the scope of that provision. When we speak of the obligation of a contract, the mind seems necessarily to refer to an executory contract; to a contract, under which something remains to be done, and there is an obligation on one or both of the parties to do it. No law of a state shall impair this obligation, by altering it in any material part. This prohibition does not apply to the remedy, but to the terms used by the parties to the agreement, and which fix their respective rights and obligations. The obligation, and the mode of enforcing the obligation, are distinct things. The former consists in the acts of the parties, and is ascertained by the binding words of the contract. The other emanates from the law-making power, which may be exercised at the discretion of the legislature, within the prescribed limits of the *constitution. A modification of the remedy for a breach of the contract, does not, in the sense of the [*574 constitution, impair its obligation. The thing to be done, and the time of performance, remain on the face of the contract, in all their binding force upon the parties; and these are shielded by the constitution, from legislative interference.

On the part of the complainants, it is contended, that on the question of jurisdiction, as in reference to any other matter in controversy, the court must look at the pleadings, and decide the point raised, in the form presented. The bill charges, that the act to establish the Warren bridge, purports to grant a right repugnant to the vested rights of the complainants, and that it impairs the obligation of the contract between them and the commonwealth; and, being contrary to the constitution of the United States, is void. In their answer, the respondents deny that the act creating the corporation of the Warren bridge, impairs the obligation of any contract set forth in the bill of the complainants. The court must look at the case made in the bill, in determining any questions which may arise; whether they relate to the merits or the jurisdiction of the court. But in either case, they are not bound by any technical allegations or responses, which may be found in the bill and answer. They must ascertain the nature of the relief sought, and the ground of jurisdiction, from the tenor of the bill.

In this case, the question of jurisdiction under the constitution is broadly presented; and must be examined free from technical embarrassment. Chief Justice Parker, in the state court, says, in reference to the charter of the complainants, "the contract of the government is, that this right shall not

be disturbed or impaired, unless public necessity demand; and if it shall so demand, the grantees shall be indemnified." Such a contract, he observes, "is founded upon the principles of our constitution, as well as natural justice; and it cannot be impaired, without a violation of the constitution of the United States: and I think, also, it is against the principles of our state constitution." In the conclusion of his opinion, Mr. Justice PUTNAM says, in speaking of the defendants' charter, "it impairs the obligation of the grants before made to the plaintiffs; it takes away their property, for public uses, without compensation, against their consent, and without a provision for a trial by jury; it is therefore void." Mr. Justice WILDE and Mr.
*575] Justice MORTON did not consider the *new charter as having been granted either in violation of the constitution of the state, or of the United States. In their decree, the court say, "that no property belonging to the complainants was taken and appropriated to public use, within the terms and meaning of the 10th article of the declaration of rights prefixed to the constitution of this commonwealth." This decree can, in no point of view, be considered as fixing the construction of the constitution of Massachusetts, as it applies to this case. The decree was entered, *pro formâ*, and is opposed to the opinion of two members of the court. But if that court had deliberately and unanimously decided, that the plaintiffs' property had not been appropriated to public use, under the constitution of Massachusetts; still, where the same point becomes important, on a question of jurisdiction, before this court, they must decide for themselves. The jurisdiction of this court could, in no respect, be considered as a consequence of the decision of the above question by the state court, in whatever way the decree might have been entered. But no embarrassment can arise on this head, as the above decree was made, as a matter of form, to bring the case before this court.

To sustain the jurisdiction of this court, the counsel for complainants place great reliance upon the fact, that the right, charged to be violated, is held directly from the state; and they insist, that there is an implied obligation on the state, that it will do nothing to impair the grant. And that, in this respect, the complainants' right rests upon very different grounds from other rights in the community, not held by grant directly from the state. On the face of the complainants' grant, there is no stipulation that the legislature will do nothing that shall injure the rights of the grantees; but it is said, that this is implied; and on what ground, does the implication arise? Does it arise from the fact, that the complainants are the immediate grantees of the state? The principle is admitted, that the grantor can do nothing that shall destroy his deed; and this rule applies as well to the state as to an individual. And the same principle operates with equal force on all grants, whether made by the state or individuals. Does an implied obligation arise on a grant made by the state, that the legislature shall do nothing to invalidate the grant, which does not arise on every other grant or deed in the commonwealth?

*576] The legislature is bound by the constitution of the state, and it *cannot be admitted, that the immediate grantee of the state has a stronger guarantee for the protection of his vested rights against unconstitutional acts, than may be claimed by any other citizen of the state. Every citizen of the state, for the protection of his vested rights, claims the

guarantee of the constitution. This, indeed, imposes the strongest obligation on the legislature not to violate those rights. Does the legislature give to its grantee, by virtue of its grant, an additional pledge that it will not violate the constitution of the state? Such an implication, if it exist, can scarcely be considered as adding anything to the force of the constitution. But this is not, it is said, the protection which the complainants invoke. In addition to their property having been taken without compensation, they allege, that their charter has been impaired by the Warren bridge charter; and on this ground, they ask the interposition of this court.

The new charter does not purport to repeal the old one, nor to alter it in any material or immaterial part. It does not, then, operate upon the complainants' grant, but upon the thing granted. It has, in effect, taken the tolls of the complainants and given them to the public. In other words, under the new charter, all that is valuable under the charter of the complainants has been appropriated to public use. It is urged, that the legislature did not intend to appropriate the property of the complainants; that there is nothing in the act of the legislature, which shows an intention by the exercise of the eminent domain, to take private property for public use; but that, on the contrary, it appears the Warren bridge charter was granted in the exercise of a legislative discretion, asserted and sustained by a majority of the legislature.

In this charter, provision is made to indemnify the owners of real estate, if it should be taken for the use of the bridge; and the new company is required to pay, in behalf of the Charles River bridge company, one-half of the annuity to the college. This would seem to show an intention to appropriate private property, if necessary, for the establishment of the Warren bridge; and also an intention to indemnify the complainants, to some extent, for the injury done them. There could have been no other motive than this, in providing that the new company should pay the hundred pounds. But the court can only judge of the intention of the legislature *by its language; and when, by its act, the franchise of the complainants is taken, and, through the instrumentality of the Warren [*577
Bridge company, appropriated to the public use, it is difficult to say, that the legislature did not intend to do, what in fact it has done. Throughout the argument, the counsel for the complainants have most ably contended, that their property had been taken and appropriated to the public use, without making compensation; and that the act was, consequently, void, under the constitution of Massachusetts.

If this be the character of the act; if, under its provisions, the property of the complainants has been appropriated to public purposes; it may be important to inquire, whether it can be considered as impairing the obligation of the contract, within the meaning of the federal constitution. That a state may appropriate private property to public use, is universally admitted. This power is incident to sovereignty, and there are no restrictions on its exercise, except such as may be imposed by the sovereignty itself. It may tax, at its discretion, and adapt its policy to the wants of its citizens; and use their means for the promotion of its objects under its own laws. If an appropriation of private property to public use impairs the obligation of a contract, within the meaning of the constitution, then every exercise of this power by a state is unconstitutional. From this conclusion, there is no

escape ; and whether compensation be made or not, cannot vary the result. The provision is not, that no state shall pass a law impairing the obligation of contracts, unless compensation be made ; but the power is absolutely inhibited to a state. If the act of the state come within the meaning of the provision, the act is void. No condition which may be annexed to it, no compensation that can be made, can give it validity. It is in conflict with the supreme law of the land, and is, therefore, a nullity. Can a state postpone the day fixed in an obligation for payment, or provide, that a bond for the payment of money shall be discharged by the payment of anything else than money? This no one will contend can be done, because such an act would clearly impair the obligation of the contract; and no compensation, which the state could give, would make the act valid.

The question is asked, whether the provision implied in the constitution of Massachusetts, that private property may be taken, by making compensation, is not impliedly incorporated in every *contract made under it ; and whether the obligation of the contract is not impaired, when property is taken by the state, without compensation? Can the contract be impaired, within the meaning of the federal constitution, when the action of the state is upon the property? The contract is not touched, but the thing covered by the contract is taken, under the power to appropriate private property for public use. If taking the property impair the obligation of the contract, within the meaning of the constitution, it cannot be taken on any terms. The provision of the federal constitution, which requires compensation to be made, when private property shall be taken for public use, acts only upon the officers of the federal government. This case must be governed by the constitution of Massachusetts.

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Can a state, in any form, exercise a power over contracts, which is expressly prohibited by the constitution of the Union? The parties making a contract may embrace any conditions they please, if the conditions do not contravene the law, or its established policy. But it is not in the power of a state, to impose upon contracts which have been made, or which may afterwards be made, any condition which is prohibited by the federal constitution. No state shall impair the obligation of contracts. Now, if the act of a state, in appropriating private property to public use come within the meaning of this provision, is not the act inhibited, and, consequently, void? This point would seem to be too plain for controversy. And is it not equally clear, that no provisions contained in the constitution of a state, or in its legislative acts, which subject the obligation of a contract to an unconstitutional control of the state, can be obligatory upon the citizens of the state? If the state has attempted to exercise a power which the federal constitution prohibits, no matter under what form the power may be assumed, or what specious pretexts may be urged in favor of its exercise, the act is unconstitutional and void.

That a state may take private property for public use, is controverted by no one. It is a principle which, from the foundation of our government, has been sanctioned by the practice of the states, respectively ; and has never been considered as coming in conflict with the federal constitution. This power of the state is admitted in the argument ; but it is contended, that the obligation of the contract has been impaired, as the property of the complainants has been taken, without compensation. Suppose, the

constitution of Massachusetts provided, that no land *should be sold for taxes, without valuation, nor unless it shall sell for two-thirds of its value, due notice being given in some newspaper; and suppose, a law of the legislature should direct land to be sold for taxes, without a compliance with these requisites; would this act impair the obligation of the grant by which the land is held, within the meaning of the constitution? The act would be clearly repugnant to the state constitution, and, consequently, all proceedings under it would be void; but it would not be repugnant to the constitution of the Union. And how does this case differ, in principle, from the one under consideration? In both cases, the power of the legislature is unquestionable; but, by the constitution of the state, it must be exercised in a particular manner; and if not so exercised, the act is void. Now, if, in either case, the obligation of the contract under which the property is held is impaired, then it must follow, that every act of a state legislature which affects the right of private property, and which is repugnant to the state constitution, is a violation of the federal constitution.

Can the construction of the federal constitution depend upon a reference to a state constitution, and by which the act complained of is ascertained to be legal or illegal? By this doctrine, the act, if done in conformity to the state constitution, would be free from objections under the federal constitution; but if this conformity do not exist, then the act would not be free from such objection. This, in effect, would incorporate the state constitution in, and make it a part of the federal constitution. No such rule of construction exists.

Suppose, the legislature of Massachusetts had taken the farm of the complainants for the use of a poor-house, or an asylum for lunatics, without making adequate compensation; or if, in ascertaining the damages, the law of the state had not been strictly pursued; could this court interpose its jurisdiction, through the supreme court of the state, and arrest the power of appropriation? In any form in which the question could be made, would it not arise under the constitution of the state, and be limited between citizens of the same state to the local jurisdiction? Does not the state constitution, which declares that private property shall not be taken for public purposes, without compensation, afford a safe guarantee to the citizens of the state against the illegal exercise of this power; a power essential to the well-being of every sovereign state, and which is always exercised under its own rules?

Had an adequate compensation been made to the complainants, *under the charter of the Warren bridge, would this question have been [*580
raised? Can any one doubt, that it was in the power of the legislature of Massachusetts to take the whole of the complainants' bridge for public use, by making compensation? Is there any power that can control the exercise of this discretion by the legislature? I know of none, either in the state or out of it; but it must be exercised in subordination to the provisions of the constitution of the state. And if it be not so exercised, the judicial authority of the state only, between its own citizens, can interpose and prevent the wrong, or repair it in damages.

In all cases where private property is taken by a state for public use, the action is on the property; and the power, if it exist in the state, must be above the contract. It does not act on the contract, but takes from under

it vested rights. And this power, when exercised by a state, does not, in the sense of the federal constitution, impair the obligation of the contract. Vested rights are disturbed, and compensation must be made; but this is a subject which belongs to the local jurisdiction. Does this view conflict with the established doctrine of this court? A reference to the points adjudged will show that it does not.

The case of *Satterlee* v. *Mathewson*, 2 Pet. 380, presented the following facts. Satterlee was the tenant of Mathewson, who claimed, at the time of the lease, under a Connecticut title, in Luzerne county, Pennsylvania. Afterwards, Satterlee purchased a Pennsylvania title for the same land. An ejectment was brought by Mathewson for the land, and the court of common pleas decided, that as Satterlee was the tenant of the plaintiff, he could not set up a title against his landlord. On a writ of error, this judgment was reversed by the supreme court, on the ground, that the relation of landlord and tenant could not exist under a Connecticut title. Shortly afterwards, the legislature of Pennsylvania passed a law, that, under such a title, the relation of the landlord and tenant should exist, and the supreme court of the state having decided that this act was valid, the question was brought before this court by writ of error. In their opinion, the court say: "We come now to the main question in the cause. Is the act which is objected to, repugnant to any provision of the constitution of the United States? It is alleged, to be particularly so, because it impairs the obligation of the contract between the state of Pennsylvania and the plaintiff, who claims under her grant, &c." The grant vested a fee-simple in the grantee, with all the rights, *privileges, &c. *581] "Were any of these rights disturbed or impaired by the act under consideration? It does not appear from the record, that they were in any instance denied, or ever drawn in question." The objection most pressed upon the court was, that the effect of this act was to divest rights which were vested by law in Satterlee. "There is certainly no part of the constitution of the United States," the court say, "which applies to a state law of this description; nor are we aware of any decision of this, or any circuit court, which has condemned such a law, upon this ground, provided its effect be not to impair the obligation of the contract." And the court add, that in the case of *Fletcher* v. *Peck*, it is nowhere intimated, that a state statute, which divests a vested right, is repugnant to the constitution of the United States. There is a strong analogy between this case and the one under consideration. The effect of the act of Pennsylvania was, to defeat the title of Satterlee, founded upon the grant of the state. It made a title valid which, in that very case, had been declared void by the court, and which gave the right to Mathewson, in that suit, against the prior grant of the state. And this court admit, that a vested right was divested by the act; but they say, it is not repugnant to the federal constitution. The act did not purport to effect the grant, which was left, with its covenants, untouched; but it created a paramount right, which took the land against the grant.

In the case under consideration, the Warren bridge charter does not purport to repeal, or in any way affect, the complainants' charter. But, like the Pennsylvania act in its effects, it divested the vested rights of the complainants. Satterlee was not the immediate grantee of the state; but that

could not affect the principle involved in the case. He claimed under the grant of the state, and the fact that there was an intermediate grantee between him and the state, could not weaken his right. In the case of *Fletcher* v. *Peck*, 6 Cranch 87, the legislature of Georgia attempted to annul its own grant. The law under which the first grant was issued, was attempted to be repealed; and all grants under it were declared to be null and void, by the second act. Here, the state acted directly upon the contract; and the case comes within the rule, that to impair the obligation of the contract, the state law must act upon the contract. The act of the legislature complained of, in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 122, had a direct bearing upon the *contract. The question was, whether under the bankrupt law of of New York, a debtor was discharged from his obligation by a surrender of his property. And so, in the case of *Trustees of Dartmouth College* v. *Woodward*, Ibid. 518, the question was, whether the legislature could, without the consent of the corporation, alter its charter in a material part, it being a private corporation. In the case of *Terrett* v. *Taylor*, 9 Cranch 52, the uncontroverted doctrine is asserted, that a legislature cannot repeal a statute creating a private corporation, and thereby destroy vested rights. The case of *Green* v. *Biddle*, 8 Wheat. 1, has also been cited to sustain the jurisdiction of the court in this case. The court decided, in that case, that the compact, which guarantied to claimants of land lying in Kentucky, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, prohibited the state of Kentucky from changing those rights. In other words, that Kentucky could not alter the compact. And when this court were called on to give effect to the act of Kentucky, which they considered repugnant to the compact, they held the provisions of the compact paramount to the act. [*582

After a careful examination of the questions adjudged by this court, they seem not to have decided in any case, that the contract is impaired, within the meaning of the federal constitution, where the action of the state has not been on the contract. That though vested rights have been divested, under an act of a state legislature, they do not consider that as impairing the grant of the state, under which the property is held. And this, it appears, is the true distinction; and the one, which has been kept in view in the whole current of adjudications by this court, under the above clause of the constitution.

Had this court established the doctrine, that where an act of a state legislature affected vested rights, held by a grant from the state, the act is repugnant to the constitution of the United States, the same principle must have applied to all vested rights. For, as has been shown, the constitution of a state gives the same guarantee of their vested rights to all its citizens, as to those who claim directly under grant from the state. And who can define the limit of a jurisdiction founded on this principle? It would necessarily extend over the legislative action of the state; and control, to a fearful extent, the exercise of their powers. *The spirit of internal improvement pervades the whole country. There is, perhaps, no state in the Union, where important pnblic works, such as turnpike roads, canals, railroads, bridges, &c., are not either contemplated, or in a state of rapid progression. These cannot be carried on, without the frequent exercise of [*583

the power to appropriate private property for public use. Vested rights are daily divested by this exercise of the eminent domain. And if, in all these cases, this court can act as a court of supervision for the correction of errors, its power may be invoked in numberless instances. If to take private property impairs the obligation of the contract under which it is held, this court may be called to determine, in almost every case where the power is exercised, as well where compensation is made, as where it is not made. For, if this court can take jurisdiction on this ground, every individual whose property has been taken, has a constitutional right to the judgment of this court, whether compensation has been made in the mode required by the constitution of the state. In ascertaining the damages, the claimant has a right to demand a jury, and that the damages shall be assessed in strict conformity to the principles of the law. To revise these cases, would carve out for this court a new jurisdiction, not contemplated by the constitution, and which cannot be safely exercised.

These are considerations which grow out of our admirable system of government, that should lead the judicial tribunals both of the federal and state governments to mutual forbearance, in the exercise of doubtful powers. The boundaries of their respective jurisdictions can never, perhaps, be so clearly defined, on certain questions, as to free them from doubt. This remark is peculiarly applicable to the federal tribunals, whose powers are delegated, and consequently, limited. The strength of our political system consists in its harmony; and this can only be preserved, by a strict observance of the respective powers of the state and federal government. Believing that this court has no jurisdiction in this case; although I am clear that the merits are on the side of the complainants; I am in favor of dismissing the bill, for want of jurisdiction.

Baldwin, Justice.—In this case, I entirely concur in the judgment of the court, as well as the reasons given in the opinion delivered by the chief justice: my only reason for giving a separate opinion is, to notice some matters not referred to in that opinion, which I am not willing should pass without expressing mine upon them. The course of the argument, and the nature of several questions involved in the case, gives them an importance deserving attention, from these and other considerations, which I cannot overlook.

The first question which arises in this cause, is an objection to the jurisdiction of the court below, made by the appellees, on the ground of the want of proper parties; and that the state of Massachusetts, being now the owners of the bridge, pursuant to the terms of the charter to the defendants, no suit could be sustained which can affect their interest in it. On an inspection of the record, the case is one which does not admit of this objection, if it was well founded otherwise. The bill was filed in June, and the pleadings closed in December 1828, so that we have no judicial knowledge of any matters which have arisen since; confining itself, as the court must do, to the pleadings of the cause, and the decree of the court below, we can notice nothing not averred in the bill or answer, nor act on any evidence which does not relate to them.

An injunction is prayed for by the plaintiffs, to restrain the defendants from erecting a bridge over Charles river, pursuant to their charter in the

act of 1828, which they allege to be a violation of their rights, by impairing the obligation of previous contracts made by the state with the plaintiffs. When the pleadings closed, the defendants had not completed the bridge complained of; they were then the only persons who had any present interest in it; they were constructing it for their own benefit, and were to have the sole and exclusive use of it, till by the terms of the charter, it became the property of the state; they were, therefore, the proper, and the only parties against whom a bill for an injunction could then be sustained. If, then, the plaintiffs were, in June 1828, entitled to a decree restraining the erection of the bridge, their right cannot be affected by any matter *pendente lite*, nor by any reversionary right, which may have accrued to the state. The case must be decided, as it ought to have been decided in December 1828, and the only question before the court below, on the pleadings and exhibits, was on the right of the plaintiffs to the only remedy prayed, which was an injunction; that court had jurisdiction between the parties to the suit, to decide the question of right between them, but could go no further than to grant the injunction against the erection of the bridge, because the bill avers no matter arising subsequent to December 1828. Whether, on an amended, a supplemental, or an original bill, a decree can be rendered for an account of tolls received, and for the suppression of the bridge, is a question which can arise only after a reversal of the decree now appealed from, and such a state of pleading as will bring subsequent matters before the court below.

It has also been objected, that the plaintiffs have a perfect remedy at law, if their case is such as is set forth in the bill, and therefore, cannot sustain a suit in equity. If this case came up by appeal from a circuit court, the question might deserve serious consideration; but as the courts in Massachusetts derive their equity jurisdiction from a state law, it becomes a very different question. The supreme court of that state is the rightful expositor of its laws (2 Pet. 524–5); and having sustained and exercised their jurisdiction over this case, as one appropriate to their statutory jurisdiction in equity, it will be considered as their construction of a state law, to which this court always pays great, and generally, conclusive, respect. Our jurisdiction over causes from state courts, by the 25th section of the judiciary act is peculiar; no error can be assigned by a plaintiff in error, except those which that act has specified, and the court can reverse for no other. It may be a very different question, whether the defendant in error may not claim an affirmance, on any ground which would entitle him to a decree below, which it is unnecessary to consider, as these objections to the jurisdiction cannot be sustained.

The next question is one vital to the plaintiffs' case, if decided against them, which is, whether a charter to a corporation is a contract, within the tenth section of the first article of the constitution, which prohibits a state from passing any law impairing the obligation of a contract; or whether this prohibition applies only to contracts between individuals, or a state and individuals. As this question is not only an all-important one, arising directly and necessarily in the case, but in one view of it, is the whole case which gives the plaintiffs a standing in this court, it will be next considered.

In this country, every person has a natural and inherent right of taking

and enjoying property, which right is recognised and secured in the constitution of every state; bodies, societies and communities have the same right, but inasmuch as on the death of any person without a will, his property passes to his personal representative or heir, a mere association of individuals must hold their real and personal property subject to the rules of the common law. A charter is not necessary to give to a body of men the capacity to take and enjoy, unless there is some statute to prevent it, by imposing a restriction or prescribing a forfeiture, where there is a capacity to take and hold; the only thing wanting is the franchise of succession, so that the property of the society may pass to successors instead of heirs. Termes de la Ley 123; 1 Bl. Com. 368–72. This and other franchises are the ligaments which unite a body of men into one, and knit them together as a natural person (4 Co. 65 *a*); creating a corporation, an invisible incorporeal being, a metaphysical person (2 Pet. 223); existing only in contemplation of law, but having the properties of individuality (4 Wheat. 636), by which a perpetual succession of many persons are considered the same, and may act as a single individual. It is the object and effect of the incorporation, to give to the artificial person the same capacity and rights as a natural person can have, and when incorporated either by an express charter or one is presumed from prescription, they can take and enjoy property to the extent of their franchises as fully as an individual. Co. Litt. 132 *b*; 2 Day's Com. Dig. 300; 1 Saund. 345. It bestows the character and properties of individuality on a collective and changing body of men (4 Pet. 562), by which their rights become as sacred as if they were held in severalty by natural person. Franchises are not peculiar to corporations, they are granted to individuals, and may be held by any persons capable of holding or enjoying property; a franchise is property, a right to the privilege or immunity conferred by the grant; it may be of a corporeal or incorporeal right, but it is a right of property, or propriety, in the thing to which it attaches. Franchises are of various grades, from that of a mere right of succession to an estate in land, to the grant of a County Palatine, which is the highest franchise known to the law; the nature and character whereof is the same, whether the grant is to one or many. Corporations are also of all grades, and made for varied objects; all governments are corporations, created by usage and common consent, or grants and charters which create a body politic for prescribed purposes; but whether they are private, local or general, in their objects, for the enjoyment of property, or the exercise of power, they are all governed by the same rules of law, as to the construction and the obligation of the instrument by which the incorporation is made. One universal rule of law protects persons and property. It is a fundamental principle of the common law of England, that the term freemen of the kingdom, includes "all persons," ecclesiastical and temporal, incorporate, politique or natural; it is a part of their *magna charta* (2 Inst. 4), and is incorporated into our institutions. The persons of the members of corporations are on the same footing of protection as other persons, and their corporate property secured by the same laws which protect that of individuals. 2 Inst. 46–7. "No man shall be taken," "no man shall be disseised," without due process of law, is a principle taken from *magna charta*, infused into all our state constitutions, and is made inviolable by the federal government, by the amendments to the constitution.

No new principle was adopted, in prohibiting the passage of a law by a state, which should impair the obligation of a contract; it was merely affirming a fundamental principle of law, and by putting contracts under the protection of the constitution, securing the rights and property of the citizens from invasion by any power whatever. It was a part of that system of civil liberty which "formed the basis whereon our republics, their laws and constitutions, are erected, and declared, by the ordinance of 1787, to be a fundamental law of all new states." This was the language of the congress, "And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner interfere with, or affect, private contracts, or any agreements, *bonâ fide* and without fraud, previously formed." (1 U. S. Stat. 52.) This ordinance was passed during the session of the convention which framed the constitution, several of the members of which were also members of congress; it was, therefore, evidently in their view, and may justly be taken as a declaration of the reasons for inserting this prohibitory clause. As an important contemporaneous historical fact, it also shows, that the convention intended to make the prohibition more definite, less extensive in one respect, and more so in another, than in the ordinance. Omitting the words "in any manner interfere with or affect," the words "impair the obligation of," were substituted; the word private was omitted, so as to extend the prohibition to all "contracts," public or private: as "the constitution unavoidably deals in general terms" (1 Wheat. 326), marks only great outlines, and designates its general objects (4 Ibid. 407), no detail was made, no definition of a contract given, or exception made.

No one can doubt, that the terms of the prohibition are not only broad enough to comprehend all contracts, but that violence will be done to the plain meaning of the language, by making any exception, by construction; it must, therefore, necessarily embrace those contracts, which grant a franchise or property to individuals or corporations, imposing the same restraints on states, as were imposed by the English constitution on the prerogative of the king, which devolved on the states by the revolution. See 4 Wheat. 651; 8 Ibid. 584–8. The king has the "prerogative of appointing ports and havens;" the "franchise of lading and discharging has been frequently granted by the crown," from an early period. "But though the king had a power of granting the franchise of ports and havens, yet he had not the power of resumption, or of narrowing or contracting their limits, when once established." 1 Bl. Com. 264. It would be strange, if the free citizens of a republic did not hold their rights by a tenure as sacred as the subjects of a monarchy; or that it should be deemed compatible with American institutions, to exclude from the protection of the constitution, those privileges and immunities which are held sacred by the laws of our ancestors. We have adopted them, as our right of inheritance, with the exception of such as are not suited to our condition, or have been altered by usage or acts of assembly. No one, I think, will venture the assertion, that it is incompatible with our situation, to protect the corporate rights of our citizens, or that, in any state, there is either a usage or law which makes them less sacred than those held by persons who are not members of of a corporation. No one can, in looking throughout the land, fail to see, that an incalculable

amount of money has been expended, and property purchased, on the faith of charters and grants, or contemplate their violation by a law, which will not, some day, take his possessions from him, by an exercise of power, founded on a principle which applies to all rights. If a state can revoke its grant of property or power to a subordinate corporation, there can be no limitation; there is no principle of law, or provision of the constitution, that can save the charter of a borough, a city, a church or a college, that will not equally save any other; of consequence, if all cannot be protected, none can be.

The federal government itself is but a corporation, created by the grant or charter of the separate states; if that is inviolable by the power of a state, each of its provisions is so; each state, in its most sovereign capacity, by the people thereof, in a convention, have made it a supreme law of the state, paramount to any state constitution then in existence, or which may be thereafter adopted. The state has made an irrevocable restriction on its own once plenary sovereignty, which it cannot loosen, without the concurrence of such a number of states, as are competent to amend the constitution. So far as such restriction extends, the state has annulled its own power, by a surrender thereof for the public good; if a state can remove that restriction on its own legislative power, and do the thing prohibited, it can also remove the restriction on its sovereignty, by revoking the powers granted to congress. The property and power of the federal government, are held by no other or stronger tenure, than the land or franchises of a citizen or corporation; both rights were inherent in the people of a state, who have made grants, by their representatives, in a convention, directly by their original power, or in a legislative act, made by the authority delegated in their state constitution. But the grants thus made are as binding on the people and the state, as if made in a convention; they are the contracts of the state, the obligation of which the people have declared, shall not be impaired by the authority of a state; it shall not "pass any law," which shall have such object in view, or produce such effect. An act of a convention is the supreme law of the state; an act of the legislature is a law subordinate; both, however, are laws of the state, of binding authority, unless repugnant to that law which the state has, by its own voluntary act, in the plenitude of its sovereignty, made paramount to both, and declared that its judges, "shall be bound thereby," anything to the contrary notwithstanding. Each state has made the obligation of contracts a part of the constitution, thus saving and confirming them, under the sanction of its own authority; no act, therefore, can violate the sanctity of contracts, which cannot annul the whole constitution; for it is a fundamental principle of law, that whatever is saved and preserved by a statute, has the same obligation as the act itself. This principle has been taken from the *magna charta* of England, and carried into the great charter of our rights of property.

By *magna charta*, c. 9, and 7 Ric. II., it is enacted, "that the citizens of London shall enjoy all their liberties, notwithstanding any statute to the contrary." By this act, the city may claim liberties by prescription, charter or parliament, notwithstanding any statute made before. 4 Inst. 250, 253; 2 Ibid. 20–1; 5 Day's Com. Dig. 20, London, M.; Harg. Law Tr. 66–7. The constitution goes further, by saving, preserving and confirming the obligation of contracts; and notwithstanding any law passed after its adop-

tion; and this confirmation, being by the supreme law of the land, makes a contract as inviolable, even by a supreme law of a state, as the constitution itself. From the beginning of the revolution, the people of the colonies clung to *magna charta*, and their charters from the crown; their violation was a continued subject of complaint. See 1 Journ. Cong. 27–8, 40–1, 60, 108, 143, 154, 167, 178; one of the grievances set forth in the declaration of independence is, "for taking away our charters," &c.

One of the causes which led to the English revolution was, "They have also invaded the privileges, and seized on the charters of most of those towns that have a right to be represented by their burgesses in parliament; and have secured surrenders to be made of them, by which the magistrates in them have delivered up all their rights and privileges, to be disposed of at the pleasure of those evil counsellors," &c. 10 Journ. Commons, 2 *b*. In the language of congress, "the legislative, executive and judging powers, are all moved by the nod of a minister; privileges and immunities last no longer than his smiles; when he frowns, their feeble forms dissolve." 1 Journ. 59–60. "Without incurring or being charged with a forfeiture of their rights, without being heard, without being tried, without law, without justice, by an act of parliament, their charter is destroyed, their liberties violated, their constitution and form of government changed; and all this, upon no better pretence, than because in one of their towns, a trespass was committed on some merchandise, said to belong to one of the companies, and because the ministry were of opinion, that such high political regulations, were necessary to compel due subordination, and obedience to their mandates." 1 Journ. 41.

Such were the principles of our ancestors, in both revolutions; they are consecrated in the constitution framed by the fathers of our government, in terms intended to protect the rights and property of the people, by prohibiting to every state the passage of any law which would be obnoxious to such imputations on the character of American legislation. The reason for this provision was, that the transcendent power of parliament devolved on the several states by the revolution (4 Wheat. 651), so that there was no power by which a state could be prevented from revoking all public grants of property or franchise, as parliament could do. Harg. L. Tr. 60–61; 4 Wheat. 643, 651. The people of the states renounced this power; and as an assurance that that they would not exercise it; or if they should do so inadvertently, that any law to that effect should be void; the constitution embraces all grants, charters and other contracts affecting property, places them beyond all legislative control, and imposes on this court the duty of protecting them from legislative violation. 6 Cranch 136; 4 Wheat. 625. In the same sovereign capacity in which the people of each state adopted the constitution, they pledged their faith that the sanctity of the obligation of contracts should be inviolable; and to insure its performance, created a competent judicial power, whom they made the final arbiter between their laws and the constitution, in all cases in which there was an alleged collision between them. These principles have been too often, and too solemnly, affirmed by this court, to make any detail of their reasoning or opinions necessary.

In *Fletcher* v. *Peck*, they were applied to a grant of land by a state to individuals, made by the authority of a state law, which was afterwards

repealed (6 Cranch 127); in *New Jersey* v. *Wilson*, to an immunity from taxation granted to a tribe of Indians (7 Ibid. 164); in *Terrett* v. *Taylor*, to a religious society (9 Ibid. 43, &c.); in *Dartmouth College* v. *Woodward*, to a literary corporation. 4 Wheat. 636. In all these cases, state laws which violated the grants and charters which conferred private or corporate rights, were held void, under the prohibition in the constitution; the court holding, that as it contained no exception in terms, none could be made by construction; the language being clear of all ambiguity, it extended to corporations as well as individuals. 8 Wheat. 480–90, *passim*.

But while the court repudiates all constructive exceptions to the prohibition, it equally repudiates its application to constructive contracts; it will preserve the immunity from taxation, when it is granted in terms, as in 7 Cranch 164; yet they will not raise an immunity by implication, "where there is no express contract." 4 Pet. 563.

There can be no difficulty in understanding this clause of the constitution; its language is plain, and the terms well defined, by the rules of law; the difficulty arises by the attempts made to interpolate exceptions on one hand, so as to withdraw contracts from its operation; and on the other hand, to imply one contract from another, to make each implied contract the parent of another, and then endeavor to infuse them all into the constitution, as the contract contained in the grant or charter in question. If human ingenuity can be thus exerted, for either purpose, with success, no one can understand the constitution as it is; we must wait till it has been made, by such construction, what such expounders may think it ought to have been, before we can assign to its provisions any determinate meaning. In the rejection of both constructions, and following the decisions of this court, my judgment is conclusively formed—that the grants of property, of franchise, privilege or immunity, to a natural or artificial person, are alike confirmed by the constitution; and that the plaintiffs are entitled to the relief prayed for in their bill, if they have otherwise made out a proper case.

In tracing their right to its origin, they found it on a grant to Harvard College, by the general court, or colonial council, in 1640, of the ferry between Boston and Charlestown, which had belonged to the colony from its first settlement. In 1637, the governor and treasurer were authorized to lease this ferry for three years, at 40*l*. a year, under which authority, they made such a lease, and gave an exclusive right of ferry between the two towns, though they were not authorized to do more than lease the ferry. The lease expired in 1640, when the ferry reverted to the colony, and was granted to the college, by no other description than "the ferry between Boston and Charlestown," which the plaintiffs contend, was a grant in perpetuity of the exclusive right of ferriage between the two towns, and from any points on Charles river, at the one or the other.

All the judges in the court below, as well as the counsel on both sides, agree, that the common law as to ferries was adopted and prevails in Massachusetts; this part of the case then must depend on what were the rules and principles of that law, in their application to such a grant at the time it was made. It is an admitted principle, that the king, by his prerogative, was vested with the right of soil and jurisdiction over the territory within which he constituted, by his charter, the colonial government; their grants

had the same validity as his, and must be construed by the same rules which regulate prerogative grants. See 1 Pick. 182, &c. As the king, by his charter, put the colonial government in his place, they held the right in and over the arms of the sea, navigable rivers, and the land in the colony, for the benefit of the people of the colony, as a public trust, not as a private estate; the people of the colony had the right of fishing, navigating and passing freely in and over the public waters, subject to such grants of franchise or property as might have been made, or which should be made in future. But as any grant of a private right in or over public property, is necessarily an abridgment of the public right, to the extent of such grants, the law looks on them with great watchfulness, and has prescribed rules for their construction, founded on a proper regard to the general interest.

The prerogative of the king is vested in him as necessary for the purposes of society; it extends to all things not injurious to his subjects, but "stretcheth not to the doing of any wrong" (1 Bl. Com. 237–9); the objects for which it is held and exercised, are for the good of the subject, and the benefit of the commonwealth, and not his private emolument. It is a part of the common law (2 Inst. 63, 496); confined to what the law allows, and is for the public good (Hob. 261); and the increase of the public treasure. Hard. 27; 2 Vent. 268. The king is the universal occupant of the public domain, which he may grant at pleasure (11 Co. 86 *b*; 9 Pet. 748; Cowp. 210); but his grants are voidable, if they are against the good of the people, their usual and settled liberties, or tend to their grievance (2 Bac. Abr. 149; Show. P. C. 75); holding it for the common benefit as a trust, his prerogative is the guardianship of public property, for the general interest of his subjects.

This is the reason why the king has a prerogative, in the construction of his grants, by which they are taken most strongly in his favor and against the grantee, because they take from the public whatever is given to an individual; whereas, the grants of private persons are taken by a contrary rule, because the public right is not affected by them. From a very early period, it was the policy of the law of England, to protect the public domain from the improvident or illegal exercise of the royal prerogative in making grants, and to secure to pious and charitable institutions, the benefit of donations made directly to them, or for their use, by rules of construction appropriate to each kind of grants, which were a part of the common law. These rules were affirmed by statutes, in order to give them a more imposing obligation; these statutes were passed in 1323–24. By the 17 Edw. II., stat. 1, c. 15, it is enacted, that "When our lord the king giveth or granteth land or a manor, with the appurtenances, without he make express mention in his deed or writing, of knights' fees, advowsons of churches, and dowers when they fall, belonging to such manor or land, then, at this day, the king reserveth to himself such fees, advowsons and dower; albeit, that among other persons, it hath been observed otherwise;" 1 Ruff. 182–3. By the 17 Edw. II., called the statute of templars, it was declared, that grants and donations for charitable purposes, should be held, "so always that the godly and worthy will of the foresaid givers be observed, performed and always religiously executed as aforesaid." Keble's Stat. 86–7. Subsequent statutes have prescribed the same rule, whereby it has ever since been a fundamental principle of the law of charities, that the will of the donor

should be the standard of construction in relation to all such gifts or grants (8 Co. 131 *b*; 10 Ibid. 34 *b*; 3 Ibid. 3 *b*; 7 Ibid. 13 *a*); putting them on the footing of a will, in which the intention of the testator prevails over the legal interpretation of the words.

Both classes of cases are exceptions to the general rules of construing private grants. They rest, however, on the strongest grounds of reason, justice and sound policy, applicable alike to England and this country. In cases of charities, the rule has been most liberally applied by this court, as it has in England, in the construction of statutes and grants, in favor of donations to them (4 Wheat. 31, &c.; 9 Cranch 43, 331; 3 Pet. 140, 480; 9 Wheat. 455, 64; 2 Pet. 580, 585); so of dedications of property to public use, or the use of a town (12 Wheat. 582; 6 Pet. 436–7; 10 Ibid. 712–13); the rules of which are essentially different from those which relate to grants from one person to another, or laws for private benefit. In cases of grants by the king, in virtue of his prerogative, then the rule prescribed by the statute of prerogative has ever been a fundamental one in England, "that nothing of prerogative can pass, without express and determinate words." Hob. 243; Hard. 309–10; Plowd. 336–7. In 1830, it was laid down in the house of lords, as clear and settled law, that the king's grants shall be taken most strongly against the grantee, though the rule was otherwise as to private grants (5 Bligh P. C. 315–16); this rule was never questioned in England, and has been adopted in all the states, as a part of their common law.

This rule is a part of the prerogative of the crown, which devolved on the several states by the revolution (4 Wheat. 651); and which the states exercise to the same extent as the king did, as the guardians of the public, for the benefit of the people at large. It is difficult to assign a good reason, why public rights should not receive the same protection in a republic as in a monarchy, or why a grant by a colony or state, should be so construed as to impair the right of the people to their common property, to a greater extent in Massachusetts, than a grant by the king would in England. But the grant of this ferry, in 1640, was only a prerogative grant, by colonial authority, which derived solely from the charter of the king, and not by act of parliament, could rise no higher than its source in his prerogative, nor could it pass, by delegated authority, what would not pass in the same words, by original grant from the king; consequently, the grant must be construed as if he had made it. If, however, there could be a doubt on this subject, by the general principles of the common law, as adopted in that colony, there were reasons peculiar to it, which would call for the most rigid rules of construing grants of any franchise, or right of any description, on the waters or shores of the rivers and arms of the sea, within its boundaries.

In 1641, the general court adopted an ordinance, which was a declaration of common liberties, providing that riparian owners of land on the sea or salt water, should hold the land to low-water mark, if the tide did not ebb and flow more than one hundred rods; though this ordinance expired with the charter of the colony, there has been, ever since, a corresponding usage, which is the common law of the state to this day. 4 Mass. 144–5; 6 Ibid. 438; 17 Ibid. 148–9; 1 Pick. 182, &c. The riparian owner of land in Charlestown "may, whenever he pleases, inclose, build and obstruct to

low-water mark, and exclude all mankind" (1 Mass, 232) : it is, therefore, a necessary conclusion, from the nature and extent of the riparian right that grants of land on Charles river must be construed by the rules of prerogative grants. Any construction which would extend them beyond the limits described in the grant, must take from the adjoining riparian owner a right which is exclusively in him ; it cannot then ever have been the law of Massachusetts, that the grant of the ferry, in general terms, between two opposite points on the shore of Charles river, which is an arm of the sea, and salt water, would give any right beyond the landings. Had the grant been definite, of the landings, describing them by metes and bounds, with the right of ferriage over the river, its construction must be the same as a general grant, for it could, in neither case, be extended, so as to give a right of landing on another man's soil.

Independent, however, of any considerations of this kind, the law of Massachusetts on the subject of the construction of grants, has been settled by the repeated decisions of its supreme court, and is thus laid down by Chief Justice PARSONS, in language which meets this case on all points : "Private statutes made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or necessary implication." 4 Mass. 145. In case of a deed from A. to B., the court gave it a strict and technical construction, excluding all the land not embraced by the words of the description (6 Mass. 439–40 ; S. P. 5 Ibid. 356) : "where a tract of land is bounded on a street or way, it does not extend across the street or way, to include other lands and flats below high-water mark." 17 Mass. 149. In grants by towns, no land passes by implication, "unless the intention of the parties to that effect, can be collected from the terms of the grant" (2 Pick. 428) ; "nothing more would pass than would satisfy the terms" (3 Ibid. 359) ; "in the absence of all proof of ancient bounds, the grant must operate according to the general description of the estate granted." 6 Ibid. 176.

"By the common law, it is clear, that all arms of the sea, coves, creeks &c., where the tide ebbs and flows, are the property of the sovereign, unless appropriated by some subject, in virtue of a grant, or prescriptive right which is founded on the supposition of a grant" (6 Pick. 182) ; "the principles of the common law were well understood by the colonial legislature." "Those who acquired the property on the shore, were restricted from such a use of it, as would impair the public right of passing over the water." "None but the sovereign power can authorize the interruption of such passages, because this power alone has the right to judge whether the public convenience may be better served by suffering bridges to be thrown over the water, than by suffering the natural passages to remain free." Ibid. 184. By the common law, and the immemorial usage of this government, all navigable waters are public property, for the use of all the citizens, and there must be some act of the sovereign power, direct or derivative, to authorize any interruption of them." "A navigable river is, of common right, a public highway, and a general authority to lay out a new highway must not be so extended as to give a power to obstruct an open highway, already in the use of the public." Ibid. 185, 187.

From these opinions, it would seem, that the interest of the riparian

owners and of the public, would require for their protection the application of such a rule of construing legislative grants of any right in or over the waters of the colony, as would confine them to the description, so that nothing should pass that was not embraced in its terms, and no right be impaired, further than the words of the law had done it. The supreme court of Massachusetts have not shown any sensibility as to the rules of construing grants, because they may be called "prerogative" rules, or in permitting the state to avail itself of prerogative rights. 6 Pick. 415. This prerogative rule has been adopted in New York, without any fear that it was incompatible with the policy of a republic. "It is an established rule, that when a grant is susceptible of two constructions, that should be adopted which is most favorable to government;" 3 Caines 295; *per* THOMPSON Justice, "It is a general rule of law, that in the exposition of governmental grants, that construction, when the terms are inexplicit, shall be adopted, which is least favorable to the grantee." p. 303. LIVINGSTON, Justice, "The idea of rolling out the patent, to the extent of four miles from every part of the plains, is literally impracticable, and when so modified as to be practicable, it would give too difficult and inconvenient a shape for location, and in a case of a location, vague and doubtful, it would be stretching the grant over all surrounding patents, to an unreasonable degree. A construction more convenient and practicable, better answering the words of the grant, more favorable to the rights of the crown, and to the security of adjoining patents, ought to be preferred." p. 306. KENT, Chief Justice, "No property can pass, as a public rule, but what was ascertained and declared" (1 Johns. Cas. 287); a road will not pass by general words thrown in at the end of the metes and bounds in a sheriff's deed." Ibid. 284, 286; S. P. 13 Johns. 551. "Such construction will be given as will give effect to the intention of the parties, if the words they employ will admit of it; *ut res majis valeat quam pereat.*" 7 Johns. 223. But when the description includes several particulars, necessary to ascertain the estate to be conveyed, none will pass except such as will agree to every description. "Thus, if a man grant all his estate in his own occupation, in the town of W., no estate can pass, except what is in his own occupation, and is also situate in that town." Ibid. 224.

"A right to fish in any water, gives no power over the land" (citing Saville 11); "nor will prescription, in any case, give a right to erect a building on another's land. This is a mark of title and of exclusive enjoyment, and it cannot be acquired by prescription." 2 Johns. 362. "A mere easement may, without express words, pass, as an incident to the principal object of the grant, but it would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries." Thus, where land was granted on each side of a public road, by such description as included no part thereof, and the road was afterwards discontinued, the grantee has no right to any part of the site of the road. 15 Johns. 452, 455. This court has not departed from these rules, in expounding grants to corporations. "In describing the powers of such a being, no words of limitation need be used; they are limited by the subject." "But if it be intended to give its acts a binding efficacy, beyond the natural limits of its power, and within the jurisdiction of a distinct power, we should expect to

find in the language of the incorporating act, some words indicating such intention." 6 Wheat. 442. "It ought not to be so construed as to imply this intention; unless its provisions were such as to render the construction inevitable." Ibid. 443. The act must contain words indicating such intention, and "this extensive construction must be essential to the execution of the corporate power." Ibid. 445. "It is an obvious principle, that a grant must describe the land to be conveyed, and that the subject granted must be identified by the description given of it in the instrument itself." 3 Pet. 96. "Whatever the legislative power may be, its acts ought never to be so construed, as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object." 2 Wheat. 203. Where a piece of ground in Charlestown was purchased by the United States for a navy yard, with the assent of Massachusetts, by the following description, "one lot of land, with the *appurtenances*," &c., it was held, that an adjacent street did not pass, as there was no intention expressed that it should pass; the term *appurtenances* received a strict, legal, technical interpretation. The court recognise the English rule, as laid down in 15 Johns. 454, and refer with approbation to a case decided in Massachusetts, in which it was held, that by the grant of a grist-mill with the appurtenances, the soil of a way, immemorially used for the purpose of access to the mill, did not pass, although it might be considered as a grant of the easement, for the accommodation of the mill. 10 Pet. 53–4; 7 Mass. 6. In this opinion, delivered in 1836, we find the rule prescribed by the statute of prerogative, recognised by this court, as it had been in the supreme courts of New York and Massachusetts, as to a grant of land, with the appurtenances; which, with the other opinions herein referred to, would be deemed conclusive evidence of the law, on any other question than one involving the application of the clause of the constitution, against impairing the obligation of contracts. But if this consideration is to have any weight in the construction of a grant by a government, it ought to operate so as to exclude any broader construction than the words thereof import; not only because it may abridge the rights of riparian owners, and the public rights of property, but for a still stronger reason—that every grant is a contract, the obligation whereof is incorporated in the constitution, as one of its provisions. Of consequence, the legislature is incompetent to resume, revoke or impair it, let their conviction of its expediency or public convenience be what it may. It is, therefore, the bounden duty of a court, not to make a grant operate by mere construction, so as to annul a state law which would be otherwise valid, and make a permanent irrevocable sacrifice of the public interest, for private emolument, further than had been done by the terms of the grant. Such has been the uniform course of this court.

"The question whether a law be void for its repugnance to the constitution, is, at all times, a question of much delicacy, which ought seldom or ever to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy its station, could it be unmindful of the obligations which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such, that the judges feel a clear and strong conviction of their incompatibil-

ity with each other." 6 Cranch 128. "On more than one occasion, this court have expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution." 4 Wheat. 625. "It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality." 12 Ibid. 436.

From these principles, it follows, that no legislative grant can be held void, on account of its alleged violation of a former grant, which is not definite in its object, the thing granted, and its extent; if it is so imperfectly described, as to leave it doubtful whether the subject-matter of both grants is the same, the doubt operates conclusively in favor of the power of the legislature to make the second grant. This consideration alone necessarily leads to the rule for construing public grants of property or franchise, even more strictly than in England; the reason exists in the provision of the constitution, which prohibits any legislative violation of the obligation of a contract; whereas, in England, parliament can revoke or annul a grant of property or power, as the several states could, before they adopted the constitution." 4 Wheat. 628, 651.

It is, however, not necessary, for the purposes of this case, to hold the plaintiffs to any other rules of construction, than those laid down by this court in 6 Pet. 738, to which the court has referred in their opinion. These rules were extracted from the adjudged cases in England, in this and the highest state courts, as unquestionable principles which were deemed too firmly established to be shaken. Yet the rule thus established, is attempted to be put down, by calling it "the royal rule of construction." See 6 Pet. 752. The prerogative rule, and one incompatible with republican institutions. To remarks of this kind, I have no reply. It suffices for me, that I find the settled doctrine of this court, to be supported by a uniform current of authority, for five hundred years, without contradiction; it sufficed also for the majority of the court in this case, to refer to the case in 6 Pet. 638, as to the rules of construing public grants, it not being deemed necessary to lay down the qualifications which applied to particular cases, which are noticed in that opinion.

In the argument of this case, the counsel on either side deemed that case worthy of a reference, nor is it noticed in the dissenting opinion, in which the general principle laid down is assailed; yet a most singular course has been pursued in relation to the opinion delivered, in which that principle was sanctioned by six of the judges. The cases referred to, the principles laid down, the very expressions of the court, have been carefully extracted from that case, and applied to this, in order to impress upon the profession, the belief that the court had intended to establish a less liberal rule of construing public grants, than the English decisions would warrant. Whether this course has been pursued, in ignorance of that opinion, or under an expectation, that it was not, or will not be read, is immaterial; it is a duty due to the profession and the court, that their principle should be known. I, therefore, subjoin an extract, to prevent further misapprehension of their meaning.

"A government is never presumed to grant the same land twice. 7 Johns. 8. Thus, a grant, even by act of parliament, which conveys a title

good against the king, takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land. 8 Co. 274 *b;* 1 Vent. 176; 2 Johns. 263. If land is granted by a state, its legislative power is incompetent to annul the grant and grant the land to another; such law is void. *Fletcher* v. *Peck*, 6 Cranch 87, &c. A state cannot impose a tax on land, granted with an exemption from taxation (*New Jersey* v. *Wilson*, 7 Ibid. 164); nor take away a corporate franchise. *Dartmouth College* v. *Woodward*. 4 Wheat. 518. Public grants convey nothing by implication; they are construed strictly in favor of the king. Dyer 362 *a;* Cro. Car. 169. Though such construction must be reasonable, such as will make the true intention of the king, as expressed in his charter, take effect, is for the king's honor, and stands with the rules of law. 4 Com. Dig. 428, 554, G. 12; 10 Co. 65. Grants of the strongest kind, "*ex speciali gratia, certa scientia, et mero motu,*" do not extend beyond the meaning and intent expressed in them, nor, by any strained construction, make anything pass, against the apt and proper, the common and usual, signification and intendment of the words of the grant, and passes nothing but what the king owned. 10 Co. 112 *b;* 4 Ibid. 35; Dyer 350–1, pl. 21. If it grant a thing in the occupation of B., it only passes what B. occupied; this in the case of a common person, *à fortiori*, in the queen's case. 4 Co. 35 *b;* Hob. 171; Hard. 225. Though the grant and reference is general, yet it ought to be applied to a certain particular, as in that case to the charter to Queen Caroline—*id certum est quod certum reddi potest.* 9 Co. 30 *a;* S. P. 46 *a*, 47 *b*. When the king's grant refers in general terms to a certainty, it contains as express mention of it as if the certainty had been expressed in the same charter. 10 Co. 64 *a*. A grant by the king does not pass anything not described or referred to, unless the grant is as fully and entirely as they came to the king, and that *ex certa scientia*, &c. Dyer 350 *b;* 10 Co. 65 *a;* 2 Mod. 2; 4 Com. Dig. 546, 548. Where the thing granted is described, nothing else passes, as "those lands." Hard. 225. The grantee is restrained to the place, and shall have no lands out of it, by the generality of the grant referring to it; as of land in A., in the tenure of B., the grant is void if it be not both in the place and tenure referred to. The pronoun "*illa*" refers to both necessarily, it is not satisfied till the sentence is ended, and governs it till the full stop. 2 Co. 33; S. P. 7 Mass. 8–9; 15 Johns. 447; 6 Cranch 237; 7 Ibid. 47–8. The application of this last rule to the words "*de illas*," in the eighth article, will settle the question, whether its legal reference is to lands alone, or to "grants" of land. The general words of a king's grant shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, or to be deemed to be to his or the prejudice of the commonwealth. 1 Co. 112–13 *b*. "Judges will invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act." Hob. 277. The words of a grant are always construed according to the intention of the parties, as manifested in the grant, by its terms, or by the reasonable and necessary implication, to be deduced from the situation of the parties and of the thing granted, its nature and use. 6 Mass. 334–5; S. & R. 110; 1 Taunt. 495, 500, 502; 7 Mass. 6; 1 Bos. & Pul. 375; 2 Johns. 321–2; 6 Ibid. 5, 10; 11 Ibid. 498–9; 3 East 15; Cro. Car. 17, 18, 57, 58,

168, 169; Plowd. 170 *b*; 7 East 621; Cowp. 360, 363; 4 Yeates 153." *United States* v. *Arredondo*, 6 Pet. 738–40.

On these rules, principles and cases, I formed my opinion in this case, after the first argument, and now feel a perfect confidence that they fully sustain it; willing to stand before the profession in this attitude, I will not be forced into any other, by any omission of a duty, however unpleasant. With this extract before them, the profession can now determine, whether the court has impugned or affirmed the true principles of law, on the construction of public grants, by prerogative or legislative power, of any portion of public property held as a trust for the benefit of all the people of a colony or state.

The grant of the ferry is in these words, "the ferry between Boston and Charlestown is granted to the college." That there was but one ferry between those places, is admitted; its location had been previously fixed by the general court, at certain points, in the resolutions which they had passed from time to time; those had been the only landings, to and from which passengers had been taken, so that the term, "the ferry," was, in itself, a perfect and complete description thereof. It had been leased to Converse, and a clause was inserted in the case, that he was to have, for three years, "the sole transporting of cattle and passengers;" but this right expired with the lease, when the ferry reverted to the colony, unincumbered with any condition whatever; so that they might make such grant of it, as they pleased. Had the grant to the college been, "as fully as the same had been held by Converse," it would have afforded some evidence of intention to have made it exclusive; but no principle is better settled, than that when the words "as fully and entirely as it came to the hands of the king," are omitted, nothing passes which is not specially described. See 6 Pet. 739, and cases cited. The expired lease to Converse, then, can have no effect on the grant, as matter of law; so far as it indicates intention, it is adverse to the plaintiffs, for when an exclusive right was intended, it was given in express terms; whereas, this grant is, *the* ferry, *illa*, that ferry, which had been established and kept up for ten years previously, at certain landings. This pronoun "the," or "*illa*," is necessarily descriptive of the place, by direct reference to the ferry, as located in fact and long occupation. Ferry is a term of the law, perfectly defined, and a grant of "the ferry," "that ferry," has the same effect as a grant of "that land," "those lands," by which nothing else can pass but those which are referred to in words of description, by metes, bounds or occupation.

In ascertaining the meaning and effect of the grant of a ferry, we must necessarily look to the ownership of the landing-places, whether it is in the grantee of the ferry or in the public. We must also look to the ownership of the bed of the river, over which the right is granted. If the river is private property, a grant of a ferry to the owner of the bed and both sides thereof, is necessarily exclusive, to the extent of his property; the public have no rights thereto, and no man has a right to land thereon, without his permission. All that the owner acquires by the grant, is the franchise of exacting a toll, for the right of passing over his own property, the extent of which is limited thereby. The toll is for the use of his landing, his boats, and passing over his land, to and from them, which excludes every construction of the grant, by which it would interfere with the right of another. 4 Burr.

2165. A grant of a ferry over a pnblic river, "is a liberty by prescription, or the king's grant, to have a boat for passage upon a great stream, for carrying of horses and men, for a reasonable toll." Termes de la Ley 223. It is, to its extent, a diminution of the public right, incumbering public property by the grant of a franchise of exacting toll for passing over it in his boats. If the landings on a public river, or an arm of the sea, are owned by the king, the grant of a ferry includes the right of landing on the shore, or in a public highways, as well as the franchise of toll. But the king cannot grant to A. a ferry between the landing-places of another, for the ferry is in respect to the landings, which must be owned by the public or the grantee of the ferry (Sav. 11, 14) ; or he must have the consent of the owner to use them. 1 Yeates 167–9 ; 9 S. & R. 32. This principle is said to have been overruled in two late cases ; on examination, however, they affirm it. In 12 East 336, 346, a question arose, how a tax should be assessed on a ferry, on which the king's bench decided, that it should be assessed on the landings, as the local, visible, tangible evidence of the property in a ferry. In 6 B. & Cr. 703, the rule as laid down in Saville, was considered, when, so far from overruling it, the two judges who gave an opinion, declared the rule to be, that it was sufficient, if the grantee of the ferry had a right to use the landing-places, though he did not own them, so that the only difference between the cases is, between the owning the landings in fee, and a right to use them, under a lease or other consent of the owner. But if, in these or any other modern cases, the doctrine laid down in Saville had been expressly overruled, it would not have had a retrospective effect to 1640, and changed the nature of the grant of this ferry. Massachusetts would, I think, not have recognised the power of English judges, at this day, to alter the rights of property, held by this ancient charter. A mere grant of a ferry, by general terms, must, from its nature, be confined to the landing-places, and the route through the water between them ; because, if extended farther, it must interfere with the rights of riparian owners, and the common right of every one to pass and repass on a public river or an arm of the sea. To extend the franchise, by implication, to a place where the grantee has neither the right of landing, or the franchise of exacting toll for passage, is also a restraint on the king, against granting a concurrent franchise to a riparian owner, on public landings or the ends of roads leading to public waters, as he may think necessary for the public good. Hence, it has been an established principle of the common law, from *magna charta* to the present time, that the public right in and over all navigable rivers and arms of the sea, continues, till an appropriation of some part is made by grant, on good consideration, or reasonable recompense by the grantee. 1 Ruff. 8, c. 30 ; 2 Inst. 58 ; 1 Mod. 104 ; Willes 268 ; 1 Salk. 357. A general grant by the king, of land in a royal haven, or which is covered by the sea, passes only the spot which is definitely granted, or which has been identified by a possession under the grant ; and what is not described in the grant, or located by possession, is presumed to have been abandoned. Though the grant was made in 1628, and its general terms were broad enough to embrace the place in controversy, the burden of showing a title to the particular spot, was thrown on the claimant. 2 Anst. 614 ; 10 Price 369, 410, 453 ; 1 Dow P. C. 322.

The rule that public grants pass nothing by implication, has been most rigidly enforced as to all grants of toll for ferries, bridges, wharves, quays,

on navigable rivers and arms of the sea, of which there cannot be stronger illustrations than in the cases which have arisen on the customs of London, and other places which impose tolls of various descriptions. By *magna charta*, the customs of London and other cities are confirmed, which has always been held to give to those customs the force of acts of parliament; yet these customs have always been held void, so far as they imposed a toll at any place where the city had not a right to demand them, or for a service or accommodation not performed or afforded, according to the precise terms of the custom. Hob. 175–6; 1 Mod. 48; 1 Vent. 71; 1 T. R. 233; 1 Mod. 104–5.

So it is, where a toll is demandable by an express grant, by custom or prescription, on a public highway, in a public port, or for the use of public property, which is termed *toll thorough*, because the party claiming it is presumed to have had no original right to the place where he demands toll. He must, therefore, show not only his right to toll, by custom, prescription or grant, but must show some consideration for it, some burden on himself some benefit to the public, or that he, or those under whom he claims, had once a right to the *locus in quo*, which had been commuted for the toll, and this consideration must be applied to the precise spot were toll is claimed. Cro. Eliz. 711; 2 Wils. 299; 3 Burr. 1406; 1 T. R. 660; 4 Taunt. 137; 6 East 458–9; 4 T. R. 667. A claim of toll at a place where no toll has been granted, or where no consideration for it exists, is void by *magna charta* and the statute of Westminster, which prohibit all evil tolls; such as are exacted where none are due, exacting unreasonable toll where reasonable only is due, or claiming *toll thorough*, without fair consideration or reasonable recompense to the public. 2 Inst. 219.

Toll traverse, or a toll demanded for passing on or over the private property of the claimant, or using it in any other way, is of a different description; being founded on the right which every man has to the exclusive enjoyment of what is exclusively his private property, its use by others is a sufficient consideration for the exaction of toll. Mo. 575; 2 Wils. 299; Cowp. 47–8. But whenever toll is exacted for the passage over a public water, the nature of it changes; its foundation not being property, it rests on a grant or prescription, and if the toll is unreasonable, the grant is void. 2 Inst. 221–2. The grantee must have the ownership or usufruct of the *locus in quo* (1 Yeates 167; 9 S. & R. 32), and within reasonable bounds; a prescription for a quay half a mile in length is not good, unless the vessels unlade at the wharf; the court say, "he may as well prescribe to the confines of France." 1 T. R. 223; 1 Mod. 104.

The right of ferry is a franchise which cannot be set up, without the license of the king (Harg. L. Tr. 10); or prescription (5 Day's Com. Dig. 361–7; Hard. 163; Willes 512; 1 Nott & McCord 394); "rights of ferry on the waters of the public are not favored;" they come too near a monopoly, and restrain trade. Hard. 163. "Courts are exceedingly careful and jealous of these claims of right, to levy money upon a subject; these tolls began and were established by the power of great men." 2 Wils. 299. A legislative grant of a ferry, with a landing in a public road, the soil whereof is not owned by the grantee, is void (9 S. & R. 32); a charter to a turnpike corporation does not authorize them to erect a toll-gate on an old road, unless specially authorized, or it is necessary to give a reasonable effect to the statute (2 Mass. 142–6; 4 Ibid. 145–6); a town must show property

in the land to low-water mark, to authorize them to regulate its use under a law. 6 Johns. 135. The consideration of grants of ferries, is the obligation to provide and keep up proper accommodations for the public (22 Hen. VI. 15 ; 6 East 459 ; s. p. 1 Ves. jr. 114); the right is commensurate with the duty, and both must exist at the place where toll is exacted for passing. 4 T. R. 667–8 ; 1 Mass. 231.

As the right to the landings, or their use, is indispensable to the right to a ferry, a right to land at one place is not an incident, and cannot be made an appurtenance to a right to land at another place, even by the express words of the grant, according to the law of this court, unless some other words are added, by way of description, besides appurtenances. Land cannot be appurtenant to land, nor can one corporeal or incorporeal thing be incident or appurtenant to another thing of the same nature ; the incident must attach to the principal thing. 10 Pet. 54, and cases cited. The principal thing is that which is of the higher and most profitable service ; the incident is something of a lower grade, which passes as appendant or appurtenant to the principal thing, without the words *cum pertinentibus*. Co. Litt. 307 *a*. The grant of a thing carries all things included, without which the thing granted cannot be had ; that ground is to be understood of things incident and directly necessary (Hob. 234) ; so that a man may always have the necessary circumstances, when he hath a title to the principal thing. Plowd. 16 ; Ibid. 317 ; Co. Litt. 56 *a*. A parcel severed from a manor, does not pass by a grant of the entire manor, unless where the severance is merely by a lease for years. An advowson appendant does not pass by the word appurtenances, as a part of the thing granted ; it will pass where the grant is made with the additional words, "as fully and entirely as they came to the hands of the king, and with his certain knowledge," but not without these words. 10 Co. 65 ; Dyer 103 *b* ; Plowd. 6, 350 *b* ; Ibid. 18 ; 2 Mod. 2 ; 4 Day's Com. Dig. 546–8. When the word appurtenances is in the grant, there must be an intention manifested by other words, so that the court can be enabled to give them their intended effect, and hold them to pass what had been occupied, or used, with the thing directly granted. Plowd. 170–1; 11 Co. 52; Cro. Jac. 170, 189; Dyer 374; 7 East 621; Cowp. 360; Cro. Car. 57–8. This is the rule in cases of private grants of land, which are taken most strongly against the grantor and in favor of the grantee, which has never been questioned ; *à fortiori*, it must apply to public grants, and it follows conclusively, that where a grant by the king, or a colony, omits even the word appurtenances, it will not pass a right which would not pass by that word alone. There is, however, another unquestioned rule, more directly applicable to the grant of a ferry, than the mere grant of land, or a substance to which a thing of the same substance cannot be appendant or appurtenant.

"But the grant of a franchise, a liberty, a particular right, on land or water, passes nothing more than the particular right. Co. Litt. 4 *b* ; 4 Day's Com. Dig. 416, 542 ; 2 Johns. 322. The grant of a franchise carries nothing by implication. Harg. L. Tr. 33. Every port has a *ville*, and the grant of the franchise of a port shall not extend beyond the *ville*, because the court cannot notice it any further *ex officio*, though they will award an inquest in some cases, to ascertain the extent. Harg. L. Tr. 46–7. Ancient grants and charters are construed according to the law at the time they

were made. 2 Inst. 282 ; 4 Day's Com. Dig. 546, 419 ; Co. Litt. 8 *b*, 94 *b*; 9 Co. 27–8. The location of a patent 160 years old, shall not be extended beyond the actual *possessio pedis* under it ; its boundaries must be ascertained by possession, and not the words ; every doubt ought to be turned against the party who seeks to extend them. 7 Johns. 5, 10, 14. "It is undoubtedly essential to the validity of every grant, that there should be a thing granted, capable of being distinguished from other things of the same kind." 7 Wheat. 362.

A toll by prescription is better than by grant (2 Inst. 221) ; so is a franchise of a port, because the extent is according to the prescription (Harg. L. Tr. 33); but it must be confined to the subject-matter and the ancient use. 1 Wils. 174 ; 6 East 215 ; 7 Ibid. 198 ; 2 Conn. 591 ; S. P. Willes 268 ; 4 T. R. 437 ; 2 H. Bl. 186. Under a charter for the erection of a road, canal or bridge, the corporation must confine their action within the precise limits designated ; any deviation from the route prescribed makes them trespassers. Cowp. 77 ; 2 Dow P. C. 519, 524. The law is the same, though the road or canal is the property of the public, and constructed for general benefit (20 Johns. 103, 739 ; 7 Johns. Ch. 332, 340); the definition of a road is, "the space over which the subject has a right to pass" (2 T. R. 234); beyond which there is no road ; so of a canal, bridge or ferry, with a grant of toll for passing ; the nature and object of the grant in prescribing bounds is necessarily a limitation ; nor does it make any difference, whether the toll is demanded in virtue of a direct grant, or one presumed by prescription, where there is no consideration existing at the precise point where toll is exacted, as is evident from the reason of the rule ; "because it is to deprive the subject of his common right and inheritance to pass through the king's highway, which right of passage was before all prescription." Mo. 574–5 ; Plowd. 793 ; 2 Wils. 299. If toll thorough is prescribed for, for passing through the streets of a town, the party must show the streets which he was bound to keep in repair, and that the passage was through such streets. 2 Wils. 299.

It would be easy to add references to other cases, but as the principles settled in those already cited, have for centuries been the established law of England, and the received law of all the states, since their settlement, it is evident, that no construction can be given to this grant, which will make it pass the exclusive right of ferriage between Boston and Charlestown. It can have no analogy to cases of donations to charities, unless it shall be held to be a charitable act to *roll out* the grant (in the words of Chief Justice KENT, 3 Caines 306) to the extent of some miles of the shores of a great river, so as create a monopoly of the right of passage, and prevent the legislature from promoting the public welfare, by the grant of a concurrent ferry. On the first argument of this case, it was contended, that the grant extended one-third of an ancient day's travel, a *dieta*, or seven miles from the landings on each side of the river, which would be twenty-eight miles ; this extravagant pretension was abandoned at the last argument, so that it is unnecessary to test its validity. But the plaintiffs still insist, that their grant must be so extended as to prevent any injurious competition for the toll due for passage of boats between the places, at ferries contiguous, or so near as to diminish their profits, and also to secure to them the whole line of travel to the landings on each side of the river. This is the ground on which

they ask an injunction to prevent the nuisance, by the erection of another bridge, and a decree of suppression, if it should be erected ; because, claiming under the ferry grant, the franchise thereby granted is imparted to the bridge to its full extent. In considering this position, I will first examine the authorities on which it is attempted to be supported.

In the Year Book, 22 Hen. VI. 14–15, PASTON, J., said, " And the law is the same, if I have, from ancient time, a ferry in a *ville*, and another should set up another ferry on the same river, near to my ferry, so that the profits of my ferry are diminished, I may have against him an action on the case." That this has been the received law ever since, is not to be questioned ; but in its application to the present ferry grant, there are two important differences to be considered. The rule applies only to *ancient* ferries ; that is, ferries by prescription, or a presumed grant ; next it applies to ferries in a *ville*, which is thus defined : " *Ville* is sometimes taken for a manor, and sometimes for a parish or a part of it " (Cow. L. Inst.); " a tithing or town " (1 Bl. Com. 114); " consisting of ten families at least " (5 Day's Com. Dig. 249 ; 2 Str. 1004, 1071); " the out part of a parish, consisting of a few houses, as it were separate from it." 3 Toml. L. Dict. 746 *b:* see Co. Litt. 115 *b*. From the nature of such a ferry, the rule applies only within these places ; it never has been applied in England, to ferries on arms of the sea, between two places on its shores ; the doctrine was expressly repudiated in *Tripp* v. *Frank*, 4 T. R. 667, where there was exclusive right of ferry by prescription, across the Humber, between Kingston and Barton, the profits of which were diminished by the defendant's ferry from Kingston to Barrow. It could not apply in this country, where the right of ferry exists only by legislative grant, and where we have no such subdivisions as correspond to a *ville* in England. Our towns, boroughs and cities are laid off by established lines, without regard to the regulations of Alfred, or the number of families or houses requisite to compose a hamlet, a *ville*, a part of a manor, or parish.

The inhabitants of these *villes* did not own the land they occupied ; they held under the lord of the manor, in whom the right of ferry was vested, as the owner of the soil, and a grant of the franchise by prescription. The tenant of that part to which it attached by prescription, being obliged to provide and maintain boats, &c., was protected against competition by the other tenants of the *ville*, who held under the same lord. It was a part of the tenure by which the land was held, that the tenants should pass at the ferry ; should grind the corn raised on the same land, at the lord's mill, or that of his tenant, so that the profits of the ancient mill should not be impaired to their injury. 22 Hen. VI. 14–15, by PASTON, J. The rule, of course, could have no application beyond the *ville* or manor, in which there existed such privity of tenure ; the nature of the right is incompatible with the *jus publicum* in public waters, or private rights of property held independently of the lord of the manor. Hence, we find no case arising in England, in which this right has been sustained, on any other ground than tenure, which is a conclusive reason against the application of the rule to any case in this country, where no such tenure exists, or can exist, as in English manors.

The plaintiffs have considered the grant of a ferry as analogous to that

of a fair or market, and have relied on cases in which damages have been recovered for erecting rival fairs or markets ; but these cases admit of the same answer as those of ferries by prescription within manors ; they grow out of feudal tenures, are founded on feudal rights, and are wholly unknown in this country, either by grant or prescription.

Markets and fairs, however, differ from other franchises ; the grant or prescription extends, *ex vi termini*, to seven miles or the *dieta*. F. N. B. 184 n.; 3 Bl. Com. 219 ; 2 Saund. 171–2. The word "near" refers to the *dieta*, in case of a rival fair or market ; and to the *ville*, in case of a ferry ; if it is beyond, no action lies. 3 Bl. Com. 219. In cases where the action is sustained, it is not on the right of property ; it must be an action on the case for consequential damages, arising from an unlawful act which injures another ; if the act is lawful, no action lies ; one may erect a mill near the ancient mill of another, because he is not bound to keep it in repair (22 Hen. VI. 14), unless a special custom is alleged and found, as in 2 Vent. 291–2.

Any man may keep a ferry for his own use, between his own landings, within the limits of a ferry by prescription, or the king's manor (Harg. L. Tr. 6, 73), but if he do it for toll, without license, he usurps a public franchise, and is finable, on a presentment, or *quo warranto* (Ibid. 73), he is not bound to keep up his boats, and as he does not share the burdens, he shall not have the benefit of the franchise (3 Bl. Com. 219), and the act being illegal, when done "without lawful authority or warrant," it is a nuisance, and case lies for damages consequent upon it (1 Mod. 69 ; 2 Saund. 172–4 ; Bull. N. P. 76), but the action does not lie, if the act, though unlawful, was not an interference with the right of the other, and within the limits of his prescription. Harg. 47. The king alone can prosecute for a purpresture, or an usurpation on the *jus publicum* of a franchise, burdensome to the subjects generally (Harg. L. Tr. 85 ; 2 Johns. Ch. 283 ; 18 Ves. 217–19), if it is outside the limits of an ancient ferry, a grant of the franchise, if fairly made, gives a complete right to the enjoyment of the franchise which none can disturb (Willes 508), because none but the king can interfere.

There is no case, where the grant of a new ferry or other franchise has been held void, on the sole ground of its interfering with the profits of an old one. *Chapman* v. *Flaxmann*, was on a special custom laid and found, that all the inhabitants of the manor which belonged to the plaintiff, were bound to grind at his mills; the defendant occupied a messuage in the manor, and erected a mill, to the plaintiff's injury, who recovered damages on the ground of the custom. 2 Vent. 291–2. In *Butler's Case*, the suit was to repeal a patent for a market at C., reciting that there was an ancient market within half a mile, and that the patent was obtained on an *ad quod damnum*, executed by surprise, and without notice, to the great damage of the former market, all of which was admitted by a demurrer, and the patent was repealed. 2 Vent. 344 ; 3 Lev. 220, 223. The suit was by the king, at the relation of the inhabitants of Rochester, and the patent avoided, on the ground, that "the king has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced," that it was *jure regio* by the common law (3 Lev. 221–2 ; but it is not asserted in any part of the case, that the patent was repealable, on the ground of the right of the relators to an exclusive market, or that they had any remedy otherwise

than at the suit of the king. In the report of the case, in Levinz, it appears, that the city of Rochester was held of the king by a fee-farm rent of twelve pounds per annum, the effect of which was to make the citizens thereof the fee-farm tenants of the king; as such they were privileged suitors, and entitled to redress, when other tenants are not, which will explain the cases cited from Hardres, decided in the exchequer, on bills in equity, to suppress rival ferries, mills and markets.

In *Churchman* v. *Tunstall*, the plaintiff was the farmer of a common ferry, time out of mind, at a fee-farm rent; the defendant owned the land on both sides of the Thames, and set up a ferry, within three-fourths of a mile of plaintiff's ferry, to his prejudice. The court dismissed the bill, "because it came too near a monopoly and restrained trade, and because no precedent was shown in point. The case of a beam that had been urged, was of a beam in the king's own manor." Hard. 162–3. In *Green* v. *Robinson and Wood*, there was a custom in a manor, held by the king in fee-farm, that all the tenants and resiants thereof should grind at the lord's mill and not elsewhere; the defendant had erected another mill, outside of the manor, near the old mill, by reason whereof, many of the tenants left the lords mill, to his great prejudice; the bill was for the demolishing the new mill. The court (HALE, ATKINS, TURNER) said, that it was lawful for any tenant to set up a mill upon his own ground, out of the manor, but not within the manor; they would prohibit him from pursuading the tenants to grind at his mill, or fetching grist out of the manor thereto, but could not decree the mill to be destroyed, unless erected within the king's manor, to the prejudice of *his* mill. No precedents were shown, and the bill was dismissed, but without prejudice to the right of the lord of the manor. Hard. 174–5. In *White and Snoak* v. *Porter*, one of the plaintiffs was a copyhold tenant for life, the other, a purchaser of the inheritance of land in the king's manor, held under a fee-farm rent, who filed their bill for the suppression of a rival mill, erected within the manor. It was decreed, that the defendant should not take away or withdraw any grist from the old mill; but his mill was not decreed to be demolished, for that can be done in the king's own case only, or in the case of his patentee, who is entitled to the privilege of this court (of exchequer), "And it was also held in this case, that to compel all the tenants within the king's manor, to grind at the king's mill, is a personal prerogative of the king's, which no other lord can have, without tenure, custom or prescription. But it will extend to a fee-farm, because it is for the king's advantage. And that the custom in this case does not go to the estate, but to the thing itself, and runs along with the mill, into whose hands soever it comes, that the suit here must be as debtor and accountant only, because the copyholder for life is not liable to the fee-farm. And if two join, as they do here, where one of them is, and the other is not, liable to the fee-farm, that is irregular, unless that other be a privileged person. Hard. 177–8. In the *Mayor, &c.* v. *Skelton*, the bill was for demolishing a mill, near to a manor of the king's, which was granted to the plaintiffs in fee-farm, whose mill was prejudiced by the one erected by the defendant. A search was directed to be made for precedents, but none could be found, and the court held, that a mill, not within the king's manor, could not be demolished, where there was no tenure nor custom,

whereby the inhabitants are bound to grind at the king's mill. Hard 184–5.

Two cases which involve the same principle, are reported by Lord HALE, in his Treatise *de Portibus Maris.* The town of *New Castle on Tyne* v. *Prior of Tinmouth,* and the *City of Bristol* v. *Morgan et al.* Both places were within the king's manors, and were held by fee-farm rent, the plaintiffs were, therefore, privileged suitors, and having made out their case, they obtained decrees for the demolishing the erections complained of, which were within the town and city, among which there was a ferry; upon which Lord HALE remarks, "Upon these records, these things are to be noted and collected, viz: 1. In fact, these places (in which the erections were demolished) were within the respective ports of Bristol and New Castle, and between the port-town and the sea. 2. That an erection of houses, or places of receipt for mariners, contiguous to, or near to, the water of that part, between the port and the sea, is an injury to the port-town, a forestalling of it, and a prejudice to the customs. 3. That it may, therefore, be demolished by decree or judgment." "But if it had not these circumstances, it had been otherwise. 1. If it had been built *contiguous* to the port-town, it should not have been demolished; and upon that account, the buildings below the town do continue, and are not within the reasons of these judgments. 2. If it had been built *above* the port, it should not have been subject to such a judgment, for it is, in that case, no forestall between the port and the sea, and so no nuisance to the port-town, as a port-town. 3. If the building had been *out of the extent* of the port, as if it had been built three or four miles below the *ville,* it had not been within the reason of either of these judgments, nor might it have been demolished, for it could not be a nuisance to the port." Harg. L. Tr. 79, 83.

In these and all other cases where rival ferries have been suppressed by decrees in the court of exchequer, they are suits by the king, or his fee-farm tenants, who, by being his debtors and accountants, are entitled to the same privileges of personal prerogative as the king himself, and may sue in the exchequer, as privileged persons. But no decree for a suppression will be rendered in any case, unless the erection is within the king's manor, and no restraint will be put upon the rival mill or ferry, if there is no tenure, custom or prescription, which gives an exclusive right to the plaintiff, to compel the tenants of the manor to resort to his mill, &c.

It has been contended by the plaintiffs, that the case in Hardr. 162, was overruled, and a contrary principle established afterwards, for which a reference is made to the argument of the attorney-general, in 2 Anstr. 608, and the opinion of the Chief Baron, in p. 416; but on a close examination of the cases, there will be found no discrepancy between the first and second decisions of the case of *Churchman* v. *Tunstall.* As reported in Hardr. 162, the plaintiff sued in the exchequer, as "a farmer of a common ferry, at Brentford, in Middlesex, at a fee-farm rent; the ferry was a common ferry, time out of mind, and he laid in his bill, that no other person ought to erect any other ferry, to the prejudice of his, &c." He did not lay the ferry to be within the king's manor, nor allege himself to be a fee-farm tenant of the king; he was, therefore, not a privileged suitor in the exchequer, so as to be able to avail himself of the personal prerogative of the king. The ferry

was also laid to be a common ferry. In the case afterwards brought, the plaintiff sued "as tenant of an ancient ferry under the crown" (Anstr. 608); on which the Chief Baron, in referring to the decisions of Lord HALE, remarks: "But the cases cited, and those which Lord HALE has given us, in his Treatise *de Portibus Maris*, clearly prove, that where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it." *Attorney-General* v. *Richards*, Anstr. 616.

This remark reconciles all the cases which have been referred to, showing that where the court of exchequer interferes to suppress any rival erection as a nuisance, it is where the *locus in quo* is the property of the crown, and the suit is brought by him, or his tenants, who sue in his right. Such was the case in Anstruther; the nuisance complained of was "the erection of a wharf in Portsmouth harbor, which prevented vessels from sailing over the spot, or mooring there," &c.; it was abated, on the ground of the property being in the king, and the erection being to the injury of the public. In such cases, the court of exchequer acts on an information by the attorney-general, or at the suit of the king's patentee, or fee-farm tenant; but this is a proceeding peculiar to that court. A court of equity never grants an injunction against a public nuisance, without a previous trial by jury, as it would, in effect, be tantamount to the conviction of a public offence. Harg. L. Tr. 85; 18 Ves. 217, 219; 19 Ibid. 617, 620; 2 Johns. Ch. 283.

Where a patent is repealed in chancery, on a *scire facias*, it is at the suit of the king, on the ground, that he was deceived, and his subjects thereby injured; but there is no case where a court of chancery has ever decreed the prostration of a mill, of a ferry, or other erection, on the sole ground of its diminishing the profits of an ancient one, or the want of power in the king to grant a concurrent franchise, at any place not within the limits of one held by grant, custom or prescription.

Taking, then, the cases relied on by the plaintiffs, as they are reported in the books, they not only fail to support their position, but directly overthrow it. The principles established are equally fatal to their right to recover damages for the consequential injury, by an action on the case, or to suppress any rival ferry, by an assize of nuisance at law, or a bill for an injunction or suppression in equity. They must, in either case, show in themselves a right of property or possession in the place where a rival ferry is established, or a special custom, compelling the inhabitants of Boston and Charlestown to cross at their ferry, or they can have no standing in any court, even if they were privileged suitors, in virtue of the personal prerogative of the king, as the fee-farm tenants of a royal manor. As the plaintiffs do not sue in this, or any analogous character, by special privilege, it is unnecessary to show, that they cannot be relieved, in the character in which they sue, on any principle laid down in the case from Levinz, or those cited from Hardres and Anstruther. An explanation of these cases was necessary, because they have been pressed, with confidence, as in point to the present, and for another reason; when explained, they show, that to bring the plaintiffs' case within them, it is required, that they sue by the highest and most odious prerogative of the crown; that which is personal to the king for his private advantage, in his demesne lands. It was also proper as an *argumentum ad hominem*, to those who feel any sensibility in

adopting the royal or prerogative rule of construing public grants, so as to impair the public interest, by no constructive extention of them, to any public property not described expressly, or included by the necessary implication of its terms. With this explanation, it will not be difficult to ascertain which kind of royal prerogative is most congenial to our republican institutions ; that which is personal, within a royal manor, and enjoyed for private profit, or that which is a trust for the whole kingdom, and for the benefit of all its subjects ; and whether the majority or minority of the court have properly applied the principle of the common law of ferries, which was adopted in Massachusetts, as the law of the colony, in 1640, when the grant was made.

The case of *Chadwick* v. *The Haverhill Bridge* has been pressed, as evidence of the law of Massachusetts, not as the decision of any court, but as expressing the opinion of one eminent lawyer who brought the action, and of another who decided it as an arbitrator. Though I entertain the most profound respect for the professional character of both the gentlemen alluded to, I cannot, as a judge, found my judgment on any opinion expressed by either, because not given under judicial responsibility. There can be but few cases, in which the mere opinion of counsel ought to be taken as authority in any court ; but in this court, testing the validity of a state law, by the rules which are imperative upon us, I feel forbidden to defer my settled opinion on the law of the case, to that of any individual, however eminent. There is no task more difficult or invidious, than to decide who were those eminent and distinguished members of the profession, in former times, or who now are, to whose opinions a court of the last resort ought to pay judicial deference, and who were and are not deserving of such pistinguished notice. Judges would incur great hazard, in making the selection, and would form their opinions by very fallible standards, if they looked beyond the state law on which the case arises, the provision of the constitution which applies to it, and the appropriate rules and principles which have been established by judicial authority. It is a risk which I will not incur, on any question involving the constitutionality of a state law ; for if the case shall be so doubtful, that any man's opinions, either way, which are not strictly judicial and authoritative, would turn the scale, I would overlook them, and decide according to the settled rule of this court : that in every case, the presumption is, that a state law is valid, and whoever alleges the contrary, is bound to show and prove it clearly. In obedience to this rule, I cannot recognise, in any private opinions of any description, by whomsoever, or howsoever, expressed or promulgated, any authority for rebutting such presumption. No more salutary rule was ever laid down by this court, or impressed on its members, in plainer language, than what is used by the late chief justice in the cases cited ; nor can there be any rule in favor of the most strict observance of which, there can be any reasons which operate with such a weight of obligation on the court at this ought.

There is no court in any country which is invested with such high powers as this : the constitution has made it the tribunal of the last resort, for the decision of all cases in law or equity arising under it. The 25th section of the judiciary act has made it our duty to take cognisance of writs of error from state courts, in cases of the most important and delicate

nature. They are those only in which the highest court of a state has adjudged a state law to be valid, notwithstanding its alleged repugnance to the constitution, a law or a treaty of the United States. When this court reverses the judgment, they overrule both the legislative and judicial authority of the state, without regard to the character or standing, political or judicial, of the individual members of either department ; surely, then, it is our most solemn duty, not to found our judgment on the opinions of those who assume to decide on the validity of state laws, without any official power, sanction or responsibility. If we defer to political authority, there can be none higher than the three branches of the legislative power ; if to judicial authority, the highest is the solemn judgment of the members of the court, in which is vested the supreme judicial power of the state.

There is another still higher consideration, which arises from the effect of a final judgment of this court under the 25th section : it is irreversible ; it is capable of no correction or modification, save by an amendment to the constitution ; it must be enforced by the executive power of the Union, and the state must submit to the prostration of its law, and its consequences, however severe the operation may be. That the case ought to be clear of any reasonable doubt in the mind of the court, either as to the law, or its application, is a proposition self-evident ; and there are no cases to which the rule applies with more force, than to those which turn on the obligation of contracts. If we steadly adhere to it, as a fundamental rule, that the judgment of the supreme court of a state, on the validity of its statutes, shall stand affirmed, until it is proved to be erroneous, the effect would be most important on constitutional questions, and lead to a course of professional and judicial opinion, which would soon assign to all the now doubtful parts of the constitution, a definite and established meaning.

The plaintiffs have also relied on the opinion of the late learned chancellor of New York, in 4 Johns. 160 and 5 Ibid, 111–12, in which he puts the case of a rival ferry set up so near an old one as to diminish its profits, and refers to the rule laid down in F. N. B. 184 ; Bro. Abr., Action on the Case, pl. 56 ; tit. Nuisance, pl. 12 ; 2 Roll. Abr. 140 ; 3 Bl. Com. 219 ; 2 Saund. 172 ; and which is taken from the 22 Hen. VI. 14, 15. In putting this case as an illustration of those then before him, this great jurist stated the proposition in general terms merely, without that precision which he adopts as to the points directly presented, and he has deduced a rule much broader than the cases warrant, when closely examined. For the purposes of the cases then under consideration, the broad rule laid down might well be applied to the grants contained in the laws of the state on which the cases turned, as a safe guide to their construction. But when a question depends on the law, as established by the adjudged cases and old writers of standard and adopted authority, we must take it from the books themselves. Having already reviewed the cases in detail, from the 22 Hen. VI., and stated my conclusions from them, I submit their correctness, without further remarking upon the rules prescribed, in relation to the extent of the rights of ferry.

I would have remained satisfied with what has been already said, if there had not been these expressions in the opinions in 4 Johns. Ch. 160–1 : "It would be like granting an exclusive right of ferriage between two

given points, and then setting up a rival ferry, within a few rods of those very points, and within the same course and line of travel. The common law contained principles applicable to this very case, dictated by a sounder judgment, and a more enlightened morality." After a reference to the rule laid down from the books which are cited, the opinion proceeds: "The same rule applies, in its spirit and substance, to all exclusive grants and monopolies. The grant must be so construed as to give it due effect, by excluding all contiguous and injurious competition." As these propositions are supported by an authority which cannot be too highly respected, and is difficult to oppose with success, I feel bound to support the negation of them, by a reference to cases and books which would have been deemed unnecessary, but for this opinion.

In Harg. L. Tr. 83, it has been seen, that Lord HALE uses the word *contiguous* to a port-town, in contradistinction to *within* it, and most distinctly negatives the idea, that a contiguous ferry or other erection would be demolished, however injurious it might be. In his opinions as chief baron of the exchequer, in the cases cited, he decided upon the same principle. The authority of his treatise *de Portibus Maris* is universally admitted, as the best evidence of the law, as it was understood in his time, in which he says, "It is part of the *jus regale*, to erect public ports; so, in special manner, are the ports and the franchises thereof." Harg. L. Tr. 53–4. "A port hath a *ville*, or city or borough," keys, wharves, cranes, warehouses and other privileges and franchises. Ibid. 46, 77. "If a man hath *portum maris*, by prescription or custom, it is as a manor; he hath not only the franchise but the very water and soil within the port." Ibid. 33. "Every port is a franchise or liberty, as a market or a fair, and much more." It has, of necessity, a market and tolls incident; it cannot be erected without a charter or prescription (Ibid. 50–1); or if it is restrained, it cannot be extended or enlarged in any other way. Ibid. 52. Where it is by a custom or prescription, the consideration is the interest of the soil both of the shore and town, and of the haven wherein the ships ride, and the consequent interest of the franchise or liberty, which constitute the port in a legal signification; which are acquirable by a subject by prescription, without any formality (Ibid. 54); and in ordinary usage and presumption they go together. Ibid. 33. The extent of the port depends on the prescription or usage; the court cannot take notice of its extent, farther than the *ville* or town at its head, that gives it its denomination; if any further extension is alleged, it is ascertained by the *venire facias de vicineto portus*. Ibid. 47, 70. The difference between a port by charter, and by custom or prescription, is thus illustrated: "If the king, at this day, grant *portum maris de S.*, the king having the port in point of interest, as well as in point of franchise, it may be doubtful, whether, at this day, it carries the soil or only the franchise, because it is not to be taken by implication." "But surely, if it were an ancient grant, and usage had gone along with it, that the grantor had also the soil; this grant might be effectual to pass both, for both are included in it." Harg. 33; S. P. Cowp. 106.

The difference between an ancient grant, and one made at this day, is this: If made beyond legal memory, and in terms so general and obscure, as not to be any record pleadable, but ought to have the aid of some other matter of record, within time of memory, or some act of allowance or of

confirmation; they shall now be allowed only to the extent of such allowance or confirmation, and shall be construed according to the law when it was made, and the ancient allowance on record (9 Co. 28 *a*); or prescription will be taken as evidence of the existence of a grant, and to supply its presumed loss by the lapse of time (Bl. Com. 274; 2 Ibid. 265); though the record is not produced, or proof adduced of its being lost, a jury will presume the grant (Cowp. 110–11); but if thegrant is within time of memory, and wants no allowance, confirmation or presumption, to give it effect, it is pleadable, without showing either. 9 Co. 28. This is called a grant at the present day; an ancient grant is by prescription. When a grant of the franchise of a port by prescription, or an ancient grant of an ancient port, is thus made out, it imports the incident franchises of markets, fairs, ferries, keys, wharves, landings, &c., and the toll for each; and the franchise is supposed to have been founded on the right of soil in fee-simple, for no prescription can be founded on any less estate. 2 Bl. Com. 265. As tenant in fee of soil and franchise, to the extent of the port, no right of property can be of a higher grade, or be entitled to a higher degree of protection by the law; the fee of the soil is a greater right than a mere liberty or franchise in or over it; the principal franchise of a port is higher and more important than any of the incidental franchises. When once established, the king cannot resume them, narrow, or confine their limits (1 Bl. Com. 264); for the crown hath not the power of doing wrong, but merely of preventing wrong from being done. Ibid. 154. But however high and sacred these ancient grants of soil and franchise are, they are not protected from grants by the king, which may diminish their profits by injurious and contiguous competition; the contrary doctrine is laid down by Lord Hale, and there cannot be found in the common law, a case or *dictum* to the contrary.

"If A. hath a port in B., and the king is pleased to erect a new port, hard by that, which it may be is more convenient for merchants, though it be a damage to the first port, so that there be no obstruction of the water, or otherwise, but that ships may, if they will, arrive at the former port, this, it seems, may be done; but then this new port must not be erected within the precincts of the former:" "he may erect a concurrent port, though near another, so it be not within the proper limits of the former, as shall be shown in the case of Hull and Yarmouth, hereafter." Harg. 60, 61–6, 71. "But it cannot be erected within the peculiar limits, by charter or prescription, belonging to the former port, because that is part of the interest of the lord of the former port. Neither can the first port be obstructed, or wholly defaced, or excluded for arrival of ships, but by act of parliament, or the consent of the owners of the ancient port." Ibid. 60, 61. "If a subject, or the king's fee-farmer has a port at R., by prescription or charter, and the king grants that no ships shall arrive within five miles, he cannot within that precinct, erect, *de novo*, a port, to the prejudice of the former, though he might have done it, without this restrictive clause; but by this inhibition, this precinct is become, as it were, parcel of the precinct of the port." Ibid. 61; s. p. 66–7. Both of the ferries of Yarmouth and Hull, were held under the crown, at a fee-farm rent. Ibid. 61, 68. So that they united the highest rights of property, with all the privileges which devolved on them, in virtue of the personal prerogative of the king, and by the force of his grant. Yet neither availed them to prevent injurious and contiguous competition, by

the erection of a concurrent and rival port. Ibid. 70. If the king own the port, he may license the erection of a new wharf, "whereof there are a thousand instances." Ibid. 85. The king's tenants cannot set up a port. Ibid. 51, 73. A subject who claims a port by prescription, must own the shores of the creek or haven, and the soil; "but he hath not thereby the franchise of a port, neither can he so use or employ it, unless he hath had that liberty, time out of mind, or by the king's charter;" "he cannot take toll or anchorage there, for that is finable by presentment, or *quo warranto*." Ibid. 54, 73.

In these unquestioned principles of law, we find its rules which define the nature and extent of all franchises on the shores or waters of public rivers, havens or arms of the sea, which can be enjoyed by an individual or a corporation. If it is by prescription, or an ancient grant, it is founded on an existing right of property in fee; the consideration for the presumed grant of tolls is for passing over or using private property, and the franchise is of a toll traverse, which, from its nature, is exclusive to the extent of the private ownership, which is defined by the possession and usage, which constitute the title by prescription. If the right to property is prescriptive, but the franchise is granted by a charter, within legal memory, which is in existence, is pleadable, and is or can be produced, then, as nothing passes by implication, the court *ex officio*, can look only to the charter for the extent of the franchise; if it is alleged, that it has had a greater extent by usage, an inquest goes to ascertain the fact. In this case, too, the franchise being a toll traverse, the jury may find it to the extent of the usage under the charter, and the right of property by prescription, so far as they unite. But when there is no existing right of property, except that which is the *jus publicum*, a grant of toll for its use, or passage over it, to any subject, is the franchise of toll thorough, or toll on a public highway, which is void, whether by prescription or the king's charter, unless for good consideration or reasonable recompense, which must be made to appear to have existed at the time of the grant, and to have been continued so long as toll is exacted. In such case, the franchise is never extended by any implication or construction, but is confined to the precise place where the consideration exists; and so far from the usage of exacting toll at any other spot being evidence of a right, it is finable on indictment or *quo warranto*. The customs of London to the contrary, though by their confirmation by *magna charta*, they have the force of acts of parliament, are illegal and void, as usurpations on the public right, and injurious to the people at large; and even the king's fee-farm tenants, in his own manors, are not exempted from the rule. An evident consequence of these principles is, that the king may grant a concurrent franchise, contiguous, or near to the place where a former one exists either by charter or prescription, if it is not within its precise limits. Whenever he shall deem it necessary for the public good, it is his right by prerogative, his power is discretionary, which the law will not control, unless it is so exercised as to prejudice the right of property existing previously. So long as its possession and use is left to the proprietor, the law does not notice the mere diminution of profits of an existing franchise on a public river, or an arm of the sea, by the erection or a rival franchise beyond its limits; the competition is beneficial to the public, by the increased accommodation afforded, and a diminution of toll exacted.

In deciding on prerogative or legislative grants, the court can look only to the power and right by which they are made ; questions of policy, expediency or discretion, are not judicial ones ; if necessity or public good brings a power into action, the court cannot judge of its degree or extent. 4 Wheat. 413. It "would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." Ibid. 423. The same rule applies to all officers or tribunals in whom a discretionary power is invested by law, without any appeal or supervisory power in any other tribunal being provided ; their acts done in the exercise of an honest and sound discretion, can be invalidated only by fraud in the party who claims under them, or an abuse or excess of authority in the depository of the power. 6 Pet. 729 ; 1 Cranch 170–1 ; 2 Pet. 412 ; 4 Ibid. 563 ; 2 Ibid. 167 ; 20 Johns. 738–40 ; 2 Dow P. C. 521, &c.; 10 Pet. 477–8.

That the power of the king over navigable rivers and arms of the sea is plenary, is undoubted ; the power is vested in him for the public good, and it is his duty to so exercise it ; he may make an exclusive grant of a franchise, or may make concurrent grants, at his discretion, subject to the qualifications stated. He may grant a monopoly, on proper consideration, but his grant of a franchise is not an exclusive one *per se ;* it must be so in terms, or it is limited to the precise place and object ; and the king is at liberty to make concurrent grants at his pleasure. The power of the king is thus declared by Lord THURLOW : "The king may, if he pleases, grant licenses to twenty new play-houses, and may give liberty to erect them in Covent Garden and Drury Lane, close to those which are established (1 Ves. jr. 114) ; but he adds, "but would it be right to do so ?" This is matter of discretion, which is referred to the chancellor, as the keeper of the king's conscience, who, after hearing the case, advises the granting or refusing the patent as he may think just, as may be seen in the case *Ex parte O'Reilly*, 1 Ves. jr. 113, 130. The ancient mode, on an application for a grant, was to sue out a writ of *ad quod damnum*, on which an inquest was held, and on the return of the inquisition, the grant was made or denied ; but it may be dispensed with by a clause of *non obstante* in the patent. F. N. B. 226. The grant is, therefore, valid, without the writ, but is voidable by the king on a *scire facias*, if it is injurious to another, on the ground of the king having been deceived. 3 Lev. 222. But the grant could not be annulled in a collateral action between A. and B., otherwise, there would be no necessity of resorting to chancery, to repeal it by a *scire facias* at the suit of the king ; this is always issued on the application of a party, by petition, setting forth the injury he sustains by the grant.

It only remains to apply the foregoing principles to the case of an ancient ferry in a *ville*, as a test of the rights of the owner by the common law. Such a ferry is by prescription ; the franchise is founded on the property in the landings, it can rest on no other right ; the right of property is in the lord of the fee, and the franchise is in him as a *toll traverse*, to the extent of the local custom or prescription, but no further, even in the king's manors, or in favor of his fee-farm tenants. The position in the Year Book, 22 Hen. VI., goes no further ; no writer of authority has asserted that the owner of such a ferry has any right beyond the *ville* or manor, which is the line and boundary of the right of soil, and no adjudged case has sanctioned

such doctrine. There is no case or principle in the common law, which gives any color for the assertion, that the franchise of an ancient ferry is more protected against injurious and contiguous competition, than the higher franchise of a port; the doctrine of Lord HALE, and the cases in Hardr. 163, &c., are to the point, that contiguous competition, by the diminution of the profits of an ancient ferry, is a *damnum absque injuriâ*. Nor in the whole body of the law, is there expressed a doubt, that the king may grant a concurrent franchise of any description, which does not extend within the limits of an existing one. Let these principles be applied to the present case.

Charles river is an arm of the sea, the colony owned a ferry over it, together with the landing places, till 1640, and held possession of it by their tenants; the soil of the adjacent shores of the river was owned by the colony, or its grantees; the rights of riparian owners extended to low water-mark, or one hundred rods on the flats, on each side. All pretence, therefore, of any right in the college, by prescription, or the presumption of any ancient grant which had been lost, is wholly out of the question; the grant made in 1640, "is a grant made at this day;" it is pleadable, it is produced from the record, and the court can notice it *ex officio*.

It is the grant of a ferry on a public highway; the franchise is of a *toll thorough*, the very nature whereof precludes any extension of it by implication or construction, beyond its precise limits, and the very spots at which the consideration for the grant exists; any exaction of toll at any other points, is the usurpation of a franchise, which, so far from giving a right, subjects the grantee to a fine.

Taking the common law to have been, from its first settlement, the law of Massachusetts, its oldest and best settled rules are, in my mind, conclusive against the pretensions of the plaintiffs in virtue of the ferry grant. That they ought to be applied in their utmost strictness, against any construction of colonial grants which tend to create monopolies by implication, is, I think, the policy and spirit of all our institutions, and called for by every consideration of public interest. The proposition that a grant within legal memory, of toll thorough, on an arm of the sea, over a public highway, of a ferry which had been occupied by the public at defined and described landings, would make it unlawful for the king to grant a concurrent ferry at other landings, would shock the sense of the profession in England, as subversive of the law. Such a proposition, as to the grant of such a franchise in these states, would be still more monstrous; because, if sustained, it would not only subvert its common and statute law, but, by infusing such a grant into the constitution, all legislative discretion would be annihilated for ever, and a monopoly created by implication and mere construction, which no power in the state or federal government could limit.

I have confined my opinion in this case to the grant of the ferry by the colony, thinking it important that the principles which apply to such grants, should be more fully explained than they had been. As the grants to the plaintiffs by the acts of the legislature, in 1785 and 1792, I can have nothing to add; the view taken by the court, in their opinion, is, to my mind, most lucid and conclusive; supported alike by argument and authority, it has my unqualified concurrence in all the results which are declared.

STORY, Justice. (*Dissenting.*)—This cause was argued at a former term of this court, and having been then held under advisement by the court for a year, was, *upon a difference of opinion among the judges, ordered [*584 to be again argued: and has accordingly been argued at the present term. The arguments of the former term were conducted with great learning, research and ability; and have been renewed, with equal learning, research and ability, at the present term. But the grounds have been, in some respects, varied; and new grounds have been assumed, which require a distinct consideration. I have examined the case with the most anxious care and deliberation, and with all the lights which the researches of the year, intervening between the first and last argument, have enabled me to obtain; and I am free to confess, that the opinion which I originally formed, after the first argument, is that which now has my most firm and unhesitating conviction. The argument at the present term, so far from shaking my confidence in it, has at every step served to confirm it. In now delivering the results of that opinion, I shall be compelled to notice the principal arguments urged the other way; and as the topics discussed and the objections raised have assumed various forms; some of which require distinct, and others, the same answers; it will be unavoidable, that some repetitions should occur in the progress of my own reasoning. My great respect for the counsel who have pressed them, and the importance of the cause, will, I trust, be thought a sufficient apology for the course which I have, with great reluctance, thought it necessary to pursue.

Some of the questions involved in the case are of local law. And here, according to the known principles of this court, we are bound to act upon that law, however different from, or opposite to, the jurisprudence of other states, it either is, or may be supposed to be. Other questions seem to belong exclusively to the jurisdiction of the state tribunals, as they turn upon a conflict, real or supposed, between the state constitution and the state laws. The only question, over which this court possesses jurisdiction in this case (it being an appeal from a state court and not from the circuit court) is, as has been stated at the bar, whether the obligation of any contract, within the true intent and meaning of the constitution of the United States, has been violated, as set forth in the bill. All the other points argued, are before us only as they preliminaries and incidents to this.

A question has, however, been made as to the jurisdiction of this court to entertain the present writ of error. It has been argued, that this bridge has now become a free bridge, and is the property *of the [*585 state of Massachusetts; that the state cannot be made a party defendant to any suit to try its title to the bridge; and that there is no difference between a suit against the state directly, and against the state indirectly, through its servants and agents. And in further illustration of this argument, it is said, that no tolls can be claimed in this case, under the notion of an implied trust; for the state court has no jurisdiction in equity over implied trusts, but only over express trusts; and if this court has no jurisdiction over the principal subject-matter of the suit, the title to the bridge, it can have none over the tolls, which are but incidents. My answer to this objection will be brief. In the first place, this is a writ of error from a state court, under the 25th section of the judiciary act of 1789, ch. 20; and in such a case, if there is drawn in question the construction of any clause of the con-

stitution of the United States, and the decision of the state court is against the right or title set up under it, this court has a right to entertain the suit, and decide the question, whoever may be the parties to the original suit, whether private persons, or the state itself. This was decided in the case of *Cohens* v. *State of Virginia*, 6 Wheat. 264. In the next place, the state of Massachusetts is not a party on the record in this suit, and therefore, the constitutional prohibition of commencing any suit against a state, does not apply; for that clause of the constitution is strictly confined to the parties on the record. So it was held in *Osborn* v. *Bank of the United States*, 9 Wheat. 738; and in the *Commonwealth Bank of Kentucky* v. *Wister*, 2 Pet. 319, 323. In the next place, it is no objection to the jurisdiction, even of the circuit courts of the United States, that the defendant is a servant or agent of the state, and the act complained of is done under its authority, if it be tortious and unconstitutional. So it was held in the cases last cited. In the next place, this court, as an appellate court, has nothing to do with ascertaining the nature or extent of the jurisdiction of the state court over any persons, or parties, or subject-matters, given by the state laws, or as to the mode of exercising the same; except so far as respects the very question arising under the 25th section of the act of 1789, ch. 20.

There are but few facts in this case which admit of any controversy. The legislature of Massachusetts, by an act passed on the 9th of March 1785, incorporated certain persons, by the name of the Proprietors of the Charles River Bridge, for the purpose of building *a bridge over Charles river, *586] between Boston and Charlestown; and granted to them the exclusive toll thereof, for forty years from the time of the first opening of the bridge for passengers. The bridge was built and opened for passengers, in June 1786. In March 1792, another corporation was created by the legislature, for the purpose of building a bridge over Charles river, from the westerly part of Boston to Cambridge; and on that occasion, the legislature, taking into consideration the probable diminution of the profits of the Charles River bridge, extended the grant of the proprietors of the latter bridge to seventy years from the first opening of it for passengers. The proprietors have, under these grants, ever since continued to possess and enjoy the emoluments arising from the tolls taken for travel over the bridge; and it has proved a very profitable concern.

In March 1828, the legislature created a corporation, called the Proprietors of the Warren Bridge, for the purpose of erecting another bridge across Charles river, between Boston and Charlestown. The *termini* of the last bridge (which has been since erected, and was, at the commencement of this suit, in the full receipt of toll, and is now a free bridge) are so very near to that of Charles River bridge, that for all practical purposes, they may be taken to be identical. The same travel is accommodated by each bridge, and necessarily approaches to a point, before it reaches either, which is nearly equidistant from each. In short, it is impossible, in a practical view, and so was admitted as the argument, to distinguish this case from one where the bridges are contiguous from the beginning to the end.

The present bill is filled by the proprietors of Charles River bridge, against the proprietors of Warren bridge, for an injunction and other relief; founded upon the allegation, that the erection of the Warren bridge, under the circumstances, is a violation of their chartered rights, and so is void by

the constitution of Massachusetts, and by the constitution of the United States. The judges of the supreme judicial court of Massachusetts, were (as is well known) equally divided in opinion upon the main points in the cause; and therefore, a *pro formâ* decree was entered, with a view to bring before this court the great and grave question, whether the legislature of Massachusetts, in the grant of the charter of the Warren bridge, has violated the obligation of the constitution of the United States? If the legislature has done so, by mistake or inadvertence, I am quite sure, that it will be the last to insist upon maintaining its own act. It has that stake in the Union, and in the maintenance of the *constitutional rights of its own citizens, which will, I trust, ever be found paramount to all local [*587 interests, feelings and prejudices; to the pride of power, and to the pride of opinion.

In order to come to any just conclusion in regard to the only question which this court, sitting as an appellate court, has a right to entertain upon a writ of error to a state court, it will be necessary to ascertain what are the rights conferred on the proprietors of Charles River bridge by the act of incorporation. The act is certainly not drawn with any commendable accuracy. But it is difficult, upon any principles of common reasoning, to mistake its real purport and object. It is entitled, "an act for incorporating certain persons, for the purpose of building a bridge over Charles river, between Boston and Charlestown, and supporting the same during the term of forty years." Yet, it nowhere, in terms, in any of the enacting clauses, confers any authority upon the corporation, thus created, to build any such bridge; nor does it state in what particular place the bridge shall commence or terminate on either side of the river, except by inference and implication from the preamble. I mention this, at the threshold of the present inquiry, as an irresistible proof that the court must, in the construction of this very act of incorporation, resort to the common principles of interpretation; and imply and presume things, which the legislature has not expressly declared. If the court were not at liberty so to do, there would be an end of the cause.

The act begins, by reciting, that "the erecting of a bridge over Charles river, in a place where the ferry between Boston and Charlestown is now kept, will be of great public utility, and Thomas Russell and others having petitioned, &c., for the act of incorporation, to empower them to build said bridge, and many other persons, under the expectation of such an act, have subscribed to a fund for executing and completing the aforesaid purpose." It then proceeds to enact, that the proprietors of the fund or stock shall be a corporation under the name of the Proprietors of Charles River Bridge; and it gives them the usual powers of corporations, such as the power to sue and be sued, &c. In the next section, it provides for the organization of the corporation; for choosing officers; for establishing rules and regulations for the corporation; and for effecting, completing and executing the purpose aforesaid. In the next section, "for the purpose of reimbursing the said proprietors the money expended in building and supporting the said bridge," it provides, that a *toll be, and thereby is granted and estab- [*588 lished, for the sole benefit of the proprietors, for forty years from the opening of the bridge for travel, according to certain specified rates. In the next section, it provides, that the bridge shall be well built, at least

forty feet wide, of sound and suitable materials, with a convenient draw or passage-way for ships and vessels, &c.; and "that the same shall be kept in good, safe and passable repair for the term aforesaid, and at the end of the said term, the said bridge shall be left in like repair." Certain other provisions are also made, as to lighting the bridge, erecting a toll-board, lifting the draw for all ships and vessels, without toll or pay," &c. The next section declares, that after the tolls shall commence, the proprietors "shall annually pay to Harvard College or university, the sum of two hundred pounds, during the said term of forty years; and at the end of the said term, the said bridge shall revert to, and be the property of the commonwealth, saving to the said college or university, a reasonable and annual compensation for the annual income of the ferry, which they might have received, had not such bridge been erected." The next and last section of the act declares the act void, unless the bridge should be built within three years from the passing of the act.

Such is the substance of the charter of incorporation, which the court is called upon to construe. But, before we can properly enter upon the consideration of this subject, a preliminary inquiry is presented, as to the proper rules of interpretation applicable to the charter. Is the charter to receive a strict or a liberal construction? Are any implications to be made, beyond the express terms? And if so, to what extent are they justifiable, by the principles of law? No one doubts, that the charter is a contract and a grant; and that it is to receive such a construction as belong to contracts and grants, as contradistinguished from mere laws. But the argument has been pressed here, with unwonted earnestness (and it seems to have had an irresistible influence elsewhere); that this charter is to be construed as a royal grant, and that such grants are always construed with a stern and parsimonious strictness. Indeed, it seems tacitly conceded, that unless such a strict construction is to prevail (and it is insisted on as the positive dictate of the common law), there is infinite danger to the defence assumed on behalf of the Warren bridge proprietors. Under such circumstances, I feel myself constrained to go at large into the doctrine of the common law, in respect to royal grants, because I cannot help thinking, that, upon this point,
*539] very great *errors of opinion have crept into the argument. A single insulated position seems to have been taken as a general axiom. In my own view of the case, I should not have attached so much importance to the inquiry; but it is now fit that it should be sifted to the bottom.

It is a well-known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said, that an opposite rule prevails in cases of grants by the king; for, where there is any doubt, the construction is made most favorably for the king, and against the grantee. The rule is not disputed; but it is a rule of very limited application. To what cases does it apply? To such cases only, where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted; so that a choice is fairly open, and either may be adopted, without any violation of the apparent objects of the grant. If the king's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law), "that it will be more

for the benefit of the subject, and the honor of the king, which is to be more regarded than his profit." Com. Dig. Grant, G. 12 ; 9 Co. 131 *a*; 10 Ibid. 67 *b* ; 6 Ibid. 6. And in every case, the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the king. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with, in all cases where the grant appears, upon its face, to flow, not from the solicitation of the subject, but from the special grace, certain knowledge, and mere motion of the crown ; or, as it stands in the old royal patents, *ex speciali gratiâ, certâ scientiâ, et ex mero motu regis"* (See *Arthur Legat's Case*, 10 Co. 109, 112 *b* ; *Sir John Moulin's Case*, 6 Ibid. 6 ; 2 Bl. Com. 347 ; Com. Dig. Grant, G. 12) ; and these words are accordingly inserted in most of the modern grants of the crown, in order to exclude any narrow construction of them. So the court admitted the doctrine to be in *Attorney-General* v. *Lord Eardly*, 8 Price 39. But what is a most important qualification of the rule, it never did apply to grants made for a valuable consideration by the crown ; for in such grants, the same rule has always prevailed, as in cases between subjects. The mere grant of a bounty *of the king may properly be restricted to its obvious intent. But the contracts of the king for value are liberally expounded, that the dignity and justice of the government may never be jeoparded, by petty evasions and technical subtleties. [*590

I shall not go over all the cases in the books, which recognise these principles, although they are abundant. Many of them will be found collected in Bacon's Abridgment, Prerogative, F. 2, p. 602–4 ; in Comyn's Digest, Grant, G. 12 ; and in Chitty on the Prerogatives of the Crown, ch. 16, § 3. But I shall dwell on some of the more prominent, and especially on those which have been mainly relied on by the defendants ; because, in my humble judgment, they teach a very different doctrine from what has been insisted on. Lord Coke, in his Commentary on the Statute of Quo Warranto, 18 Edw. I., makes this notable remark : "Here is an excellent rule for construction of the king's patent, not only of liberties, but of lands, tenements and other things, which he may lawfully grant, that they have no strict or narrow interpretation, for the overthrowing of them, *sed secundum eundum plenitudinem judicentur ;* that is, to have a liberal and favorable construction, for the making them available in law, *usque ad plenitudinem*, for the honor of the king." Surely, no lawyer would contend for a more beneficent or more broad exposition of any grant whatsoever, than this.

So, in respect to implications, in cases of royal grants, there is not the slightest difficulty, either upon authority or principle, in giving them a large effect, so as to include things which are capable of being the subject of a distinct grant. A very remarkable instance of this sort arose under the Statute of Prerogative (17 Edw. II., Stat. 2, c. 15), which declared, that when the king granteth to any, a manor or land, with the appurtenances, unless he makes express mention in the deed, in writing, of advowsons, &c., belonging to such manor, then the king reserveth to himself such advowsons. Here, the statute itself prescribed a strict rule of interpretation.(*a*)

(*a*) s. p. Attorney-General v. Sitwell, 1 Yo. & Coll. 583.

Yet, in *Whistler's Case*, 10 Co. 63, it was held, that a royal grant of a manor, with the appurtenances, in as ample a manner as it came to the king's hands, conveyed an advowson, which was appendant to the manor, by implication from the words actually used, and the apparent intent. This was certainly a very strong case of raising an implication from words susceptible of different interpretations, where the statute had furnished a positive rule for a narrow construction, excluding the *advowson. So
*591] it has been decided, that if the king grants a messuage and all lands *spectantes, aut cum eo dismissas*, lands which have been enjoyed with it for a convenient time, pass. 2 Roll. Abr. 186, C. 25, 30; Cro. Car. 169; Chitty on the Prerogatives, ch. 16, § 3, p. 393; Com. Dig. Grant, G. 5. In short, wherever the intent from the words is clear, or possesses a reasonable certainty, the same construction prevails in crown grants, as in private grants; especially, where the grant is presumed to be from the voluntary bounty of the crown, and not from the representation of the subject.

It has been supposed, in the argument, that there is a distinction between grants of lands held by the king, and grants of franchises which are matters of prerogative, and held by the crown for the benefit of the public, as flowers of prerogative. I know of no such distinction; and Lord Coke, in the passage already cited, expressly excludes it; for he insists, that the same liberal rule of interpretation is to be applied to cases of grants of liberties, as to cases of grants of lands.

I am aware, that Mr. Justice Blackstone, in his Commentaries (2 Bl. Com. 347), has laid down some rules apparently varying from what has been stated. He says, "the manner of granting by the king does not more differ from that by a subject, than the construction of his grants when made. 1. A grant made by the king, at the suit of the grantee, shall be taken most beneficially for the king and against the party; whereas, the grant of a subject is construed most strongly against the grantor, &c. 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant; therefore, in a private grant of the profits of land for one year, free ingress, egress and regress, to cut and carry away those profits, are also inclusively granted, &c. But the king's grant shall not inure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for such a grant shall not inure to make him a denizen, that so he may be capable to take by the grant." Now, in relation to the last position, there is nothing strange or unnatural in holding, that a crown grant shall not inure to a totally different purpose from that which is expressed, or to a double intent; when all its terms are satisfied by a single intent. It is one thing to grant land to an alien, and quite a different thing to make him a denizen. The one is not an incident to the other, nor does it naturally flow
*592] from it. The king may be willing to grant land to an alien, when *he may not be willing to give him all the privileges of a subject. It is well known, that an alien may take land by grant, and may hold it against every person but the king, and it does not go to the latter, until office found; so that, in the meantime, an alienation by the alien will be good. A grant, therefore, to an alien, is not utterly void; it takes effect, though it is not indefeasible. And in this respect, there does not seem any difference between a grant by a private person, and by the crown; for the grant of

the latter takes effect, though it is liable to be defeated. See Com. Dig. Alien, C. 4 ; 1 Leon. 47 ; 4 Ibid. 82. The question in such cases is not, whether there may not be implications in a crown grant ; but whether a totally different effect shall be given to a crown grant from what its terms purport. The same principle was acted upon in *Englefield's Case*, 7 Co. 14 *a*. There, the crown had demised certain lands, which were forfeited by a tenant for life, by attainder, to certain persons, for forty years ; and the crown being entitled to a condition which would defeat the remainder over, after the death of the person attainted, tendered performance of the condition to the remainder-man, who was a stranger to the demise ; and he contended, that by the demise, the condition was suspended. And it was held, that the demise should not operate to a double intent, viz., to pass the term, and also, in favor of a stranger, to suspend the condition ; for (it was said) "the grant of the crown shall be taken according to the express intention comprehended in the grant, and shall not extend to any other thing, by construction or implication, which doth not appear by the grant, that the intent did extend to;" though it might have been different, in the case of a subject.

In regard to the other position of Mr. Justice BLACKSTONE, it may be supposed, that he means to assert, that in a crown grant of the profits of land for a year, free ingress, egress and regress to take the profits, are not included by implication, as they would be in a subject's grant. If such be his meaning, he is certainly under a mistake. The same construction would be put upon each ; for otherwise nothing would pass by the grant. It is a principle of common sense, as well as of law, that when a thing is granted, whatever is necessary to its enjoyment, is granted also. It is not presumed, that the king means to make a void grant ; and therefore, if it admits of two constructions, that shall be followed which will secure its validity and operation. In Comyn's Digest (Com. Dig. Grant, E. 11, Co. Litt. 56 *a*), a case is cited from the Year Book, 1 Hen. IV. 5 (it should be 6 *a*), that if there be a grant of land, *cum pertinentiis*, *to which common is appendant, the common passes as an incident, even though it be the [*593 grant of the king. So, it is said, in the same case, if the king grant to me the foundation of an abbey, the corody passes. So, if the king grant to me a fair, I shall have a court of piepoudre, as incident thereto. And there are other cases in the books, to the same effect. See Bac. Abr. Prerogative, F. 2, p. 602 ; Comyn's Dig. Grant, G. 12 ; *Lord Chandos's Case*, 6 Co. 55 ; *Sir Robert Atkyn's Case*, 1 Vent. 399, 409 ; 9 Co. 29–30. Finch, in his Treatise on the Law, contains nothing beyond the common authorities. Finch's Law, b. 2, ch. 2, p. 24 (ed. 1613); Cro. Eliz. 591, *per* POPHAM, Ch. J. ; 17 Vin. Abr. Prerogative, O, c, pl. 13 ; Com. Dig. Franchise, C.; 2 Inst. 282.

Lord COKE, after stating the decision of *Sir John Moulin's Case*, 6 Co. 6, adds these words : "Note the gravity of the ancient sages of the law, to construe the king's grants beneficially for his honor, and not to make any strict or literal construction in subversion of such grants." This is an admonition, in my humble judgment, very fit to be remembered and acted upon by all judges, who are called upon to interpose between the government and the citizen, in cases of public grants. *Legat's Case*, 10 Co. 109, contains nothing, that in the slightest degree impugns the general doctrine

here contended for. It proceeded upon a plain interpretation of the very words of the grant; and no implications were necessary or proper, to give it its full effect.

The case of the *Royal Fishery of the Banne*, decided in Ireland, in the privy council, in 8 James I. (Davies 149), has been much relied on to establish the point, that the king's grant shall pass nothing by implication. That case, upon its actual circumstances, justifies no such sweeping conclusion. The king was owner of a royal fishery in gross (which is material), on the river Banne, in navigable waters, where the tide ebbed and flowed, about two leagues from the sea; and he granted to Sir R. McD. the territory of Rout, which is parcel of the county of Antrim, and adjoining to the river Banne, in that part where the said fishery is; the grant containing the following words, "*omnia castra, messuagia, &c., piscarias, piscationes, aquas, aquarum cursus, &c., ac omnia alia hereditamenta in vel infra dictum territorium de Rout, in comitatu Antrim, exceptis, et ex hac concessione nobis heredibus et successoribus nostris reservatis tribus partibus piscationibus fluminis de Banne.*" The question was, whether the grant passed the royal fishery in the *Banne to the grantee? And it was held, that it did not; first, because the river Banne, so far as the sea ebbs and flows, is a royal navigable river, and the fishery there, a royal fishery; secondly, because no part of this royal fishery could pass by the grant of the land adjoining, and by the general grant of all the fisheries (in or within the territory of Rout), for this royal fishery is not appurtenant to the land, but is a fishery in gross, and parcel of the inheritance of the crown itself; and general words in the king's grant shall not pass such special royalty, which belongs to the crown by prerogative; thirdly, that by the exception in the grant of three parts of this fishery, the other fourth part of this fishery did not pass by this grant; for the king's grant shall pass nothing by implication; and for this was cited 2 Hen. VII. 13. Now, there is nothing in this case, which is not easily explicable upon the common principles of interpretation. The fishery was a royal fishery in gross, and not appurtenant to the territory of Rout. *Ward* v. *Cresswell*, Willes 265. The terms of the grant were of all fisheries in and within this territory; and this excluded any fishery not within it, or not appurtenant to it. The premises, then, clearly did not, upon any just construction, convey the fishery in question, for it was not within the territory. The only remaining question was, whether the exception of three-quarters, would, by implication, carry the fourth part which was not excepted; that is, whether terms of exception in a crown grant should be construed to be terms of grant, and not of exception. It is certainly no harsh application of the common rules of interpretation, to hold that an implication which required such a change in the natural meaning of the words, ought not to be allowed, to the prejudice of the crown. *Non constat*, that the king might not have supposed, at the time of the grant, that he was owner of three parts only of the fishery, and not of the fourth part. This case of the *Fishery of the Banne* was cited and commented on by Mr. Justice Bayley, in delivering the opinion of the court, in the case of the *Duke of Somerset* v. *Fogwell*, 5 Barn. & Cres. 875, 885, and the same view was taken of the grounds of the decision, which has been here stated; the learned judge adding, that it was further agreed in that case, that the grant of the king

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passes nothing by implication; by which he must be understood to mean, nothing, which its terms do not, fairly and reasonably construed, embrace as a portion of or incident to the subject matter of the grant.

As to the case cited from 2 Hen. VII. 13 (which was the sole authority *relied on), it turned upon a very different principle. There, the king, [*595 by letters-patent, granted to a man that he might give twenty marks annual rent to a certain chaplain to pray for souls, &c.; and the question was, whether the grant was not void for uncertainty, as no chaplain was named. And the principal stress of the argument seems to have been, whether this license should be construed to create or enable the grantee to create a corporation capable of taking the rent. In the argument, it was asserted, that the king's grants should not be construed, by implication, to create a corporation, or to inure to a double intent. In point of fact, however, I find (Chronica Juridicialia, p. 141), that neither of the persons, whose opinions are stated in the case, was a judge at the time of the argument, nor does it appear what the decision was; so that the whole report is but the argument of counsel. The same case is fully reported by Lord Coke, in the case of *Sutton's Hospital*, 10 Co. 27–8, who says, that he had seen the original record, and who gives the opinions of the judges at large, by which it appears that the grant was held valid. And so, says Lord Coke, "Note, reader, this grant of the king inures to these intents, viz., to make an incorporation; to make a succession; and to grant a rent." So, that here we have a case, not only of a royal grant being construed liberally, but divers implications being made, not at all founded in the express terms of the grant. The reason of which was (as Lord Coke says), because the kings's charter made for the erection of pious and charitable works, shall be always taken in the most favorable and beneficial sense. This case was recognised by the judges as sound law, in the case of *Sutton's Hospital*. And it was clearly admitted by the judges, that in a charter of incorporation by the crown, all the incidents to a corporation were tacitly annexed, although not named; as the right to sue and be sued; to purchase, hold and alien lands; to make by-laws, &c. And if power is expressly given to purchase, but no clause to alien, the letter follows by implication, as an incident. Comyn's Dig. Franchise, F, 6, F, 10, F, 15. It is very difficult to affirm, in the teeth of such authorities, that in the king's grants nothing is to be taken by implication; as is gravely asserted in the case in Davies 149. The case cited to support it, is directly against it. In truth, it is obvious, that the learned judges mistook the mere arguments of counsel, for the solemn opinions of the court; and the case, as decided, is a direct authority the other way.

*The case of *Blankley* v. *Winstanley*, 3 T. R. 279, has also been [*596 relied on for the same purpose; but it has nothing to do with the point. The court there held, that by the saving in the very body of the charter, the concurrent jurisdiction of the county magistrates was preserved. There was nothing said by the court, in respect to the implications in crown grants. The whole argument turned upon the meaning of the express clauses.

Much reliance has also been placed upon the language of Lord Stowell, in *The Elsebe*, 5 Rob. 173. The main question in that case was, whether the crown had a right to release captured property, before adjudication, without the consent of the captors. That question depended upon the effect

of the king's orders in council, his proclamation, and the parliamentary prize act; for, independently of these acts, it was clear, that all captured property, *jure belli*, belonged to the crown; and was subject to its sole disposal. Lord STOWELL, whose eminent qualifications as a judge entitle him to great reverence, on that occasion said: "A general presumption arising from these considerations is, that government does not mean to divest itself of this universal attribute of sovereignty conferred for such purposes (to be used for peace, as well as war), unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption, must be taken also the wise policy of our own peculiar law, which interprets the grants of the crown in this respect, by other rules than those which are applicable in the construction of the grants of individuals. Against an individual, it is presumed, that he meant to convey a benefit, with the utmost liberality that his words will bear. It is indifferent to the public, in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign, it is far otherwise. It is not held by the sovereign himself, as private property, and no alienation shall be presumed, except what is clearly and indisputably expressed." Now, the right of the captors in that case, was given by the words of the king's order in council only. It was a right to seize and bring in for adjudication. The *right* to seize, then, was given, and the *duty* to bring in for adjudication was imposed. If nothing more had existed, it would be clear, that the crown would have the general property in the captures. Then, again, the prize act and prize proclamation gave to the captors a right in the property, after adjudication, as lawful prize, and not before. This very limitation naturally implied, that until adjudication, they had no right in the property. *And this is the ground, upon which Lord STOWELL placed his judgment, as the clear result of a reasonable interpretation of these acts; declining to rely on any reasoning from considerations of public policy. And it is to be considered, that Lord STOWELL was not speaking of an ordinary grant of land, or of franchises, in the common course of mere municipal regulations; but of sovereign attributes and prerogatives, involving the great rights and duties of war and peace, where, upon every motive of public policy, and every ground of rational interpretation, there might be great hesitation in extending the terms of a grant beyond their fair interpretation.

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But what, I repeat, is most material to be stated, is, that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere *donation*, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant—favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government, that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract. Such was the doctrine of my Lord COKE, and of the venerable sages of the law, in other times, when a resistance to prerogative was equivalent to a removal from office. Even in the worst ages of arbitrary power, and irresistible prerogative, they did not hesitate to declare, that contracts founded in a valuable consideration ought to be construed liberally for the subject, for the honor

of the crown. 2 Inst. 496. See also Com. Dig. Franchise, C. F. 6. If we are to have the grants of the legislature construed by the rules applicable to royal grants, it is but common justice, to follow them throughout, for the honor of this republic. The justice of the commonwealth will not, I trust, be deemed less extensive than that of the crown.

I think, that I have demonstrated, upon authority, that it is by no means true, that implications may not, and ought not, to be admitted, in regard to crown grants. And I would conclude what I have to say on this head, by a remark made by the late Mr. Chief Justice PARSONS, a lawyer equally remarkable for his extraordinary genius, and his professional learning. "In England, prerogative is the cause of one against the whole; here, it is the cause of all against *one. In the first case, the feelings and vices, as well as the virtues, are enlisted against it; in the last, in favor of it. [*598 And therefore, *here*, it is of more importance, that the judicial courts should take care that the claim of prerogative should be more strictly watched." *Martin* v. *Commonwealth*, 1 Mass. 356.

If, then, the present were the case of a royal grant, I should most strenuously contend, both upon principle and authority, that it was to receive a liberal, and not a strict construction. I should so contend, upon the plain intent of the charter, from its nature and objects, and from its burdens and duties. It is, confessedly, a case of contract, and not of bounty; a case of contract for a valuable consideration; for objects of public utility; to encourage enterprise; to advance the public convenience; and to secure a just remuneration for large outlays of private capital. What is there in such a grant of the crown, which should demand from any court of justice a narrow and strict interpretation of its terms? Where is the authority with contains such a doctrine, or justifies such a conclusion? Let it not be assumed, and then reasoned from, as an undisputed concession. If the common law carries in its bosom such a principle, it can be shown by some authorities, which ought to bind the judgment, even if they do not convince the understanding. In all my researches, I have not been able to find any, whose reach does not fall far, very far, short of establishing any such doctrine. Prerogative has never been wanting in pushing forward its own claims for indulgence or exemption. But it has never yet (so far as I know) pushed them to this extravagance.

I stand upon the old law; upon law established more than three centuries ago, in cases contested with as much ability and learning, as any in the annals of our jurisprudence, in resisting any such encroachments upon the rights and liberties of the citizens, secured by public grants. I will not consent to shake their title deeds, by any speculative niceties or novelties.

The present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants have, therefore, in reality, nothing to do with the case. We are to give this act of incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent; and that once ascertained, it is our duty to give it a full and liberal operation. The books are full of cases to this *effect (see Com. Dig. Parliament, R. 10 to R. 28; Bac. Abr. Statute), if indeed, so plain a principle of com- [*599

mon sense and common justice stood in any need of authority to support it.

Lord Chief Justice EYRE, in the case of *Boulton* v. *Bull*, 2 H. Bl. 463, 500, took notice of the distinction between the construction of a crown grant, and a grant by an act of parliament; and held the rules of the common law, introduced for the protection of the crown, in respect to its own grants, to be inapplicable to a grant by an act of parliament. "It is to be observed (said his lordship), that there is nothing technical in the composition of an act of parliament. In the exposition of statutes, the intent of parliament is the guide. It is expressly laid down in our books (I do not here speak of penal statutes), that every statute ought to be expounded, not according to the letter, but the intent." Again, he said, "this case was compared to the case of the king being deceived in his grants; but I am not satisfied, that the king, proceeding by and with the advice of parliament, is in that situation, in respect to which he is under the special protection of the law; and that he could, on that ground, be considered as deceived in his grant; no case was cited to prove that position." Now, it is to be remembered, that his lordship was speaking upon the construction of an act of parliament of a private nature; an act of parliament in the nature of a monopoly; an act of parliament granting an exclusive patent for an invention to the celebrated Mr. Watt. And let it be added, that his opinion as to the validity of that grant, notwithstanding all the obscurities of the act, was ultimately sustained in the king's bench by a definitive judgment in its favor. See *Hornblower* v. *Boulton*, 8 T. R. 95.

A doctrine equally just and liberal has been repeatedly recognised by the supreme court of Massachusetts. In the case of *Richards* v. *Daggett*, 4 Mass. 534, 537, Mr. Chief Justice PARSONS, in delivering the opinion of the court, said: "It is always to be presumed, that the legislature intend the most beneficial construction of their acts, when the design of them is not apparent." See also, *Inhabitants of Somerset* v. *Inhabitants of Dighton*, 12 Mass. 383; *Whitney* v. *Whitney*, 14 Ibid. 88; 8 Ibid. 523; *Holbrook* v. *Holbrook*, 1 Pick. 248; *Stanwood* v. *Peirce*, 7 Mass 458. Even in relation to mere private statutes, made for the accommodation of particular citizens, and which may affect the rights and privileges of others; courts of law will give them a large construction, if it arise from necessary implication. *Coolidge* v. *Williams*, 4 Mass. 145.

*600] *As to the manner of construing parliamentary grants for private enterprise, there are some recent decisions, which, in my judgment, establish two very important principles, applicable directly to the present case; which, if not confirmatory of the views which I have endeavored to maintain, are at least not repugnant to them. The first is, that all grants for purposes of this sort are to be construed as contracts between the government and the grantees, and not as mere laws; the second is, that they are to receive a reasonable construction; and that if, either upon their express terms, or by just inference from the terms, the intent of the contract can be made out, it is to be recognised and enforced accordingly. But if the language be ambiguous, or if the inference be not clearly made out, then the contract is to be taken most strongly against the grantor, and most favorably for the public. The first case is the *Company of Proprietors of the Leeds and Liverpool Canal* v. *Hustler*, 1 Barn. & Cres. 424, where the question

was upon the terms of the charter, granting a toll. The toll was payable on empty boats, passing a lock of the canal. The court said "no toll was expressly imposed upon empty boats, &c., and we are called upon to say, that such a toll was imposed by inference. Those who seek to impose a burden upon the public, should take care that their claim rests upon plain and unambiguous language; here the claim is by no means clear." The next case was the *Kingston-upon-Hull Dock Company* v. *La Marche*, 8 Barn. & Cres. 42, where the question was, as to right to wharfare of goods shipped off from their quays. Lord TENTERDEN, in delivering the judgment of the court in the negative, said: "This was clearly a bargain made between a company of adventurers and the public; and as, in many similar cases, the terms of the bargain are contained in the act; and the plaintiffs can claim nothing which is not clarly given." The next case is the *Proprietors of the Stourbridge Canal* v. *Wheeley*, 2 Barn. & Ad. 792, in which the question was as to a right to certain tolls. Lord TENTERDEN, in delivering the opinion of the court, said, "this like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute. And the rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the act." "Now, it is quite certain, that the company have no right expressly given to receive any compensation, except, &c.; and *therefore, it is incumbent upon them to show, that they have a right, clearly given by [*601 inference from some other of the clauses." This latter statement shows, that it is not indispensable, that in grants of this sort, the contract or the terms of the bargain should be in express language; it is sufficient, if they may be clearly proved by implication or inference.

I admit, that where the terms of a grant are to impose burdens upon the public, or to create a restraint injurious to the public interest, there is sound reason for interpreting the terms, if ambiguous, in favor of the public. But at the same time, I insist, that there is not the slightest reason for saying, even in such a case, that the grant is not to be construed favorably to the grantee, so as to secure him in the enjoyment of what is actually granted.

I have taken up more time in the discussion of this point, than, perhaps, the occasion required, because of its importance, and the zeal, and earnestness and learning, with which the argument for a strict construction has been pressed upon the court, as in some sort vital to the merits of this controversy. I feel the more confirmed in my own views upon the subject, by the consideration, that every judge of the state court, in delivering his opinion, admitted, either directly or by inference, the very principle for which I contend. Mr. Justice MORTON, who pressed the doctrine of a strict construction most strongly, at the same time said, "although no distinct thing or right will pass by implication, yet I do not mean to question, that the words used should be understood in their most natural and obvious sense; and that whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant." 7 Pick. 462. Mr. Justice WILDE said, "in doubtful cases, it seems to me a sound and wholesome rule of construction to interpret public grants most favorably to the public interests, and that they are not to be enlarged by *doubtful* implications." "When,

therefore, the legislature makes a grant of a public franchise, it is not to be extended by construction, beyond its clear and obvious meaning." "There are some legislative grants, no doubt, that may admit of a different rule of construction; such as grants of land on a valuable consideration, and the like." Ibid. 469. These two learned judges were adverse to the plaintiffs' claim. But the two other learned judges, who were in favor of it, took a much broader and more liberal view of the rules of interpretation of the charter.

An attempt has, however, been made, to put the case of legislative grants upon the same footing as royal grants, as to their construction; *upon
*602] some supposed analogy between royal grants and legislative grants, under our republican forms of government. Such a claim in favor of republican prerogative is new; and no authority has been cited which supports it. Our legislatures neither have, nor affect to have, any royal prerogatives. There is no provision in the constitution authorizing their grants to be construed differently from the grants of private persons, in regard to the like subject-matter. The policy of the common law, which gave the crown so many exclusive privileges and extraordinary claims, different from those of the subject, was founded, in a good measure, if not altogether, upon the divine right of kings, or, at least, upon a sense of their exalted dignity and pre-eminence over all subjects, and upon the notion, that they are entitled to peculiar favor, for the protection of their kingly rights and office. Parliamentary grants never enjoyed any such privileges; they were always construed according to common sense and comon reason, upon their language and their intent. What reason is there, that our legislative acts should not receive a similar interpretation? Is it not, at least, as important, in our free governments, that a citizen should have as much security for his rights and estate derived from the grants of the legislature, as he would have in England? What solid ground is there to say, that the words of a grant, in the mouth of a citizen, shall mean one thing, and in the mouth of the legislature shall mean another thing? That in regard to the grant of a citizen, every word shall, in case of any question of interpretation or implication, be construed against him, and in regard to the grant of the government, every word shall be construed in its favor? That language shall be construed, not according to its natural import and implications from its own proper sense, and the objects of the instrument; but shall change its meaning, as it is spoken by the whole people, or by one of them? There may be very solid grounds to say, that neither grants nor charters ought to be extended beyond the fair reach of their words; and that no implications ought to be made, which are not clearly deducible from the language, and the nature and objects of the grant.

In the case of a legislative grant, there is no ground to impute surprise, imposition or mistake, to the same extent as in a mere private grant of the crown. The words are the words of the legislature, upon solemn deliberation, and examination and debate. Their purport is presumed to be well
*603] known, and the public interests are *watched, and guarded by all the varieties of local, personal and professional jealousy; as well as by the untiring zeal of numbers, devoted to the public service.

It should also be constantly kept in mind, that in construing this charter, we are not construing a statute involving political powers and sov-

ereignty, like those involved in the case of *The Elsebe*, 5 Rob. 173. We are construing a grant of the legislature, which though in the form of a statute, is still but a solemn contract. In such a case, the true course is, to ascertain the sense of the parties, from the terms of the instrument; and that once ascertained, to give it full effect. Lord Coke, indeed, recommends this as the best rule, even in respect to royal grants. "The best exposition" (says he) "of the king's charter is, upon the consideration of the whole charter, to expound the charter by the charter itself; every material part thereof (being) explained according to the true and genuine sense, which is the best method." *Case of Sutton's Hospital*, 10 Co. 24 *b*.

But with a view to induce the court to withdraw from all the common rules of reasonable and liberal interpretation in favor of grants, we have been told at the argument, that this very charter is a restriction upon the legislative power; that it is in derogation of the rights and interests of the state, and the people; that it tends to promote monopolies and exclusive privileges; and that it will interpose an insuperable barrier to the progress of improvement. Now, upon every one of these propositions, which are assumed, and not proved, I entertain a directly opposite opinion; and if I did not, I am not prepared to admit the conclusion for which they are adduced. If the legislature has made a grant, which involves any or all of these consequences, it is not for courts of justice to overturn the plain sense of the grant, because it has been improvidently or injuriously made.

But I deny the very ground-work of the argument. This charter is not (as I have already said) any restriction upon the legislative power; unless it be true, that because the legislature cannot grant again, what it has already granted, the legislative power is restricted. If so, then every grant of the public land is a restriction upon that power; a doctrine, that has never yet been established, nor (so far as I know) ever contended for. Every grant of a franchise is, so far as that grant extends, necessarily exclusive; and cannot be resumed or interfered with. All the learned judges in the state *court admitted, that the franchise of Charles River bridge, whatever it be, could not be resumed or interfered with. [*604
The legislature could not recall its grant, or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands. In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation. The identical land, or the identical franchise, cannot be regranted, or avoided by a new grant. But the legislative power remains unrestricted. The subject-matter only (I repeat it) has passed from the hands of the government. If the legislature should order a government debt to be paid by a sale of the public stock, and it is so paid, the legislative power over the funds of the government remains unrestricted, although it has ceased over the particular stock, which has been thus sold. For the present, I pass over all further consideration of this topic, as it will necessarily come again under review, in examining an objection of a more broad and comprehensive nature.

Then, again, how is it established, that this is a grant in derogation of the rights and interests of the people? No individual citizen has any right to build a bridge over navigable waters; and consequently, he is deprived of no right, when a grant is made to any other persons for that purpose.

Whether it promotes or injures the particular interest of an individual citizen, constitutes no ground for judicial or legislative interference, beyond what his own rights justify. When, then, it is said, that such a grant is in derogation of the rights and interests of the people, we must understand, that reference is had to the rights and interests common to the whole people, as such (such as the right of navigation), or belonging to them as a political body; or, in other words, the rights and interests of the state. Now, I cannot understand, how any grant of a franchise is a derogation from the rights of the people of the state, any more than a grant of public land. The right, in each case, is gone, to the extent of the thing granted, and so far may be said to derogate from, that is to say, to lessen the rights of the people, or of the state. But that is not the sense in which the argument is pressed; for, by derogation, is here meant an injurious or mischievous detraction from the sovereign rights of the state. On the other hand, there can be no derogation from the rights of the people, as such, except it applies to rights common there before; which the building of a bridge over navigable waters certainly is not. If it had been said, that *the grant of this bridge was in derogation of the common right of navigating the Charles river, by reason of its obstructing, *pro tanto*, a free and open passage, the ground would have been intelligible. So, if it had been an exclusive grant of the navigation of that stream. But, if at the same time, equivalent public rights of a different nature, but of greater public accommodation and use, had been obtained; it could hardly have been said, in a correct sense, that there was any derogation from the rights of the people, or the rights of the state. It would be a mere exchange of one public right for another.

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Then, again, as to the grant being against the interests of the people. I know not how that is established; and certainly, it is not to be assumed. It will hardly be contended, that every grant of the government is injurious to the interests of the people; or that every grant of a franchise, must necessarily be so. The erection of a bridge may be of the highest utility to the people. It may essentially promote the public convenience, and aid the public interests, and protect the public property. And if no persons can be found willing to undertake such a work, unless they receive in return the exclusive privilege of erecting it, and taking toll; surely, it cannot be said, as of course, that such a grant, under such circumstances, is, *per se*, against the interests of the people. Whether the grant of a franchise is, or is not, on the whole, promotive of the public interests, is a question of fact and judgment, upon which different minds may entertain different opinions. It is not to be judicially assumed to be injurious, and then the grant to be reasoned down. It is a matter exclusively confided to the sober consideration of the legislature; which is invested with full discretion, and possesses ample means to decide it. For myself, meaning to speak with all due deference for others, I know of no power or authority confided to the judicial department, to rejudge the decisions of the legislature upon such a subject. It has an exclusive right to make the grant, and to decide whether it be, or be not, for the public interests. It is to be presumed, if the grant is made, that it is made from a high sense of public duty, to promote the public welfare, and to establish the public prosperity. In this very case, the legislature has, upon the very face of the act, made a solemn

declaration as to the motive for passing it; that "the erecting of a bridge over Charles River, &c., will be of great public utility." What court of justice is invested with authority to gainsay this *declaration? To strike it out of the act, and reason upon the other words, as if it [*606 were not there? To pronounce that a grant is against the interest of the people, which the legislature has declared to be of great utility to the people? It seems to me, to be our duty to interpret laws, and not to wander into speculations upon their policy. And where, I may ask, is the proof that Charles River bridge has been against the interests of the people? The record contains no such proof; and it is, therefore, a just presumption that it does not exist.

Again, it is argued, that the present grant is a grant of a monopoly, and of exclusive privileges; and therefore, to be construed by the most narrow mode of interpretation. The sixth article of the bill of rights of Massachusetts has been supposed to support the objection; "No man, nor corporation or association of men, have any other title to obtain advantages or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissive to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver or judge, is absurd and unnatural." Now, it is plain, that taking this whole clause together, it is not an inhibition of all legislative grants of exclusive privileges; but a promulgation of the reasons why there should be no hereditary magistrates, legislators or judges. But it admits, by necessary implication, the right to grant exclusive privileges for public services, without ascertaining of what nature those services may be. It might be sufficient to say, that all the learned judges in the state court admitted, that the grant of an exclusive right ta take toll at a ferry, or a bridge, or a turnpike, is not a monopoly which is deemed odious in law; nor one of the particular and exclusive privileges, distinct from those of the community, which are reprobated in the bill of rights. All that was asserted by the judges, opposed to a liberal interpretation of this grant, was, that it tended to promote monopolies. See the case, 7 Pick. 116, 132, 137.

Again, the old colonial act of 1641, against monopolies, has been relied on, to fortify the same argument. That statute is merely in affirmance of the principles of the English statute against monopolies, of 21 James I., c. 3; and if it were now in force (which it is not), it would require the same construction. There is great virtue in particular phrases; and when it is once *suggested, that a grant is of the nature or tendency of a mo- [*607 nopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice, which grew up, in former times, from the gross abuses of the royal prerogatives; to which, in America, there are no analogous authorities. But what is a monopoly, as understood in law? It is an exclusive right, granted to a few, of something which was before of common right. Thus, a privilege granted by the king for the sole buying, selling, making, working or using a thing, whereby the subject, in general, is restrained from that liberty of manufacturing or trading, which before he had, is a monopoly. 4 Bl. Com. 159; Bac. Abr. Prerogative, F. 4. My Lord Coke, in his Pleas of the Crown (3 Inst. 181), has given this very definition of a

monopoly; and that definition was approved by HOLT and TREBY (afterwards chief justices of king's bench), *arguendo*, as counsel, in the great case of the *East India Company* v. *Sandys*, 10 How. State Trials 386. His words are, that a monopoly is "an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of everything, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade." So, that it is not the case of a monopoly, if the subjects had not the common right or liberty before to do the act, or possess or enjoy the privilege or franchise granted, as a common right. 10 How. State Trials 425. And it deserves an especial remark, that this doctrine was an admitted concession, pervading the entire arguments of the counsel who opposed, as well as of those who maintained the grant of the exclusive trade, in the case of the *East India Company* v. *Sandys*, 10 How. St. Tr. 386, a case which constitutes, in a great measure, the basis of this branch of the law.

No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream is a grant of a common right. Before such grant, had all the citizens of the state a right to erect bridges over navigable streams? Certainly, they had not; and therefore, the grant was no restriction of any common right. It was neither a monopoly; nor, in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before; and had no tendency to take it from him. It took, indeed, from the legislature the power of granting the same identical
*608] privilege or franchise *to any other persons. But this made it no more a monopoly, than the grant of the public stock or funds of a state for a valuable consideration. Even in cases of monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been, to give them a favorable construction, in support of the patent, as Lord Chief Justice EYRE said, *ut res magis valeat quam pereat. Boulton* v. *Bull*, 2 H. Bl. 463, 500.

But it has been argued, and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees, it will interpose an effectual barrier against all general improvements of the country. For myself, I profess not to feel the cogency of this argument, either in its general application to the grant of franchises, or in its special application to the present grant. This is a subject upon which different minds may well arrive at different conclusions, both as to policy and principle. Men may, and will, complexionally differ upon topics of this sort, according to their natural and acquired habits of speculation and opinion. For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain and questionable, both as to security and as to productiveness. No man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slighest security of enjoying the rewards of that success, for a single moment. If the government means to invite its citizens to enlarge

the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant; and that success will not be the signal of a general combination to overthrow its rights and to take away its profits. The very agitation of a question of this sort is sufficient to alarm every stockholder in every public enterprise of this sort, throughout the whole country. Already, in my native state, the legislature has found it necessary expressly to concede the exclusive privilege here contended against; in order to insure the accomplishment of a railroad for the benefit of the public. And yet, we are told, that all such exclusive grants are to the detriment of the public.

But if there were any foundation for the argument itself, in a *general view, it would totally fail in its application to the present case. Here, the grant, however exclusive, is but for a short and limited [*609 period, more than two-thirds of which have already elapsed; and when it is gone, the whole property and franchise are to revert to the state. The legislature exercised a wholesome foresight on the subject; and within a reasonable period, it will have an unrestricted authority to do whatever it may choose, in the appropriation of the bridge and its tolls. There is not, then, under any fair aspect of the case, the slightest reason to presume that public improvements either can, or will, be injuriously retarded by a liberal construction of the present grant.

It have thus endeavored to answer, and I think I have successfully answered all the arguments (which indeed run into each other) adduced to justify a strict construction of the present charter. I go further, and maintain, not only that it is not a case for strict construction; but that the charter, upon its very face, by its terms, and for its professed objects, demands from the court, upon undeniable principles of law, a favorable construction for the grantees. In the first place, the legislature has declared, that the erecting of the bridge will be of great public utility; and this exposition of its own motives for the grant, requires the court to give a liberal interpretation, in order to promote, and not to destroy, an enterprise of great public utility. In the next place, the grant is a contract for a valuable consideration, and a full and adequate consideration. The proprietors are to lay out a large sum of money (and in those times it was a very large outlay of capital) in erecting a bridge; they are to keep it in repair, during the whole period of forty years; they are to surrender it in good repair, at the end of that period, to the state, as its own property; they are to pay, during the whole period, an annuity of 200*l.* to Harvard College; and they are to incur other heavy expenses and burdens, for the public accommodation. In return for all these charges, they are entitled to no more than the receipt of the tolls, during the forty years, for their reimbursement of capital, interest and expenses. With all this, they are to take upon themselves the chances of success; and if the enterprise fails, the loss is exclusively their own. Nor let any man imagine, that there was not, at the time when this charter was granted, much solid ground for doubting success. In order to entertain a just view of this subject, we must go back to that period of general bankruptcy, and distress and difficulty. The constitution of *the United [*610 States was not only not then in existence, but it was not then even dreamed of. The union of the states was crumbling into ruins, under the

old confederation. Agriculture, manufactures and commerce were at their lowest ebb. There was infinite danger to all the states, from local interests and jealousies, and from the apparent impossibility of a much longer adherence to that shadow of a government, the continental congress. And even four years afterwards, when every evil had been greatly aggravated, and civil war was added to other calamities, the constitution of the United States was all but shipwrecked, in passing through the state conventions; it was adopted by very slender majorities. These are historical facts, which required no coloring to give them effect, and admitted of no concealment, to seduce men into schemes of future aggrandizement. I would even now put it to the common sense of every man, whether, if the constitution of the United States had not been adopted, the charter would have been worth a forty years' purchase of the tolls.

This is not all. It is well known, historically, that this was the very first bridge ever constructed, in New England, over navigable tide-waters so near the sea. The rigors of our climate, the dangers from sudden thaws and freezing, and the obstructions from ice in a rapid current, were deemed by many persons to be insuperable obstacles to the success of such a project. It was believed, that the bridge would scarcely stand a single severe winter. And I myself am old enough to know, that in regard to other arms of the sea, at much later periods, the same doubts have had a strong and depressing influence upon public enterprises. If Charles River bridge had been carried away, during the first or second season after its erection, it is far from being certain, that up to this moment, another bridge, upon such an arm of the sea, would ever have been erected in Massachusetts. I state these things, which are of public notoriety, to repel the notion that the legislature was surprised into an incautious grant, or that the reward was more than adequate to the perils. There was a full and adequate consideration, in a pecuniary sense, for the charter. But, in a more general sense, the erection of the bridge, as a matter of accommodation, has been incalculably beneficial to the public. Unless, therefore, we are wholly to disregard the declarations of the legislature, and the objects of the charter, and the historical facts of the times; and indulge in mere private speculations of profit and loss, by our present lights and experience; *it seems to me, that the court is bound to come to the interpretation of this charter, with a persuasion that it was granted in furtherance, and not in derogation, of the public good.

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But I do not insist upon any extraordinary liberality in interpreting this charter. All I contend for is, that it shall receive a fair and reasonable interpretation; so as to carry into effect the legislative intention, and secure to the grantees a just security for their privileges. I might, indeed, well have spared myself any investigation of the principles upon which royal and legislative grants are ordinarily to be construed; for this court has itself furnished an unequivocal rule for interpreting all public contracts. The present grant is confessedly a contract; and in *Huidekoper's Lessee* v. *Douglass*, 3 Cranch 1, this court said: "This is a contract, and although a state is a party, it ought to be construed according to those well-established principles which regulate contracts, generally;" that is, precisely as in cases between mere private persons, taking into consideration the nature and objects of the grant. A like rule was adopted by this court, in the case of

a contract by the United States. *United States* v. *Gurney*, 4 Cranch 333. And the good sense and justice of the rule seem equally irresistible.

Let us now enter upon the consideration of the terms of the charter. In my judgment, nothing can be more plain, than that it is a grant of a right to errect a bridge between Boston and Charlestown, in the place where the ferry between those towns was kept. It has been said, that the charter itself does not describe the bridge as between Charlestown and Boston, but grants an authority to errect "a bridge over Charles river, in the place where the old ferry was then kept;" and that these towns are not named, except for the purpose of describing the then ferry. Now, this seems to me, with all due deference, to be a distinction without a difference. The bridge is to be erected in the place where the old ferry then was. But where was it to begin? and where was it to terminate? Boston and Charlestown are the only possible *termini*, for the ferry-ways were there; and it was to be built between Boston and Charlestown, because the ferry was between them. Surely, according to the true sense of the preamble, where alone the descriptive words occur (for it is a great mistake to suppose, that the enacting clause anywhere refers, except by implication, to the location of the bridge), it is wholly immaterial, whether we read the clause, "whereas, the erecting of a bridge *over Charles river, in the place where the ferry between Boston and Charlestown is now kept;" or [*612 "whereas, the erecting of a bridge over Charles river, between Charlestown and Boston, where the ferry is now kept." In each case, the bridge is to be between Boston and Charlestown; and the *termini* are the ferry-ways. The title of the act puts this beyond all controversy; for it is "an act for incorporating certain persons for the purpose of building a bridge over Charles river, between Boston and Charlestown, &c." But, then, we are told, that no rule in construing statutes is better settled, than that the title of an act does not constitute any part of the act. If, by this, no more be meant, than that the title of an act constitutes no part of its enacting clauses, the accuracy of the position will not be disputed. But if it is meant to say, that the title of the act does not belong to it, for any purpose of explanation or construction, and that, in no sense, is it any part of the act; I, for one, must deny that there is any such settled principle of law. On the contrary, I understand that the title of an act (though it is not ordinarily resorted to), may be legitimately resorted to, for the purpose of ascertaining the legislative intention, just at much as any other part of the act. In point of fact, it is usually resorted to, whenever it may assist us in removing any ambiguities in the enacting clauses. Thus, in the great case of *Sutton's Hospital*, 10 Co. 23, 24 *b*, the title of an act of parliament was thought not unworthy to be examined, in construing the design of the act. In *Boulton* v. *Bull*, 2 H. Bl. 463, 500, the effect of the title of an act was largely insisted upon in the argument, as furnishing a key to the intent of the enacting clauses. And Lord Chief Justice Eyre admitted the propriety of the argument, and met it, by saying, that, in that case, he would, if necessary, expound the word "engine," in the body of the bill, in opposition to the title to it, to mean a "method," in order to support the patent. In the case of the *United States* v. *Fisher*, 2 Cranch 358, the supreme court of the United States expressly recognised the doctrine, and gave it a practical application. In that case, the chief justice, in delivering the opinion of the

court, after adverting to the argument at the bar, respecting the degree of influence which the title of an act ought to have in construing the enacting clauses, said: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such a case, the title claims a degree of notice, and will have its due share of consideration."

*613] *According to my views of the terms of the charter, the grant, then, is of the franchise of erecting a bridge over Charles river, between Charlestown and Boston, and of taking tolls or pontage from passengers. It is, therefore, limited to those towns; and does not exclude the legislature from any right to grant a bridge over the same river, between any other towns and Boston; as, for example, between Chelsea and Boston, or Cambridge and Boston, or Roxbury and Boston.

But although, in my judgment, this is the true construction of the limits of the charter, *ex vi terminorum*, my opinion does not, in any important degree, rest upon it. Taking this to be a grant of a right to build a bridge over Charles river, in the place where the old ferry between Charlestown and Boston was then kept (as is contended for by the defendants), still it has, as all such grants must have, a fixed locality, and the same question meets us; is the grant confined to the mere right to erect a bridge on the proper spot, and to take toll of the passengers, who may pass over it, without any exclusive franchise on either side of the local limits of the bridge? or does it, by implication, include an exclusive franchise on each side, to an extent which shall shut out any injurious competition? In other words, does the grant still leave the legislature at liberty to erect other bridges on either side, free or with tolls, even in juxta-position with the timbers and planks of this bridge? or is there an implied obligation on the part of the legislature, to abstain from all acts of this sort, which shall impair or destroy the value of the grant? The defendants contend, that the exclusive right of the plaintiffs extend no farther than the planks and timbers of the bridge; and that the legislature is at full liberty to grant any new bridge, however near; and although it may take away a large portion, or even the whole of the travel which would otherwise pass over the bridge of the plaintiffs. And to this extent, the defendants must contend; for their bridge is, to all intents and purposes, in a legal and practical sense, contiguous to that of the plaintiffs.

The argument of the defendants is, that the plaintiffs are to take nothing by implication. Either (say they) the exclusive grant extends only to the local limits of the bridge; or it extends the whole length of the river, or, at least, up to old Cambridge bridge. The latter construction would be absurd and monstrous; and therefore, the former must be the true one. Now, I utterly deny the alternative involved in the dilemma. The right to

*614] build a bridge over a *river, and to take toll, may well include an exclusive franchise, beyond the local limits of the bridge; and yet not extend through the whole course of the river, or even to any considerable distance on the river. There is no difficulty, in common sense, or in law, in maintaining such a doctrine. But then, it is asked, what limits can be assigned to such a franchise? The answer is obvious; the grant carries with it an exclusive franchise, to a reasonable distance on the river; so that the ordinary travel to the bridge shall not be diverted by any new

bridge, to the injury or ruin of the franchise. A new bridge, which would be a nuisance to the old bridge, would be within the reach of its exclusive right. The question would not be so much as to the fact of distance, as it would be as to the fact of nuisance. There is nothing new in such expositions of incorporeal rights ; and nothing new in thus administering, upon this foundation, remedies in regard thereto. The doctrine is coeval with the common law itself. Suppose, an action is brought for shutting up the ancient lights belonging to a messuage ; or for diverting a water-course ; or for flowing back a stream ; or for erecting a nuisance near a dwelling-house ; the question in such cases is not one of mere distance ; of mere feet and inches, but of injury—permanent, real and substantial injury—to be decided upon all the circumstances of the case. But of this I shall speak again hereafter.

Let us see what is the result of the narrow construction contended for by the defendants. If that result be such as is inconsistent with all reasonable presumptions growing out of case ; if it be repugnant to the principles of equal justice ; if it will defeat the whole objects of the grant ; it will not, I trust, be insisted on, that this court is bound to adopt it.

I have before had occasion to take notice, that the original charter is a limited one for forty years ; that the whole compensation of the proprietors for all their outlay of capital, their annuity to Harvard College and their other annual burdens and charges, is to arise out of the tolls allowed them during that period. No other fund is provided for their indemnity ; and they are to take it, subject to all the perils of failure and the chances of an inadequate remuneration. The moment the charter was accepted, the proprietors were bound to all the obligations of this contract, on their part. Whether the bargain should turn out to be good or bad, productive or unproductive of profit, did not vary their duties. The franchise was not a mere *jus privatum*. From the moment of its acceptance, and the erection of *the bridge, it became charged with a *jus publicum*. The government had a right to insist that the bridge should be kept in perfect [*615 repair, for public travel, by the proprietors ; that the bridge should be lighted ; that the draw should be raised without expense, for the purposes of navigation ; and if the proprietors had refused or neglected to do their duty in any of these respects, they would have been liable to a public prosecution. It could be no apology or defence, that the bridge was unprofitable ; that the tolls were inadequate ; that the repairs were expensive ; or that the whole concern was a ruinous enterprise. The proprietors took the charter *cum onere*, and must abide by their choice. It is no answer to all this, to say, that the proprietors might surrender their charter, and thus escape from the burden. They could have no right to make such a surrender. It would depend upon the good pleasure of the government, whether it would accept of such a surrender, or not ; and until such an acceptance, the burdens would be obligatory to the last hour of the charter. And when that hour shall have arrived, the bridge itself, in good repair, is to be delivered to the state.

Now, I put it to the common sense of every man, whether if, at the moment of granting the charter, the legislature had said to the proprietors ; you shall build the bridge ; you shall bear the burdens ; you shall be bound by the charges ; and your sole reimbursement shall be from the tolls of

forty years: and yet we will not even guaranty you any certainty of receiving any tolls; on the contrary; we reserve to ourselves the full power and authority to erect other bridges, toll or free bridges, according to our own free will and pleasure, contiguous to yours, and having the same *termini* with yours; and if you are successful, we may thus supplant you, divide, destroy your profits, and annihilate your tolls, without annihilating your burdens: if, I say, such had been the language of the legislature, is there a man living, of ordinary discretion or prudence, who would have accepted such a charter, upon such terms? I fearlessly answer, no. There would have been such a gross inadequacy of consideration, and such a total insecurity of all the rights of property, under such circumstances, that the project would have dropped still-born. And I put the question further, whether any legislature, meaning to promote a project of permanent, public utility (such as this confessedly was), would ever have dreamed of such a qualification of its own grant, when it sought to enlist private capital and private patronage to insure the accomplishment of it?

*616] *Yet, this is the very form and pressure of the present case. It is not an imaginary and extravagant case. Warren bridge has been erected, under such a supposed reserved authority, in the immediate neighborhood of Charles River bridge; and with the same *termini*, to accommodate the same line of travel. For a half-dozen years, it was to be a toll bridge, for the benefit of the proprietors, to reimburse them for their expenditures; at the end of that period, the bridge is to become the property of the state, and free of toll; unless the legislature should thereafter impose one. In point of fact, it has since become, and now is, under the sanction of the act of incorporation, and other subsequent acts, a free bridge, without the payment of any tolls, for all persons. So that, in truth, here now is a free bridge, owned by and erected under the authority of the commonwealth, which necessarily takes away all the tolls from Charles River bridge; while its prolonged charter has twenty years to run. And yet the act of the legislature establishing Warren bridge, is said to be no violation of the franchise granted to the Charles River bridge. The legislature may annihilate, nay, has annihilated, by its own acts, all chance of receiving tolls, by withdrawing the whole travel; though it is admitted, that it cannot take away the barren right to gather tolls, if any should occur, when there is no travel to bring a dollar. According to the same course of argument, the legislature would have a perfect right to block up every avenue to the bridge, and to obstruct every highway which should lead to it, without any violation of the chartered rights of Charles River bridge; and at the same time, it might require every burden to be punctiliously discharged by the proprietors, during the prolonged period of seventy years. I confess, that the very statement of such propositions is so startling to my mind, and so irreconcilable with all my notions of good faith, and of any fair interpretation of the legislative intentions, that I should always doubt the soundness of any reasoning which should conduct me to such results.

But it is said, that there is no prohibitory covenant in the charter, and no implications are to be made of any such prohibition. The proprietors are to stand upon the letter of their contract, and the maxim applies, *de non apparentibus et non existentibus, eadem est lex.* And yet it is conceded, that the legislature cannot revoke or resume this grant. Why not, I pray

to know? There is no negative covenant in the charter; there is no express prohibition to be found there. The reason is plain. The prohibition arises by *natural, if not by necessary, implication. It would be against the [*617 first principles of justice, to presume that the legislature reserved a right to destroy its own grant. That was the doctrine in *Fletcher* v. *Peck*, 6 Cranch 87, in this court; and in other cases turning upon the same great principle of political and constitutional duty and right. Can the legislature have power to do that indirectly, which it cannot do directly? If it cannot take away, or resume, the franchise itself, can it take away its whole substance and value? If the law will create an implication, that the legislature shall not resume its own grant, is it not equally as natural and as necessary an implication, that the legislature shall not do any act directly to prejudice its own grant, or to destroy its value? If there were no authority in favor of so reasonable a doctrine, I would say, in the language of the late lamented Mr. Chief Justice PARKER, in this very case: "I ground it on the principles of our government and constitution, and on the immutable principles of justice, which ought to bind governments, as well as people."

But it is most important to remember, that in the construction of all legislative grants, the common law must be taken into consideration; for the legislature must be presumed to have in view the general principles of construction which are recognised by the common law. Now, no principle is better established, than the principle, that when a thing is given or granted, the law giveth, impliedly, whatever is necessary for the taking and enjoying the same. This is laid down in Co. Litt. 56 *a*; and is, indeed, the dictate of common sense applicable to all grants. Is not the unobstructed possession of the tolls, indispensable to the full enjoyment of the corporate rights granted to the proprietors of Charles River bridge? If the tolls were withdrawn, directly or indirectly, by the authority of the legislature, would not the franchise be utterly worthless? A burden, and not a benefit? Would not the reservation of authority in the legislature to create a rival bridge, impair, if it did not absolutely destroy, the exclusive right of the proprietors of Charles River bridge? I conceive it utterly impossible to give any other, than an affirmative, answer to each of these questions. How, then, are we to escape from the conclusion, that that which would impair or destroy the grant, is prohibited by implication of law, from the nature of the grant? "We are satisfied," said Mr. Chief Justice PARSONS, in delivering the opinion of the court, in *Wales* v. *Stetson*, 2 Mass. 143, 146, "that the rights legally vested in any corporation cannot *be controlled or destroyed by any [*618 statute, unless a power for that purpose be reserved to the legislature, in the act of incorporation." Where is any such reservation to be found in the charter of Charles River bridge?

My brother WASHINGTON (than whom few judges ever possessed a sounder judgment or clearer learning), in his able opinion in the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 658, took this same view of the true sense of the passage in Blackstone's Commentaries, and uses the following strong language on the subject of a charter of the government: "Certain obligations are created (by it) both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his former grant. It implies, therefore, a con-

tract not to re-assert the right to grant the franchise to another, or to impair it." I know not how language more apposite could be applied to the present case. None of us then doubted its entire correctness, when he uttered it; and I am not able to preceive how the legal inference can now be escaped. The case of the *Chesapeake and Ohio Canal Company* v. *Baltimore and Ohio Railroad Company*, 4 Gill & Johns. 1, 4, 6, 143, 146, 149, fully sustains the same doctrine; and most elaborately expound its nature, and operation and extent.

But we are not left to mere general reasoning on this subject. There are cases of grants of the crown, in which a like construction has prevailed, which are as conclusive upon this subject, in point of authority, as any can be. How stands the law in relation to grants by the crown, of fairs, markets and ferries? I speak of grants, for all claims of this sort resolve themselves into grants; a prescription being merely evidence of, and pre-supposing, an ancient grant, which can be no longer traced, except by the constant use and possession of the franchise. If the king grants a fair, or a market, or a ferry, has the franchise no existence beyond the local limits where it is erected? Does the grant import no more than a right to set up such fair, or market, or ferry, leaving in the crown full power and authority to make other grants of the same nature, in juxta-position with those local limits? No case, I will venture to say, has ever maintained such a doctrine; and the common law repudiates it (as will be presently shown) in the most express terms.

The authorities are abundant, to establish, that the king cannot *make any second grant which shall prejudice the profits of the former grant. And why not? Because the grant imposes public burdens on the grantee, and subjects him to public charges, and the profits constitute his only means of remuneration; and the crown shall not be at liberty directly to impair, much less, to destroy, the whole value and objects of its grant. In confirmation of this reasoning, it has been repeatedly laid down in the books, that when the king grants a fair, or market, or ferry, it is usual to insert in all such grants a clause or proviso, that it shall not be to the prejudice of any other existing franchise of the same nature; as a fair, or market, or ferry. But if such a clause or proviso is not inserted, the grant is always construed with the like restriction; for such a clause will be implied by law. And therefore, if such new grant is without such a clause, if it occasion any damage either to the king, or to a subject, in any other thing, it will be revocable. So my Lord Coke laid it down in 2 Inst. 406. The judges laid down the same law, in the house of lords, in the case of the *King* v. *Butler*, 3 Lev. 220, 222; which was the case of a grant of a new market, to the supposed prejudice of an old market. Their language on that occasion deserves to be cited: it was, "that the king has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *scire facias*." And, afterwards, referring to cases where a writ of *ad quod damnum* had been issued, they added, "there, the king takes notice, that it is not *ad damnum*; and yet, if it be *ad damnum*, the patent is void; for in all such patents, the condition is implied, viz., that it be not *ad damnum* of the neighboring merchants." And they added further, "this is positively alleged (in the *scire facias*), that *concessio predicta est ad damnum et depauperationem*, &c.; which is a sufficient cause to revoke

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the patent, if there were nothing more." The same doctrine is laid down in Mr. Serjeant Williams's learned note (2) to the case of *Yard* v. *Ford*, 2 Saund. 172. Now, if, in the grant of any such franchise of a fair, or market, or ferry, there is no implied obligation or condition that the king will not made any subsequent grant to the prejudice of such prior grant, or impairing its rights, it is inconceivable, why such a proviso should be implied. But if (as the law certainly is) the king can make no subsequent grant, to the prejudice of his former grant, then the reason of such implication is clear; for the king will not be presumed to intend to violate his duty, but rather to be deceived in his second grant, if to the prejudice of the first.

*It is upon this ground, and this ground only, that we can explain the established doctrine in relation to ferries. When the crown [*620 grants a ferry from A. to B., without using any words which import it to be an exclusive ferry, why is it (as will be presently shown), that by the common law, the grant is construed to be exclusive of all other ferries between the same places or *termini*; at least, if such ferries are so near that they are injurious to the first ferry, and tend to a direct diminution of its receipts? Plainly, it must be, because from the nature of such a franchise, it can have no permanent value, unless it is exclusive; and the circumstance that during the existence of the grant, the grantee has public burdens imposed upon him, raises the implication, that nothing shall be done to the prejudice of it, while it is a subsisting franchise. The words of the grant do, indeed, import *per se*, merely to confer a right of ferry between A. and B.; but the common law steps in, and, *ut res magis valeat quam pereat*, expands the terms into an exclusive right, from the very nature, and objects and motives, of the grant.

I say this is the theory of the common law on this subject. Let us now see, if it is not fully borne out by the authorities in relation to ferries; a franchise, which approaches so near to that of a bridge, that human ingenuity has not as yet been able to state any assignable difference between them, except that one includes the right of pontage, and the other of passage or ferriage (see *Webb's Case*, 8 Co. 47 *b*); that is, each includes public duties and burdens, and an indemnity for these duties and burdens by a right to receive tolls. A grant of a ferry must always be by local limits; it must have some *termini*; and must be between some fixed points, villes or places. But is the franchise of a ferry limited to the mere ferry-ways? Unless I am greatly mistaken, there is an unbroken series of authorities establishing the contrary doctrine; a doctrine firmly fixed in the common law, and brought to America by our ancestors as a part of their inheritance. The case of a ferry is put as a case of clear law by Paston, Justice, as long ago as in 22 Hen. V. 14 *b*. "If," says he, "I have a market or a fair on a particular day, and another sets up a market on fair on the same day, in a *ville* which is near to my market, so that my market, or my fair, is impaired, I shall have against him an assize of nuisance, or an action on the case." And the same law is, "if I have an ancient ferry in a *ville*, and another sets up another ferry upon the same river, near to my ferry, so that the profits of my ferry are impaired, I shall have an action on the case *against [*621 him." And *Newton* (who, it seems, was of counsel for the defendant in that case) admitted the law to be so; and gave as a reason, "for you are bound to support the ferry, and to serve and repair it for the ease of the

common people, and otherwise you shall be grievously amerced ; and it is inquirable before the sheriff, at his tourn, and also before the justices in eyre." As to the case of a market or fair, *Newton* said, that in the king's grant of a market or fair, there is always a proviso that it should not be to the nuisance of another market or fair. To which PASTON, Justice, replied, "suppose the king grants to me a market, without any proviso, if one sets up, after that time, another market, which is a nuisance to that, I shall have against him an assize of nuisance."

The doctrine here laid down seems indisputable law ; and it was cited and approved by Lord ABINGER, in *Huzzey* v. *Field*, 2 Cromp. Mees. & Rosc. 432 ; to which reference will presently be made. In Bacon's Abridgment, Prerogative, F. 1, it is laid down, "that if the king creates or grants a fair or market, to a person, and afterwards grants another to another person, to the prejudice of the first, the second grant is void :" see 16 Vin. Abr. Nuisance, G. pl. 2. The same law is laid down in 3 Bl. Com. 218–19. "If (says he) I am entitled to hold a fair or market, and another person sets up a fair or market, so near mine that it does me a prejudice, it is a nuisance to the freehold which I have in my market or fair." He adds, "if a ferry is erected on a river, so near another ancient ferry as to draw away the custom, it is a nuisance to the old one ; for where there is a ferry by prescription, the owner is bound always to keep it in repair and readiness, for the ease of the king's subjects, otherwise he may be grievously amerced. It would be, therefore, extremely hard, if a new ferry were suffered to share the profits, which does not also share the burden." The same doctrine is to be found in Comyn's Digest (Action upon the Case for a Nuisance, A.) and in many other authorities. See *Yard* v. *Ford*, 2 Saund. 175, and note 2 ; Fitz. N. B. 184 ; Hale de Port. Maris, ch. 5, Harg. Law Tracts, p. 59 ; Com. Dig. Piscary, B. ; Ibid. Market, C. 2, C. 3 ; 2 Bl. Com. 27.

The doctrine is, in England, just as true now, and just as strictly enforced, as it was three centuries ago. In *Blisset* v. *Hart*, Willes 508, the plaintiff recovered damages for a violation of his right to an ancient ferry, against the defendant, who had set up a neighboring ferry to his nuisance. The court
*622] said, "A ferry is *publici *juris.* It is a franchise, that no one can erect without a license from the crown ; and when one is erected, another cannot be erected without an *ad quod damnum.* If a second is erected, without a license, the crown has a remedy by a *quo warranto ;* and the former grantee has a remedy by action." The case of *Tripp* v. *Frank*, 4 T. R. 666, proceeds upon the admission of the same doctrine ; as does *Prince* v. *Lewis*, 5 Barn. & Cres. 363 ; *Peter* v. *Kendall*, 6 Ibid. 703 ; *Mosley* v. *Chadwick*, 7 Ibid. 47, note *a ;* and *Mosley* v. *Walker*, Ibid. 40.

There is a very recent case (already alluded to), which was decided by the court of exchequer, upon the fullest consideration, and in which the leading authorities upon this point were discussed with great acuteness and ability. I mean the case of *Huzzey* v. *Field*, in 1835, 2 Cromp. Mees. & Rosc. 432. Lord ABINGER, in delivering the opinion of the court on that occasion, used the following language : "So far, the authorities appear to be clear, that if a new ferry be put up, without the king's license, to the prejudice of an old one, an action will lie ; and there is no case, which has the appearance of being to the contrary, except that of *Tripp* v. *Frank*, hereafter mentioned.

These old authorities proceeded upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration, to the subject, who, as he received a benefit, may have, by the grant of the crown, a corresponding obligation imposed upon him, in return for the benefit received; and secondly, that if another, without legal authority, interrupts the grantee in the exercise of his franchise, by withdrawing the profits of passengers, which he would otherwise have had, and which he has, in a manner, purchased from the public, at the price of his corresponding liability, the disturber is subject to an action for the injury. And the case is in this respect analogous to a grant of a fair or market, which is also a privilege of the nature of a monopoly. A public ferry, then, is a public highway of a special description; and its *termini* must be places where the public have rights, as towns or villes, or highways leading to towns or villes. The right of the grantee is, in one case, an exclusive right of carrying from town to town; in the other, of carrying from one point to the other, all who are going to use the highway, to the nearest town or *ville* to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers, must be injurious. For instance, if any one should construct a new landing *place, at a short distance of one *terminus* of the ferry, and make a proclamation of carrying passengers over [*623 from the other *terminus*, and then landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or *ville*, by which the passengers go immediately to the first and all the villes, to which that highway leads; there could not be any doubt, but such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry, or not. If such new ferry be nearer, or the boat used more commodious, or the fare less; it is obvious, that all the custom must be inevitably withdrawn from the old ferry. And thus, the grantee would be deprived of all the benefit of the franchise, whilst he continued liable to all the burdens imposed upon him."

Language more apposite to the present case could scarcely have been used. And what makes it still stronger is, that the very case before the court was of a new ferry, starting on one side, from the same town, but not at the same place in the town, to a *terminus* on the other side, different from that of the old ferry-house, and more than half a mile from it, and thence by a highway, communicated with the highway which was connected with the old ferry, at a mile distant from the ferry. Now, if the right of the old ferry did not, by implication, extend on either side beyond its local *termini*, no question could have arisen as to the disturbance. *Trotter* v. *Harris*, 2 Younge & Jerv. 285, proceeded upon similar principles; though it did not call for so exact an exposition of them.

It is observable, that in the case of *Huzzey* v. *Field*, the defendant did not claim under any license or grant from the crown; and therefore, it may be supposed in argument, that it does not apply to a case where that is a grant of the new ferry from the crown. But in point of law, there is no difference between the cases. In each case, the new ferry must be treated as a clear disturbance of the rights of the old ferry, or it is not, in either case; for if the first grant does not, by implication, carry an exclusive right above and below its local *termini*, then there can be no pretence, in either

case, for the grantee of the old ferry to complain of the new ferry; for it does not violate his rights under his grant. If the first grant does, by implication, carry an exclusive right above and below its local *termini*, so far as it may be prejudiced or disturbed by a new ferry, then it is equally clear, upon established principles, that the king *cannot, by a new grant, prejudice his former grant; for the law deprives him of any such prerogative. It is true, that where the new ferry is got up without a license from the crown, it may be abated as a nuisance, upon a *quo warranto*, or information by the crown. But this will not confer any right of action on the grantee of the old ferry, unless his own rights have been disturbed.

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I have said, that this is the result of established principles; and the case of the *Islington Market*, recently before the judges of England, upon certain questions submitted to them by the house of lords, is an authority of the most solemn and conclusive nature, upon this identical point of franchise. What gives it still more importance is, that in the last three questions proposed to the judges by the house of lords, the very point as to the power of the king to make a second grant of a market, to the prejudice of his former grant, within the limits of the common law, arose, and was pointedly answered in the negative. On that occasion, the judges said, that while the first grant of a market remains unrepealed, even the default of the grantee of the franchise, in not providing, according to his duty, proper accommodations for the public, cannot operate, in point of law, as a ground for granting a new charter to another, to hold a market, within the common law, which shall really be injurious to the existing market. The judges, after adverting to the usual course of the issuing of a writ of *ad quod damnum*, in cases where a new market is asked for, added: "We do not say, that a writ of *ad quod damnum* is absolutely necessary. But if the crown were to grant a new charter, without a writ of *ad quod damnum*, and it should appear, that the interests of other persons were prejudiced, the crown would be supposed to be deceived, and the grant might be repealed on a *scire facias*." And they cited, with approbation, the doctrine of Lord Coke, in 2 Inst. 406, that "if one held a market, either by prescription or by letters-patent, and another obtains a market, to the nuisance of a former market, he shall not tarry till he have avoided the letters patent of the latter market by course of law, that he may have an assize of nuisance:" thus establishing the doctrine, that there is no difference in point of law, whether the first market be by prescription or by grant; or whether the new market be with, or without, a patent from the crown. In each case, the remedy is the same for the owner of the first market, if the new market is a nuisance to him. The judges also held, that the *circumstance of the benefit of the public requiring a new market would not, of itself, warrant the grant of the new market.

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Mr. Dane, in his Abridgment (2 Dane's Abr. ch. 67, p. 683), lays down the doctrine in terms equally broad and comprehensive, as applicable to America. After having spoken of a ferry, as imposing burdens *publici juris*, he adds, "in this way, a ferry becomes property, an incorporeal hereditament; the owners of which, for the public convenience, being obliged by law to perform certain public services, must, as a reasonable equivalent, be protected in this property." And he cites the case of *Chadwick* v. *Proprietors of the Haverhill Bridge*, as directly in point; that the erection of a

neighboring bridge, under the authority of the legislature, is a nuisance to a ferry. Notwithstanding all the commentary bestowed on that case, to escape from its legal pressure, I am of opinion, that the report of the referees never could have been accepted by the court, or judgment given thereon, if the declaration had not stated a right which, in point of law, was capable of supporting such a judgment. The court seems, from Mr. Dane's statement of the case, clearly to have recognised the title of the plaintiff, if he should prove himself the owner of a ferry. Besides, without disparagement to any other man, Mr. Dane himself (the chairman of the referees), from his great learning and ability, is well entitled to speak with the authority of a commentator of the highest character, upon such a subject.

It is true, that there is the case of *Churchman* v. *Tunstal*, Hardr. 162 where a different doctrine, as to a ferry, was laid down. But that case is repugnant to all former cases, as well as later cases ; and Lord Ch. Baron MACDONALD, in *Attorney-General* v. *Richard*, 2 Anstr. 603, informs us, that it was afterwards overturned. Lord ABINGER, in *Huzzey* v. *Field*, 2 Comp. Mees. & Rosc. 432, goes further, and informs us, that after the bill in that case was dismissed (which was a bill by a farmer of a ferry, as it should seem, under the crown, for an injunction to restrain the defendant, who had lands on both sides of the Thames, three-quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so), another bill was brought, after the restoration, in 1663, and a decree made by Lord HALE in favor of the plaintiff, that the new ferry should be put down. This last determination is exceedingly strong, carrying the implication in regard to the franchise of a ferry, as exclusive of all other ferries *injurious to it, to a very enlarged extent ; and it was made by one of the greatest judges who ever adorned the English bench. [*626

But it has been suggested, that the doctrine as to ferries is confined to ancient ferries by prescription, and does not apply to those where there is a grant which may be shown. In the former case, the exclusive right may be proved by long use, and exclusive use ; in the latter, the terms of the grant show whether it is exclusive or not ; and if not stated to be exclusive, in the grant, it cannot, by implication, be presumed to be exclusive. Now, there is no authority shown for such a distinction ; and it is not sound in itself. If a ferry exists by prescription, nothing more, from the nature of the thing, can be established by long possession, than that the ferry originated in some grant, and that it has local limits, from the ferry-ways on one side to those on the other side. The mere absence of any other near ferry proves nothing, except that there is no competition ; for until there is some interference, by the erection of another ferry, there can be nothing exclusive, above or below the ferry-ways, established by the mere use of the ferry. If such an interference should occur, then the question might arise ; and the long use could establish no more than the rightful possession of the franchise. The question, whether the franchise is exclusive or not, must depend upon the nature of such a franchise at the common law, and the implications belonging to it. In short, it is, in the authorities, taken to be exclusive, unless a contrary presumption arises from the facts, as it did in *Holcroft* v. *Heel*, 1 Bos. & Pul. 400. But Lord COKE, in 2 Inst. 406, lays down the law as equally applicable to all cases of prescription and of grant : "If, says he, one hath a market, either by prescription or by letters-patent

of the king, another obtains a market, to the nuisance of the former market, he shall not tarry till he have avoided the letters-patent of the latter market, by course of law; but he may have an assize of nuisance." The same rule must, for the same reason, apply to fairs and ferries. The case of *Prince* v. *Lewis*, 5 Barn. & Cres. 363, was the case of the grant of a market, and not of a market by prescription; yet no one suggested any distinction on this account. *Holcroft* v. *Heel*, 1 Bos. & Pul. 400, was the case of a grant of a market by letters-patent.

In *Ogden* v. *Gibbons*, 4 Johns. Ch. 150, Mr. Chancellor KENT recognises, in the most ample manner, the general principles of the common law. Speaking of the grant, in the case, of an exclusive right to navigate with steamboats from New York to Elizabethtown Point, *&c., he declared, that *627] the true intent was to include not merely that point, but the whole shore or navigable part of Elizabethtown. "Any narrower construction," said he, "in favor of the grantor, would render the deed a fraud upon the grantee. It would be like granting an exclusive right of ferriage between two given points, and the setting up a rival ferry, within a few rods of those very points, and within the same course of the line of travel. The common law contained principles applicable to this very case, dictated by a sounder judgment, and a more enlightened morality. If one had a ferry by prescription, and another erected a ferry so near to it as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action, &c. The same rule applies, in its spirit and substance, to all exclusive grants and monopolies. The grant must be so construed so as to give it due effect by excluding all contiguous and injurious competition." Language more apposite to the present case could not will be imagined. Here, there is an exclusive grant of a bridge from Charlestown to Boston on the old ferry-ways; must it not also be so construed as to exclude all contiguous and injurious competition? Such an opinion, from such an enlightened judge, is not to be overthrown by general suggestions against making any implications in legislative grants.

The case of the *Newburgh Turnpike Company* v. *Miller*, 5 Johns. Ch. 101, decided by the same learned judge, is still more directly in point; and, so far as his authority can go, conclusively establishes the doctrine, not only that the franchise of a ferry is not confined to the ferry-ways, but that the franchise of a bridge is not confined to the *termini* and local limits of the bridge. In that case, the plaintiffs had erected a toll-bridge over the river Wallkill, in connection with a turnpike, under an act of the legislature; and the defendants afterwards erected another road and bridge near to the former, and thereby diverted the toll from the plaintiffs' bridge. The suit was a bill in chancery, for a perpetual injunction of this nuisance of the plaintiffs' bridge; and it was accordingly, at the hearing granted by the court. Mr. Chancellor KENT, on that occasion, said, "considering the proximity of the new bridge, and the facility that every traveller has, by means of that bridge, and the road connected with it, to shun the plaintiffs' gate, which he would otherwise be obliged to pass, I cannot doubt, for a moment, that the new bridge is a direct and immediate disturbance of the plaintiffs' enjoyment of their privileges," &c. "The new road, by its *termini*, created a competition *most injurious to the statute franchise; and becomes, *628] what is deemed in law, in respect to such franchise, a nuisance." And

after adverting to his own language, already quoted, in *Odgen* v. *Gibbons*, 4 Johns. Ch. 150, 160, he added, "The same doctrine applies to any exclusive privilege created by statute; all such privileges come within the equity and reason of the principle. No rival road, bridge or ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration, by which individuals are invited to expend money upon great, and expensive, and hazardous public works, as roads and bridges; and to become bound to keep them in constant and good repair; is the grant of an exclusive toll. This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful." Now, when the learned chancellor here speaks of an *exclusive* privilege or franchise, he does not allude to any terms in the statute grant, expressly giving such a privilege beyond the local limits; for the statute contained no words to such an effect. The grant, indeed, was, by necessary implication, exclusive, as to the local limits, for the legislature could not grant any other bridge in the same place with the same *termini*. It was to such a grant of a franchise, exclusive in this sense, and in no other, that his language applies. And he affirms the doctrine, in the most positive terms, that such a grant carries with it a necessary right to exclude all injurious competition, as an indispensable incident. And his judgment turned altogether upon this doctrine. It is true, that in this case, the defendants did not erect the new bridge, under any legislative act. But that is not material in regard to the point now under consideration. The point we are now considering is, whether the grant of a franchise to erect a bridge or a ferry, is confined to the local limits or *termini*, to the points and planks of the bridge, or to the ferry-ways of the ferry. The learned chancellor rejects such a doctrine, with the most pointed severity of phrase. "It operates (says he) as a fraud upon the grant, and goes to defeat it." The grant necessarily includes, "a right to an *exclusive* toll." "No rival road, bridge or ferry can be tolerated, so near to the former as to affect or take away its custom." Now, if such be the true construction of the grant of such a franchise, it is just as true a construction in relation to the government, as in relation *to private persons. It would be absurd, to say, that the same grant means one [*629
think as to the public, and an entirely opposite thing in relation to individuals. If the right to an exclusive franchise or toll exists, it exists from the nature and objects of the grant; and applies equally in all directions. It would be repugnant to all notions of common sense, as well as of justice, to say, that the legislature had a right to commit a fraud upon its own grant. The whole reasoning of the learned chancellor repudiates such a notion.

But in what manner is the doctrine to be maintained, that the franchise of a ferry is confined to the ferry-ways, and the franchise of a bridge to the planks? It is said, that in Saville 11, it is laid down, "that a ferry is in respect to the landing-place, and not of the water; which water may belong to one, and the ferry to another." There can be no doubt of this doctrine. A ferry must have local limits. It must have *termini* or landing-places; and it may include only a right of passage over the water. And is not this equally true, whether it be a ferry by prescription, or by grant? If so, can there be any difference as to the value of the exclusive right in

cases of grant, or of prescription? Does not each rest on its landing-places? But it is added, in Saville, "and in every ferry, the land on both sides of the water ought to be (belong) to the owner of the ferry; for otherwise he cannot land upon the other part." Now, if by this is meant, that the owner of the ferry must be the owner of the land, it is not law; for all that is required, is, that he should have a right or easement in the landing-places. So it was adjudged, in *Peter* v. *Kendall*, 6 Barn. & Cres. 703; and the *dictum* of Saville was there overruled. If the same principle is to be applied (as I think it must be) to a bridge, then, as there must be a subsisting right in the proprietors of Charles River bridge to have such landing-places on the old ferry-ways, there must be an assignment or grant implied of those ferry-ways by Harvard College, to the proprietors for that purpose. But of this I shall speak hereafter.

One of the learned judges in the state court (who was against the plaintiffs) admitted, that if any person should be forcibly prevented fram passing over the plaintiffs' bridge, it would be an injury, for which an action on the case would lie. I entirely assent to this doctrine, which appears to me to be founded in the most sound reasoning. It is supported by the case of the *Bailiffs of Tewksbury* v. *Diston*, 6 East 438, and by the authorities cited by Lord Ellenborough *on that occassion; and especially by *630] the doctrine of Mr. Justice Powell, in *Ashby* v. *White*, 2 Ld. Raym. 948; and s. c. 6 Mod. 49. But how can this be, if the franchise of the bridge is confined to the mere local limits or timbers of the bridge? If the right to take toll does not commence or attach in the plaintiffs, except when the passengers arrive on the bridge, how can an action lie for the proprietors for obstructing passengers from coming to the bridge? The remedy of the plaintiffs can only be co-extensive with their rights and franchise. And if an action lies for an obstruction of passengers, because it goes to impair the right of toll, and to prevent its being earned, why does not the diversion of passengers from the bridge by other means, equally give a cause of action, since it goes, equally, nay more, to impair the right of the plaintiffs to toll? If the legislature could not impair or destroy its own grant, by blocking up all avenues to the bridge, how can it possess the right to draw away all the tolls, by a free bridge, which must necessarily withdraw all passengers? For myself, I cannot perceive any ground upon which a right of action is maintainable, for any obstruction of passengers, which does not equally apply to the diversion of passengers. In each case, the injury of the franchise is the same, although the means used are, or may be, different.

The truth is, that the reason why the grant of a franchise, for example, of a ferry or of a bridge, though necessarily local in its limits, is yet deemed to extend beyond those local limits, by operation and intendment of law, is founded upon two great fundamental maxims of law applicable to all grants. One is the doctrine already alluded to, and laid down in *Liford's Case*, in 11 Co. 46, 52 *a*; *lex est cuicunque, aliquis, quod concedit, concedere videtur et id, sine quo res ipsa esse non potuit;* or, as it is expressed with pregnant brevity by Mr. Justice Twisden, in *Pomfret* v. *Ricroft*, 1 Saund. 321, 323, "when the use is granted, everything is granted by which the grantee may have and enjoy the use." See also *Lord Darcy* v. *Askwith*, Hob. 234; 1 Saund. 323, note 6, by Williams; Co. Litt. 56 *a*.

Another is, that wherever a grant is made for a valuable consideration, which involves public duties and charges, the grant shall be construed so as to make the indemnity co-extensive with the burden. *Qui sentit onus, sentire debet et commodum.* In the case of a ferry, there is a public charge and duty. The owner must keep the ferry in good repair, upon the peril of an indictment. He must keep sufficient accommodations for all travellers, *at all reasonable times. He must content himself with a reasonable toll. Such is the *jus publicum.* In return, the law will [*631 exclude all injurious competition, and deem every new ferry a nuisance, which subtracts from him the ordinary custom and toll. See Com. Dig. Piscary, B.; Ibid. Ferry. So strong is the duty of the ferry-owner to the public, that it was held, in *Paine* v. *Patrick*, 3 Mod. 289, 294, that the ferry-owner could not excuse himself from not keeping proper boats, even by showing that he had erected a bridge more convenient for passengers. It would be a fraud upon such a grant of a ferry, to divert the travel, and yet to impose the burden. The right to take toll would, or might, be useless, unless it should be exclusive within all the bounds of injurious rivalship from another ferry. The franchise is, therefore, construed to extend beyond the local limits, and to be exclusive, within a reasonable distance; for the plain reason, that it is indispensable to the fair enjoyment of the franchise and right of toll. The same principle applies, without a shadow of difference that I am able to perceive, to the case of a bridge; for the duties are *publici juris*, and pontage and passage are but different names for exclusive toll for transportation.

In the argument at the present term, it has been further contended, that at all events, in the state of Massachusetts, the ancient doctrine of the common law in relation to ferries is not in force, and never has been recognised; that all ferries in Massachusetts are held at the mere will of the legislature, and may be established by them and annihilated by them at pleasure; and of course, that the grantees hold them *durante bene placito* of the legislature. And in confirmation of this view of the subject, certain proceedings of the colonial legislature have been relied on, and especially those stated in the record, between the years 1629 and 1650; to the colonial act of 1641, against monopolies (which is, in substance, like the statute of monopolies of the 21 James I., c. 3); and to the general colonial and provincial and state statutes, regulating ferries, passed in 1641, 1644, 1646, 1647, 1695, 1696, 1710, 1719, 1781 and 1787; some of which contain special provisions respecting Charlestown and Boston ferry.

As to the proceedings of the colonial government, so referred to, in my judgment, they establish no such conclusion. But some of them, at least, are directly opposed to it. Thus, for example, in 1638, a ferry was granted to Garret Spencer, at Lynn, for two years. In 1641, it was ordered, that they that put two boats between *Cape Ann and Annisquam, shall [*632 have liberty to take sufficient toll, as the court shall think fit, for one-and-twenty years. Could the colonial government have repealed these grants, within the terms specified, at their pleasure? In 1648, John Glover had power given him to let a ferry over Neponset river, between Dorchester and Braintree, to any person or persons, for the term of seven years, &c.; or else to take it to himself and his heirs, as his inheritance for ever; provided it be kept in such a place, and at such a price, as may be most con-

venient for the country, and pleasant to the general court. Now, if Glover, according to this act, had taken this ferry to him and his heirs, as an inheritance, could the colonial legislature have revoked it, at its pleasure? Or rather, can it be presumed, that the colonial legislature intended such a ferry, confessedly an inheritance, to be an estate held only at will? It would be repugnant to all notions of legal interpretation.

In 1637, the general court ordered the ferry between Boston and Charlestown to be let for three years. It was, afterwards, in 1640, granted to Harvard College. From that time, down to 1785, it was always held and claimed by the college, as its inheritance. But the college never supposed, that it was not subject to the regulation of the legislature, so far as the public interests were concerned. The acts of 1650, 1654, 1694, 1696, 1710 and 1781, establish this. But they show no more. That many of the ferries in Massachusetts were held, and perhaps were always held, under mere temporary licenses of the legislature, or of certain magistrates to whom they were intrusted, is not denied. But it is as clear, that there were other ferries, held under more permanent tenures. The colonial act of 1644, authorized magistrates to pass ferries toll free, except such ferries as are appropriated to any, or rented out, and are out of the country's hands; and then it is "ordered, that their passages be paid by the country." The act of 1694 excepts from its operation, "such ferries as are already stated and settled, either by the court, or town to whom they appertain." The colonial act of 1670, as an inducement to the town of Cambridge, or other persons, to repair the bridge at Cambridge, or to erect a new one, declared, "that this order (granting certain tolls) should continue in force, so long a time as the said bridge is maintained serviceable and safe for passage." So that it is plain, that the colonial legislature did contemplate both ferries and bridges to be held by permanent tenures, and not to be revocable at pleasure.

*633] *But to all the general laws respecting ferries, one answer may be given, that their provisions are generally confined to the due regulation of public ferries, and matters *publici juris;* and so far as the public have rights which ought to be conforced and protected, and which the legislature had a proper right to enforce and protect by suitable laws. And in regard to matters not strictly of this nature, the enactments may well apply to all such ferries within the state as were held under the mere temporary license of the state, and were revocable and controllable at pleasure by the legislature, in which predicament a very large number of ferries in the state were; and also to those ferries (among which Charlestown ferry seems to have been) over which a modified legislative control had been, at their original establishment, reserved. Beyond these results, I am not prepared to admit, that these statutes either had, or ever were supposed to have, any legitimate operation. And before I should admit such a conclusion, I should require the evidence of some solemn judgment of a court of justice, in Massachusetts, to the very point.

But the argument presses the doctrine to an extent which it is impossible can be correct, if any principles respecting vested rights exist, or have any recognition, in a free government. What is it? That all ferries in Massachusetts are revocable and extinguishable at pleasure. Suppose, then, the legislature of Massachusetts, for a valuable consideration, should grant a ferry from A. to B., to a grantee and his heirs, or to a grantee, for forty

years, or for life; will it be contended, that the legislature can take away, revoke or annihilate that grant, within the period? That it may make such a grant, cannot well be denied; for there is no prohibition touching it in the constitution of Massachusetts. That it can take away or resume such a grant, has never yet been held by any judicial tribunal in that state. The contrary is as well established, as to all sorts of grants, unless an express power be reserved for the purpose, as any principle in its jurisprudence. In the very case now before this court, every judge of the supreme court of the state admitted, that the legislature could not resume or revoke its charter to Charles River bridge. Why not, if it could revoke its solemn grant of a ferry to a private person, or to a corporation, during the stipulated period of the grant? The legislature might just as well resume its grant of the public land, or the grant of a turnpike, or of a railroad, or of any other franchise, within the period stipulated by its charter.

The doctrine then is untenable. The moment that you ascertain [*634
*what the terms and stipulations of a grant of a ferry, or any other franchise, are, that moment they are obligatory. They cannot be gainsaid or resumed. So this court has said, in the case of *Fletcher* v. *Peck*, 6 Cranch 87; and so are the unequivocable principles of justice, which cannot be overturned, without shaking every free government to its very foundations. If, then, the ferry between Charlestown and Boston was vested, in perpetuity, in the corporation of Harvard College, it could not be taken away, without its consent, by the legislature. It was a ferry, so far withdrawn from the power of any legislation trenching on its rights and franchises. It is assuming the very point in controversy, to say, that the ferry was held at the mere pleasure of the legislature. An exclusive claim, and possession and *user*, and taking of the profits thereof, for 150 years, by the corporation of Harvard College, without interruption, was as decisive evidence of its exclusive right to the franchise in perpetuity, as the title deed of any man to his own estate. The legislature of Massachusetts has never, so far as I know, breathed a doubt on the point. All the judges of the state court admit the exclusive right of Harvard College to the ferry, in the most unequivocal terms. The argument, then, that the English doctrine as to ferries has not been adopted, and is not in force in Massachusetts, is not supported. For myself, I can only say, that I have always understood that the English doctrine on this subject constitutes a part of the common law of Massachusetts. But what is most material to be stated, not one of the learned judges in the state court doubted or denied the doctrine, though it was brought directly before them; and they gave, *seriatim*, opinions containing great diversities of judgment on other points.(*a*) It is also fully established by the case of *Chadwick* v. *Proprietors of Haverhill Bridge*, already cited.

But it is urged, that some local limits must be assigned to such grants, and the court must assign them, for otherwise they would involve the absurdity of being co-extensive with the range of the river; for every other bridge or ferry must involve some diminution of toll; and how much (it is asked) is necessary to constitute an infringement of the right? I have already given an answer, in part, to this suggestion. The rule of law is clear. The application of it must depend upon the particular circumstances

(*a*) See 7 Pick. 344.

of each case. Wherever *any other bridge or ferry is so near, that it injures the franchise, or diminishes the toll, in a positive and essential decree, there it is a nuisance, and is actionable. It invades the franchise, and ought to be abated. But whether there be such an injury or not, is a matter, not of law, but of fact. Distance is no otherwise important than as it bears on the question of fact. All that is required, is, that there should be a sensible, positive injury. In the present case, there is no room to doubt upon this point, for the bridges are contiguous; and Warren bridge, after it was opened, took away three-fourths of the profits of the travel from Charles River bridge; and when it became free (as it now is), it necessarily took away all the tolls, or all except an unimportant and trivial amount.

What I have said, however, is to be understood with this qualification, that the franchise of the bridge has no assigned local limits; but it is a simple grant of the right to erect a bridge across a river, from one point to another, without being limited between any particular *villes* or towns, or by other local limits. In the case now before the court, I have already stated, that my judgment is, that the franchise is merely to erect a bridge between Charlestown and Boston; and therefore, it does not, necessarily, exclude the legislature from making any other grant, for the erecting of a bridge between Boston and any other town. The exclusive right being between those towns, it only precludes another legislative grant between those towns, which is injurious to Charles River bridge. The case of *Tripp* v. *Frank*, 4 T. R. 666, is a clear authority for this doctrine. It was there decided, that the grant of an exclusive ferry between A. and B., did not exclude a ferry between A. and C. But the argument of the plaintiff's counsel was tacitly admitted by the court, that "ferries, in general, must have some considerable extent, upon which their right may operate; otherwise, the exclusive privilege would be of no avail; that extent must be governed by local circumstances." And there is the greatest reason for supporting such rights, because the owners of ferries are bound, at their peril, to supply them to the public use; and are, therefore, fairly entitled to the public advantage arising from them.

But it is said, if this is the law, what then is to become of turnpikes and canals? Is the legislature precluded from authorizing new turnpikes or new canals, simply because they cross the path of the old ones, and incidentally diminish their receipt of tolls? The answer is plain. Every turnpike has its local limits and local *termini;* its points of beginning and of end. No one ever imagined, that the *legislature might grant a new turnpike, with exactly the same location and *termini.* That would be to rescind its first grant. The grant of a turnpike between A. and B., does not preclude the legislature from the grant of a turnpike between A. and C., even though it should incidentally intercept some of the travel; for it is not necessarily a nuisance to the former grant. The *termini* being different, the grants are or may be substantially different. But if the legislature should grant a second turnpike, substantially taking away the whole travel from the first turnpike, between the same local points; then, I say, it is a violation of the rights of the first turnpike. And the opinion of Mr. Chancellor KENT, and all the old authorities on the subject of ferries, support me in the doctrine.

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Some reliance has been placed upon the cases of *Prince* v. *Lewis*, 5 Barn. & Cres. 363, and *Mosley* v. *Walker*, 7 Ibid. 40, as impugning the reasoning. But it appears to me, that they rather fortify than shake it. In the former case, the king granted a market to A. and his heirs, in a place within certain specified limits, and the grantee used part of the limits for other purposes, and space enough was not ordinarily left for the marketing. It was held, that the owner of the market could not maintain an action against a person for selling marketable goods in the neighborhood, without showing that, at the time of the sale, there was room enough in the market for the seller. This clearly admits the exclusive right of the owner, if there is room enough in the market. The other case affirms the same principle, as, indeed, it was before affirmed, in *Mosley* v. *Chadwick*, 7 Barn. & Cres. 47, note.

But then again, it is said, that all this rests upon implication, and not upon the words of the charter. I admit, that it does; but I again say, that the implication is natural and necessary. It is indispensable to the proper effect of the grant. The franchise cannot subsist without it, at least, for any valuable or practical purpose. What objection can there be to implications, if they arise from the very nature and objects of the grant? If it be indispensable to the full enjoyment of the right to take toll, that it should be exclusive within certain limits, is it not just and reasonable, that it should be so construed? If the legislative power to errect a new bridge would annihilate a franchise already granted, is it not, unless expressly reserved, necessarily excluded, by intendment of law? Can any reservations be raised by mere implication, to defeat the operation of a grant, especially, when such a reservation would be co-extensive with the whole *right granted, and amount to the reservation of a right to recall the whole grant. [*637

Besides, in this very case, it is admitted on all sides, that from the defective language and wording of the charter, no power is directly given to the proprietors to erect the bridge; and yet it is agreed, that the power passes by necessary implication from the grant, for otherwise it would be utterly void. The argument, therefore, surrenders the point as to the propriety of making implications; and reduces the question to the mere consideration of what is a necessary implication. Now, I would willingly put the whole case upon this point, whether it is not as indispensable to the fair and full operation of the grant, that the plaintiffs should be secure in the full enjoyment of their right to tolls, without disturbance or diversion; as that they should have the power to erect the bridge. If the tolls may be all swept away, by a contiguous free bridge, erected the next day, can it be said, in any sense, that the object of the franchise is obtained? What does the sound logic of the common law teach us on this point? If a grant, even of the crown, admits of two constructions, one of which will defeat, and the other will promote and secure, the fair operation of the grant; the latter is to be followed.

The truth is, that the whole argument of the defendants turns upon an implied reservation of power in the legislature to defeat and destroy its own grant. The grant, construed upon its own terms, upon the plain principles of construction of the common law, by which alone it ought to be judged, is an exclusive grant. It is the grant of a franchise, *publici juris*, with a

right of tolls ; and in all such cases, the common law asserts the grant to be exclusive, so as to prevent injurious competition. The argument seeks to exclude the common law from touching the grant, by implying an exception in favor of the legislative authority to make any new grant. And let us change the position of the question as often as we may, it comes to this, as a necessary result—that the legislature has reserved the power to destroy its own grant, and annihilate the right of pontage of the Charles River bridge. If it stops short of this exercise of its power, it is its own choice, and not its duty. Now, I maintain, that such a reservation is equivalent to a power to resume the grant ; and yet it has never been for a moment contended, that the legislature was competent to resume it.

To the answer already given to the objection, that, unless such a reservation of power exists, there will be a stop put to the progress *of all
*638] public improvements ; I wish, in this connection, to add, that there never can any such consequence follow upon the opposite doctrine. If the public exigencies and interests require that the franchise of Charles River bridge should be taken away, or impaired, it may be lawfully done, upon making due compensation to the proprietors. " Whenever," says the constitution of Massachusetts, " the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor ;" and this franchise is property—is fixed determinate property. We have been told, indeed, that where the damage is merely *consequential* (as, by the erection of a new bridge, it is said that it would be), the constitution does not entitle the party to compensation ; and *Thruston* v. *Hancock*, 12 Mass. 220, and *Callender* v. *Marsh*, 1 Pick. 418, are cited in support of the doctrine. With all possible respect for the opinions of others, I confess myself to be among those who never could comprehend the law of either of those cases ; and I humbly continue to doubt, if, upon principle or authority, they are easily maintainable ; and I think my doubts fortified by the recent English decisions. But, assuming these cases to be unquestionable, they do not apply to a case like the prevent, if the erection of such a new bridge is a violation of the plaintiffs' franchise. That franchise, so far as it reaches, is private property ; and so far as it is injured, it is the taking away of private property. Suppose, a man is the owner of a mill, and the legislature authorizes a diversion of the water-course which supplies it, whereby the mill is injured or ruined ; are we to be told, that this is a consequential injury, and not within the scope of the constitution ? If not within the scope of the constitution, it is, according to the fundamental principles of a free government, a violation of private rights, which cannot be taken away, without compensation. The case of *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 139, would be a sufficient authority to sustain this reasoning ; if it did not stand upon the eternal principles of justice, recognised by every government which is not a pure despotism.

Not a shadow of authority has been introduced, to establish the position of the defendants, that the franchise of a toll-bridge is confined to the planks of the bridge ; and yet it seems to me, that the *onus probandi* is on them ; for all the analogies of the common law are against them. They are driven,
*639] indeed, to contend, that the same principles apply to ferries, which are limited to the ferry-ways, *unless some prescription has given

them a more extensive range. But here, unless I am entirely mistaken, they have failed to establish their position; as I understand the authorities, they are, unequivocally, the other way. Are we then to desert the wholesome principles of the common law, the bulwark of our public liberties, and the protecting shield of our private property, and assume a doctrine, which substantially annihilates the security of all franchises affected with public easements?

But it is said, that if the doctrine contended for be not true, then every grant to a corporation becomes, *ipso facto*, a monopoly or exclusive privilege. The grant of a bank, or of an insurance company, or of a manufacturing company, becomes a monopoly, and excludes all injurious competition. With the greatest deference and respect for those who press such an argument, I cannot but express my surprise that it should be urged. As long ago as the case in the Year Book, 22 Hen. VI. 14, the difference was pointed out in argument, between such grants as involve public duties and public matters for the common benefit of the people, and such as are for mere private benefit, involving no such consideration. If a bank, or insurance company, or manufacturing company, is established in any town, by an act of incorporation; no one ever imagined that the corporation was bound to do business, to employ its capital, to manufacture goods, to make insurance. The privilege is a mere private corporate privilege, for the benefit of the stockholders, to be used or not, at their own pleasure; to operate when they please; and to stop when they please. Did any man ever imagine, that he had a right to have a note discounted by a bank, or a policy underwritten by an insurance company? Such grants are always deemed *privati juris*. No indictment lies for a *non-user*. But in cases of ferries and bridges, and other franchises of a like nature (as has been shown), they are affected with a *jus publicum*. Such grants are made for the public accommodation; and pontage and passage are authorized to be levied upon travellers (which can only be by public authority); and in return, the proprietors are bound to keep up all suitable accommodations for travellers, under the penalty of indictment for their neglect.

The tolls are deemed an equivalent for the burden, and are deemed exclusive, because they might not otherwise afford any just indemnity. In the very case at bar, the proprietors of Charles River bridge (as we have seen) are compellable to keep their draws and *bridge in good repair, during the period of seventy years; to pay an annuity to Harvard [*640 College; to give all reasonable accommodations to the public travel; and if they do not, they may be grievously amerced. The burdens being exclusively on them, must not the tolls granted by way of remuneration (I repeat it); must they not be equally exclusive, to insure an indemnity? Is there any analogy in such a case, to the case of a bank, or an insurance company, or a manufacturing company? The case of *Jackson* v. *Lamphire*, 3 Pet. 280, contains no doctrine which, in the slighest degree, interferes with that which I have been endeavoring to establish in the present case. In that decision, I believe that I concurred; and I see no reason now to call in question the soundness of that decision. That case does not pretend to inculcate the doctrine, that no implication can be made, as to matters of contract, beyond the express terms of a grant. If it did, it would be in direct conflict with other most profoundly considered adjudications of this court. It

asserted only, that the grant in that case carried no implication that the grantee should enjoy the land therein granted, free from any legislative regulations to be made, in violation of the constitution of the state. Such an implication, so broad and so unmeasured, which might extend far beyond any acts which could be held, in any just sense, to revoke or impair the grant, could, by no fit reasoning, be deduced from the nature of the grant. What said the court on that occasion? "The only contract made by the state, is a grant to J. C., his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land; and we do not, in this case, feel at liberty to create one by implication. The state has not, by this act, impaired the force of the grant. It does not profess or attempt to take the land from the assigns of C., and give it to one not claiming under him. Neither does the award produce that effect. The grant remains in full force; the property conveyed is held by the grantee; and the state asserts no claim to it." But suppose, the reverse had been the fact. Suppose, that the state had taken away the land, and granted it to another; or asserted its own right otherwise to impair the grant; does it not follow, from this very reasoning of the court, that it would have been held to have violated the implied obligations of the grant? Certainly, it must have been so held, or the court would have overturned its own most solemn judgments in other cases. Now, there is not, and cannot be, any real distinction between a grant of land *and a grant of franchises. The implication, in each case, must be the same, viz., that the thing granted shall not be resumed or impaired by the grantor.

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It has been further argued, that even if the charter of the Charles River bridge does imply such a contract on the part of the legislature, as is contended for, it is void for want of authority in the legislature to make it; because it is a surrender of the right of eminent domain, intrusted to the legislature and its successors, for the benefit of the public, which is not at liberty to alienate. If the argument means no more, than that the legislature, being intrusted with the power to grant franchises, cannot, by contract, agree to surrender or part with this power, generally, it would be unnecessary to consider the argument; for no one supposes that the legislature can rightfully surrender its legislative power. If the argument means no more, than that the legislature, having the right, by the constitution, to take private property (among which property are franchises) for public purposes, cannot divest itself of such a right, by contract, there would be as little reason to contest it. Neither of these cases is like that before the court. But the argument (if I do not misunderstand it) goes further, and denies the right of the legislature to make a contract granting the exclusive right to build a bridge between Charlestown and Boston, and thereby taking from itself the right to grant another bridge between Charlestown and Boston, at its pleasure; although the contract does not exclude the legislature from taking it for public use, upon making actual compensation; because it trenches upon the sovereign right of eminent domain.

It is unnecessary to consider, whether the phrase "eminent domain," in the sense in which it is used in the objection, is quite accurate. The right of eminent domain is usually understood to be the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes.

Vattel (b. 1, c. 20, § 244) seems so to have understood the terms; for he says, that the right, which belongs to the society, or the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth (the property) contained in the state, is called the "eminent domain." And he adds, that it is placed among the prerogatives of majesty; which, in another section (b. 1, c. 4, § 45), he defines to be, "all the prerogatives without which the sovereign command, or authority, *could not be exerted in the manner most conducive to the public welfare." The right of "eminent domain," then, does not comprehend all, but only is among the prerogatives of majesty. But the objection uses the words in a broader sense, as including what may be deemed the essential and ordinary attributes of sovereignty; such as the right to provide for the public welfare, to open highways, to build bridges, and, from time to time, to make grants of franchises for the public good. Without doubt, these are proper attributes of sovereignty, and prerogatives resulting from its general nature and functions. And so Vattel considers them in the passage cited at the bar: b. 1, c. 9, § 100–1. But they are attributes and prerogatives of sovereignty only, and can be exercised only by itself, unless specially delegated. [*642

But, without stopping to examine into the true meaning of phrases, it may be proper to say, that however extensive the prerogatives and attributes of sovereignty may theoretically be, in free governments, they are universally held to be restrained within some limits. Although the sovereign power in free governments may appropriate all the property, public as well as well as private, for public purposes, making compensation therefor; yet it has never been understood, at least, never in our republic, that the sovereign power can take the private property of A. and give it to B., by the right of "eminent domain;" or, that it can take it at all, except for public purposes; or, that it can take it for public purposes, without the duty and responsibility of making compensation for the sacrifice of the private property of one, for the good of the whole. These limitations have been held to be fundamental axioms in free governments like ours; and have accordingly received the sanction of some of our most eminent judges and jurists. Vattel himself lays them down, in discussing the question of the right of eminent domain, as among the fundamental principles of government, binding even upon the sovereignty itself. "If," says he, "the nation itself disposes of the public property, in virtue of this eminent domain, the alienation is valid, as having been made with a sufficient power. When it disposes, in like manner, in a case of necessity, of the possessions (the property) of a community, or of an individual, the alienation will be valid, for the same reason. But justice demands, that this community or this individual be recompensed out of the public money; and if the treasury is not able to pay, all the citizens are obliged to contribute to it." *Vatt. b. 1, c. 20, § 244. They have also been incorporated into most of our state constitututions, and into that of the United States; and, what is most important to the present argument, into the state constitution of Massachusetts. So long as they remain in those constitutions, they must be treated as limitations imposed by the sovereign authority upon itself; and *à fortiori*, upon all its delegated agents. The legislature of Massachusetts is, in no just sense, sovereign. It is but the agent, with limited authority, of the state sovereignty; and it cannot rightfully transcend the bounds [*643

fixed in the constitution. What those limits are, I shall presently consider. It is but justice to the argument, to say, that I do not understand it to maintain, that the legislature ought not, in all cases, as a matter of duty, to give compensation, where private property or franchises are taken away. But that the legislature is the final judge as to the time, the manner and the circumstances, under which it should be given or withheld; whether when the property is taken, or afterwards; and whether it is, or is not, a case for compensation at all.

But let us see what the argument is, in relation to sovereignty in general. It admits, that the sovereign power has, among its prerogatives, the right to make grants, to build bridges, to erect ferries, to lay out highways; and to create franchises for public and private purposes. If it has a right to make such grants, it follows, that the grantees have a right to take, and to hold, these franchises. It would be a solecism, to declare that the sovereign power could grant, and yet no one could have a right to take. If it may grant such franchises, it may define and limit the nature and extent of such franchises; for, as the power is general, the limitations must depend upon the good pleasure and discretion of the sovereign power in making the particular grant. If it may prescribe the limits, it may contract that these limits shall not be invaded by itself or by others.

It follows, from this view of the subject, that if the sovereign power grants any franchise, it is good and irrevocable, within the limits granted, whatever they may be; or else, in every case, the grant will be held only during pleasure; and the identical franchise may be granted to any other person, or may be revoked at the will of the sovereign. This latter doctrine is not pretended; and, indeed, is unmaintainable in our systems of free government. If, on the other hand, the argument be sound, that the sovereign power cannot grant a franchise, to be exclusive within certain limits, and cannot contract *not to grant the same, or any like franchise, within the same limits, to the prejudice of the first grant, because it would abridge the sovereign power in the exercise of its right to grant franchises; the argument applies equally to all grants of franchises, whether they are broad or narrow: for, *pro tanto*, they do abridge the exercise of the sovereign power to grant the same franchise within the same limits. Thus, for example, if the sovereign power should expressly grant an exclusive right to build a bridge over navigable waters, between the towns of A. and B., and should expressly contract with the grantees, that no other bridge should be built between the same towns; the grant would, upon the principles of the argument, be equally void in regard to the franchise, within the planks of the bridge, as it would be in regard to the franchise, outside of the planks of the bridge; for, in each case, it would, *pro tanto*, abridge or surrender the right of the sovereign to grant a new bridge within the local limits. I am aware, that the argument is not pressed to this extent; but it seems to me a necessary consequence flowing from it. The grant of the franchise of a bridge, twenty feet wide, to be exclusive within those limits, is certainly, if obligatory, an abridgment or surrender of the sovereign power to grant another bridge within the same limits; if we mean to say, that every grant that diminishes the things upon which that power can rightfully act, is such an abridgment. Yet the argument admits, that within the limits and planks of the bridge itself, the grant is exclusive; and cannot be recalled. There is no doubt,

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that there is a necessary exception in every such grant, that if it is wanted for public use, it may be taken by the sovereign power for such use, upon making compensation. Such a taking is not a violation of the contract; but it is strictly an exception, resulting from the nature and attributes of sovereignty; implied from the very terms, or at least, acting upon the subject-matter of the grant, *suo jure*.

But the legislature of Massachusetts is, as I have already said, in no just sense, the sovereign of the state. The sovereignty belongs to the people of the state, in their original character as an independent community; and the legislature possesses those attributes of soverignty, and those only, which have been delegated to it by the people of the state, under its constitution. There is no doubt, that among the powers so delegated to the legislature, is the power to grant the franchises of bridges and ferries, and others of a like nature. The power to grant is not limited by *any restrictive terms in the constitution; and it is, of course, general and unlimited, [*645 as to the terms, the manner, and the extent of granting franchises. These are matters resting in its sound discretion; and having the right to grant, its grantees have a right to hold, according to the terms of their grant, and to the extent of the exclusive privileges conferred thereby. This is the necessary result of the general authority, upon the principles already stated.

But this doctrine does not stand upon general reasoning alone. It is directly and positively affirmed by all the judges of the state court (the true and rightful expositors of the state constitution), in this very case. All of them admit, that the grant of an exclusive franchise of this sort, made by the legislature, is absolutely obligatory upon the legislature, and cannot be revoked or resumed; and that it is a part of the contract, implied in the grant, that it shall not be revoked or resumed; and that, as a contract, it is valid to the extent of the exclusive franchise granted. So that the highest tribunal in the state which is entitled to pass judgment on this very point, has decided against the soundness of the very objection now stated; and has affirmed the validity and obligation of such a grant of the franchise. The question, among the learned judges, was not, whether the grant was valid or not; for all of them admitted it to be good and irrevocable. But the question was, what was, in legal construction, the nature and extent of the exclusive franchise granted. This is not all. Although the legislature have an unlimited power to grant franchises, by the constitution of Massachusetts; they are not intrusted with any general sovereign power to recall or resume them. On the contrary, there is an express prohibition in the bill of rights, in that constitution, restraining the legislature from taking any private property, except upon two conditions; first, that it is wanted for public use; and secondly, that due compensation is made. So that the power to grant franchises, which are confessedly property, is general; while the power to impair the obligation of the grant, and to resume the property, is limited. An act of the legislature transcending these bounds, is utterly void; and so it has been constantly held by the state judges. The same doctrine has been maintained by this court, on various occasions; and especially, in *Fletcher* v. *Peck*, 6 Cranch 146; and in *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518.

Another answer to the argument has been, in fact, already given. It is, that by the grant of a particular franchise, the legislature does *not [*646 surrender its power to grant franchises, but merely parts with its

power to grant the same franchise ; for it cannot grant that which it has already parted with. Its power remains the same ; but the thing on which it can alone operate, is disposed of. It may, indeed, take it again for public uses, paying a compensation. But it cannot resume it, or grant it to another person, under any other circumstances, or for any other purposes. In truth, however, the argument itself proceeds upon a ground which the court cannot act upon or sustain. The argument is, that if the state legislature makes a grant of a franchise exclusive, and contracts that it shall remain exclusive, within certain local limits, it is an excess of power, and void as an abridgment or surrender of the right of sovereignty, under the state constitution. But this is a point over which this court has no jurisdiction. We have no right to inquire, in this case, whether a state law is repugnant to its own constitution ; but only whether it is repugnant to the constitution of the United States. If the contract has been made, we are to say, whether its obligation has been impaired ; and not to ascertain whether the legislature could rightfully make it. Such was the doctrine of this court in the case of *Jackson* v. *Lamphire*, already cited. 3 Pet. 280–9. But the conclusive answer is, that the state judges have already settled that point, and held the present grant a contract ; to be valid to the extent of the exclusive limits of the grant, whatever they are.

To sum up, then, the whole argument on this head : I maintain, that, upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication, that the legislature shall do no act to destroy or essentially to impair the franchise ; that (as one of the learned judges of the state court expressed it) there is an implied agreement that the state will not grant another bridge between Boston and Charlestown, so near as to draw away the custom from the old one ; and (as another learned judge expressed it) that there is an implied agreement of the state to grant the undisturbed use of the bridge and its tolls, so far as respects any acts of its own, or of any persons acting under its authority. In other words, the state impliedly contracts not to resume its grant, or to do any act to the prejudice or destruction of its grant. I maintain, that there is no authority or principle established in relation to the construction of crown grants, or legislative grants, which does not concede and justify this doctrine. Where the thing is given, *the incidents, without *647] which it cannot be enjoyed, are also given ; *ut res magis valeat quam pereat.* I maintain, that a different doctrine is utterly repugnant to all the principles of the common law, applicable to all franchises of a like nature ; and that we must overturn some of the best securities of the rights of property, before it can be established. I maintain, that the common law is the birthright of every citizen of Massachusetts, and that he holds the title deeds of his property, corporeal and incorporeal, under it. I maintain, that under the principles of the common law, there exists no more right in the legislature of Massachusetts, to erect the Warren bridge, to the ruin of the franchise of the Charles River bridge, than exists to transfer the latter to the former, or to authorize the former to demolish the latter. If the legislature does not mean in its grant to give any exclusive rights, let it say so, expressly, directly, and in terms admitting of no misconstruction. The grantees will then take at their peril, and must abide the results of their overweening confidence, indiscretion and zeal.

My judgment is formed upon the terms of the grant, its nature and objects, its designs and duties; and, in its interpretation, I seek for no new principles, but I apply such as are as old as the very rudiments of the common law.

But if I could persuade myself that this view of the case were not conclusive upon the only question before this court, I should rely upon another ground, which, in my humble judgment, is equally decisive in favor of the plaintiffs. I hold, that the plaintiffs are the equitable assignees (during the period of their ownership of the bridge) of the old ferry, belonging to Harvard College, between Charlestown and Boston, for a valuable consideration; and as such assignees, they are entitled to an exclusive right to the ferry, so as to exclude any new bridge from being erected between those places, during that period. If Charles River bridge did not exist, the erection of Warren bridge would be a nuisance to that ferry, and would, in fact, ruin it. It would be exactly the case of *Chadwick* v. *Proprietors of the Haverhill Bridge;* which, notwithstanding all I have heard to the contrary, I deem of the very highest authority. But, independently of that case, I should arrive at the same conclusion, upon general principles. The general rights and duties of the owners of the ferries, at the common law, were not disputed by any of the learned judges in the state court, to be precisely the same in Massachusetts, as in England. I shall not, therefore, attempt to go over *that ground, with any further illustrations than what have already, in another part of this opinion, been suggested. [*648
I cannot accede to the argument, that the ferry was extinguished by operation of law, by the grant of the bridge, and the acceptance of the annuity. In my judgment, it was indispensable to the existence of the bridge, as to its *termini*, that the ferry should be deemed to be still a subsisting franchise; for otherwise, the right of landing on each side would be gone. I shall not attempt to go over the reasoning, by which I shall maintain this opinion; as it is examined with great clearness and ability by Mr. Justice PUTNAM, in his opinion in the state court, to which I gladly refer, as expressing mainly all my own views on this topic. Indeed, there is, in the whole of that opinion, such masculine vigor, such a soundness and depth of learning, such a forcible style of argumentation and illustration, that in every step of my own progress, I have sedulously availed myself of his enlightened labors. For myself, I can only say, that I have as yet heard no answer to his reasoning; and my belief is, that in a judicial sense, it is unanswerable.

Before I close, it is proper to notice, and I shall do it briefly, another argument strongly pressed at the bar against the plaintiffs; and that is, that the extension of the term of the franchise of the plaintiffs for thirty years, by the act of 1792 (erecting the West Boston bridge, between Boston and Cambridge), and the acceptance thereof by the plaintiffs, amounted to a surrender or extinguishment of their exclusive franchise, if they ever had any, to build bridges over Charles river; so that they are barred from now setting it up against the Warren bridge. In my judgment, there is no foundation whatsoever, either in law, or in the facts, to sustain this objection. If any legitimate conclusion be deducible from the terms of that act, it is, that the plaintiffs, if they had claimed any such exclusive right over the whole river, would, by their acceptance of the new term of years, have been

estopped to claim any damages done to their franchise by the erection of West Boston bridge; and that their consent must be implied to its erection. But there is no warrant for the objection, in any part of the language of the act. The extension of the term is not granted upon any condition whatsoever. No surrender of any right is asked, or required. The clause extending the term, purports, in its face, to be a mere donation or bounty of the legislature, founded on motives of public liberality and policy. It is granted expressly as an encouragement to enterprise, and as a compensation
*649] *for the supposed diminution of tolls, which West Boston bridge would occasion to Charles River bridge; and in no manner suggests any sacrifice or surrender of right whatsoever, to be made by the plaintiffs. In the next place, the erection of West Boston bridge was no invasion, whatsoever, of the franchise of the plaintiffs. Their right, as I have endeavored to show, was limited to a bridge, and the travel between Charlestown and Boston; and did not extend beyond those towns. West Boston bridge was between Boston and Cambridge, at the distance of more than a mile by water, and by land of nearly three miles; and as the roads then ran, the line of travel for West Boston bridge would scarcely ever, perhaps never, approach nearer than that distance to Charles River bridge. The grant, therefore, could not have been founded in any notion of any surrender or extinguishment of the exclusive franchise of the plaintiffs; for it did not reach to such an extent; it did not reach Cambridge, and never had reached it.

As to the report of the committee, on the basis of which the West Boston bridge was granted, it has, in my judgment, no legal bearing on the question. The committee say, that they are of opinion, that the act of 1785 did not confer "an exclusive grant of the right to build over the waters of Charles river." That is true; and it is equally true, that the plaintiffs never asserted, or pretended to have, any such right. In their remonstrance against the erection of West Boston bridge, they assert no such right; but they put themselves upon mere equitable considerations, addressing themselves to the sound discretion of the legislature. If they had asserted such a broad right, it would not justify any conclusion, that they were called upon to surrender, or did surrender, their real and unquestionable rights. The legislature understood itself to be granting a boon; and not making a bargain or asking a favor. It was liberal, because it meant to be just, in a case of acknowledged hazard, and of honorable enterprise, very beneficial to the public. To suppose, that the plaintiffs meant to surrender their present valuable and exclusive right of franchise for thirty-four remaining years, and to put it in the power of the legislature, the next day, or the next year, to erect a bridge, toll or free, which by its contiguity should ruin theirs, or take away all their profits; is a supposition, in my judgment, truly extravagant, and without a *scintilla* of evidence to support it. The burdens of maintaining the bridge were to remain; the payment of the annuity to Harvard College was to remain:
*650] and yet, upon this *supposition, the extension of the term of their charter, granted in the shape of a bounty, would amount to a right to destroy the franchise the next day, or the next hour, at the pleasure of the legislature. I cannot perceive, upon what ground such an implication can be made; an implication, not arising from any words or intent expressed on the face of the act, or fairly inferrible from its purposes; and wholly

repugnant to the avowed objects of the grant, which are to confer a benefit, and not to impose an oppressive burden, or create a ruinous competition.

Upon the whole, my judgment is, that the act of the legislature of Massachusetts granting the charter of Warren Bridge, is an act impairing the obligation of the prior contract and grant to the proprietors of Charles River bridge; and, by the constitution of the United States, it is, therefore, utterly void. I am for reversing the decree to the state court (dismissing the bill); and for remanding the cause to the state court for further proceedings, as to law and justice shall appertain.

THOMPSON, Justice.—The opinion delivered by my brother, Mr. Justice STORY, I have read over and deliberately considered. On this full consideration, I concur entirely in all the principles and reasonings contained in it; and I am of opinion, the decree of the supreme judicial court of Massachusetts should be reversed.

THIS cause came on to be heard, on the transcript of the record from the supreme judicial court, holden in and for the county of Suffolk, in the commonwealth of Massachusetts, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said supreme judicial court in this cause be and the same is hereby affirmed, with costs.

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