ERROR to the Superior Court of the State of New-Hampshire. This was an action of trover, brought in the state court, in which the plaintiffs in error declared for [17 U.S. 518, 519] two books of records, purporting to contain the records of all the doings and proceedings of the trustees of Dartmouth College, from the establishment of the corporation until the 7th day of October 1816; the original charter or letters-patent, constituting the college; the common seal; and four volumes or books of account, purporting to contain the charges and accounts in favor of the college. The defendant pleaded the general issue, and at the trial, the following special verdict was found:

The said jurors, upon their oath, say, that his Majesty George III., king of Great Britain, &c., issued his letters-patent, under the public seal of the province, now state, of New Hampshire, bearing the 13th day of December, in the 10th year of his reign, and in the year of our Lord 1769, in the words following:

George the Third, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth, To all to whom these presents shall come, greeting:

Whereas, it hath been represented to our trusty and well-beloved John Wentworth, Esq., governor and commander-in-chief, in and over our province of New Hampshire, in New England, in America, that the Reverend Eleazar Wheelock, of Lebanon, in the colony of Connecticut, in New England, aforesaid, now doctor in divinity, did, on or about the year of our Lord 1754, [17 U.S. 518, 520] at his own expense, on his own estate and plantation, set on foot an Indian charity school, and for several years, through the assistance of well-disposed persons in America, clothed, maintained and educated a number of the children of the Indian natives, with a view to their carrying the Gospel, in their own language, and spreading the knowledge of the great Redeemer, among their savage tribes, and hath actually employed a number of them as missionaries and school-masters in the wilderness, for that purpose: and by the blessing of God upon the endeavors of said Wheelock, the design became reputable among the Indians, insomuch that a large number desired the education of their children in said school, and were also disposed to receive missionaries and school-masters, in the wilderness, more than could be supported by the charitable contributions in these American colonies. Whereupon, the said Eleazar Wheelock thought it expedient, that endeavors should be used to raise contributions from well-disposed persons in England, for the carrying on and extending said undertaking; and for that purpose the said Eleazar Wheelock requested the Rev. Nathaniel Whitaker, now doctor in divinity to go over to England for that purpose, and sent over with him the Rev. Samson Occom, an Indian minister, who had been educated by the said Wheelock. And to enable the said Whitaker to the more successful performance of said work, on which he was sent, said Wheelock gave him a full power of attorney, by which said Whitaker solicited those worthy and generous contributors to the charity, viz., [17 U.S. 518, 521] The Right Honorable William, Earl of Dartmouth, the Honorable Sir Sidney Stafford Smythe, Knight, one of the barons of his Majesty's court of exchequer, John Thornton, of Clapham, in the county of Surrey, Esquire, Samuel Roffey, of Lincoln's Inn Fields, in the county of Middlesex, Esquire, Charles Hardy, of the parish of Saint Mary-le-bonne, in said county, Esquire, Daniel West, of Christ's church, Spitalfields, in the county aforesaid, Esquire, Samuel Savage, of the same place, gentleman, Josiah Roberts, of the parish of St. Edmund the King, Lombard Street, London, gentleman, and Robert Keen, of the parish of Saint Botolph, Aldgate, London, gentleman, to receive the several sums of money, which should be contributed, and to be trustees for the contributors to such charity, which they cheerfully agreed to. Whereupon, the said Whitaker did, by virtue of said power of attorney, constitute and appoint the said Earl of Dartmouth, Sir Sidney Stafford Smythe, John Thornton, Samuel Roffey, Charles Hardy and Daniel West, Esquires, and Samuel Savage, Josiah Roberts and Robert Keen, gentlemen, to be trustees of the money which had then been contributed, and which should, by his means, be contributed for said purpose; which trust they have accepted, as by their engrossed declaration of the same, under their hands and seals, well executed, fully appears, and the same has also been ratified, by a deed of trust, well executed by the said Wheelock.

And the said Wheelock further represents, that he has, by power of attorney, for many weighty reasons, [17 U.S. 518, 522] given full power to the said trustees, to fix upon and determine the place for said school, most

subservient to the great end in view; and to enable them understandingly, to give the preference, the said Wheelock has laid before the said trustees, the several offers which have been generously made in the several governments in America, to encourage and invite the settlement of said school among them, for their own private emolument, and the increase of learning in their respective places, as well as for the furtherance of the general design in view. And whereas, a large number of the proprietors of lands in the western part of this our province of New Hampshire, animated and excited thereto, by the generous example of his excellency, their governor, and by the liberal contributions of many noblemen and gentlemen in England, and especially by the consideration, that such a situation would be as convenient as any for carrying on the great design among the Indians; and also, considering, that without the least impediment to the said design, the same school may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon to be formed in that new country, with a learned and orthodox ministry; they, the said proprietors, have promised large tracts of land, for the uses aforesaid, provided the school shall be settled in the western part of our said province. And they, the said right honorable, honorable and worthy trustees, before mentioned, having maturely considered the reasons and arguments, in favor of the several places [17 U.S. 518, 523] proposed, have given the preference to the western part of our said province, lying on Connecticut river, as a situation most convenient for said school.

And the said Wheelock has further represented a necessity of a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same. And the said Wheelock has also represented, that for many weighty reasons, it will be expedient, at least, in the infancy of said institution, or till it can be accommodated in that new country, and he and his friends be able to remove and settle, by and round about it, that the gentlemen, whom he has already nominated in his last will (which he has transmitted to the aforesaid gentlemen of the trust in England), to be trustees in America, should be of the corporation now proposed. And also, as there are already large collections for said school, in the hands of the aforesaid gentlemen of the trust, in England, and all reasons to believe, from their singular wisdom, piety and zeal to promote the Redeemer's cause (which has already procured for them the utmost confidence of the kingdom), we may expect they will appoint successors in time to come, who will be men of the same spirit, whereby great good may and will accrue many ways to the institution, and much be done, by their example and influence, to encourage and facilitate the whole design in view; for which reason, said Wheelock desires, that the trustees aforesaid may be vested with all that power therein, which can consist with their distance from the same. [17 U.S. 518, 524] KNOW YE, THEREFORE, that We, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace, certain knowledge and mere motion, by and with the advice of our counsel for said province, by these presents, will, ordain, grant and constitute, that there be a college erected in our said province of New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes in this land, in reading, writing and all parts of learning, which shall appear necessary and expedient, for civilizing and christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and any others. And the trustees of said college may and shall be one body corporate and politic, in deed, action and name, and shall be called, named and distinguished by the name of the Trustees of Dartmouth College.

And further, we have willed, given, granted, constituted and ordained, and by this our present charter, of our special grace, certain knowledge and mere motion, with the advice aforesaid, do, for us, our heirs and successors for ever, will, give, grant, constitute and ordain, that there shall be in the said Dartmouth College, from henceforth and for ever, a body politic, consisting of trustees of said Dartmouth College. And for the more full and perfect erection of said corporation and body politic, consisting of trustees of Dartmouth College, we, of our special grace, certain [17 U.S. 518, 525] knowledge and mere motion, do, by these presents, for us, our heirs and successors, make, ordain, constitute and appoint our trusty and

well- beloved John Wentworth, Esq., governor of our said province, and the governor of our said province of New Hampshire for the time being, and our trusty and well-beloved Theodore Atkinson, Esq., now president of our council of our said province, George Jaffrey and Daniel Peirce, Esq'rs, both or our said council, and Peter Gilman, Esq., now speaker of our house of representatives in said province, and William Pitkin, Esq., one of the assistants of our colony of Connecticut, and our said trusty and well- beloved Eleazar Wheelock, of Lebanon, doctor in divinity, Benjamin Pomroy, of Hebroe, James Lockwood, of Weathersfield, Timothy Pitkin and John Smalley, of Farmington, and William Patten, of Hartford, all of our said colony of Connecticut, ministers of the gospel (the whole number of said trustees consisting, and hereafter for ever to consist, of twelve and no more) to be trustees of said Dartmouth College, in this our province of New Hampshire.

And we do further, of our special grace, certain knowledge and mere motion, for us, our heirs and successors, will, give, grant and appoint, that the said trustees and their successors shall for ever hereafter be, in deed, act and name, a body corporate and politic, and that they, the said body corporate and politic, shall be known and distinguished, in all deeds, grants, bargains, sales, writings, evidences or otherwise howsoever, and in all courts for ever hereafter, plea and be impleaded by the name of the Trustees of Dartmouth College; and that the said corporation, [17 U.S. 518, 526] by the name aforesaid, shall be able, and in law capable, for the use of said Dartmouth College, to have, get, acquire, purchase, receive, hold, possess and enjoy, tenements, hereditaments, jurisdictions and franchises, for themselves and their successors, in fee-simple, or otherwise howsoever, and to purchase, receive or build any house or houses, or any other buildings, as they shall think needful and convenient, for the use of said Dartmouth College, and in such town in the western part of our said province of New Hampshire, as shall, by said trustees, or the major part of them, he agreed on; their said agreement to be evidenced by an instrument in writing, under their hands, ascertaining the same: And also to receive and dispose of any lands, goods, chattels and other things, of what nature soever, for the use aforesaid: And also to have, accept and receive any rents, profits, annuities, gifts, legacies, donations or bequests of any kind whatsoever, for the use aforesaid; so, nevertheless, that the yearly value of the premises do not exceed the sum of 6000l. sterling; and therewith, or otherwise, to support and pay, as the said trustees, or the major part of such of them as are regularly convened for the purpose, shall agree, the president, tutors and other officers and ministers of said Dartmouth College; and also to pay all such missionaries and school-masters as shall be authorized, appointed and employed by them, for civilizing and christianizing, and instructing the Indian natives of this land, their several allowances; and also their respective annual salaries or allowances, and all such necessary and [17 U.S. 518, 527] contingent charges, as from time to time shall arise and accrue, relating to the said Dartmouth College: And also, to bargain, sell, let or assign, lands, tenements or hereditaments, goods or chattels, and all other things whatsoever, by the name aforesaid in as full and ample a manner, to all intents and purposes, as a natural person, or other body politic or corporate, is able to do, by the laws or our realm of Great Britain, or of said province of New Hampshire.

And further, of our special grace, certain knowledge and mere motion, to the intent that our said corporation and body politic may answer the end of their erection and constitution, and may have perpetual succession and continuance for ever, we do, for us, our heirs and successors, will, give and grant unto the Trustees of Dartmouth College, and to their successors for ever, that there shall be, once a year, and every year, a meeting of said trustees, held at said Dartmouth College, at such time as by said trustees, or the major part of them, at any legal meeting of said trustees, shall be agreed on; the first meeting to be called by the said Eleazar Wheelock, as soon as conveniently may be, within one year next after the enrolment of these our letters-patent, at such time and place as he shall judge proper. And the said trustees, or the major part of any seven or more of them, shall then determine on the time for holding the annual meeting aforesaid, which may be altered as they shall hereafter find most convenient. And we further order and direct, that the said Eleazar Wheelock shall notify the time for holding said first meeting, to be called as aforesaid, by sending a letter [17 U.S. 518, 528] to each of said trustees, and causing an advertisement thereof to be printed in the New Hampshire Gazette, and in some public

newspaper printed in the colony of Connecticut. But in case of the death or incapacity of the said Wheelock, then such meeting to be notified in manner aforesaid, by the governor or commander-in-chief of our said province for the time being. And we do also, for us, our heirs and successors, hereby will, give and grant unto the said Trustees of Dartmouth College, aforesaid, and to their successors for ever, that when any seven or more of the said trustees, or their successors, are convened and met together, for the service of said Dartmouth College, at any time or times, such seven or more shall be capable to act as fully and amply, to all intents and purposes, as if all the trustees of said college were personally present- and all affairs and actions whatsoever, under the care of said trustees, shall be determined by the majority or greater number of those seven or more trustees so convened and met together.

And we do further will, ordain and direct, that the president, trustees, professors, tutors and all such officers as shall be appointed for the public instruction and government of said college, shall, before they undertake the execution of their offices or trusts, or within one year after, take the oaths and subscribe the declaration provided by an act of parliament made in the grst year of King George the First, entitled 'an act for the further security of his majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being [17 U.S. 518, 529] Protestants, and for the extinguishing the hopes of the pretended Prince of Wales, and his open and secret abettors;' that is to say, the president, before the governor of our said province for the time being, or by one by him empowered to that service, or by the president of our said council, and the trustees, professors, tutors and other officers, before the president of said college for the time being, who is hereby empowered to administer the same; an entry of all which shall be made in the records of said college.

And we do, for us, our heirs, and successors, hereby will, give and grant full power and authority to the president hereafter by us named, and to his successors, or, in case of his failure, to any three or more of the said trustees, to appoint other occasional meetings, from time to time, of the said seven trustees, or any greater number of them, to transact any matter or thing necessary to be done before the next annual meeting, and to order notice to the said seven, or any greater number of them, of the times and places of meeting for the service aforesaid, by a letter under his or their hands, of the same, one month before said meeting: provided always, that no standing rule or order be made or altered, for the regulation of said college, nor any president or professor be chosen or displaced, nor any other matter or thing transacted or done, which shall continue in force after the then next annual meeting of the said trustees, as aforesaid.

And further, we do, by these presents, for us, our heirs and successors, create, make, constitute, nominate and appoint our trusty and well-beloved Eleazar Wheelock, doctor in divinity, the founder of said [17 U.S. 518, 530] college, to be president of said Dartmouth College, and to have the immediate care of the education and government of such students as shall be admitted into said Dartmouth College for instruction and education; and do will, give and grant to him, in said office, full power, authority and right, to nominate, appoint, constitute and ordain, by his last will, such suitable and meet person or persons as he shall choose to succeed him in the presidency of said Dartmouth College; and the person so appointed, by his last will, to continue in office, vested with all the powers, privileges, jurisdiction and authority of a president of said Dartmouth College; that is to say, so long and until such appointment by said last will shall be disapproved by the trustees of said Dartmouth College.

And we do also, for us, our heirs and successors, will, give and grant to the said trustees of said Dartmouth College, and to their successors for ever, or any seven or more of them, convened as aforesaid, that in the case of the ceasing or failure of a president, by any means whatsoever, that the said trustees do elect, nominate and appoint such qualified person as they, or the major part of any seven or more of them, convened for that purpose as above directed, shall think fit, to be president of said Dartmouth College, and to have the care of the education and government of the students as aforesaid; and in case of the ceasing of a president as aforesaid, the senior professor or tutor, being one of the trustees, shall exercise the office of a president, until the trustees shall make choice of and appoint, a president as aforesaid; [17 U.S. 518, 531] and such professor or tutor, or any three or more of the trustees,

shall immediately appoint a meeting of the body of the trustees for the purpose aforesaid. And also we do will, give and grant to the said trustees, convened as aforesaid, that they elect, nominate and appoint so many tutors and professors to assist the president in the education and government of the students belonging thereto, as they the said trustees shall, from time to time, think needful and serviceable to the interests of said Dartmouth College. And also, that the said trustees or their successors, or the major part of any seven or more of them, convened for that purpose as above directed, shall, at any time, displace and discharge from the service of said Dartmouth College, any or all such officers, and elect others in their room and stead, as before directed. And also, that the said trustees, or their successors, or the major part of any seven of them which shall convene for that purpose, as above directed, do, from time to time, as occasion shall require, elect, constitute and appoint a treasurer, a clerk, an usher and a steward for the said Dartmouth College, and appoint to them, and each of them, their respective businesses and trust; and displace and discharge from the service of said college, such treasurer, clerk, usher or steward, and to elect others in their room and stead; which officers so elected, as before directed, we do for us, our heirs and successors, by these presents, constitute and establish in their respective offices, and do give to each and every of them full power and authority to exercise the same in said Dartmouth College, according to the [17 U.S. 518, 532] directions, and during the pleasure of said trustees, as fully and freely as any like officers in any of our universities, colleges or seminaries of learning in our realm of Great Britain, lawfully may or ought to do. And also, that the said trustees and their successors, or the major part of any seven or more of them, which shall convene for that purpose, as is above directed, as often as one or more of said trustees shall die, or by removal or otherwise shall, according to their judgment, become unfit or incapable to serve the interests of said college, do, as soon as may be after the death, removal or such unfitness or incapacity of such trustee or trustees, elect and appoint such trustee or trustees as shall supply the place of him or them so dying, or becoming incapable to serve the interests of said college; and every trustee so elected and appointed shall, by virtue of these presents, and such election and appointment, be vested with all the powers and privileges which any of the other trustees of said college are hereby vested with. And we do further will, ordain and direct, that from and after the expiration of two years from the enrolment of these presents, such vacancy or vacancies as may or shall happen, by death or otherwise, in the aforesaid number of trustees, shall be filled up by election as aforesaid, so that when such vacancies shall be filled up unto the complete number of twelve trustees, eight of the aforesaid whole number of the body of trustees shall be resident, and respectable freeholders of our said province of New Hampshire, and seven of said whole number shall be laymen. [17 U.S. 518, 533] And we do further, of our special grace, certain knowledge and mere motion, will, give and grant unto the said trustees of Dartmouth College, that they, and their successors, or the major part of any seven of them, which shall convene for that purpose, as is above directed, may make, and they are hereby fully empowered, from time to time, fully and lawfully to make and establish such ordinances, orders and laws, as may tend to the good and wholesome government of the said college, and all the students and the several officers and ministers thereof, and to the public benefit of the same, not repugnant to the laws and statutes of our realm of Great Britain, or of this our province of New Hampshire, and not excluding any person of any religious denomination whatsoever, from free and equal liberty and advantage of education, or from any of the liberties and privileges or immunities of the said college, on account of his or their speculative sentiments in religion, and of his or their being of a religious profession different from the said trustees of the said Dartmouth College. And such ordinances, orders and laws, which shall as aforesaid be made, we do, for us, our heirs and successors, by these presents, ratify, allow of, and confirm, as good and effectual to oblige and bind all the students, and the several officers and ministers of the said college. And we do hereby authorize and empower the said trustees of Dartmouth College, and the president, tutors and professors by them elected and appointed as aforesaid, to put such ordinances, orders and laws in execution, to all proper intents and purposes. [17 U.S. 518, 534] And we do further, of our special grace, certain knowledge and mere motion, will, give, and grant unto the said trustees of said Dartmouth College, for the encouragement of learning, and animating the students of said college to diligence and industry, and a laudable progress in literature, that

they, and their successors, or the major part of any seven or more of them, convened for that purpose, as above directed, do, by the president of said college, for the time being, or any other deputed by them, give and grant any such degree or degrees to any of the students of the said college, or any others by them thought worthy thereof, as are usually granted in either of the universities, or any other college in our realm of Great Britain; and that they sign and seal diplomas or certificates of such graduations, to be kept by the graduates as perpetual memorials and testimonials thereof.

And we do further, of our special grace, certain knowledge and mere motion, by these presents, for us, our heirs and successors, give and grant unto the trustees of said Dartmouth College, and to their successors, that they and their successors shall have a common seal, under which they may pass all diplomas or certificates of degrees, and all other affairs and business of, and concerning the said college; which shall be engraven in such a form and with such an inscription as shall be devised by the said trustees, for the time being, or by the major part of any seven or more of them, convened for the service of the said college, as is above directed. [17 U.S. 518, 535] And we do further, for us, our heirs and successors, give and grant unto the said trustees of the said Dartmouth College, and their successors, or to the major part of any seven or more of them, convened for the service of the said college, full power and authority, from time to time, to nominate and appoint all other officers and ministers, which they shall think convenient and necessary for the service of the said college, not herein particularly named or mentioned; which officers and ministers we do hereby empower to execute their offices and trusts, as fully and freely as any of the officers and ministers in our universities or colleges in our realm of Great Britain lawfully may or ought to do.

And further, that the generous contributors to the support of this design of spreading the knowledge of the only true God and Saviour among the American savages, may, from time to time, be satisfied that their liberalities are faithfully disposed of, in the best manner, for that purpose, and that others may, in future time, be encouraged in the exercise of the like liberality, for promoting the same pious design, it shall be the duty of the president of said Dartmouth College, and of his successors, annually, or as often as he shall be thereunto desired or required, to transmit to the right honorable, honorable, and worthy gentlemen of the trust, in England, before mentioned, a faithful account of the improvements and disbursements of the several sums he shall receive from the donations and bequests made in England, through the hands of said trustees, and also advise them of the general plans laid, and prospects exhibited, as well as a faithful [17 U.S. 518, 536] account of all remarkable occurrences, in order, if they shall think expedient, that they may be published. And this to continue so long as they shall perpetuate their board of trust, and there shall be any of the Indian natives remaining to be proper objects of that charity. And lastly, our express will and pleasure is, and we do, by these presents, for us, our heirs and successors, give and grant unto the said trustees of Dartmouth College, and to their successors for ever, that these our letters-patent, on the enrolment thereof in the secretary's office of our province of New Hampshire aforesaid, shall be good and effectual in the law, to all intents and purposes, against us, our heirs and successors, without any other license, grant or confirmation from us, our heirs and successors, hereafter by the said trustees to be had and obtained, notwithstanding the not writing or misrecital, not naming or misnaming the aforesaid offices, franchises, privileges, immunities or other the premises, or any of them, and notwithstanding a writ of ad quod damnum hath not issued forth to inquire of the premises, or any of them, before the ensealing hereof, any statute, act, ordinance, or provision, or any other matter or thing, to the contrary notwithstanding. To have and to hold, all and singular the privileges, advantages, liberties, immunities, and all other the premises herein and hereby granted, or which are meant, mentioned or intended to be herein and hereby given and granted, unto them, the said trustees of Dartmouth College, and to their successors for ever. In testimony whereof, we have caused these our letters to be made patent, and the public seal of [17 U.S. 518, 537] our said province of New Hampshire to be hereunto affixed. Witness our trusty and well-beloved John Wentworth, Esquire, governor and commander-in- chief in and over our said province, &c., this thirteenth day of December, in the tenth year of our reign, and in the year of our Lord 1769.

N.B. The words 'and such professor or tutor, or any three or more of the trustees, shall immediately appoint a meeting of the body of the trustees, for the purpose aforesaid,' between the first and second lines, also the words 'or more,' between the 27th and 28th lines, also the words 'or more,' between the 28th and 29th lines, and also the words 'to all intents and purposes,' between the 37th and 38th lines of this sheet, were respectively interlined, before signing and sealing.

And the said jurors, upon their oath, further say, that afterwards, upon the 18th day of the same December, the said letters-patent were duly enrolled and recorded in the secretary's office of said province, now state, of New Hampshire; and afterwards, and within one year from the issuing of the same letters-patent, all the persons named as trustees in the same accepted the said letters-patent, and assented thereunto, and the corporation therein and thereby created and erected was duly organized, and has, until the passing of the act of the legislature of the state of New Hampshire, of the 27th of June, A. D. 1816, and ever since (unless prevented by said act and the [17 U.S. 518, 538] doings under the same) continued to be a corporation.

And the said jurors, upon their oath, further say, that immediately after its erection and organization as aforesaid, the said corporation had, took, acquired and received, by gift, donation, devise and otherwise, lands, goods, chattels and moneys of great value; and from time to time since, have had, taken, received and acquired, in manner aforesaid, and otherwise, lands, goods, chattels and moneys of great value; and on the same 27th day of June, A. D. 1816, the said corporation, erected and organized as aforesaid, had, held and enjoyed, and ever since have had, held and enjoyed, divers lands, tenements, hereditaments, goods, chattels and moneys, acquired in manner aforesaid, the yearly income of the same, not exceeding the sum of $26,666, for the use of said Dartmouth College, as specified in said letters-patent. And the said jurors, upon their oath, further say, that part of the said lands, so acquired and holden by the said trustees as aforesaid, were granted by (and are situate in) the state of Vermont, A. D. 1785, and are of great value; and other part of said lands, so acquired and holden as aforesaid, were granted by (and are situate in) the state of New Hampshire, in the years 1789 and 1807, and are of great value. And the said jurors, upon their oath, further say, that the said trustees of Dartmonth College, so constituted as aforesaid, on the same 27th day of June, A. D. 1816, were possessed of the goods and chattels in the declaration of the said trustees specified, [17 U.S. 518, 539] and at the place therein mentioned, as of their own proper goods and chattels, and continued so possessed until, and at the time of the demand and refusal of the same, as hereinafter mentioned, unless divested thereof, and their title thereto defeated and rendered invalid, by the provisions of the act of the state of New Hampshire, made and passed on the same 27th day of June, A. D. 1816, and the doings under the same, as hereinafter mentioned and recited.

And the said jurors, upon their oath, further say, that on the 27th day of June, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain act, entitled, 'an act to amend the charter, and enlarge and improve the corporation of Dartmouth College,' in the words following:

An act to amend the charter, and enlarge and improve the corporation of Dartmouth College.

Whereas, knowledge and learning generally diffused through a community, are essential to the preservation of a free government, and extending the opportunities and advantages of education is highly conducive to promote this end, and by the constitution it is made the duty of the legislators and magistrates, to cherish the interests of literature, and the sciences, and all seminaries established for their advancement; and as the college of the state may, in the opinion of the legislature, be rendered more extensively useful: therefore--

1. Be it enacted, &c., that the [17 U.S. 518, 540] corporation, heretofore called and known by the name of the Trustees of Dartmouth College, shall ever hereafter be called and known by the name of the Trustees of Dartmouth University; and the whole number of said trustees shall be twenty-one, a majority of whom shall form a quorum for the transaction of business; and they and their successors in that capacity, as hereby constituted, shall respectively for ever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed,

enjoyed and used by the Trustees of Dartmouth College, except so far as the same may be varied or limited by the provisions of this act. And they shall have power to determine the times and places of their meetings, and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof: to appoint such officers as they may deem proper, and determine their duties and compensation, and also to displace them; to delegate the power of supplying vacancies in any of the offices of the university, for any term of time not extending beyond their next meeting: to pass ordinances for the government of the students, with reasonable penalties, not inconsistent with the constitution and laws of this state; to prescribe the course of education, and confer degrees; and to arrange, invest and employ the funds of the university.

2. And be it further enacted, that there shall be a board of overseers, who shall have perpetual succession, and whose number shall be twenty-five, [17 U.S. 518, 541] fifteen of whom shall constitute a quorum for the transaction of business. The president of the senate, and the speaker of the house of representatives of New Hampshire, the governor and lientenant-governor of Vermont, for the time being, shall be members of said board, ex officio. The board of overseers shall have power to determine the times and places of their meetings, and manner of notifying the same; to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new college buildings: provided always, that the said negative shall be expressed within sixty days from the time of said overseers being furnished with copies of such acts: provided also, that all votes and proceedings of the board of trustees shall be valid and effectual, to all intents and purposes, until such negative of the board of overseers be expressed, according to the provisions of this act.

3. Be it further enacted, that there shall be a treasurer of said corporation, who shall be duly sworn, and who, before he enters upon the duties of his office, shall give bonds, with sureties, to the satisfaction of the corporation, for the faithful performance thereof; and also a secretary to each of the boards of trustees and overseers, to be elected by the said boards, respectively, who shall keep a just and true record of the proceedings of the board for [17 U.S. 518, 542] which he was chosen. And it shall furthermore be the duty of the secretary of the board of trustees to furnish, as soon as may be, to the said board of overseers, copies of the records of such votes and proceedings, as by the provisions of this act are made subject to their revision and control.

4. Be it further enacted, that the president of Dartmouth University, and his successors in office, shall have the superintendence of the government and instruction of the students, and may preside at all meetings of the trustees, and do and execute all the duties devolving by usage on the president of a university. He shall render annually to the governor of this state an account of the number of students, and of the state of the funds of the university; and likewise copies of all important votes and proceedings of the corporation and overseers, which shall be made out by the secretaries of the respective boards.

5. Be it further enacted, that the president and professors of the university shall be nominated by the trustees, and approved by the overseers: and shall be liable to be suspended or removed from office in manner as before provided. And each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

6. Be it further enacted, that the governor and counsel are hereby authorized to fill all vacancies in the board of overseers, whether the same be original vacancies, or are occasioned by the death, resignation or removal of any member. And [17 U.S. 518, 543] the governor and counsel in like manner shall, by appointments, as soon as may be, complete the present board of trustees to the number of twenty-one, as provided for by this act, and shall have power also to fill all vacancies that may occur previous to, or during the first meeting of the said board of trustees. But the president of said university for the time being, shall, nevertheless, be a member of said board of trustees, ex officio. And the governor and council shall have power to inspect the doings and proceedings of the corporation, and of all the officers of the university,

whenever they deem it expedient; and they are hereby required to make such inspection, and report the same to the legislature of this state, as often as once in every five years. And the governor is hereby authorized and requested to summon the first meeting of the said trustees and overseers, to be held at Hanover, on the 26th day of August next.

7. Be it further enacted, that the president and professors of the university, before entering upon the duties of their offices, shall take the oath to support the constitution of the United States and of this state; certificates of which shall be in the office of the secretary of this state, within sixty days from their entering on their offices respectively.

8. Be it further enacted, that perfect freedom of religious opinion shall be enjoyed by all the officers and students of the university; and no officer or student shall be deprived of any honors, privileges or benefits of the institution, on account of his religious creed or belief. The theological colleges which [17 U.S. 518, 544] may be established in the university shall be founded on the same principles of religious freedom; and any man, or body of men, shall have a right to endow colleges or professorships of any sect of the Protestant Christian religion: and the trustees shall be held and obliged to appoint professors of learning and piety of such sects, according to the will of the donors.

Approved, June 27th, 1816.

And the said jurors, upon their oath, further say, that, at the annual meeting of the trustees of Dartmouth College, constituted agreeably to the letters-patent aforesaid, and in no other way or manner, holden at said college, on the 28th day of August, A. D. 1816, the said trustees voted and resolved, and caused the said vote and resolve to be entered on their records, that they do not accept the provisions of the said act of the legislature of New Hampshire of the 27th of June 1816, above recited, but do, by the said vote and resolve, expressly refuse to accept or act under the same. And the said jurors, upon their oath, further say, that the said trustees of Dartmouth College have never accepted, assented to, or acted under, the said act of the 27th of June, A. D. 1816, or any act passed in addition thereto, or in amendment thereof, but have continued to act, and still claim the right of acting, under the said letters-patent.

And the said jurors, upon their oath, further say, that on the 7th day of October, A. D. 1816, and before the commencement of this suit, the said trustees of Dartmouth College demanded of the said [17 U.S. 518, 545] William H. Woodward the property, goods and chattels in the said declaration specified, and requested the said William H. Woodward, who then had the same in his hands and possession, to deliver the same to them, which the said William H. Woodward then and there refused to do, and has ever since neglected and refused to do, but converted the same to his own use, if the said trustees of Dartmouth College could, after the passing of the said act of the 27th day of June, lawfully demand the same, and if the said William H. Woodward was not, by law, authorized to retain the same in his possession after such demand.

And the said jurors, upon their oath, further say, that on the 18th day of December, A. D. 1816, the legislature of the said state of New Hampshire made and passed a certain other act, entitled, 'an act in addition to, and in amendment of, an act, entitled, an act to amend the charter, and enlarge and improve the corporation of Dartmouth College,' in the words following:

An act in addition to, and in amendment of, an act, entitled, 'an act to amend the charter, and enlarge and improve the Corporation of Dartmouth College.'

Whereas, the meetings of the trustees and overseers of Dartmouth University, which were summoned agreeably to the provisions of said act, failed of being duly holden, in consequence of a quorum of neither said trustees nor overseers attending at the [17 U.S. 518, 546] time and place appointed, whereby the proceedings of said corporation have hitherto been, and still are delayed:

1. Be it enacted, &c., that the governor be, and he is hereby authorized and requested to summon a meeting of the trustees of Dartmouth University, at such time and place as he may deem expedient. And the said trustees, at such meeting, may do and transact any matter or thing, within the limits of their jurisdiction and power, as such trustees, to every intent

and purpose, and as fully and completely as if the same were transacted at any annual or other meeting. And the governer, with advice of council, is authorized to fill all vacancies that have happened, or may happen in the board of said trustees, previous to their next annual meeting. And the governor is hereby authorized to summon a meeting of the overseers of said university, at such time and place as he may consider proper. And provided, a less number than a quorum of said board of overseers convene at the time and place appointed for such meeting of their board, they shall have power to adjourn, from time to time, until a quorum shall have convened.

2. And be it further enacted, that so much of the act, to which this is an addition, as makes necessary any particular number of trustees or overseers of said university, to constitute a quorum for the transaction of business, be, and the same hereby is repealed; and that hereafter, nine of said trustees, convened agreeably to the provisions of this act, or [17 U.S. 518, 547] to those of that to which this is an addition, shall be a quorum for transacting business; and that in the board of trustees, six votes at least shall be necessary for the passage of any act or resolution. And provided also, that any smaller number than nine of said trustees, convened at the time and place appointed for any meeting of their board, according to the provisions of this act, or that to which this is an addition, shall have power to adjourn from time to time, until a quorum shall have convened.

3. And be it further enacted, that each member of said board of trustees, already appointed or chosen, or hereafter to be appointed or chosen, shall, before entering on the duties of his office, make and subscribe an oath for the faithful discharge of the duties aforesaid; which oath shall be returned to, and filed in the office of the secretary of state, previous to the next regular meeting of said board, after said member enters on the duties of his office, as aforesaid.

Approved, December 18th, 1816.

And the said jurors, upon their oath, further say, that on the 26th day of December, A. D. 1816, the legislature of said state of New Hampshire made and passed a certain other act, entitled, 'an act in addition to an act, entitled, an act in addition to, and in amendment of an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College,' in the words following: [17 U.S. 518, 548] An act in addition to an act, entitled, 'an act in addition to, and in amendment of, an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College.'

Be it enacted &c., that if any person or persons shall assume the office of president, trustee, professor, secretary, treasurer, librarian or other officer of Dartmouth University; or by any name, or under any pretext, shall, directly or indirectly, take upon himself or themselves the discharge of any of the duties of either of those offices, except it be pursuant to, and in conformity with, the provisions of an act, entitled, 'an act to amend the charter and enlarge and improve the corporation of Dartmouth College,' or, of the 'act, in addition to and in amendment of an act, entitled, an act to amend the charter and enlarge and improve the corporation of Dartmouth College,' or shall in any way, directly or indirectly, wilfully impede or hinder any such officer or officers already existing, or hereafter to be appointed agreeably to the provisions of the acts aforesaid, in the free and entire discharge of the duties of their respective offices, conformably to the provisions of said acts, the person or persons so offending shall, for each offence, forfeit and pay the sum of five hundred dollars, to be recovered by any person who shall sue therefor, one-half thereof to the use of the prosecutor, and the other half to the use of said university.

And be it further enacted, that the person or persons who sustained the offices of secretary and treasurer [17 U.S. 518, 549] of the trustees of Dartmouth College, next before the passage of the act, entitled, 'an act to amend the charter and enlarge and improve the corporation of Dartmouth College,' shall continue to hold and discharge the duties of those offices, as secretary and treasurer of the trustees of Dartmouth University, until another person or persons be appointed, in his or their stead, by the trustees of said university. And that the treasurer of said university, so existing, shall, in his office, have the care, management, direction and superintendence of the property of said corporation, whether real or personal, until a quorum of said trustees shall have convened in a regular meeting.

Approved, December 26th, 1816.

And the said jurors, upon their oath, further say, that the said William H. Woodward, before the said 27th day of June, had been duly appointed by the said trustees of Dartmouth College, secretary and treasurer of the said corporation, and was duly qualified to exercise, and did exercise the said offices, and perform the duties of the same; and as such secretary and treasurer, rightfully had, while he so continued secretary and treasurer as aforesaid, the custody and keeping of the several goods, chattels and property, in said declaration specified.

And the said jurors, upon their oath, further say, that the said William H. Woodward was removed by said trustees of Dartmouth College (if the said trustees could, by law, do the said acts) from said office of secretary, on the 27th day of August, A. D. 1816, and from said office of treasurer, on the 27th day of [17 U.S. 518, 550] September, then next following, of which said removals he, the said William H. Woodward, had due notice on each of said days last mentioned.

And the said jurors, upon their oath, further say, that the corporation called the Trustees of Dartmouth University, was duly organized on the 4th day of February, A. D. 1817, pursuant to, and under, the said recited acts of the 27th day of June, and of the 18th and 26th days of December, A. D. 1816; and the said William H. Woodward was, on the said 4th day of February, A. D. 1817, duly appointed by the said Trustees of Dartmouth University, secretary and treasurer of the said Trustees of Dartmouth University, and then and there accepted both said offices.

And the said jurors, upon their oath, further say, that this suit was commenced on the 8th day of February, A. D. 1817. But whether upon the whole matter aforesaid, by the jurors aforesaid, in manner and form aforesaid found, the said acts of the 27th of June, 18th and 26th of December, A. D. 1816, are valid in law, and binding on the said trustees of Dartmouth College, without acceptance thereof and assent thereunto by them, so as to render the plaintiffs incapable of maintaining this action, or whether the same acts are repugnant to the constitution of the United States, and so void, the said jurors are wholly ignorant, and pray the advice of the court upon the premises. And if, upon the said matter, it shall seem to the court here, that the said acts last mentioned are valid in law, and binding on said trustees of Dartmouth College, [17 U.S. 518, 551] without acceptance thereof, and assent thereto, by them, so as to render the plaintiffs incapable of maintaining this action, and are not repugnant to the constitution of the United States, then the said jurors, upon their oath, say, that the said William H. Woodward is not guilty of the premises above laid to his charge, by the declaration aforesaid, as the said William H. Woodward hath above in pleading alleged. But if, upon the whole matter aforesaid, it shall seem to the court here, that the said acts last mentioned are not valid in law, and are not binding on the said trustees of Dartmouth College, without acceptance thereof, and assent thereto, by them, so as to render them incapable of maintaining this action, and that the said acts are repugnant to the constitution of the United States and void, then the said jurors, upon their oath, say that the said William H. Woodward is guilty of the premises above laid to his charge, by the declaration aforesaid, and in that case, they assess the damages of them, the said trustees of Dartmouth College, by occasion thereof, at $20,000.

Judgment having been afterwards rendered upon the said special verdict, by the superior court of the state of New Hampshire, being the highest court of law or equity of said state, for the plaintiff below, the cause was brought before this court by writ of error.

March 10th and 11th, 1818.

Webster, for the plaintiffs in error.-The general question is, whether the acts of the 27th of June, and of the 18th and 26th of December 1816, are [17 U.S. 518, 552] valid and binding on the rights of the plaintiffs, without their acceptance or assent.

The substance of the facts recited in the preamble to the charter, is, that Dr. Wheelock had founded a charity, on funds owned and procured by himself; that he was at that time, the sole dispenser and sole administrator, as well as the legal owner of these funds; that he had made his will devising this property in trust, to continue the existence and uses of the school, and appointed trustees; that, in this state of

things, he had been invited to fix his school permanently in New Hampshire, and to extend the design of it to the education of the youth of that province; that before he removed his school, or accepted this invitation, which his friends in England had advised him to accept, he applied for a charter, to be granted, not to whomsoever the king or government of the province should please, but to such persons as he named and appointed, viz., the persons whom he had already appointed to be the future trustees of his charity, by his will. The charter, or letters-patent, then proceed to create such a corporation, and to appoint twelve persons to constitute it, by the name of the 'Trustees of Dartmouth College;' to have perpetual existence, as such corporation, and with power to hold and dispose of lands and goods for the use of the college, with all the ordinary powers of corporations. They are, in their discretion, to apply the funds and property of the college to the support of the president, tutors, ministers and other officers of the college, and such missionaries and school- masters as they may see fit to employ among [17 U.S. 518, 553] the Indians. There are to be twelve trustees for ever, and no more; and they are to have the right of filling vacancies occurring in their own body. The Rev. Mr. Wheelock is declared to be the founder of the college, and is, by the charter, appointed first president, with power to appoint a successor, by his last will. All proper powers of government, superintendence and visitation, are vested in the trustees. They are to appoint and remove all officers, at their discretion; to fix their salaries, and assign their duties; and to make all ordinances, orders and laws, for the government of the students. And to the end that the persons who had acted as depositaries of the contributions in England, and who had also been contributors themselves, might be satisfied of the good use of their contributions, the president was, annually, or when required, to transmit to them an account of the progress of the institution, and the disbursements of its funds, so long as they should continue to act in that trust. These letters-patent are to be good and effectual in law, against the king, his heirs and successors for ever, without further grant or confirmation; and the trustees are to hold all and singular these privileges, advantages, liberties and immunities, to them and to their successors for ever. No funds are given to the college by this charter. A corporate existence and capacity are given to the trustees, with the privileges and immunities which have been mentioned, to enable the founder and his associates the better to manage the funds which they themselves had contributed, and such others as they might afterwards obtain. [17 U.S. 518, 554] After the institution, thus created and constituted, had existed, uninterruptedly and usefully, nearly fifty years, the legislature of New Hampshire passed the acts in question. The first act makes the twelve trustees under the charter, and nine other individuals to be appointed by the governor and council, a corporation, by a new name; and to this new corporation transfers all the property, rights, powers, liberties and privileges of the old corporation; with further power to establish new colleges and an institute, and to apply all or any part of the funds to these purposes, subject to the power and control of a board of twenty-five overseers, to be appointed by the governor and council. The second act makes further provisions for executing the objects of the first, and the last act authorizes the defendant, the treasurer of the plaintiffs, to retain and hold their property, against their will.

If these acts are valid, the old corporation is abolished, and a new one created. The first act does, in fact, if it can have effect, create a new corporation, and transfer to it all the property and franchises of the old. The two corporations are not the same, in anything which essentially belongs to the existence of a corporation. They have different names, and different powers, rights and duties; their organization is wholly different; the powers of the corporation are not vested in the same or similar hands. In one, the trustees are twelve, and no more; in the other, they are twenty-one. In one, the power is a single board; in the other, it is divided between two boards. Although the act professes to [17 U.S. 518, 555] include the old trustees in the new corporation, yet that was without their assent, and against their remonstrance; and no person can be compelled to be a member of such a corporation against his will. It was neither expected nor intended, that they should be members of the new corporation. The act itself treats the old corporation as at an end, and going on the ground, that all its functions have ceased, it provides for the first meeting and organization of the new corporation. It expressly provides also, that the new corporation shall have and hold all the property of the old; a provision which would be quite unnecessary, upon any other ground, than that the old corporation was dissolved. But if it could be

contended, that the effect of these acts was not entirely to abolish the old corporation, yet it is manifest, that they impair and invade the rights, property and powers of the trustees, under the charter, as a corporation, and the legal rights, privileges and immunities which belong to them, as individual members of the corporation. The twelve trustees were the sole legal owners of all the property acquired under the charter; by the acts, others are admitted, against their will, to be joint owners. The twelve individuals, who are trustees, were possessed of all the franchises and immunities conferred by the charter; by the acts, nine other teustees, and twenty-five overseers, are admitted, against their will, to divide these franchises and immunities with them. If, either as a corporation, or as individuals, they have any legal rights, this forcible intrusion of others violates those rights, as manifestly as an entire and complete ouster [17 U.S. 518, 556] and dispossession. These acts alter the whole constitution of the corporation; they affect the rights of the whole body, as a corporation, and the rights of the individuals who compose it; they revoke corporate powers and franchises; they alienate and transfer the property of the college to others. By the charter, the trustees had a right to fill vacancies in their own number; this is now taken away. They were to consist of twelve, and by express provision, of no more; this is altered. They and their successors, appointed by themselves, were for ever to hold the property; the legislature has found successors for them, before their seats are vacant. The powers and privileges, which the twelve were to exercise exclusively, are now to be exercised by others. By one of the acts, they are subjected to heavy penalties, if they exercise their offices, or any of those powers and privileges granted them by charter, and which they had exercised for fifty years; they are to be punished for not accepting the new grant, and taking its benefits. This, it must be confessed, is rather a summary mode of settling a question of constitutional right. Not only are new trustees forced into the corporation, but new trusts and uses are created. The college is turned into a university; power is given to create new colleges, and to authorize any diversion of the funds, which may be agreeable to the new boards, sufficient latitude in given, by the undefined power of establishing an institute. To these new colleges, and this institute, the funds contributed by the founder, Dr. Wheelock, and by the original donors, the Earl of Dartmouth [17 U.S. 518, 557] and others, are to be applied, in plain and manifest disregard of the uses to which they were given. The president, one of the old trustees, had a right to his office, salary and emoluments, subject to the twelve trustees alone; his title to these is now changed, and he is made accountable to new masters; so also, all the professors and tutors. If the legislature can, at pleasure, make these alterations and changes in the rights and privileges of the plaintiffs, it may, with equal propriety, abolish these rights and privileges altogether; the same power which can do any part of this work, can accomplish the whole. And, indeed, the argument, on which these acts have been hitherto defended, goes altogether on the ground, that this is such a corporation as the legislature may abolish at pleasure; and that its members have no rights, liberties, franchises, property or privileges, which the legislature may not revoke, annul, alienate or transfer to others, whenever it sees fit.

It will be contended by the plaintiffs, that these acts are not valid and binding on them without their assent. 1. Because they are against common right, and the constitution of New Hampshire. 2. Because they are repugnant to the constitution of the United States. I am aware of the limits which bound the jurisdiction of the court in this case; and that on this record, nothing can be decided, but the single question, whether these acts are repugnant to the constitution of the United States. Yet it may assist in forming an opinion of their true nature and character, to compare them with those fundamental principles, introduced into the state governments [17 U.S. 518, 558] for the purpose of limiting the exercise of the legislative power, and which the constitution of New Hampshire expresses with great fullness and accuracy.

It is not too much to assert, that the legislature of New Hampshire would not have been competent to pass the acts in question, and to make them binding on the plaintiffs, without their assent, even if there had been, in the constitution of New Hampshire, or of the United States, no special restriction on their power; because these acts are not the exercise of a power properly legislative. Calder v. Bull, 3 Dall. 386. Their object and effect is, to take away from one, rights, property and franchises, and to grant them to another. This is not the exercise of a legislative power. To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper

province of the judiciary. Attainder and confiscation are acts of sovereign power, not acts of legislation. The British parliament, among other unlimited powers, claims that of altering and vacating charters; not as an act of ordinary legislation, but of uncontrolled authority. It is, theoretically, omnipotent; yet, in modern times, it has attempted the exercise of this power, very rarely. In a celebrated instance, those who asserted this power in parliament, vindicated its exercise only in a case, in which it could be shown, 1st. That the charter in question was a charter of political power. 2d. That there was a great and overruling state necessity, justifying the [17 U.S. 518, 559] violation of the charter. 3. That the charter had been abused, and justly forfeited. (Annual Register 1784, p. 160; Parl. Reg. 1783; Mr. Burke's Speech on Mr. Fox's East India Bill, Burke's Works, vol. 3, p. 414, 417, 467, 468, 486.) The bill affecting this charter did not pass; its history is well known. The act which afterwards did pass, passed with the assent of the corporation. Even in the worst times, this power of parliament to repeal and rescind charters has not often been exercised. The illegal proceedings in the reign of Charles II. were under color of law. Judgments of forfeiture were obtained in the courts. Such was the case of the quo warranto against the city of London, and the proceedings by which the charter of Massachusetts was vacated. The legislature of New Hampshire has no more power over the rights of the plaintiffs than existed, somewhere, in some department of government, before the revolution. The British parliament could not have annulled or revoked this grant, as an act of ordinary legislation. If it had done it at all, it could only have been, in virtue of that sovereign power, called omnipotent, which does not belong to any legislature in the United States. The legislature of New Hampshire has the same power over this charter, which belonged to the king, who granted it, and no more. By the law of England, the power to create corporations is a part of the royal prerogative. 1 Bl. Com. 472. By the revolution, this power may be considered as having devolved on the legislature of [17 U.S. 518, 560] the state, and it has, accordingly, been exercised by the legislature. But the king cannot abolish a corporation, or new model it, or alter its powers, without its assent. This is the acknowledged and well-known doctrine of the common law. 'Whatever might have been the notion in former times,' says Lord MANSFIELD, 'it is most certain, now, that the corporations of the universities are lay corporations; and that the crown cannot take away from them any rights that have been formerly subsisting in them, under old charters or prescriptive usage.' 3 Burr. 1656. After forfeiture duly found, the king may regrant the franchises; but a grant of franchises, already granted, and of which no forfeiture has been found, is void. Corporate franchises can only be forfeited by trial and judgment. King v. Pasmore, 3 T. R. 244. In case of a new charter or grant to an existing corporation, it may accept or reject it as it pleases. King v. Vice-Chancellor of Cambridge, 3 Burr. 1656; 3 T. R. 240, per Lord KENYON. It may accept such part of the grant as it chooses, and reject the rest. 3 Burr. 1661. In the very nature of things a charter cannot be forced upon any body; no one can be compelled to accept a grant; and without acceptance, the grant is necessarily void. Ellis v. Marshall, 2 Mass. 277; Kyd on Corp. 65-6. It cannot be pretended, that the legislature, as successor to the king in this part of his prerogative, has any power to revoke, vacate or alter this charter. If, therefore, the legislature has not this power, by any [17 U.S. 518, 561] specific grant contained in the constitution; nor as included in its ordinary legislative powers; nor by reason of its succession to the prerogatives of the crown in this particular; on what ground would the authority to pass these acts rest, even if there were no special prohibitory clauses in the constitution, and the bill of rights?

But there are prohibitions in the constitution and bill of rights of New Hampshire, introduced for the purpose of limiting the legislative power, and of protecting the rights and property of the citizens. One prohibition is, 'that no person shall be deprived of his property, immunities or privileges, put out of the protection of the law, or deprived of his life, liberty or estate, but by judgment of his peers, or the law of the land.' In the opinion, however, which was given in the court below, it is denied, that the trustees, under the charter, had any property, immunity, liberty or privilege, in this corporation, within the meaning of this prohibition in the bill of rights. It is said, that it is a public corporation and public property. That the trustees have no greater interest in it than any other individuals. That it is not private property, which they can sell, or transmit to their heirs; and that, therefore, they have no interest in it. That their office is a public trust, like that of the governor, or a judge; and that they have no more

concern in the property of the college, than the governor in the property of the state, or than the judges in the fines which they impose on the culprits at their bar. That it is nothing to them, whether their powers shall be extended or lessened, any more than it is [17 U.S. 518, 562] to the courts, whether their jurisdiction shall be enlarged or diminished. It is necessary, therefore, to inquire into the true nature and character of the corporation which was created by the charter of 1769.

There are divers sorts of corporations; and it may be safely admitted that the legislature has more power over some, than over others. 1 Wooddes. 474; 1 Bl. Com. 467. Some corporations are for government and political arrangement; such, for example, as cities, counties and the towns in New England. These may be changed and modified, as public convenience may require, due regard being always had to the rights of property. Of such corporations, all who live within the limits are, of course, obliged to be members, and to submit to the duties which the law imposes on them as such. Other civil corporations are for the advancement of trade and business, such as banks, insurance companies, and the like. These are created, not by general law, but usually by grant; their constitution is special; it is such as the legislature sees fit to give, and the grantees to accept.

The corporation in question is not a civil, although it is a lay corporation. It is an eleemosynary corporation. It is a private charity, originally founded and endowed by an individual, with a charter obtained for it at his request, for the better administration of his charity. 'The eleemosynary sort of corporations are such as are constituted for the perpetual distributions of the free-alms or bounty of the founder of them, to such persons as he has directed. Of this [17 U.S. 518, 563] are all hospitals for the maintenance of the poor, sick and impotent; and all colleges both in our universities and out of them.' 1 Bl. Com. 471. Eleemosynary corporations are for the management of private property, according to the will of the donors; they are private corporations. A college is as much a private corporation as an hospital; especially, a college founded as this was, by private bounty. A college is a charity. 'The establishment of learning,' says Lord HARDWICKE, 'is a charity, and so considered in the statute of Elizabeth. A devise to a college, for their benefit, is a laudable charity, and deserves encouragement.' 1 Ves. 537. The legal signification of a charity is derived chiefly from the statute 43 Eliz., c. 4. 'Those purposes,' says Sir. W. GRANT, 'are considered charitable, which that statute enumerates.' 9 Ves. 405. Colleges are enumerated as charities in that statute. The government, in these cases, lends its aid to perpetuate the beneficient intention of the donor, by granting a charter, under which his private charity shall continue to be dispensed, after his death. This is done, either by incorporating the objects of the charity, as, for instance, the scholars in a college, or the poor in a hospital; or by incorporating those who are to be governors or trustees of the charity. 1 Wooddes. 474.

In cases of the first sort, the founder is, by the common law, visitor. In early times, it became a maxim, that he who gave the property might regulate it in future. Cujus est dare, ejus est disponere. This right of visitation descended from the founder to his heir, as [17 U.S. 518, 564] a right of property, and precisely as his other property went to his heir; and in default of heirs, it went to the king, as all other property goes to the king, for the want of heirs. The right of visitation arises from the property; it grows out of the endowment. The founder may, if he please, part with it, at the time when he establishes the charity, and may vest it in others. Therefore, if he chooses that governors, trustees or overseers should be appointed in the charter, he may cause it to be done, and his power of visitation will be transferred to them, instead of descending to his heirs. The persons thus assigned or appointed by the founder will be visitors, with all the powers of the founder, in exclusion of his heir. 1 Bl. Com. 472. The right of visitation then accrues to them, as a matter of property, by the gift, transfer or appointment of the founder. This is a private right, which they can assert in all legal modes, and in which they have the same protection of the law as in all other rights. As visitors, they may make rules, ordinances and statutes, and alter and repeal them, so far as permitted so to do by the charter. 2 T. R. 350-51. Although the charter proceeds from the crown, or the government, it is considered as the will of the donor. It is obtained at his request. He imposes it as the rule which is to prevail in the dispensation of his bounty, in all future times. The king, or government, which grants the charter, is not thereby the founder, but he who furnishes the funds. The gift of the revenues is the foundation. 1 Bl. Com.

480. The leading [17 U.S. 518, 565] case on this subject is Phillips v. Bury. 3 This was an ejectment brought to recover the rectory-house, &c., of Exeter college, in Oxford. The question was, whether the plaintiff or defendant was legal rector. Exeter college was founded by an individual, and incorporated by a charter granted by Queen Elizabeth. The controversy turned upon the power of the visitor, and in the discussion of the cause, the nature of college charters and corporations was very fully considered; and it was determined, that the college was a private corporation, and that the founder had a right to appoint a visitor, and give him such power as he thought fit. 4 The learned Bishop Stillingfleet's argument in the same cause, as a member of the House of Lords, when it was there heard, exhibits very clearly the nature of colleges and similiar corporations. 5 These opinions received the sanction of the House of Lords, and they seem to be settled and undoubted law. Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds. Green v. Rutherford, 1 Ves. 472; Attorney-General v. Foundling Hospital, 2 Ves. Jr. 47; Kyd on Corp. 195; Coop. Eq. Pl. 292. [17 U.S. 518, 566] 'The foundations of colleges,' says Lord MANSFIELD, 'are to be considered in two views, viz., as they are corporations, and as they are eleemosynary. As eleemosynary, they are the creatures of the founder; he may delegate his power, either generally or specially; he may prescribe particular modes and manners, as to the exercise of part of it. If he makes a general visitor (as by the general words, visitator sit), the person so constituted has all incidental power; but he may be restrained as to particular instances. The founder may appoint a special visitor, for a particular purpose, and no further. The founder may make a general visitor; and yet appoint an inferior particular power, to be executed without going to the visitor in the first instance.' St. John's College, Cambridge v. Todington, 1 Burr. 200. And even if the king be founder, if he grant a charter incorporating trustees and governors, they are visitors, and the king cannot visit. Attorney-General v. Middleton, 2 Ves. 328. A subsequent donation, or engrafted fellowship, falls under the same general visitatorial power, if not otherwise specially provided. Green v. Rutherford; St. John's College v. Todington.

In New England, and perhaps throughout the United States, eleemosynary corporations have been generally established in the later mode, that is by incorporating governors or trustees, and vesting in them the right of visitation. Small variations may have been in some instances adopted; as in the case of Harvard College, where some power of inspection is given to the overseers, but [17 U.S. 518, 567] not, strictly speaking, a visitatorial power, which still belongs, it is apprehended, to the fellows or members of the corporation. In general, there are many donors. A charter is obtained, comprising them all, or some of them, and such others as they choose to include, with the right of appointing their successors. They are thus the visitors of their own charity, and appoint others, such as they may see fit, to exercise the same office in time to come. All such corporations are private. The case before the court is clearly that of an eleemosynary corporation. It is, in the strictest legal sense, a private charity. In King v. St. Catharine's Hall, 4 T. R. 233, that college is called a private, eleemosynary, lay corporation. It was endowed by a private founder, and incorporated by letters-patent. And in the same manner was Dartmouth College founded and incorporated. Dr. Wheelock is declared by the charter to be its founder. It was established by him, on funds contributed and collected by himself. As such founder, he had a right of visitation, which he assigned to the trustees, and they received it, by his consent and appointment, and held it under the charter. 1 Bl. Com. ubi supra. He appointed these trustees visitors, and in that respect to take place of his heir; as he might have appointed devisees to take his estate, instead of his heir. Little, probably, did he think, at that time, that the legislature would ever take away this property and these privileges, and give them to others; little did he suppose, that this charter secured to him and his successors no legal rights; little did [17 U.S. 518, 568] the other donors think so. If they had, the college would have been, what the university is now, a thing upon paper, existing only in name. The numerous academies in New England have been established substantially in the same manner. They hold their property by the same tenure, and no other. Nor has Harvard College any surer title than Dartmouth College; it may, to- day, have more friends; but to-

morrow, it may have more enemies; its legal rights are the same. So also of Yale College; and indeed of all the others. When the legislature gives to these institutions, it may, and does, accompany its grants with such conditions as it pleases. The grant of lands by the legislature of New Hampshire to Dartmouth College, in 1789, was accompanied with various conditions. When donations are made, by the legislature or others, to a charity, already existing, without any condition, or the specification of any new use, the donation follows the nature of the charity. Hence the doctrine, that all eleemosynary corporations are private bodies. They are founded by private persons, and on private property. The public cannot be charitable in these institutions. It is not the money of the public, but of private persons which is dispensed. It may be public, that is, general, in its uses and advantages; and the state may very laudably add contributions of its own to the funds; but it is still private in the tenure of the property, and in the right of administering the funds.

If the doctrine laid down by Lord HOLT, and the House of Lords, in Phillips v. Bury, and recognised and established in all the other cases, be correct, [17 U.S. 518, 569] the property of this college was private property; it was vested in the trustees by the charter, and to be administered by them, according to the will of the founder and donors, as expressed in the charter; they were also visitors of the charity, in the most ample sense. They had, therefore, as they contend, privileges, property and immunities, within the true meaning of the bill of rights. They had rights, and still have them, which they can assert against the legislature, as well as against other wrongdoers. It makes no difference, that the estate is holden for certain trusts; the legal estate is still theirs. They have a right in the property, and they have a right of visiting and superintending the trust; and this is an object, of legal protection, as much as any other right. The charter declares that the powers conferred on the trustees, are 'privileges, advantages, liberties and immunities;' and that they shall be for ever holden by them and their successors. The New Hampshire bill of rights declares that no one shall be deprived of his 'property, privileges or immunities,' but by judgment of his peers, or the law of the land.

The argument on the other side is, that although these terms may mean something in the bill of rights, they mean nothing in this charter. But they are terms of legal signification, and very properly used in the charter; they are equivalent with franchises. Blackstone says, that franchise and liberty are used as synonymous terms. And after enumerating other liberties and franchises, he says, 'it is likewise, a franchise, for a number of persons to be incorporated and subsist as a body politic, with a power to maintain [17 U.S. 518, 570] perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom.' 2 Bl. Com. 37. Liberties is the term used in magna charta, as including franchises, privileges, immunities and all the rights which belong to that class. Professor Sullivan says, the term signifies the 'privileges that some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the king; as the chattels of felons or outlaws, and the lands and privilegs of corporations.' Sullivan's Lect, 41st Lect. The privilege, then, of being a member of a corporation, under a lawful grant, and of exercising the rights and powers of such member, is such a privilege, liberty or franchise, as has been the object of legal protection, and the subject of a legal interest, from the time of magna charta to the present moment. The plaintiffs have such an interest in this corporation, individually, as they could assert and maintain in a court of law, not as agents of the public, but in their own right. Each trustee has a franchise, and if he be disturbed in the enjoyment of it, he would have redress, on appealing to the law, as promptly as for any other injury. If the other trustees should conspire against any one of them, to prevent his equal right and voice in the appointment of a president or professor, or in the passing of any statute or ordinance of the college, he would be entitled to his action, for depriving him of his franchise. It makes no difference, that this property is to be holden and administered, and these franchises exercised, [17 U.S. 518, 571] for the purpose of diffusing learning. No principle and no case establishes any such distinction. The public may be benefited by the use of this property; but this does not change the nature of the property, or the rights of the owners. The object of the charter may be public good; so it is in all other corporations; and this would as well justify the resumption or violation of the grant in any other case as in this. In the case of an advowson, the

use is public, and the right cannot be turned to any private benefit or emolument. It is, nevertheless, a legal private right, and the property of the owner, as emphatically as his freehold. The rights and privileges of trustees, visitors or governors of incorporated colleges, stand on the same foundation. They are so considered, both by Lord HOLT and Lord HARDWICKE. Phillips v. Bury; Green v. Rutherforth. See also 2 Bl. Com. 21.

To contend, that the rights of the plaintiffs may be taken away, because they derive from them no pecuniary benefit, or private emolument, or because they cannot be transmitted to their heirs, or would not be assets to pay their debts, is taking an extremely narrow view of the subject. According to this notion, the case would be different, if, in the charter, they had stipulated for a commission on the disbursement of the funds; and they have ceased to have any interest in the property, because they have undertaken to administer it gratuitously. It cannot be necessary to say much in refutation of the idea, that there cannot be a legal interest, or [17 U.S. 518, 572] ownership, in anything which does not yield a pecuniary profit; as if the law regarded no rights but the rights of money, and of visible tangible property: Of what nature are all rights of suffrage? No elector has a particular personal interest; but each has a legal right, to be exercised at his own discretion, and it cannot be taken away from him.

The exercise of this right, directly and very materially affects the public; much more so than the exercise of the privileges of a trustee of this college. Consequences of the utmost magnitude may sometimes depend on the exercise of the right of suffrage by one or a few electors. Nobody was ever yet heard to contend, however, that on that account the public might take away the right or impair it. This notion appears to be borrowed from no better source than the repudiated doctrine of the three judges in the Aylesbury Case. 6 That was an action against a returning officer, for refusing the plaintiff's vote, in the election of a member of parliament. Three of the judges of the king's bench held, that the action could not be maintained, because, among other objections, 'it was not any matter of profit, either in praesenti or in futuro.' It would not enrich the plaintiff, in praesenti, nor would it, in futuro, go to his heirs, or answer to pay his debts. But Lord HOLT and the House of Lords were of another opinion. The judgment of the three judges was reversed, and the doctrine they held, having been exploded for a century, seems now for the first time to be revived. Individuals have a right [17 U.S. 518, 573] to use their own property for purposes of benevolence, either towards the public, or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, by contracting to give perpetuity to the stipulated manner of exercising it, to rescind this contract, and seize on the property, is not law, but violence. Whether the state will grant these franchises, and under what conditions it will grant them, it decides for itself. But when once granted, the constitution holds them to be sacred, till forfeited for just cause. That all property, of which the use may be beneficial to the public, belongs, therefore, to the public, is quite a new doctrine. It has no precedent, and is supported by no known principle. Dr. Wheelock might have answered his purposes, in this case, by executing a private deed of trust. He might have conveyed his property to trustees, for precisely such uses as are described in this charter. Indeed, it appears, that he had contemplated the establishment of his school in that manner, and had made his will, and devised the property to the same persons who were afterwards appointed trustees in the charter. Many literary and other charitable institutions are founded in that manner, and the trust is renewed, and conferred on other persons, from time to time, as occasion may require. In such a case, no lawyer would or could say, that the legislature might divest the trustees, constituted by deed or will, seize upon the property, and give it to other persons, for other purposes. And does the granting of a charter, which is only done to perpetuate the trust [17 U.S. 518, 574] in a more convenient manner, make any difference? Does or can this change the nature of the charity, and turn it into a public, political corporation? Happily, we are not without authority on this point. It has been considered and adjudged.

Lord HARDWICKE says, in so many words, 'The charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be.' Attorney-General v. Pearce, 2 Atk. 87. The granting of the corporation is but making the trust perpetual, and does not alter the nature of the charity.

The very object sought in obtaining such charter, and in giving property to such a corporation, is to make and keep it private property, and to clothe it with all the security and inviolability of private property. The intent is, that there shall be a legal private ownership, and that the legal owners shall maintain and protect the property, for the benefit of those for whose use it was designed. Who ever endowed the public? Who ever appointed a legislature to administer his charity? Or who ever heard, before, that a gift to a college, or hospital, or an asylum, was, in reality, nothing but a gift to the state? The state of Vermont is a principal donor to Dartmouth College. The lands given lie in that state. This appears in the special verdict. Is Vermont to be considered as having intended a gift to the state of New Hampshire in this case; as it has been said is to be the reasonable construction of all donations to the college? The legislature of New Hampshire affects to represent the public, and therefore, claims a right to control [17 U.S. 518, 575] all property destined to public use.

What hinders Vermont from considering herself equally the representative of the public, and from resuming her grants, at her own pleasure? Her right to do so is less doubtful, than the power of New Hampshire to pass the laws in question. In University v. Foy, 2 Hayw. 310, the supreme court of North Carolina pronounced unconstitutional and void, a law repealing a grant to the University of North Carolina; although that university was originally erected and endowed by a statute of the state. That case was a grant of lands, and the court decided, that it could not be resumed. This is the grant of a power and capacity to hold lands. Where is the difference of the cases, upon principle? In Terrett v. Taylor, 9 Cranch 43, this court decided, that a legislative grant or confirmation of lands, for the purposes of moral and religious instruction, could no more be rescinded than other grants. The nature of the use was not holden to make any difference. A grant to a parish or church, for the purposes which have been mentioned, cannot be distinguished, in respect to the title it confers, from a grant to a college for the promotion of piety and learning. To the same purpose may be cited, the case of Pawlet v. Clark. The state of Vermont, by statute, in 1794, granted to the respective towns in that state, certain glebe lands, lying within those towns, for the sole use and support of religious worship. In 1799, an act was passed, to repeal the act of 1794; but this court declared that the act of 1794, 'so far as it [17 U.S. 518, 576] granted the glebes to the towns, could not afterwards be repealed by the legislature, so as to divest the rights of the towns under the grant.' 9 Cranch 292. It will be for the other side to show, that the nature of the use decides the question, whether the legislature has power to resume its grants. It will be for those who maintain such a doctrine, to show the principles and cases upon which it rests. It will be for them also, to fix the limits and boundaries of their doctrine, and to show what are, and what are not, such uses as to give the legislature this power of resumption and revocation. And to furnish an answer to the cases cited, it will be for them further to show, that a grant for the use and support of religious worship, stands on other ground than a grant for the promotion of piety and learning.

I hope enough has been said, to show, that the trustees possessed vested liberties, privileges and immunities, under this charter; and that such liberties, privileges and immunities, being once lawfully obtained and vested, are as inviolable as any vested rights of property whatever. Rights to do certain acts, such, for instance, as the visitation and superintendence of a college, and the appointment of its officers, may surely be vested rights, to all legal intents, as completely as the right to posses property. A late learned judge of this court has said, when I say, that a right is vested in a citizen, I mean, that he has the power to do certain actions, or to possess certain things, according to the law of the land. 3 Dall. 394. [17 U.S. 518, 577] If such be the true nature of the plaintiffs' interests under this charter, what are the articles in the New Hampshire bill of rights which these acts infringe? They infringe the second article; which says, that the citizens of the state have a right to hold and possess property. The plaintiffs had a legal property in this charter; and they had acquired property under it. The acts deprive them of both; they impair and take away the charter; and they appropriate the property to new uses, against their consent. The plaintiffs cannot now hold the property acquired by themselves, and which this article says, they have a right to hold. They infringe the twentieth article. By that article it is declared, that in questions of property, there is a right to trial; the plaintiffs are divested, without trial or judgment. They infringe the twenty-third article. It is therein declared, that no retrospective laws shall be passed; the article bears

directly on the case; these acts must be deemed retrospective, within the settled construction of that term. What a retrospective law is, has been decided, on the construction of this very article, in the circuit court for the first circuit. The learned judge of that circuit, says, 'every statute which takes away or impairs vested rights, acquired under existing laws, must be deemed retrospective.' Society v. Wheeler, 2 Gallis. 103. That all such laws are retrospective, was decided also in the case of Dash v. Van Kleeck, 7 Johns. 477, where a most learned [17 U.S. 518, 578] judge quotes this article from the constitution of New Hampshire, with manifest approbation, as a plain and clear expression of those fundamental and unalterable principles of justice, which must lie at the foundation of every free and just system of laws. Can any man deny, that the plaintiffs had rights, under the charter, which were legally vested, and that by these acts, those rights are impaired?7 These [17 U.S. 518, 579] acts infringe also, the thirty-seventh article of the constitution of New Hampshire; which says, that the powers of government shall be kept separate. By these acts, the legislature assumes to exercise a judicial power; it declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether waste paper, it has restrained the power of the legislature in these particulars, If it has any meaning, it is, that the legislature shall pass no act, directly and manifestly impairing private property, and private privileges. It shall not judge, by act; it shall not decide, by act; it shall not deprive, by act. But it shall leave all these things to be tried and adjudged by the law of the land.

The fifteenth article has been referred [17 U.S. 518, 580] to before. It declares, that no one shall be 'deprived of his property, immunities or privileges, but by the judgment of his peers, or the law of the land.' Notwithstanding the light in which the learned judges in New Hampshire viewed the rights of the plaintiffs under the charter, and which has been before adverted to, it is found to be admitted, in their opinion, that those rights are privileges, within the meaning of this fifteenth article of the bill of rights. Having quoted that article, they say, 'that the right to manage the affairs of this college is a privilege, within the meaning of this clause of the bill of rights, is not to be doubted.' In my humble opinion, this surrenders the point. To resist the effect of this admission, however, the learned judges add, 'but how a privilege can be protected from the operation of the law of the land, by a clause in the constitution, declaring that it shall not be taken away, but by the law of the land, is not very easily understood.' This answer goes on the ground, that the acts in question are laws of the land, within the meaning of the constitution. If they be so, the argument drawn from this article is fully answered. If they be not so, it being admitted that the plaintiffs' rights are 'privileges,' within the meaning of the article, the argument is not answered, and the article is infringed by the acts. Are then these acts of the legislature, which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone: 'And first, it (i. e., law) is a rule; not a transient sudden order from a superior, to or concerning a particular [17 U.S. 518, 581] person; but something permanent, uniform and universal. Therefore, a particular act of the legislature, to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titlus only, and has no relation to the community in general; it is rather a sentence than a law.' 1 Bl. Com. 44. Lord Coke is equally decisive and emphatic. Citing and commenting on the celebrated 29th chap. of magna charta, he says, 'no man shall be disseised, &c., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), by the due course and process of law.' 2 Inst. 46. Have the plaintiffs lost their franchises by 'due course and process of law?' On the contrary, are not these acts 'particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws?' By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's [17 U.S. 518, 582] estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance,

completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country. 'Is that the law of the land,' said Mr. Burke, 'upon which, if a man go to Westminster Hall, and ask counsel by what title or tenure he holds his privilege or estate, according to the law of the land, he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know what the law of the land is? Will this he said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?' That the power of electing and appointing the officers of this college is not only a right of the trustees, as a corporation, generally, and in the aggregate, but that each individual trustee has also his own individual franchise in such right of election and appointment, is according to the language of all the authorities. Lord HOLT says, 'it is agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the [17 U.S. 518, 583] particular members, and to be enjoyed by them in their private capacity. Where the privilege of election is used by particular persons, it is a particular right, vested in every particular man.' 2 Ld. Raym. 952.

It is also to be considered, that the president and professors of this college have rights to be affected by these acts. Their interest is similar to that of fellows in the English colleges; because they derive their living wholly, or in part, from the founder's bounty. The president is one of the trustees or corporators. The professors are not necessarily members of the corporation; but they are appointed by the trustees, are removable only by them, and have fixed salaries, payable out of the general funds of the college. Both president and professors have freeholds in their offices; subject only to be removed by the trustees, as their legal visitors, for good cause. All the authorities speak of fellowships in colleges as freeholds, notwithstanding the fellows may be liable to be suspended or removed, for misbehavior, by their constituted visitors. Nothing could have been less expected, in this age, than that there should have been an attempt, by acts of the legislature, to take away these college livings, the inadequate, but the only support of literary men, who have devoted their lives to the instruction of youth. The president and professors were appointed by the twelve trustees. They were accountable to nobody else, and could be removed by nobody else. They accepted their offices on this tenure. Yet the legislature has appointed [17 U.S. 518, 584] other persons, with power to remove these officers, and to deprive them of their livings; and those other persons have exercised that power. No description of private property has been regarded as more sacred than college livings. They are the estates and freeholds of a most deserving class of men; of scholars who have consented to forego the advantages of professional and public employments, and to devote themselves to science and literature, and the instruction of youth, in the quiet retreats of academic life. Whether to dispossess and oust them; to deprive them of their office, and turn them out of their livings; to do this, not by the power of their legal visitors, or governors, but by acts of the legislature; and to do it, without forfeiture, and without fault; whether all this be not in the highest degree an indefensible and arbitrary proceeding, is a question, of which there would seem to be but one side fit for a lawyer or a scholar to espouse. Of all the attempts of James II. to overturn the law, and the rights of his subjects, none was esteemed more arbitrary or tyrannical, than his attack on Magdalen college, Oxford: and yet, that attempt was nothing but to put out one president and put in another. The president of that college, according to the charter and statutes, is to be chosen by the fellows, who are the corporators. There being a vacancy, the king chose to take the appointment out of the hands of the fellows, the legal electors of a president, into his own hands. He, therefore, sent down his mandate, commanding the fellows to admit, for president, a person of his nomination; and inasmuch as this was directly against [17 U.S. 518, 585] the charter and constitution of the college, he was pleased to add a non obstante clause, of sufficiently comprehensive import. The fellows were commanded to admit the person mentioned in the mandate, 'any statute, custom or constitution to the contrary notwithstanding, wherewith we are graciously pleased to dispense, in this behalf.' The fellows refused obedience to this mandate, and Dr. Hough, a man of

independence and character, was chosen president by the fellows, according to the charter and statutes. The king then assumed the power, in virtue of his prerogative, to send down certain commissioners to turn him out; which was done accordingly; and Parker, a creature suited to the times, put in his place. And because the president, who was rightfully and legally elected, would not deliver the keys, the doors were broken open. 'The nation, as well as the university,' says Bishop Burnet,8 'looked on all these proceedings with just indignation. It was thought an open piece of robbery and burglary, when men, authorized by no legal commission, came and forcibly turned men out of their possession and freehold.' Mr. Hume, although a man of different temper, and of other sentiments, in some respects, than Dr. Burnet, speaks of this arbitrary attempt of prerogative, in terms not less decisive. 'The president, and all the fellows,' says he, 'except two, who complied, were expelled the college: and Parker was put in possession of the office. This act of violence, of all those which were committed during [17 U.S. 518, 586] the reign of James, is perhaps the most illegal and arbitrary. When the dispensing power was the most strenuously insisted on by court lawyers, it had still been allowed, that the statutes which regard private property could not legally be infringed by that prorogative. Yet, in this instance, it appeared, that even these were not now secure from invasion. The privileges of a college are attacked; men are illegally dispossessed of their property for adhering to their duty, to their oaths, and to their religion.' This measure king James lived to repent, after repentance was too late. When the charter of London was restored, and other measured of violence retracted, to avert the impending revolution, the expelled president and fellows of Magdalen college were permitted to resume their rights. It is evident, that this was regarded as an arbitrary interference with private property. Yet private property was no otherwise attacked, than as a person was appointed to administer and enjoy the revenues of a college, in a manner and by persons not authorized by the constitution of the college. A majority of the members of the corporation would not comply with the king's wishes; a minority would; the object was, therefore, to make this minority, a majority. To this end, the king's commissioners were directed to interfere in the case, and they united with the two complying fellows, and expelled the rest; and thus effected a change in the government of the college. The language in which Mr. Hume, and all other writers, speak of this abortive attempt of oppression, shows, that colleges were esteemed to be, as [17 U.S. 518, 587] they truly are, private corporations, and the property and privileges which belong to them, private property, and private privileges. Court lawyers were found to justify the king in dispensing with the laws; that is, in assuming and exercising a legislative authority. But no lawyer, not even a court lawyer, in the reign of king James the second, so far as appears, was found to say, that even by this high authority, he could infringe the franchises of the fellows of a college, and take away their livings. Mr. Hume gives the reason; it is, that such franchises were regarded, in a most emphatic sense, as private property. 9 If it could be made to appear, that the trustees and the president and professors held their offices and franchises during the pleasure of the legislature, and that the property holden belonged to the state, then, indeed, the legislature have done no more than they had a right to do. But this is not so. The charter is a charter of privileges and immunities; and these are holden by the trustees, expressly against the state, for ever. It is admitted, that the state, by its courts of law, can enforce the will of the donor, and compel a faithful execution of the trust. The plaintiffs claim no exemption from legal responsibility. They hold themselves at all times answerable to the law of the land, for their conduct in the trust committed to them. They ask only to hold the property of which they are owners, and the franchises which belong to them, until they shall be found by due course and process of law to have forfeited them. It can make no difference, [17 U.S. 518, 588] whether the legislature exercise the power it has assumed, by removing the trustees and the president and professors, directly, and by name, or by appointing others to expel them. The principle is the same, and in point of fact, the result has been the same. If the entire franchise cannot be taken away, neither can it be essentially impaired. If the trustees are legal owners of the property, they are sole owners. If they are visitors, they are sole visitors. No one will be found to say, that if the legislature may do what it has done, it may not do anything and everything which it may choose to do, relative to the property of the corporation, and the privileges of its members and officers.

If the view which has been taken of this question be at all correct, this was an eleemosynary corporation-a

private charity. The property was private property. The trustees were visitors, and their right to hold the charter, administer the funds, and visit and govern the college, was a franchise and privilege, solemnly granted to them. The use being public, in no way diminishes their legal estate in the property, or their title to the franchise. There is no principle, nor any case, which declares that a gift to such a corporation is a gift to the public. The acts in question violate property; they take away privileges, immunities and franchises; they deny to the trustees the protection of the law; and they are retrospective in their operation. In all which respects, they are against the constitution of New Hampshire.

2. The plaintiffs contend, in the second place, that the acts in question are repugnant to the 10th section [17 U.S. 518, 589] of the 1st article of the constitution of the United States. The material words of that section are, 'no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.' The object of these most important provisions in the national constitution has often been discussed, both here and elsewhere. It is exhibited with great clearness and force by one of the distinguished persons who framed that instrument. 'Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the [17 U.S. 518, 590] community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding.' 10 It has already been decided in this court, that a grant is a contract, within the meaning of this provision; and that a grant by a state is also a contract, as much as the grant of an individual. 11 [17 U.S. 518, 591] It has also been decided, that a grant by a state before the revolution, is as much to be protected as a grant since. New Jersey v. Wilson, 7 Cranch 264. But the case of Terrett v. Taylor, before cited, is of all others most pertinent to the present argument. Indeed, the judgment of the court in that case seems to leave little to be argued or decided in this. 12 This court, then, does not admit the doctrine, [17 U.S. 518, 592] that a legislature can repeal statutes creating private corporations. If it cannot repeal them altogether, of course, it cannot repeal any part of them, or impair them, or essentially alter them, without the consent of the corporators. If, therefore, it has been shown, that this college is to be regarded as a private charity, this case is embraced within the very terms of that decision. A grant of corporate powers and privileges is as much a contract, as a grant of land. What proves all charters of this sort to be contracts, is, that they must be accepted, to give them force and effect. If they are not accepted, they are void. And in the case of an existing corporation, if a new charter is given it, it may even accept part, and reject the rest. In Rex v. Vice-Chancellor of Cambridge, 3 Burr. 1656, Lord MANSFIELD says, 'there is a vast deal of difference between a new charter granted to a new corporation (who must take it as it is given), and a new charter given to a corporation already in being, and acting either under a former charter, or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it; they may act partly under it, and [17 U.S. 518, 593] partly under their old charter, or prescription. The validity of these new charters must turn upon the acceptance of them.' In the same case, Mr. Justice WILMOT says, 'it is the concurrence and acceptance of the university, that gives the force to the charter of the crown.' In the King v. Pasmore, 3 T. R. 240, Lord KENYON observes, 'some things are clear: when a corporation exists, capable of discharging its functions, the crown cannot obtrude another charter upon them; they may either accept or reject it.' 13 In all cases relative to charters,

the acceptance of them is uniformly alleged in the pleadings. This shows the general understanding of the law, that they are grants, or contracts; and that parties are necessary to give them force and validity. In King v. Dr. Askew, 4 Burr. 2200, it is said, 'the crown cannot oblige a man to be a corporator, without his consent; he shall not be subject to the inconveniences of it, without accepting it and assenting to it.' These terms, 'acceptance,' and 'assent,' are the very language of contract. In Ellis v. Marshall, 2 Mass. 279, it was expressly adjudged, that the naming of the defendant, among others, in an act of incorporation, did not, of itself, make him a corporator; and that his assent was necessary to that end. The court speak of the act of incorporation as a grant, and observe, 'that a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities.' But Mr. Justice BULLER, in King v. Pasmore, [17 U.S. 518, 594] furnishes, if possible, a still more direct and explicit authority. Speaking of a corporation for government, he says, 'I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place.'

This language applies, with peculiar propriety and force, to the case before the court. It was in consequence of the 'privileges bestowed,' that Dr. Wheelock and his associates undertook to exert themselves for the instruction and education of youth in this college; and it was on the same consideration, that the founder endowed it with his property. And because charters of incorporation are of the nature of contracts, they cannot be altered or varied, but by consent of the original parties. If a charter be granted by the king, it may be altered by a new charter, granted by the king, and accepted by the corporators. But if the first charter be granted by parliament, the consent of parliament must be obtained to any alteration. In King v. Miller, 6 T. R. 277, Lord KENYON says, 'where a corporation takes its rise from the king's charter, the king, by granting, and the corporation, by accepting, another charter, may alter it, because it is done with the consent of all the parties who are competent to consent to the alteration.' 14 There are, in this [17 U.S. 518, 595] case, all the essential constituent parts of a contract. There is something to be contracted about; there are parties, and there are plain terms in which the agreement of the parties, on the subject of the contract, is expressed; there are mutual considerations and inducements. The charter recites, that the founder, on his part, has agreed to establish his seminary in New Hampshire, and to enlarge it, beyond its original design, among other things, for the benefit of that province; and thereupon, a charter is given to him and his associates, desiguated by himself, promising and assuring to them, under the plighted faith of the state, the right of governing the college, and administering its concerns, in the manner provided in the charter. There is a complete and perfect grant to them of all the power of superintendence, visitation and government. Is not this a contract? If lands or money had been granted to him and his associates, for the same purposes, such grant could not be rescinded. And is there any difference, in legal contemplation, between a grant of corporate franchises, and a grant of tangible property? No such difference is recognised in any decided case, nor does it exist in the common apprehension of mankind.

It is, therefore, contended, that this case falls within the true meaning of this provision of the constitution, as expounded in the decisions of this court; that the charter of 1769 is a contract, a stipulation or agreement: mutual in its considerations, express and formal in its terms, and of a most binding and solemn nature. That the acts in question impair this contract, [17 U.S. 518, 596] has already been sufficiently shown. They repeal and abrogate its most essential parts.

Much has heretofore been said on the necessity of admitting such a power in the legislature as has been assumed in this case. Many cases of possible evil have been imagined, which might otherwise be without remedy. Abuses, it is contended, might arise in the management of such institutions, which the ordinary courts of law would be unable to correct. But this is only another instance of that habit of supposing extreme cases, and then of reasoning from them, which is the constant refuge of those who are obliged to defend a cause which, upon its merits, is indefensible. It would be sufficient to say, in answer,

that it is not pretended, that there was here any such case of necessity. But a still more satisfactory answer is, that the apprehension of danger is groundless, and therefore, the whole argument fails. Experience has not taught us, that there is danger of great evils, or of great inconvenience, from this source. Hitherto, neither in our own country nor elsewhere, have such cases of necessity occurred. The judicial establishments of the state are presumed to be competent to prevent abuses and violations of trust, in cases of this kind, as well as in all others. If they be not, they are imperfect, and their amendment would be a most proper subject for legislative wisdom. Under the government and protection of the general laws of the land, those institutions have always been found safe, as well as useful. They go on with the progress of society, accommodating themselves easily, without sudden change or [17 U.S. 518, 597] violence, to the alterations, which take place in its condition; and in the knowledge, the habits and pursuits of men. The English colleges were founded in Catholic ages. Their religion was reformed with the general reformation of the nation; and they are suited perfectly well to the purpose of educating the Protestant youth of modern times. Dartmouth College was established under a charter granted by the provincial government; but a better constitution for a college, or one more adapted to the condition of things under the present government, in all material respects, could not now be framed. Nothing in it was found to need alteration at the revolution. The wise men of that day saw in it one of the best hopes of future times, and commended it, as it was, with parental care, to the protection and guardianship of the government of the state. A charter of more liberal sentiments, or wiser provisions, drawn with more care, or in a better spirit, could not be expected at any time, or from any source. The college needed no change in its organization or government. That which it did need was the kindness, the patronage, the bounty of the legislature; not a mock elevation to the character of a university, without the solid benefit of a shilling's donation, to sustain the character; not the swelling and empty authority of establishing institutes and other colleges. This unsubstantial pageantry would seem to have been in derision of the scanty endowment and limited means of an unobtrusive, but useful and growing seminary. Least of all, was there a necessity, or pretence of necessity, to infringe its legal rights, violate its franchises [17 U.S. 518, 598] and privileges, and pour upon it these overwhelming streams of litigation.

But this argument, from necessity, would equally apply in all other cases. If it be well founded, it would prove, that whenever any inconvenience or evil should be experienced from the restrictions imposed on the legislature by the constitution, these restrictions ought to be disregarded. It is enough to say, that the people have thought otherwise. They have, most wisely, chosen to take the risk of occasional inconvenience, from the want of power, in order that there might be a settled limit to its exercise, and a permanent security against its abuse. They have imposed prohibitions and restrains; and they have not rendered these altogether vain and nugatory, by conferring the power of dispensation. If inconvenience should arise, which the legislature cannot remedy under the power conferred upon it, it is not answerable for such inconvenience. That which it cannot do within the limits prescribed to it, it cannot do at all. No legislature in this country is able, and may the time never come, when it shall be able, to apply to itself the memorable expression of a Roman pontiff: 'Licet hoc de jure non possumus, volumus tamen de plenitudine potestatis.'

The case before the court is not of ordinary importance, nor of every- day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the inviolability [17 U.S. 518, 599] of their charters. It will be a dangerous, a most dangerous, experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions. If the franchise may be, at any time, taken away or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics; party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only; they are certain and immediate.

When the court in North Carolina declared the law of the state, which repealed a grant to its university, unconstitutional and void, the legislature had the candor and the wisdom to repeal the law. This example, so honorable to the state which exhibited it, is most fit to be followed on this occasion. And there is good reason to hope, that a state which has hitherto been so much distinguished for temperate councils, cautious legislation, and regard to law, will not fail to adopt a course which will accord with her highest and best interest, and in no small degree, elevate her reputation. It was, for many obvious reasons, most anxiously desired, that the question of the power of the legislature over this charter should have been finally decided in the state court. An earnest hope was entertained, [17 U.S. 518, 600] that the judges of that court might have viewed the case in a light favorable to the rights of the trustees. That hope has failed. It is here that those rights are now to be maintained, or they are prostrated for ever. Omnia alia perfugia bonorum, subsidia, consilia, auxilia jura ceciderunt. Quem enim alium appellem? quem obtestor? quem implorem? Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quoe spe exigua extremaque pendet, temerimus; nihil est proeterea quo confugere possimus.

Holmes, for the defendant in error, argued, that the prohibition in the constitution of the United States, which alone gives the court jurisdiction in this case, did not extend to grants of political power; to contracts concerning the internal government and police of a sovereign state. Nor does it extend to contracts which relate merely to matters of civil institution, even of a private nature. Thus, marriage is a contract, and a private contract; but relating merely to a matter of civil institution, which every society has an inherent right to regulate as its own wisdom may dictate, it cannot be considered as within the spirit of this prohibitory clause. Divorces unquestionably impair the obligation of the nuptial contract; they change the relations of the marriage state, without the consent of both the parties, and thus come clearly within the letter of the prohibition. But surely, no one will contend, that there is locked up in this mystical clause of the constitution a prohibition to the states to grant divorces, a power [17 U.S. 518, 601] peculiarly appropriate to domestic legislation, and which has been exercised in every age and nation where civilization has produced that corruption of manners, which, unfortunately, requires this remedy. Still less can a contract concerning a public office to be exercised, or duty to be performed, be included within this prohibition. The convention who framed the coustitution, did not intend to interfere in the exercise of the political powers reserved to the state governments. That was left to be regulated by their own local laws and constitutions; with this exception only, that the Union should guaranty to each state a republican form of government, and defend it against domestic insurrection and rebellion. Beyond this, the authorities of the Union have no right to interfere in the exercise of the powers reserved to the state. They are sovereign and independent in their own sphere. If, for example, the legislature of a particular state should attempt to deprive the judges of its courts (who, by the state constitution, held their places during good behavior) of their offices, without a trial by impeachment; or should arbitrarily and capriciously increase the number of the judges, so as to give the preponderancy in judicature to the prevailing political faction, would it be pretended, that the minority could resist such a law, upon the ground of its impairing the obligation of a contract? Must not the remedy, if anywhere existing, be found in the interposition of some state authority to enforce the provisions of the state constitution?

The education of youth, and the encouragement of the arts and sciences, is one of the most [17 U.S. 518, 602] important objects of civil government. Vattel, lib. 1, c. 11, 112-13. By our constitutions, it is left exclusively to the states, with the exception of copyrights and patents. It was in the exercise of this duty of government, that this charter was originally granted to Dartmouth College. Even when first granted, under the colonial government, it was subject to the notorious authority of the British parliament over all charters containing grants of political power. It might have been revoked or modified by act of parliament. 1 Bl. Com. 485. The revolution, which separated the colony from the parent county, dissolved all connection between this corporation and the crown of Great Britain. But it did not destroy that supreme authority which every political society has over its public institutions; that still remained, and was transferred to the people of New Hampshire. They have not relinquished it to the government of the United States,

or to any department of that government. Neither does the constitution of New Hampshire confirm the charter of Dartmouth College, so as to give it the immutability of the fundamental law. On the contrary, the constitution of the state admonishes the legislature of the duty of encouraging science and literature, and thus seems to suppose its power of control over the scientific and literary institutions of the state. The legislature had, therefore, a right to modify this trust, the original object of which, was the education of the Indian and English youth of the province. It is not necessary to contend, that it had the right of wholly diverting [17 U.S. 518, 603] the fund from the original object of its pious and benevolent founders. Still, it must be insisted, that a regal grant, with a regal and colonial policy, necessarily became subject to the modification of a republican legislature, whose right, and whose duty, it was, to adapt the education of the youth of the country to the change in its political institutions. It is a corollary from the right of self-government. The ordinary remedies which are furnished in the court for a misuser of the corporate franchises, are not adapted to the great exigencies of are volution in government. They presuppose a permanently-established order of things, and are intended only to correct occasional deviations and minor mischiefs. But neither a reformation in religion, nor a revolution in government, can be accomplished or confirmed by a writ of quo warranto or mandamus. We do not say, that the corporation has forfeited its charter for misuser; but that it has become unfit for use, by a change of circumstances. Nor does the lapse of time from 1776 to 1816, infer an acquiescence on the part of the legislature, or a renunciation of its right to abolish or reform an institution, which being of a public nature, cannot hold its privileges by prescription. Our argument is, that it is, at all times, liable to be new modelled by the legislative wisdom, instructed by the lights of the age.

The conclusion then is, that this charter is not such a contract as is contemplated by the constitution of the United States; that it is not a contract of a private nature, concerning property or other private interests: but that it is a grant of a public nature, [17 U.S. 518, 604] for public purposes, relative to the internal government and police of a state, and therefore, liable to be revoked or modified by the supreme power of that state.

Supposing, however, this to be a contract such as was meant to be included in the constitutional prohibition, is its obligation impaired by these acts of the legislature of New Hampshire? The title of the acts of the 27th of June, and the 18th of December 1816, shows that the legislative will and intention was to amend the charter, and enlarge and improve the corporation. If, by a technical fiction, the grant of the charter can be considered as a contract between the king (or the state) and the corporators, the obligation of that contract is not impaired; but is rather enforced, by these acts, which continue the same corporation, for the same objects, under a new name. It is well settled, that a mere change of the name of a corporation will not affect its identity. An addition to the number of the colleges, the creation of new fellowships, or an increase of the number of the trustees, do not impair the franchises of the corporate body. Nor is the franchise of any individual corporator impaired. In the words of Mr. Justice ASHHURST, in the case of the King v. Pasmore, 3 T. R. 244, 'the members of the old body have no injury or injustice to commplain of, for they are all included in the new charter of incorporation; and if any of them do not become members of the new incorporation, but refuse to accept, it is their own [17 U.S. 518, 605] fault.' What rights, which are secured by this alleged contract, are invaded by the acts of the legislature? Is it the right of property, or of privileges? It is not the former, because the corporate body is not deprived of the least portion of its property. If it be the personal privileges of the corporators that are attacked, these must be either a common and universal privilege, such as the right of suffrage, for interrupting the exercise of which an action would lie; or they must be monopolies and exclusive privileges, which are always subject to be regulated and modified by the supreme power of the state. Where a private proprietary interest is coupled with the exercise of political power, or a public trust, the charters of corporations have frequently been amended by legislative authority. Gray v. Portland Bank, 3 Mass. 364; Commonwealth v. Bird, 12 Ibid. 443. In charters creating artificial persons, for purposes exclusively private, and not interfering with the common rights of the citizens, it may be admitted, that the legislature cannot interfere to amend, without the consent of the grantees. The grant of such a charter might, perhaps, be considered as analogous to a

contract between the state and private individuals, affecting their private rights, and might thus be regarded as within the spirit of the constitutional prohibition. But this charter is merely a mode of exercising one of the great powers of civil government. Its amendment, or even repeal, can no more be considered as the breach of a contract, than the amendment or repeal of any other law.

Such repeal or amendment is an ordinary act of publie [17 U.S. 518, 606] legislation, and not an act impairing the obligation of a contract between the government and private citizens, under which personal immunities or proprietary interests are vested in them.

The Attorney-General, on the same side, stated, that the only question properly before court was, whether the several acts of the logislature of New Hampshire, mentioned in the special verdict, are repugnant to that clause of the constitution of the United States, which provides, that no state shall 'pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts?'

Beside its intrinsic difficulty, the extreme delicacy of this question is evinced by the sentiments expressed by the court, whenever it has been called to act on such a question. Calder v. Bull, 3 Dall. 392, 394, 395; Fletcher v. Peck, 6 Cranch 87; New Jersey v. Wilson, 7 Ibid. 164; Terrett v. Taylor, 9 Ibid. 43. In the case of Fletcher v. Peck, the court says, 'The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts are to be considered as void. The opposition between the constitution and the law should be such [17 U.S. 518, 607] that the judge feels a clear and strong conviction of their incompatibility with each other.' 6 Cranch 128. In Calder v. Bull, 3 Dall. 395, Mr. Justice CHASE expressed himself with his usual emphatic energy, and said, 'I will not decide any law to be void, but in a very clear case.' It is, then, a very clear case, that these acts of New Hampshire are repugnant to the constitution of the United States?

1. Are they bills of attainder? The elementary writers inform us, that an attainder is 'the stain or corruption of the blood of the criminal capitally condemned.' 4 Bl. Com. 380. True it is, that the Chief Justice says, in Fletcher v. Peck, 6 Cranch 138, that a bill of attainder may affect the life of an individual, or may confiscate his estate, or both. But the cause did not turn upon this point, and the Chief Justice was not called upon to weigh, with critical accuracy, his expressions in this part of the case. In England, most certainly, the first idea presented is that of corruption of blood, and consequent forfeiture of the entire property of the criminal, as the regular and inevitable consequences of a capital conviction at common law. Statutes sometimes pardon the attainder, and merely forfeit the estate; but this forfeiture is always complete and entire. In the present case, however, it cannot be pretended, that any part of the estate of the trustees is forfeited, and, if a part, certainly not the whole.

2. Are these acts 'laws impairing the obligation [17 U.S. 518, 608] of contracts?' The mischiefs actually existing at the time the constitution was established, and which were intended to be remedied by this prohibitory clause, will show the nature of the contracts contemplated by its authors. It was the inviolability of private contracts, and private rights acquired under them, which was intended to be protected; 15 and not contracts which are, in their nature, matters of civil police, nor grants by a state, of power, and even property, to individuals, in trust to be administered for purposes merely public. 'The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts,' says Mr. Justice CHASE, 'were inserted to secure private rights.' Calder v. Bull, 3 Dall. 390. The cases determined in this court, illustrate the same construction of this clause of the constitution. Fletcher v. Peck was a case where a state legislature attempted to revoke its grant, so as to divest a beneficial estate in lands; a vested estate; an actual conveyance to individuals as their private property. 6 Cranch 87. In the case of New Jersey v. Wilson, there was an express contract, contained in a public treaty of cession with the Indians, by which the privilege of perpetual exemption from taxation was indelibly

impressed upon the lands, and could not be taken away, without a violation of the public faith [17 U.S. 518, 609] solemnly pledged. 7 Cranch 164. Terrett v. Taylor was also a case of an attempt to divest an interest in lands actually vested under an act amounting to a contract. 9 Ibid. 43. In all those instances, the property was held by the grantees, and those to whom they had conveyed, beneficially, and under the sanction of contracts, in the ordinary and popular signification of that term. But this is an attempt to extend its obvious and natural meaning, and to apply it, by a species of legal fiction, to a class of cases which have always been supposed to be within the control of the sovereign power. Charters to public corporations, for purposes of public policy, are necessarily subject to the legislative discretion, which may revoke or modify them, as the continually fluctuating exigencies of the society may require. Incorporations for the purposes of education and other literary objects, in one age, or under one form of government, may become unfit for their office in another age, or under another government.

This charter is said to be a contract between Doctor Wheelock and the King; a contract founded on a donation of private property by Doctor Wheelock. It is hence inferred, that it is a private eleemosynary corporation; and the right of visitation is said to be in the founder and heirs; and that the state can have no right to interfere, because it is neither the founder of this charity, nor contributor to it. But if the basis of this argument is removed, what becomes of the superstructure? The fact that Doctor Wheelock was a contributor, is not found by the [17 U.S. 518, 610] special verdict; and not having been such, in truth, it cannot be added, under the agreement to amend the special verdict. The jury find the charter, and that does not recite that the college was a private foundation by Doctor Wheelock. On the contrary, the real state of the case is, that he was the projector; that he had a school, on his own plantation, for the education of Indians; and through the assistance of others, had been employed for several years, in clothing, maintaining and educating them. He solicited contributions, and appointed others to solicit. At the foundation of the college, the institution was removed from his estate. The honors paid to him by the charter were the reward of past services, and of the boldness, as well as piety, of the project. The state has been a contributor of funds, and this fact is found. It is, therefore, not a private charity, but a public institution; subject to be modified, altered and regulated by the supreme power of the state.

This charter is not a contract, within the true intent of the constitution. The acts of New Hampshire, varying in some degree the forms of the charter, do not impair the abligation of a contract. In a case which is really one of contract, there is no difficulty in ascertaining who are the contracting parties. But here they cannot be fixed. Doctor Wheelock can only be said to be a party, on the ground of his contributing funds, and thus being the founder and visitor. That ground being removed, he ceases to be a party to the contract. Are the other contributors, alluded to in the charter, and enumerated [17 U.S. 518, 611] by Belknap in his history of New Hampshire, are they contracting parties? They are not before the court; and even if they were, with whom did they contract? With the King of Great Britain? He, too, is not before the court; and has declared, by his chancellor, in the case of the Attorney-General v. The City of London (3 Bro. C. C. 171; 1 Ves. jr. 243), that he has no longer any connection with these corporations in America. Has the state of New Hampshire taken his place? Neither is that state before the court, nor can it be, as a party, originally defendant. But suppose this to be a contract between the trustees, and the people of New Hampshire. A contract is always for the benefit and advantage of some person. This contract cannot be for the benefit of the trustees: it is for the use of the people. The cestui que use is always the contracting party; the trustee has nothing to do with stipulating the terms. The people then grant powers for their own use; it is a contract with themselves!

But if the trustees are parties on one side, what do they give, and what do they receive? They give their time and labor. Every society has a right to the services of its members, in places of public trust and duty. A town appoints, under the authority of the state, an overseer of the poor, or of the highways. He gives, reluctantly, his labor and services; he receives nothing in return, but the privilege of giving his labor and services. Such appointments to offices of public trust have never been considered [17 U.S. 518, 612] as contracts which the sovereign authority was not competent to rescind or modify. There can be no contract in which the party

does not receive some personal, private, individual benefit. To make this charter a contract, and a private contract, there must be a private beneficial interest vested in the party who pays the consideration. What is the private beneficial interest vested in the party, in the present case? The right of appointing the president and professors of the college, and of establishing ordinances for its government, &c. But to make these rights an interest which will constitute the end and object of a contract, the exercise of these rights must be for the private individual advantage of the trustees. Here, however, so far from that being the fact, it is solely for the advantage of the public; for the interests of piety and learning. It was upon these principles, that Lord KENYON determined, in the case of Weller v. Foundling Hospital, 1 Peake 154, that the governor and members of the corporation were competent witnesses, because they were trustees of a public charity, and had no private personal interest. It is not meant to deny, that mere right, a franchise, an incorporeal hereditament, may be the subject of a contract; but it must always be a direct, individual, beneficial interest to the party whe takes that right. The rights of municipal corporators are of this nature. The right of suffrage, there, belongs beneficially to the individual elector, and is to be exercised for his own exclusive advantage. It is in relation to these town [17 U.S. 518, 613] corporations, that Lord KENYON speaks, when he says, that the king cannot force a new charter upon them. Rex v. Pasmore, 3 T. R. 244. This principle is established for the benefit of all the corporators. It is accompanied by another principle, without which it would never have been adopted; the power of proposing amendments, at the desire of those for whose benefit the charter was granted. These two principles work together for the good of the whole. By the one, these municipal corporations are saved from the tyranny of the crown; and by the other, they are preserved from the infinite perpetuity of inveterate errors. But in the present case, there is no similar qualification of the immutability of the charter, which is contended for in the argument on the other side. But in truth, neither the original principle, nor its qualification, apply to this case; for there is here no such beneficial interest and individual property as are enjoyed by town corporators.

3. But even admitting it to be a case of contract, its obligation is not impaired by these legislative acts. What vested right has been divested? None! The former trustees are continued. It is true, that new trustees are added, but this affords no reasonable ground of complaint. The privileges of the House of Lords, in England, are not impaired by the introduction of new members. The old corporation is not abolished, for the foundation, as now regulated, is substantially the same. It is identical in all its essential constituent parts, and all its former rights are [17 U.S. 518, 614] preserved and confirmed. See Mayor of Colchester v. Seaber, 3 Burr. 1866. The change of name does not change its original rights and franchises. 1 Saund. 344, n. 1; Luttrel's Case, 4 Co. 87. By the revolution which separated this country from the British empire, all the powers of the British government devolved on the states. The legislature of New Hampshire then became clothed with all the powers, both of the king and parliament, over these public institutions. On whom, then, did the title to the property of this college fall? If, before the revolution, it was beneficially vested in any private individuals, or corporate body, I do not contend, that the revolution divested it, and gave it to the state. But it was not before vested beneficially in the trustees. The use unquestionably belonged to the people of New Hampshire, who were the cestuis que trust. The legal estate was, indeed, vested in the trustees, before the revolution, by virtue of the royal charter of 1769. But that charter was destroyed by the revolution (Attorney-General v. City of London, 3 Bro. C. C. 171; s. c. 1 Ves. jr. 143), and the legal estate, of course, fell upon those who held the equitable estate-upon the people. If those who were trustees carried on the duties of the trust, after the revolution, it must have been subject to the power of the people. If it be said, that the state gave its implied assent to the terms of the old charter, then it must be subject to all the terms on which it was granted; and among these, to the oath of allegiance to the king. But if, to avoid [17 U.S. 518, 615] this concession, it be said, that the charter must have been so far modified as to adapt it to the character of the new government, and to the change in our civil institutions; that is precisely what we contend for. These civil institutions must be modified, and adapted to the mutations of society and manners. They belong to the people, are established for their benefit, and ought to be subject to their authority.

Hopkinson, in reply, insisted, that the whole argument on the other side proceeded on an assumption which

was not warranted, and could not be maintained. The corporation created by this charter is called a public corporation; its members are said to be public officers, and agents of government. They were officers of the king, it is said, before the revolution, and they are officers of the state since. But upon what authority is all this taken? What is the acknowledged principle, which decides thus of this corporation? Where are the cases in which such a doctrine has ever prevailed? No case, no book of authority, has been, or can be, cited to this purpose. Every writer on the law of corporations, all the cases in law and equity, instruct us, that colleges are regarded in law as private eleemosynary corporations, especially, colleges founded, as this was, by a private founder. If this settled principle be not overthrown, there is no foundation for the defendant's argument. We contend, that this charter is a contract between the government and the members of the corporation created by it. It is a contract, because it is a grant of valuable rights and privileges; and every grant implies [17 U.S. 518, 616] a contract not to resume the thing granted. Public offices are not created by contract or by charter; they are provided for by general laws. Judges and magistrates do not hold their offices under charters; these offices are created by public laws, for public political purposes, and filled by appointments made in the exercise of political power. There is nothing like this in the origin of the powers of the plaintiffs. Nor is there, in their duties, any more than in their origin, anything which likens them to public political agents. Their duties are such as they themselves have chosen to assume, in relation to a fund created by private benefaction, for charitable uses. These duties relate to the instruction of youth; but instructors of youth are not public officers.

The argument on the other side, if it proves anything, will prove that professors, masters, preceptors and tutors, are all political persons and public officers; and that all education is necessarily and exclusively the business of the state. 16 The confutation of such an argument lies in stating it. The trustees of this college perform no duties, and have no responsibility in any way connected with the civil government of the state. They derive no compensation for their services from the public treasury. They are the gratuitous administrators of a private bounty; the trustees of a literary establishment, standing, in contemplation of law, on the same foundation as hospitals are other charities. It is true, that a college, in a popular sense, is a public institution, because its uses are public, and its benefits may be enjoyed by all who choose to enjoy them. [17 U.S. 518, 617] But in a legal and technical sense, they are not public institutions, but private charities. Corporations may, therefore, be very well said to be for public use, of which the property and privileges are yet private. Indeed, there may be supposed to be an ultimate reference to the public good, in granting all charters of incorporation; but this does not change the property from private to public. If the property of this corporation be public property, that is, property belonging to the state, when did it become so? It was once private property; when was it surrendered to the public? The object in obtaining the charter, was not, surely, to transfer the property to the public, but to secure it for ever in the hands of those with whom the original owners saw fit to intrust it. Whence then, that right of ownership and control over this property, which the legislature of New Hampshire has undertaken to exercise? The distinction between public, political or civil corporations, and corporations for the distribution of private charity, is fully explained, and broadly marked, in the cases which have been cited, and to which no answer has been given. The hospital of Pennsylvania is quite as much a public corporation, as this college. It has great funds, most wisely and beneficently administered. Is it to be supposed, that the legislature might rightfully lay its hands on this institution, violate its charter, and direct its funds to any purpose which its pleasure might prescribe?

The property of this college was private property, before the charter; and the charter has wrought no change in the nature or title of this property. The school had existed as a charity school, [17 U.S. 518, 618] for years before the charter was granted. During this time, it was manifestly a private charity. The case cited from Atkyns, shows, that a charter does not make a charity more public, but only more permanent. Before he accepted the charter, the founder of this college possessed an absolute right to the property with which it was endowed, and also the right flowing from that, of administering and applying it to the purposes of the charity by him established. By taking the charter, he assented, that the right to the property, and the power of administering it, should go to the corporation of which he and others were members. The beneficial

purpose to which the property was to be used, was the consideration on the part of the government for granting the charter. The perpetuity which it was calculated to give to the charity, was the founder's inducement to solicit it. By this charter, the public faith is solemnly pledged, that the arrangement thus made shall be perpetual. In consideration that the founder would devote his property to the purposes beneficial to the public, the government has solemnly covenanted with him, to secure the administration of that property in the hands of trustees appointed in the charter. And yet the argment now is, that because he so devoted his property to uses beneficial to the public, the government may, for that reason, assume the control of it, and take it out of those hands to which it was confided by the charter. In other words, because the founder has strictly performed the contract on his part, the government, on its part, is at liberty to violate it. This argument is equally unsound in morality and in law. [17 U.S. 518, 619] The founder proposed to appropriate his property, and to render his services, upon condition of receiving a charter which should secure to him and his associates certain privileges and immunities. He undertook the discharge of certain duties, in consideration of obtaining certain rights. There are rights and duties on both sides. On the part of the founder, there is the duty of appropriating the property, and of rendering the services imposed on him by the charter, and the right of having secured to him and his associates the administration of the charity, according to the terms of the charter, for ever. On the part of the government, there is the duty of maintaining and protecting all the rights and privileges conferred by the charter, and the right of insisting on the compliance of the trustees with the obligations undertaken by them, and of enforcing that compliance by all due and regular means. There is a plain, manifest, reasonable stipulation, mixed up of rights and duties, which cannot be separated but by the hand of injustice and violence. Yet the attempt now is, to break the mutuality of this stipulation; to hold the founder's property, and yet take away that which was given him as the consideration upon which he parted with his property. The charter was a grant of valuable powers and privileges. The state now claims the right of revoking this grant, without restoring the consideration which it received for making the grant. Such a pretence may suit despotic power. It may succeed, where the authority of the legislature is limited by no rule, and bounded only by its will. It may prevail in those systems in which injustice is [17 U.S. 518, 620] not always unlawful, and where neither the fundamental constitution of the government sets and limits to power, nor any just sentiment or moral feeling affords a practical restraint against a power which in its theory is unlimited. But it cannot prevail in the United States, where power is restrained by constitutional barriers, and where no legislature is, even in theory, invested with all sovereign powers. Suppose, Dr. Wheelock had chosen to establish and perpetuate this charity, by his last will, or by a deed, in which he had given the property, appointed the trustees, provided for their succession, and prescribed their duties. Could the legislature of New Hampshire have broken in upon this gift, changed its parties, assumed the appointment of the trustees, abolished its stipulations and regulations, or imposed others? This will hardly be pretended, even in this bold and hardy argument-and why not? Because the gift, with all its restrictions and provisions, would be under the general and implied protection of the law. How is it, in our case? Why, in addition to the general and implied protection afforded to all rights and all property, it has an express, specific, covenanted assurance of protection and inviolability, given on good and sufficient considerations, in the usual manner of contracts between individuals. There can be no doubt that, in contemplation of law, a charter, such as this, is a contract. It takes effect only with the assent of those to whom it is granted. Laws enjoin duties, without or against the will of those who are to perform them. But the duties of the trustees, under this charter, are binding upon them [17 U.S. 518, 621] only because they have accepted the charter, and assented to its terms.

But taking this to be a contract, the argument of the defendant is, that it is not such a contract as the constitution of the United States protects. But why not? The constitution speaks of contracts, and ought to include all contracts for property or valuable privileges. There is no distinction or discrimination made by the constitution itself, which will exclude this case from its protection. The decisions which have already been made in this court are a complete answer to the defendant's argument.

The attorney-general has insisted, that Dr. Wheelock was not the founder of this college; that other donors

have better title to that character; and, that therefore, the plaintiff's argument, so far as it rests on the supposed fact of Dr. Wheelock's being the founder, fails. The first answer to this is, that the charter declares Dr. Wheelock to be the founder in express terms. It also recites facts, which would show him to be the founder, and on which the law would invest him with that character, if the charter itself had not declared him so. But if all this were otherwise, it would not help the defendant's argument. The foundation was still private; and whether Dr. Wheelock, or Lord Dartmouth, or any other person, possessed the greatest share of merit in establishing the college, the result is the same, so far as it bears on the present question. Whoever was founder, the visitatorial power was assigned to the trustees, by the charter, and it, therefore, is of no importance whether the founder was one individual or another. It [17 U.S. 518, 622] is narrowing the ground of our argument to suppose, that we rest it on the particular facts of Dr. Wheelock's being founder; although the fact is fully established by the charter itself. Our argument is, that this is a private corporation; that the founder of the charity, before the charter, had a right of visiting and governing it, a right growing out of the property of the endowment; that by the charter, this visitatorial power is vested in the trustees, as assignees of the founder; and that it is a privilege, right and immunity, originally springing from property, and which the law regards and protects, as much as it regards and protects property and privileges of any other description. By the charter, all proper powers of government are given to the trustees, and this makes them visitors; and from the time of the acceptance of the charter, no visitatorial power remained in the founder or his heirs. This is the clear doctrine of the case of Green v. Rutherforth, which has been cited, and which is supported by all the other cases. Indeed, we need not stop here in the argument. We might go further, and contend, that if there were no private founder, the trustees would pass the visitatorial power. Where there are charters, vesting the usual and proper powers of government in the trustees, they thereby become the visitors, and the founder retains no visitatorial power, although that founder be the king. 2 Ves. 328; 1 Ibid. 78. Even, then, if this college had originated with the government, and been founded by it; still, if the government had given a charter to [17 U.S. 518, 623] trustees, and conferred on them the powers of visitation and control, which this charter contains, it would by no means follow, that the government might revoke the grant, merely because it had itself established the institution. Such would not be the legal consequence. If the grant be of privileges and immunities, which are to be esteemed objects of value, it cannot be revoked. But this case is much stronger than that. Nothing is plainer than that Dr. Wheelock, from the recitals of this charter, was the founder of that institution. It is true, that others contributed; but it is to be remembered, that they contributed to Dr. Wheelock, and to the funds while under his private administration and control, and before the idea of a charter had been suggested. These contributions were obtained on his solicitation, and confided to his trust.

If we have satisfied the court that this charter must be regarded as a contract, and such a contract as is protected by the constitution of the United States, it will hardly be seriously denied, that the acts of the legislature of New Hampshire impair this contract. They impair the rights of the corporation as an aggregate body, and the rights and privileges of individual members. New duties are imposed on the corporation; the funds are directed to new purposes; a controlling power over all the proceedings of the trustees, is vested in a board of overseers unknown to the charter. Nine new trustees are added to the original number, in direct hostility with the provision of the charter. There are radical and essential alterations, [17 U.S. 518, 624] which go to alter the whole organization and frame of the corporation.

If we are right in the view which we have taken of this case, the result is, that before, and at the time of, the granting of this charter, Dr. Wheelock had a legal interest in the funds with which the institution was founded; that he made a contract with the then existing government of the state, in relation to that interest, by which he devoted to uses beneficial to the public, the funds which he had collected, in consideration of the stipulations and covenants, on the part of the government, contained in the charter; and that these stipulations are violated, and the contract impaired, by the acts of the legislature of New Hampshire.

February 2d, 1819.

The opinion of the court was delivered by MARSHALL, Ch. J.

This is an action of trover, brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled. A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December 1816, be valid, and binding on the trustees, without their assent, and not repugnant to the constitution of the United States; otherwise, it finds for the plaintiffs. [17 U.S. 518, 625] The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a state is to be revised-an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion, this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that 'no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.' In the same instrument, they have also said, 'that the judicial power shall extend to all cases in law and equity arising under the constitution.' On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink. [17 U.S. 518, 626] The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of 'The Trustees of Dartmouth College,' granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June 1816, and is entitled, 'an act to amend the charter, and enlarge and improve the corporation of Dartmouth College.' Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives, of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members ex officio. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect. The majority of the trustees of the college have refused to accept this amended charter, and have [17 U.S. 518, 627] brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is to be found. The points for consideration are, 1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

1. On the first point, is has been argued, that the word 'contract,' in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state, for

state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, [17 U.S. 518, 628] would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument, a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term 'contract' must be understood in a more limited sense. That it must be understood as intended to guard against a power, of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That, anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that, since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this [17 U.S. 518, 629] description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. 18 Those acts enable some tribunals, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it, without the consent of the other, it will be time enough to inquire, whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be

[17 U.S. 518, 630] public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property, for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds, in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist, that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them for ever, may not assert all the rights which they possessed,

while in being; whether, if they be without personal representatives, who may feel injured by a violation of the compact, the trustees be not so completely their representatives, in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter. It becomes then the duty of the court, most [17 U.S. 518, 631] seriously to examine this charter, and to ascertain its true character.

From the instrument itself, it appears, that about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England, for carrying on and extending his undertaking. In this pious work, he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money, which had been, and should be, contributed; which appointment Dr. Wheelock confirmed by a deed of trust, authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut river, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition, that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had, by his last will, named as trustees in America, to be members of the proposed corporation. 'In consideration of the premises,' 'for the education and instruction of the youth of the Indian tribes,' &c., 'and also of English youth, and any others,' the charter was granted, and the trustees of Dartmouth College were, by that name, created a body [17 U.S. 518, 632] corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, 'the founder of said college,' president thereof, with power, by his last will, to appoint a successor, who is to continue in office, until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal or disability; and also to make orders, ordinances and laws for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees. This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees in England, were, in fact, the largest [17 U.S. 518, 633] contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college. The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him, in his last will, as the trustees of his charity- school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying, that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private

individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds, the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It [17 U.S. 518, 634] is then an eleemosynary (1 Bl. Com. 471), and so far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity-school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have [17 U.S. 518, 635] supposed, that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England, and in America, enabled him to extend his care to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant-tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact, that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary-not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from [17 U.S. 518, 636] the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character

on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be. If, then, a natural person, employed [17 U.S. 518, 637] by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals, for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property, in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognised, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit consitutes the consideration, and in most cases, the sole consideration of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, [17 U.S. 518, 638] provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being, a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred, which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act [17 U.S. 518, 639] change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: 'Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace,' &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point, we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the 'benefit intended for the province' is that which is derived from 'establishing the best means of education therein;' that is, from establishing in the province, Dartmouth College, as constituted by the charter. But, if these words, considered alone, could admit of doubt,

that [17 U.S. 518, 640] doubt is completely removed, by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was 'most subservient to the great ends in view,' and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, 'and also of English youth, and any others.' So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors [17 U.S. 518, 641] were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity-school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained, than on all that have been discussed. The founders of the college, at least, those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract, as the constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about [17 U.S. 518, 642] which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him, and them, to perpetuate their beneficent intention. It was granted. An artificial, immortal being, was created by the crown, capable of receiving and distributing for ever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives; they are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So, with respect to the students who are to derive learning from this source; the corporation is a trustee for them also. Their potential rights, which, taken distributively, [17

U.S. 518, 643] are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet, then, as now, the donors would have no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interests in the property confided to their protection. Yet the contract would, at that time, have been deemed sacred by all. What has since occurred, to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now, what is was in 1769.

This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original [17 U.S. 518, 644] parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The [17 U.S. 518, 645] case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction, so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground, can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us, to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be

themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if [17 U.S. 518, 646] they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words, which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded, in order to leave them exposed to legislative alteration?

All feel, that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power 'to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.' They have, so far, withdrawn science, and the useful arts, from the action of the state governments. Why then should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions, made for the security [17 U.S. 518, 647] of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent, as to require a forced construction of that instrument, in order to effect it. These eleemosynary institutions do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps, delusive hope, that the charity will flow for ever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine, that the framers of our constitution were [17 U.S. 518, 648] strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that if allowed to continue themselves, they now are, and must remain for ever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature. It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students.

Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter, by the crown; but at whose suggestion were they named? By whom were they [17 U.S. 518, 649] selected? The charter informs us. Dr. Wheelock had represented, 'that for many weightly reasons, it would be expedients, that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed.' When, afterwards, the trustees are named in the charter, can it be doubted, that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these, is the doctor himself. If any others were appointed, at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation, which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably, with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity [17 U.S. 518, 650] benevolence which suggested his undertaking. It surely cannot be assumed, that his trustees were selected without judgment. With as little probability can it be assumed, that while the light of science, and of liberal principles, pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that while the human race is rapidly advancing, they are stationary. Reasoning a priori, we should believe, that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous, in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution, which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers? [17 U.S. 518, 651] From the review of this charter, which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated, that this corporation, thus constituted, should continue for ever; and that the number of trustees should for ever consist of twelve, and no more. By this contract, the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear, to require the support of argument, that all contracts and rights respecting property, remained unchanged by the revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter, at any time prior to the adoption of the present constitution of the

United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the constitution of the United States has imposed this additional limitation, [17 U.S. 518, 652] that the legislature of a state shall pass no act 'impairing the obligation of contracts.'

It has been already stated, that the act 'to amend the charter, and enlarge and improve the corporation of Dartmouth College,' increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. [17 U.S. 518, 653] They contracted for a system, which should, so far as human foresight can provide, retain for ever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is re-organized; and re-organized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet, it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea, that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, 'the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice [17 U.S. 518, 654] of, and appoint a president.' According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party, who appears in court to assert that interest; yet it is by no means clear, that the trustees of Dartmouth College have no beneficial interest in themselves. But the court has deemed it unnecessary to investigate this partieular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for

the plaintiffs. The judgment of the state court must, therefore, be reversed.

WASHINGTON, Justice.

This cause turns upon the validity of certain laws of the state of New Hampshire, which have been stated in the case, and which, it is contended by the counsel for the plaintiffs [17 U.S. 518, 655] in error, are void, being repugnant to the constitution of that state, and also to the constitution of the United States. Whether the first objection to these laws be well founded or not, is a question with which this court, in this case, has nothing to do: because it has no jurisdiction, as an appellate court, over the decisions of a state court, except in cases where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission.

The clause in the constitution of the United States which was drawn in question in the court from whence this transcript has been sent, is that part of the tenth section of the first article, which declares, that 'no state shall pass any bill of attainder, ex post facto law, or any law impairing the obligation of contracts.' The decision of the state court is against the title specially claimed by the plaintiffs in error, under the above clause, because they contend, that the laws of New Hampshire, above referred to, [17 U.S. 518, 656] impair the obligation of a contract, and are, consequently, repugnant to the above clause of the constitution of the United States, and void. There are, then, two questions for this court to decide: 1st. Is the charter granted to Dartmouth College on the 13th of December 1769, to be considered as a contract? If it be, then, 2d. Do the laws in question impair its obligation?

1. What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on Cont. 6. Under this definition, says Mr. Powell, it is obvious, that every feoffment, gift, grant, agreement, promise, &c., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved: these must all concur, because the regular effect of all contracts is, on one side, to acquire, and on the other, to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. If a doubt could exist that a grant is a contract, the point was decided in the case of Fletcher v. Peck, 6 Cranch 87, [17 U.S. 518, 657] in which it was laid down, that a contract is either executory or executed; by the former, a party binds himself to do, or not to do, a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts.

If, then, a grant be a contract, within the meaning of the constitution of the United States, the next inquiry is, whether the creation of a corporation by charter, be such a grant, as includes an obligation of the nature of a contract, which no state legislature can pass laws to impair? A corporation is defined by Mr. Justice Blackstone (2 Bl. Com. 37) to be a franchise. It is, says he, 'a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise or freedom.' This franchise, like other franchises, is an incorporeal hereditament, issuing out of something real or personal, or concerning or annexed to, and exercisable within a thing corporate. To this grant, or this franchise, the

parties are the king and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. [17 U.S. 518, 658] The subjects of the grant are not only privileges and immunities, but property, or, which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. (2 Bl. Com. 37.) It implies, therefore, a contract not to re-assert the right to grant the franchise to another, or to impair it. There is also an implied contract, that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit, and to govern the corporation, of which he is the acknowledged founder and patron, and also, that in case of its dissolution, the reversionary right of the founder to the property, with which he had endowed it, should be preserved inviolate.

The rights acquired by the other contracting party are those of having perpetual succession, of suing and being sued, of purchasing lands for the benefit of themselves and their successors, and of having a common seal, and of making by-laws. The obligation imposed upon them, and which forms the consideration of the grant is that of acting up to the end or design for which they were created by their founder. Mr. Justice BULLER, in the case of the King v. Pasmore, 3 T. R. 246, says, that the grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration [17 U.S. 518, 659] of the privileges bestowed, to exert themselves for the good government of the place. If they fail to perform their part of it, there is an end of the compact. The charter of a corporation, says Mr. Justice Blackstone (2 Bl. Com. 484), may be forfeited through negligence, or abuse of its franchises, in which case, the law judges, that the body politic has broken the condition upon which it was incorporated, and thereupon the corporation is void. It appears to me, upon the whole, that these principles and authorities prove, incontrovertibly, that a charter of incorporation is a contract.

2. The next question is, do the acts of the legislature of New Hampshire of the 27th of June, and 18th and 26th of December 1816, impair this contract, within the true intent and meaning of the constitution of the United States? Previous to the examination of this question, it will be proper clearly to mark the distinction between the different kinds of lay aggregate corporations, in order to prevent any implied decision by this court of any other case, than the one immediately before it.

We are informed, by the case of Philips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346, which contains all the doctrine of corporations connected with this point, that there are two kinds of corporations aggregate, viz., such as are for public government, and such as are for private charity. The first are those for the government of a town, city or the like; and being for public advantage, are [17 U.S. 518, 660] to be governed according to the law of the land. The validity and justice of their private laws and constitutions are examinable in the king's courts. Of these, there are no particular founders, and consequently, no particular visitor; there are no patrons of these corporations. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them, and are to be visited by them or their heirs, or such other persons as they may appoint. The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full, to prove, that a college is a private charity, as well as an hospital, and that there is, in reality, no difference between them, except in degree; but they are within the same reason, and both eleemosynary.

These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and privileges, and their existence and subjection to public control. The one is the mere creature of public institution, created exclusively for the public advantage, without other endowments than such as the king, or government, may bestow upon it, and having no other founder or visitor than the king or

government, the fundator incipiens. [17 U.S. 518, 661] The validity and justice of its laws and constitution are examinable by the courts having jurisdiction over them; and they are subject to the general law of the land. It would seem reasonable, that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is, in reality, but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the cestui que trust of the foundation. These trustees or governors have no interest, no privileges or immunities, which are violated by such interference, and can have no more right to complain of them, than an ordinary trustee, who is called upon in a court of equity to execute the trust. They accepted the charter, for the public benefit alone, and there would seem to be no reason, why the government, under proper limitations, should not alter or modify such a grant, at pleasure. But the case of a private corporation is entirely different. That is the creature of private benefaction, for a charity or private purpose. It is endowed and founded by private persons, and subject to their control, laws and visitation, and not to the general control of the government; and all these powers, rights and privileges flow from the property of the founder in the funds assigned for the support of the charity. Although the king, by the grant of the charter, is, in some sense, the founder of all eleemosynary corporations, because, without his grant, they cannot exist; yet the patron or endower is the perficient founder, to whom belongs, as of [17 U.S. 518, 662] right, all the powers and privileges, which have been described. With such a corporation, it is not competent for the legislature to interfere. It is a franchise, or incorporeal hereditament, founded upon private property, devoted by its patron to a private charity, of a peculiar kind, the offspring of his own will and pleasure, to be managed and visited by persons of his own appointment, according to such laws and regulations as he, or the persons so selected, may ordain.

It has been shown, that the charter is a contract on the part of the government, that the property with which the charity is endowed, shall be for ever vested in a certain number of persons, and their successors, to subserve the particular purposes designated by the founder, and to be managed in a particular way. If a law increases or diminishes the number of the trustees, they are not the persons which the grantor agreed should be the managers of the fund. If it appropriate the fund intended for the support of a particular charity, to that of some other charity, or to an entirely different charity, the grant is in effect set aside, and a new contract substitued in its place; thus disappointing completely the intentions of the founder, by changing the objects of his bounty. And can it be seriously contended, that a law, which changes so materially the terms of a contract, does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract, be of its essence, how [17 U.S. 518, 663] is it possible, that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old charter?

This course of reasoning, which appears to be perfectly manifest, is not without authority to support it. Mr. Justice Blackstone lays it down (2 Bl. Com. 37), that the same identical franchise, that has been before granted to one, cannot be bestowed on another; and the reason assigned is, that it would prejudice the former grant. In the King v. Pasmore, 3 T. R. 246, Lord KENYON says, that an existing corporation cannot have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter. The reason is obvious; a charter is a contract, to the validity of which the consent of both parties is essential, and therefore, it cannot be altered or added to without such consent.

But the case of Terrett v. Taylor, 9 Cranch 43, fully supports the distinction above stated, between civil and private corporations, and is entirely in point. It was decided in that case, that a private corporation, created by the legislature, may lose its franchises by misuser, or non- user, and may be resumed by the government, under a judicial judgment of forfeiture. In respect to public corporations, which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge or restrain them, securing, however, the property for the use of those for whom, and at whose expense, it was purchased. But it is denied, that it has power to repeal [17 U.S. 518, 664] statutes creating private

corporations, or confirming to them property already acquired under the faith of previous laws; and that it can, by such repeal, vest the property of such corporations in the state, or dispose of the same to such purposes as it may please, without the consent or default of the corporators. Such a law, it is declared, would be repugnant both to the spirit and the letter of the constitution of the United States.

If these principles, before laid down, be correct, it cannot be denied, that the obligations of, the charter to Dartmouth College are impaired by the laws under consideration. The name of the corporation, its constitution and government, and the objects of the founder, and of the grantor of the charter, are totally changed. By the charter, the property of this founder was vested in twelve trustees, and no more, to be disposed of by them, or a majority, for the support of a college, for the education and instruction of the Indians, and also of English youth, and others. Under the late acts, the trustees and visitors are different; and the property and franchises of the college are transferred to different and new uses, not contemplated by the founder. In short, it is most obvious, that the effect of these laws is to abolish the old corporation, and to create a new one in its stead. The laws of Virginia, referred to in the case of Terrett v. Taylor, authorized the overseers of the poor to sell the glebes belonging to the Protestant Episcopal Church, and to appropriate the proceeds to other uses. The laws in question divest, the trustees of Dartmouth College of the property vested in them [17 U.S. 518, 665] by the founder, and vest it in other trustees, for the support of a different institution, called Dartmouth University. In what respects do they differ? Would the difference have been greater in principle, if the law had appropriated the funds of the college to the making of turnpike roads, or to any other purpose of a public nature? In all respects, in which the contract has been altered, without the assent of the corporation, its obligations have been impaired; and the degree can make no difference in the construction of the above provision of the constitution.

It has been insisted, in the argument at the bar, that Dartmouth College was a mere civil corporation, created for a public purpose, the public being deeply interested in the education of its youth; and that, consequently, the charter was as much under the control of the government of New Hampshire, as if the corporation had concerned the government of a town or city. But it has been shown, that the authorities are all the other way. There is not a case to be found which contradicts the doctrine laid down in the case of Philips v. Bury, viz., that a college, founded by an individual, or individuals, is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government.

It is objected, in this case, that Dr. Wheelock is not the founder of Dartmouth College. Admit, he is not. How would this alter the case? Neither the king, nor the province of New Hampshire was the founder; and if the contributions made by the governor of New Hampshire, by those persons who [17 U.S. 518, 666] granted lands for the college, in order to induce its location in a particular part of the state, by the other liberal contributors in England and America, bestow upon them claims equal with Dr. Wheelock, still it would not alter the nature of the corporation, and convert it into one for public government. It would still be a private eleemosynary corporation, a private charity, endowed by a number of persons, instead of a single individual. But the fact is, that whoever may mediately have contributed to swell the funds of this charity, they were bestowed at the solicitation of Dr. Wheelock, and vested in persons appointed by him, for the use of a charity, of which he was the immediate founder, and is so styled in the charter.

Upon the whole, I am of opinion, that the above acts of New Hampshire, not having received the assent of the corporate body of Dartmouth College, are not binding on them, and, consequently, that the judgment of the state court ought to be reserved.

JOHNSON, Justice, concurred, for the reasons stated by the Chief Justice.

LIVINGSTON, Justice, concurred, for the reasons stated by the Chief Justice, and Justices WASHINGTON and STORY.

STORY, Justice.

This is a cause of great importance, and as the very learned discussions, as well here, as in the state court, show, of no inconsiderable difficulty. There are two

questions, to which the appellate jurisdicdiction of this court properly applies. [17 U.S. 518, 667] 1. Whether the original charter of Dartmouth College is a contract, within the prohibitory clause of the constitution of the United States, which declares, that no state shall pass any 'law impairing the obligation of contracts?' 2. If so, whether the legislative acts of New Hampshire of the 27th of June, and of the 18th and 27th of December 1816, or any of them, impair the obligations of that charter?

It will be necessary, however, before we proceed to discuss these questions, to institute an inquiry into the nature, rights and duties of aggregate corporations, at common law; that we may apply the principles, drawn from this source, to the exposition of this charter, which was granted emphatically with reference to that law.

An aggregate corporation, at common law, is a collection of individuals, united into one collective body, under a special name, and possessing certain immunities, privileges and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members, and [17 U.S. 518, 668] may contract with them in the same manner, as with any strangers. 1 Bl. Com. 469, 475; 1 Kyd on Corp. 13, 69, 189; 1 Wooddes. 471, &c. A great variety of these corporations exist, in every country governed by the common law; in some of which, the corporate existence is perpetuated by new elections, made from time to time; and in others, by a continual accession of new members, without any corporate act. Some of these corporations are, from the particular purposes to which they are devoted, denominated spiritual, and some lay; and the latter are again divided into civil and eleemosynary corporations. It is unnecessary, in this place, to enter into any examination of civil corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms and bounty of the founder, in such manner as he has directed; and in this class, are ranked hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits. 1 Bl. Com. 469, 470, 471, 482. 1 Kyd on Corp. 25; 1 Wooddes. 474; Attorney-General v. Whorwood, 1 Ves. 534; St. John's College v. Todington, 1 W. Bl. 84; s. c. 1 Burr. 200; Philips v. Bury, 1 Ld. Raym. 5; S. C. 2 T. R. 346; Porter's Case, 1 Co. 22 b, 23.

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many repects, they are so, although they involve some private interests; but strictly speaking, public corporations [17 U.S. 518, 669] are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, public corporation. So, an hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.

This reasoning applies in its full force to eleemosynary corporations. An hospital, founded by a private benefactor, is, in point of law, a private corporation, although dedicated by its charter to general charity. So, a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution.

This is the unequivocal doctrine of the authorities; and cannot be [17 U.S. 518, 670] shaken but by undermining the most solid foundations of the common law. Philips v. Bury, 1 Ld. Raym. 5, 9; s. c. 2 T. R. 346.

It was, indeed, supposed at the argument, that if the uses of an eleemosynary corporation be for general charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity, which is extensive in its reach, may be called a public charity, in contradistinction to a charity embracing but a few definite objects. In this sense, the language was unquestionably used by Lord HARDWICKE in the case cited at the argument; Attorney-General v. Pearce, 2 Atk. 87; 1 Bac. Abr. tit. Charitable Uses, E, 589; and in this sense, a private corporation may well enough be denominated a public charity. So it would be, if the endowment, instead of being vested in a corporation, were assigned to a private trustee; yet, in such a case, no one would imagine, that the trust ceased to be private, or the funds became public property. That the mere act of incorporation will not change the charity from a private to a public one, is most distinctly asserted in the authorities. Lord HARDWICKE, in the case already alluded to, says, 'the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be; but it is the extensiveness which will constitute it a public one. A devise to the poor of the parish is a public charity. Where testators leave it to the discretion of a trustee to choose out the objects, though each particular [17 U.S. 518, 671] object may be said to be private, yet in the extensiveness of the benefit accruing from them, they may properly be called public charities. A sum to be disposed of by A. B., and his executors, at their discretion, among poor house-keepers, is of this kind.' The charity, then, may, in this sense, be public, although it may be administered by private trustees; and for the same reason, it may thus be public, though administered by a private corporation. The fact, then, that the charity is public, affords no proof that the corporation is also public; and consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord COKE. 19

When, then, the argument assumes, that because the charity is public, the corporation is public, it manifestly confounds the popular, with the strictly legal, sense of the terms. And if it stopped here, it would not be very material to correct the error. But it is on this foundation, that a superstructure is erected, which is to compel a surrender of the cause. When the corporation is said, at the bar, to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such [17 U.S. 518, 672] an authority does not exist in the government, except where the corporation, is in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord HOLT down to the present day. Rex v. Bury, 1 Ld. Raym. 5; s. c. Comb. 265; Holt 715; 1 Show. 360; 4 Mod. 106; Skin. 447, and Ld. HOLT's opinion from his own MS., in 2 T. R. 346. Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them, without any assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary, discretion of the government. Yet, who ever thought before, that the munificient gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy, as we now find of law to sustain it.

An eleemosynary corporation, then, upon a private foundation, being a private corporation, it is next to be considered, what is deemed a foundation, [17 U.S. 518, 673] and who is the founder. This cannot be

stated with more brevity and exactness, than in the language of the elegant commentator upon the laws of England: 'The founder of all corporations (says Sir William Blackstone), in the strictest and original sense, is the king alone, for he only can incorporate a society; and in civil corporations, such as mayor, commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king; but in eleemysonary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one fundatio incipiens, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other fundatio perficiens, or the dotation of it, in which sense, the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense, we generally call a man the founder of a college or hospital.' 1 Bl. Com. 480; 10 Co. 33.

To all eleemosynary corporations, a visitatorial power attaches, as a necessary incident; for these corporations being composed of individuals, subject to human infirmities, are liable, as well as private persons, to deviate from the end of their institution. The law, therefore, has provided, that there shall somewhere exist a power to visit, inquire into, and correct all irregularities and abuses in such corporations, and to compel the original purposes of the charity to be faithfully fulfilled. 1 Bl. Com. 480. The nature and extent of this visitatorial power has been expounded [17 U.S. 518, 674] with admirable fulness and accuracy by Lord HOLT in one of his most celebrated judgments. Phillips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346. And of common right, by the dotation, the founder and his heirs are the legal visitors, unless the founder has appointed and assigned another person to be visitor. For the founder may, if he please, at the time of the endowment, part with his visitatorial power, and the person to whom it is assigned will, in that case, possess it in exclusion of the founder's heirs. 1 Bl. Com. 482. This visitatorial power is, therefore, an hereditament founded in property, and valuable, in intendment of law; and stands upon the maxim, that he who gives his property, has a right to regulate it in future. It includes also the legal right of patronage, for as Lord HOLT justly observes, 'patronage and visitation are necessary consequents one upon another.' No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons, under the charter, it can be inferred, that the founder meant to part with it in their favor; and he may divide it among various persons, or subject it to any modifications or control, by the fundamental statutes of the corporation. But where the appointment is given in general terms, the whole power vests in the appointee. Eden v. Foster, 2 P. Wms. 325; Attorney-General v. Middleton, 2 Ves. 327; St. Johns College v. Todington, 1 W. Bl. 84.; s. c. 2 Burr. 200; Attorney-General v. Clare College, 3 Atk. 662; s. c. 1 Ves. 78. In the construction [17 U.S. 518, 675] of charters, too, it is a general rule, that if the objects of the charity are incorporated, as for instance, the master and fellows of a college, or the master and poor of a hospital, the visitatorial power, in the absence of any special appointment, silently vests in the founder and his heirs. But where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character. Philips v. Bury, 1 Ld. Raym. 5; s. c. 2 T. R. 346; Green v. Rutherforth, 1 Ves. 472; Attorney-General v. Middleton, 2 Ibid. 327; Case of Sutton Hospital, Co. 23, 31.

When a private eleemosynary corporation is thus created, by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to, or diminish, the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn, and well settled doctrines of the common law. 20

But an eleemosynary, like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises, by misuser or non-user [17 U.S. 518, 676] of them. It is subject to the controling authority of its legal visitor, who, unless restrained by the terms of the charter, may amend and repeal its statutes, remove its officers, correct abuses, and generally superintend the management of the trusts.

Where, indeed, the visitatorial power is vested in the trustees of the charity, in virtue of their incorporation, there can be no amotion of them from their corporate capacity. But they are not, therefore, placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the court of chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds. 2 Fonbl. Eq., B. 2, pt. 2, ch. 1, 1, note a; Coop. Eq. Pl. 292; 2 Kyd on Corp. 195; Green v. Rutherforth, 1 Ves. 462; Attorney-General v. Foundling Hospital, 4 Bro. C. C. 165; s. c. 2 Ves. jr. 42; Eden v. Foster, 2 P. Wms. 325; 1 Wooddes. 476; Attorney- General v. Price, 3 Atk. 108; Attorney-General v. Lock, 3 Ibid. 164; Attorney-General v. Dixie, 13 Ves. 519; Ex parte Kirby Ravensworth Hospital, 15 Ibid. 304, 314; Attorney-General v. Earl of Clarendon, 17 Ibid. 491, 499; Berkhamstead Free School, 2 Ves. & B. 134; Attorney- General v. Corporation of Carmarthen, Cooper 30; Mayor, &c., of Colchester v. Lowten, 1 Ves. & B. 226; Rex v. Watson, 2 T. R. 199; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 371; Attorney-General v. Middleton, 2 Ves. 327. And where a corporation is a mere trustee of a charity, a court of equity will go yet further; and though it cannot appoint or remove a corporator, it will, yet, in a case of [17 U.S. 518, 677] gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands. Mayor, &c., of Coventry v. Attorney-General, 7 Bro. P. C. 235; Attorney-General v. Earl of Clarendon, 17 Ves. 491, 499.

Thus much it has been thought proper to premise respecting the nature, rights, and duties of eleemosynary corporations, growing out of the common law. We may now proceed to an examination of the original charter of Dartmouth College.

It begins, by a recital, among other things, that the Rev. Eleazer Wheelock, of Lebanon, in Connecticut, about the year 1754, at his own expense, on his own estate, set on foot an Indian charity-school; and by the assistance of other persons, educated a number of the children of the Indians, and employed them as missionaries and school-masters among the savage tribes; that the design became reputable among the Indians, so that more desired the education of their children at the school, than the contributions in the American colonies would support; that the said Wheelock thought it expedient to endeavor to procure contributions in England, and requested the Rev. Nathaniel Whitaker to go to England, as his attorney, to solicit contribution, and also solicited the Earl of Dartmouth and others, to receive the contributions and become trustees thereof, which they cheerfully agreed to, and he constituted them trustees accordingly, by a power of attorney, and they testified their acceptance by a sealed instrument; that the said

Wheelock also authorized the trustees to fix and determine [17 U.S. 518, 678] upon the place for the said school; and to enable them understandingly to give the preference, laid before them, the several offers of the governments in America, inviting the settlement of the school among them; that a large number of the proprietors of lands, in the western parts of New Hampshire, to aid the design, and considering that the same school might be enlarged and improved to promote learning among the English, and to supply the churches there with an orthodox ministry, promised large tracts of land for the uses aforesaid, provided the school should be settled in the western part of said province; that the trustees, thereupon, gave a preference to the western part of said province, lying on Connecticut river, as a situation most convenient for said school: That the said Wheelock further represented the necessity for a legal incorporation, in order to the safety and well-being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same; that in the infancy of said institution, certain gentlemen whom he had already nominated in his last will (which he had transmitted to the trustees in England), to be trustees in America, should be the corporation now proposed; and lastly, that there were already large contributions for said school in the hands of the trustees in England, and further success might be expected; for which reason, the said Wheelock desired they might be invested with all that power therein, which could consist with their distance from the same. The charter, after these recitals, declares, that the king, considering the premises, and being willing to [17 U.S. 518, 679] encourage the charitable design, and that the best means of education might be established in New Hampshire for the benefit thereof, does, of his special grace, certain knowledge and mere motion, ordain and

grant, that there be a college erected in New Hampshire, by the name of Dartmouth College, for the education and instruction of youth of the Indian tribes, and also of English youth and others; that the trustees of said college shall be a corporation for ever, by the name of the Trustees of Dartmouth College: that the then governor of New Hampshire, the said Wheelock, and ten other persons, specially named in the charter, shall be trustees of the said college, and that the whole number of trustees shall for ever thereafter consist of twelve, and no more; that the said corporation shall have power to sue and to be sued by their corporate name, and to acquire and hold for the use of the said Dartmouth College, lands, tenements, hereditaments and franchises; to receive, purchase and build any houses for the use of said college, in such town in the western part of New Hampshire, as the trustees, or a major part of them, shall, by a written instrument, agree on; and to receive, accept and dispose of any lands, goods, chattels, rents, gifts, legacies, &c., not exceeding the yearly value of 6000l. It further declares, that the trustees, or a major part of them, regularly convened (for which purpose seven shall form a quorum), shall have authority to appoint and remove the professors, tutors and other officers of the college, and to pay them, and also such missionaries and school-masters as shall be employed by the trustees for instructing the Indians, salaries and [17 U.S. 518, 680] allowances, as well as other corporate expenses, out of the corporate funds. It further declares, that, the said trustees, as often as one or more of the trustees shall die, or by removal or otherwise, shall, according to their judgment, become unfit or incapable to serve the interests of the college, shall have power to elect and appoint other trustees in their stead, so that when the whole number shall be complete of twelve trustees, eight shall be resident freeholders of New Hampshire, and seven of the whole number, laymen. It further declares, that the trustees shall have power, from time to time, to make and establish rules, ordinances and laws, for the government of the college, not repugnant to the laws of the land, and to confer collegiate degrees. It further appoints the said Wheelock, whom it denominates 'the founder of the college,' to be president of the college, with authority to appoint his successor, who shall be president, until disapproved of by the trustees. It then concludes with a direction, that it shall be the duty of the president to transmit to the trustees in England, so long as they should perpetuate their board, and as there should be Indian natives remaining to be proper objects of the bounty, an annual account of all the disbursements from the donations in England, and of the general plans and prosperity of the institution.

Such are the most material clauses of the charter. It is observable, in the first place, that no endowment whatever is given by the crown; and no power is reserved to the crown or government in any manner to alter, amend or control the charter. It is also apparent, [17 U.S. 518, 681] from the very terms of the charter, that Dr. Wheelock is recognised as the founder of the college, and that the charter is granted upon his application, and that the trustees were in fact nominated by him. In the next place, it is apparent, that the objects of the institution are purely charitable, for the distribution of the private contributions of private benefactors. The charity was, in the sense already explained, a public charity, that is, for the general promotion of learning and piety; but in this respect, it was just as much public before, as after the incorporation. The only effect of the charter was to give permanency to the design, by enlarging the sphere of its action, and granting a perpetuity of corporate powers and franchises, the better to secure the administration of the benevolent donations. As founder, too, Dr. Wheelock and his heirs would have been completely clothed with the visitatorial power: but the whole government and control, as well of the officers as of the revenues of the college, being with his consent assigned to the trustees in then corporate character, the visitatorial power, which is included in this authority, rightfully devolved on the trustees. As managers of the property and revenues of the corporation, they were amenable to the jurisdiction of the judicial tribunals of the state; but as visitors, their discretion was limited only by the charter, and liable to no supervision or control, at least, unless it was fraudulently misapplied.

From this summary examination it follows, that Dartmouth College was, under its original charter, a private eleemosynary corporation, endowed with [17 U.S. 518, 682] the usual privileges and franchises of such corporations, and among others, with a legal perpetuity, and was exclusively under the government and control of twelve trustees, who were to be elected

and appointed, from time to time, by the existing board, as vacancies or removals should occur.

We are now led to the consideration of the first question in the cause, whether this charter is a contract, within the clause of the constitution prohibiting the states from passing any law impairing the obligation of contracts. In the case of Fletcher v. Peck, 6 Cranch 87, 136, this court laid down its exposition of the word 'contract' in this clause, in the following manner: 'A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one, in which a party binds himself to do, or not to do, a particular thing. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. A contract executed, as well as one that is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is always estopped by his own grant.' This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a state, under a legislative act. It determines, in the most unequivocal manner, that the grant of a state is a contract, within the clause of [17 U.S. 518, 683] the constitution now in question, and that it implies a contract not to re- assume the rights granted; a fortiori, the doctrine applies to a charter or grant from the king.

But it is objected, that the charter of Dartmouth College is not a contract contemplated by the constitution, because no valuable consideration passed to the king, as an equivalent for the grant, it purporting to be granted ex mcro motu, and further, that no contracts, merely voluntary, are within the prohibitory clause. It must be admitted, that mere executory contracts cannot be enforced at law, unless there be a valuable consideration to sustain them; and the constitution certainly did not mean to create any new obligations, or give any new efficacy to nude pacts. But it must, on the other hand, be also admitted, that the constitution did intend to preserve all the obligatory force of contracts, which they have by the general principles of law. Now, when a contract has once passed, bona fide, into grant, neither the king, nor any private person, who may be the grantor, can recall the grant of the property, although the conveyance may have been purely voluntary. A gift, completely executed, is irrevocable. The property conveyed by it becomes, as against the donor, the absolute property of the donee; and no subsequent change of intention of the donor can change the rights of the donee. 2 Bl. Com. 441; Jenk. Cent. 104. And a gift by the crown of incorporeal hereditaments, such as corporate franchises, when executed, comes completely [17 U.S. 518, 684] within the principle, and is, in the strictest sense of the terms, a grant. 2 Bl. Com. 317, 346; Shep. Touch. ch. 12, p. 227. Was it ever imagined, that land, voluntarily granted to any person by a state, was liable to be resumed, at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but in a country like ours, where thousands of land-titles had their origin in gratuitous grants of the states, it would go far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete, and accepted by the grantees, it involved a contract, that the grantees should hold, and the grantor should not re-assume the grant, as much as if it had been founded on the most valuable consideration.

But it is not admitted, that this charter was not granted for what the law deems a valuable consideration. For this purpose, it matters not how trifling the consideration may be; a pepper-corn is as good as a thousand dollars. Nor is it necessary, that the consideration should be a benefit to the grantor. It is sufficient, if it import damage or loss, or forbearance of benefit, or any act done or to be done, on the part of the grantee. It is unnecessary to state cases; they are familiar to the mind of every lawyer. Pillans v. Van Mierop, per Yates, J., 3 Burr. 1663; Forth v. Stanton, 1 Saund. 211, Williams' note 2, and the cases there cited.

With these principles in view, let us now examine [17 U.S. 518, 685] the terms of this charter. It purports, indeed, on its face, to be granted 'of the special grace, certain knowledge and mere motion' of the king; but these words were introduced for a very different purpose from that now contended for. It is a general rule of the common law (the reverse of that applied in ordinary cases), that a grant of the king, at the suit of the grantee, is to be construed most beneficially for the

king, and most strictly against the grantee. Wherefore, it is usual to insert in the king's grants, a clause, that they are made, not at the suit of the grantee, but of the special grace, certain knowledge and mere motion of the king; and then they receive a more liberal construction. This is the true object of the clause in question, as we are informed by the most accurate authorities. 2 Bl. Com. 347; Finch's Law 100; 10 Rep. 112; 1 Shep. Abr. 136; Bull. N. P. 136. But the charter also, on its face, purports to be granted, in consideration of the premises in the introductory recitals.

Now, among these recitals, it appears, that Dr. Wheelock had founded a charity-school at his own expense, on his own estate; that divers contributions had been made in the colonies, by others, for its support; that new contributions had been made, and were making, in England, for this purpose, and were in the hands of trustees appointed by Dr. Wheelock to act in his behalf; that Dr. Wheelock had consented to have the school established at such other place as the trustees should select; that offers had been made by several of the governments in America, inviting the [17 U.S. 518, 686] establishment of the school among them; that offers of land had also been made by divers proprietors of lands in the western parts of New Hampshire, if the school should be established there; that the trustees had finally consented to establish it in New Hampshire; and that Dr. Wheelock represented that, to effectuate the purposes of all parties, an incorporation was necessary. Can it be truly said, that these recitals contain no legal consideration of benefit to the crown, or of forbearance of benefit on the other side? Is there not an implied contract by Dr. Wheelock, if a charter is granted, that the school shall be removed from his estate to New Hampshire? and that he will relinquish all his control over the funds collected, and to be collected, in England, under his auspices, and subject to his authority? that he will yield up the management of his charity-school to the trustees of the college? that he will relinquish all the offers made by other American governments, and devote his patronage to this institution? It will scarcely be denied, that he gave up the right any longer to maintain the charity-school already established on his own estate; and that the funds collected for its use, and subject to his management, were yielded up by him, as an endowment of the college. The very language of the charter supposes him to be the legal owner of the funds of the charity-school, and in virtue of this endowment, declares him the founder of the college. It matters not, whether the funds were great or small; Dr. Wheelock had procured them, by his own influence, and they were under his control, to be applied to the [17 U.S. 518, 687] support of his charity-school; and when he relinquished this control, he relinquished a right founded in property acquired by his labors. Besides, Dr. Wheelock impliedly agreed to devote his future services to the college, when erected, by becoming president thereof, at a period when sacrifices must necessarily be made to accomplish the great design in view. If, indeed, a pepper-corn be, in the eye of the law, of sufficient value to found a contract, as upon a valuable consideration, are these implied agreements, and these relinquishments of right and benefit, to be deemed wholly worthless? It has never been doubted, that an agreement not to exercise a trade in a particular place was a sufficient consideration to sustain a contract for the payment of money; a fortiori, the relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration; for it is parting with a legal right. Even a right of patronage (jus patronatus) is of great value in intendment of law. Nobody doubts, that an advowson is a valuable hereditament; and yet, in fact, it is but a mere trust, or right of nomination to a benefice, which cannot be legally sold to the intended incumbent. 2 Bl. Com. 22, Christian's note. In respect to Dr. Wheelock, then, if a consideration be necessary to support the charter as a contract, it is to be found in the implied stipulations on his part in the charter itself. He relinquished valuable rights, and undertook a laborious office, in consideration of the grant of the incorporation. [17 U.S. 518, 688] This is not all. A charter may be granted upon an executory, as well as an executed or present consideration. When it is granted to persons who have not made application for it, until their acceptance thereof, the grant is yet in fieri. Upon the acceptance, there is an implied contract on the part of the grantees, in consideration of the charter, that they will perform the duties, and exercise the authorities conferred by it. This was the doctrine asserted by the late learned Mr. Justice BULLER, in a modern case. Rex v. Pasmore, 3 T. R. 199, 239, 246. He there said, 'I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of

incorporation to be a compact between the crown, and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place,' (i. e. , the place incorporated). It will not be pretended, that if a charter be granted for a bank, and the stockholders pay in their own funds, the charter is to be deemed a grant, without consideration, and therefore, revocable at the pleasure of the grantor. Yet, here, the funds are to be managed, and the services performed exclusively for the use and benefit of the stockholders themselves. And where the grantees are mere trustees to perform services, without reward, exclusively for the benefit of others, for public charity, can it be reasonably argued, that these services are less valuable to the government, than if performed for the private emolument of [17 U.S. 518, 689] the trustees themselves? In respect then to the trustees also, there was a valuable consideration for the charter, the consideration of services agreed to be rendered by them, in execution of a charity, from which they could receive no private remuneration.

There is yet another view of this part of the case, which deserves the most weighty consideration. The corporation was expressly created for the purpose of distributing in perpetuity the charitable donations of private benefactors. By the terms of the charter, the trustees, and their successors, in their corporate capacity, were to receive, hold and exclusively manage all the funds so contributed. The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be for ever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, there was an implied contract on the part of the crown, with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation, according to the general law of the land. As, soon, then, as a donation was made to the corporation, there was an implied contract, springing up, and founded on a valuable consideration, that the crown would not revoke or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor, [17 U.S. 518, 690] upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter.

In every view of the case, if a consideration were necessary (which I utterly deny) to make the charter a valid contract, a valuable consideration did exist, as to the founder, the trustees, and the benefactors. And upon the soundest legal principles, the charter may be properly deemed, according to the various aspects in which it is viewed, as a several contract with each of these parties, in virtue of the foundation, or the endowment of the college, or the acceptance of the charter, or the donations to the charity.

And here we might pause: but there is yet remaining another view of the subject, which cannot consistently be passed over without notice. It seems to be assumed by the argument of the defendant's counsel, that there is no contract whatsoever, in virtue of the charter, between the crown and the corporation itself. But it deserves consideration, whether this assumption can be sustained upon a solid foundation.

If this had been a new charter, granted to an existing corporation, or a grant of lands to an existing corporation, there could not have been a doubt, that the grant would have been an executed contract with the corporation; as much so, as if it had been to any private person. But it is supposed, that as this corporation was not then in existence, but was created and its franchises bestowed, uno flatu, the charter cannot be construed a contract, because there was no person in rerum naturce, with whom it might be made.

Is this, however, a just and legal view of the [17 U.S. 518, 691] subject? If the corporation had no existence, so as to become a contracting party, neither had it, for the purpose of receiving a grant of the franchises. The truth is, that there may be a priority of operation of things in the same grant; and the law distinguishes and gives such priority, wherever it is necessary to effectuate the objects of the grant. Case of Sutton Hospital, 10 Co. 23; Buckland v. Fowcher, cited, Ibid. 27-8, and recognised in Attorney-General v. Bowyer, 3 Ves. Jr. 714, 726-7; S. P. Highmore on Mort. 200, &c. From the nature of things, the artificial person called a corporation, must be created, before it can be

capable of taking anything. When, therefore, a charter is granted, and it brings the corporation into existence, without any act of the natural persons who compose it, and gives such corporation any privileges, franchises or property, the law deems the corporation to be first brought into existence, and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence, by some future acts of the corporators, the franchises remain in abeyance, until such acts are done, and when the corporation is brought into life, the franchises instantaneously attach to it. There may be, in intendment of law, a priority of time, even in an instant, for this purpose. Ibid. And if the corporation have an existence, before the grant of its other franchises attaches, what more difficulty is there in deeming the grant of these franchises a contract with it, than if granted by another instrument, at a subsequent period?

It behooves those also, who hold, that a grant to a corporation, not then in existence, is incapable [17 U.S. 518, 692] of being deemed a contract, on that account, to consider, whether they do not, at the same time, establish, that the grant itself is a nullity, for precisely the same reason. Yet such a doctrine would strike us all, as pregnant with absurdity, since it would prove that an act of incorporation could never confer any authorities, or rights or property on the corporation it created. It may be admitted, that two parties are necessary to form a perfect contract; but it is denied, that it is necessary, that the assent of both parties must be at the same time. If the legislature were voluntarily to grant land in fee, to the first child of A., to be hereafter born; as soon as such child should be born, the estate would vest in it. Would it be contended, that such grant, when it took effect, was revocable, and not an executed contract, upon the acceptance of the estate? The same question might be asked, in a case of a gratuitous grant by the king, or the legislature, to A. for life, and afterwards, to the heirs of B., who is then living. Take the case of a bank, incorporated for a limited period, upon the express condition that it shall pay out of its corporate funds, a certain sum, as the consideration for the charter, and after the corporation is organized, a payment duly made of the sum, out of the corporate funds; will it be contended, that there is not a subsisting contract between the government and the corporation, by the matters thus arising ex post facto, that the charter shall not be revoked, during the stipulated period? Suppose, an act declaring that all persons, who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of certain [17 U.S. 518, 693] lands belonging to the state, in certain proportions; if a person, afterwards born, pays the stipulated sum into the treasury, is it less a contract with him, than it would be with a person in esse at the time the act passed? We must admit, that there may be future springing contracts, in respect to persons not now in esse, or we shall involve ourselves in inextricable difficulties. And if there may be, in respect to natural persons, why not also in respect to artificial persons, created by the law, for the very purpose of being clothed with corporate powers? I am unable to distinguish between the case of a grant of land or of franchises to an existing corporation, and a like grant to a corporation brought into life for the very purpose of receiving the grant. As soon as it is in esse, and the franchises and property become vested and executed in it, the grant is just as much an executed contract, as if its prior existence had been established for a century.

Supposing, however, that in either of the views which have been suggested, the charter of Dartmouth College is to be deemed a contract, we are yet met with several objections of another nature. It is, in the first place, contended, that it is not a contract, within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institution, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest.

It is admitted, that the state legislatures have [17 U.S. 518, 694] power to enlarge, repeal and limit the authorities of public officers, in their official capacities, in all cases, where the constitutions of the states respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities; they are to exercise them only during the good pleasure of the legislature. But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited

period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens. Will it be contended, that the legislature of a state can diminish the salary of a judge, holding his office during good behavior? Such an authority has never yet been asserted, to our knowledge. It may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses (as may municipal corporations [17 U.S. 518, 695] are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it. Terrett v. Taylor, 9 Cranch 43; Town of Pawlet v. Clark, Ibid. 292.

As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. In a legal sense, all contracts, recognised as valid in any country, may be properly said to be matters of civil institution, since they obtain their obligation and construction jure loci contractus. Titles to land, constituting part of the public domain, acquired by grants under the provisions of existing laws by private persons, are certainly contracts of civil institution. Yet no one ever supposed, that when acquired bona fide, they were not beyond the reach of legislative revocation. And so, certainly, is the established doctrine of this court. Ibid. A general law, regulating divorces from the contract of marriage, like a law regulating [17 U.S. 518, 696] remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. 21 It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of a contract, by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations were no longer observed, is, in no correct sense, a law impairing the obligations of the contract. Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. But if the argument means to assert, that the legislative power to dissolve such a contract, without such a breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If, under the faith of existing laws, a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive, why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition, as any other contract for a valuable consideration. A man has just as good a right to his wife, as to the property acquired under a marriage [17 U.S. 518, 697] contract.

He has a legal right to her society and her fortune; and to divest such right, without his default, and against his will, would be as flagrant a violation of the principles of justice, as the confiscation of his own estate. I leave this case, however, to be settled, when it shall arise. I have gone into it, because it was urged with great earnestness upon us, and required a reply. It is sufficient now to say, that as at present advised, the argument derived from this source, does not press my mind with any new and insurmountable difficulty.

In respect also to grants and contracts, it would be far too narrow a construction of the constitution, to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private

trustee, for the benefit of a particular cestui que trust, or for any special, private or public charity, cannot be the less a contract, because the trustee takes nothing for his own benefit. A grant of the next presentation to a church is still a contract, although it limit the grantee to a mere right of nomination or patronage. 2 Bl. Com. 21. The fallacy of the argument consists, in assuming the very ground in controversy. It is not admitted, that a contract with a trustee is, in its own nature, revocable, whether it be for special or general purposes, for public charity or particular beneficence. A private donation, vested in a trustee, for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee, and administer [17 U.S. 518, 698] in its own way. The truth is, that the government has no power to revoke a grant, even of its own funds, when given to a private person, or a corporation, for special uses It cannot recall its own endowments, granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice.

Another objection growing out of, and connected with that which we have been considering, is, that no grants are within the constitutional prohibition, except such as respect property in the strict sense of the term; that is to say, beneficial interests in lands, tenements and hereditaments, &c., which may be sold by the grantees, for their own benefit: and that grants of franchises, immunities and authorities not valuable to the parties, as property, are excluded from its purview. No authority has been cited to sustain this distinction, and no reason is perceived to justify its adoption. There are many rights, franchises and authorities, which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. A grant of the next presentation to a church, limited to the grantee alone, has been already mentioned. A power of appointment, reserved in a marriage settlement, either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is another instance. [17 U.S. 518, 699] A grant of lands to a trustee, to raise portions or pay debts, is, in law, a valuable grant, and conveys a legal estate. Even a power, given by will, to executors, to sell an estate for payment of debts is, by the better opinions and authority, coupled with a trust, and capable of survivorship. Co. Litt. 113 a, Harg. & Butler's note 2; Sugden on Powers 140; Jackson v. Jansen, 6 Johns. 73; Franklin v. Osgood, 2 Johns. Cas. 1; S. C. 14 Johns. 527; Zebach v. Smith, 3 Binn. 69; Lessee of Moody v. Vandyke, 4 Ibid. 7, 31; Attorney-General v. Gley, 1 Atk. 356; 1 Bac. Abr. 586 (Gwillim's edit .). Many dignities and offices, existing at common law, are merely honorary, and without profit, and sometimes are onerous. Yet a grant of them has never been supposed the less a contract on that account. In respect to franchises, whether corporate or not, which include a pernancy of profits, such as a right of fishery, or to hold a ferry, a market or a fair, or to erect a turnpike, bank or bridge, there is no pretence to say, that grants of them are not within the constitution. Yet they may, in point of fact, be of no exchangeable value to the owners. They may be worthless in the market. The truth, however, is, that all incorporeal hereditaments, whether they be immunities, dignities, offices or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseisin of them. Whenever they are the subjects of a contract or grant, they are just as much within the reach of the constitution as any other grant. [17 U.S. 518, 700] Nor is there any solid reason why a contract for the exercise of a mere authority should not be just as much guarded, as a contract for the use and dominion of property. Mere naked powers, which are to be exercised for the exclusive benefit of the grantor, are revocable by him, for that very reason. But it is otherwise, where a power is to be exercised in aid of a right vested in the grantee. We all know, that a power of attorney, forming a part of a security upon the assignment of a chose in action, is not revocable by the grantor. For it then sounds in contract, and is coupled with an interest. Walsh v. Whitcomb, 2 Esp. 565; Bergen v. Bennett, 1 Caines' Cas. 1, 15; Raymond v. Squire, 11 Johns. 47. So, if an estate be conveyed in trust for the grantor, the estate is irrevocable in the grantee, although he can take no beneficial interest for himself. Many of the best settled estates stand upon conveyances of this nature; and

there can be no doubt, that such grants are contracts within the prohibition in question.

In respect to corporate franchises, they are, properly speaking, legal estates, vested in the corporation itself, as soon as it is in esse. They are not mere naked powers, granted to the corporation; but powers coupled with an interest. The property of the corporation rests upon the possession of its franchises; and whatever may be thought, as to the corporators, it cannot be denied, that the corporation itself has a legal interest in them. It may sue and be sued for them. Nay, more, this very right is one of its ordinary [17 U.S. 518, 701] franchises. 'It is likewise a franchise,' says Mr. Justice Blackstone, 'for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom.' 2 Bl. Com. 37; 1 Kyd on Corp. 14, 16. In order to get rid of the legal difficulty of these franchises being considered as valuable hereditaments or property, the counsel for the defendant are driven to contend, that the corporators or trustees are mere agents of the corporation, in whom no beneficial interest subsists; and so nothing but a naked power is touched, by removing them from the trust; and then to hold the corporation itself a mere ideal being, capable indeed of holding property or franchises, but having no interest in them which can be the subject of contract. Neither of these positions is admissible. The former has been already sufficiently considered, and the latter may be disposed of in a few words. The corporators are not mere agents, but have vested rights, in their character, as corporators. The right to be a freeman of a corporation, is a valuable temporal right. It is a right of voting and acting in the corporate concerns, which the law recognises and enforces, and for a violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections; it is as sacred a right; and whatever might have been the prevalence of former doubts, since the time of Lord HOLT, such a right has always been deemed a valuable franchise or privilege. Ashby v. White, 2 Ld. Raym. 938; 1 Kyd on Corp. 16. [17 U.S. 518, 702] This reasoning, which has been thus far urged, applies with full force to the case of Dartmouth College. The franchises granted by the charter were vested in the trustees, in their corporate character. The lands and other property, subsequently acquired, were held by them in the same manner. They were the private demesnes of the corporation, held by it, not, as the argument supposes, for the use and benefit of the people of New Hampshire, but, as the charter itself declares, 'for the use of Dartmouth College.' There were not, and in the nature of things, could not be, any other cestui que use, entitled to claim those funds. They were, indeed, to be devoted to the promotion of piety and learning, not at large, but in that college and the establishments connected with it: and the mode in which the charity was to be applied, and the objects of it, were left solely to the trustees, who were the legal governors and administrators of it. No particular person in New Hampshire possessed a vested right in the bounty; nor could he force himself upon the trustees as a proper object. The legislature itself could not deprive the trustees of the corporate funds, nor annul their discretion in the application of them, nor distribute them among its its own favorites. Could the legislature of New Hampshire have seized the land given by the state of Vermont to the corporation, and appropriated it to uses distinct from those intended by the charity, against the will of the trustees? This question cannot be answered in the affirmative, until it is established that the legislature may lawfully take the property of A. and give it to B.; and if it [17 U.S. 518, 703] could not take away or restrain the corporate funds, upon what pretence can it take away or restrain the corporate franchises? Without the franchises, the funds could not be used for corporate purposes; but without the funds, the possession of the franchises might still be of inestimable value to the college, and to the cause of religion and learning.

Thus far, the rights of the corporation itself, in respect to its property and franchises, have been more immediately considered. But there are other rights and privileges, belonging to the trustees, collectively and severally, which are deserving of notice. They are intrusted with the exclusive power to manage the funds, to choose the officers, and to regulate the corporate concerns, according to their own discretion. The jus patronatus is vested in them. The visitatorial power, in its most enlarged extent, also belongs to them. When this power devolves upon the founder of a charity, it is an hereditament, descendible in perpetuity to his heirs, and in default of heirs, it escheats to the government. Rex v. St. Catherine's Hall, 4 T. R. 233. It

is a valuable right, founded in property, as much so as the right of patronage in any other case. It is a right which partakes of a judicial nature. May not the founder as justly contract for the possession of this right, in return for his endowment, as for any other equivalent? and if, instead of holding it as an hereditament, he assigns it in perpetuity to the trustees of the corporation, is it less a valuable hereditament in their hands? The right is not merely a collective right in all the trustees; [17 U.S. 518, 704] each of them also has a franchise in it. Lord HOLT says, 'it is agreeable to reason, and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit redound to the particular members, and be enjoyed by them in their private capacities. Where the privilege of election is used by particular persons, it is a particular right vested in each particular man.' Ashby v. White, 2 Ld. Raym. 938, 952; Attorney-General v. Dixie, 13 Ves. 519. Each of the trustees had a right to vote in all elections. If obstructed in the exercise of it, the law furnished him with an adequate recompense in damages. If ousted unlawfully from his office, the law would, by a mandamus, compel a restoration.

It is attempted, however, to establish that the trustees have no interest in the corporate franchises, because it is said, that they may be witnesses, in a suit brought against the corporation. The case cited at the bar certainly goes the length of asserting, that in a suit brought against a charitable corporation, for a recompence for services performed for the corporation, the governors, constituting the corporation (but whether intrusted with its funds or not by the act of incorporation does not appear), are competent witnesses against the plaintiff. Weller v. Governor of the Foundling Hospital, 1 Peake's Cas. 153. But assuming this case to have been rightly decided (as to which, upon the authorities, there may be room to doubt), the corporators [17 U.S. 518, 705] being technically parties to the record (Attorney-General v. City of London, 3 Bro. C. C. 171; s. c. 1 Ves. jr. 243; Burton v. Hinde, 5 T. R. 174; Nason v. Thatcher, 7 Mass. 398; Phillips on Evid. 42, 52, 57 and notes; 1 Kyd on Corp. 304, &c.; Highmore on Mortm. 514), it does not establish, that in a suit for the corporate property vested in the trustees in their corporate capacity, the trustees are competent witnesses. At all events, it does not establish, that in a suit for the corporate franchises to be exercised by the trustees, or to enforce their visitatorial power, the trustees would be competent witnesses. On a mandamus to restore a trustee to his corporate or visitatorial power, it will not be contended, that the trustee is himself a competent witness, to establish his own rights, or the corporate rights. Yet, why not, if the law deems that a trustee has no interest in the franchise? The test of interest assumed in the argument proves nothing in this case. It is not enough, to establish, that the trustees are sometimes competent witnesses; it is necessary to show, that they are always so, in respect to the corporate franchises, and their own. It will not be pretended, that in a suit for damages for obstruction in the exercise of his official powers, a trustee is a disinterested witness. Such an obstruction is not a damnum absque injurid. Each trustee has a vested right, and legal interest, in his office, and it cannot be divested but by due course of law. The illustration, therefore, lends no new force to the argument, for it does not establish, that when their own rights [17 U.S. 518, 706] are in controversy, the trustees have no legal interest in their offices.

The principal objections having been thus answered, satisfactorily, at least, to my own mind, it remains only to declare, that my opinion, after the most mature deliberation is, that the charter of Dartmouth College, granted in 1969, is a contract within the purview of the constitutional prohibition.

I might now proceed to the discussion of the second question; but it is necessary previously to dispose of a doctrine which has been very seriously urged at the bar, viz., that the charter of Dartmouth College was dissolved at the revolution, and is, therefore, a mere nullity. A case before Lord THURLOW has been cited in support of this doctrine. Attorney- General v. City of London, 3 Bro. C. C. 171; S. C. 1 Ves. jr. 243. The principal question in that case was, whether the corporation of William & Mary College, in Virginia (which had received its charter from King William and Queen Mary), should still be permitted to administer the charity, under Mr. Boyle's will, no interest having passed to the college, under the will, but it acting as an agent or trustee, under a decree in chancery, or whether a new scheme for the administration of the charity should be laid before the court. Lord THURLOW directed a new scheme, because the college, belonging to an independent government, was

no longer within the reach of the court. And he very unnecessarily added, that he could not now consider the college as a corporation, or as another report (1 Ves. jr. 243) states, [17 U.S. 518, 707] that he could not take notice of it, as a corporation, it not having proved its existence, as a corporation, at all. If, by this, Lord THURLOW meant to declare, that all charters acquired in America from the crown, were destroyed by the revolution, his doctrine is not law; and if it had been true, it would equally apply to all other grants from the crown, which would be monstrous. It is a principle of the common law, which has been recognised as well in this, as in other courts, that the division of an empire works no forfeiture of previously-vested rights of property. And this maxim is equally consonant with the common sense of mankind, and the maxims of eternal justice. Terrett v. Taylor, 9 Cranch 43, 50; Kelly v. Harrison, 5 Johns. Cas. 29; Jackson v. Lunn, 3 Ibid. 109; Calvin's Case, 7 Co. 27. This objection, therefore, may be safely dismissed without further comment.

The remaining inquiry is, whether the acts of the legislature of New Hampshire, now in question, or any of them, impair the obligations of the charter of Dartmouth College. The attempt certainly is to force upon the corporation a new charter, against the will of the corporators. Nothing seems better settled, at the common law, than the doctrine, that the crown cannot force upon a private corporation a new charter; or compel the old members to give up their own franchises, or to admit new members into the corporation. Rex v. Vice-Chancellor of Cambridge, 3 Burr. 1656; Rex v. Pasmore, 3 T. R. 240; 1 Kyd on Corp. 65; Rex v. Larwood, Comb. 316. Neither can the crown compel a man [17 U.S. 518, 708] to become a member of such corporation, against his will. Rex v. Dr. Askew, 4 Burr. 2200. As little has it been supposed, that under our limited governments, the legislature possessed such transcendent authority. On one occasion, a very able court held, that the state legislature had no authority to compel a person to become a member of a mere private corporation, created for the promotion of a private enterprise, because every man had a right to refuse a grant. Ellis v. Marshall, 2 Mass. 269. On another occasion, the same learned court declared, that they were all satisfied, that the rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation. Wales v. Stetson, 2 Mass. 143, 146. These principles are so consonant with justice, sound policy and legal reasoning, that it is difficult to resist the impression of their perfect correctness. The application of them, however, does not, from our limited authority, properly belong to the appellate jurisdiction of this court in this case.

A very summary examination of the acts of New Hampshire will abundantly show, that in many material respects they change the charter of Dartmouth College. The act of the 27th of June 1816, declares that the corporation known by the name of the Trustees of Dartmouth College shall be called the Trustees of Dartmouth University. That the whole number of trustees shall be twenty-one, a majority [17 U.S. 518, 709] of whom shall form a quorum; that they and their successors shall hold, use, and enjoy for ever, all the powers, authorities, rights, property, liberties, privileges and immunities, heretofore held, &c., by the trustees of Dartmouth College, except where the act otherwise provides; that they shall also have power to determine the times and places of their meetings, and manner of notifying the same; to organize colleges in the university; to establish an institute, and elect fellows and members thereof; to appoint and displace officers, and determine their duties and compensation; to delegate the power of supplying vacancies in any of the offices of the university for a limited term; to pass ordinances for the government of the students; to prescribe the course of education; and to arrange, invest and employ the funds of the university. The act then provides for the appointment of a board of twenty-five oversers, fifteen of whom shall form a quorum, of whom five are to be such ex officio, and the residue of the overseers, as well as the new trustees, are to be appointed by the governor and council. The board of overseers are, among other things, to have power, 'to inspect and confirm, or disapprove and negative, such votes and proceedings of the board of trustees as shall relate to the appointment and removal of president, professors, and other permanent officers of the university, and determine their salaries; to the establishment of colleges and professorships, and the erection of new college buildings.' The act then provides, that the president and professors shall be nominated by the trustees, and appointed by the overseers, [17 U.S.

518, 710] and shall be liable to be suspended and removed in the same manner; and that each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards. The supplementary act of the 18th of December 1816, declares, that nine trustees shall form a quorum, and that six votes at least shall be necessary for the passage of any act or resolution. The act of the 26th of December 1816, contains other provisions, not very material to the question before us.

From this short analysis, it is apparent, that, in substance, a new corporation is created, including the old corporators, with new powers, and subject to a new control; or that the old corporation is newly organized and enlarged, and placed under an authority hitherto unknown to it. The board of trustees are increased from twelve to twenty-one. The college becomes a university. The property vested in the old trustees is transferred to the new board of trustees, in their corporate capacities. The quorum is no longer seven, but nine. The old trustees have no longer the sole right to perpetuate their succession, by electing other trustees, but the nine new trustees are, in the first instance, to be appointed by the governor and council, and the new board are then to elect other trustees, from time to time, as vacancies occur. The new board, too, have the power to suspend or remove any member, so that a minority of the old board, co-operating with the new trustees, possess the unlimited power to remove the majority of the old board. The powers, too, of the corporation are varied. It has authority to organize new colleges in [17 U.S. 518, 711] 'the university, and to establish an institute, and elect fellows and members thereof.' A board of overseers is created (a board utterly unknown to the old charter), and is invested with a general supervision and negative upon all the most important acts and proceedings of the trustees. And to give complete effect to this new authority, instead of the right to appoint, the trnstees are in future only to nominate, and the overseers are to approve, the president and professors of the university.

If these are not essential changes, impairing the rights and authorities of the trustees, and vitally affecting the interests and organization of Dartmouth College, under its old charter, it is difficult to conceive what acts, short of an unconditional repeal of the charter, could have that effect. If a grant of land or franchises be made to A., in trust for special purposes, can the grant be revoked, and a new grant thereof be made to A., B. and C., in trust for the same purposes, without violating the obligation of the first grant? If property be vested by grant in A. and B., for the use of a college, or an hospital, of private foundation, is not the obligation of that grant impaired, when the estate is taken from their exclusive management, and vested in them in common with ten other persons? If a power of appointment be given to A. and B., is it no violation of their right, to annul the appointment, unless it be assented to by five other persons, and then confirmed by a distinct body? If a bank or insurance company, by the terms of its charter, be under the management of directors, elected by the stockholders, would not the [17 U.S. 518, 712] rights acquired by the charter be impaired, if the legislature should take the right of election from the stockholders, and appoint directors unconnected with the corporation? These questions carry their own answers along with them. The common sense of mankind will teach us, that all these cases would be direct infringements of the legal obligations of the grants to which they refer; and yet they are, with no essential distinction, the same as the case now at the bar.

In my judgment, it is perfectly clear, that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons, without its assent, is a violation of the obligations of that charter. If the legislature mean to claim such an authority, it must be reserved in the grant. The charter of Dartmouth College contains no such reservation; and I am, therefore, bound to declare, that the acts of the legislature of New Hampshire, now in question, do impair the obligations of that charter, and are, consequently, unconstitutional and void.

In pronouncing this judgment, it has not for one moment escaped me, how delicate, difficult and ungracious is the task devolved upon us. The predicament in which this court stands in relation to the nation at large, is full of perplexities and embarrassments. It is called to decide on causes between citizens of different states, between a state

and its citizens, and between different states. It stands, therefore in the midst of [17 U.S. 518, 713] jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and I trust, it will always be found to possess firmness enough to do that.

Under these impressions, I have pondered on the case before us with the most anxious deliberation. I entertain great respect for the legislature, whose acts are in question. I entertain no less respect for the enlightened tribunal whose decision we are called upon to review. In the examination, I have endeavored to keep my steps super antiquas vias of the law, under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence, or popular appeal. We have nothing to do, but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgment of our country.

DUVALL, Justice, dissented. 22 [17 U.S. 518, 714] Upon the suggestion of the plaintiff's counsel, that the defendant had died since the last term, the court ordered the judgment to be entered nunc pro tunc as of that term, as follows:--

JUDGMENT.-This cause came on to be heard, on the transcript of the record, and was argued by counsel: And thereupon, all and singular the premises being seen, and by the court now here fully understood, and mature deliberation being thereupon had,

___ that it was but a renewal and confirmation of the charter of the old company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was at the time solemnly protested against by the parliament of Paris as illegal); that their new grant might still be perfected by letters-patent, which the faith of the king was pledged to issue; and that the privileges thus granted to them were irrevocably vested, as a right of property, of which they could not be deprived by any authority in the kingdom. 'En effet, quand le roi accorde un privilege exclusif, ce privilege est le prix d'une mise de fonds, dans un commerce hazardeux, dont l'entreprize est jugee avantageuse a l'etat. Dela nait par consequent un contrat synallagmatique, qui se forme entre le souverain et les actionnaires. Dela nait un droit de propriete qui devient inebranlable pour le souverain lui-meme.' And of this opinion were the advocates (MM. HARDOIN, GERBIER and DE BONNIERES) consulted by the company. See a Collection of Tracts on the French East India company, Paris, 1788. in the Library of Congress. [17 U.S. 518, 715] it appears to this court, that the said acts of the legislature of New Hampshire, of the 27th of June and of the 18th and 26th of December, Anno Domini 1816, in the record mentioned, are repugnant to the constitution of the United States, and so not valid; and therefore, that the said superior court of judicature of the state of New Hampshire erred, in rendering judgment on the said special verdict in favor of the said plaintiffs; and that the said court ought to have rendered judgment thereon, that the said trustees recover against the said Woodward, the amount of damages found and assessed, in and by the verdict aforesaid, viz., the sum of $20,000: Whereupon, it is considered, ordered and adjudged by this court, now here, that the aforesaid judgment of the said superior court of judicature of the state of New Hampshire be, and the same hereby is, reversed and annulled: And this court, proceeding to render such judgment in the premises as the said superior court of judicature ought to have rendered, it is further considered by this court, now here, that the said trustees of Dartmouth College do recover against the said William Woodward the aforesaid sum of $20,000, with costs of suit; and it is by this court, now here, further ordered, that a special mandate do go from this court to the said superior court of judicature, to carry this judgment into execution.

Footnotes

[Footnote 3] Reported in 1 Ld. Raym. 5; Comb. 265; Holt 715; 1 Show. 360; 4 Mod. 106; Skin. 447.

[Footnote 4] Lord HOLT's judgment, copied from his own manuscript, is in 2 T. R. 346.

[Footnote 5] 1 Burn's Eccl. Law 443.

[Footnote 6] Ashby v. White, 2 Ld. Raym. 938.

[Footnote 7] 'It is a principle in the English law, as ancient as the law itself,' says Chief Justice KENT, in

the case last cited, 'that a statute, even of its omnipotent parliament, is not to have a retrospective effect. Nova constitutio futuris formam imponere debet, et non praeteritis. (Bracton, lib. 4, fol. 228; 2 Inst. 292.) The maxim in Bracton was probably taken from the civil law, for we find in that system the same principle, that the law-giver cannot alter his mind, to the prejudice of a vested right. Nemo potest mutare consilium suum in alterius injuriam. (Dig. 50, 17, 75.) This maxim of Papinian is general in its terms; but Dr. Taylor (Elements of the Civil Law 168) applies it directly as a restriction upon the law- giver; and a declaration in the code leaves no doubt as to the sense of the civil law. Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari nisi nominatim, et de praeterito tempore, et adhue pendentibus negotiis cautum sit. (Cod. 1, 14, 7.) This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future, as contradistinguished from past, contracts and vested rights. (Perezii, Praelec. hit.) It is, indeed, admitted, that the prince may enact a retrospective law, provided it be done expressly; for the will of the prince, under the despotism of the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial, from the legislative, power, was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions.

This was called the interlocutio principis; and this, according to Huber's definition, was, quando principes inter partes loquuntur, et jus dicunt. (Praelec. Juris. Rom., vol. 2, 545.) No correct civilian, and especially, no proud admirer of the ancient republic (if any such then existed), could have reflected on this interference with private rights, and pending suits without disgust and indignation; and we are rather surprised to find, that under the violent and irregular genius of the Roman government, the principle before us should have been acknowledged and obeyed to the extent in which we find it. The fact shows, that it must be founded in the clearest justice. Our case is happily very different from that of the subjects of Justinian. With us, the power of the law-giver is limited and defined; the judicial is regarded as a distinct, independent power; private rights have been better understood, and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering, is now to be regarded as sacred.'

[Footnote 8] History of his Own Times, vol. 3, p. 119.1

[Footnote 1] Burnet is, notoriously, an unreliable historian. Dr. Johnson said of him, and this work, 'I do not believe, that Burnet intentionally lied; but he was so much prejudiced, that he took no pains to find out the truth. He was like a man who resolves to regulate his time by a certain watch; but will not inquire whether the watch is right or not.'

[Footnote 9] See a full account of this, in State Trials, 4th ed., vol. 4, p. 262.

[Footnote 10] Letters of Publius, or The Federalist (No. 44., by Mr. Madison).

[Footnote 11] In Fletcher v. Peck, 6 Cranch 87, the court says, 'a contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the government. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition, contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not

from the words which are employed. Whatever respect might have been felt for the state sovereignties, it is not be disguised, that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves, and their property, from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states, are obviously founded on this sentiment; and the constitution of the United States contains what may be deemed a bill of rights, for the people of each state.'

[Footnote 12] 'A private corporation,' says the court, 'created by the legislature, may lose its franchises by a misuser or non-user of them; and they may be resumed by the government, under a judicial judgment, upon a quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted, that such exclusive privileges attached to a private corporation as are inconsistent with the new government, may be abolished. In respect, also, to public corporations which exist only for public purposes, such as counties, towns, cities, &c., the legislature may, under proper limitations, have a right to charge, modify, enlarge or restrain them, securing, however, the property for the use of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal, can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine.'

[Footnote 13] See also 1 Kyd on Corp. 65.

[Footnote 14] See Ex parte Bolton School, 2 Bro. C. C. 662.

[Footnote 15] The Federalist, No. 44; 1 Tucker's Bl. Com. part 1, Appendix, 312.

[Footnote 16] This appears to be the prevailing idea of the present day; the people are taxed for the support of state schools, and the payment of state school-masters, as state officers, whether they can, in conscience, make use of these state institutions, or not. What would have been thought of this in 1819?

[Footnote 17] See Newton v. Commissioners, 100 U.S. 557 .

[Footnote 18] Starr v. Hamilton, 1 Deady 268.

[Footnote 19] The case of Sutton Hospital, 10 Co. 23.

[Footnote 20] See Rex v. Pasmore, 3 T. R. 199, and the cases there cited.

[Footnote 21] See Holmes v. Lansing, 3 Johns. Cas. 73.

[Footnote 22] In the discussions which arose in France, in 1786, upon the new charter then recently granted to the French East India company, it seems to have been taken for granted, by the lawyers on both sides, to whom the questions in controversy were submitted by the company, and by the merchants who considered themselves injured by its establishment, that if the charter had regularly issued according to the forms of the French law, it was irrevocable, unless forfeited for non-user or misuser. The advocates (MM. LACRETELLE and BLONDE) who were consulted by the merchants of the kingdom opposed to the establishment of the company, denied its legal existence, on the ground, that the king had been surprised in his grant; that it was not yet perfected by the issuing of letters-patent, nor duly registered by the parliaments; and that it both might and ought to be suppressed, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy. On the other hand, it was contended by the company, that their grant was irrevocable;