THE

OPINION

OF

JUDGE STORY

IN THE CASE OF

WILLIAM ALLEN vs. JOSEPH McKEEN,

TREASURER OF BOWDOIN COLLEGE;

DECIDED IN THE CIRCUIT COURT OF THE UNITED STATES, AT THE MAY TERM AT PORTLAND, 1833.

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Circuit Court of the United States, May Term, 1833, *at Portland.*

WILLIAM ALLEN *vs.* JOSEPH MCKEEN.

In this case Judge STORY gave the following OPINION:

This cause has been argued with a degree of learning and ability proportionate to its importance. I have taken time to consider it, and propose now to deliver the judgment, which, upon mature deliberation, I feel bound to adopt.

Before proceeding to the questions in controversy, it seems necessary to give an outline of the material facts, so that the manner, in which the points of law are raised, may be clearly seen. Bowdoin College was established in Brunswick, in the present State of Maine, by an Act of the Legislature of Massachusetts, passed on the twenty-fourth day of June, 1794.— The Act or Charter of Incorporation, after providing that there should be erected and established a College, &c. to be under the government and regulation of two certain bodies politic and corporate in the act mentioned, proceeds in the second section to enact, that certain persons, (naming them) eleven in number, together with the President and Treasurer of the College for the time being, be created a body politic by the name of the President and Trustees of Bowdoin College, with perpetual succession. The third section declares, that the Corporation so created, for the more orderly conducting the business thereof, shall have full power and authority from time to time, to elect a Vice-President and Secretary of the Corporation, and *to declare the tenures and duties of their respective offices*; and also to remove any Trustee from the same Corporation, when in their judgment he shall be rendered incapable by age, or otherwise, of discharging the duties of his office, or shall neglect or refuse to perform them, and to fill up all vacancies in the corporation, &c.; provided that the number of Trustees, including the President and Treasurer, shall never be greater than thirteen, nor less than seven. The fourth section confers on the corporation the usual powers of corporate bodies, and among others the power to hold real estate, the clear annual income of which shall not exceed £10,000. The fifth section authorizes them to elect a President, Treasurer, Professors, and Trustees and other College officers; to purchase lands, erect colleges, &c. and to make all reasonable regulations, and by-laws, not repugnant to the laws of the State, and to confer degrees.—

The sixth section declares, that the clear rents, issues and profits of all the estate, real and personal, of which the corporation shall be seized, or possessed, shall be appropriated to the endowment of the College, in such manner as shall most effectually promote virtue and piety, the knowledge of languages, and the useful and liberal arts and sciences, as shall be directed from time to time by the corporation. The 7th section proceeds to declare, that the acts of the corporation respecting elections, the purchase and erection of houses, the duties, salaries and tenures of office of officers, the appropriation of monies, the acceptance of conditional donations, conferring of degrees, the making and altering of the rules and orders, &c. &c. shall not have any force or validity, until agreed to by the Board of Overseers created by the same act. The ninth section proceeds to appoint certain persons by name, (in number forty-three) together with the President of the College and Secretary of the Corporation, the Board of Overseers of the College, creating them a body corporate with the usual powers, and among others with the power of amotion of the members of the Board, and providing, that the Board shall never be greater than forty-five, nor less than twenty-five. The 16th section provides "that the Legisla-"ture of this Commonwealth may grant any further powers "to, or alter, limit, annul, or restrain any of the powers by "this Act vested in the said Corporation, *as shall be judged* "*necessary to promote the best interests of the said College.*"— The 17th section grants to the College five townships of land of the contents of six miles square, to be laid out and assigned from any of the unappropriated lands belonging to the Commonwealth, in the then District of Maine, the same to be vested in the Trustees of the College and their successors forever, for the use, benefit, and purpose of supporting the College, with power to dispose of them, &c. and subject to certain conditions of settlement.

Such are the most material clauses of the charter. The lands so granted by the Commonwealth have been vested in the Corporation; and other donations have from time to time been received by it from the munificence of private individuals. The College Boards soon after the grant of the charter were duly organized under the charter, and suitable arrangements were made, so that the College went into operation in the year 1801, and has ever since continued to perform the functions, for which it was established, in the promotion of sound literature and the liberal arts and sciences.

No alteration was ever proposed, or made to the charter during the union of Massachusetts and Maine. But upon the separation of the latter, as an independent State, from the former, it was provided by the act of separation of the 19th of June, 1819, (which was incorporated into the Constitution of Maine, which went into effect on the 15th of March, 1820,)

among the fundamental articles, that "all grants of land, "franchises, immunities, corporate or other rights, &c. which "have been, or may be made by the said Commonwealth "before the separation, &c. shall continue in force, after the "said District shall become a separate State. But the grant, "which has been made to the President and Trustees of "Bowdoin College out of the tax laid upon the Banks, &c. "shall be charged upon the tax upon the Banks within the "said District of Maine, and paid according to the terms of "the grants. And the President and Trustees and the Over-"seers of the said College shall have, hold, and enjoy, their "powers and privileges in all respects, so that the same shall "not be subject to be altered, limited, annulled, or restrained, "except by judicial process according to the principles of "law." And the ninth article of the same act declares, that the fundamental article shall be incorporated, *ipso facto*, into the State Constitution, "subject, however, to be modified, or "annulled by the agreement of the Legislature of both the "said States; but by no other power or body whatsoever." With a view, doubtless, to meet the special security thus given to the rights and privileges of Bowdoin College, another article (the 8th) of the Constitution of Maine declares, "that "no donation, grant, or endowment, shall at any time be "made by the Legislature to any literary institution now es-"tablished, or which may hereafter be established, unless at "the time of making of such endowment, the Legislature of "the State shall have the right to grant any further powers to, "alter, limit, or restrain any of the powers vested in any such "literary institution; as shall be judged necessary to promote "the best interests thereof."

By a vote passed by the Trustees of the College in July, 1801, and duly concurred in by the Board of Overseers, the salary of the President of the College was fixed at $1000 per annum, (an addition of $200 was afterwards made in 1805,) to be paid in quarterly instalments, and to commence, when he shall enter on the duties of his office; and it has accordingly been constantly so paid by the Treasurer without any further order of either Board, from time to time, to the President for the time being, without objection. By another vote of the College Boards of November 4, 1801, the tenure of the office of the President was declared to be during good behaviour. By the by-laws of the institution, every candidate for a degree was required to pay five dollars to the Treasurer for the President; and a like fee was subsequently required for every medical degree. Doctor Allen (the Pl'ff) was duly elected President of the College in December, 1819; and in May, 1820, he was inaugurated, and assumed the duties of the office under this known tenure of office, and the salary and perquisites annexed thereto. In the same month, with

the zealous co-operation of President Allen, the College Boards passed a vote, which, after reciting the clause of the Constitution of Maine as to endowments, already referred to, declared that the consent of the Boards be given, that the right may be vested in the Legislature of the State of Maine, (that is, the right to enlarge, alter, limit, or restrain the powers given by the College Charter,) and that a Committee be authorized in behalf of the Institution to take such measures as may be necessary to vest such right in the said Legislature, so as to enable them to make the endowment thereby prayed for, or any further endowment, which they in their wisdom might be disposed to make. President Allen was appointed one of this Committee ; and accordingly application was made to the Legislatures of Massachusetts and Maine for their assent to such modification of the College Charter, as should enable the College constitutionally to receive patronage and endowments from the Legislature of Maine. The Legislature of Massachusetts accordingly passed a Resolve on the 12th June 1820, and the Legislature of Maine one on the 16th of the same month on this subject, the terms of which will bereafter come more fully under consideration. The Legislature of Maine, supposing that by the conjoint operation of the State Legislatures, all restraint upon their constitutional authority to alter the charter was removed, in March 1821, passed an Act providing, that the number of Trustees of the College including the President should never be less than twenty nor more than twenty five, and a quorum to be thirteen ; and the number of Overseers should never be less than forty five, nor more than sixty ; that *the Governor and Council should appoint twelve persons as Trustees, and fifteen as Overseers, &c. &c.* ; that the Boards respectively should thereafter fill all other vacancies. Other Acts were passed in June 1820, in Feb. 1822, in Feb. 1826, respecting the College, upon the terms of which it is unnecessary to dwell. On the 31st of March 1831, the act was passed, which has given rise to the present controversy. The first section declares " that no " person holding the office or place of President in any Col- " lege in this State" (and there were at that time, and are now but two Colleges in the State) "shall hold said office or place " beyond the day of the next commencement of the College, " in which he holds the same, unless he shall be re-elected." " And no person shall be elected or re-elected to the office or " place of President unless he shall receive in each Board two " thirds of all the votes given in the question of his election. " And every person elected to said office or place after the " passing of this act, shall be liable to be removed *at the pleas-* " *ure of the Board of Trustees*, or *Board of Trustees and* " *Overseers*, which shall elect him." The second section provides " that the fees paid for any diploma, or medical, or

"academical degree, &c. shall be paid into the Treasury for "the use of the College, and no part shall be received by any officer, as a perquisite of office." At the annual meeting of the Boards of the College in Sept. 1831, they passed a vote "that they *acquiesce in said Act*, and will now &c. proceed to carry the provisions thereof into effect." The Board of Trustees then proceeded (after having given due notice to President Allen) to an election of President; but no candidate having a majority of votes, no choice was made; and the College has ever since remained without any acknowledged President.

The present action has been brought by Doctor Allen, against the Dft., who is Treasurer of the College, for the salary and perquisites of office, due to him, (as he contends) as President of the College, *de jure*, notwithstanding his ejection from office in Sept. 1831.

Two questions have been made at the Bar. First, whether the present action is maintainable against the Dft. as Treasurer, supposing the P'ff. still to be rightfully in office. Secondly, whether the P'ff. is rightfully in office, notwithstanding the Act of 1831, and the proceedings of the Board thereupon; so that he is entitled to recover the amount of his salary and perquisites, or either, against the College.

A strong desire has been expressed at the Bar in behalf of the parties, that the Court would not, even if it might, confine its judgment to the first question; but that it would proceed to decide the whole merits of the controversy, as essential to the good order and prosperity of the College, as well as to the rights of the Dft. Under these circumstances, although I am conscious of the delicacy and difficulty of the task, (a task, from which I would gladly have been spared) I shall express the opinion, which I have deliberately formed upon both the questions in the case without hesitation, but at the same time with all the diffidence, which the magnitude of the interests involved in them, cannot fail to create. For the present, I shall pass the question, whether the action is maintainable against the present Dft. and proceed at once to the main points upon the merits.

And the first point naturally arising upon the discussion is, in what light the original charter granted by Massachusetts for the establishment of Bowdoin College is to be viewed.—Is it the erection of a private Corporation for objects of a public nature, like other Institutions for the general administration of charity? Or is it in the strict sense of law a public corporation, solely for public purposes, and controllable at will by the Legislative power, which erected it, or which has succeeded to the like authority? The former is asserted by the P'ff's. Counsel to be its true predicament; the latter is as strenuously contended for on the other side.

That a College established for the promotion of education, and for instruction in virtue and piety, and in the liberal arts and sciences, is in some sense a public institution or corporation cannot well be denied ; for it is for the benefit of the public at large, or at least for all persons, who are suitable objects of the bounty ; and this is the popular sense, in which the language is commonly used. And in this sense an Institution founded exclusively by private donors for purposes of general charity, such as a hospital for the poor, the sick, the disabled, or the insane, may well be called a public Institution. But in the sense of the law a far more limited, as well as more exact, meaning is intended by a public Institution or Corporation. Upon this subject, however, I may well spare myself from any elaborate exposition, since it was fully considered in the great case of Dartmouth College, vs, Woodward, (4 Wheaton, R. 518) from which I will make a quotation, contained in the opinion of one of the Judges, which it is well known, had the approbation of the Court,—" Public Corporations" (says the opinion) "are generally esteemed such as exist for public po-
" litical purposes only, such as towns, cities, parishes, and
" counties ; and in many respects they are so, although they
" involve some private interests. But, strictly speaking, pub-
" lic corporations are such only, as are founded by the Gov-
" ernment for public purposes, *where the whole interests*
" *belong also to the Government.* If, therefore, the foundation
" be private, though under a 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,
" the nature and objects of the Institution. For instance, a
" Bank created by the Government for its own use, whose
" stock is exclusively owned by the Government, is in the
" strictest sense a public corporation. So is a hospital creat-
" ed, and endowed by the Government for general charity,"
(meaning, as is obvious from the context, a hospital, like the Navy Hospital, or the General Marine Hospital established and supported by the U. States, out of its own funds, and over which it retains the entire Government.) "But a Bank,
" whose stock is owned by private persons, (and it might have
" been added, partly by private persons, and partly by the
" Government) 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, in
" deed, as if the franchise were vested in a single person."

" This reasoning applies in its full force to eleemosynary
" corporations. A hospital founded by a private benefactor,
" is in point of law a private corporation, although ded-

" icated by its charter to general charity So is 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 of the " community, and thus acquire the character of a public, in- " stitution. This is the very universal doctrine of the au- " thorities ; and cannot be shaken, but by undermining the " most solid foundations of the common law." It is after- wards added : " 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 upon 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 ir- " reconcilable with the whole current of decisions since the " time of Lord Coke." And it is further stated, that no au- thority exists in the Government to regulate, control, or direct a corporation, or its funds, " except where the corporation is " in the strictest sense public ; that is, *where its whole inter- " ests and franchises are the exclusive property and domain of " the Government itself*;" (a)

That a college, merely because it receives a charter from the Government, though founded by private benefactors, is not thereby constituted a public corporation, controllable by the Government, is clear, beyond any reasonable doubt. So the law was understood by Lord Holt, in his celebrated judg- ments in Phillips vs. Buxy (1. d Raym. R. S. S. C. 2 T. Rep. 346). Lord Hardwicke in the Attorney General vs. Pearse (2 Atk. R. 87) said, " the charter of the Crown cannot make " a charity more or less public, but only more permanent, " than it would otherwise be." And the decision of the Su- preme Court in the case of Dartmouth College v. Woodward is direct to the same purpose.

Nor does it make any difference, that the funds have been generally derived from the bounty of the Government itself. The Government may as well bestow its bounty upon a pri- vate corporation for charity, as upon a public corporation ; and its funds once bestowed upon the former become irrevo- cable, precisely in the same manner, and to the same extent, as if they had been bestowed upon an individual. The Gov- ernment cannot resume a gift, once absolutely made to a pri- vate person, neither can it resume a like gift to a private cor- poration. It is true, that the Government may reserve such a power in granting a charter, if it chooses so to do ; but, then, the power arises from the very terms of the grant, and not from any implied authority derived from the bounty being for general charity, any more than it would from its being for private charity. The Government may reserve a right to revoke at pleasure, even its private gifts ; but certainly the Law will not imply such a right without some positive expres-

(a) See 4 Wheaton, 668 to 672.

sion of such an intention. Mr. Chancellor Kent has stated the true principles of Law on this subject, with his usual accuracy and clearness. " An eleemosynary corporation (says " he) is a private charity, constituted for the perpetual distri- " bution of the alms and bounty of the founder. In this " class are ranked hospitals for the relief of poor, sick, and " impotent persons, and colleges and academies established " for the promotion of learning and piety, and endowed with " property, by *public and private donations*."(b)

To be sure, where the Government is the founder of a college, it has certain rights and privileges attached to it in point of Law ; but in this respect it is not distinguishable from any private founder. Every founder of an eleemosynary corporation, (that is, the *fundator perficiens*, or person, who originally gives to it its funds and revenues) and his heirs, have a right to visit, inquire into, and correct all irregularities and abuses, which may arise in the course of the administration of its funds, unless he has conferred, (as he has a right to do) the power upon some other persons. This power is commonly known by the name of the *visitatorial power*, and i is a necessary incident to all eleemosynary corporations ; for these corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution ; and therefore ought to be liable to some supervision and control.(c) But, what is the nature and extent of this visitatorial power ? Is it a power to revoke the gift, to change its uses, to divest the rights of the parties entitled to the bounty ? Certainly not. It is a mere power to control and arrest abuses, and to enforce a due observance of the statutes of the charity. Lord Holt in Phillips vs. Bury (2 T. R. 352) says, the visitatorial power " is an appointment of Law. It ariseth 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 " gives him and his heirs a visitatorial power, that is, an au- " thority to inspect the accounts, and regulate the behaviour " of the members, that partake of the charity ; for it is fit " the members that are endowed, and that have the charity " bestowed upon them, should not be left to themselves (for " divisions and contests will arise amongst them about the " dividend of the charity) but pursue the intent and design " of him, that bestowed it upon them." But the founder may part with his visitatorial power, and vest it in other persons , and when he does so, they exclusively succeed to his authority. No technical terms are necessary to assign over, 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

(b) 2 Kent Comm. Lect. 23, p. 274, (2d edition.)
(c) 1 Black. Comm. 480.

persons, or subject it to any modification or control by the fundamental statutes of the foundation.(d) Now, it is a general rule in the construction of charters, that if the objects of the charity are not incorporated, but certain Trustees are incorporated to manage the charity, the visitatorial power is deemed to belong to such Trustees in their corporate capacity.(e) And so the Law is laid down by Lord Holt in Phillips vs. Bury (2 T. R. 352,353). This visitatorial power is an hereditament founded in property,and valuable in the intendment of law ; and where it is vested in Trustees, there can be no amotion of them from their corporate capacity, and no disturbance or interference with the just exercise of their authority,unless it is reserved by the statutes of the foundation, or charter. But, still, as managers of the revenues of the charity, they are not beyond control ; but are subject to the general superintendence of a Court of Chancery, for any abuse of their trust in the management of it.

If with these principles in view, we examine the charter of Bowdoin College, we shall find, that it is a private and not a public corporation. That it answers the very description of a private College, as laid down by Mr. Chief Justice Marshall in Dartmouth College vs. Woodward (4 Wheaton, R. 640, 641.) It "is an eleemosynary institution, incorporated "for the purpose of perpetuating the application of the boun- "ty of the donors to the objects of that bounty. Its trustees "were originally named by the founder, and invested with "the power of perpetuating themselves. They are not pub- "lic officers ; nor is it a civil institution ; but a charity school, "or a seminary of education, incorporated for the preserva- "tion of its property, and the perpetual application of that "property to the objects of its creation." The Commonwealth of Massachusetts is its founder, having given it its original funds. But it is made capable of receiving, and has actually received funds from the bounty of private donors. As founder, the Commonwealth of Massachusetts would have possessed the visitatorial power, if it had not entrusted that and all other powers and franchises and rights of property of the College to the Boards of Trustees and Overseers established by the charter, and in the manner therein stated. As soon as that charter was accepted, and carried into operation by the Trustees and Overseers named in it, they acquired a permanent right and title in their offices, which could not be devested, except in the manner pointed out in that charter. The Legislature was bound by the act; they could not resume their grant ; and they could not touch the vested rights, privileges or franchises of the College, except so far, as the power was reserved by the 16th section of the act. The language

(d) Dartmouth College v. Woodward, 4 Wheaton, 675. Phillips v. Bury, 2 T. R. 350, 352, 353.

(e) Ibid. Green v. Rutherford, 1 Ves. 472. Attorney General v. Middleton, 2 Ves. 327. Case ofSutton's Hospital, 10 Co. R. 23, 31, 2 Kent Comm. sect. 23, p. 300, &c. (2d edition).

of that section is certainly very broad; but it is not unlimited. It is there declared, that the Legislature "may grant further "powers to, or alter, limit, annul or restrain any of the powers "by this act vested in the said Corporation, *as shall be judged* "*necessary to promote the best interest of the College.*" Whatever it may do then, must be done to promote the best interest of the College. It is true, that it is constituted the sole Judge, what is the best interest of the College; but still it cannot do any thing pointedly destructive of that interest. Its authority is confined to the enlarging, altering, annulling or restraining of the *powers* of the Corporation. It cannot intermeddle with its *property;* it cannot extinguish its corporate existence; it cannot resume all its property, and annihilate all its powers and franchises. The Legislature must leave its vitality and property, and enable it still to act as a College. It cannot remove the Trustees, or Overseers, though it may abridge, as well as enlarge, their powers. At least, any argument, which should attempt to establish a different doctrine, must proceed upon the difficult assumption, that a power "to promote the best interest of the College" included a power to destroy all its interests, nay its very existence.

But it is unnecessary to enlarge upon this topic, since the present case does not rest upon the effect of this clause of the original charter.—The act of Separation, which is constitutionally binding upon the Legislature of Maine, gives, as we have seen, a complete guaranty to the powers and privileges of the President, Trustees and Overseers, under the charter; so that they are incapable of being altered, limited, annulled, or restrained, except by judicial process according to the principles of law, unless that act has been modified by the subsequent agreement of the Legislatures of both States.

The next inquiry naturally is, whether any such modification has been made, as is contemplated by the act of Separation. If it has, another inquiry will be, what is the true extent of the modification actually made and authorized. The Resolve of the Legislature of Massachusetts was passed (as we have seen) on the 12th day of June, 1820. After reciting the clause in the act of separation above referred to, and the petition of the Trustees and Overseers of Bowdoin College for such a modification of that clause, as would enable the Legislature of Maine to make donations, grants and endowments to the college, it is Resolved "That the consent and "agreement of this Commonwealth be, and the same is hereby "given to any alteration, or modification of the aforementioned "clause or provision in said act relating to Bowdoin College, "*not affecting the rights or interests of this Commonwealth,* "which the President and Trustees and Overseers of the said "College, or others, having authority to act for said Corpora- "tion, *may make therein* with the consent of the Legislature of "said state of Maine; and such alterations or modifications, "made as aforesaid, are hereby ratified on the part of this "Commonwealth." Now, whether this resolve is exactly in

conformity to the petition of the Trustees and Overseers, and carried into effect their objects, is a point wholly unnecessary to be here discussed; for the state of Massachusetts had a right to prescribe such terms as it pleased, and was not bound to grant, what was asked, but what it deemed in its discretion fit to be granted. We must, then, construe the Resolve, as we would any other solemn act of Legislation, according to its true intent to be collected from its terms. Now, it is very clear, that Massachusetts was not willing to make an unconditional surrender of all rights and interests under the charter to the Legislature of Maine; for an express exception or reservation is made of alterations or modifications "*affecting the rights and interests of the Commonwealth*" under the clause of the act of Separation. The very exception or reservation supposes, that there are some rights and privileges and interests of the Commonwealth, arising under the charter; for otherwise the language of the exception or reservation would be useless, if not absurd. Nor is it difficult to perceive, that the Commonwealth of Massachusetts had rights and interests, which might be affected by certain alterations of the charter. In the first place, the Commonwealth was the founder of the College, and had given certain lands to be appropriated to the uses of the charity. It had a right and interest in having these funds perpetually applied to the original objects of the Institution. As founder, too, it was entitled to the visitatorial power over the College; and having delegated that power to certain Trustees and Overseers in perpetual succession, as its chosen, substituted agents and visitors, it had also a right and interest in having that power perpetually exercised by the very bodies, and by none others, which it had constituted for this purpose. Nothing is clearer in point of law, than the right of a founder to have his visitatorial power exclusively exercised by the very functionaries in whom he has vested it. It is the very substratum of his donation.

This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the Trustees, strictly adhered to, unless so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them from his Trustees and confer the same power on other persons. My view of this Resolve, therefore, is, that it authorizes no alterations or modifications of the College charter, which shall divert the funds of the founder from their original objects, or shall vest the visitatorial power in any other bodies, or persons, than the Trustees and Overseers marked out in the original charter; and *a fortiori* that it does not justify the transfer of these powers from the Trustees to any other persons not in privity with them. It does not authorize the Legislature of Maine to assume to itself the powers of the Trustees, or Overseers, or of either of them, or to appoint new Trustees or Overseers; for that would affect the rights and interests of the founder, who had a right to select his own administrators of his own bounty in perpetuity. I do not say, that the Legislature of Maine might not have authorized an

increase of the number of both Boards, leaving the appointment to be made by the existing Boards ; for that would still leave the funds to be administered by agents selected by the proper visitors of the founder. Upon that point I give no opinion. What I do mean to say is, that the Legislature of Maine was not authorized by this Resolve of Massachusetts to affect the rights and interests of the latter state by making appointments of Trustees and Overseers of the charity through its own agency, and independent of the agency of the charter, Trustees and Overseers. Massachusetts has no where therein given any assent to such an alteration or modification of the Charter of the College.

But this is not all. The language of the Resolve is, that Massachusetts assents and agrees to any alteration and modification, " which the President and Trustees and Overseers of " said College may make therein with the consent and agree- " ment of the Legislature of said state of Maine ; and such " alterations or modifications *made as aforesaid, are hereby* rat- " ified on the part of this Commonwealth." Now, I confess, that I think there is great force in the argument, that this Resolve had in view certain alterations and modifications, then to be made, *uno flatu*, and not any subsequent alterations and modifications, which might from time to time, and in all future times and ages be made in the charter. It is scarcely conceivable, that Massachusetts should use terms of ratification *in presenti*, as applicable to all such possible alterations in all future times. That was not necessary to accomplish the objects of the petitioners. A single alteration or modification, which should confer upon the Legislature of Maine the authority required by the Constitution to authorize any donation, grant or endowment of that Legislature to the College, would have been sufficient, without any general and sweeping authority for unlimited changes. But, be this as it may, it is very clear, that Massachusetts has not assented or agreed to any alterations or modifications, which the Legislature of Maine might in virtue of its sole authority make, but to such only, as the President and Trustees and Overseers of the College may make with the consent and agreement of the Legislature of Maine. The alterations and modifications are, then, to be made by the Boards of the College, or by their agents, with the consent of the Legislature, and not by the Legislature without their consent. In short, the alterations or modifications are to originate with the Boards, and to be made by them ; but they are inoperative, unless ratified by the Legislature. If, therefore, the Legislature of Maine has undertaken to make laws altering or modifying the charter of the College without making the validity of such Laws dependent upon the adoption of the Boards before or after their passage, I have no hesitation in saying, that such laws have never been assented to by Massachusetts, and are, consequently, unconstitutional and void.

But let us see, whether the Legislature of Maine has adopted this Resolve of Massachusetts ; for there must be a concur-

rence of the Legislatures of both States *ad idem*, to repeal or modify the clause in the act of Separation. It is very certain, that the Legislature of Maine has passed no correspondent resolve or act, *in totidem verbis*, nor has it in terms assented or agreed to the resolve of Massachusetts. How, then, can the resolve have any operation? The act of Separation declares, that the fundamental articles, the terms and conditions of the Separation, shall be, *ipso facto*, incorporated into the constitution of Maine, "subject, however, to be modified "or annulled by the agreement of the Legislatures of both "the said States." To constitute such an agreement, both parties must assent to the same thing. The whole proposition must be adopted or nothing. From the very nature and force of the term, an agreement can be but one thing; and in that one thing, both parties must concur. If then Massachusetts and Maine have not agreed to the same identical thing, the *casus fœderis* has not arisen. Indeed, I am inclined to go much farther. I do exceedingly doubt, if any modification or amendment can be made in any of these fundamental articles, without the specific modification or amendment being drawn out, and expressly assented to by both States. I do not think, consistently with the letter, or spirit of the qualifying or enacting clause, that the Legislature of either State can delegate to other persons, its authority to assent to, or frame any such agreement. It cannot agree *ab ante*, to any modifications or amendments, which third persons may make; it must agree to some specific proposition, purporting to be its own final act in the premises.

But, it is argued, that the act of Maine of the 16th March, 1820, (which was passed four days after the Massachusetts resolve,) contains a virtual assent to that resolve, and that therefore there has been a sufficient compliance with the requisites of the articles of separation. Let us see, then, what the purport of that act is. It is entitled "an act to modify, and limit the terms and conditions of the act of separation relative to Bowdoin College, and encourage literature, and the arts and sciences;" and it enacts "that provided the Legislature "of Massachusetts *shall agree thereto*, the President and "Trustees and the Overseers of Bowdoin College having "already assented thereto, the terms and conditions men- "tioned in the act of the Commonwealth of Massachusetts "passed on 19th of June A. D. 1819, entitled &c. be and "the same hereby are so far modified, limited or annulled, "as that the President and Trustees and the Overseers shall "have, hold, and enjoy their powers and privileges in all res- "pects, subject however to be altered, limited, restrained, or "extended by the Legislature of the State of Maine, as shall "by the said Legislature be judged necessary to promote the "best interests of said Institution." Now, it seems to me, that this act is precisely in the form contemplated by the act of Separation, in order to justify a modification of the charter. It presents a specific alteration for the consideration and

agreement of Massachusetts; and thus affords a very strong confirmation of the view, which has been already taken of this point by the Court. The act is to take effect, and the modification is to be incorporated into the charter, provided the Legislature of the Commonwealth of Massachusetts *shall agree thereto*, that is, to the specific modification proposed in the act. Now, it is certain, that the act of Maine, or the specific modification of the charter therein proposed, has never been agreed to by the Legislature of Massachusetts. The act has never, as far as any of us know, been laid before the Legislature of Massachusetts, either for consideration or for confirmation. The act does not look to any antecedent Resolve of Massachusetts, and dispense with any farther assent, but it expressly looks to some future act or assent of Massachusetts. The language is, provided the Legislature *shall* agree thereto; not *has* agreed thereto. Nor is this a mere matter of form. It is in my judgment matter of substance, and was so rightly understood by the Legislature of Maine, as indispensable to the constitutional efficacy of the act of 1820. In no just sense can this act be construed to be an adoption of the Massachusetts Resolve. The terms are not the same; the objects are not the same; the limitations are not the same.—Massachusetts signifies her assent to any alteration or modification "*not affecting the rights or interests of this Commonwealth.*" No such qualification or limitation is to be found engrafted on the act of Maine. The latter saves no right, and no interests of Massachusetts. Massachusetts signifies her assent to any alteration &c. which the President, Trustees, and Overseers &c. may make in the charter, with the consent and agreement of the Legislature of Maine. The act of the latter assents to no such general authority, but confines itself to a single proposition, and that conceived almost in the very terms of the 8th article of the Constitution of the State. It is impossible, therefore, in an exact and legal sense to assert, that the Resolve of Massachusetts, and the act of Maine speaks *ad idem*. The proposition of neither legislature has been specifically acted upon by the other. There has been a miscarriage of the parties, unintentional, in all probability, but not in my judgment, the less fatal on that account.

But although I am clear in this opinion, it is not my intention to rest the present case upon this ground alone, though it seems to be impregnable. There is another point of view, in which the constitutional doctrine is equally clear, and equally fatal.

Let it be conceded, that the act of Maine of the 16th of June 1830 is constitutional, and has become incorporated into the charter of the College and there yet remains a very important inquiry; what is the true extent of the authority of the Legislature conferred by that act over the College?—The words are that "the President and Trustees and the "Overseers of Bowdoin College shall have, hold and enjoy their "powers and privileges in all respects, subject, however, to

"be altered, limited, restrained, or extended by the Legisla-
"ture &c. as shall &c. be judged necessary to promote the
"best interests of said Institution". In the first place, it is clear, that this language can in no reasonable, indeed, I may say, by no possible interpretation be construed to include an authority to annul the charter, or the corporation created by it, or the Institution itself The word "annul" is not in it, as it was in the 16th section of the original charter of 1794; but the other words of that section are retained, except that the word "extend" is substituted for the word "grant." This alone would furnish an almost irresistible argument, that the authority to annul was intended to be withheld from the Legislature. But the words of the section in their actual connexion exclude any authority to annul the charter. It would be utterly repugnant to all common sense to say, that an annihilation of the College would be an act to promote its "best interests." But the authority is limited in other respects. It is not an authority to alter, limit, restrain, or extend *the charter* generally, but only to alter, limit, restrain or extend the *powers* and *privileges* conferred by the charter on the President, Trustees, and Overseers, as may be judged necessary to promote the best interests of the Institution. The act, then, does not authorize the creation of new Boards, in whom the corporate powers and privileges may be vested, nor any transfer whatsoever to other persons of the powers and privileges of the old Boards. The powers and privileges of the existing Boards may be extended or restrained, limited or altered; but they cannot be transferred over to other persons; for that would be an act of a very different character. Whatever powers and privileges are allowed by the Legislature, to be exercised for the promotion of the best interests of the institution, are to be exercised by the Charter Boards. No authority is conferred upon the Legislature to add new members to the Boards, by its own nomination, or by that of the Governor and Council of the State. That would be an extension, not of the powers and privileges of the Boards, but of the Legislative action over them. If the Legislature could add one new member of its own choice or appointment, and not of the choice or appointment of the Charter Boards, it could add any number whatsoever, five, or fifty, or one hundred. It could annihilate the powers and privileges of the Charter Boards, under the pretence of alteration or extension. It would hardly be contended, that the Legislature possesses a right to substitute itself in the management of the College and its interests, for the Charter Boards; and if not, how can it confer such an authority upon other persons?— The President, Trustees and Overseers are to "hold and enjoy their powers and privileges in all respects, subject &c. &c." But how can they hold or enjoy any such powers or privileges, if they are liable to be transferred to any other per-

sons, and taken from themselves ? If such had been the intent of the parties, other language would have been used ; the Charter, the College, and the Boards would have been made subject to the pleasure of the Legislature ; the power to annul and transfer the powers and privileges would have found its way into the act in a clear and determinate manner. I agree, that the Legislature might authorise an enlargement of the Boards, by the appointment of new members to be nominated by the Boards ; for it would be but an enlargement of the powers and privileges of the existing Boards. But it is morally impossible, as I think, to engraft upon the terms of the act an authority in the Legislature to make, of itself, new Boards, or to change the whole organization of the old Boards by the addition of members, not chosen by those Boards. I am not prepared, therefore, to admit that the act of the 19th of March, 1821, enlarging the Boards, or the act of the 27th Feb. 1826, make the Governor, *ex officio*, a member of the Board of Trustees, can be maintained as constitutional exercises of authority. I do not say, that the proceedings of the Boards, as actually constituted, since the passage of those acts are void. That is a very different question, turning upon very different considerations. There is a marked distinction in the law, which allows the acts of many officers *de facto* to be good, although they may not be officers *de jure*, or regularly elected. The present case is quite enough loaded with difficulties for the court not to desire to plunge into that point, although from the strong desire expressed, and the discussions pressed at the bar for an opinion upon this point, it has not been very easy wholly to avoid it.

Let us see, then, how far the act of the 31st of March, 1831, is affected by any of those considerations. It is in its terms an act of positive and direct legislation. It legislates the existing Presidents of Bowdoin and Waterville Colleges (the only Colleges in the State) out of office from and after the next annual commencement of the Colleges. It is a direct exercise of the power of amotion from office by the legislature itself.-- That very power was expressly and exclusively conferred upon the College Boards by the original charter. Massachusetts has never consented, that it should be taken away from those Boards, and be exercised by the Legislature of Maine ; for it is an alteration or modification "affecting the rights and interests of that Commonwealth" in regard to those very Boards. The act of Maine of June, 1820, has not conferred this power on the Legislature ; for that act authorizes no transfer of any of the powers of the Boards to the Legislature, or to any other persons. It would have been quite a different question, if the Legislature had undertaken merely to alter the term of office of the future Presidents chosen by the Boards, with a grant of power to remove such future Presidents at the pleasure of the Boards. The wisdom of such a provision might be more than doubtful. The authority to make it, might perhaps be more clear.

But it is said, that the Boards have assented to the act, and have adopted it; and it has therefore, become binding upon the College. I think, that the argument is not correct. The Boards have not adopted it; they have merely "*acquiesced*" in it, a phrase evidently chosen, ex industria, by the Boards, as expressive of mere submission to the Legislative will, and not of approbation; a course, which might naturally be adopted to avoid a direct collision with the Legislature, and as a respectful appeal for a future revision of the act by the Legislature itself. But if the acquiescence of the Boards could be construed into an approval of the act (as, I think, it ought not to be) still, that approval cannot give effect to an unconstitutional act. The Legislature and the Boards are not the only parties in interest upon such constitutional questions. The People have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers, and no private arrangements between such parties can supersede them.

Independent, however, of this general ground, there is another of great weight and importance; and that is, that President Allen was in office under a lawful contract made with the Boards, by which contract he was to hold that office during good behaviour with a fixed salary, and certain fees annexed thereto. This was a contract for a valuable consideration, the obligation of which could not consistently with the constitution of the United States be impaired by the State Legislature. The act of 1831, directly impairs the obligations of that contract. It, *ipso facto*, takes away from President Allen the tenure, by which he held his office; and removes him from it. Now, it was as little competent for the Legislature to exercise this authority, as it was for the Boards of the College. The President, holding his office during good behaviour, could not be removed from office, except for gross misbehaviour, and then only by the Boards in the manner pointed out in the original charter. It is no answer to say, that the President personally assented to the proposition to clothe the Legislature with an authority of this sort, *in futuro*. However indefensible any act might be on his part, by which he should surrender for all his successors the tenure of office during good behaviour, which he should yet retain for himself, (a design which I am very far from imputing to him;) still the act of June, 1820, could in no legal sense be construed to apply to past contracts. It could operate only in relation to powers to be exercised by the Boards, *in futuro*. And, at all events, he has not assented to the act of 1831; and has resisted it, as in his opinion oppressive, vindictive, and unconstitutional.

In every view, therefore, in which I have been able to contemplate this subject, it seems to me that the act of 1831 is unconstitutional, and void, so far as it seeks to remove President Allen from office. The Legislature could not constitutionally deprive him of his office, or of his right to the salary and perquisites annexed thereto.

The other question in the case is of minor importance to the parties; but still in a legal point of view it is entitled to grave consideration. From what has been already stated President Allen is *de jure* in office; and as there is no pretence to say, that he has not always been ready to perform the duties of his office, he is entitled to recover against the Corporation the entire emoluments annexed by his contract to the office at the time, when he accepted it, or which have since been annexed to it.—But the present suit is not brought against the Corporation. It is against the Treasurer of the Corporation personally, as having received money for the use of the P'ff. To justify a recovery then, it must be clearly made out, that there is in his hands money, which has been specifically appropriated to, and belongs to the P'ff., as President of the College. As to this part of the case, there may arise a distinction between the salary, and the fees of office. Since the College commencement in 1831, no money has come into the hands of the Treasurer, which by any order of the Board has been specifically directed to be paid to the President of the College, *eo nomine*, or to the P'ff. Before that period the salary was payable quarterly, and was accordingly paid by the Treasurer, under the general vote of the Board already stated. It was a duty incumbent upon him so to do, in order to carry that vote into effect; and if funds existed in his hands sufficient for the purpose, there was an implied appropriation of those funds for that purpose. But the acquiescence of the Boards at that period in the Act of the Legislature of 1831, and their information to the P'ff. of that acquiescence, and their proceeding to elect a new President, (though ineffectual) amounts, as I think, to an implied revocation of the authority to pay over any future salary to the P'ff. as President. They treated him, as no longer in office, and had a right to take from their Treasurer (who is but their agent) the authority to pay to the P'ff. any further salary, and to assume upon themselves all the consequences of a breach of their contract. But as to the fees for academical and medical degrees, the posture of the case is somewhat different. It is true, that the Act of 1831, in the second section, declares, that the fees paid for degrees, shall thereafter be paid into the Treasury for the use of the College. But so far as regarded the P'ff., who by his contract, and the by-laws, was entitled to those fees, the act was inoperative. Besides :—The Boards have never acquiesced *de facto* in this part of the Act. On the contrary, in Sept. 1832, there was an express refusal to change the former by-laws, by which "candidates for either degree shall pay five dollars each, to the Treasurer for the use of the President;" so that those by-laws, at least so far as the P'ff. is concerned, remain unrepealed; and the fees received by the Treasurer for such degrees, have been expressly received by him for the use of the President. They are strictly money had, and received for his use; and as the Pl'ff. still continues *de jure* President, he is entitled to them, unless there is some stubborn rule of law, which stands in his way.

It is a very clearly established principle of law, that if one man receive money, which ought to be paid to another, or belongs to him, this action for money had and received will lie in favor of the party, to whom of right the money belongs. So it is laid down by Lord Chief Justice Willes, in Scott v. Surman, (Willes R. 400); (f) and the doctrine has ever since been adhered to. Nor is there any difficulty in maintaining such a suit, simply because it involves a trial of the title to office, if the party has once been in possession. Upon this point nothing more is necessary than to re-

er to Arris v. Stukely, (2 Mod. R. 260) and Boyter v. Dodsworth (6 Term Rep. 681.) (g). It seems to me, therefore, that as to the fees actually received for degrees by the Treasurer for the President, the suit is maintainable, and, as to the salary, not.

I have now finished all that is necessary to be said for the decision of this Court. But I cannot dismiss it without expressing my regret, that it has ever come before the cause, and that I have been deprived of the assistance of my learned Brother, the District Judge, in deciding it. If this Court were permitted to have any choice as to the causes, which should come before it, this is one of the last which it would desire to entertain. But no choice is left. This Court is bound to a single duty, and that is, to decide the causes brought before it according to law, leaving the consequences to fall as they may.

It is impossible in any aspect of the case not to feel, that the decision is full of embarrassment. On the one hand the importance of the vested rights and franchises of the literary institution have not been exaggerated; and on the other hand the extreme difficulty of successfully conducting any literary institution without the patronage and cordial support of the Government, and under a head, who may (however undeservedly) not enjoy its highest confidence. But these are considerations proper to be weighed by others, who possess a discretion and voice in a fit adjustment of controversies of this sort. To the Court is left the humbler, but unenviable task of pronouncing a judgment, such as a just reverence for the Law, and a conscientious discharge of its duty impose upon it.

The verdict taken for the Dft. must, pursuant to the agreement of the Parties, be set aside, and a verdict entered for the P'ff., for such a sum, as shall be ascertained by an auditor to be appointed by the Court, as due to him for the fees for degrees received by the Dft. for the use of the President.

(f) See also Woodward v. Freeman's R. 429. Mayor of London v. Gorey, Freeman's R. 433. Howard v. Wood, Freeman's R. 474, and note of Mr. Smirke.

(g) Green v. Hewett Peake, N. P. R. 182. Rains v. Commissioners of Canterbury, 7 Mod. 147. Powell v. Milbank, 1 Term R. 399, note. Sadler v. Evans, 4 Burr R. 1984. Drew v Fletcher, 1 B & Cres. R. 283.— Lightley v. Clouston. 1 Taunt. R. 115, per Heath J, Hall v. Marston, 17 Mass. R. 575. Hearsey v. Pruyn, 7 John. R. 179, 182.