

Town of Pawlet Vs. Clark

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Appellant : Town of Pawlet

Respondent : Clark

Judgement :

Town of Pawlet v. Clark - 13 U.S. 292 (1815)

U.S. Supreme Court Town of Pawlet v. Clark, 13 U.S. 9 Cranch 292 292 (1815)

Town of Pawlet v. Clark

13 U.S. (9 Cranch) 292

ON CERTIFICATE OF DIVISION OF OPINION AMONG THE JUDGES

OF THE CIRCUIT COURT OF THE DISTRICT OF VIRGINIA

SYLLABUS

This Court has jurisdiction, where one party claims land under a grant from the State of New Hampshire and the other under a grant from the State of Vermont, although at the time of the first grant Vermont was a part of New Hampshire.

A grant of a tract of land in equal shares to sixty-three persons, to be divided amongst them into sixty-eight equal shares, with a specific appropriation of five shares, conveys only a sixty-eighth part to each person. If one of the shares be declared to be "for a glebe for the Church of England as by law established," that share is not holden in trust by the grantees, nor is it a condition annexed to their rights or shares.

The Church of England is not a body corporate, and cannot receive a donation *eo nomine*.

A grant to the church of such place is good at common law, and vests the fee in the parson and his successors. If such a grant be made by the Crown, it cannot be resumed by the Crown at its pleasure. Land at common law may be granted to pious uses before there is a grantee in existence competent to take it, and in the meantime the fee will be in abeyance. Such a grant cannot be resumed at the pleasure of the Crown.

The common law, so far as it related to the erection of churches of the episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession was recognized and adopted in New Hampshire. It belonged exclusively to the Crown to erect the church in each town that should be entitled to take the glebe, and upon such erection to collate through the governor a parson to the benefice.

A voluntary society of Episcopalians within a town, unauthorized by the Crown, could not entitle themselves to the glebe. Where no such church was duly erected by the town, the glebe remained as an *haereditas jacens*, and the state which succeeded to the rights of the Crown might, with the assent of the town, alien or encumber it or might erect an Episcopalian church therein, and collate, either directly or through the vote of the town indirectly, its parson, who would thereby become seized of the glebe *jure ecclesiae*, and be a corporation capable of transmitting the inheritance.

By the Revolution, the State of Vermont succeeded to all the rights of the Crown to the unappropriated as well as appropriated glebes.

By the statute of Vermont of 30 October, 1794, the respective towns became entitled to the property of the glebes therein situated.

A legislative grant cannot be repealed.

No Episcopal Church in Vermont can be entitled to the glebe unless it was duly erected by the Crown before the Revolution or by the state since.

This was a case certified from the Circuit Court for the District of Vermont in which, upon an action of ejectment brought by the Town of Pawlet to recover possession of the glebe lot, as it was called, in that town, the opinions of the judges of that court were opposed upon the question whether judgment should be rendered for the plaintiff or for the defendants upon a verdict found, subject to the opinion of the Court upon the following case stated:

"In this cause it is agreed on the part of the plaintiffs that the lands demanded in the plaintiffs' declaration are a part of the right of land granted in the charter of the Town of Pawlet by the former governor of the Province of New Hampshire as a glebe for the Church of England as by law established, and that in the year 1802 there was in the Town of Pawlet a society of Episcopalians duly organized agreeably to the rules and regulations of that denomination of Christians heretofore commonly known and called by the name of the Church of England. That in the same year the said society contracted with the reverend Bethuel Chittenden, a regular ordained minister of the Episcopal Church, who then resided in Shelburn, in the County of Chittenden (but had not any settlement as a clerk or pastor therein) to preach to the said society in the Town of Pawlet at certain stated times and to receive the avails of the lands in question, and that the said Chittenden thereupon gave a lease of the said land to Daniel Clark and others, who went into possession of the premises and still holds the same under the said lease, and that the said Chittenden regularly preached and administered the ordinances to the people of the said society, according to his said contract, and

received the rents and profits of the said land until the year of our Lord Christ

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1809, when the said Chittenden deceased, and that in 1809 the said society contracted with the Reverend Abraham Brownson, a regular ordained minister of the Episcopal Church residing in Manchester and officiating there a part of the time, to preach to the said society a certain share of the time and to receive the rents and profits of the said land, and that the said Brownson has regularly attended to his duty in the said church and administered ordinances in the same until September, 1811, about which time the said society regularly settled the Reverend Stephen Jewett, who now resides in the said Town of Pawlet and who from the time of his settlement is to receive all the temporalities of the said church. And it is further agreed by the said parties that the General Assembly of the State of Vermont, on 5 November, 1805, did grant to the several towns in this state, in which they respectively be (reference being had to the act of the general assembly aforesaid) all the lands granted by the King of Great Britain to the Episcopalian church by law established (reference being had to the charter of the Town of Pawlet aforesaid for the said grant of the King of Great Britain), and that the lands in the plaintiffs' declaration mentioned and described are part of the lands so granted by the King of Great Britain to the Episcopalian church."

The charter of Pawlet is dated 26 August, 1761, and purports to be a grant from the King, issued by Benning Wentworth, Governor of New Hampshire, and has these words:

"Know ye that we, of our special grace, . . . have, upon the conditions and reservations hereinafter made, given and granted, and by these presents for us, our heirs and successors, do give and grant in equal shares unto our loving subjects, inhabitants of our said Province of New Hampshire and our other governments and to their heirs and assigns forever, whose names are entered on this grant, to be divided amongst them into sixty-eight equal shares, all that tract or parcel of land situate, lying, and being within our said Province of New Hampshire, containing by admeasurement 23,040 acres, which tract is to contain six miles

square and no more, . . . and that the same be and hereby is incorporated into a township by the name of Pawlet, . . .

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to have and to hold the tract of land as above expressed, together with all . . . to them and their respective heirs and assigns forever. . . ."

On the back of which grant were endorsed "the names of the grantees of Pawlet, viz., Jonathan Willard" and others, being in all 62, then follow these words:

"His Excellency Benning Wentworth, Esquire, a tract of land to contain five hundred acres as marked in the plan B.W., which is to be accounted two of the within shares -- one whole share for the incorporated society for the propagation of the gospel in foreign parts, one share for a glebe for the Church of England as by law established, one share for the first settled minister of the gospel, one share for the benefit of a school in said town."

The Act of 5 November, 1805, is entitled

"An act directing the appropriation of the lands in this state, heretofore granted by the government of Great Britain to the Church of England as by law established."

"Whereas the several glebe rights granted by the British government to the Church of England as by their law established are in the nature of public reservations, and as such became vested by the Revolution in the sovereignty of this state, therefore,"

"Sec. 1. Be it enacted by the General Assembly of the State of Vermont that the several rights of land in this state granted under the authority of the British government to the Church of England as by law established be and the same are hereby granted severally to the respective towns in which such lands lie and to their respective use and uses forever in manner following, to-wit: "

"It shall be the duty of the selectmen in the respective towns in the name and behalf, and at the expense, of such towns, if necessary, to sue for and recover the

possession of such lands, and the same to lease out according to their best judgment and discretion, reserving an annual rent therefor, which shall be paid into the treasury of such town and appropriated to"

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the use of schools therein, and shall be applied in the same manner as monies arising from school lands are by law directed to be applied.

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STORY, J., delivered the opinion of the Court as follows;

The first question presented in this case is whether the Court has jurisdiction. The plaintiffs claim under a grant from the State of Vermont, and the defendants claim under a grant from the State of New Hampshire, made at the time when the latter state comprehended the whole territory of the former state. The Constitution of the United States, among other things, extends the judicial power of the United States to controversies "between citizens of the same state claiming lands under grants of different states." It is argued that the grant under which the defendants claim is not a grant of a different state within the meaning of the Constitution, because Vermont, at the time of its emanation, was not a distinct government, but was included in the same sovereignty as New Hampshire.

But it seems to us that there is nothing in this objection. The Constitution intended to secure an impartial tribunal for the decision of causes arising from the grants of different states, and it supposed that a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign. It had no reference whatsoever to the antecedent situation of the territory, whether included in one sovereignty or another. It simply regarded the fact whether grants arose under the same or under different states. Now it is very clear that although the territory of Vermont was once a part of New Hampshire, yet the State of Vermont, in its

sovereign capacity, is not and never was the same as the State of New Hampshire. The grant of the plaintiffs emanated purely and exclusively from the sovereignty of Vermont, that of the defendants purely and exclusively from the sovereignty of New Hampshire. The sovereign power of New Hampshire remains the same although it has lost a part of its territory; that of Vermont never existed until its territory was separated from the jurisdiction of New Hampshire. The circumstance that a part of the territory or population was once under a common sovereign no more makes the states the same than the circumstance that a part of the members of one corporation constitutes a component part of another corporation makes the corporation the same. Nor can it be affirmed in any correct sense that the grants are of the same state, for the grant of the defendants could not have been made by the State of Vermont, since that state had not at that time any legal existence, and the grant of the plaintiffs could not have been made by New Hampshire, since at that time New Hampshire had no jurisdiction or sovereign existence by the name of Vermont. The case is therefore equally within the letter and spirit of the clause of the Constitution. It would indeed have been a sufficient answer to the objection that the Constitution and laws of the United States, by the admission of Vermont into the union as a distinct government, had decided that it was a different state from that of New Hampshire.

The other question which has been argued is not without difficulty. It is contended by the plaintiffs that the original grant in the charter of Pawlet of "one share for a glebe for the Church of England as by law established" is either void for want of a grantee, or if it could take effect at all, it was as a public reservation which, upon the Revolution, devolved upon the State of Vermont.

The material words of the royal charter of 1761 are

"do give and grant in equal shares unto our loving subjects, &c., their heirs and assigns forever, whose names are entered on this grant, to be divided amongst them into sixty-eight equal shares, all that tract or parcel of land, &c., and that the same be and hereby is incorporated

into a township by the name of Pawlet, and the inhabitants that do or shall hereafter inhabit the said township are hereby declared to be enfranchised with and entitled to all and every the privileges and immunities that other towns within our province by law exercise and enjoy. To have and to hold the tract of land, &c.;, to them and their respective heirs and assigns forever, upon the following conditions. . . ."

Upon the charter are endorsed the names of sixty-two persons, and then follows this additional clause:

"His Excellency, Benning Wentworth, a tract of land to contain 500 acres as marked in the plan B.W., which is to be accounted two shares -- one share for the incorporated society for the propagation of the gospel in foreign parts, one share for a glebe for the Church of England as by law established, one share for the first settled minister of the gospel, one share for the benefit of a school in said town."

Thus making up, with the preceding sixty-two shares, the whole number of sixty-eight shares stated in the charter.

Before we proceed to the principal points in controversy, it will be proper to dispose of those which more immediately respect the legal construction of the language of the charter. And in our judgment, upon the true construction of that instrument, none of the grantees, saving Governor Wentworth, could legally take more than one single share, or a sixty-eighth part of the township. This construction is conformable to the letter and obvious intent of the grant, and, as far as we have any knowledge, has been uniformly adopted in New Hampshire. It is not for this Court upon light grounds or ingenious and artificial reasoning to disturb a construction which has obtained so ancient a sanction and has settled so many titles, even if it were at first somewhat doubtful. But it is not in itself doubtful, for it is the only construction which will give full effect to all the words of the charter. Upon any other, the words "in equal shares" and "to be divided amongst them in sixty-eight equal shares" would be nugatory or senseless. We are further of

opinion that the share for a glebe is not vested in the other grantees having a capacity to take, and so in the nature of a condition,

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use, or trust, attaching to the grant. It is nowhere stated to be a condition binding upon such proprietors, although other conditions are expressly specified. Nor is it a trust or use growing out of the sixty-eighth part granted to the respective proprietors, for it is exclusive of these shares by the very terms of the charter. The grant is in the same clause with that to the society for the propagation of the gospel, and in the same language, and ought therefore to receive the same construction unless repugnant to the context or manifestly requiring a different one. It is very clear that the society for the propagation of the gospel take a legal, and not a merely equitable, estate, and there would be no repugnancy to the context, in considering the glebe, in whomsoever it may be held to vest, as a legal estate.

We are further of opinion that the three shares in the charter "for a glebe," "for the first settled minister," and "for a school," are to be read in connection, so as to include in each the words "in the said town," *i.e.* of Pawlet, so that the whole clause is to be construed one share for a glebe, &c.;, in the Town of Pawlet, one share for the first settled minister in the Town of Pawlet, and one share for a school in the Town of Pawlet.

We will now consider what is the legal operation of such a grant at the common law, and how far it is affected by the laws of New Hampshire or Vermont.

At common law, the Church of England, in its aggregate description, is not deemed a corporation. It is indeed one of the great estates of the realm, but is no more on that account a corporation than the nobility in their collective capacity. The phrase, "the Church of England," so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate under the superintendence of its spiritual head. In this sense, the Church of England is said to have peculiar rights and

privileges not as a corporation, but as an ecclesiastical institution under the patronage of the state. In this sense it is used in Magna Charta, ch. 1, where it is declared "*quod ecclesia anglicana libera sit, et habeat omnia jura sua integra, et libertates*

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suas illoesas," and Lord Coke in his commentary on the text, obviously so understands it, 2 Inst. 2, 3. The argument, therefore, that supposes a donation to "the Church of England" in its collective capacity to be good cannot be supported, for no such corporate body exists even in legal contemplation.

But it has been supposed that the "Church of England of a particular parish" must be a corporation for certain purposes, although incapable of asserting its rights and powers except by its parson regularly inducted. And in this respect it might be likened to certain other aggregate corporations acknowledged in law, whose component members are civilly dead and whose rights may be effectually vindicated through their established head, though during a vacancy of the headship they remain inert; such are the common law corporations of abbot and convent, and prior and monks of a priory. Nor is this supposition without the countenance of authority.

The expression "parish church" has various significations. It is applied sometimes to a select body of Christians forming a local spiritual association, and sometimes to the building in which the public worship of the inhabitants of a parish is celebrated, but the true legal notion of a parochial church is a consecrated place having attached to it the rights of burial and the administration of the sacraments. Com.Dig. Eglise, C. Seld. de Decim. 265; 2 Inst. 363; 1 Burn's Eccles.Law 217; 1 Woodes 314. Doctor Gibson, indeed, holds that the church in consideration of law is properly the cure of souls, and the right of tithes. Gibs. 189; 1 Burn's Eccles.Law 232.

Every such church, of common right, ought to have a manse and glebe as a suitable endowment, and without such endowment it cannot be consecrated, and

until consecration it has no legal existence as a church. Com.Dig. Dismes, B. 2; 3 Inst. 203; Gibs. 190; 1 Burn's Eccl.Law 233; Com.Dig. Esglise, A.; Dort. of Plural 80. When a church has thus acquired all the ecclesiastical rights, it becomes in the language of law a rectory or parsonage, which consists of a glebe, tithes, and oblations established for the maintenance of a parson

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or rector to have cure of souls within the parish. Com.Dig. Ecelesiast.Persons, c. 6.

These capacities, attributes and rights, however, in order to possess a legal entity, and much more to be susceptible of a legal perpetuity, must be invested in some natural or corporate body, for in no other way can they be exercised or vindicated. And so is the opinion of Lord Coke in 3 Inst. 201-202, where he says

"albeit they [*i.e.*, subjects] might build churches without the King's license, yet they could not erect a spiritual politic body to continue in succession and capable of endowment without the King's license; but by the common law before the Statute of Mortmain they might have endowed the spiritual body once incorporated *perpetuis futuris temporibus*, without any license from the King or any other."

This passage points clearly to the necessity of a spiritual corporation to uphold the rectorial rights. We shall presently see whether the parish church, after consecration, was deemed in legal intendment such a corporation. In his learned treatise on tenures, Lord Chief Baron Gilbert informs us that anciently, according to the superstition of the age, abbots and prelates

"were supposed to be married to the church, inasmuch as the right of property was vested in the church, the estate being appropriated, and the bishop and abbot as husbands and representatives of the church had the right of possession in them, and this the rather because they might maintain actions and recover and hold courts within their manors and precincts as the entire owners, and that crowns and temporal states might have no reversions of interests in their feuds and donations. Therefore, since they had the possession in fee, they might alien in fee; but they

could not alien more than the right of possession that was in them, for the right of propriety was in the church."

But as to a parochial parson, "because the cure of souls was only committed to him during life, he was not capable of a fee, and therefore the fee was in abeyance." Gilb. Tenares, 110, &c.;

Conformable herewith is the doctrine of Bracton, who observes that an assize *juris utrum* would not lie

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in cases of a gift of lands to cathedral and conventual churches, though given *in liberam eleemosynam*, because they were not given to the church solely, but also to a parson to be held as a barony, *non solum dantur ecclesiis, sed et personis tenendae in baronia*, and therefore they might have all the legal remedies applicable to a fee. But he says it is otherwise to a person claiming land in right of his church, for in cases of parochial churches, gifts were not considered as made to the parson, but to the church, *quia ecclesiis parochialibus non fit donatio personae, sed ecclesiae, secundum perpendi poterit per modum donationis*. Bracton 286b; 1 Reeves Hist.Law 369. And in another place, Bracton, speaking of the modes of acquiring property, declares that a donation may well be made to cathedrals, convents, parish churches and religious personages, *poterit etiam donatio fieri in liberam eleemosynam, sicut ecclesiis cathedralibus, conventualibus, parochialibus, vivis religiosis, . . . &c.*; Bracton 27b; 1 Reeve Hist.Law 303.

The language of these passages would seem to consider cathedral, conventual, and parochial churches as corporations of themselves, capable of holding lands. But upon an attentive examination it will be found to be no more than an abbreviated designation of the nature, quality, and tenure of different ecclesiastical inheritances, and that the real spiritual corporations, which are tacitly referred to, are the spiritual heads of the particular church, *viz.*, the bishop, the abbot, and, as more important to the present purpose, the parson, *qui gerit personam*

ecclesiae.

Upon this ground it has been held in the year books, 11 Il. 4, 84b, and has been cited as good law by Fitzherbert and Brook, Fitz., Feofft. pl. 42, (Bro. Estate pl. 49; S.C. Viner, Ab.L., pl. 4), that if a grant be made to the church of such a place, it shall be a fee in the parson and his successors. *Si terre soit done per ceux paroles, dedit et concessit ecclesiae de tiel lieu, le parson et ses successeurs serra inheriter.* And in like manner if a gift be of chattels to parishioners, who are no corporation, it is good and the church wardens shall take them in succession, for the gift is to the use of the church. 37 H. VI 30; 1 Kyd. Corp. 29.

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In other cases, the law looks to the substance of the gift, and in favor of religion vests it in the party capable of taking it. And notwithstanding the doubts of a learned but singular mind, Perk. § 55, in our judgment the grant in the present charter, if there had been a church actually existing in Pawlet at the time of the grant, must upon the common law have received the same construction. In the intendment of law, the parson and his successors would have been the representatives of the church entitled to take the donation of the glebe. It would in effect have been a grant to the parson of the Church of England in the Town of Pawlet and to his successors of one share in the township as an endowment to be held *jure ecclesiae*, for a glebe is emphatically the dowry of the church; *Gleba est terra qua consistit dos ecclesiae.* Lind. 254.

Under such circumstances, by the common law, the existing parson would have immediately become seized of the freehold of the glebe, as a sole corporation capable of transmitting the inheritance to his successors.

Whether, during his life, the fee would be in abeyance according to the ancient doctrine, Litt. § 646, 647; Co.Lit. 342, 5 Edw. IV, p. 105; Byer 74, pl. 43; Hob. 338; Com.Dig. Abeyance A; *id.*, Ecclesiastical persons, C. 9; Perk. § 709, or whether, according to learned opinions in modern times, the fee should be considered as *quodam modo* vested in the parson for the benefit of his church and his

successors, Co.Lit. 341a; Com.Dig. Ecclesiast. Persons C. 9; Fearn, cont. rem. 513, &c.; Christian's note to 2 Black.Com. 107, note 3; Gilb. tenures 113; 1 Woodeson 312, is not very material to be settled, for at all events the whole fee would have passed out of the Crown. Litt. § 648; Co.Lit. 341a; Christian's note, *ubi supra*; Gilb. tenures 113. Nor would it be in the power of the Crown, after such a grant executed in the parson, to resume it at its pleasure. It would become a perpetual inheritance of the church, not liable, even during a vacancy, to be divested, though by consent of all parties interested, viz., the patron and ordinary and also the parson if the church were full, it might be aliened or encumbered. Litt. § 648; Co.Lit. 343; Perk. § 35; 1 Burn's Ecclesiast.Law 586.

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But inasmuch as there was not any church duly consecrated and established in Pawlet at the time of the charter, it becomes necessary further to inquire whether, at common law, a grant so made is wholly void for want of a corporation having a capacity to take.

In general, no grant can take effect unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further, for if there be an aggregate corporation, having a head, as a mayor and commonalty, a grant or devise made to the corporation during the vacancy of the headship is merely void, although for some purposes, as for the choice of a head, the corporation is still considered as having a legal entity, 13 Ed. IV, 8; 18 Ed. IV, 8; Bro.Corporation 58-59; Dalison, R. 31; 1 Kyd.Corp. 106-107; Perk. § 33, 50. Whether this doctrine has been applied to parochial churches during an avoidance has not appeared in any authorities that have fallen within our notice, and perhaps can be satisfactorily settled only by a recurrence to analogous principles, which have been applied to the original endowments of such churches.

We have already seen that at no parish church, as such, could have a legal existence until consecration, and consecration was expressly inhibited unless upon a suitable endowment of land. The cannon law, following the civil law,

required such endowment to be made, or at least ascertained, before the building of the church was begun. Gibs. 189; 1 Burn's Eccles.Law 233. This endowment was in ancient times commonly made by an allotment of manse and glebe by the Lord of the manor, who thereupon became the patron of the church. Other persons also at the time of consecration often contributed small portions of ground, which is the reason, we are told, why in England in many parishes, the glebe is not only distant from the manor, but lies in remote divided parcels, Ken.Par.Aut. 222=223, cited in 1 Burn's, Eccles.Law 234. The manner of founding the church and making the allotment was for the bishop or his commissioner to set up a cross and set forth the ground where the church was to be built, and it then became the endowment of the church. Degge. 1, ch. 12, cited 1 Burn's Eccles.Law 233.

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From this brief history of the foundation of parsonages and churches it is apparent that there could be no spiritual or other corporation capable of receiving livery of seizin of the endowment of the church. There could be no parson, for he could be inducted into office only as a parson of an existing church, and the endowment must precede the establishment thereof. Nor is it even hinted that the land was conveyed in trust, for at this early period trusts were an unknown refinement. The land therefore must have passed out of the donors, if at all, without a grantee, by way of public appropriation or dedication to pious uses. In this respect it would form an exception to the generality of the rule that to make a grant valid, there must be a person *in esse* capable of taking it. And under such circumstances, until a parson should be legally inducted to such new church, the fee of its lands would remain in abeyance, or be like the *haereditas jacens* of the Roman code, in expectation of an heir. This would conform exactly to the doctrine of the civil law, which, as to pious donations, Bracton has not scrupled to affirm to be the law of England.

" *Res vero sacrae, religiosae, et sanctae in nullius bonis sunt, quod enim divini juris est, id in nullius hominis bonis est, immo in bonis dei hominum censura. . . .*

Res quidam nullius dicuntur pluribus modis. . . . Item censura (ut dictum est), sicut res sacrae religiosae et sanctae. Item casu, sicut est haereditas jacens ante additionem, sed fallit in hoc, quia sustinet vicem personae defuncti, vel quia speratur futura haereditas ejus, qui adibit. "

Bracton 8a; Justin. Instit. lib. 2, tit. 1; Co.Lit. 342, on Litt. § 447.

Nor is this a novel doctrine in the common law. In the familiar case where a man lays out a public street or highway, there is, strictly speaking, no grantee of the easement, but it takes effect by way of grant or dedication to public uses. *Lade v. Shepherd*, 2 Str. 1004. Hale in Harg. 78. So if the parson or a stranger purchase a bell with his own money and put it up, and property passes from the purchaser, because, when put up, it is consecrated to the church, 11 H. IV, 12, 1 Kyd. Corp. 29-30. These principles may seem to savor of the ancient law, but in a modern case in which, in argument, the doctrine was asserted, Lord Hardwicke did not deny it, but simply decided that the circumstances of that case did not amount to a donation of the land, on which

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a chapel had been built, to public and pious uses. *Attorney General v. Foley*, 1 Dick. 363. And in an intermediate period, Lord Chief Justice Dyer held that if the Crown by a statute renounced an estate, the title was gone from the Crown, although not vested in any other person, but the fee remained in abeyance.

It is true that Weston, J., was, in the same case, of a different opinion; but Lord Chief Baron Comyns has quoted Dyer's opinion without any mark of disapprobation. Com.Dig. Abeyance, A. 1.

For the reasons, then, that have been stated, a donation by the Crown for the use of a nonexisting parish church may well take effect by the common law as a dedication to pious uses, and the Crown would thereupon be deemed the patron of the future benefice when brought into life. And after such a donation, it would not be competent for the Crown to resume it at its own will, or alien the property without the same consent which is necessary for the alienation of other church

property, *viz.*, the consent of the ordinary, and parson, if the church be full, or in a vacancy, of the ordinary alone.

And the same principles would govern the case before the court if it were to be decided upon the mere footing of the common law. If the charter had been of a township in England, the grant of the glebe would have taken effect as a dedication to the parochial Church of England to be established therein.

Before such church were duly erected and consecrated the fee of the glebe would remain in abeyance, or at least be beyond the power of the Crown to alien without the ordinary's consent. Upon the erection and consecration of such a church and the regular induction of a parson, such parson and his successors would, by operation of law and without further act, have taken the inheritance *jure ecclesiae*.

Let us now see how far these principles were applicable to New Hampshire at the time of issuing of the charter of Pawlet.

New Hampshire was originally erected into a royal

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province in the 31st year of Charles II, and from thence until the Revolution, continued a royal province, under the immediate control and direction of the Crown. By the first royal commission granted in 31 Charles II, among other things judicial powers, in all actions, were granted to the provincial governor and council,

"so always that the form of proceedings in such cases, and the judgment thereupon to be given, be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid (*i.e.* of the province) and the circumstances of the place will admit."

Independent, however, of such a provision, we take it to be a clear principle that the common law in force at the emigration of our ancestors is deemed the birthright of the colonies unless so far as it is inapplicable to their situation or repugnant to their other rights and privileges. *A fortiori* the principle applies to a

royal province.

By the same commission or charter the Crown granted to the subjects of the province,

"that liberty of conscience shall be allowed to all protestants, and that such especially as shall be conformable to the rites of the Church of England shall be particularly countenanced and encouraged."

By a subsequent commission of 15 Geo. II, the governor of the province, among other things, is authorized

"to collate any person or persons to any churches, chapels, or other ecclesiastical benefices within our said province as often as any shall happen to be void,"

and this authority was continued and confirmed in the same terms by royal commissions, in 1 Geo. III and 6 Geo. III. By the provincial statute of 13 Ann, ch. 43, the respective towns in the province were authorized to choose, settle, and maintain their ministers and to levy taxes for this purpose, so always that no person who constantly and conscientiously attended public worship according to another persuasion should be excused from taxes. And the respective towns were further authorized to build and repair meeting houses, minister's houses, and school houses and to provide and pay schoolmasters. This is the whole of the provincial and royal legislation upon the subject of religion.

Inasmuch as liberty of conscience was allowed and

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the Church of England was not exclusively established, the ecclesiastical rights to titles, oblations and other dues had no legal existence in the province. Neither, upon the establishment of churches, was a consecration by the bishop or a presentation of a parson to the ordinary indispensable, for no bishopric existed within the province.

But the common law, so far as it respected the erection of churches of the Episcopal persuasion of England, the right to present or collate to such churches, and the corporate capacity of the parsons thereof to take in succession, seems to have been fully recognized and adopted. It was applicable to the situation of the province, was avowed in the royal grants and commissions, and explicitly referred to in the appropriation of glebes, in almost all the charters of townships in the province. And it seems to be also clear that it belonged to the Crown exclusively, at its own pleasure, to erect the church in each town that should be entitled to take the glebe, and upon such erection to collate, through the governor, a parson to the benefice. The respective towns in their corporate capacity had no control over the glebe, but inasmuch as they were bound by the provincial statute to maintain public worship, and had therefore an interest to be eased of the public burden, by analogy to the common law in relation to the personal property of the parish church, the glebe could not, before the erection of a church, be aliened by the Crown without their consent, nor after the erection of a church and induction of a parson could the glebe be aliened without the joint consent of the Crown as patron, the parson as *persona ecclesiae*, and the parishioners of the church as having a temporal as well as spiritual interest, and thereby in effect representing the ordinary.

But a mere voluntary society of Episcopalians within a town, unauthorized by the Crown, could no more entitle themselves, on account of their religious tenets, to the glebe than any other society worshiping therein.

The church entitled must be a church recognized in law for this particular purpose. Whenever, therefore, within the province, previous to the Revolution, an Episcopal Church was duly erected by the Crown in any town,

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the parsons thereof regularly inducted had a right to the glebe in perpetual succession. Where no such church was duly erected by the Crown, the glebe remained as an *haereditas jacens*, and the state which succeeded to the rights of the Crown might, with the assent of the town, alien or encumber it, or might erect

an Episcopal Church therein and collate, either directly or, through the vote of the town, indirectly its parson, who would thereby become seized of the glebe *jure ecclesiae* and be a corporation capable of transmitting the inheritance.

Such in our judgment are the rights and privileges of the Episcopal Churches of New Hampshire and the legal principles applicable to the glebes reserved in the various townships of that state previous to the Revolution. And without an adoption of some of the common law in the manner which I have suggested, it seems very difficult to give full effect to the royal grants and commissions or to uphold that ecclesiastical policy which the Crown had a right to patronize and to which it so explicitly avowed its attachment.

It seems to be tacitly, if not openly, conceded that before the Revolution, no regular Episcopal Church was established in Pawlet. By the Revolution, the State of Vermont succeeded to all the rights of the Crown as to the unappropriated as well as appropriated glebes.

It now, therefore becomes material to survey the statutes which the State of Vermont has, from time to time, passed on this subject.

By the statute of 26 October, 1787, the selectmen of the respective towns were authorized during the then septennary (which expired in 1792), to take the care and inspection of the glebes and to lease the same for and during the same term, and further to recover possession of the same, where they had been taken possession of by persons without title, but an exception is made in favor of ordained Episcopal ministers, who during their ministry within the same term were allowed to take the profits of the glebes within their respective towns. The statute of 30 October, 1794, granted to their respective towns the entire property of the glebes therein situate for the sole use and support of religious worship, and

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authorized the selectmen of the towns to lease and recover possession of such glebes. This act was repealed by the statute of 5 November, 1779. But by the statute of 5 November, 1805, the glebes were again granted to the respective

towns for the use of the schools of such towns, and power was given to the selectmen to sue for possession of and to lease the same.

By the operation of these statutes and especially of that of 1794, which, so far as it granted the glebes to the towns, could not afterwards be repealed by the legislature so as to divest the right of the towns under the grant, the towns became respectively entitled to all the glebes situate therein which had not been previously appropriated by the regular and legal erection of an Episcopal Church within the particular town; for the such case, the towns would legally represent all the parties in interest, *viz.*, the state which might be deemed the patron, and the parish.

Without the authority of the state, however, they could not apply the lands to other uses than public worship, and in this respect the statute of 1805 conferred a new right which the towns might or might not exercise at their own pleasure.

Upon these principles, the plaintiffs are entitled to recover unless the defendants show not merely that before the year 1794 there was a society of Episcopalians in Pawlet regularly established according to the rules of that sect, but that such society was erected by the Crown or the state, as an Episcopal Church (*i.e.* the Church of England) established in the Town of Pawlet. For unless it have such a legal existence, its parson cannot be entitled to the glebe reserved in the present charter.

The statement of facts is not, in this particular, very exact, but it may be inferred from it that the Episcopal society or church was not established in Pawlet previous to the year 1802. In what manner and by what authority it was then established does not distinctly appear. As the title of the plaintiffs is, however, *prima facie* good, and the title of the defendants is not shown to be sufficient, upon the principles which have been stated the plaintiffs would seem entitled to judgment.

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There is another view of the subject which if any doubt hung over that which has been already suggested would decide the cause in favor of the plaintiffs. And it is

entitled to the more weight because it seems in analogous cases to have received the approbation and sanction of the state courts of New Hampshire. In the various royal charters of townships in which shares have been reserved for public purposes (and they are numerous), it has been held that the shares for the first settled minister and for the benefit of a school were vested in the town in its corporate capacity; in the latter case as a fee simple absolute, in the former case as a base fee, determinable upon the settlement of the first minister by the town.

The foundation of this construction is supposed to be that the town is by law obliged to maintain public worship and public schools, and that therefore the legal title ought to pass to the town, which is considered as the real *cestui que use*. By analogy to this reasoning, the share for a glebe might be deemed to be vested in the town for the use of an Episcopal Church, and then before any such church should be established, and the use executed in its parson by the joint assent of the legislature and the town, the land might at any time be appropriated to other purposes.

We do not profess to lay any particular stress on this last consideration, because we are entirely satisfied to vest the decision upon the principles which have been before asserted.

On the whole, the opinion of the majority of the Court is that upon the special statement of facts by the parties

Judgment ought to pass for the plaintiffs.

JOHNSON, J.

The difficulties in this case appear to me to arise from refining too much upon the legal principles relative to ecclesiastical property under the laws of England.

I find no difficulty in getting a sufficient trustee to sustain the fee until the uses shall arise.

It is not material whether the corporation of Pawlet

consist of the proprietors or inhabitants. The grant certainly vests the legal interest in the proprietor, and it is in nothing inconsistent with this idea to admit that the corporate powers of the Town of Pawlet are vested in the inhabitants. The proprietors may still well be held trustees, but the application of the trust may be subject to the will of the whole combined population.

I therefore construe this grant thus, we vest in you so much territory, by metes and bounds, in trust to divide the same into sixty-eight shares; to assign one share in fee to each of you, the grantees, two to the governor, one to the Church of England as by law established, &c.; This certainly would be a sufficient conveyance to support the fee for the purposes prescribed.

But the difficulty arises on the meaning of the words "Church of England as by law established." This was unquestionably meant to set apart a share of the land granted for the use of that class of Christians known by the description of Episcopalians. But was it competent for any man or any number of men to enter upon this land without any legal designation or organization identifying them to come within the description of persons for whose use this reservation was made? I think not. Some act of the Town of Pawlet, or of the legislature of the state, or at least of Episcopal jurisdiction, became necessary to give form and consistency to the *cestui que use* until such person or body became constituted and recognized. I see nothing to prevent the legislature itself from making an appropriation of this property.

Their controlling power over the corporate body denominated the Town of Pawlet certainly sanctioned such an act, and before the act passed in this case, there does not appear to have been in existence a person or body of men in which the use could have vested.

I therefore concur in the decision of the Court.

