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Charles River Bridge Vs. Warren Bridge

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Decided On : 1837

Appeal No. : 36 U.S. 420

Appellant : Charles River Bridge

Respondent : Warren Bridge

Judgement :

Charles River Bridge v. Warren Bridge - 36 U.S. 420 (1837)
U.S. Supreme Court Charles River Bridge v. Warren Bridge, 36 U.S. 11 Pet. 420 420 (1837)

Proprietors of Charles River Bridge v.

Proprietors of Warren Bridge

36 U.S. (11 Pet.) 420

ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

SYLLABUS

In 1650, the Legislature of Massachusetts granted to Harvard College the liberty and power to dispose of a ferry by lease or otherwise from Charlestown to Boston,

passing over Charles River. The right to set up a ferry between these places had been given by the governor under the authority of the Court of Assistance, by an order dated November 9, 1636, to a particular individual, and was afterwards leased successively to others, they having the privilege of taking tolls regulated in the grant; and when, in 1650, the franchise of this ferry was granted to the college, the rights of the lessees in the same had expired. Under the grant, the college continued to hold the ferry by its lessees and receive the profits therefrom until 1785, when the Legislature of Massachusetts incorporated a company to build a bridge over Charles River where the ferry stood, granting them tolls, the company to pay to Harvard College two hundred pounds a year during the charter, for forty years, which was afterwards extended to seventy years, after which the bridge was to become the property of the Commonwealth. The bridge was built under this charter, and the corporation received the tolls allowed by the law, always keeping the bridge in order and performing all that was enjoined on them to do. In 1828, the Legislature of Massachusetts incorporated another company for the erection of another bridge, the Warren Bridge, over Charles River from Charlestown to Boston, allowing the company to take tolls, commencing in Charlestown, near where the Charles River Bridge commenced, and terminating in Boston about eight hundred feet from the termination of the Charles River Bridge. The bridge was to become free after a few years, and has actually become free. Travelers who formerly passed over the Charles River Bridge from Charlestown square now pass over the Warren Bridge, and thus the Charles River Bridge Company are deprived of the tolls they would have otherwise received. The value of the franchise granted by the Act of 1783 is now entirely destroyed. The proprietors of the Charles River Bridge filed a bill in the Supreme Judicial Court of Massachusetts against the proprietors of the Warren Bridge, first for an injunction to prevent the erection of the bridge and afterwards for general relief, stating that the act of the Legislature of Massachusetts authorizing the building of the Warren Bridge was an act impairing the obligations of a contract, and therefore repugnant to the Constitution of the United States. The Supreme Court of Massachusetts dismissed the bill of the complainants, and the case was brought by writ of error to the Supreme Court of the United States under the provisions of the 25th Section of the Judiciary Act of 1789. The judgment of the Supreme Judicial Court of

Massachusetts dismissing the bill of the plaintiffs in error was affirmed.

The Court are fully sensible that it is their duty in exercising the high powers conferred on them by the Constitution of the United States to deal with these great and extensive interests (chartered property) with the utmost caution, guarding,

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as far as they have power to do so the rights of property, at the same time carefully abstaining from any encroachment on the rights reserved to the States.

The plaintiffs in error insisted on two grounds for the reversal of the judgment or decree of the Supreme Court of Massachusetts. 1. That, by the grant of 1650, Harvard College was entitled, in perpetuity, to the right to keep a ferry between Charlestown and Boston; that the right was exclusive, and the legislature had no right to establish another ferry on the same line of travel, because it would infringe the rights of the college and those of the plaintiffs under the charter of 1785. 2. That the true construction of the acts of the Legislature of Massachusetts granting the privilege to build a bridge necessarily imported that the Legislature would not authorize another bridge, and especially a free one, by the side of the Charles River Bridge, so that the franchise which they held would be of no value, and that this grant of the franchise of the ferry to the college, and the grant of the right of pontage to the proprietors of the Charles River Bridge, is a contract which is impaired by the law authorizing the erection of the Warren Bridge. By the Court. It is very clear that, in the form in which this case comes before us, being a writ of error to a State court, the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principles that the law divests vested rights. It is well settled by the decisions of this Court that a State law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States unless it also impairs the obligation of contract.

The case of *Satterlee v. Matthewson,* 2 Peters 413 413, cited.

The ferry right which was owned by Harvard College was extinguished by the building of the Charles River Bridge. The ferry, with all its privileges, was then at an end forever, and a compensation in money was given in lieu of it.

As the franchise of the ferry and that of the bridge are different in their nature, and were each established by separate grants which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which could authorize the Court to associate these grants together and to infer that any privilege was intended to be given to the bridge company merely because it had been conferred on the other. The charter of the bridge is a written instrument, and must speak for itself and be interpreted by its own terms.

The grant to the bridge company is of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. There is nothing in the local situation of this country, or in the nature of our political institutions, which should lead this Court to depart from the rules of construction of statutes adopted under the system of jurisprudence which we have derived from English law. No good reason can be assigned for introducing a new and adverse rule of construction in favour of corporations while we adopt and adhere to the rules of construction known to the English common law in every other case without exception.

Public grants are to be construed strictly. In the case of *The United States v. Arredondo,* 6 Pet. 736, the leading case on this subject are collected together by the learned judge who delivered the opinion of the Court, and the principle recognized that, in grants by the public, nothing passes by implication. *Jackson v. Lamphire,* 3 Peters 289; *Beatys v. The lessee of Knowles,* 4 Peters 165; *The Providence Bank v. Billings and Pittmen,* 4 Peters 514, cited.

In the case of *The Providence Bank v. Billings and Pittman,* 4 Peters 514, Chief Justice Marshall, speaking of the taxing power, said,

"as the whole community is interested in retaining it undiminished, that community has a right to insist that

its abandonment ought no to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

The case now before the Court is, in principle, precisely the same. It is a charter from a State. The act of incorporation is silent in relation to the contested power. The argument in favour of the proprietors of the Charles River Bridge is the same, almost, in words, with that used for the Providence Bank -- that is, that the power claimed by the State, if it exists, mist be so used as not to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer. And the fact that the power has been already exercised so as to destroy the value of the franchise cannot in any degree affect the principle. The existence of the power does not and cannot depend upon the circumstance of its having been exercised or not.

The object and the end of all Government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created; and in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power because, like the taxing power, the whole community have an interest in preserving it undiminished, and, when a corporation alleges that a State has surrendered, for seventy years, its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this Court,"that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a Government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of

construction announced by the Court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and wellbeing of every citizen depends on their faithful preservation.

The act of incorporation of the proprietors of the Charles River Bridge is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge, and establishes certain rates of toll which the company is authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge; no right to erect another bridge themselves, nor to prevent other persons from erecting one; no engagement from the State that another shall not be erected; and no undertaking not to sanction competition nor to make improvements that may

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diminish the amount of its income. Upon all these subjects, the charter is silent, and nothing is said in it about a line of travel so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiffs are entitled to them, it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.

Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this Court is called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, where there must have been so many occasions to give rise to it, proves that neither States nor individuals nor corporations ever imagined that such a contract can be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract, and if it is maintained that they have made it, it must be by a legal fiction, in opposition to the truth of the fact and the obvious intention of the party. The Court cannot deal thus with the rights reserved to the States, and, by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement which is so necessary to their wellbeing and prosperity.

Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling, and you will soon find the old turnpike corporations awakening from their sleep and calling upon this Court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had been before occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and be obliged to stand still until the claims of the old turnpike corporations shall be satisfied and they shall consent to permit these States to avail themselves of the lights of modern science and to partake of the benefit of those improvements which are now adding to the wealth and prosperity and the convenience and comfort of every other part of the civilized world.

In error to the Supreme Judicial Court of Massachusetts. The plaintiffs in error were a corporation created by an act of the Legislature of the State of Massachusetts, passed on the 9th of March 1785, entitled

"an act for incorporating certain persons for the purpose of building a bridge over Charles River, between Boston and Charlestown, and supporting the same, during forty years."

The preamble of the act stated,

"whereas, the erecting a bridge over Charles River, in the place where the ferry between Boston and Charlestown is now kept, will be of great public utility, and Thomas Russell, Esq., and others, have petitioned this court for an act of incorporation, to empower them to build the same bridge,"

&c.; The act authorizes taking certain tolls, prescribed the size of the

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bridge, and fixed certain regulations by which it would not be permitted to impede the navigation of Charles River, and enjoined certain things to be done by which the bridge should be kept in good order and fitted for constant and convenient use. The fifth section of the act provided

"that after the said toll shall commence, the said proprietors or corporation shall annually pay to Harvard College or University the sum of two hundred pounds during the said term of forty years, and at the end of the said term, the said bridge shall revert to, and be the property of, the Commonwealth, saving to the said college or university, a reasonable and annual compensation for the annual income of the ferry which they might have received had not said bridge been erected."

The bridge was erected under the authority of this act, and afterwards, on the 9th of March 1792, in an act which authorized the making a bridge from the western part of Boston to Cambridge, after reciting that the erecting of Charles River bridge was a work of hazard and public utility, and another bridge in the place proposed for the West Boston bridge might diminish the emoluments of Charles River bridge; therefore, for the encouragement of enterprise, the eighth section of the act declared

"that the proprietors of the Charles River bridge shall continue to be a corporation and body politic for and during the term of seventy years, to be computed from the day the bridge was first opened for passengers."

The record contained exhibits relating to the establishment of the ferry from Charlestown to Boston at the place where the bridge was erected, and also the proceedings of the General Courts of Massachusetts by which the ferry there became the property of Harvard College. Some of these proceedings, verbatim, were as follows:

"A Court of Assistance, holden at Boston, Nov. 9th, 1830. Present, the Gov'nr, Dep'y Gov'r, Sir Richard Saltonstall, Mr. Ludlow, Capt. Endicott, Mr. Coddington, Mr. Pinchon, Mr. Bradstreet. It is further ordered, that whosoever shall first give in his name to Mr. Gov'nr, that hee will undertake to sett upp a ferry betwixt Boston and Charlton, and shall begin the same, at such tyme as Mr. Gov'r shall appoynt; shall have 1d. for every person, and 1d. for every one hundred weight of goods hee shall so transport. "

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"A court holden at Boston, November 5th, 1633. Present, the Governor, Mr. Ludlow, Mr. Nowell, Mr. Treasu'r, Mr. Coddington, S. Bradstreet. Mr. Rich. Brown is allowed by the court to keepe a fferry over Charles ryver, against his house, and is to have 2d. for every single person hee soe transports, and 1d. a piece, if there be two or more."

"Att the Gen'all Court, holden at Newe Towne, May 6th, 1635. Present, the Govnr, Deputy Gov'nr, Mr. Winthrop, Sen'r, Mr. Haynes, Mr. Humphrey, Mr. Endicott, Mr. Treasu'r, Mr. Pinchon, Mr. Nowell, Mr. Bradstreete and the deputies. It is ordered that there shall be a fferry sett upp on Boston syde, by the Wynd myll hill, to transport men to Charlton and Wenesemet, upon the same rates that the fferry-men att Charlton and Wenesemet transport men to Boston."

"A Generall Courte, held at Newtowne, the 2d day of the 9th mo. 1637. (Adjourned until the 15th, present.)"

"Present, the Governor, Deputy Gov'nr, Mr. John Endicott, Mr. Humfrey, Mr. Bellingham, Mr. Herlakenden, Mr. Stoughton, Mr. Bradstreete and Increase Nowell."

"The ferry betweene Boston and Charlestowne is referred to the Governor and Treasurer, to let at 40 pr. A., beginning the 1st of the 10th mo., and from thence for three years."

"At a General Court of elections, held at Boston, the 13th of the 3d mo., A. 1640. Present, the Governor, &c.; Mr. Treasurer, Mr. Samuel Sheapard and Leift. Sprague, have power to lett the ferry between Boston and Charlestown, to whom they see cause, when the time of Edward Converse is expired, at their discretion."

"At a session beginning the 30th of the 8th mo. 1644. It is ordered, that the magistrates and deputies of ye. co'rte, their passage over the fferries, together with their necessary attendants, shall be free, not paying any thing for it, except at such ferries as are appropriated to any, or are rented out, and are out of the countries' hands, and there it is ordered that their passages shall be paid by ye. country."

Further extract from the colony records, filed by the plfs.

"At a General Court, &c.; 7th day 8th mo. The ferry betweene Boston and Charlestown is granted to the Colledge."

"At a Generall Courte of elections, begunne the 6th of May

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1646. In answer to the petition of James Heyden, with his partners, ferrymen of Charlestown, and of the satisfaction of all other ferry-men, that there may be no mistake who are freed, or should be passage free, and how long: It is hereby declared, that our honored magistrates, and such as are, or from time to time, shall be chosen to serve as deputyes at the Generall Court, with both their necessary attendants, shall be passage free over all ferryes; and by necessary attendants, wee meane a man and a horse, at all times during the term of their

being magistrates or deputyes, but never intended all the familyes of either at any time, and that ye order neither expresseth nor intendeth any such thing."

"Att a third session of the Generall Courte of elections, held at Boston, the 15th of October 1650. In answer to the petition of Henry Dunster, president of Harvard Colledge, respecting the hundred pounds due from the country to the college, and rectifying the fferry rent, which belongs to the college: It is ordered, that the treasurer shall pay the president of the college the some of one hundred pounds, with two years forbearance, as is desired; and forbearance till it be paid out of this next levy, that so the ends proposed may be accomplisht; and for the ferry of Charles Towne, when the lease is expired, it shall be in the liberty and power of the president, in behalfe and for the behoofe of the College, to dispose of the said ferry, by lease, or otherwise, making the best and most advantage thereof, to his own content, so as such he disposeth it unto performe the service and keep sufficient boates for the use thereof, as the order of the court requires."

The case of the plaintiffs in error is thus stated in the opinion of the court:

It appears from the record that, in the year 1650, the Legislature of Massachusetts granted to the president of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf, and for the behoof of the college, and that, under that grant, the college continued to hold and keep the ferry, by its lessees or agents, and to receive the profits of it, until 1758. In that year, a petition was presented to the Legislature by Thomas Russell and others, stating the inconvenience of the transportation by ferries over Charles River and the public advantage that would result from a bridge and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between

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Boston and Charlestown was then kept. Pursuant to the petition, the Legislature, on the 9th of March 1785, passed an act incorporating a company by the name of "The Proprietors of the Charles River Bridge" for the purposes mentioned in the

petition. Under this charter, the company were authorized to erect a bridge "in the place where the ferry is now kept;" certain tolls were granted, and the charter was limited to forty years from the first opening of the bridge for passengers; and from the time the toll commenced until the expiration of the term, the company were to pay two hundred pounds, annually, to Harvard College; and at the expiration of the forty years, the bridge was to be the property of the Commonwealth,

"saving, as the law expresses it, to the said college or university, a reasonable annual compensation for the annual income of the ferry, which they might have received, had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th June 1786. In 1792, the charter was extended to seventy years from the opening of the bridge, and, at the expiration of that time, it was to belong to the Commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds, and have performed all the duties imposed on them by the terms of their charter.

In 1828, the Legislature of Massachusetts incorporated a company by the name of "The proprietors of the Warren Bridge," for the purpose of erecting another bridge over the Charles River. The bridge is only sixteen rods, at its commencement on the Charlestown side, from the commencement of the bridge of the plaintiffs, and they are about fifty rods apart at their termination on the Boston side. The travelers who pass over either bridge proceed from Charlestown square, which receives the travel of many great public roads leading from the country, and the passengers and travelers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of the charter, was to be surrendered to the State as soon as the expenses of the proprietors in building and supporting it should be reimbursed, but this period was not, in any event, to exceed six years from the time the company commenced receiving toll. When the original bill in this case was filed, the Warren Bridge had not been built, and the bill was filed, after the passage of the law,

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in order to obtain an injunction to prevent its erection, and for general relief.

The bill, among other things, charged as a ground for relief that the act for the erection of the Warren Bridge impaired the obligation of the contract between the State of Massachusetts and the proprietors of the Charles River Bridge, and was therefore repugnant to the Constitution of the United States. Afterwards, a supplemental bill was filed stating that the bridge had been so far completed that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed that foot passengers could pass, but denied that any persons but the workmen and superintendents had passed over with their consent.

In this State of the pleadings, the cause came on for a hearing in the Supreme Judicial Court for the County of Suffolk, in the Commonwealth of Massachusetts, at November term 1829, and the court decided that the act incorporating the Warren Bridge did not impair the obligation of the contract with proprietors of the Charles River Bridge, and dismissed the complainant's bill. The complainants prosecuted this writ of error.

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TANEY, Ch. J., delivered the opinion of the court.

The questions involved in this case are of the gravest character, and the Court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount, and many persons may, no doubt, be seriously affected in their pecuniary interests by any decision which the Court may pronounce; and the questions which have been raised as to the power of the several States in relation to the corporations they have chartered are pregnant with important consequences, not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist.

The Court are fully sensible that it is their duty, in exercising the high powers conferred on them by the Constitution of the United States, to deal with these great and extensive interests with the utmost caution, guarding, so far as they have the power to do so, the rights of property, and at the same time, carefully abstaining from any encroachment on the rights reserved to the states.

It appears from the record that, in the year 1650, the Legislature of Massachusetts granted to the president of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise in the behalf and for the behoof of the college, and that, under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it, until 1785. In the last-mentioned year, a petition was presented to the Legislature by Thomas Russell and others, stating the inconvenience of the transportation by ferries over Charles River and the public advantages that would result from a bridge, and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the Legislature, on the 9th of March 1785, passed an act incorporating a company by the name of "The Proprietors of the Charles River Bridge" for the purposes mentioned in the petition. Under this charter, the company were empowered to erect a bridge in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to

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forty years from the first opening of the bridge for passengers, and from the time the toll commenced, until the expiration of this term, the company were to pay 200 annually to Harvard College, and, at the expiration of the forty years, the bridge was to be the property of the Commonwealth,

"saving (as the law expresses it) to the said college or university a reasonable annual compensation for the annual income of the ferry which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June 1786. In 1792, the charter was extended to seventy years from the opening of the bridge, and, at the expiration of that time, it was to belong to the Commonwealth. The corporation have regularly paid to the college the annual sum of 200, and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the Legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge" for the purpose of erecting another bridge over Charles River. This bridge is only sixteen rods, at its commencement on the Charlestown side, from the commencement of the bridge of the plaintiffs, and they are about fifty rods apart at their termination on the Boston side. The travelers who pass over either bridge proceed from Charlestown square, which receives the travel of many great public roads leading from the country, and the passengers and travelers who go to and from Boston used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surrendered to the State as soon as the expenses of the proprietors in building and supporting it should be reimbursed, but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built, and the bill was filed, after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged as a ground for relief that the act for the erection of the Warren Bridge impaired the obligation of the contract between the Commonwealth and the proprietors of the Charles River Bridge, and was, therefore, repugnant to the the Constitution of the United States. Afterwards, a supplemental bill was filed stating that the bridge had then been so far

completed that it had been opened for travel, and that divers persons had passed over and thus avoided the payment of the toll which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge has been so far completed that foot passengers could pass, but denied that any persons but the workmen and the superintendents had had passed over with their consent. In this State of the pleadings, the cause came on for hearing in the Supreme Judicial Court for the County of Suffolk, in the Commonwealth of Massachusetts, at November Term 1829, and the Court decided that the act incorporating the Warren Bridge did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill, and the case is brought here by writ of error from that decision. It is, however, proper to State that it is understood that the State court was equally divided upon the question, and that the decree dismissing the bill, upon the ground above stated, was pronounced by a majority of the Court for the purpose of enabling the complainants to bring the question for decision before this Court.

In the argument here, it was admitted that, since the filing of the supplemental bill, a sufficient amount of toll had been reserved by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the state, and has been made a free bridge, and that the value of the franchise granted to the proprietors of the Charles River Bridge has by this means been entirely destroyed. If the complainants deemed these facts material, they ought to have been brought before the State court by a supplemental bill, and this Court, in pronouncing its judgment, cannot regularly notice them. But in the view which the Court take of this subject, these additional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argued on that ground, and the controversy has been for a long time depending, and all parties desire a final end of it, and as it is of importance to them that the principles on which this Court decide should not be misunderstood, the case will be treated, in the opinion now delivered, as if these admitted facts were regularly before us.

A good deal of evidence has been offered, to show the nature and extent of the ferry right granted to the college, and also to show the rights claimed by the proprietors of the bridge, at different times

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by virtue of their charter, and the opinions entertained by committees of the Legislature and others upon that subject. But as these circumstances do not affect the judgment of this Court, it is unnecessary to recapitulate them.

The plaintiffs in error insist, mainly, upon two grounds: 1st. that by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston, that this right was exclusive, and that the Legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college, and that these rights, upon the erection of the bridge in the place of the ferry under the charter of 1785, were transferred to, and became vested in "The Proprietors of the Charles River Bridge," and that under, and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel as the rights of the ferry. 2d. That, independently of the ferry right, the acts of the Legislature of Massachusetts of 1785 and 1792, by their true construction, necessarily implied that the Legislature would not authorize another bridge, and especially, a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value, and the plaintiffs in error contend that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the state, and that the law authorizing the erection of the Warren Bridge in 1828 impairs the obligation of one or both of these contracts.

It is very clear that, in the form in which this case comes before us (being a writ of error to a State court), the plaintiffs, in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this Court that a State law may be retrospective in its character, and may divest

vested rights and yet not violate the Constitution of the United States unless it also impairs the obligation of a contract. In *Satterlee v. Matthewson,* 2 Pet. 413, this Court, in speaking of the State law then before them and interpreting the article in the Constitution of the United States which forbids the States to pass laws impairing the obligation of contracts, uses the following language:

"It (the State law) is said to be retrospective, be it so. But retrospective laws which do not impair the obligation of contracts

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or partake of the character of ex post facto *laws* are not condemned or forbidden by any part of that instrument"

(the Constitution of the United States). And in another passage in the same case, the Court say:

"The objection, however, most pressed upon the Court and relied upon by the counsel for the plaintiff in error was that the effect of this act was to divest rights which were vested by law in Satterlee. There is, certainly, no part of the Constitution of the United States which applies to a State law of this description, nor are we aware of any decision of this or of any Circuit Court, which has condemned such a law, upon this ground, provided its effect be not to impair the obligation of a contract."

The same principles were reaffirmed in this Court in the late case of *Watson and others v. Mercer,* decided in 1834, 8 Pet. 110:

"As to the first point (say the Court), it is clear that this Court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws, generally, but only *ex post facto* laws."

After these solemn decisions of this Court, it is apparent that the plaintiffs in error cannot sustain themselves here either upon the ferry right or the charter to the

bridge, upon the ground that vested rights of property have been divested by the Legislature. And whether they claim under the ferry right or the charter to the bridge, they must show that the title which they claim was acquired by contract, and that the terms of that contract have been violated by the charter to the Warren Bridge. In other words, they must show that the State had entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren Bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case.

The nature and extent of the ferry right granted to Harvard College in 1650 must depend upon the laws of Massachusetts, and the character and extent of this right has been elaborately discussed at the bar. But in the view which the Court take of the case before them, it is not necessary to express any opinion on these questions. For, assuming that the grant to Harvard College and the charter to the bridge company were both contracts, and that the ferry right was as extensive and exclusive as the plaintiffs contend for, still they

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cannot enlarge privileges granted to the bridge unless it can be shown that the rights of Harvard College in this ferry have, by assignment or in some other way, been transferred to the proprietors of the Charles River Bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college before the bridge was built.

It has been strongly pressed upon the Court by the plaintiffs in error that these rights are still existing, and are now held by the proprietors of the bridge. If this franchise still exists, there must be somebody possessed of authority to use it, and to keep the ferry. Who could now lawfully set up a ferry where the old one was kept? The bridge was built in the same place, and its abutments occupied the landings of the ferry. The transportation of passengers in boats, from landing to landing was no longer possible, and the ferry was as effectually destroyed as if a convulsion of nature had made there a passage of dry land. The ferry, then, of necessity, ceased to exist as soon as the bridge was erected, and when the ferry

itself was destroyed, how can rights which were incident to it be supposed to survive? The exclusive privileges, if they had such, must follow the fate of the ferry, and can have no legal existence without it, and if the ferry right had been assigned by the college, in due and legal form, to the proprietors of the bridge, they themselves extinguished that right when they erected the bridge in its place. It is not supposed by anyone that the bridge company have a right to keep a ferry. No such right is claimed for them, nor can be claimed for them, under their charter to erect a bridge, and it is difficult to imagine how ferry rights can be held by a corporation or an individual who have no right to keep a ferry. It is clear that the incident must follow the fate of the principal, and the privilege connected with property cannot survive the destruction of the property, and if the ferry right in Harvard College was exclusive, and had been assigned to the proprietors of the bridge, the privilege of exclusion could not remain in the hands of their assignees if those assignees destroyed the ferry.

But upon what ground can the plaintiffs in error contend that the ferry rights of the college have been transferred to the proprietors of the bridge? If they have been thus transferred, it must be by some mode of transfer known to the law, and the evidence relied on to prove it can be pointed out in the record. How was it transferred? It is not suggested that there ever was, in point of fact, a deed of

conveyance executed by the college to the bridge company. Is there any evidence in the record from which such a conveyance may, upon legal principle, be presumed? The testimony before the Court, so far from laying the foundation for such a presumption, repels it in the most positive terms. The petition to the Legislature in 1785, on which the charter was granted, does not suggest and assignment nor any agreement or consent on the part of the college, and the petitioners do not appear to have regarded the wishes of that institution as by any means necessary to insure their success. They place their application entirely on considerations of public interest and public convenience and the superior advantages of a communication across Charles River by a bridge instead of a ferry. The Legislature, in granting the charter, show, by the language of the law,

that they acted on the principles assumed by the petitioners. The preamble recites that the bridge "will be of great public utility," and that is the only reason they assign for passing the law which incorporates this company. The validity of the character is not made to depend on the consent of the college, nor of any assignment or surrender on their part, and the Legislature deal with the subject as if it were one exclusively within their own power, and as if the ferry right were not to be transferred to the bridge company, but to be extinguished, and they appear to have acted on the principle that the state, by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place; and, upon that principle, they proceed to make a pecuniary compensation to the college for the franchise thus taken away; and as there is an express reservation of a continuing pecuniary compensation to the college when the bridge shall become the property of the state, and no provision whatever for the restoration of the ferry right, it is evident that no such right was intended to be reserved or continued. The ferry, with all its privileges, was intended to be forever at an end, and a compensation in money was given in lieu of it. The college acquiesced in this arrangement, and there is proof in the record that it was all done with their consent. Can a deed of assignment to the bridge company which would keep alive the ferry rights in their hands be presumed under such circumstances? Do not the petition, the law of incorporation, and the consent of the college to the pecuniary provision made for it in perpetuity all repel the notion of an assignment of its rights to the bridge

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company, and prove that every party to this proceeding intended that its franchises, whatever they were, should be resumed by the state, and be no longer held by any individual or corporation? With such evidence before us, there can be no ground for presuming a conveyance to the plaintiffs. There was no reason for such a conveyance; there was every reason against it, and the arrangements proposed by the charter to the bridge, could not have been carried into full effect, unless the rights of the ferry were entirely extinguished.

It is, however, said that the payment of the 200 a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest, and by substitution, upon chancery principles, to be clothed with all their rights. The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls, which the company were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this incumbrance, as well as to every other expenditure to which the company might be subjected under the provisions of their charter. The tolls were to be collected from the public, and it was intended that the expense of the annuity to Harvard College should be borne by the public, and it is manifest that it was so borne from the amount which it is admitted they received until the Warren Bridge was erected. Their agreement, therefore, to pay that sum can give them no equitable right to be regarded as the assignees of the college, and certainly can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege, and had not been resumed by the state, for the purpose of building a bridge in its place.

Neither can the extent of the preexisting ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not, by any means, follow that, because the legislative power of Massachusetts in 1650 may have granted to a justly favored seminary of learning the exclusive right of ferry between Boston and Charlestown, they would, in 1785, give the same extensive privilege to another corporation who were about to erect a bridge in the same place. The fact that such a right

was granted to the college cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population, longer experience in legislation, the different character of the corporations which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the State in

this respect, and as the franchise of the ferry and that of the bridge are different in their nature, and were each established by separate grants which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the Court to associate these grants together and to infer that any privilege was intended to be given to the bridge company merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself and be interpreted by its own terms.

This brings us to the act of the Legislature of Massachusetts of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge," and it is here, and in the law of 1792 prolonging their charter that we must look for the extent and nature of the franchise conferred upon the plaintiffs. Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings on the part of the state may be implied. The Court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled both in England and by the decisions of our own tribunals. In the case of the *Proprietors of the Stourbridge Canal v. Wheeley and Others,* 2 B. & Ad. 793, the Court say,

"the canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this -- that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act."

And the doctrine thus laid down in abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the

canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of Parliament, so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks, and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels, the Court held that the right to demand toll in the latter case could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company, the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted, in every other case, civil and criminal, its rules for the construction of statutes, is there anything in our local situation or in the nature of our political institutions which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the states more unfavorable to the public than upon an act of Parliament framed in the same words would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle and for introducing a new and adverse rule of construction in favor of corporations while we adopt and adhere to the rules of construction known to the English common law in every other case, without exception? We think not, and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of

monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging

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these privileges by implication and construing a statute more unfavorably to the public and to the rights of community than would be done in a like case in an English court of justice.

But we are not now left to determine for the first time the rules by which public grants are to be construed in this country. The subject has already been considered in this Court, and the rule of construction above stated fully established. In the case of the *United States v. Arredondo,* 8 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the Court, and the principle recognised that, in grants by the public, nothing passes by implication. The rule is still more clearly and plainly stated in the case of *Jackson v. Lamphire,* 3 Pet. 289. That was a grant of land by the state, and in speaking of this doctrine of implied covenants in grants by the state, the Court use the following language, which is strikingly applicable to the case at bar:

"The only contract made by the state, is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land, and we do not feel ourselves at liberty in this case to create one by implication. The State has not by this act impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius and gave it to one not claiming under him; neither does the award produce that effect; the grant remains in full force, the property conveyed is held by his grantee, and the State asserts no claim to it."

The same rule of construction is also stated in the case of *Beaty v. Lessee of Knowler,* 4 Pet. 168, decided in this Court in 1830. In delivering their opinion in that case, the Court say:

"That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."

But the case most analogous to this, and in which the question came more directly before the Court is the case of the *Providence Bank v. Billings,* 4 Pet. 514, which was decided in 1830. In that case, it appeared that the Legislature of Rhode Island had chartered the bank, in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the State that it would not impose a tax on the bank, nor any reservation of the right to do so. It was silent on this point. Afterwards, a law

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was passed, imposing a tax on all banks in the state, and the right to impose this tax was resisted by the Providence Bank, upon the ground that if the State could impose a tax, it might tax so heavily as to render the franchise of no value, and destroy the institution, that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the Court said that the taxing power was of vital importance, and essential to the existence of government, and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the Court, the late chief justice states the principle, in the following clear and emphatic language. Speaking of the taxing power, he says,

"as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

The case now before the Court is, in principle, precisely the same. It is a charter from a state; the act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River Bridge is the same, almost in words, with that used by the Providence Bank -- that is, that the power

claimed by the state, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer, and the fact that the power has been already exercised so as to destroy the value of the franchise cannot in any degree affect the principle. The existence of the power does not, and cannot, depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said that, in the case of the *Providence Bank,* this Court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in

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preserving it undiminished. And when a corporation alleges that a State has surrendered, for seventy years, its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this Court, above quoted, "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a government would be of no great value if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the Court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the

power then in question, and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the state would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and wellbeing of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation for the purpose of building the bridge, and establishes certain rates of toll which the company are authorized to take; this is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge, no right to erect another bridge themselves, nor to prevent other persons from erecting one, no engagement from the State that another shall not be erected, and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent, and

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nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant, and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it, or from it, less convenient. None of the faculties or franchises granted to that

corporation has been revoked by the Legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter and there mentioned to have been granted to it remain unimpaired. But its income is destroyed by the Warren Bridge, which, being free, draws off the passengers and property which would have gone over it and renders their franchise of no value. This is the gist of the complainant, for it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show that the Legislature contracted not to do the act of which they complain, and that they impaired, or, in other words, violated, that contract by the erection of the Warren Bridge.

The inquiry, then, is does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none -- no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question: in charters of this description, no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied, and the same answer must be given to them that was given by this Court to Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their

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comfort and convenience, and of advancing the public prosperity by providing safe, convenient and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the state unless it shall appear by plain words that it was intended to be done.

But the case before the Court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786, the time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years, and the rights, privileges and franchises of the company must depend upon the construction of the last-mentioned law, taken in connection with the Act of 1785.

The act of 1792 which extends the charter of this bridge incorporates another company to build a bridge over Charles River, furnishing another communication with Boston, and distant only between one and two miles from the old bridge. The first six sections of this act incorporate the proprietors of the West Boston bridge, and define the privileges and describe the duties of that corporation. In the 7th section, there is the following recital:

"And whereas, the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston bridge may diminish the emoluments of Charles River Bridge, therefore, for the encouragement of enterprise,"

they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed, subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that, by the same act that extended this charter, the Legislature established another bridge which they knew would lessen its profits, and this, too, before the expiration of the first charter, and only seven years after it was granted, thereby showing that the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem that the Legislature were especially careful to exclude any inference that the extension was made upon the ground of

compromise with the bridge company or as a compensation for rights impaired. On the contrary, words are cautiously employed to exclude that conclusion, and the extension is declared to be granted as a reward for the hazard they had run and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success, and the improvements which the Legislature then contemplated might diminish the emoluments they had expected to receive from it.

It results from this statement that the Legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits, and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the state. Can they, when holding their corporate existence under this law and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the Legislature be presumed to have taken upon themselves an implied obligation contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication even between individuals; still less will it be found where sovereign rights are concerned and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer it from the nature of the very instrument in which the Legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the state, to make such a contract.

Indeed, the practice and usage of almost every State in the Union old enough to have commenced the work of internal improvement is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel, the later ones interfering materially with

the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and traveling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless that the

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franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the state. Amid the multitude of cases which have occurred, and have been daily occurring, for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for and this Court called upon to infer it from an ordinary act of incorporation containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither states nor individuals nor corporations ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract, and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact and the obvious intention of the party. We cannot deal thus with the rights reserved to the states, and, by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their wellbeing and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the states and of property in a line of travel by a corporation if it would now be sanctioned by this Court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it in the various acts which have been passed within the last forty years for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without

invading its rights in the privileged line? If this Court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies, and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling, and you will soon find the old turnpike corporations awakening from their sleep, and calling

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upon this Court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had been before occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This Court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel, for if such a right of property exists, we have no lights to guide us in marking out its extent unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries by prescription, between towns, and are prepared to decide that, when a turnpike road from one town to another had been made, no railroad or canal between these two points could afterwards be established. This Court are not prepared to sanction principles which must lead to such results.

Many other questions, of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them, and the Court deem it proper to avoid volunteering an opinion on any question involving the construction of the Constitution where the case itself does not bring the question directly before them and make it their duty to decide upon it. Some questions, also, of a purely technical character have been made and argued as to the form of proceeding and

the right to relief. But enough appears on the record to bring out the great question in contest, and it is the interest of all parties concerned that the real controversy should be settled without further delay; and as the opinion of the Court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding in which the parties have brought it before the Court.

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts dismissing the plaintiffs' bill must, therefore be affirmed, with costs.

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Mc LEAN, Justice.

This suit in chancery was commenced in the Supreme Court of Massachusetts, where the bill was dismissed, by a decree *pro forma,* the members of that Court being equally divided in opinion, and a writ of error was taken to this Court on the ground that the right asserted by the complainants, and which has been violated, under the charter of the respondents, is protected by a special provision in the federal Constitution.

The complainants' right is founded on an act of the Legislature of Massachusetts, passed March 9th, 1785, which incorporated certain individuals, and authorized them to erect a bridge over Charles River, a navigable stream between Boston and Charlestown, and an amendatory act, passed in 1791, extending the charter thirty years. As explanatory of this right, if not the ground on which it in part rests, a reference is made to an ancient ferry over the same river which was held by Harvard College and the right of which was transferred, it is contended, in equity, if not in law, to the bridge company. The wrong complained of consists in the construction of a new bridge over the same river, under a recent act of the Legislature, within a few rods of the old one, and which takes away the entire profits of the old bridge.

The act to establish the Charles River Bridge required it to be constructed within a limited time, of certain dimensions, to be kept in repair, and to afford certain specified accommodations to the public. The company were authorized to charge certain rates of toll, and they were required to pay, annually, 200 to Harvard College. The first charter was granted for forty years. The facts proved in the case show that a bridge of the description required by the Act of 1785 was constructed within the time limited, that the annual payment has been made to the college, and that, in every other respect, the corporation has faithfully performed the conditions and duties enjoined on it.

It is contended that the charter granted to the respondents, violates the obligation of that which had been previously granted to the complainants, and that, consequently, it is in conflict with that provision of the Constitution which declares that no "state shall pass any law impairing the obligation of contracts."

In the investigation of this case, the first inquiry which seems naturally

to arise is as to the nature and extent of the right asserted by the complainants. As early as the year 1631, a ferry was established across Charles River, by the colonial government of Massachusetts Bay. In 1640, the General Court say "that the ferry is granted to the college." From this time, the profits of the ferry were received by the college, and it was required, by various statutes, under certain penalties, to keep certain boats, &c.;, for the accommodation of the public. This duty was performed by the college, and it continued to occupy the ferry until the Charles River Bridge was constructed.

From the above act of the General Court, and others which have been shown, and the unmolested use of the ferry for more than 140 years by the college, it would seem that its right to this use had received all the sanctions necessary to constitute a valid title. If the right was not founded strictly on prescription, it rested on a basis equally unquestionable.

At the time this ferry was established, it was the only public communication between Boston and Charlestown. These places, and especially the latter, were then small, and no greater accommodation was required than was afforded by the ferry. Its franchise was not limited, it is contended, to the ferry ways, but extended to the whole line of travel between the two towns.

It cannot be very material to inquire whether this ferry was originally public or private property, or whether the landing places were vested in the college, or their use only, and the profits of the ferry. The beneficial interest in the ferry was held by the college, and it received the tolls. The regulation of the ferry, it being a matter of public concern, belonged to the government. It prescribed the number of boats to be kept, and the attendance necessary to be given, and, on a failure to comply with these requisitions, the college would have been subjected to the forfeiture of the franchise and the other penalties provided by statute. Was this right of ferry, with all its immunities, transferred to the Charles River Bridge Company?

It is not contended that there is any express assignment of this right, by deed or otherwise, but the complainants claim that the evidence of the transfer is found in the facts of the case. Before the charter was granted, the college was consulted on the subject; so soon as the bridge was constructed, the use of the ferry ceased,

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and the college has regularly received from the complainants the annuity of 200. This acquiescence, it is contended, taken in connection with the other facts in the case, goes to establish the relinquishment of the right to the ferry for the annual compensation required to be paid under the charter. That there was a substitution of the bridge for the ferry, with the consent of the college, is evident, but there seems to have been no assignment of the rights of the ferry. The original bridge charter was granted for forty years, at the expiration of which period the property of the bridge was to revert to the Commonwealth,

"saving to the college a reasonable and annual compensation for the annual income of the ferry, which they might have received had not said bridge been

erected."

Had the bridge been destroyed by fire or otherwise, there was no investiture of right to the ferry in the complainants that would have enabled them to keep up the ferry and realize the profits of it. On the destruction of the bridge, the college, it is presumed, might have resumed all the rights and responsibilities attached to the ferry. At least it is very clear that these rights and responsibilities would not have devolved on the complainants. They stipulated to afford a different accommodation to the public. If, then, these rights could not have been claimed and exercised by the complainants, under such circumstances, how can they be considered as enlarging, or in any way materially affecting, the franchise under the charter of 1785?

That the franchise of a ferry, at common law and in the State of Massachusetts, extends beyond the landing places is very clear from authority. 10 Petersdorf 53; 13 Vin. 513; Willes' Rep. 512 note; 12 East 330; 6 Barn. & Cres. 703; Year Book, Hen. 6, 22; Rolles' Abr. 140; Fitz. 428 n; Com.Digest Market, c. 2; Piscary, B. Action on the Case, A.; 3 Blk. 219; 1 Nott & M'Cord 387; 2 Saund. 172; 6 Mod. 229; 2 Vent. 344; 3 Levinz 220; Com.Dig.Patent, F. 4, 5, 6, 7; 2 Saund. 72, n. 4; 2 Inst. 406; Chit.Pre. 12, chap. 3; 10, chap. 2; 3 Salk. 198; Willes 512; 4 T.R. 666; Saund. 114, Cro.E. 710.

The annuity given to the college was a compensation for the profits of the ferry, and shows a willingness by the college to suspend its rights to the ferry, during the time specified in the act. And if, indeed, it might be construed into an abandonment of the ferry, still it was an abandonment to the public, on the terms specified, for a better accommodation.

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The bridge was designed not only to answer all the purposes of the ferry, but to enlarge the public convenience. The profits contemplated by the corporators were not only those which had been realized from the ferry, but such as would arise from the increased facilities to the public.

If there was no assignment of the ferry franchise to the complainants, its extent cannot be a matter of importance in this investigation, nor is it necessary to inquire into the effect of an assignment, under the circumstances of the case, if it had been made. There is no provision in the act of incorporation vesting the company with the privileges of the ferry. A reference is made to it merely with the view of fixing the site of the bridge. The right and obligations of the complainants must be ascertained by the construction of the Act of 1785.

This act must be considered in the light of a contract, and the law of contracts applies to it. In one sense it is a law, having passed through all the forms of legislation and received the necessary sanctions, but it is essentially a contract as to the obligation imposed by it and the privileges it confers.

Much discussion has been had at the bar as to the rule of construing a charter or grant, and many authorities have been referred to on this point. In ordinary cases, a grant is construed favorable to the grantee, and against the grantor. But it is contended that, in governmental grants, nothing is taken by implication. The broad rule thus laid down cannot be sustained by authority. If an office be granted by name, all the immunities of that office are taken by implication. Whatever is essential to the enjoyment of the thing granted must be taken by implication. And this rule holds good whether the grant emanate from the royal prerogative of the King, in England, or under an act of legislation, in this country. The general rule is that "a grant of the King, at the suit of the grantee, is to be construed most beneficially for the King, and most strictly against the grantee," but grants obtained as a matter of special favor of the King, or on a consideration, are more liberally construed. Grants of limited political powers are construed strictly. Com.Dig. tit. Grant, E. 5; 2 Dane's Abr. 683; *Stark v. McGowan,* 1 Nott & M'Cord 387; Pop. 79; Moore 474; 8 Coke 92; 6 Barn. & Cres. 703; 5 *Ib.* 875; 3 M. & S. 247; Hargrave, 18-23; Angel on Tide Water 106-1077, 4 Burr. 2161; 4 T.R. 439; 2 Bos.

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& Pul. 472; 1 T.R. 669; 1 Con.Rep. 382; 17 Johns. 195; 3 M. & S. 247; 6 Mass. 437; 1 Mass. 231; 17 Mass. 289; Angel 108; 4 Mass. 140, 522; Bac.Pre.T.2; Plow.

336-337, 9 Coke 30; 1 Vent. 409; Croke J. 179; Dyer 30; Saville 132; 10 Coke 112; Com.Dig.Grant, 9, 12; Bac.tit.Prerog. 2; 5 Barn. & Cres. 875; 1 Mass. 356.

Where the Legislature, with a view of advancing the public interest by the construction of a bridge, a turnpike road, or any other work of public utility, grants a charter, no reason is perceived why such a charter should not be construed by the same rule that governs contracts between individuals. The public, through their agent, enter into the contract with the company, and a valuable consideration is received in the construction of the contemplated improvement. This consideration is paid by the company, and sound policy requires that its rights should be ascertained and protected by the same rules as are applied to private contracts.

In the argument, great reliance was placed on the case of the *Stourbridge Canal v. Wheeley and Others,* 2 Barn. & Ald. 792. The question in this case was, whether the plaintiffs had a right to charge toll in certain cases, and Lord Tenterden said,

"the canal having been made under the provisions of an act of Parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases, is now fully established to be this -- that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing which is not clearly given to them by the act."

This is relied on to show that nothing is taken, under such a grant, by implication or inference. His lordship says the right must be clearly given -- he does not say expressly given, which would preclude all inference. In another part of the same opinion, his lordship says,

"Now it is quite certain that the company have no right, expressly given, to receive any compensation except the tonnage paid for goods carried through some of the locks on the canal, or the collateral cuts, and it is, therefore, incumbent upon them to show that they have a right, clearly given, by inference, from some of the

other clauses."

May this right be shown by inference, and is not this implication? The doctrine laid down in this case is simply this: that the right to charge the toll must be given expressly or it must be clearly made out by inference. Does not this case establish the doctrine of implication, as applied to the construction of grants? Is it not the right to pass by-laws incident to a corporation? A right cannot be claimed by a corporation under ambiguous terms; it must clearly appear to have been granted either in express terms or by inference, as stated by Lord Tenterden.

A corporate power to impose a tax on the land of the company, as considered in the case of *Beaty v. Lessee of Knowles,* 4 Pet. 168, must, in its nature, be strictly construed, and so, in all cases where corporate powers in the nature of legislation are exercised. In that case, the directors were authorized to impose a tax under certain circumstances, and the Court held that they had no power to impose the tax under other circumstances.

Charles River being a navigable stream, any obstructions to its navigation by the erection of a bridge or any other work would have been punishable unless authorized by law. By the Act of 1785, the complainants were authorized to build the bridge, elect their officers, &c.;, and charge certain rates of toll. The power to tax passengers was the consideration on which the expense of building the bridge, lighting it, &c.;, and keeping it in repair, was incurred. The grant, then, of tolls was the essential part of the franchise. That course of reasoning which would show the consideration to consist in anything short of this power to tax and the profit arising therefrom is too refined for practical purposes. The builders of the bridge had, no doubt, a desire to increase the public accommodation, but they looked chiefly to a profitable investment of their funds, and that part of the charter which secured this object formed the consideration on which the work was performed.

But it is said there was no exclusive right given, and that, consequently, the Legislature might well cause another bridge to be built whenever, in their opinion,

the public convenience required it. On the other hand, it is insisted that the franchise of the bridge was as extensive as that of the ferry, and that the grant of this franchise having been made by the Legislature, it had no power to grant a part of it to the new bridge.

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That this part of the case presents considerations of great importance and of much difficulty cannot be denied. To inquire into the validity of a solemn act of legislation is, at all times, a task of much delicacy, but it is peculiarly so when such inquiry is made by a federal tribunal and relates to the act of a State Legislature. There are cases, however, in the investigation of which such an inquiry becomes a duty, and then no Court can shrink, or desire to shrink, from its performance. Under such circumstances, this duty will always be performed with the high respect due to a branch of the government which, more than any other, is clothed with discretionary powers and influenced by the popular will.

The right granted to the Charles River Bridge Company is, in its nature, to a certain extent exclusive, but to measure this extent presents the chief difficulty. If the boundaries of this right could be clearly established, it would scarcely be contended by anyone that the Legislature could, without compensation, grant to another company the whole or any part of it. As well might it undertake to grant a tract of land although an operative grant had been previously made for the same land. In such a case, the second grant would be void on the ground that the Legislature had parted with the entire interest in the premises. As agent of the public, it has passed the title to the first grantee, and, having done so, it could convey no right by its second grant. The principle is the same in regard to the question under consideration. If the franchise granted to the complainants extended beyond the new bridge, it was as much above the power of the Legislature to make the second grant as it would be to grant a part of a tract of land for which a patent had been previously and regularly issued. The franchise, though incorporeal, in legal contemplation, has body and extension, and having been granted, is not less scrupulously guarded by the principles of law than an

interest in the soil. It is a substantive right in law, and can no more be resumed by the Legislature, when once granted, than any other right.

But would it not be unsafe, it is suggested, for the judicial authority to interpose and limit this exercise of legislative discretion? The charter of the Warren Bridge, it is said, was not hastily granted; that all the circumstances of the case, year after year, were duly examined by the Legislature, and, at last, the act of incorporation was passed because, in the judgment of the Legislature, the public

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accommodation required it, and it is insisted that the grant to the complainants was necessarily subject to the exercise of this discretion.

It is undoubtedly the province of the Legislature to provide for the public exigencies, and the utmost respect is always due to their acts; and the validity of those acts can only be questioned judicially where they infringe upon private rights. At the time the Charles River Bridge was built, the population of Boston and Charlestown was small in comparison with their present numbers, and it is probable that the increase has greatly exceeded any calculation made at the time. The bridge was sufficient to accommodate the public, and it was, perhaps, believed that it would be sufficient during the time limited in the charter. If, however, the increased population and intercourse between these towns and the surrounding country required greater accommodation than was afforded by the bridge, there can be no doubt that the Legislature could make provision for it.

On the part of the complainants' counsel it is contended, if increased facilities of intercourse between these places were required by the public, the Legislature was bound in good faith to give the option to the Charles River Bridge Company, either to enlarge their bridge or construct a new one, as might be required. And this argument rests upon the ground that the complainants' franchise included the whole line of travel between the two places. Under this view of their rights, the company proposed to the Legislature, before the new charter was granted to the respondents, to do anything which should be deemed requisite for the public

accommodation. In support of the complainants' right in this respect, a case in referred to in 7 Barn. & Cres. 40, where it is laid down that the lord of an ancient market may, by law, have a right to prevent other persons from selling goods in their private houses, situated within the limits of his franchise, and also to 5 Barn. & Cres. 363. These cases show that the grant to the lord of the market is exclusive, yet, if the place designated for the market is made too small by the act of the owner, any person may sell in the vicinity of the market without incurring any responsibility to the lord of the market.

Suppose, the Legislature had passed a law requiring the

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complainants to enlarge their bridge, or construct a new one, would they have been bound by it? Might they have not replied to the Legislature, we have constructed our bridge of the dimensions required by the charter; we have therefore provided for the public all the accommodation which we are bound to give? And if the Legislature could not require this of the complainants, is it not clear that they cannot assert an exclusive claim to the advantages of an enlarged accommodation? In common with our citizens, they submitted propositions to the Legislature, but they could urge no exclusive right to afford any accommodation beyond what was given by their bridge. When the Charles River Bridge was built, it was considered a work of great magnitude. It was, perhaps, the first experiment made to throw a bridge of such length over an arm of the sea, and in the construction of it, great risk and expense were incurred. The unrestricted profits contemplated were necessary to induce or justify the undertaking. Suppose, within two or three years after the Charles River Bridge had been erected, the Legislature had authorized another bridge to be built alongside of it which could only accommodate the same line of travel. Whether the profits of such a bridge were realized by a company or by the state, would not the act of the Legislature have been deemed so gross a violation of the rights of the complainants as to be condemned by the common sense and common justice of mankind? The plea that the timbers or stone of the new bridge did not interfere with the old one could not in such a case have availed. The value of the bridge is not estimated by the

quantity of timber and stone it may contain, but by the travel over it. And if one-half or two-thirds of this travel, all of which might conveniently have passed over the old bridge, be drawn to the new one, the injury is much greater than would have been the destruction of the old bridge. A reconstruction of the bridge, if destroyed, would secure to the company the ordinary profits, but the division or destruction of the profits by the new bridge runs to the end of the charter of the old one. And shall it be said that the greater injury, the diversion of the profits, may be inflicted on the company with impunity, while, for the less injury, the destruction of the bridge, the law would give an adequate remedy?

I am not here about to apply the principles which have been long established in England for the protection of ancient ferries,

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fairs, mills, &c.; In my opinion, this doctrine, in its full extent, is not adapted to the condition of our country. And it is one of the most valuable traits in the common law that it forms a rule of right only in cases and under circumstances adapted to its principles. In this country, there are few rights founded on prescription. The settlement of our country is comparatively recent, and its rapid growth in population and advance in improvements have prevented, in a great degree, interests from being acquired by immemorial usage. Such evidence of right is found in countries where society has become more fixed and improvements are in a great degree stationary. But without the aid of the principles of the common law, we should be at a loss how to construe the charter of the complainants and ascertain their rights.

Although the complainants cannot fix their franchise, by showing the extent of the ferry rights, yet, under the principles of the common law, which have been too long settled in Massachusetts, in my opinion, to be now shaken, they may claim their franchise beyond the timbers of their bridge. If they may go beyond these, it is contended that no exact limit can be prescribed. And because it may be difficult, and perhaps, impracticable, to designate with precision the exact limit, does it follow that the complainants' franchise is as narrow as their bridge? Is it more

difficult to define, with reasonable certainty, the extent of this right than it is, in many other cases, to determine the character of an offence against the laws from established facts? What shall constitute a public or private nuisance? What measure of individual wrong shall be sufficient to convict a person of the latter? And what amount of inconvenience to the public shall constitute the former? Would it be more difficult to define the complainants' franchise than to answer these questions? And yet public and private nuisances are of daily cognisance in Courts of justice.

How have ferry rights, depending upon the same principles, been protected for centuries, in England? The principles of the common law are not applied with that mathematical precision of which the principles of the civil law are susceptible. But if the complainants' franchise cannot be measured by feet and inches, it does not follow that they have no rights.

In determining upon facts which establish rights or wrongs,

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public as well as private, an exercise of judgment is indispensable, the facts and circumstances of each case are considered, and a sound and legal conclusion is drawn from them.

The bridge of the complainants was substituted for the ferry, and it was designed to accommodate the course of travel between Boston and Charlestown. This was the view of the Legislature in granting the charter and of the complainants in accepting it. And if it be admitted that the great increase of population has required the erection of other bridges than that which is complained of in this suit over this arm of the sea, that can afford no protection to the defendants. If the interests of the complainants have been remotely injured by the construction of other bridges, does that give a license to the defendants to inflict on them a more direct and greater injury? By an extension of the complainants' charter, thirty years, an indemnity was given and accepted by them for the construction of the West Boston bridge.

The franchise of the complainants must extend a reasonable distance above and below the timbers of their bridge. This distance must not be so great as to subject the public to serious inconvenience, nor so limited as to authorize a ruinous competition. It may not be necessary to say that for a remote injury, the law would afford a remedy, but where the injury is ruinous, no doubt can exist on the subject. The new bridge, while tolls were charged, lessened the profits of the old one about one-half, or two-thirds, and now that it is a free bridge by law, the tolls received by the complainants are merely nominal. On what principle of law, can such an act be sustained? Are rights acquired under a solemn contract with the Legislature held by a more uncertain tenure than other rights? Is the legislative power so omnipotent in such cases as to resume what it has granted without compensation? It will scarcely be contended that, if the Legislature may do this, indirectly, it may not do it directly. If it may do it through the instrumentality of the Warren Bridge Company, it may dispense with that instrumentality.

But it is said that any check to the exercise of this discretion by the Legislature will operate against the advance of improvements. Will not a different effect be produced? If every bridge or turnpike company were liable to have their property wrested from them, under an act of the Legislature, without compensation, could much value be attached to such property? Would prudent men expend their funds in making such improvements?

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Can it be considered as an injurious check to legislation that private property shall not be taken for public purposes without compensation? This restriction is imposed by the federal Constitution, and by the constitutions of the respective states.

But it has been urged that the property of the complainants has not been taken, as the tolls in anticipation cannot be denominated property. The entire value of the bridge consists in the right of exacting toll. Is not this right property, and cannot its value be measured? Do not past receipts and increased intercourse afford a rule by which future receipts may be estimated? And if the whole of these tolls are

taken under an act of the Legislature, is not the property of the complainants taken? The charter of the complainants has been compared to a bank charter, which implies no obligation on the Legislature not to establish another bank in the same place. This is often done, and it is contended that, for the consequential injury done the old bank, by lessening its profits, no one supposes that an action would lie, or that the second charter is unconstitutional. This case bears little or no analogy to the one under consideration. A bank may wind up its business, or refuse its discounts, at the pleasure of its stockholders and directors. They are under no obligation to carry on the operations of the institution, or afford any amount of accommodation to the public. Not so with the complainants. Under heavy penalties, they are obliged to keep their bridge in repair, have it lighted, the gates kept open, and to pay 200 annually to the college. This the complainants are bound to do although the tolls received should scarcely pay for the oil consumed in the lamps of the bridge.

The sovereign power of the State has taken the tolls of the complainants, but it has left them in possession of their bridge. Its stones and timbers are untouched, and the roads that lead to it remain unobstructed.

One of the counsel in the defence, with emphasis, declared that the Legislature can no more repeal a charter than it can lead a citizen to the block. The Legislature cannot bring a citizen to the block; may it open his arteries? It cannot cut off his head; may it bleed him to death? Suppose the Legislature had authorized the construction of an impassable wall which encircled the ends of the bridge so as to prevent passengers from crossing on it. The wall may be as distant from the abutments of the bridge as the

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Warren Bridge. Would this be an infringement of the plaintiffs' franchise? On the principles contended for, how could it be so considered? If the plaintiffs' franchise is limited to their bridge, then they are not injured by the construction of this wall, or at least they are without remedy. This wall would be no more injurious to the plaintiffs than the free bridge. And the plaintiffs might be told, as alleged in this

case, the wall does not touch your bridge. You are left in the full exercise of your corporate faculties. You have the same right to charge toll as you ever had.

The Legislature had the same right to destroy the plaintiffs' bridge by authorizing the construction of the wall as they had by authorizing the construction of a free bridge. In deciding this question, we are not to consider what may be the law on this subject in Pennsylvania, Maryland, Virginia or Ohio, but what it is in Massachusetts. And in that state, the doctrine has been sanctioned that associations of men to accomplish enterprises of importance to the public, and who have vested their funds on the public faith, are entitled to protection. That their rights do not become the sport of popular excitement, any more than the rights of other citizens. The case under consideration forms, it is believed, a solitary exception to this rule, whether we look to the action of the Legislature, or the opinions of the distinguished jurists of the state, on the bench and at the bar.

The expense of keeping up the bridge and paying the annuity to the college is all that is left by the State to the complainants. Had this been proposed, or anything which might lead to such a result, soon after the construction of the complainants' bridge, it is not probable that it would have been sanctioned, and yet it might as well have been done then as now. A free bridge then could have been no more injurious to the plaintiffs than it is now. No reflection is intended on the Commonwealth of Massachusetts, which is so renowned in our history for its intelligence, virtue and patriotism. She will not withhold justice when the rights of the complainants shall be established.

Much reliance is placed on the argument, in the case reported in 29 U. S. 4 Pet. 560, in which it was decided that a law of the State of Rhode Island imposing a tax upon banks is constitutional. As these banks were chartered by the state, it was contended that there was no implied obligation on the Legislature not to tax them. That if

this power could be exercised, it might be carried so far as to destroy the banks. But this Court sustained the right of the State to tax. The analogy between the two cases is not perceived. Does it follow, because the complainants' bridge is not exempt from taxation, that it may be destroyed, or its value greatly impaired by any other means? The power to tax extends to every description of property held within the state which is not specially exempted, and there is no reason or justice in withholding from the operation of this power property held directly under the grant of the state.

The complainants' charter has been called a monopoly, but in no just sense can it be so considered. A monopoly is that which has been granted without consideration, as a monopoly of trade, or of the manufacture of any particular article to the exclusion of all competition. It is withdrawing that which is a common right from the community and vesting it in one or more individuals, to the exclusion of all others. Such monopolies are justly odious, as they operate not only injuriously to trade, but against the general prosperity of society. But the accommodation afforded to the public by the Charles River Bridge, and the annuity paid to the college, constitute a valuable consideration for the privilege granted by the charter. The odious features of a monopoly do not, therefore, attach to the charter of the plaintiffs.

The 10th article of the declaration of rights in the Constitution of Massachusetts provides:

"Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

And in the 12th article, it is declared that "no subject shall be deprived of his property, immunities, privileges or estate, but by the judgment of his peers or the law of the land." Here is a power, recognised in the sovereignty, and as incident to it, to apply private property to public uses by making for it a just compensation. This power overreaches every other, and must be exercised at the discretion of the government, and a bridge, a turnpike-road, a tract of land, or any other

property may be taken, in whole or in part, for public purposes on condition of making compensation.

In the case of *Chadwick v. The Proprietors of the Haverhill Bridge,* reported in Dane's Abridgment 683, it appears that a bridge was built under a charter within forty yards of the plaintiff's ferry, and over the same water. By an act of the Legislature, commissioners were authorized to ascertain the damages sustained by the

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plaintiff, but he preferred his action at law, which was prosecuted, and adequate damages were recovered. It is true, this matter was referred to arbitrators, but they were men of distinguished legal attainments and great experience, and they, after determining that the plaintiff could sustain his action, assessed the damages. This award was sanctioned by the Court. Under the circumstances of this case, at least as great a weight of authority belongs to it as if the decision had been made by a court on the points involved. The case presented by the complainants is much stronger than Chadwick's, and if he was entitled to reparation for the injury done, no doubt can exist of the complainants' right.

In the extension of the national road through the State of Ohio, a free bridge was thrown across a stream by the side of a toll bridge, which had some ten or fifteen years of its charter to run. The new bridge did not in the least obstruct the passage over the old one, and it was contended that, as no exclusive right was given under the first grant, the owner of the toll bridge was entitled to no compensation. It was said on that occasion, as it has been urged on this, that the right was given subject to the discretion of the Legislature as to a subsequent grant, and that the new bridge could not be objected to by the first grantee, whether it was built under the authority of the State or federal government. This course of reasoning influenced a decision against the claimant in the first instance, but a reconsideration of his case, and a more thorough investigation of it, induced the proper authority to reverse the decision, and award an indemnity for the injury done. The value of the charter was estimated, and a just compensation was made. This, it is true, was not

a judicial decision, but it was a decision of the high functionaries of the government, and is entitled to respect. It was dictated by that sense of justice which should be felt on the bench, and by every tribunal having the power to act upon private rights.

It is contended by the respondents' counsel that there was not only no exclusive right granted in the complainants' charter beyond the timbers of the bridge, but the broad ground is assumed that the Legislature had no power to make such a grant, that they cannot grant any part of the eminent domain which shall bind a subsequent Legislature. And a number of authorities were cited to sustain their position: 1 Vattell ch. 9, sec. 101; 4 Litt.R. 327; Domat, Book 1, tit. 6, sec. 1, 17 Vin. 88, Chit. on Prer. 81; 10 Price 350; Puff.

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ch. 5, sec. 7, 5 Cowen 558, 19 U. S. 6 Wheat. 593; 20 Johns.R. 25; Hargrave's Law Tracts 36; 4 Gill & Johns. 1.

If this doctrine be sustainable as applied to this case, it is not perceived why an exception should be made in favor of the plaintiffs within the timbers of their bridge. It is admitted that their grant is good to this extent, and if the Legislature may grant a part of the eminent domain to this extent, why may it not go beyond it? If it may grant any part of the eminent domain, must not the extent of the grant be fixed at its discretion? In what other mode can it be determined, than by a judicial construction of the grant?

Acts of incorporation, when granted on a valuable consideration, assume the nature of contracts, and vested rights under them are no more subject to the legislative power than any other vested rights. In granting the charter to the Charles River Bridge Company, the Legislature did not divest itself of the power to grant similar charters. But the thing granted passed to the grantee, and can no more be resumed by the Legislature than it can resume the right to a tract of land which has been granted. When land is granted, the State can exercise no acts of ownership over it unless it be taken for public use, and the same rule applies to a

grant for a bridge, a turnpike-road, or any other public improvement. It would assume a bold position to say that a subsequent Legislature may resume the ownership of a tract of land which had been granted at a preceding session, and yet the principle is the same in regard to vested rights under an act of incorporation. By granting a franchise, the State does not divest itself of any portion of its sovereignty, but to advance the public interests, one or more individuals are vested with a capacity to exercise the powers necessary to attain the desired object. In the case under consideration, the necessary powers to construct and keep up the Charles River Bridge were given to Thomas Russell and his associates. This did not withdraw the bridge from the action of the State sovereignty any more than it is withdrawn from land which it has granted. In both cases, the extent of the grant may become a question for judicial investigation and decision, but the rights granted are protected by the law.

It is insisted that as the complainants accepted the extension of their charter in 1792, under an express assertion of right by the Legislature to make new grants at its discretion, they cannot now object to the respondents' charter. In the acceptance of the extended charter, the complainants are bound only by the provisions of that

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charter. Any general declarations, which the Legislature may have made as regards its power to grant charters could have no more bearing on the rights of the complainants than on similar rights throughout the state. There was no reservation of this power in the prolonged charter, nor was there any general enactment on the subject. Of course, the construction of the charter must depend upon general and established principles.

It has been decided by the supreme Court of New York that, unless the act making the appropriation of private property for public use contain a provision of indemnity, it is void. Where property is taken under great emergencies by an officer of the government, he could hardly be considered, I should suppose, a trespasser though he does not pay for the property at the time it is taken. There

can be no doubt that a compensation should be provided for in the same act which authorizes the appropriation of the property, or in a contemporaneous act. If, however, this be omitted, and the property be taken, the law unquestionably gives a remedy adequate to the damages sustained. No government which rests upon the basis of fixed laws, whatever form it may have assumed or wherever the sovereignty may reside, has asserted the right or exercised the power of appropriating private property to public purposes without making compensation.

In the 4th section of the act to establish the Warren Bridge, there is a provision that the corporation shall make compensation for any real estate that may be taken for the use of the bridge. The property of the complainants which was appropriated under the new charter cannot strictly be denominated real estate, and consequently this special provision does not reach their case. In this respect, the law must stand as though no such provision had been made. But was the complainants' property appropriated, under the charter granted to the respondents, for particular purposes? If the new bridge were deemed necessary by the Legislature to promote the general convenience, and the defendants were consequently authorized to construct it, and a part of the plaintiffs' franchise were granted to the defendants, it was an appropriation of private property for public use. It was as much an appropriation of private property for public use as would have been an appropriation of the ground of an individual for a turnpike or a railroad authorized by law.

By the charter of the Warren Bridge, as soon as the company should be reimbursed the money expended in the construction of the bridge, the expenses incurred in keeping it up, and five percent

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interest per annum on the whole amount, the bridge was to become the property of the state, and, whether these sums should be received or not, it was to become public property in six years from the time it was completed. The cost of construction, and the expenses, together with the five percent interest, have been reimbursed, and, in addition, a large sum has been received by the State from the

tolls of this bridge. But it is now, and has been since March last, it is admitted, a free bridge.

In granting the charter of the Warren Bridge, the Legislature seem to recognise the fact that they were about to appropriate the property of the complainants for public uses, as they provide that the new company shall pay annually to the college, in behalf of the old one, 100. By this provision, it appears that the Legislature has undertaken to do what a jury of the country only could constitutionally do -- assess the amount of compensation to which the complainants are entitled. Here, then, is a law which not only takes away the property of the complainants, but provides, to some extent, for their indemnity. Whether the complainants have availed themselves of this provision or not does not appear, nor is it very material. The law in this respect does not bind them, and they are entitled to an adequate compensation for the property taken. These considerations belong to the case as it arises under the laws and Constitution of Massachusetts.

The important inquiry yet remains whether this Court can take jurisdiction in the form in which the case is presented. The jurisdiction of this Court is resisted on two grounds. In the first place, it is contended that the Warren Bridge has become the property of the state, and that the defendants have no longer any control over the subject, and also that the Supreme Court of Massachusetts have no jurisdiction over trusts.

The chancery jurisdiction of the Supreme Court of Massachusetts is admitted to be limited, but they are specially authorized, in cases of nuisances, to issue injunctions, and where this ground of jurisdiction is sustained, all the incidents must follow it. If the law incorporating the Warren Bridge Company was unconstitutional on the ground that it appropriated to public use the property of the complainants without making compensation, can there be any doubt that the Supreme Court of Massachusetts had jurisdiction of the case? And having jurisdiction, is it not clear that the whole matter in controversy may be settled by a decree that the defendants shall

account to the complainants for moneys received by them after they had notice of the injunction.

It is also insisted that the State is the substantial party to this suit, and, as the Court has no jurisdiction against a sovereign State, that they can sustain no jurisdiction against those who act as agents under the authority of a State. That if such a jurisdiction were asserted by this Court, they would do indirectly, what the law prohibits them from doing directly. In the case of *Osborn v. Bank of the United States,* 9 Wheat. 733, this Court says,

"the Circuit Courts of the United States have jurisdiction of a bill in equity, filed by the Bank of the United States for the purpose of protecting the bank in the exercise of its franchises, which are threatened with invasion and destruction under an unconstitutional State law, and as the State itself cannot be made a defendant, it may be maintained against the officers and agents of the State who are appointed to execute such law."

As regards the question of jurisdiction, this case, in principle, is similar to the one under consideration. Osborn acted as the agent or officer of the State of Ohio in collecting from the bank, under an act of the state, a tax or penalty unconstitutionally imposed, and if, in such a case, jurisdiction could be sustained against the agent of the state, why can it not be sustained against a corporation, acting as agent, under an unconstitutional act of Massachusetts, in collecting tolls which belong to the plaintiffs?

In the second place, it is contended that this Court cannot take jurisdiction of this case under that provision of the federal Constitution which prohibits any State from impairing the obligation of contracts, as the charter of the complainants has not been impaired. It may be necessary to ascertain definitely the meaning of this provision of the Constitution and the judicial decisions which have been made under it.

What was the evil against which the Constitution intended to provide by declaring that no State shall pass any law impairing the obligation of contracts? What is a

contract, and what is the obligation of a contract? A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement, sanctioned by moral and legal principles. The evil which this inhibition on the States was intended to

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prevent is found in the history of our revolution. By repeated acts of legislation in the different states during that eventful period, the obligation of contracts was impaired. The time and mode of payment were altered by law, and so far was this interference of legislation carried that confidence between man and man was well nigh destroyed. Those proceedings grew out of the paper system of that day, and the injuries which they inflicted were deeply felt in the country at the time the Constitution was adopted. The provision was designed to prevent the States from following the precedent of legislation so demoralizing in its effects and so destructive to the commercial prosperity of a country. If it had not been otherwise laid down, in the case of *Fletcher v. Peck,* 6 Cranch 125, I should have doubted whether the inhibition did not apply exclusively to executory contracts. This doubt would have arisen as well from the consideration of the mischief against which this provision was intended to guard as from the language of the provision itself.

An executed contract is the evidence of a thing done, and, it would seem, does not necessarily impose any duty or obligation on either party to do any act or thing. If a State convey land which it had previously granted, the second grant is void, not, it would seem to me, because the second grant impairs the obligation of the first, for, in fact, it does not impair it, but because, having no interest in the thing granted, the State could convey none. The second grant would be void in this country on the same ground that it would be void in England if made by the King. This is a principle of the common law, and is as immutable as the basis of justice. It derives no strength from the above provision of the Constitution, nor does it seem to me to come within the scope of that provision.

When we speak of the obligation of a contract, the mind seems necessarily to refer to an executory contract, to a contract under which something remains to be done and there is an obligation on one or both of the parties to do it. No law of a State shall impair this obligation by altering it in any material part. This prohibition does not apply to the remedy, but to the terms used by the parties to the agreement, and which fix their respective rights and obligations. The obligation, and the mode of enforcing the obligation, are distinct things. The former consists in the acts of the parties, and is ascertained by the binding words of the contract. The other emanates from the lawmaking power, which may be exercised at the discretion of the Legislature, within the prescribed limits of the

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constitution. A modification of the remedy for a breach of the contract does not, in the sense of the Constitution, impair its obligation. The thing to be done and the time of performance remain on the face of the contract in all their binding force upon the parties, and these are shielded by the Constitution from legislative interference.

On the part of the complainants, it is contended that, on the question of jurisdiction, as in reference to any other matter in controversy, the Court must look at the pleadings, and decide the point raised in the form presented. The bill charges that the act to establish the Warren Bridge purports to grant a right repugnant to the vested rights of the complainants, and that it impairs the obligation of the contract between them and the Commonwealth, and, being contrary to the Constitution of the United States, is void. In their answer, the respondents deny that the act creating the corporation of the Warren Bridge, impairs the obligation of any contract set forth in the bill of the complainants. The Court must look at the case made in the bill in determining any questions which may arise, whether they relate to the merits or the jurisdiction of the Court. But, in either case, they are not bound by any technical allegations or responses which may be found in the bill and answer. They must ascertain the nature of the relief sought, and the ground of jurisdiction, from the tenor of the bill.

In this case, the question of jurisdiction under the Constitution is broadly presented, and must be examined free from technical embarrassment. Chief Justice Parker, in the State court, says, in reference to the charter of the complainants,

"the contract of the government is that this right shall not be disturbed or impaired, unless public necessity demand, and if it shall so demand, the grantees shall be indemnified."

Such a contract, he observes,

"is founded upon the principles of our Constitution, as well as natural justice, and it cannot be impaired without a violation of the Constitution of the United States, and I think also it is against the principles of our State Constitution."

In the conclusion of his opinion, Mr. Justice Putam says, in speaking of the defendants' charter,

"it impairs the obligation of the grants before made to the plaintiffs; it takes away their property, for public uses, without compensation, against their consent, and without a provision for a trial by jury; it is therefore void."

Mr. Justice Wilde and Mr. Justice Morton did not consider the

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new charter as having been granted either in violation of the Constitution of the state or of the United States.

In their decree, the Court say

"that no property belonging to the complainants was taken and appropriated to public use, within the terms and meaning of the 10th article of the declaration of rights prefixed to the Constitution of this Commonwealth."

This decree can in no point of view be considered as fixing the construction of the Constitution of Massachusetts as it applies to this case. The decree was entered

pro forma, and is opposed to the opinion of two members of the Court.

But if that Court had deliberately and unanimously decided that the plaintiffs' property had not been appropriated to public use under the Constitution of Massachusetts, still, where the same point becomes important on a question of jurisdiction before this Court, they must decide for themselves. The jurisdiction of this Court could in no respect be considered as a consequence of the decision of the above question by the State court, in whatever way the decree might have been entered. But no embarrassment can arise on this head, as the above decree was made, as a matter of form, to bring the case before this Court.

To sustain the jurisdiction of this Court, the counsel for complainants place great reliance upon the fact that the right, charged to be violated is held directly from the State, and they insist that there is an implied obligation on the State that it will do nothing to impair the grant. And that, in this respect, the complainants' right rests upon very different grounds from other rights in the community not held by grant directly from the State.

On the face of the complainants' grant, there is no stipulation that the Legislature will do nothing that shall injure the rights of the grantees; but it is said that this is implied, and on what ground, does the implication arise? Does it arise from the fact that the complainants are the immediate grantees of the State?

The principle is admitted that the grantor can do nothing that shall destroy his deed, and this rule applies as well to the State as to an individual. And the same principle operates with equal force on all grants, whether made by the State or individuals.

Does an implied obligation arise on a grant made by the State that the Legislature shall do nothing to invalidate the grant, which does not arise on every other grant or deed in the Commonwealth?

The Legislature is bound by the Constitution of the State, and it

cannot be admitted that the immediate grantee of the State has a stronger guarantee for the protection of his vested rights against unconstitutional acts than may be claimed by any other citizen of the State. Every citizen of the State, for the protection of his vested rights, claims the guarantee of the Constitution. This, indeed, imposes the strongest obligation on the Legislature not to violate those rights. Does the Legislature give to its grantee, by virtue of its grant, an additional pledge that it will not violate the Constitution of the State? Such an implication, if it exist, can scarcely be considered as adding anything to the force of the Constitution. But this is not, it is said, the protection which the complainants invoke. In addition to their property's having been taken without compensation, they allege that their charter has been impaired by the Warren Bridge charter, and, on this ground, they ask the interposition of this Court.

The new charter does not purport to repeal the old one, nor to alter it in any material or immaterial part. It does not, then, operate upon the complainants' grant, but upon the thing granted. It has, in effect, taken the tolls of the complainants and given them to the public. In other words, under the new charter, all that is valuable under the charter of the complainants has been appropriated to public use.

It is urged that the Legislature did not intend to appropriate the property of the complainants; that there is nothing in the act of the Legislature which shows an intention, by the exercise of the eminent domain, to take private property for public use, but that, on the contrary, it appears the Warren Bridge charter was granted in the exercise of a legislative discretion, asserted and sustained by a majority of the Legislature.

In this charter, provision is made to indemnify the owners of real estate if it should be taken for the use of the bridge and the new company is required to pay, in behalf of the Charles River Bridge Company, one-half of the annuity to the college.

This would seem to show an intention to appropriate private property, if necessary, for the establishment of the Warren Bridge, and also an intention to indemnify the complainants to some extent for the injury done them. There could have been no

other motive than this in providing that the new company should pay the hundred pounds.

But the Court can only judge of the intention of the Legislature

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by its language, and when, by its act, the franchise of the complainants is taken, and, through the instrumentality of the Warren Bridge Company, appropriated to the public use, it is difficult to say that the Legislature did not intent to do, what in fact it has done. Throughout the argument, the counsel for the complainants have most ably contended that their property had been taken and appropriated to the public use without making compensation, and that the Act was consequently void under the Constitution of Massachusetts.

If this be the character of the Act, if, under its provisions, the property of the complainants has been appropriated to public purposes, it may be important to inquire whether it can be considered as impairing the obligation of the contract within the meaning of the federal Constitution.

That a State may appropriate private property to public use is universally admitted. This power is incident to sovereignty, and there are no restrictions on its exercise except such as may be imposed by the sovereignty itself. It may tax at its discretion, and adapt its policy to the wants of its citizens, and use their means for the promotion of its objects under its own laws.

If an appropriation of private property to public use impairs the obligation of a contract within the meaning of the Constitution, then every exercise of this power by a State is unconstitutional. From this conclusion there is no escape, and whether compensation be made or not cannot vary the result.

The provision is not that no State shall pass a law impairing the obligation of contracts unless compensation be made, but the power is absolutely inhibited to a State. If the act of the State come within the meaning of the provision, the act is void. No condition which may be annexed to it, no compensation that can be

made, can give it validity. It is in conflict with the supreme law of the land, and is therefore a nullity.

Can a State postpone the day fixed in an obligation for payment, or provide that a bond for the payment of money shall be discharged by the payment of anything else than money? This no one will contend can be done, because such an act would clearly impair the obligation of the contract, and no compensation which the State could give would make the act valid.

The question is asked whether the provision implied in the Constitution of Massachusetts that private property may be taken by making compensation is not impliedly incorporated in every

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contract made under it, and whether the obligation of the contract is not impaired when property is taken by the State without compensation?

Can the contract be impaired within the meaning of the federal Constitution when the action of the State is upon the property? The contract is not touched, but the thing covered by the contract is taken under the power to appropriate private property for public use. If taking the property impair the obligation of the contract within the meaning of the Constitution, it cannot be taken on any terms. The provision of the federal Constitution which requires compensation to be made when private property shall be taken for public use acts only upon the officers of the federal government. This case must be governed by the Constitution of Massachusetts.

Can a State in any form exercise a power over contracts which is expressly prohibited by the Constitution of the Union? The parties making a contract may embrace any conditions they please if the conditions do not contravene the law or its established policy. But it is not in the power of a State to impose upon contracts which have been made, or which may afterwards be made, any condition which is prohibited by the federal Constitution. No State shall impair the obligation of contracts. Now, if the act of a State in appropriating private property to public use

come within the meaning of this provision, is not the act inhibited, and consequently void? This point would seem to be too plain for controversy. And is it not equally clear that no provisions contained in the Constitution of a State or in its legislative acts which subject the obligation of a contract to an unconstitutional control of the State can be obligatory upon the citizens of the State? If the State has attempted to exercise a power which the federal Constitution prohibits, no matter under what form the power may be assumed or what specious pretexts may be urged in favor of its exercise, the act is unconstitutional and void.

That a State may take private property for public use is controverted by no one. It is a principle which, from the foundation of our government, has been sanctioned by the practice of the States respectively, and has never been considered as coming in conflict with the federal Constitution.

This power of the State is admitted in the argument, but it is contended that the obligation of the contract has been impaired, as the property of the complainants has been taken without compensation. Suppose the Constitution of Massachusetts provided that no land

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should be sold for taxes without valuation, nor unless it shall sell for two-thirds of its value, due notice being given in some newspaper; and suppose a law of the Legislature should direct land to be sold for taxes without a compliance with these requisites; would this act impair the obligation of the grant by which the land is held within the meaning of the Constitution? The act would be clearly repugnant to the State Constitution, and, consequently, all proceedings under it would be void, but it would not be repugnant to the Constitution of the Union. And how does this case differ, in principle, from the one under consideration? In both cases, the power of the Legislature is unquestionable, but, by the Constitution of the State, it must be exercised in a particular manner, and if not so exercised, the act is void. Now if, in either case, the obligation of the contract under which the property is held is impaired, then it must follow that every act of a State Legislature which affects the right of private property, and which is repugnant to the State

Constitution, is a violation of the federal Constitution.

Can the construction of the federal Constitution depend upon a reference to a State Constitution, and by which the act complained of is ascertained to be legal or illegal? By this doctrine, the act, if done in conformity to the State Constitution, would be free from objections under the federal Constitution, but if this conformity do not exist, then the act would not be free from such objection. This, in effect, would incorporate the State Constitution in, and make it a part of, the federal Constitution. No such rule of construction exists.

Suppose the Legislature of Massachusetts had taken the farm of the complainants for the use of a poor-house or an asylum for lunatics without making adequate compensation, or if, in ascertaining the damages, the law of the State had not been strictly pursued, could this Court interpose its jurisdiction, through the Supreme Court of the State, and arrest the power of appropriation? In any form in which the question could be made, would it not arise under the Constitution of the State, and be limited between citizens of the same State to the local jurisdiction? Does not the State Constitution, which declares that private property shall not be taken for public purposes without compensation, afford a safe guarantee to the citizens of the State against the illegal exercise of this power, a power essential to the wellbeing of every sovereign State, and which is always exercised under its own rules?

Had an adequate compensation been made to the complainants,

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under the charter of the Warren Bridge, would this question have been raised? Can anyone doubt that it was in the power of the Legislature of Massachusetts to take the whole of the complainants' bridge for public use by making compensation? Is there any power that can control the exercise of this discretion by the Legislature? I know of none, either in the State or out of it, but it must be exercised in subordination to the provisions of the Constitution of the State. And if it be not so exercised, the judicial authority of the State only, between its own

citizens, can interpose and prevent the wrong or repair it in damages.

In all cases where private property is taken by a State for public use, the action is on the property, and the power, if it exist in the State, must be above the contract. It does not act on the contract, but takes from under it vested rights. And this power, when exercised by a State, does not, in the sense of the federal Constitution, impair the obligation of the contract. Vested rights are disturbed, and compensation must be made, but this is a subject which belongs to the local jurisdiction. Does this view conflict with the established doctrine of this Court? A reference to the points adjudged will show that it does not.

The case of *Satterlee v. Mathewson,* 2 Pet. 380, presented the following facts. Satterlee was the tenant of Mathewson, who claimed, at the time of the lease, under a Connecticut title, in Luzerne county, Pennsylvania. Afterwards, Satterlee purchased a Pennsylvania title for the same land. An ejectment was brought by Mathewson for the land, and the Court of Common Pleas decided that, as Satterlee was the tenant of the plaintiff, he could not set up a title against his landlord. On a writ of error, this judgment was reversed by the Supreme Court on the ground that the relation of landlord and tenant could not exist under a Connecticut title. Shortly afterwards, the Legislature of Pennsylvania passed a law that, under such a title, the relation of the landlord and tenant should exist, and the Supreme Court of the State having decided that this act was valid, the question was brought before this Court by writ of error. In their opinion, the Court say:

"We come now to the main question in the cause. Is the act which is objected to repugnant to any provision of the Constitution of the United States? It is alleged to be particularly so because it impairs the obligation of the contract between the State of Pennsylvania and the plaintiff, who claims under her grant, &c.;"

The grant vested a fee simple in the grantee, with all the rights,

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privileges, &c.;

"Were any of these rights disturbed or impaired by the act under consideration? It does not appear from the record that they were in any instance denied, or ever drawn in question."

The objection most pressed upon the Court was that the effect of this act was to divest rights which were vested by law in Satterlee. "There is certainly no part of the Constitution of the United States," the Court say,

"which applies to a State law of this description, nor are we aware of any decision of this or any Circuit Court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of the contract."

And the Court add that in the case of Fletcher v. Peck, it is nowhere intimated that a State statute, which divests a vested right, is repugnant to the Constitution of the United States. There is a strong analogy between this case and the one under consideration.

The effect of the act of Pennsylvania was to defeat the title of Satterlee founded upon the grant of the State. It made a title valid which, in that very case, had been declared void by the Court, and which gave the right to Mathewson, in that suit, against the prior grant of the State. And this Court admit that a vested right was divested by the act, but they say it is not repugnant to the federal Constitution. The act did not purport to effect the grant, which was left, with its covenants, untouched, but it created a paramount right, which took the land against the grant.

In the case under consideration, the Warren Bridge charter does nor purport to repeal or in any way affect the complainants' charter. But, like the Pennsylvania act in its effects, it divested the vested rights of the complainants. Satterlee was not the immediate grantee of the State, but that could not affect the principle involved in the case. He claimed under the grant of the State, and the fact that there was an intermediate grantee between him and the State could not weaken his right.

In the case of *Fletcher v. Peck,* 6 Cranch 87, the Legislature of Georgia attempted to annul its own grant. The law under which the first grant was issued

was attempted to be repealed, and all grants under it were declared to be null and void by the second act. Here, the State acted directly upon the contract, and the case comes within the rule that, to impair the obligation of the contract, the State law must act upon the contract.

The act of the Legislature complained of in the case of *Sturges v. Crowninshield,* 4 Wheat. 122, had a direct bearing upon the

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contract. The question was whether, under the bankrupt law of of New York, a debtor was discharged from his obligation by a surrender of his property. And so, in the case of *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, the question was whether the Legislature could, without the consent of the corporation, alter its charter in a material part, it being a private corporation.

In the case of *Terrett v. Taylor,* 9 Cranch 52, the uncontroverted doctrine is asserted that a Legislature cannot repeal a statute creating a private corporation, and thereby destroy vested rights.

The case of *Green v. Biddle,* 8 Wheat. 1, has also been cited to sustain the jurisdiction of the Court in this case. The Court decided in that case that the compact, which guarantied to claimants of land lying in Kentucky under titles derived from Virginia their rights as they existed under the laws of Virginia, prohibited the State of Kentucky from changing those rights. In other words, that Kentucky could not alter the compact. And when this Court were called on to give effect to the act of Kentucky, which they considered repugnant to the compact, they held the provisions of the compact paramount to the act.

After a careful examination of the questions adjudged by this Court, they seem not to have decided in any case that the contract is impaired within the meaning of the federal Constitution where the action of the State has not been on the contract. That though vested rights have been divested, under an act of a State Legislature, they do not consider that as impairing the grant of the State under which the property is held. And this, it appears, is the true distinction, and the one which has

been kept in view in the whole current of adjudications by this Court under the above clause of the Constitution.

Had this Court established the doctrine that, where an act of a State Legislature affected vested rights held by a grant from the State, the act is repugnant to the Constitution of the United States, the same principle must have applied to all vested rights. For, as has been shown, the Constitution of a State gives the same guarantee of their vested rights to all its citizens, as to those who claim directly under grant from the State. And who can define the limit of a jurisdiction founded on this principle? It would necessarily extend over the legislative action of the State, and control to a fearful extent the exercise of their powers.

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The spirit of internal improvement pervades the whole country. There is perhaps no State in the Union where important public works such as turnpike roads, canals, railroads, bridges, &c.;,are not either contemplated or in a state of rapid progression. These cannot be carried on without the frequent exercise of the power to appropriate private property for public use. Vested rights are daily divested by this exercise of the eminent domain. And if, in all these cases, this Court can act as a court of supervision for the correction of errors, its power may be invoked in numberless instances. If to take private property impairs the obligation of the contract under which it is held, this Court may be called to determine in almost every case where the power is exercised, as well where compensation is made as where it is not made. For if this Court can take jurisdiction on this ground, every individual whose property has been taken has a constitutional right to the judgment of this Court whether compensation has been made in the mode required by the Constitution of the State.

In ascertaining the damages, the claimant has a right to demand a jury, and that the damages shall be assessed in strict conformity to the principles of the law. To revise these cases would carve out for this Court a new jurisdiction not contemplated by the Constitution and which cannot be safely exercised.

These are considerations which grow out of our admirable system of government that should lead the judicial tribunals both of the federal and State governments to mutual forbearance, in the exercise of doubtful powers. The boundaries of their respective jurisdictions can never, perhaps, be so clearly defined, on certain questions, as to free them from doubt. This remark is peculiarly applicable to the federal tribunals, whose powers are delegated, and consequently limited. The strength of our political system consists in its harmony, and this can only be preserved by a strict observance of the respective powers of the State and federal government. Believing that this Court has no jurisdiction in this case, although I am clear that the merits are on the side of the complainants, I am in favor of dismissing the bill for want of jurisdiction.

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STORY, Justice, dissenting.

This cause was argued at a former term of this Court, and, having been then held under advisement by the Court for a year, was, upon a difference of opinion among the judges, ordered to be again argued, and has accordingly been argued at the present term.

The arguments of the former term were conducted with great learning, research and ability, and have been renewed with equal learning, research and ability at the present term. But the grounds have been, in some respects, varied, and new grounds have been assumed which require a distinct consideration. I have examined the case with the most anxious care and deliberation, and with all the lights which the researches of the years intervening between the first and last argument have enabled me to obtain, and I am free to confess that the opinion which I originally formed after the first argument is that which now has my most firm and unhesitating conviction. The argument at the present term, so far from shaking my confidence in it, has at every step served to confirm it.

In now delivering the results of that opinion, I shall be compelled to notice the principal arguments urged the other way, and as the topics discussed and the

objections raised have assumed various forms, some of which require distinct, and others the same answers, it will be unavoidable that some repetitions should occur in the progress of my own reasoning. My great respect for the counsel who have pressed them and the importance of the cause will, I trust, be thought a sufficient apology for the course which I have, with great reluctance, thought it necessary to pursue.

Some of the questions involved in the case are of local law. And here, according to the known principles of this Court, we are bound to act upon that law, however different from, or opposite to, the jurisprudence of other States, it either is or may be supposed to be. Other questions seem to belong exclusively to the jurisdiction of the State tribunals as they turn upon a conflict, real or supposed, between the State Constitution and the State laws. The only question over which this Court possesses jurisdiction in this case (it being an appeal from a State court, and not from the Circuit Court) is, as has been Stated at the bar, whether the obligation of any contract, within the true intent and meaning of the Constitution of the United States, has been violated as set forth in the bill. All the other points argued, are before us only as they preliminaries and incidents to this.

A question has, however, been made as to the jurisdiction of this Court to entertain the present writ of error. It has been argued that this bridge has now become a free bridge, and is the property

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of the State of Massachusetts; that the State cannot be made a party defendant to any suit to try its title to the bridge; and that there is no difference between a suit against the State directly and against the State indirectly, through its servants and agents. And in further illustration of this argument, it is said that no tolls can be claimed in this case under the notion of an implied trust, for the State court has no jurisdiction in equity over implied trusts, but only over express trusts, and if this Court has no jurisdiction over the principal subject matter of the suit, the title to the bridge, it can have none over the tolls, which are but incidents.

My answer to this objection will be brief. In the first place, this is a writ of error from a State court, under the 25th section of the Judiciary Act of 1789, ch. 20, and in such a case, if there is drawn in question the construction of any clause of the Constitution of the United States, and the decision of the State court is against the right or title set up under it, this Court has a right to entertain the suit and decide the question, whoever may be the parties to the original suit, whether private persons, or the State itself. This was decided in the case of *Cohens v. State of Virginia,* 6 Wheat. 264. In the next place, the State of Massachusetts is not a party on the record in this suit, and therefore the constitutional prohibition of commencing any suit against a State does not apply, for that clause of the Constitution is strictly confined to the parties on the record. So it was held in *Osborn v. Bank of the United States,* 9 Wheat. 738, and in the *Commonwealth Bank of Kentucky v. Wister,* 2 Pet. 319, 27 U. S. 323 . In the next place, it is no objection to the jurisdiction even of the Circuit Courts of the United States that the defendant is a servant or agent of the State, and the act complained of is done under its authority, if it be tortious and unconstitutional. So it was held in the cases last cited. In the next place, this Court, as an appellate Court, has nothing to do with ascertaining the nature or extent of the jurisdiction of the State court over any persons, or parties, or subject matters, given by the State laws, or as to the mode of exercising the same, except so far as respects the very question arising under the 25th section of the Act of 1789, ch. 20.

There are but few facts in this case which admit of any controversy. The Legislature of Massachusetts, by an act passed on the 9th of March 1785, incorporated certain persons, by the name of the Proprietors of the Charles River Bridge, for the purpose of building

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a bridge over Charles River between Boston and Charlestown, and granted to them the exclusive toll thereof for forty years from the time of the first opening of the bridge for passengers. The bridge was built and opened for passengers in June, 1786. In March, 1792, another corporation was created by the Legislature for the purpose of building a bridge over Charles River, from the westerly part of

Boston to Cambridge, and on that occasion, the Legislature, taking into consideration the probable diminution of the profits of the Charles River Bridge, extended the grant of the proprietors of the latter bridge to seventy years from the first opening of it for passengers. The proprietors have, under these grants, ever since continued to possess and enjoy the emoluments arising from the tolls taken for travel over the bridge, and it has proved a very profitable concern.

In March, 1828, the Legislature created a corporation called the Proprietors of the Warren Bridge for the purpose of erecting another bridge across Charles River between Boston and Charlestown. The termini of the last bridge (which has been since erected, and was, at the commencement of this suit, in the full receipt of toll, and is now a free bridge) are so very near to that of Charles River Bridge that. for all practical purposes, they may be taken to be identical. The same travel is accommodated by each bridge, and necessarily approaches to a point, before it reaches either, which is nearly equidistant from each. In short, it is impossible, in a practical view, and so was admitted as the argument, to distinguish this case from one where the bridges are contiguous from the beginning to the end.

The present bill is filled by the proprietors of Charles River Bridge against the proprietors of Warren Bridge for an injunction and other relief founded upon the allegation that the erection of the Warren Bridge, under the circumstances, is a violation of their chartered rights, and so is void by the Constitution of Massachusetts, and by the Constitution of the United States. The judges of the Supreme Judicial Court of Massachusetts were (as is well known) equally divided in opinion upon the main points in the cause, and therefore, a *pro forma* decree was entered with a view to bring before this Court the great and grave question whether the Legislature of Massachusetts, in the grant of the charter of the Warren Bridge, has violated the obligation of the Constitution of the United States? If the Legislature has done so, by mistake or inadvertence, I am quite sure that it will be the last to insist upon maintaining its own act. It has that stake in the Union, and in the maintenance of the

constitutional rights of its own citizens, which will, I trust, ever be found paramount to all local interests, feelings and prejudices, to the pride of power, and to the pride of opinion.

In order to come to any just conclusion in regard to the only question which this Court, sitting as an appellate Court, has a right to entertain upon a writ of error to a State court, it will be necessary to ascertain what are the rights conferred on the proprietors of Charles River Bridge by the act of incorporation. The act is certainly not drawn with any commendable accuracy. But it is difficult, upon any principles of common reasoning, to mistake its real purport and object. It is entitled

"an act for incorporating certain persons for the purpose of building a bridge over Charles River between Boston and Charlestown, and supporting the same during the term of forty years."

Yet, it nowhere, in terms, in any of the enacting clauses, confers any authority upon the corporation thus created to build any such bridge, nor does it State in what particular place the bridge shall commence or terminate on either side of the river, except by inference and implication from the preamble. I mention this at the threshold of the present inquiry as an irresistible proof that the Court must, in the construction of this very act of incorporation, resort to the common principles of interpretation, and imply and presume things which the Legislature has not expressly declared. If the Court were not at liberty so to do, there would be an end of the cause.

The act begins by reciting that

"the erecting of a bridge over Charles River, in a place where the ferry between Boston and Charlestown is now kept, will be of great public utility, and Thomas Russell and others having petitioned, &c.;, for the act of incorporation, to empower them to build said bridge, and many other persons, under the expectation of such an act, have subscribed to a fund for executing and completing the aforesaid purpose."

It then proceeds to enact that the proprietors of the fund or stock shall be a corporation under the name of the Proprietors of Charles River Bridge, and it gives them the usual powers of corporations, such as the power to sue and be sued, &c.; In the next section, it provides for the organization of the corporation, for choosing officers, for establishing rules and regulations for the corporation, and for effecting, completing and executing the purpose aforesaid. In the next section, "for the purpose of *reimbursing* the said proprietors the money expended in building and supporting the said bridge," it provides that a

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toll be, and thereby is granted and established, for the *sole benefit of the proprietors,* for *forty* years from the opening of the bridge for travel, according to certain specified rates. In the next section, it provides that the bridge shall be well built, at least forty feet wide, of sound and suitable materials, with a convenient draw or passageway for ships and vessels, &c.;, and

"that the same shall be kept in *good, safe* and *passable repair* for the term aforesaid, and at the end of the said term, the *said bridge shall be left in like repair.* "

Certain other provisions are also made as to lighting the bridge, erecting a toll-board, lifting the draw for all ships and vessels, " *without toll or pay,* " &c.; The next section declares that after, the tolls shall commence, the proprietors

" *shall annually pay to Harvard College or University,* the sum of two hundred pounds, during the said term of forty years, and, at the end of the said term, the said bridge shall revert to, and be the property of the Commonwealth, saving to the said college or university a reasonable and annual compensation for the annual income of the ferry, which they might have received had not such bridge been erected."

The next and last section of the act declares the act void unless the bridge should be built within three years from the passing of the act.

Such is the substance of the charter of incorporation which the Court is called upon to construe. But, before we can properly enter upon the consideration of this subject, a preliminary inquiry is presented as to the proper rules of interpretation applicable to the charter. Is the charter to receive a strict or a liberal construction? Are any implications to be made beyond the express terms? And if so, to what extent are they justifiable by the principles of law? No one doubts that the charter is a contract and a grant, and that it is to receive such a construction as belong to contracts and grants, as contradistinguished from mere laws. But the argument has been pressed here, with unwonted earnestness (and it seems to have had an irresistible influence elsewhere) that this charter is to be construed as a royal grant, and that such grants are always construed with a stern and parsimonious strictness. Indeed, it seems tacitly conceded that, unless such a strict construction is to prevail (and it is insisted on as the positive dictate of the common law), there is infinite danger to the defence assumed on behalf of the Warren Bridge proprietors. Under such circumstances, I feel myself constrained to go at large into the doctrine of the common law in respect to royal grants, because I cannot help thinking that, upon this point, very great

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errors of opinion have crept into the argument. A single insulated position seems to have been taken as a general axiom. In my own view of the case, I should not have attached so much importance to the inquiry, but it is now fit that it should be sifted to the bottom.

It is a well known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the King, for, where there is any doubt, the construction is made most favorably for the King, and against the grantee. The rule is not disputed, but it is a rule of very limited application. To what cases does it apply? To such cases only where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted, so that a choice is fairly open, and either may be adopted, without any violation of the apparent objects of the grant. If the King's grant admits of two

interpretations, one of which will make it utterly void and worthless and the other will give it a reasonable effect, then the latter is to prevail, for the reason (says the common law) "that it will be more for the benefit of the subject, and the honor of the King, which is to be more regarded than his profit." Com.Dig.Grant, G. 12; 9 Co.R. 131a; 10 Co.R. 67b; 6 Co.R. 6. And in every case, the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the King. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with in all cases where the grant appears upon its face to flow not from the solicitation of the subject, but from the special grace, certain knowledge, and mere motion of the Crown, or, as it stands in the old royal patents, " *ex speciali gratia, certa scientia, et ex mero motu regis* " (*See Arthur Legat's Case,* 10 Co.R. 109, 112b; *Sir John Moulin's Case,* 6 Co.R. 6; 2 Black.Com. 347; Com.Dig.Grant, G. 12), and these words are accordingly inserted in most of the modern grants of the Crown in order to exclude any narrow construction of them. So the Court admitted the doctrine to be in *Attorney General v. Lord Eardly,* 8 Price 39. But what is a most important qualification of the rule, it never did apply to grants made for a valuable consideration by the Crown; for in such grants, the same rule has always prevailed as in cases between subjects. The mere grant of a bounty

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of the King may properly be restricted to its obvious intent. But the contracts of the King for value are liberally expounded that the dignity and justice of the government may never be jeoparded by petty evasions and technical subtleties.

I shall not go over all the cases in the books, which recognise these principles, although they are abundant. Many of them will be found collected in Bacon's Abridgment, Prerogative, F. 2, p. 602-4; in Comyn's Digest, Grant, G. 12; and in Chitty on the Prerogatives of the Crown, ch. 16, s. 3. But I shall dwell on some of the more prominent, and especially on those which have been mainly relied on by the defendants, because, in my humble judgment, they teach a very different doctrine from what has been insisted on. Lord Coke, in his Commentary on the

Statute of Quo Warranto, 18 Edw. I., makes this notable remark:

"Here is an excellent rule for construction of the King's patent, not only of liberties, but of lands, tenements and other things which he may lawfully grant that they have no strict or narrow interpretation, for the overthrowing of them, *sed secundum eundum plenitudinem judicentur,* that is, to have a liberal and favorable construction, for the making them available in law, *usque ad plenitudinem,* for the honor of the King."

Surely, no lawyer would contend for a more beneficent or more broad exposition of any grant whatsoever than this.

So, in respect to implications, in cases of royal grants, there is not the slightest difficulty, either upon authority or principle, in giving them a large effect so as to include things which are capable of being the subject of a distinct grant. A very remarkable instance of this sort arose under the Statute of Prerogative (17 Edw. II., Stat. 2, c. 15), which declared that, when the King granteth to any a manor or land, with the appurtenances, unless he makes express mention in the deed, in writing, of advowsons, &c.;, belonging to such manor, then the King reserveth to himself such advowsons. Here, the statute itself prescribed a strict rule of interpretation. [Footnote 1] Yet, in *Whistler's Case,* 10 Co.R. 63, it was held that a royal grant of a manor, with the appurtenances, in as ample a manner as it came to the King's hands, conveyed an advowson, which was appendant to the manor, by implication from the words actually used, and the apparent intent. This was certainly a very strong case of raising an implication from words susceptible of different interpretations, where the statute had furnished a positive rule for a narrow construction, excluding the

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advowson. So it has been decided that, if the King grants a messuage and all lands *spectantes, aut cum eo dismissas,* lands which have been enjoyed with it for a convenient time, pass. 2 Rolle.Abridg. 186, c. 25, 30; Cro.Car. 169; Chitty on the Prerogatives, ch. 16, s. 3, p. 393; Com.Dig.Grant, G. 5. In short, wherever the

intent from the words is clear, or possesses a reasonable certainty, the same construction prevails in Crown grants as in private grants, especially, where the grant is presumed to be from the voluntary bounty of the Crown, and not from the representation of the subject.

It has been supposed in the argument that there is a distinction between grants of lands held by the King and grants of franchises which are matters of prerogative, and held by the Crown for the benefit of the public, as flowers of prerogative. I know of no such distinction, and Lord Coke, in the passage already cited, expressly excludes it, for he insists that the same liberal rule of interpretation is to be applied to cases of grants of liberties as to cases of grants of lands.

I am aware that Mr. Justice Blackstone, in his Commentaries, 2 Black.Com. 347, has laid down some rules apparently varying from what has been Stated. He says,

"the manner of granting by the King does not more differ from that by a subject than the construction of his grants when made. 1. A grant made by the King, at the suit of the grantee, shall be taken most beneficially for the King and against the party, whereas, the grant of a subject is construed most strongly against the grantor, &c.; 2. A subject's grant shall be construed to include many things besides what are expressed if necessary for the operation of the grant; therefore, in a private grant of the profits of land for one year, free ingress, egress and regress, to cut and carry away those profits, are also inclusively granted, &c.; But the King's grant shall not inure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing, for such a grant shall not inure to make him a denizen that so he may be capable to take by the grant. Now in relation to the last position, there is nothing strange or unnatural in holding that a Crown grant shall not inure to a totally different purpose from that which is expressed, or to a double intent, when all its terms are satisfied by a single intent. It is one thing to grant land to an alien, and quite a different thing to make him a denizen. The one is not an incident to the other, nor does it naturally flow from it. The King may be willing to grant land to an alien, when

he may not be willing to give him all the privileges of a subject. It is well known that an alien may take land by grant, and may hold it against every person but the King, and it does not go to the latter until office found, so that, in the meantime, an alienation by the alien will be good. A grant, therefore, to an alien is not utterly void; it takes effect, though it is not indefeasible. And, in this respect, there does not seem any difference between a grant by a private person and by the Crown, for the grant of the latter takes effect, though it is liable to be defeated. *See* Com.Dig. Alien, c. 4, 1 Leon. 47, 4 Leon. 82. The question in such cases is not whether there may not be implications in a Crown grant, but whether a totally different effect shall be given to a Crown grant from what its terms purport. The same principle was acted upon in *Englefield's Case,* 7 Co.R. 14a. There, the Crown had demised certain lands, which were forfeited by a tenant for life, by attainder, to certain persons for forty years, and the Crown, being entitled to a condition which would defeat the remainder over after the death of the person attainted, tendered performance of the condition to the remainderman, who was a stranger to the demise, and he contended that, by the demise, the condition was suspended. And it was held that the demise should not operate to a double intent, *viz.,* to pass the term, and also, in favor of a stranger, to suspend the condition, for (it was said)"

"the grant of the Crown shall be taken according to the express intention comprehended in the grant, and shall not extend to any other thing, by construction or implication, which doth not appear by the grant that the intent did extend to,"

though it might have been different in the case of a subject.

In regard to the other position of Mr. Justice Blackstone, it may be supposed that he means to assert that, in a Crown grant of the profits of land for a year, free ingress, egress and regress to take the profits are not included by implication, as they would be in a subject's grant. If such be his meaning, he is certainly under a mistake. The same construction would be put upon each, for otherwise nothing would pass by the grant. It is a principle of common sense, as well as of law, that, when a thing is granted, whatever is necessary to its enjoyment is granted also. It

is not presumed that the King means to make a void grant; and therefore, if it admits of two constructions, that shall be followed which will secure its validity and operation. In Comyn's Digest (Com.Dig.Grant, E. 11, Co.Litt. 56a), a case is cited from the Year Book, 1 Hen. 4, 5 (it should be 6a) that if there be a grant of land, *cum pertinentiis,*

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to which common is appendant, the common passes as an incident, even though it be the grant of the King. So, it is said, in the same case, if the King grant to me the foundation of an abbey, the corody passes. So, if the King grant to me a fair, I shall have a Court of Piepoudre, as incident thereto. And there are other cases in the books to the same effect. *See* Bac.Abridg. Prerogative, F. 2, p. 602; Comyn's Dig.Grant, G. 12; *Lord Chandos' Case,* 6 Co.R. 55; *Sir Robert Atkyn's Case,* 1 Vent. 399, 409; 9 Co.R. 29-30. Finch, in his Treatise on the Law, contains nothing beyond the common authorities. Finch's Law, b. 2, ch. 2, p. 24 (ed. 1613); Cro.Eliz. 591 per Popham, C.J., 17 Vin.Abr.Prerogative, O. c. pl. 13, Com.Dig.Franchise, C. 2; Inst. 282.

Lord Coke, after stating the decision of *Sir John Moulin's Case,* 6 Co.R. 6, adds these words:

"Note the gravity of the ancient sages of the law, to construe the King's grants beneficially for his honor, and not to make any strict or literal construction in subversion of such grants."

This is an admonition, in my humble judgment, very fit to be remembered and acted upon by all judges who are called upon to interpose between the government and the citizen in cases of public grants. *Legat's Case,* 10 Co.R. 109, contains nothing that in the slightest degree impugns the general doctrine here contended for. It proceeded upon a plain interpretation of the very words of the grant, and no implications were necessary or proper to give it its full effect.

The case of the *Royal Fishery of the Banne,* decided in Ireland, in the Privy Council, in 8 James I. (Davies 149), has been much relied on to establish the point

that the King's grant shall pass nothing by implication. That case, upon its actual circumstances, justifies no such sweeping conclusion. The King was owner of a royal fishery in gross (which is material), on the river Banne, in navigable waters, where the tide ebbed and flowed, about two leagues from the sea, and he granted to Sir R. M'D. the territory of Rout, which is parcel of the county of Antrim, and adjoining to the river Banne, in that part where the said fishery is, the grant containing the following words,

" *omnia castra, messuagia, &c.;, piscarias, piscationes, aquas, aquarum cursus, &c.;, ac omnia alia hereditamenta in vel infra dictum territorium de Rout, in comitatu Antrim, exceptis, et ex hac concessione nobis heredibus et successoribus nostris reservatis tribus partibus piscationibus fluminis de Banne.* "

The question was whether the grant passed the royal fishery in the

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Banne to the grantee? And it was held that it did not, first, because the river Banne, so far as the sea ebbs and flows, is a royal navigable river, and the fishery there a royal fishery; secondly, because no part of this royal fishery could pass by the grant of the land adjoining, and by the general grant of all the fisheries (in or within the territory of Rout), for this royal fishery is not appurtenant to the land, but is a fishery in gross, and parcel of the inheritance of the Crown itself, and general words in the King's grant shall not pass such special royalty, which belongs to the Crown by prerogative; thirdly, that, by the exception in the grant of three parts of this fishery, the other fourth part of this fishery did not pass by this grant, for the King's grant shall pass nothing by implication, and for this was cited 2 Hen. 7, 13.

Now there is nothing in this case which not easily explicable upon the common principles of interpretation. The fishery was a royal fishery in gross, and not appurtenant to the territory of Rout. *Ward v. Cresswell,* Willes' R. 265. The terms of the grant were of all fisheries in and within this territory, and this excluded any fishery not within it, or not appurtenant to it. The premises, then, clearly did not, upon any just construction, convey the fishery in question, for it was not within the

territory. The only remaining question was whether the exception of three-quarters would, by implication, carry the fourth part which was not excepted, that is, whether terms of exception in a Crown grant should be construed to be terms of grant, and not of exception. It is certainly no harsh application of the common rules of interpretation to hold that an implication which required such a change in the natural meaning of the words ought not to be allowed to the prejudice of the Crown. *Non constat* that the King might not have supposed, at the time of the grant that he was owner of three parts only of the fishery, and not of the fourth part. This case of the Fishery of the Banne was cited and commented on by Mr. Justice Bayley in delivering the opinion of the court in the case of the *Duke of Somerset v. Fogwell,* 5 Barn. & Cres. 875, 885, and the same view was taken of the grounds of the decision, which has been here Stated, the learned judge adding that it was further agreed in that case that the grant of the King passes nothing by implication, by which he must be understood to mean nothing which its terms do not, fairly and reasonably construed, embrace as a portion of or incident to the subject matter of the grant.

As to the case cited from 2 Hen. 7, 13 (which was the sole authority

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relied on), it turned upon a very different principle. There, the King, by letters patent, granted to a man that he might give twenty marks annual rent to a certain chaplain to pray for souls, &c.;, and the question was whether the grant was not void for uncertainty, as no chaplain was named. And the principal stress of the argument seems to have been whether this license should be construed to create or enable the grantee to create a corporation capable of taking the rent. In the argument, it was asserted that the King's grants should not be construed by implication to create a corporation, or to inure to a double intent. In point of fact, however, I find (Chronica Juridicialia, p. 141) that neither of the persons whose opinions are Stated in the case was a judge at the time of the argument, nor does it appear what the decision was, so that the whole report is but the argument of counsel. The same case is fully reported by Lord Coke, in the case of *Sutton's Hospital,* 10 Co.Rep. 27-28, who says that he had seen the original record, and

who gives the opinions of the judges at large, by which it appears that the grant was held valid. And so, says Lord Coke, "Note, reader, this grant of the King inures to these intents, *viz.,* to make an incorporation, to make a succession, and to grant a rent." So that here we have a case not only of a royal grant being construed liberally, but divers implications being made, not at all founded in the express terms of the grant. The reason of which was (as Lord Coke says) because the King's charter made for the erection of pious and charitable works shall be always taken in the most favorable and beneficial sense. This case was recognised by the judges as sound law in the case of *Sutton's Hospital.* And it was clearly admitted by the judges that, in a charter of incorporation by the Crown, all the incidents to a corporation were tacitly annexed, although not named, as the right to sue and be sued, to purchase, hold and alien lands, to make by-laws, &c.; And if power is expressly given to purchase, but no clause to alien, the letter follows by implication, as an incident. Comyn's Dig.Franchise, F. 6, F. 10, F. 15. It is very difficult to affirm in the teeth of such authorities that, in the King's grants, nothing is to be taken by implication, as is gravely asserted in the case in Davies' Reports 149. The case cited to support it is directly against it. In truth, it is obvious that the learned judges mistook the mere arguments of counsel for the solemn opinions of the Court, and the case, as decided, is a direct authority the other way.

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The case of *Blankley v. Winstanley,* 3 T.R. 279, has also been relied on for the same purpose, but it has nothing to do with the point. The Court there held that, by the saving in the very body of the charter, the concurrent jurisdiction of the county magistrates was preserved. There was nothing said by the Court in respect to the implications in Crown grants. The whole argument turned upon the meaning of the express clauses.

Much reliance has also been placed upon the language of Lord Stowell in *The Elsebe,* 5 Rob. 173. The main question in that case was, whether the Crown had a right to release captured property, before adjudication, without the consent of the captors. That question depended upon the effect of the King's orders in council,

his proclamation, and the Parliamentary Prize Act, for, independently of these acts, it was clear that all captured property, *jure belli,* belonged to the Crown, and was subject to its sole disposal. Lord Stowell, whose eminent qualifications as a judge entitle him to great reverence, on that occasion said:

"A general presumption arising from these considerations is that government does not mean to divest itself of this universal attribute of sovereignty conferred for such purposes (to be used for peace, as well as war) unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption must be taken also the wise policy of our own peculiar law, which interprets the grants of the Crown in this respect by other rules than those which are applicable in the construction of the grants of individuals. Against an individual, it is presumed that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign, it is far otherwise. It is not held by the sovereign himself, as private property, and no alienation shall be presumed except what is clearly and indisputably expressed."

Now the right of the captors in that case was given by the words of the King's order in council only. It was *a right to seize and bring in for adjudication.* The *right* to seize, then, was given, and the *duty* to bring in for adjudication was imposed. If nothing more had existed, it would be clear that the Crown would have the general property in the captures. Then again, the prize act and prize proclamation gave to the captors a right in the property, *after adjudication,* as lawful prize, and not before. This very limitation naturally implied that, *until adjudication,* they had no right in the property.

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And this is the ground, upon which Lord Stowell placed his judgment, as the clear result of a reasonable interpretation of these acts, declining to rely on any reasoning from considerations of public policy. And it is to be considered that Lord Stowell was not speaking of an ordinary grant of land, or of franchises, in the common course of mere municipal regulations, but of sovereign attributes and

prerogatives, involving the great rights and duties of war and peace, where, upon every motive of public policy and every ground of rational interpretation, there might be great hesitation in extending the terms of a grant beyond their fair interpretation.

But what, I repeat, is most material to be stated is that all this doctrine in relation to the King's prerogative of having a construction in his own favor is exclusively confined to cases of mere donation, flowing from the bounty of the Crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases, and the grant is expounded exactly as it would be in the case of a private grant -- favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract. Such was the doctrine of my Lord Coke, and of the venerable sages of the law in other times, when a resistance to prerogative was equivalent to a removal from office. Even in the worst ages of arbitrary power, and irresistible prerogative, they did not hesitate to declare that contracts founded in a valuable consideration ought to be construed liberally for the subject, for the honor of the Crown. 2 Inst. 496. *See also* Com.Dig.Franchise, C. F. 6. If we are to have the grants of the Legislature construed by the rules applicable to royal grants, it is but common justice to follow them throughout, for the honor of this republic. The justice of the Commonwealth will not, I trust, be deemed less extensive than that of the Crown.

I think that I have demonstrated, upon authority, that it is by no means true that implications may not, and ought not, to be admitted, in regard to Crown grants. And I would conclude what I have to say on this head by a remark made by the late Mr. Chief Justice Parsons, a lawyer equally remarkable for his extraordinary genius and his professional learning.

"In England, prerogative is the cause of *one* against the *whole;* here, it is the cause of *all* against

one. In the first case, the feelings and vices, as well as the virtues, are enlisted against it; in the last, in favor of it. And therefore, *here,* it is of more importance that the judicial Courts should take care that the claim of prerogative should be *more strictly watched.* "

Martin v. Commonwealth, 1 Mass. 356.

If, then, the present were the case of a royal grant, I should most strenuously contend, both upon principle and authority, that it was to receive a liberal, and not a strict, construction. I should so contend, upon the plain intent of the charter, from its nature and objects, and from its burdens and duties. It is, confessedly, a case of contract, and not of bounty; a case of contract for a valuable consideration, for objects of public utility, to encourage enterprise, to advance the public convenience, and to secure a just remuneration for large outlays of private capital. What is there in such a grant of the Crown which should demand from any Court of justice a narrow and strict interpretation of its terms? Where is the authority with contains such a doctrine, or justifies such a conclusion? Let it not be assumed, and then reasoned from as an undisputed concession. If the common law carries in its bosom such a principle, it can be shown by some authorities, which ought to bind the judgment, even if they do not convince the understanding. In all my researches, I have not been able to find any whose reach does not fall far -- very far -- short of establishing any such doctrine. Prerogative has never been wanting in pushing forward its own claims for indulgence or exemption. But it has never yet (so far as I know) pushed them to this extravagance.

I stand upon the old law, upon law established more than three centuries ago, in cases contested with as much ability and learning, as any in the annals of our jurisprudence, in resisting any such encroachments upon the rights and liberties of the citizens secured by public grants. I will not consent to shake their title deeds by any speculative niceties or novelties.

The present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants have, therefore, in reality, nothing to do with the case. We are to give this act of

incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent, and that once ascertained, it is our duty to give it a full and liberal operation. The books are full of cases to this

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effect, *see* Com.Dig.Parliament, R. 10 to R. 28, Bac.Abridg. Statute, if indeed, so plain a principle of common sense and common justice stood in any need of authority to support it. Lord Chief Justice Eyre, in the case of *Boulton v. Bull,* 2 H. 136, 463, 500, took notice of the distinction between the construction of a Crown grant and a grant by an act of Parliament, and held the rules of the common law, introduced for the protection of the Crown in respect to its own grants, to be inapplicable to a grant by an act of Parliament.

"It is to be observed [said his lordship] that there is nothing technical in the composition of an act of Parliament. In the exposition of statutes, the intent of Parliament is the guide. It is expressly laid down in our books (I do not here speak of penal statutes) that every statute ought to be expounded, not according to the letter, but the intent."

Again, he said,

"this case was compared to the case of the King being deceived in his grants, but I am not satisfied that the King, proceeding by and with the advice of Parliament, is in that situation in respect to which he is under the special protection of the law, and that he could, on that ground, be considered as deceived in his grant. No case was cited to prove that position."

Now it is to be remembered that his lordship was speaking upon the construction of an act of Parliament of a private nature, an act of Parliament in the nature of a monopoly, an act of Parliament granting an exclusive patent for an invention to the celebrated Mr. Watt. And let it be added that his opinion as to the validity of that grant, notwithstanding all the obscurities of the act, was ultimately sustained in the King's bench by a definitive judgment in its favor. *See Hornblower v. Boulton,* 8

T.R. 95. A doctrine equally just and liberal has been repeatedly recognised by the Supreme Court of Massachusetts. In the case of *Richards v. Daggett,* 4 Mass.R. 534, 537, Mr. Chief Justice Parsons, in delivering the opinion of the Court, said:

"It is always to be presumed that the Legislature intend the most beneficial construction of their acts when the design of them is not apparent."

See also Inhabitants of Somerset v. Inhabitants of Dighton, 12 Mass.R. 383; *Whitney v. Whitney,* 14 Mass.R. 88; 8 Mass.R. 523; *Holbrook v. Holbrook,* 1 Pick.R. 248; *Stanwood v. Peirce,* 7 Mass.R. 458. Even in relation to mere private statutes, made for the accommodation of particular citizens, and which may affect the rights and privileges of others, Courts of law will give them a large construction if it arise from necessary implication. *Coolidge v. Williams,* 4 Mass.R. 145.

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As to the manner of construing Parliamentary grants for private enterprise, there are some recent decisions which, in my judgment, establish two very important principles applicable directly to the present case which, if not confirmatory of the views which I have endeavored to maintain, are at least not repugnant to them. The first is that all grants for purposes of this sort are to be construed as contracts between the government and the grantees, and not as mere laws; the second is that they are to receive a reasonable construction, and that if, either upon their express terms or by just inference from the terms, the intent of the contract can be made out, it is to be recognised and enforced accordingly. But if the language be ambiguous, or if the inference be not clearly made out, then the contract is to be taken most strongly against the grantor, and most favorably for the public. The first case is the *Company of Proprietors of the Leeds and Liverpool Canal v. Hustler,* 1 Barn. & Cres. 424, where the question was upon the terms of the charter, granting a toll. The toll was payable on empty boats, passing a lock of the canal. The Court said

"no toll was expressly imposed upon empty boats, &c.;, and we are called upon to say that such a toll was imposed by inference. Those who seek to impose a

burden upon the public should take care that their claim rests upon plain and unambiguous language; here, the claim is by no means clear."

The next case was the *Kingston-upon-Hull Dock Company v. La Marche,* 8 Barn. & Cres. 42, where the question was as to right to wharfage of goods shipped off from their quays. Lord Tenterden, in delivering the judgment of the Court in the negative, said:

"This was clearly a bargain made between a company of adventurers and the public, and as in many similar cases, the terms of the bargain are contained in the act, and the plaintiffs can claim nothing which is not clearly given."

The next case is the *Proprietors of the Stourbridge Canal v. Wheeley,* 2 Barn. & Ad. 792, in which the question was as to a right to certain tolls. Lord Tenterden, in delivering the opinion of the Court, said,

"this like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute. And the rule of construction in all such cases in now fully established to be this -- that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing which is not clearly given to them by the act. . . . Now it is quite certain that the company have no right expressly given to receive any compensation, except, &c.;, and

therefore it is incumbent upon them to show that that they have a right, clearly given by inference from some other of the clauses."

This latter statement shows that it is not indispensable that, in grants of this sort, the contract or the terms of the bargain should be in express language; it is sufficient if they may be clearly proved by implication or inference.

I admit that, where the terms of a grant are to impose burdens upon the public or to create a restraint injurious to the public interest, there is sound reason for interpreting the terms, if ambiguous, in favor of the public. But at the same time, I

insist that there is not the slightest reason for saying, even in such a case, that the grant is not to be construed favorably to the grantee so as to secure him in the enjoyment of what is actually granted.

I have taken up more time in the discussion of this point than perhaps the occasion required. because of its importance and the zeal, and earnestness and learning with which the argument for a strict construction has been pressed upon the Court as in some sort vital to the merits of this controversy. I feel the more confirmed in my own views upon the subject by the consideration that every judge of the State court, in delivering his opinion, admitted either directly or by inference the very principle for which I contend. Mr. Justice Morton, who pressed the doctrine of a strict construction most strongly, at the same time said,

"although no distinct thing or right will pass by implication, yet I do not mean to question that the words used should be understood in their most natural and obvious sense, and that whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant."

7 Pick. 462. Mr. Justice Wilde said,

"in doubtful cases, it seems to me a sound and wholesome rule of construction to interpret public grants most favorably to the public interests, and that they are not to be enlarged by *doubtful* implications. . . . When, therefore, the Legislature makes a grant of a public franchise, it is not to be extended by construction beyond its clear and obvious meaning. . . . There are some legislative grants, no doubt, that may admit of a different rule of construction, such as grants of land on a valuable consideration, and the like."

7 Pick. 469. These two learned judges were adverse to the plaintiffs' claim. But the two other learned judges, who were in favor of it, took a much broader and more liberal view of the rules of interpretation of the charter.

An attempt has, however, been made to put the case of legislative grants upon the same footing as royal grants as to their construction,

upon some supposed analogy between royal grants and legislative grants under our republican forms of government. Such a claim in favor of republican prerogative is new, and no authority has been cited which supports it. Our Legislatures neither have nor affect to have any royal prerogatives. There is no provision in the Constitution authorizing their grants to be construed differently from the grants of private persons in regard to the like subject matter. The policy of the common law which gave the Crown so many exclusive privileges and extraordinary claims different from those of the subject was founded, in a good measure, if not altogether, upon the divine right of Kings, or at least upon a sense of their exalted dignity and preeminence over all subjects, and upon the notion that they are entitled to peculiar favor for the protection of their Kingly rights and office. Parliamentary grants never enjoyed any such privileges; they were always construed according to common sense and common reason, upon their language and their intent. What reason is there that our legislative acts should not receive a similar interpretation? Is it not at least as important in our free governments that a citizen should have as much security for his rights and estate derived from the grants of the Legislature as he would have in England? What solid ground is there to say that the words of a grant, in the mouth of a citizen shall mean one thing, and in the mouth of the Legislature shall mean another thing? That, in regard to the grant of a citizen, every word shall, in case of any question of interpretation or implication, be construed against him, and in regard to the grant of the government, every word shall be construed in its favor? That language shall be construed not according to its natural import and implications from its own proper sense and the objects of the instrument, but shall change its meaning, as it is spoken by the whole people or by one of them? There may be very solid grounds to say that neither grants nor charters ought to be extended beyond the fair reach of their words, and that no implications ought to be made which are not clearly deducible from the language and the nature and objects of the grant.

In the case of a legislative grant, there is no ground to impute surprise, imposition or mistake to the same extent as in a mere private grant of the Crown. The words

are the words of the Legislature, upon solemn deliberation and examination and debate. Their purport is presumed to be well known, and the public interests are

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watched, and guarded by all the varieties of local, personal and professional jealousy, as well as by the untiring zeal of numbers, devoted to the public service.

It should also be constantly kept in mind that, in construing this charter, we are not construing a statute involving political powers and sovereignty, like those involved in the case of *The Elsebe,* 5 Rob.R. 173. We are construing a grant of the Legislature, which though in the form of a statute, is still but a solemn contract. In such a case, the true course is to ascertain the sense of the parties, from the terms of the instrument, and, that once ascertained, to give it full effect. Lord Coke, indeed, recommends this as the best rule, even in respect to royal grants.

"The best exposition [says he] of the King's charter is, upon the consideration of the whole charter, to expound the charter by the charter itself, every material part thereof [being] explained according to the true and genuine sense, which is the best method."

Case of Sutton's Hospital, 10 Co.R. 24b.

But with a view to induce the Court to withdraw from all the common rules of reasonable and liberal interpretation in favor of grants, we have been told at the argument that this very charter is a restriction upon the legislative power, that it is in derogation of the rights and interests of the State, and the people, that it tends to promote monopolies and exclusive privileges, and that it will interpose an insuperable barrier to the progress of improvement. Now upon every one of these propositions, which are assumed, and not proved, I entertain a directly opposite opinion, and if I did not, I am not prepared to admit the conclusion for which they are adduced. If the Legislature has made a grant which involves any or all of these consequences, it is not for Courts of justice to overturn the plain sense of the grant because it has been improvidently or injuriously made.

But I deny the very groundwork of the argument. This charter is not (as I have already said) any restriction upon the legislative power, unless it be true that, because the Legislature cannot grant again what it has already granted, the legislative power is restricted. If so, then every grant of the public land is a restriction upon that power, a doctrine that has never yet been established, nor (so far as I know) ever contended for. Every grant of a franchise is, so far as that grant extends, necessarily exclusive, and cannot be resumed or interfered with. All the learned judges in the State

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Court admitted that the franchise of Charles River Bridge, whatever it be, could not be resumed or interfered with. The Legislature could not recall its grant or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands. In each case, the particular land, or the particular franchise, is withdrawn from the legislative operation. The identical land, or the identical franchise, cannot be regranted, or avoided by a new grant. But the legislative power remains unrestricted. The subject matter only (I repeat it) has passed from the hands of the government. If the Legislature should order a government debt to be paid by a sale of the public stock, and it is so paid, the legislative power over the funds of the government remains unrestricted, although it has ceased over the particular stock, which has been thus sold. For the present, I pass over all further consideration of this topic, as it will necessarily come again under review in examining an objection of a more broad and comprehensive nature.

Then, again, how is it established that this is a grant in derogation of the rights and interests of the people? No individual citizen has any right to build a bridge over navigable waters, and consequently, he is deprived of no right when a grant is made to any other persons for that purpose. Whether it promotes or injures the particular interest of an individual citizen constitutes no ground for judicial or legislative interference beyond what his own rights justify. When, then, it is said that such a grant is in derogation of the rights and interests of the people, we must understand that reference is had to the rights and interests common to the whole

people as such (such as the right of navigation), or belonging to them as a political body, or, in other words, the rights and interests of the State. Now I cannot understand how any grant of a franchise is a derogation from the rights of the people of the State any more than a grant of public land. The right in each case is gone to the extent of the thing granted, and so far may be said to derogate from that is to say to lessen the rights of the people, or of the State. But that is not the sense in which the argument is pressed, for, by derogation, is here meant an injurious or mischievous detraction from the sovereign rights of the State. On the other hand, there can be no derogation from the rights of the people, as such, except it applies to rights common there before, which the building of a bridge over navigable waters certainly is not. If it had been said that

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the grant of this bridge was in derogation of the common right of navigating the Charles River by reason of its obstructing, *pro tanto,* a free and open passage, the ground would have been intelligible. So if it had been an exclusive grant of the navigation of that stream. But if, at the same time, equivalent public rights of a different nature, but of greater public accommodation and use, had been obtained, it could hardly have been said in a correct sense that there was any derogation from the rights of the people or the rights of the State. It would be a mere exchange of one public right for another.

Then again, as to the grant being against the interests of the people. I know not how that is established, and certainly it is not to be assumed. It will hardly be contended that every grant of the government is injurious to the interests of the people, or that every grant of a franchise must necessarily be so. The erection of a bridge may be of the highest utility to the people. It may essentially promote the public convenience, and aid the public interests, and protect the public property. And if no persons can be found willing to undertake such a work unless they receive in return the exclusive privilege of erecting it and taking toll, surely it cannot be said as of course that such a grant, under such circumstances, is *per se* against the interests of the people. Whether the grant of a franchise is, or is not, on the whole, promotive of the public interests is a question of fact and

judgment upon which different minds may entertain different opinions. It is not to be judicially assumed to be injurious, and then the grant to be reasoned down. It is a matter exclusively confided to the sober consideration of the Legislature, which is invested with full discretion and possesses ample means to decide it. For myself, meaning to speak with all due deference for others, I know of no power or authority confided to the judicial department to rejudge the decisions of the Legislature upon such a subject. It has an exclusive right to make the grant, and to decide whether it be, or be not, for the public interests. It is to be presumed, if the grant is made, that it is made from a high sense of public duty, to promote the public welfare, and to establish the public prosperity. In this very case, the Legislature has, upon the very face of the act, made a solemn declaration as to the motive for passing it, that "the erecting of a bridge over Charles River, &c.;, will be of great public utility."

What Court of justice is invested with authority to gainsay this

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declaration? To strike it out of the act, and reason upon the other words, as if it were not there? To pronounce that a grant is against the interest of the people which the Legislature has declared to be of great utility to the people? It seems to me to be our duty to interpret laws, and not to wander into speculations upon their policy. And where, I may ask, is the proof that Charles River Bridge has been against the interests of the people? The record contains no such proof, and it is therefore a just presumption that it does not exist.

Again, it is argued that the present grant is a grant of a monopoly, and of exclusive privileges, and therefore to be construed by the most narrow mode of interpretation. The sixth article of the bill of rights of Massachusetts has been supposed to support the objection,

"No man, nor corporation or association of men, have any other title to obtain advantages or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the

public, and this title being in nature neither hereditary nor transmissive to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver or judge, is absurd and unnatural."

Now it is plain that, taking this whole clause together, it is not an inhibition of all legislative grants of exclusive privileges, but a promulgation of the reasons why there should be no hereditary magistrates, legislators or judges. But it admits, by necessary implication, the right to grant exclusive privileges for public services, without ascertaining of what nature those services may be. It might be sufficient to say that all the learned judges in the state court admitted that the grant of an exclusive right to take toll at a ferry, or a bridge, or a turnpike, is not a monopoly which is deemed odious in law, nor one of the particular and exclusive privileges, distinct from those of the community, which are reprobated in the bill of rights. All that was asserted by the judges opposed to a liberal interpretation of this grant was that it tended to promote monopolies. *See* the case, 7 Pick.R. 116, 132, 137.

Again, the old colonial act of 1641 against monopolies has been relied on to fortify the same argument. That statute is merely in affirmance of the principles of the English statute against monopolies, of 21 James I., ch. 3, and if it were now in force (which it is not), it would require the same construction. There is great virtue in particular phrases, and when it is once

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suggested that a grant is of the nature or tendency of a monopoly, the mind almost instantaneously prepares itself to reject every construction which does not pare it down to the narrowest limits. It is an honest prejudice, which grew up in former times from the gross abuses of the royal prerogatives, to which, in America, there are no analogous authorities. But what is a monopoly, as understood in law? It is an exclusive right, granted to a few, of something which was before of common right. Thus, a privilege granted by the King for the sole buying, selling, making, working or using a thing, whereby the subject, in general, is restrained from that liberty of manufacturing or trading which before he had, is a monopoly. 4 Black.Com. 159, Bac. Abridg. Prerogative, F. 4. My Lord Coke, in his Pleas of the

Crown, 3 Inst. 181, has given this very definition of a monopoly, and that definition was approved by Holt and Treby (afterwards chief justices of King's bench), *arguendo,* as counsel, in the great case of the *East India Company v. Sandys,* 10 How.St.Tr. 386. His words are that a monopoly is

"an institution by the King, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of everything, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade."

So that it is not the case of a monopoly if the subjects had not the common right or liberty before to do the act, or possess or enjoy the privilege or franchise granted, as a common right. 10 How.St.Tr. 425. And it deserves an especial remark that this doctrine was an admitted concession, pervading the entire arguments of the counsel who opposed, as well as of those who maintained the grant of the exclusive trade, in the case of the *East India Company v. Sandys,* 10 How.St.Tr. 386, a case which constitutes, in a great measure, the basis of this branch of the law.

No sound lawyer will, I presume, assert that the grant of a right to erect a bridge over a navigable stream is a grant of a common right. Before such grant, had all the citizens of the State a right to erect bridges over navigable streams? Certainly they had not, and therefore the grant was no restriction of any common right. It was neither a monopoly nor, in a legal sense, had it any tendency to a monopoly. It took from no citizen what he possessed before, and had no tendency to take it from him. It took, indeed, from the Legislature the power of granting the same identical privilege or franchise

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to any other persons. But this made it no more a monopoly than the grant of the public stock or funds of a State for a valuable consideration. Even in cases of monopolies, strictly so called, if the nature of the grant be such that it is for the public good, as in cases of patents for inventions, the rule has always been to give

them a favorable construction in support of the patent, as Lord Chief Justice Eyre said, *ut res magis valeat quam pereat. Boulton v. Bill,* 2 H Bl. 463, 500.

But it has been argued, and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees, it will interpose an effectual barrier against all general improvements of the country. For myself, I profess not to feel the cogency of this argument, either in its general application to the grant of franchises or in its special application to the present grant. This is a subject upon which different minds may well arrive at different conclusions, both as to policy and principle. Men may, and will, complexionally differ upon topics of this sort according to their natural and acquired habits of speculation and opinion. For my own part, I can conceive of no surer plan to arrest all public improvements founded on private capital and enterprise that to make the outlay of that capital uncertain and questionable, both as to security and as to productiveness. No man will hazard his capital in any enterprise in which, if there be a loss, it must be borne exclusively by himself, and if there be success, he has not the slightest security of enjoying the rewards of that success for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge that the property will be safe, that the enjoyment will be coextensive with the grant, and that success will not be the signal of a general combination to overthrow its rights and to take away its profits. The very agitation of a question of this sort is sufficient to alarm every stockholder in every public enterprise of this sort throughout the whole country. Already, in my native State, the Legislature has found it necessary expressly to concede the exclusive privilege here contended against in order to insure the accomplishment of a railroad for the benefit of the public. And yet we are told that all such exclusive grants are to the detriment of the public.

But if there were any foundation for the argument itself in a

general view, it would totally fail in its application to the present case. Here, the grant, however exclusive, is but for a short and limited period, more than two-thirds of which have already elapsed, and when it is gone, the whole property and franchise are to revert to the State. The Legislature exercised a wholesome foresight on the subject, and. within a reasonable period, it will have an unrestricted authority to do whatever it may choose in the appropriation of the bridge and its tolls. There is not, then, under any fair aspect of the case, the slightest reason to presume that public improvements either can or will be injuriously retarded by a liberal construction of the present grant.

I have thus endeavored to answer, and I think I have successfully answered, all the arguments (which indeed run into each other) adduced to justify a strict construction of the present charter. I go further, and maintain not only that it is not a case for strict construction, but that the charter, upon its very face, by its terms, and for its professed objects demands from the Court, upon undeniable principles of law, a favorable construction for the grantees. In the first place, the Legislature has declared that the erecting of the bridge will be of great public utility, and this exposition of its own motives for the grant requires the Court to give a liberal interpretation in order to promote, and not to destroy, an enterprise of great public utility. In the next place, the grant is a contract for a valuable consideration, and a full and adequate consideration. The proprietors are to lay out a large sum of money (and, in those times, it was a very large outlay of capital) in erecting a bridge; they are to keep it in repair during the whole period of forty years; they are to surrender it in good repair, at the end of that period, to the State as its own property; they are to pay, during the whole period, an annuity of 200 to Harvard College; and they are to incur other heavy expenses and burdens for the public accommodation. In return for all these charges, they are entitled to no more than the receipt of the tolls during the forty years for their reimbursement of capital, interest and expenses. With all this, they are to take upon themselves the chances of success, and if the enterprise fails, the loss is exclusively their own. Nor let any man imagine that there was not, at the time when this charter was granted, much solid ground for doubting success. In order to entertain a just view of this subject, we must go back to that period of general bankruptcy and distress and difficulty.

the United States was not only not then in existence, but it was not then even dreamed of. The union of the States was crumbling into ruins under the old confederation. Agriculture, manufactures, and commerce were at their lowest ebb. There was infinite danger to all the States from local interests and jealousies and from the apparent impossibility of a much longer adherence to that shadow of a government, the Continental Congress. And even four years afterwards, when every evil had been greatly aggravated, and civil war was added to other calamities, the Constitution of the United States was all but shipwrecked, in passing through the State conventions. It was adopted by very slender majorities. These are historical facts which required no coloring to give them effect, and admitted of no concealment to seduce men into schemes of future aggrandizement. I would even now put it to the common sense of every man whether, if the Constitution of the United States had not been adopted, the charter would have been worth a forty years' purchase of the tolls.

This is not all. It is well known historically that this was the very first bridge ever constructed in New England over navigable tidewaters so near the sea. The rigors of our climate, the dangers from sudden thaws and freezing, and the obstructions from ice in a rapid current were deemed by many persons to be insuperable obstacles to the success of such a project. It was believed that the bridge would scarcely stand a single severe winter. And I myself am old enough to know that, in regard to other arms of the sea at much later periods, the same doubts have had a strong and depressing influence upon public enterprises. If Charles River Bridge had been carried away during the first or second season after its erection, it is far from being certain that, up to this moment, another bridge upon such an arm of the sea would ever have been erected in Massachusetts. I State these things, which are of public notoriety, to repel the notion that the Legislature was surprised into an incautious grant, or that the reward was more than adequate to the perils. There was a full and adequate consideration, in a pecuniary sense, for the charter. But, in a more general sense, the erection of the bridge, as a matter of

accommodation, has been incalculably beneficial to the public. Unless, therefore, we are wholly to disregard the declarations of the Legislature, and the objects of the charter, and the historical facts of the times, and indulge in mere private speculations of profit and loss by our present lights and experience,

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it seems to me that the Court is bound to come to the interpretation of this charter with a persuasion that it was granted in furtherance, and not in derogation, of the public good.

But I do not insist upon any extraordinary liberality in interpreting this charter. All I contend for is that it shall receive a fair and reasonable interpretation, so as to carry into effect the legislative intention and secure to the grantees a just security for their privileges. I might, indeed, well have spared myself any investigation of the principles upon which royal and legislative grants are ordinarily to be construed, for this Court has itself furnished an unequivocal rule for interpreting all public contracts. The present grant is confessedly a contract, and in *Huidekoper's Lessee v. Douglass,* 3 Cranch 1, this Court said:

"This is a contract, and although a State is a party, it ought to be construed according to those well established principles which regulate contracts, generally,"

that is, precisely as in cases between mere private persons, taking into consideration the nature and objects of the grant. A like rule was adopted by this Court in the case of a contract by the United States. *United States v. Gurney,* 4 Cranch 333. And the good sense and justice of the rule seem equally irresistible.

Let us now enter upon the consideration of the terms of the charter. In my judgment, nothing can be more plain than that it is a grant of a right to erect a bridge between Boston and Charlestown, in the place where the ferry between those towns was kept. It has been said that the charter itself does not describe the bridge as between Charlestown and Boston, but grants an authority to erect "a bridge over Charles River, in the place where the old ferry was then kept," and that these towns are not named except for the purpose of describing the then ferry.

Now this seems to me, with all due deference, to be a distinction without a difference. The bridge is to be erected in the place where the old ferry then was. But where was it to begin? and where was it to terminate? Boston and Charlestown are the only possible termini, for the ferry ways were there, and it was to be built between Boston and Charlestown because the ferry was between them. Surely, according to the true sense of the preamble, where alone the descriptive words occur (for it is a great mistake to suppose that the enacting clause anywhere refers, except by implication, to the location of the bridge), it is wholly immaterial, whether we read the clause, "whereas, the erecting of a bridge

over Charles River, in the place where the ferry between Boston and Charlestown is now kept," or "whereas, the erecting of a bridge over Charles River, between Charlestown and Boston, where the ferry is now kept." In each case, the bridge is to be between Boston and Charlestown, and the termini are the ferry ways. The title of the act puts this beyond all controversy, for it is "an act for incorporating certain persons for the purpose of building a bridge over Charles River, between Boston and Charlestown, &c.;" But then we are told that no rule in construing statutes is better settled than that the title of an act does not constitute any part of the act. If by this no more be meant than that the title of an act constitutes no part of its enacting clauses, the accuracy of the position will not be disputed. But if it is meant to say that the title of the act does not belong to it for any purpose of explanation or construction, and that in no sense is it any part of the act, I, for one, must deny that there is any such settled principle of law. On the contrary, I understand that the title of an act (though it is not ordinarily resorted to) may be legitimately resorted to for the purpose of ascertaining the legislative intention just at much as any other part of the act. In point of fact, it is usually resorted to whenever it may assist us in removing any ambiguities in the enacting clauses. Thus, in the great case of *Sutton's Hospital,* 10 Co.R. 23, 24b, the title of an act of Parliament was thought not unworthy to be examined, in construing the design of the act. In *Boulton v. Bull,* 2 Hen.Bl. 463, 500, the effect of the title of an act was largely insisted upon in the argument, as furnishing a key to the intent of the

enacting clauses. And Lord Chief Justice Eyre admitted the propriety of the argument, and met it, by saying that, in that case, he would, if necessary, expound the word "engine" in the body of the bill, in opposition to the title to it, to mean a "method," in order to support the patent. In the case of the *United States v. Fisher,* 2 Cranch 358, the Supreme Court of the United States expressly recognised the doctrine, and gave it a practical application. In that case, the Chief Justice, in delivering the opinion of the Court, after adverting to the argument at the bar respecting the degree of influence which the title of an act ought to have in construing the enacting clauses, said:

"Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived, and, in such a case, the title claims a degree of notice, and will have its due share of consideration. "

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According to my views of the terms of the charter, the grant, then, is of the franchise of erecting a bridge over Charles River between Charlestown and Boston, and of taking tolls or pontage from passengers. It is, therefore, limited to those towns, and does not exclude the Legislature from any right to grant a bridge over the same river between any other towns and Boston, as, for example, between Chelsea and Boston, or Cambridge and Boston, or Roxbury and Boston.

But although, in my judgment, this is the true construction of the limits of the charter, *ex vi terminorum,* my opinion does not in any important degree rest upon it. Taking this to be a grant of a right to build a bridge over Charles River in the place where the old ferry between Charlestown and Boston was then kept (as is contended for by the defendants), still it has, as all such grants must have, a fixed locality, and the same question meets us: is the grant confined to the mere right to erect a bridge on the proper spot, and to take toll of the passengers who may pass over it, without any exclusive franchise on either side of the local limits of the bridge? or does it, by implication, include an exclusive franchise on each side, to an extent which shall shut out any injurious competition? In other words, does the grant still leave the Legislature at liberty to erect other bridges on either side, free

or with tolls, even in juxtaposition with the timbers and planks of this bridge? or is there an implied obligation on the part of the Legislature to abstain from all acts of this sort which shall impair or destroy the value of the grant? The defendants contend that the exclusive right of the plaintiffs extends no farther than the planks and timbers of the bridge, and that the Legislature is at full liberty to grant any new bridge, however near and although it may take away a large portion, or even the whole, of the travel which would otherwise pass over the bridge of the plaintiffs. And to this extent, the defendants must contend, for their bridge is, to all intents and purposes, in a legal and practical sense, contiguous to that of the plaintiffs.

The argument of the defendants is that the plaintiffs are to take nothing by implication. Either (say they) the exclusive grant extends only to the local limits of the bridge or it extends the whole length of the river, or at least up to old Cambridge bridge. The latter construction would be absurd and monstrous, and therefore the former must be the true one. Now I utterly deny the alternative involved in the dilemma. The right to build a bridge over a

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river and to take toll may well include an exclusive franchise beyond the local limits of the bridge and yet not extend through the whole course of the river, or even to any considerable distance on the river. There is no difficulty, in common sense or in law, in maintaining such a doctrine. But then, it is asked, what limits can be assigned to such a franchise? The answer is obvious, the grant carries with it an exclusive franchise to a reasonable distance on the river, so that the ordinary travel to the bridge shall not be diverted by any new bridge, to the injury or ruin of the franchise. A new bridge, which would be a nuisance to the old bridge, would be within the reach of its exclusive right. The question would not be so much as to the fact of distance as it would be as to the fact of nuisance. There is nothing new in such expositions of incorporeal rights, and nothing new in thus administering, upon this foundation, remedies in regard thereto. The doctrine is coeval with the common law itself. Suppose, an action is brought for shutting up the ancient lights belonging to a messuage, or for diverting a watercourse, or for flowing back a stream, or for erecting a nuisance near a dwelling house; the question in such

cases is not one of mere distance, of mere feet and inches, but of injury -- permanent, real and substantial injury -- to be decided upon all the circumstances of the case. But of this I shall speak again hereafter.

Let us see what is the result of the narrow construction contended for by the defendants. If that result be such as is inconsistent with all reasonable presumptions growing out of case, if it be repugnant to the principles of equal justice, if it will defeat the whole objects of the grant, it will not, I trust, be insisted on that this Court is bound to adopt it.

I have before had occasion to take notice that the original charter is a limited one for forty years; that the whole compensation of the proprietors for all their outlay of capital, their annuity to Harvard College, and their other annual burdens and charges, is to arise out of the tolls allowed them during that period. No other fund is provided for their indemnity, and they are to take it subject to all the perils of failure and the chances of an inadequate remuneration. The moment the charter was accepted, the proprietors were bound to all the obligations of this contract on their part. Whether the bargain should turn out to be good or bad, productive or unproductive of profit, did not vary their duties. The franchise was not a mere *jus privatum.* From the moment of its acceptance and the erection of

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the bridge, it became charged with a *jus publicum.* The government had a right to insist that the bridge should be kept in perfect repair for public travel by the proprietors, that the bridge should be lighted, that the draw should be raised without expense for the purposes of navigation, and, if the proprietors had refused or neglected to do their duty in any of these respects, they would have been liable to a public prosecution. It could be no apology or defence that the bridge was unprofitable, that the tolls were inadequate, that the repairs were expensive, or that the whole concern was a ruinous enterprise. The proprietors took the charter *cum onere,* and must abide by their choice. It is no answer to all this to say that the proprietors might surrender their charter, and thus escape from the burden. They could have no right to make such a surrender. It would depend upon the

good pleasure of the government whether it would accept of such a surrender or not, and, until such an acceptance, the burdens would be obligatory to the last hour of the charter. And when that hour shall have arrived, the bridge itself, in good repair, is to be delivered to the State.

Now I put it to the common sense of every man whether if, at the moment of granting the charter, the Legislature had said to the proprietors, you shall build the bridge, you shall bear the burdens, you shall be bound by the charges, and your sole reimbursement shall be from the tolls of forty years; and yet we will not even guaranty you any certainty of receiving any tolls; on the contrary, we reserve to ourselves the full power and authority to erect other bridges, toll or free bridges, according to our own free will and pleasure, contiguous to yours and having the same termini with yours, and if you are successful, we may thus supplant you, divide, destroy your profits, and annihilate your tolls without annihilating your burdens; if, I say, such had been the language of the Legislature, is there a man living, of ordinary discretion or prudence, who would have accepted such a charter upon such terms? I fearlessly answer, no. There would have been such a gross inadequacy of consideration, and such a total insecurity of all the rights of property under such circumstances that the project would have dropped still-born. And I put the question further, whether any Legislature, meaning to promote a project of permanent public utility (such as this confessedly was) would ever have dreamed of such a qualification of its own grant when it sought to enlist private capital and private patronage to insure the accomplishment of it?

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Yet this is the very form and pressure of the present case. It is not an imaginary and extravagant case. Warren Bridge has been erected under such a supposed reserved authority in the immediate neighborhood of Charles River Bridge, and with the same termini, to accommodate the same line of travel. For a half-dozen years, it was to be a toll bridge, for the benefit of the proprietors, to reimburse them for their expenditures; at the end of that period, the bridge is to become the property of the State, and free of toll unless the Legislature should thereafter

impose one. In point of fact, it has since become, and now is, under the sanction of the act of incorporation and other subsequent acts, a free bridge, without the payment of any tolls, for all persons. So that, in truth, here now is a free bridge, owned by and erected under the authority of the Commonwealth, which necessarily takes away all the tolls from Charles River Bridge while its prolonged charter has twenty years to run. And yet the act of the Legislature establishing Warren Bridge is said to be no violation of the franchise granted to the Charles River Bridge. The Legislature may annihilate -- nay, has annihilated -- by its own acts all chance of receiving tolls by withdrawing the whole travel, though it is admitted that it cannot take away the barren right to gather tolls, if any should occur, when there is no travel to bring a dollar. According to the same course of argument, the Legislature would have a perfect right to block up every avenue to the bridge, and to obstruct every highway which should lead to it, without any violation of the chartered rights of Charles River Bridge, and, at the same time, it might require every burden to be punctiliously discharged by the proprietors during the prolonged period of seventy years. I confess that the very statement of such propositions is so startling to my mind, and so irreconcilable with all my notions of good faith and of any fair interpretation of the legislative intentions, that I should always doubt the soundness of any reasoning which should conduct me to such results.

But it is said that there is no prohibitory covenant in the charter, and no implications are to be made of any such prohibition. The proprietors are to stand upon the letter of their contract, and the maxim applies, *de non apparentibus et non existentibus, eadem est lex.* And yet it is conceded that the Legislature cannot revoke or resume this grant. Why not, I pray to know? There is no negative covenant in the charter, there is no express prohibition to be found there. The reason is plain. The prohibition arises by

natural, if not by necessary, implication. It would be against the first principles of justice to presume that the Legislature reserved a right to destroy its own grant. That was the doctrine in *Fletcher v. Peck,* 6 Cranch 87, in this Court, and in other

cases turning upon the same great principle of political and constitutional duty and right. Can the Legislature have power to do that indirectly which it cannot do directly? If it cannot take away, or resume, the franchise itself, can it take away its whole substance and value? If the law will create an implication that the Legislature shall not resume its own grant, is it not equally as natural and as necessary an implication that the Legislature shall not do any act directly to prejudice its own grant, or to destroy its value? If there were no authority in favor of so reasonable a doctrine, I would say, in the language of the late lamented Mr. Chief Justice Parker in this very case:

"I ground it on the principles of our government and Constitution, and on the immutable principles of justice, which ought to bind governments, as well as people."

But it is most important to remember that, in the construction of all legislative grants, the common law must be taken into consideration, for the Legislature must be presumed to have in view the general principles of construction which are recognised by the common law. Now no principle is better established than the principle that, when a thing is given or granted, the law giveth, impliedly, whatever is necessary for the taking and enjoying the same. This is laid down in Co.Litt. 56a, and is, indeed, the dictate of common sense applicable to all grants. Is not the unobstructed possession of the tolls indispensable to the full enjoyment of the corporate rights granted to the proprietors of Charles River Bridge? If the tolls were withdrawn, directly or indirectly, by the authority of the Legislature, would not the franchise be utterly worthless? A burden, and not a benefit? Would not the reservation of authority in the Legislature to create a rival bridge impair, if it did not absolutely destroy, the exclusive right of the proprietors of Charles River Bridge? I conceive it utterly impossible to give any other than an affirmative answer to each of these questions. How, then, are we to escape from the conclusion that that which would impair or destroy the grant is prohibited by implication of law, from the nature of the grant? "We are satisfied," said Mr. Chief Justice Parsons, in delivering the opinion of the court in *Wales v. Stetson,* 2 Mass.R, 143, 146,

"that the rights legally vested in any corporation cannot

be controlled or destroyed by any statute unless a power for that purpose be reserved to the Legislature in the act of incorporation."

Where is any such reservation to be found in the charter of Charles River Bridge?

My brother Washington (than whom few judges ever possessed a sounder judgment or clearer learning), in his able opinion in the case of *Dartmouth College v. Woodward,* 4 Wheat. 658, took this same view of the true sense of the passage in Blackstone's Commentaries, and uses the following strong language on the subject of a charter of the government:

"Certain obligations are created (by it) both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the King's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his former grant. It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it."

I know not how language more apposite could be applied to the present case. None of us then doubted its entire correctness when he uttered it, and I am not able to perceive how the legal inference can now be escaped. The case of the *Chesapeake and Ohio Canal Company v. Baltimore and Ohio Railroad Company,* 4 Gill & Johns.R. 1, 4, 6, 143, 146, 149, fully sustains the same doctrine and most elaborately expounds its nature and operation and extent.

But we are not left to mere general reasoning on this subject. There are cases of grants of the Crown, in which a like construction has prevailed, which are as conclusive upon this subject in point of authority as any can be. How stands the law in relation to grants by the Crown of fairs, markets and ferries? I speak of grants, for all claims of this sort resolve themselves into grants, a prescription being merely evidence of, and presupposing, an ancient grant which can be no longer traced except by the constant use and possession of the franchise. If the King grants a fair, or a market, or a ferry, has the franchise no existence beyond the local limits where it is erected? Does the grant import no more than a right to

set up such fair or market or ferry, leaving in the Crown full power and authority to make other grants of the same nature in juxtaposition with those local limits? No case, I will venture to say, has ever maintained such a doctrine, and the common law repudiates it (as will be presently shown) in the most express terms.

The authorities are abundant to establish that the King cannot

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make any second grant which shall prejudice the profits of the former grant. And why not? Because the grant imposes public burdens on the grantee, and subjects him to public charges, and the profits constitute his only means of remuneration, and the Crown shall not be at liberty directly to impair, much less, to destroy, the whole value and objects of its grant. In confirmation of this reasoning, it has been repeatedly laid down in the books that, when the King grants a fair, or market, or ferry, it is usual to insert in all such grants a clause or proviso that it shall not be to the prejudice of any other existing franchise of the same nature as a fair, or market, or ferry. But if such a clause or proviso is not inserted, the grant is always construed with the like restriction, for such a clause will be implied by law. And therefore, if such new grant is without such a clause, if it occasion any damage either to the King or to a subject in any other thing, it will be revocable. So my Lord Coke laid it down in 2 Inst. 406. The judges laid down the same law in the House of Lords in the case of the *King v. Butler,* 3 Leo. 220, 222, which was the case of a grant of a new market to the supposed prejudice of an old market. Their language on that occasion deserves to be cited: it was "that the King has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *scire facias.* " And, afterwards, referring to cases where a writ of *ad quod damnum* had been issued, they added,

"there, the King takes notice that it is not *ad damnum,* and yet, if it be *ad damnum,* the patent is void, for in all such patents, the condition is implied, *viz.,* that it be not *ad damnum* of the neighboring merchants."

And they added further,

"this is positively alleged (in the *scire facias*) that *concessio predicta est ad damnum et depauperationem,* &c.;, which is a sufficient cause to revoke the patent if there were nothing more."

The same doctrine is laid down in Mr. Serjeant Williams' learned note (2) to the case of *Yard v. Ford,* 2 Saund. 174. Now if, in the grant of any such franchise of a fair or market or ferry, there is no implied obligation or condition that the King will not made any subsequent grant to the prejudice of such prior grant, or impairing its rights, it is inconceivable, why such a proviso should be implied. But if (as the law certainly is) the King can make no subsequent grant to the prejudice of his former grant, then the reason of such implication is clear, for the King will not be presumed to intend to violate his duty, but rather to be deceived in his second grant, if to the prejudice of the first.

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It is upon this ground, and this ground only that we can explain the established doctrine in relation to ferries. When the Crown grants a ferry from A. to B. without using any words which import it to be an exclusive ferry, why is it (as will be presently shown) that, by the common law, the grant is construed to be exclusive of all other ferries between the same places or termini, at least if such ferries are so near that they are injurious to the first ferry and tend to a direct diminution of its receipts? Plainly it must be because, from the nature of such a franchise, it can have no permanent value unless it is exclusive, and the circumstance that, during the existence of the grant, the grantee has public burdens imposed upon him raises the implication that nothing shall be done to the prejudice of it while it is a subsisting franchise. The words of the grant do, indeed, import, *per se,* merely to confer a right of ferry between A. and B., but the common law steps in, and, *ut res magis valeat quam pereat,* expands the terms into an exclusive right from the very nature and objects and motives of the grant.

I say this is the theory of the common law on this subject. Let us now see if it is not fully borne out by the authorities in relation to ferries, a franchise which

approaches so near to that of a bridge that human ingenuity has not as yet been able to state any assignable difference between them except that one includes the right of pontage and the other of passage or ferriage (*see Webb's Case,* 8 Co.R. 47 b), that is, each includes public duties and burdens, and an indemnity for these duties and burdens by a right to receive tolls. A grant of a ferry must always be by local limits; it must have some termini; and must be between some fixed points, villes or places. But is the franchise of a ferry limited to the mere ferry ways? Unless I am greatly mistaken, there is an unbroken series of authorities establishing the contrary doctrine -- a doctrine firmly fixed in the common law and brought to America by our ancestors as a part of their inheritance. The case of a ferry is put as a case of clear law by Paston, Just., as long ago as in 22 Hen. V. 14b. "If," says he,

"I have a market or a fair on a particular day, and another sets up a market on fair on the same day in a ville which is near to my market, so that my market, or my fair, is impaired, I shall have against him an assize of nuisance, or an action on the case."

And the same law is,

"if I have an ancient ferry in a ville, and another sets up another ferry upon the same river, near to my ferry, so that the profits of my ferry are impaired, I shall have an action on the case

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against him."

And Newton (who, it seems, was of counsel for the defendant in that case) admitted the law to be so, and gave as a reason,

"for you are bound to support the ferry, and to serve and repair it for the ease of the common people, and otherwise you shall be grievously amerced, and it is inquirable before the sheriff, at his tourn, and also before the justices in eyre."

As to the case of a market or fair, Newton said that, in the King's grant of a market or fair, there is always a proviso that it should not be to the nuisance of another market or fair. To which Paston, Just., replied,

"suppose the King grants to me a market, without any proviso, if one sets up after that time another market which is a nuisance to that, I shall have against him an assize of nuisance."

The doctrine here laid down seems indisputable law, and it was cited and approved by Lord Abinger, in *Huzzey v. Field,* 2 Cromp.Mees. & Rosc. 432, to which reference will presently be made. In Bacon's Abridgment, Prerogative, F. 1, it is laid down

"that if the King creates or grants a fair or market to a person, and afterwards grants another to another person, to the prejudice of the first, the second grant is void."

See 16 Viner's Abridg. Nuisance, G. pl. 2. The same law is laid down in 3 Black.Com. 218-19.

"If (says he) I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that it does me a prejudice, it is a nuisance to the freehold which I have in my market or fair."

He adds,

"if a ferry is erected on a river so near another ancient ferry as to draw away the custom, it is a nuisance to the old one, for where there is a ferry by prescription, the owner is bound always to keep it in repair and readiness, for the ease of the King's subjects; otherwise he may be grievously amerced. It would be therefore extremely hard if a new ferry were suffered to share the profits which does not also share the burden."

The same doctrine is to be found in Comyn's Digest (Action upon the Case for a Nuisance, A.) and in many other authorities. *See Yard v. Ford,* 2 Saund. 175, and note 2, Fitz. N.Brev. 184, Hale de Port. Maris, ch. 5, Harg.Law Tracts, p. 59,

Com.Dig.Piscary, B., *Id.;* Market, C. 2, C. 3, 2 Black.Com. 27.

The doctrine is, in England, just as true now, and just as strictly enforced, as it was three centuries ago. In *Blisset v. Hart,* Willes' R. 508, the plaintiff recovered damages for a violation of his right to an ancient ferry against the defendant, who had set up a neighboring ferry to his nuisance. The Court said,

"A ferry is *publici*

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juris. It is a franchise that no one can erect without a license from the Crown, and when one is erected, another cannot be erected without an *ad quod damnum.* If a second is erected without a license, the Crown has a remedy by a *quo warranto,* and the former grantee has a remedy by action."

The case of *Tripp v. Frank,* 4 T.R. 666, proceeds upon the admission of the same doctrine, as does *Prince v. Lewis,* 5 Barn. & Cres. 363; *Peter v. Kendall,* 6 Barn. & Cres. 703; *Mosley v. Chadwick,* 7 Barn. & Cres. 47, note a, and *Mosley v. Walker,* 7 Barn. & Cres. 40.

There is a very recent case (already alluded to) which was decided by the Court of Exchequer upon the fullest consideration, and in which the leading authorities upon this point were discussed with great acuteness and ability. I mean the case of *Huzzey v. Field,* in 1835, 13 Law Journ. 239, S.C., 2 Cromp.Meeson & Rose. 432. Lord Abinger, in delivering the opinion of the Court on that occasion, used the following language:

"So far, the authorities appear to be clear that, if a new ferry be put up without the King's license, to the prejudice of an old one, an action will lie, and there is no case which has the appearance of being to the contrary except that of *Tripp v. Frank,* hereafter mentioned. These old authorities proceeded upon the ground, first, that the grant of the franchise is good in law, being for a sufficient consideration, to the subject, who, as he received a benefit, may have, by the grant of the Crown, a corresponding obligation imposed upon him, in return for the

benefit received, and secondly that if another, without legal authority, interrupts the grantee in the exercise of his franchise by withdrawing the profits of passengers which he would otherwise have had, and which he has, in a manner, purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury. And the case is in this respect analogous to a grant of a fair or market, which is also a privilege of the nature of a monopoly. A public ferry, then, is a public highway of a special description, and its termini must be places where the public have rights, as towns or villes, or highways leading to towns or villes. The right of the grantee is, in one case, an exclusive right of carrying from town to town, in the other, of carrying from one point to the other, all who are going to use the highway to the nearest town or ville to which the highway leads on the other side. Any new ferry, therefore, which has the effect of taking away such passengers must be injurious. For instance, if anyone should construct a new landing

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place at a short distance of one terminus of the ferry, and make a proclamation of carrying passengers over from the other terminus, and then landing them at that place, from which they pass to the same public highway upon which the ferry is established, before it reaches any town or ville, by which the passengers go immediately to the first and all the villes, to which that highway leads, there could not be any doubt but such an act would be an infringement of the right of ferry, whether the person so acting intended to defraud the grantee of the ferry or not. If such new ferry be nearer, or the boat used more commodious, or the fare less, it is obvious that all the custom must be inevitably withdrawn from the old ferry. And thus, the grantee would be deprived of all the benefit of the franchise, whilst he continued liable to all the burdens imposed upon him."

Language more apposite to the present case could scarcely have been used. And what makes it still stronger is that the very case before the Court was of a new ferry, starting on one side, from the same town, but not at the same place in the town, to a terminus on the other side, different from that of the old ferry-house, and more than half a mile from it, and thence by a highway, communicated with the

highway which was connected with the old ferry, at a mile distant from the ferry. Now if the right of the old ferry did not, by implication, extend on either side beyond its local termini, no question could have arisen as to the disturbance. *Trotter v. Harris,* 2 Younge & Jerv. 285, proceeded upon similar principles, though it did not call for so exact an exposition of them.

It is observable that, in the case of *Huzzey v. Field,* the defendant did not claim under any license or grant from the Crown, and therefore it may be supposed in argument that it does not apply to a case where that is a grant of the new ferry from the Crown. But, in point of law, there is no difference between the cases. In each case, the new ferry must be treated as a clear disturbance of the rights of the old ferry, or it is not, in either case; for if the first grant does not by implication carry an exclusive right above and below its local termini, then there can be no pretence in either case for the grantee of the old ferry to complain of the new ferry, for it does not violate his rights under his grant. If the first grant does, by implication, carry an exclusive right above and below its local termini so far as it may be prejudiced or disturbed by a new ferry, then it is equally clear upon established principles that the King

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cannot, by a new grant, prejudice his former grant, for the law deprives him of any such prerogative. It is true that, where the new ferry is got up without a license from the Crown, it may be abated as a nuisance upon a *quo warranto* or information by the Crown. But this will not confer any right of action on the grantee of the old ferry unless his own rights have been disturbed.

I have said that this is the result of established principles, and the case of the Islington Market, recently before the judges of England upon certain questions submitted to them by the house of lords, is an authority of the most solemn and conclusive nature upon this identical point of franchise. What gives it still more importance is that, in the last three questions proposed to the judges by the house of lords, the very point as to the power of the King to make a second grant of a market, to the prejudice of his former grant, within the limits of the common law,

arose and was pointedly answered in the negative. On that occasion the judges said that, while the first grant of a market remains unrepealed, even the default of the grantee of the franchise in not providing, according to his duty, proper accommodations for the public cannot operate, in point of law, as a ground for granting a new charter to another to hold a market, within the common law, which shall really be injurious to the existing market. The judges, after adverting to the usual course of the issuing of a writ of *ad quod damnum* in cases where a new market is asked for, added:

"We do not say that a writ of *ad quod damnum* is absolutely necessary. But if the Crown were to grant a new charter without a writ of *ad quod damnum,* and it should appear that the interests of other persons were prejudiced, the Crown would be supposed to be deceived, and the grant might be repealed on a *scire facias.* "

And they cited with approbation the doctrine of Lord Coke in 2 Inst. 406 that,

"if one held a market either by prescription or by letters-patent and another obtains a market to the nuisance of a former market, he shall not tarry till he have avoided the letters-patent of the latter market by course of law that he may have an assize of nuisance,"

thus establishing the doctrine that there is no difference in point of law whether the first market be by prescription or by grant, or whether the new market be with, or without, a patent from the Crown. In each case, the remedy is the same for the owner of the first market if the new market is a nuisance to him. The judges also held that the

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circumstance of the benefit of the public requiring a new market would not, of itself, warrant the grant of the new market.

Mr. Dane, in his Abridgment (2 Dane's Abridg. ch. 67, p. 683), lays down the doctrine in terms equally broad and comprehensive as applicable to America. After

having spoken of a ferry as imposing burdens *publici juris,* he adds,

"in this way, a ferry becomes property, an incorporeal hereditament, the owners of which, for the public convenience, being obliged by law to perform certain public services, must, as a reasonable equivalent, be protected in this property."

And he cites the case of *Chadwick v. Proprietors of the Haverhill Bridge* as directly in point, that the erection of a neighboring bridge, under the authority of the Legislature, is a nuisance to a ferry. Notwithstanding all the commentary bestowed on that case to escape from its legal pressure, I am of opinion that the report of the referees never could have been accepted by the Court, or judgment given thereon, if the declaration had not stated a right which, in point of law, was capable of supporting such a judgment. The Court seems, from Mr. Dane's statement of the case, clearly to have recognised the title of the plaintiff if he should prove himself the owner of a ferry. Besides, without disparagement to any other man, Mr. Dane himself (the chairman of the referees), from his great learning and ability, is well entitled to speak with the authority of a commentator of the highest character upon such a subject.

It is true that there is the case of *Churchman v. Tunstal,* Hard.R. 162, where a different doctrine as to a ferry was laid down. But that case is repugnant to all former cases, as well as later cases, and Lord Ch. Baron Macdonald, in *Attorney-General v. Richard,* 2 Anstr.R. 603, informs us that it was afterwards overturned. Lord Abinger, in *Huzzey v. Field,* 2 Comp.Mees. & Rosc. 432, goes further and informs us that, after the bill in that case was dismissed (which was a bill by a farmer of a ferry, as it should seem, under the Crown, for an injunction to restrain the defendant, who had lands on both sides of the Thames, three-quarters of a mile off, and who was in the habit of ferrying passengers across, from continuing to do so), another bill was brought, after the restoration, in 1663, and a decree made by Lord Hale in favor of the plaintiff that the new ferry should be put down. This last determination is exceedingly strong, carrying the implication in regard to the franchise of a ferry as exclusive of all other ferries

injurious to it, to a very enlarged extent, and it was made by one of the greatest judges who ever adorned the English bench.

But it has been suggested that the doctrine as to ferries is confined to ancient ferries by prescription, and does not apply to those where there is a grant which may be shown. In the former case, the exclusive right may be proved by long use, and exclusive use; in the latter, the terms of the grant show whether it is exclusive or not, and, if not stated to be exclusive in the grant, it cannot, by implication, be presumed to be exclusive. Now there is no authority shown for such a distinction, and it is not sound in itself. If a ferry exists by prescription, nothing more, from the nature of the thing, can be established by long possession than that the ferry originated in some grant, and that it has local limits from the ferry ways on one side to those on the other side. T he mere absence of any other near ferry proves nothing except that there is no competition, for until there is some interference by the erection of another ferry, there can be nothing exclusive, above or below the ferry ways, established by the mere use of the ferry. If such an interference should occur, then the question might arise, and the long use could establish no more than the rightful possession of the franchise. The question whether the franchise is exclusive or not must depend upon the nature of such a franchise at the common law and the implications belonging to it. In short, it is, in the authorities, taken to be exclusive unless a contrary presumption arises from the facts, as it did in *Holcroft v. Heel,* 1 Bos. & Pul. 400. But Lord Coke, in 2 Inst. 406, lays down the law as equally applicable to all cases of prescription and of grant:

"If, says he, one hath a market either by prescription or by letters-patent of the King, another obtains a market, to the nuisance of the former market, he shall not tarry till he have avoided the letters-patent of the latter market by course of law, but he may have an assize of nuisance."

The same rule must, for the same reason, apply to fairs and ferries. The case of *Prince v. Lewis,* 5 Barn. & Cres. 363, was the case of the grant of a market, and not of a market by prescription, yet no one suggested any distinction on this account. *Holcroft v. Heel,* 1 Bos. & Pul. 400, was the case of a grant of a market by letters-patent.

In *Ogden v. Gibbons,* 4 Johns. Ch. 150, Mr. Chancellor Kent recognises, in the most ample manner, the general principles of the common law. Speaking of the grant in the case of an exclusive right to navigate with steamboats from New York to Elizabethtown Point,

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&c.;, he declared that the true intent was to include not merely that point, but the whole shore or navigable part of Elizabethtown. "Any narrower construction," said he,

"in favor of the grantor would render the deed a fraud upon the grantee. It would be like granting an exclusive right of ferriage between two given points, and the setting up a rival ferry within a few rods of those very points, and within the same course of the line of travel. The common law contained principles applicable to this very case, dictated by a sounder judgment and a more enlightened morality. If one had a ferry by prescription, and another erected a ferry so near to it as to draw away its custom, it was a nuisance for which the injured party had his remedy by action, &c.; The same rule applies, in its spirit and substance, to all exclusive grants and monopolies. The grant must be so construed so as to give it due effect by excluding all contiguous and injurious competition."

Language more apposite to the present case could not well be imagined. Here, there is an exclusive grant of a bridge from Charlestown to Boston on the old ferry ways, must it not also be so construed as to exclude all contiguous and injurious competition? Such an opinion, from such an enlightened judge, is not to be overthrown by general suggestions against making any implications in legislative grants.

The case of the *Newburgh Turnpike Company v. Miller,* 5 Johns. Ch. 101, decided by the same learned judge, is still more directly in point, and, so far as his authority can go, conclusively establishes the doctrine not only that the franchise of a ferry is not confined to the ferry ways, but that the franchise of a bridge is not confined to the termini and local limits of the bridge. In that case, the plaintiffs had

erected a toll-bridge over the river Wallkill, in connection with a turnpike, under an act of the Legislature, and the defendants afterwards erected another road and bridge near to the former, and thereby diverted the toll from the plaintiffs' bridge. The suit was a bill in chancery for a perpetual injunction of this nuisance of the plaintiffs' bridge, and it was accordingly, at the hearing granted by the Court. Mr. Chancellor Kent on that occasion said,

"considering the proximity of the new bridge, and the facility that every traveler has, by means of that bridge and the road connected with it, to shun the plaintiffs' gate, which he would otherwise be obliged to pass, I cannot doubt for a moment that the new bridge is a direct and immediate disturbance of the plaintiffs' enjoyment of their privileges,"

&c.;

"The new road, by its termini, created a competition

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most injurious to the statute franchise, and becomes what is deemed in law in respect to such franchise, a nuisance."

And after adverting to his own language, already quoted, in *Odgen v. Gibbons,* 4 John.Ch.R. 150, 160, he added:

"The same doctrine applies to any exclusive privilege created by statute. A such privileges come within the equity and reason of the principle. No rival road, bridge or ferry, or other establishment of a similar kind, and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud upon the grant, and goes to defeat it. The consideration, by which individuals are invited to expend money upon great and expensive and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, *is the grant of an exclusive toll.* This right, thus purchased for a valuable consideration, cannot be taken away by direct or indirect means devised for the purpose, both of which are equally unlawful."

Now when the learned chancellor here speaks of an *exclusive* privilege or franchise, he does not allude to any terms in the statute grant expressly giving such a privilege beyond the local limits, for the statute contained no words to such an effect. The grant, indeed, was, by necessary implication, exclusive, as to the local limits, for the Legislature could not grant any other bridge in the same place with the same termini. It was to such a grant of a franchise exclusive in this sense, and in no other, that his language applies. And he affirms the doctrine in the most positive terms that such a grant carries with it a necessary right to exclude all injurious competition as an indispensable incident. And his judgment turned altogether upon this doctrine.

It is true that, in this case, the defendants did not erect the new bridge under any legislative act. But that is not material in regard to the point now under consideration. The point we are now considering is whether the grant of a franchise to erect a bridge or a ferry is confined to the local limits or termini, to the points and planks of the bridge, or to the ferry ways of the ferry. The learned chancellor rejects such a doctrine with the most pointed severity of phrase. "It operates (says he) as a fraud upon the grant, and goes to defeat it." The grant necessarily includes, "a right to an exclusive toll." "No rival road, bridge or ferry can be tolerated so near to the former as to affect or take away its custom." Now if such be the true construction of the grant of such a franchise, it is just as true a construction in relation to the government, as in relation

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to private persons. It would be absurd to say that the same grant means one think as to the public, and an entirely opposite thing in relation to individuals. If the right to an exclusive franchise or toll exists, it exists from the nature and objects of the grant, and applies equally in all directions . It would be repugnant to all notions of common sense, as well as of justice, to say that the Legislature had a right to commit a fraud upon its own grant. The whole reasoning of the learned chancellor repudiates such a notion.

But in what manner is the doctrine to be maintained that the franchise of a ferry is confined to the ferry ways, and the franchise of a bridge to the planks? It is said that in Saville's Reports 11, it is laid down, "that a ferry is in respect to the landing place, and not of the water, which water may belong to one, and the ferry to another." There can be no doubt of this doctrine. A ferry must have local limits. It must have termini or landing places, and it may include only a right of passage over the water. And is not this equally true whether it be a ferry by prescription or by grant? If so, can there be any difference as to the value of the exclusive right in cases of grant or of prescription? Does not each rest on its landing places? But it is added, in Saville:

"And in every ferry, the land on both sides of the water ought to be [belong] to the owner of the ferry, for otherwise he cannot land upon the other part."

Now if by this is meant that the owner of the ferry must be the owner of the land, it is not law, for all that is required is that he should have a right or easement in the landing places. So it was adjudged in *Peter v. Kendall,* 6 Barn. & Cres. 703, and the dictum of Saville was there overruled. If the same principle is to be applied (as I think it must be) to a bridge, then, as there must be a subsisting right in the proprietors of Charles River Bridge to have such landing places on the old ferry ways, there must be an assignment or grant implied of those ferry ways by Harvard College to the proprietors for that purpose. But of this I shall speak hereafter.

One of the learned judges in the State court (who was against the plaintiffs) admitted that if any person should be forcibly prevented from passing over the plaintiffs' bridge, it would be an injury for which an action on the case would lie. I entirely assent to this doctrine, which appears to me to be founded in the most sound reasoning. It is supported by the case of the *Bailiffs of Tewksbury v. Diston,* 6 East R. 438, and by the authorities cited by Lord Ellenborough

on that occasion, and especially by the doctrine of Mr. Justice Powell in *Ashby v. White,* 2 Lord Raym. 948, and S.C. 6 Mod. 49. But how can this be if the franchise of the bridge is confined to the mere local limits or timbers of the bridge? If the right to take toll does not commence or attach in the plaintiffs, except when the passengers arrive on the bridge, how can an action lie for the proprietors for obstructing passengers from coming to the bridge? The remedy of the plaintiffs can only be coextensive with their rights and franchise. And if an action lies for an obstruction of passengers, because it goes to impair the right of toll and to prevent its being earned, why does not the diversion of passengers from the bridge by other means equally give a cause of action, since it goes, equally, nay more, to impair the right of the plaintiffs to toll? If the Legislature could not impair or destroy its own grant by blocking up all avenues to the bridge, how can it possess the right to draw away all the tolls by a free bridge, which must necessarily withdraw all passengers? For myself, I cannot perceive any ground upon which a right of action is maintainable for any obstruction of passengers which does not equally apply to the diversion of passengers. In each case, the injury of the franchise is the same, although the means used are, or may be, different.

The truth is that the reason why the grant of a franchise, for example, of a ferry or of a bridge, though necessarily local in its limits, is yet deemed to extend beyond those local limits by operation and intendment of law is founded upon two great fundamental maxims of law applicable to all grants. One is the doctrine already alluded to, and laid down in *Liford's Case,* in 11 Co.R. 46, 52a, *lex est cuicunque, aliquis, quod concedit, concedere videtur et id, sine quo res ipsa esse non potuit,* or, as it is expressed with pregnant brevity by Mr. Justice Twisden in *Pomfret v. Ricroft,* 1 Saund. 321, 323, "when the use is granted, everything is granted by which the grantee may have and enjoy the use." *See also Lord Darcy v. Askwith,* Hob.R. 234, 1 Saund. 323, note 6, by Williams; Co.Litt. 56a. Another is that wherever a grant is made for a valuable consideration which involves public duties and charges, the grant shall be construed so as to make the indemnity coextensive with the burden. *Qui sentit onus, sentire debet et commodum.* In the case of a ferry, there is a public charge and duty. The owner must keep the ferry in good repair upon the peril of an indictment. He must keep sufficient

accommodations for all travelers,

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at all reasonable times. He must content himself with a reasonable toll. Such is the *jus publicum.* In return, the law will exclude all injurious competition, and deem every new ferry a nuisance which subtracts from him the ordinary custom and toll. *See* Com.Dig.Piscary, B. *id.* Ferry. So strong is the duty of the ferry owner to the public that it was held, in *Paine v. Patrick,* 3 Mod. 289, 294 that the ferry owner could not excuse himself from not keeping proper boats even by showing that he had erected a bridge more convenient for passengers. It would be a fraud upon such a grant of a ferry to divert the travel and yet to impose the burden. The right to take toll would, or might, be useless unless it should be exclusive within all the bounds of injurious rivalship from another ferry. The franchise is therefore construed to extend beyond the local limits, and to be exclusive within a reasonable distance, for the plain reason that it is indispensable to the fair enjoyment of the franchise and right of toll. The same principle applies, without a shadow of difference that I am able to perceive, to the case of a bridge, for the duties are *publici juris,* and pontage and passage are but different names for exclusive toll for transportation.

In the argument at the present term, it has been further contended that, at all events, in the State of Massachusetts, the ancient doctrine of the common law in relation to ferries is not in force, and never has been recognised; that all ferries in Massachusetts are held at the mere will of the Legislature, and may be established by them and annihilated by them at pleasure; and, of course, that the grantees hold them *durante bene placito* of the Legislature. And in confirmation of this view of the subject, certain proceedings of the colonial Legislature have been relied on, and especially those stated in the record, between the years 1629 and 1650, to the colonial act of 1641, against monopolies (which is, in substance, like the statute of monopolies of the 21 James I., c. 3), and to the general colonial and provincial and State statutes regulating ferries passed in 1641, 1644, 1646, 1647, 1695, 1696, 1710, 1719, 1781 and 1787, some of which contain special provisions respecting Charlestown and Boston ferry.

As to the proceedings of the colonial government so referred to, in my judgment, they establish no such conclusion. But some of them, at least, are directly opposed to it. Thus, for example, in 1638, a ferry was granted to Garret Spencer, at Lynn, for two years. In 1641, it was ordered that they that put two boats between

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Cape Ann and Annisquam shall have liberty to take sufficient toll, as the Court shall think fit, for one-and-twenty years. Could the colonial government have repealed these grants, within the terms specified, at their pleasure? In 1648, Juhn Glover had power given him to let a ferry over Neponset river between Dorchester and Braintree to any person or persons for the term of seven years, &c.;, or else to take it to himself and his heirs, as his inheritance forever, provided it be kept in such a place, and at such a price, as may be most convenient for the country, and pleasant to the General Court. Now if Glover, according to this act, had taken this ferry to him and his heirs as an inheritance, could the colonial Legislature have revoked it at its pleasure? Or rather, can it be presumed that the colonial Legislature intended such a ferry, confessedly an inheritance, to be an estate held only at will? It would be repugnant to all notions of legal interpretation.

In 1637, the General Court ordered the ferry between Boston and Charlestown to be let for three years. It was afterwards, in 1640, granted to Harvard College. From that time down to 1785, it was always held and claimed by the college as its inheritance. But the college never supposed that it was not subject to the regulation of the Legislature so far as the public interests were concerned. The acts of 1650, 1654, 1694, 1696, 1710 and 1781 establish this. But they show no more. That many of the ferries in Massachusetts were held, and perhaps were always held, under mere temporary licenses of the Legislature or of certain magistrates to whom they were intrusted is not denied. But it is as clear that there were other ferries held under more permanent tenures. The colonial act of 1644 authorized magistrates to pass ferries toll-free except such ferries as are appropriated to any, or rented out, and are out of the country's hands, and then it is "ordered that their passages be paid by the country." The act of 1694 excepts

from its operation "such ferries as are already stated and settled either by the court or town to whom they appertain." The colonial act of 1670, as an inducement to the town of Cambridge or other persons to repair the bridge at Cambridge or to erect a new one, declared,

"that this order (granting certain tolls) should continue in force so long a time as the said bridge is maintained serviceable and safe for passage."

So that it is plain that the colonial Legislature did contemplate both ferries and bridges to be held by permanent tenures, and not to be revocable at pleasure.

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But to all the general laws respecting ferries, one answer may be given that their provisions are generally confined to the due regulation of public ferries and matters *publici juris,* and so far as the public have rights which ought to be enforced and protected, and which the Legislature had a proper right to enforce and protect by suitable laws. And in regard to matters not strictly of this nature, the enactments may well apply to all such ferries within the State as were held under the mere temporary license of the State, and were revocable and controllable at pleasure by the Legislature, in which predicament a very large number of ferries in the State were, and also to those ferries (among which Charlestown ferry seems to have been) over which a modified legislative control had been, at their original establishment, reserved. Beyond these results, I am not prepared to admit that these statutes either had or ever were supposed to have any legitimate operation. And before I should admit such a conclusion, I should require the evidence of some solemn judgment of a court of justice in Massachusetts to the very point.

But the argument presses the doctrine to an extent which it is impossible can be correct if any principles respecting vested rights exist, or have any recognition in a free government. What is it? That all ferries in Massachusetts are revocable and extinguishable at pleasure. Suppose, then, the Legislature of Massachusetts, for a valuable consideration, should grant a ferry from A. to B. to a grantee and his heirs, or to a grantee for forty years, or for life; will it be contended that the

Legislature can take away, revoke or annihilate that grant within the period? That it may make such a grant cannot well be denied, for there is no prohibition touching it in the Constitution of Massachusetts. That it can take away or resume such a grant has never yet been held by any judicial tribunal in that State. The contrary is as well established as to all sorts of grants unless an express power be reserved for the purpose, as any principle in its jurisprudence. In the very case now before this Court, every judge of the Supreme Court of the State admitted that the Legislature could not resume or revoke its charter to Charles River Bridge. Why not, if it could revoke its solemn grant of a ferry to a private person, or to a corporation, during the stipulated period of the grant? The Legislature might just as well resume its grant of the public land, or the grant of a turnpike, or of a railroad, or of any other franchise, within the period stipulated by its charter.

The doctrine, then, is untenable. The moment that you ascertain

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what the terms and stipulations of a grant of a ferry or any other franchise are that moment, they are obligatory. They cannot be gainsaid or resumed. So this Court has said, in the case of *Fletcher v. Peck,* 6 Cranch 87, and so are the unequivocable principles of justice, which cannot be overturned without shaking every free government to its very foundations. If, then, the ferry between Charlestown and Boston was vested, in perpetuity, in the corporation of Harvard College, it could not be taken away without its consent by the Legislature. It was a ferry so far withdrawn from the power of any legislation trenching on its rights and franchises. It is assuming the very point in controversy to say that the ferry was held at the mere pleasure of the Legislature. An exclusive claim, and possession and user, and taking of the profits thereof, for 150 years, by the corporation of Harvard College, without interruption, was as decisive evidence of its exclusive right to the franchise in perpetuity as the title deed of any man to his own estate. The Legislature of Massachusetts has never, so far as I know, breathed a doubt on the point. All the judges of the State court admit the exclusive right of Harvard College to the ferry in the most unequivocal terms. The argument, then, that the English doctrine as to ferries has not been adopted, and is not in force in

Massachusetts, is not supported. For myself, I can only say that I have always understood that the English doctrine on this subject constitutes a part of the common law of Massachusetts. But, what is most material to be stated, not one of the learned judges in the State court doubted or denied the doctrine, though it was brought directly before them, and they gave, *seriatim,* opinions containing great diversities of judgment on other points. [Footnote 2] It is also fully established by the case of *Chadwick v. Proprietors of Haverhill Bridge,* already cited.

But it is urged that some local limits must be assigned to such grants, and the Court must assign them, for otherwise they would involve the absurdity of being coextensive with the range of the river, for every other bridge or ferry must involve some diminution of toll, and how much (it is asked) is necessary to constitute an infringement of the right? I have already given an answer, in part, to this suggestion. The rule of law is clear. The application of it must depend upon the particular circumstances of each case. Wherever

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any other bridge or ferry is so near that it injures the franchise, or diminishes the toll in a positive and essential decree, there it is a nuisance, and is actionable. It invades the franchise, and ought to be abated. But whether there be such an injury or not is a matter not of law, but of fact. Distance is no otherwise important than as it bears on the question of fact. All that is required is that there should be a sensible, positive injury. In the present case, there is no room to doubt upon this point, for the bridges are contiguous, and Warren Bridge, after it was opened, took away three-fourths of the profits of the travel from Charles River Bridge, and when it became free (as it now is), it necessarily took away all the tolls, or all except an unimportant and trivial amount.

What I have said, however, is to be understood with this qualification -- that the franchise of the bridge has no assigned local limits, but it is a simple grant of the right to erect a bridge across a river, from one point to another, without being limited between any particular villes or towns, or by other local limits. In the case now before the Court, I have already stated that my judgment is that the franchise

is merely to erect a bridge between Charlestown and Boston, and therefore it does not necessarily exclude the Legislature from making any other grant for the erecting of a bridge between Boston and any other town. The exclusive right being between those towns, it only precludes another legislative grant between those towns which is injurious to Charles River Bridge. The case of *Tripp v. Frank,* 4 T.R. 666, is a clear authority for this doctrine. It was there decided that the grant of an exclusive ferry between A. and B. did not exclude a ferry between A. and C. But the argument of the plaintiff's counsel was tacitly admitted by the Court that

"ferries, in general, must have some considerable extent upon which their right may operate; otherwise, the exclusive privilege would be of no avail; that extent must be governed by local circumstances."

And there is the greatest reason for supporting such rights, because the owners of ferries are bound, at their peril, to supply them to the public use, and are therefore fairly entitled to the public advantage arising from them.

But it is said, if this is the law, what then is to become of turnpikes and canals? Is the Legislature precluded from authorizing new turnpikes or new canals simply because they cross the path of the old ones, and incidentally diminish their receipt of tolls? The answer is plain. Every turnpike has its local limits and local termini, its points of beginning and of end. No one ever imagined that the

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Legislature might grant a new turnpike with exactly the same location and termini. That would be to rescind its first grant. The grant of a turnpike between A. and B. does not preclude the Legislature from the grant of a turnpike between A. and C., even though it should incidentally intercept some of the travel, for it is not necessarily a nuisance to the former grant. The termini being different, the grants are or may be substantially different. But if the Legislature should grant a second turnpike, substantially taking away the whole travel from the first turnpike between the same local points, then, I say, it is a violation of the rights of the first turnpike. And the opinion of Mr. Chancellor Kent and all the old authorities on the subject of

ferries support me in the doctrine.

Some reliance has been placed upon the cases of *Prince v. Lewis,* 5 Barn. & Cres. 363, and *Mosley v. Walker,* 7 Barn. & Cres. 40, as impugning the reasoning. But it appears to me that they rather fortify than shake it. In the former case, the King granted a market to A. and his heirs in a place within certain specified limits, and the grantee used part of the limits for other purposes, and space enough was not ordinarily left for the marketing. It was held that the owner of the market could not maintain an action against a person for selling marketable goods in the neighborhood without showing that, at the time of the sale, there was room enough in the market for the seller. This clearly admits the exclusive right of the owner if there is room enough in the market. The other case affirms the same principle, as, indeed, it was before affirmed in *Mosley v. Chadwick,* 7 Barn. & Cres. 47, note.

But then again, it is said that all this rests upon implication, and not upon the words of the charter. I admit that it does, but I again say that the implication is natural and necessary. It is indispensable to the proper effect of the grant. The franchise cannot subsist without it, at least, for any valuable or practical purpose. What objection can there be to implications if they arise from the very nature and objects of the grant? If it be indispensable to the full enjoyment of the right to take toll that it should be exclusive within certain limits, is it not just and reasonable that it should be so construed? If the legislative power to erect a new bridge would annihilate a franchise already granted, is it not, unless expressly reserved, necessarily excluded by intendment of law? Can any reservations be raised by mere implication to defeat the operation of a grant, especially when such a reservation would be coextensive with the whole

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right granted, and amount to the reservation of a right to recall the whole grant.

Besides, in this very case, it is admitted on all sides that, from the defective language and wording of the charter, no power is directly given to the proprietors

to erect the bridge, and yet it is agreed that the power passes by necessary implication from the grant, for otherwise it would be utterly void. The argument, therefore, surrenders the point as to the propriety of making implications and reduces the question to the mere consideration of what is a necessary implication. Now I would willingly put the whole case upon this point, whether it is not as indispensable to the fair and full operation of the grant that the plaintiffs should be secure in the full enjoyment of their right to tolls, without disturbance or diversion -- as that they should have the power to erect the bridge. If the tolls may be all swept away, by a contiguous free bridge erected the next day, can it be said in any sense that the object of the franchise is obtained? What does the sound logic of the common law teach us on this point? If a grant, even of the Crown, admits of two constructions, one of which will defeat, and the other will promote and secure, the fair operation of the grant, the latter is to be followed.

The truth is that the whole argument of the defendants turns upon an implied reservation of power in the Legislature to defeat and destroy its own grant. The grant, construed upon its own terms, upon the plain principles of construction of the common law, by which alone it ought to be judged, is an exclusive grant. It is the grant of a franchise, *publici juris,* with a right of tolls, and in all such cases, the common law asserts the grant to be exclusive, so as to prevent injurious competition. The argument seeks to exclude the common law from touching the grant by implying an exception in favor of the legislative authority to make any new grant. And let us change the position of the question as often as we may, it comes to this, as a necessary result -- that the Legislature has reserved the power to destroy its own grant, and annihilate the right of pontage of the Charles River Bridge. If it stops short of this exercise of its power, it is its own choice, and not its duty. Now I maintain that such a reservation is equivalent to a power to resume the grant, and yet it has never been for a moment contended that the Legislature was competent to resume it.

To the answer already given to the objection that, unless such a reservation of power exists, there will be a stop put to the progress

of all public improvements, I wish, in this connection, to add that there never can any such consequence follow upon the opposite doctrine. If the public exigencies and interests require that the franchise of Charles River Bridge should be taken away, or impaired, it may be lawfully done, upon making due compensation to the proprietors. "Whenever," says the Constitution of Massachusetts,

"the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,"

and this franchise is property -- is fixed determinate property. We have been told, indeed that where the damage is merely consequential (as, by the erection of a new bridge, it is said that it would be), the Constitution does not entitle the party to compensation, and *Thruston v. Hancock,* 12 Mass. 220, and *Callender v. Marsh,* 1 Pick. 418, are cited in support of the doctrine. With all possible respect for the opinions of others, I confess myself to be among those who never could comprehend the law of either of those cases, and I humbly continue to doubt if, upon principle or authority, they are easily maintainable, and I think my doubts fortified by the recent English decisions. But, assuming these cases to be unquestionable, they do not apply to a case like the present, if the erection of such a new bridge is a violation of the plaintiffs' franchise. That franchise, so far as it reaches, is private property, and, so far as it is injured, it is the taking away of private property. Suppose, a man is the owner of a mill, and the Legislature authorizes a diversion of the watercourse which supplies it whereby the mill is injured or ruined; are we to be told that this is a consequential injury, and not within the scope of the Constitution? If not within the scope of the Constitution, it is, according to the fundamental principles of a free government, a violation of private rights, which cannot be taken away without compensation. The case of *Gardner v. Village of Newburgh,* 2 Johns. Ch. 139, would be a sufficient authority to sustain this reasoning if it did not stand upon the eternal principles of justice, recognised by every government which is not a pure despotism.

Not a shadow of authority has been introduced to establish the position of the defendants that the franchise of a toll bridge is confined to the planks of the bridge, and yet it seems to me that the *onus probandi* is on them, for all the analogies of

the common law are against them. They are driven, indeed, to contend that the same principles apply to ferries, which are limited to the ferry ways,

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unless some prescription has given them a more extensive range. But here, unless I am entirely mistaken, they have failed to establish their position. As I understand the authorities, they are, unequivocally, the other way. Are we then to desert the wholesome principles of the common law, the bulwark of our public liberties, and the protecting shield of our private property, and assume a doctrine which substantially annihilates the security of all franchises affected with public easements?

But it is said that, if the doctrine contended for be not true, then every grant to a corporation becomes, *ipso facto,* a monopoly or exclusive privilege. The grant of a bank, or of an insurance company, or of a manufacturing company, becomes a monopoly, and excludes all injurious competition. With the greatest deference and respect for those who press such an argument, I cannot but express my surprise that it should be urged. As long ago as the case in the Year Book, 22 Hen. VI. 14, the difference was pointed out in argument between such grants as involve public duties and public matters for the common benefit of the people and such as are for mere private benefit, involving no such consideration. If a bank or insurance company or manufacturing company is established in any town by an act of incorporation, no one ever imagined that the corporation was bound to do business, to employ its capital, to manufacture goods, to make insurance. The privilege is a mere private corporate privilege, for the benefit of the stockholders, to be used or not at their own pleasure, to operate when they please, and to stop when they please. Did any man ever imagine that he had a right to have a note discounted by a bank, or a policy underwritten by an insurance company? Such grants are always deemed *privati juris.* No indictment lies for a non-user. But in cases of ferries and bridges, and other franchises of a like nature (as has been shown), they are affected with a *jus publicum.* Such grants are made for the public accommodation, and pontage and passage are authorized to be levied upon travelers (which can only be by public authority), and, in return, the

proprietors are bound to keep up all suitable accommodations for travelers, under the penalty of indictment for their neglect.

The tolls are deemed an equivalent for the burden, and are deemed exclusive because they might not otherwise afford any just indemnity. In the very case at bar, the proprietors of Charles River Bridge (as we have seen) are compellable to keep their draws and

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bridge in good repair during the period of seventy years, to pay an annuity to Harvard College, to give all reasonable accommodations to the public travel, and, if they do not, they may be grievously amerced. The burdens being exclusively on them, must not the tolls granted by way of remuneration (I repeat it), must they not be equally exclusive, to insure an indemnity? Is there any analogy in such a case to the case of a bank, or an insurance company, or a manufacturing company? The case of *Jackson v. Lamphire,* 3 Pet. 280, contains no doctrine which in the slightest degree interferes with that which I have been endeavoring to establish in the present case. In that decision I believe that I concurred, and I see no reason now to call in question the soundness of that decision. That case does not pretend to inculcate the doctrine that no implication can be made, as to matters of contract, beyond the express terms of a grant. If it did, it would be in direct conflict with other most profoundly considered adjudications of this Court. It asserted only that the grant in that case carried no implication that the grantee should enjoy the land therein granted free from any legislative regulations to be made, in violation of the Constitution of the State. Such an implication, so broad and so unmeasured, which might extend far beyond any acts which could be held, in any just sense, to revoke or impair the grant, could by no fit reasoning be deduced from the nature of the grant. What said the Court on that occasion?

"The only contract made by the State is a grant to J.C., his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land, and we do not, in this case, feel at liberty to create one by implication. The State has not, by this act, impaired the force of the

grant. It does not profess or attempt to take the land from the assigns of C. and give it to one not claiming under him. Neither does the award produce that effect. The grant remains in full force, the property conveyed is held by the grantee, and the State asserts no claim to it."

But suppose the reverse had been the fact. Suppose that the State had taken away the land and granted it to another, or asserted its own right otherwise to impair the grant; does it not follow from this very reasoning of the Court that it would have been held to have violated the implied obligations of the grant? Certainly it must have been so held, or the Court would have overturned its own most solemn judgments in other cases. Now there is not, and cannot be, any real distinction between a grant of land

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and a grant of franchises. The implication, in each case, must be the same, *viz.,* that the thing granted shall not be resumed or impaired by the grantor.

It has been further argued that, even if the charter of the Charles River Bridge does imply such a contract on the part of the Legislature, as is contended for, it is void for want of authority in the Legislature to make it, because it is a surrender of the right of eminent domain, intrusted to the Legislature and its successors for the benefit of the public, which is not at liberty to alienate. If the argument means no more than that the Legislature, being intrusted with the power to grant franchises, cannot, by contract, agree to surrender or part with this power generally, it would be unnecessary to consider the argument, for no one supposes that the Legislature can rightfully surrender its legislative power. If the argument means no more than that the Legislature, having the right by the Constitution to take private property (among which property are franchises) for public purposes, cannot divest itself of such a right by contract, there would be as little reason to contest it. Neither of these cases is like that before the Court. But the argument (if I do not misunderstand it) goes further, and denies the right of the Legislature to make a contract granting the exclusive right to build a bridge between Charlestown and Boston, and thereby taking from itself the right to grant another bridge between

Charlestown and Boston at its pleasure, although the contract does not exclude the Legislature from taking it for public use, upon making actual compensation, because it trenches upon the sovereign right of eminent domain.

It is unnecessary to consider whether the phrase "eminent domain," in the sense in which it is used in the objection, is quite accurate. The right of eminent domain is usually understood to be the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all citizens within the territorial sovereignty to public purposes. Vattel (B. 1, c. 20, 244) seems so to have understood the terms, for he says that the right, which belongs to the society, or the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth (the property) contained in the State is called the "eminent domain." And he adds that it is placed among the prerogatives of majesty, which, in another section (B. 1, c. 4, 45), he defines to be

"all the prerogatives without which the sovereign command, or authority,

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could not be exerted in the manner most conducive to the public welfare."

The right of "eminent domain," then, does not comprehend all, but only is among the, prerogatives of majesty. But the objection uses the words in a broader sense, as including what may be deemed the essential and ordinary attributes of sovereignty, such as the right to provide for the public welfare, to open highways, to build bridges, and, from time to time, to make grants of franchises for the public good. Without doubt, these are proper attributes of sovereignty, and prerogatives resulting from its general nature and functions. And so Vattel considers them in the passage cited at the bar: B. 1, c. 9, 100-101. But they are attributes and prerogatives of sovereignty only, and can be exercised only by itself, unless specially delegated.

But without stopping to examine into the true meaning of phrases, it may be proper to say that, however extensive the prerogatives and attributes of sovereignty may theoretically be, in free governments, they are universally held to be restrained

within some limits. Although the sovereign power in free governments may appropriate all the property, public as well as well as private, for public purposes, making compensation therefor, yet it has never been understood, at least, never in our republic, that the sovereign power can take the private property of A. and give it to B., by the right of "eminent domain," or that it can take it at all, except for public purposes, or that it can take it for public purposes without the duty and responsibility of making compensation for the sacrifice of the private property of one for the good of the whole. These limitations have been held to be fundamental axioms in free governments like ours, and have accordingly received the sanction of some of our most eminent judges and jurists. Vattel himself lays them down, in discussing the question of the right of eminent domain, as among the fundamental principles of government, binding even upon the sovereignty itself. "If," says he,

"the nation itself disposes of the public property in virtue of this eminent domain, the alienation is valid as having been made with a sufficient power. When it disposes in like manner, in a case of necessity, of the possessions (the property) of a community or of an individual, the alienation will be valid for the same reason. But justice demands that this community or this individual be recompensed out of the public money, and if the treasury is not able to pay, all the citizens are obliged to contribute to it.

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Vattel, b. 1, c. 20, 244. They have also been incorporated into most of our State constitutions, and into that of the United States, and, what is most important to the present argument, into the State Constitution of Massachusetts. So long as they remain in those constitutions, they must be treated as limitations imposed by the sovereign authority upon itself, and, *a fortiori,* upon all its delegated agents. The Legislature of Massachusetts is in no just sense sovereign. It is but the agent, with limited authority, of the State sovereignty, and it cannot rightfully transcend the bounds fixed in the Constitution. What those limits are, I shall presently consider. It is but justice to the argument to say that I do not understand it to maintain that the Legislature ought not, in all cases, as a matter of duty, to give compensation where private property or franchises are taken away. But that the Legislature is the

final judge as to the time, the manner, and the circumstances under which it should be given or withheld, whether when the property is taken or afterwards, and whether it is or is not a case for compensation at all."

But let us see what the argument is in relation to sovereignty in general. It admits that the sovereign power has, among its prerogatives, the right to make grants, to build bridges, to erect ferries, to lay out highways, and to create franchises for public and private purposes. If it has a right to make such grants, it follows that the grantees have a right to take and to hold these franchises. It would be a solecism to declare that the sovereign power could grant, and yet no one could have a right to take. If it may grant such franchises, it may define and limit the nature and extent of such franchises, for, as the power is general, the limitations must depend upon the good pleasure and discretion of the sovereign power in making the particular grant. If it may prescribe the limits, it may contract that these limits shall not be invaded by itself or by others.

It follows from this view of the subject that, if the sovereign power grants any franchise, it is good and irrevocable within the limits granted, whatever they may be, or else, in every case, the grant will be held only during pleasure, and the identical franchise may be granted to any other person, or may be revoked at the will of the sovereign. This latter doctrine is not pretended, and, indeed, is unmaintainable in our systems of free government. If, on the other hand, the argument be sound that the sovereign power cannot grant a franchise, to be exclusive within certain limits, and cannot contract

not to grant the same or any like franchise within the same limits to the prejudice of the first grant, because it would abridge the sovereign power in the exercise of its right to grant franchises, the argument applies equally to all grants of franchises, whether they are broad or narrow, for, *pro tanto,* they do abridge the exercise of the sovereign power to grant the same franchise within the same limits. Thus, for example, if the sovereign power should expressly grant an exclusive right to build a bridge over navigable waters between the towns of A. and B., and

should expressly contract with the grantees that no other bridge should be built between the same towns, the grant would, upon the principles of the argument, be equally void in regard to the franchise within the planks of the bridge,as it would be in regard to the franchise, outside of the planks of the bridge, for, in each case, it would, *pro tanto,* abridge or surrender the right of the sovereign to grant a new bridge within the local limits. I am aware that the argument is not pressed to this extent, but it seems to me a necessary consequence flowing from it. The grant of the franchise of a bridge twenty feet wide, to be exclusive within those limits, is certainly, if obligatory, an abridgment or surrender of the sovereign power to grant another bridge within the same limits if we mean to say that every grant that diminishes the things upon which that power can rightfully act, is such an abridgment. Yet the argument admits that, within the limits and planks of the bridge itself, the grant is exclusive and cannot be recalled. There is no doubt that there is a necessary exception in every such grant that, if it is wanted for public use, it may be taken by the sovereign power for such use upon making compensation. Such a taking is not a violation of the contract, but it is strictly an exception resulting from the nature and attributes of sovereignty, implied from the very terms, or at least acting upon the subject matter of the grant, *suo jure.*

But the Legislature of Massachusetts is, as I have already said, in no just sense the sovereign of the State. The sovereignty belongs to the people of the State, in their original character as an independent community, and the Legislature possesses those attributes of sovereignty, and those only, which have been delegated to it by the people of the State under its Constitution. There is no doubt that among the powers so delegated to the Legislature is the power to grant the franchises of bridges and ferries, and others of a like nature. The power to grant is not limited by

any restrictive terms in the Constitution, and it is, of course, general and unlimited as to the terms, the manner, and the extent of granting franchises. These are matters resting in its sound discretion, and, having the right to grant, its grantees have a right to hold according to the terms of their grant and to the extent of the

exclusive privileges conferred thereby. This is the necessary result of the general authority upon the principles already stated.

But this doctrine does not stand upon general reasoning alone. It is directly and positively affirmed by all the judges of the State court (the true and rightful expositors of the State Constitution) in this very case. All of them admit that the grant of an exclusive franchise of this sort, made by the Legislature, is absolutely obligatory upon the Legislature, and cannot be revoked or resumed, and that it is a part of the contract implied in the grant that it shall not be revoked or resumed, and that, as a contract, it is valid to the extent of the exclusive franchise granted. So that the highest tribunal in the State which is entitled to pass judgment on this very point has decided against the soundness of the very objection now stated, and has affirmed the validity and obligation of such a grant of the franchise. The question among the learned judges was not, whether the grant was valid or not, for all of them admitted it to be good and irrevocable. But the question was what was, in legal construction, the nature and extent of the exclusive franchise granted. This is not all. Although the Legislature have an unlimited power to grant franchises, by the Constitution of Massachusetts, they are not intrusted with any general sovereign power to recall or resume them. On the contrary, there is an express prohibition in the bill of rights in that Constitution restraining the Legislature from taking any private property except upon two conditions: first, that it is wanted for public use, and secondly that due compensation is made. So that the power to grant franchises, which are confessedly property, is general, while the power to impair the obligation of the grant and to resume the property is limited. An act of the Legislature transcending these bounds is utterly void, and so it has been constantly held by the State judges. The same doctrine has been maintained by this Court on various occasions, and especially, in *Fletcher v. Peck,* 6 Cranch 146, and in *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518.

Another answer to the argument has been, in fact, already given. It is that, by the grant of a particular franchise, the Legislature does

not surrender its power to grant franchises, but merely parts with its power to grant the same franchise, for it cannot grant that which it has already parted with. Its power remains the same, but the thing on which it can alone operate is disposed of. It may, indeed, take it again for public uses, paying a compensation. But it cannot resume it, or grant it to another person, under any other circumstances or for any other purposes. In truth, however, the argument itself proceeds upon a ground which the Court cannot act upon or sustain. The argument is that, if the State Legislature makes a grant of a franchise exclusive, and contracts that it shall remain exclusive within certain local limits, it is an excess of power, and void as an abridgment or surrender of the right of sovereignty under the State Constitution. But this is a point over which this Court has no jurisdiction. We have no right to inquire, in this case, whether a State law is repugnant to its own Constitution, but only whether it is repugnant to the Constitution of the United States. If the contract has been made, we are to say whether its obligation has been impaired, and not to ascertain whether the Legislature could rightfully make it. Such was the doctrine of this Court in the case of *Jackson v. Lamphire,* already cited. 3 Pet. 28 U. S. 280 -289. But the conclusive answer is that the State judges have already settled that point, and held the present grant a contract to be valid to the extent of the exclusive limits of the grant, whatever they are.

To sum up, then, the whole argument on this head: I maintain that, upon the principles of common reason and legal interpretation, the present grant carries with it a necessary implication that the Legislature shall do no act to destroy or essentially to impair the franchise, that (as one of the learned judges of the State court expressed it) there is an implied agreement that the State will not grant another bridge between Boston and Charlestown, so near as to draw away the custom from the old one, and (as another learned judge expressed it) that there is an implied agreement of the State to grant the undisturbed use of the bridge and its tolls so far as respects any acts of its own or of any persons acting under its authority. In other words, the State impliedly contracts not to resume its grant or to do any act to the prejudice or destruction of its grant. I maintain that there is no authority or principle established in relation to the construction of Crown grants, or legislative grants, which does not concede and justify this doctrine. Where the

thing is given,

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the incidents, without which it cannot be enjoyed, are also given, *ut res magis valeat quam pereat.* I maintain that a different doctrine is utterly repugnant to all the principles of the common law, applicable to all franchises of a like nature, and that we must overturn some of the best securities of the rights of property before it can be established. I maintain that the common law is the birthright of every citizen of Massachusetts, and that he holds the title deeds of his property, corporeal and incorporeal, under it. I maintain that, under the principles of the common law, there exists no more right in the Legislature of Massachusetts to erect the Warren Bridge, to the ruin of the franchise of the Charles River Bridge, than exists to transfer the latter to the former, or to authorize the former to demolish the latter. If the Legislature does not mean in its grant to give any exclusive rights, let it say so expressly, directly, and in terms admitting of no misconstruction. The grantees will then take at their peril, and must abide the results of their overweening confidence, indiscretion, and zeal.

My judgment is formed upon the terms of the grant, its nature and objects, its designs and duties; and, in its interpretation, I seek for no new principles, but I apply such as are as old as the very rudiments of the common law.

But if I could persuade myself that this view of the case were not conclusive upon the only question before this Court, I should rely upon another ground which, in may humble judgment, is equally decisive in favor of the plaintiffs. I hold that the plaintiffs are the equitable assignees (during the period of their ownership of the bridge) of the old ferry, belonging to Harvard College, between Charlestown and Boston, for a valuable consideration, and, as such assignees, they are entitled to an exclusive right to the ferry, so as to exclude any new bridge from being erected between those places during that period. If Charles River Bridge did not exist, the erection of Warren Bridge would be a nuisance to that ferry, and would, in fact, ruin it. It would be exactly the case of *Chadwick v. Proprietors of the Haverhill Bridge,* which, notwithstanding all I have heard to the contrary, I deem of the very

highest authority. But, independently of that case, I should arrive at the same conclusion, upon general principles. The general rights and duties of the owners of the ferries at the common law were not disputed by any of the learned judges in the State court to be precisely the same in Massachusetts as in England. I shall not, therefore, attempt to go over

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that ground with any further illustrations than what have already, in another part of this opinion, been suggested. I cannot accede to the argument that the ferry was extinguished by operation of law, by the grant of the bridge and the acceptance of the annuity. In my judgment, it was indispensable to the existence of the bridge as to its termini that the ferry should be deemed to be still a subsisting franchise, for otherwise, the right of landing on each side would be gone. I shall not attempt to go over the reasoning by which I shall maintain this opinion, as it is examined with great clearness and ability by Mr. Justice Putnam, in his opinion in the State court, to which I gladly refer as expressing mainly all my own views on this topic. Indeed, there is, in the whole of that opinion, such masculine vigor, such a soundness and depth of learning, such a forcible style of argumentation and illustration, that, in every step of my own progress, I have sedulously availed myself of his enlightened labors. For myself, I can only say that I have as yet heard no answer to his reasoning, and my belief is that, in a judicial sense, it is unanswerable.

Before I close, it is proper to notice, and I shall do it briefly, another argument strongly pressed at the bar against the plaintiffs, and that is that the extension of the term of the franchise of the plaintiffs for thirty years, by the Act of 1792 (erecting the West Boston bridge, between Boston and Cambridge), and the acceptance thereof by the plaintiffs, amounted to a surrender or extinguishment of their exclusive franchise, if they ever had any, to build bridges over Charles River, so that they are barred from now setting it up against the Warren Bridge. In my judgment, there is no foundation whatsoever, either in law or in the facts, to sustain this objection. If any legitimate conclusion be deducible from the terms of that act, it is that the plaintiffs, if they had claimed any such exclusive right over the whole river, would, by their acceptance of the new term of years, have been

estopped to claim any damages done to their franchise by the erection of West Boston bridge, and that their consent must be implied to its erection. But there is no warrant for the objection in any part of the language of the act. The extension of the term is not granted upon any condition whatsoever. No surrender of any right is asked or required. The clause extending the term purports, in its face, to be a mere donation or bounty of the Legislature, founded on motives of public liberality and policy. It is granted expressly as an encouragement to enterprise, and as a compensation

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for the supposed diminution of tolls, which West Boston bridge would occasion to Charles River Bridge, and in no manner suggests any sacrifice or surrender of right whatsoever to be made by the plaintiffs. In the next place, the erection of West Boston bridge was no invasion whatsoever of the franchise of the plaintiffs. Their right, as I have endeavored to show, was limited to a bridge, and the travel between Charlestown and Boston, and did not extend beyond those towns. West Boston bridge was between Boston and Cambridge, at the distance of more than a mile by water, and by land of nearly three miles, and as the roads then ran, the line of travel for West Boston bridge would scarcely ever, perhaps never, approach nearer than that distance to Charles River Bridge. The grant, therefore, could not have been founded in any notion of any surrender or extinguishment of the exclusive franchise of the plaintiffs, for it did not reach to such an extent, it did not reach Cambridge, and never had reached it.

As to the report of the committee on the basis of which the West Boston bridge was granted, it has, in my judgment, no legal bearing on the question. The committee say that they are of opinion that the Act of 1785 did not confer "an exclusive grant of the right to build over the waters of Charles River." That is true, and it is equally true that the plaintiffs never asserted, or pretended to have, any such right. In their remonstrance against the erection of West Boston bridge, they assert no such right, but they put themselves upon mere equitable considerations, addressing themselves to the sound discretion of the Legislature. If they had asserted such a broad right, it would not justify any conclusion that they were

called upon to surrender, or did surrender, their real and unquestionable rights. The Legislature understood itself to be granting a boon, and not making a bargain or asking a favor. It was liberal, because it meant to be just, in a case of acknowledged hazard, and of honorable enterprise very beneficial to the public. To suppose that the plaintiffs meant to surrender their present valuable and exclusive right of franchise for thirty-four remaining years, and to put it in the power of the Legislature, the next day, or the next year, to erect a bridge, toll or free, which, by its contiguity should ruin theirs, or take away all their profits, is a supposition, in my judgment, truly extravagant, and without a scintilla of evidence to support it. The burdens of maintaining the bridge were to remain; the payment of the annuity to Harvard College was to remain; and yet, upon this

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supposition, the extension of the term of their charter, granted in the shape of a bounty, would amount to a right to destroy the franchise the next day, or the next hour, at the pleasure of the Legislature. I cannot perceive upon what ground such an implication can be made, an implication not arising from any words or intent expressed on the face of the act or fairly inferrible from its purposes, and wholly repugnant to the avowed objects of the grant, which are to confer a benefit, and not to impose an oppressive burden, or create a ruinous competition.

Upon the whole, my judgment is that the act of the Legislature of Massachusetts granting the charter of Warren Bridge is an act impairing the obligation of the prior contract and grant to the proprietors of Charles River Bridge, and, by the Constitution of the United States, it is therefore utterly void. I am for reversing the decree to the State court (dismissing the bill), and for remanding the cause to the State court for further proceedings, as to law and justice shall appertain.

[Footnote 1]

S.P. in *Attorney-General v. Sitwell,* 1 Younge's Rep. 583.

[Footnote 2]

See Proprietors of Charles River Bridge, 7 Pick.R. 344.

THOMPSON, Justice.

The opinion delivered by my brother Mr. Justice Story I have read over and deliberately considered. On this full consideration, I concur entirely in all the principles and reasonings contained in it, and I am of opinion the decree of the Supreme Judicial Court of Massachusetts should be reversed.

This cause came on to be heard on the transcript of the record from the Supreme Judicial Court, holden in and for the County of Suffolk, in the Commonwealth of Massachusetts, and was argued by counsel; on consideration whereof, it is ordered, adjudged and decreed by this Court that the decree of the said Supreme Judicial Court in this cause be and the same is hereby affirmed, with costs.

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