12/321. Explnd. in Pike v. State, 14/406, & Revrsd. in 15 How. 302.

THE STATE ET AL. *vs.* CURRAN.

It is not inconsistent with the usages even of despotic governments for a subject to sue his sovereign in his own courts of justice, and this right in the subject was unqualified in the English Government, until the usurpation of the Feudal Kings; and was afterwards always allowed in a qualified form—by petition. Our Constitution affirmatively, and not by implication, directs that provision shall be made for suits against the State. It follows that a right of a citizen to sue a State is not derogatory to common right, or subversive of the true principles of the common law, but is in harmony with both, and it cannot be supposed that the people, in convention, in directing that the Legislature should provide in what courts, and in what manner, suits may be commenced against the State intended that these provisions should be any other than such as would advance this right in the citizen to apply to the courts of justice for the redress of grievances. Hence, the statutes authorizing suits against the State are to be liberally construed.

Under the provisions of *Chap.* 157, *Digest*, when so construed, the State may be sued as well in chancery as at law, and as well for property as money demands, and in this view every provision of the various statutes touching the subject will be found sensible, effective, and in harmony.

A law in force when a contract is made, cannot, by its legitimate operation, impair its obligation in the sense of the Constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulation between the parties.

Where an act of incorporation is a grant of political power; where it creates a civil institution to be employed in the administration of Government, or where its whole funds belong to the public, the charter is completely within legislative control. Such corporations are created by the mere will of the Legislature, and are in no way the result of contract; while those through which the Legislature seeks to accomplish some public purpose, by the instrumentality of a second party, who is to advance some money, labor or property, are the direct result of contract. The one is within legislative control, while the other cannot be dissolved, under the provision of the Federal Constitution, otherwise than in pursuance of a power to do so reserved by the State, to be exercised upon the happening of some contingency, and is therefore one of the stipulations out of which the incorporation sprung.

This classification of corporations obviates the difficulty and disputation arising from the ordinary division of corporations into public and private.

The Bank of the State of Arkansas was of the class of corporations that are within the legislative control, and the Legislature possessed the

power to repeal its entire charter, on any of its provisions, when, in the exercise of constitutional discretion, the public interest might seem to require it.

Had the Legislature simply repealed the charter of the Bank previous to 11th January, 1843, when the common law as to the effect of the expiration of corporations, &c., was repealed and other provisions made, (*Digest, Ch.* 39, *Sec.* 16,) all its real estate would have reverted to the original grantor or his heirs, its personal property would have vested in the State, and the debts due to and from the bank would have been extinguished. In such case, the bill-holder would have had no remedy except that growing out of the 28th section of the charter, whereby the State contracted with the bill-holders that the bills should be receivable in payment of all debts due the State.

Where the Legislature possesses the power to repeal the charter of a corporation, and exercises it, the courts will not presume that such power was improperly or unconsciously exercised.

The Legislature possessing the power to repeal the charter of the Bank of the State, and the acts placing the bank in liquidation being but in partial exercise of that power, on the failure of the Bank, in the judgment of the Legislature to accomplish the objects of its creation, are all declared to be constitutional and valid acts.

The Legislature possessing the power to place the Bank in liquidation, husband its assets, and provide for the appropriation of them to the discharge of the liabilities of the Bank as it might deem just and expedient, the acts exempting the debtors of the Bank from the process of garnishment, making provision for the disposition of the bills of the Real Estate Bank on hand, and for the transfer of the Real Estate of the Bank to the State are valid acts, and a judgment creditor of the Bank cannot, by Bill in chancery, subject such assets to the satisfaction of his demand, though his judgment be obtained on the bills of the Bank.

Appeal from the Chancery side of Pulaski Circuit Court.

THIS was a bill filed by James M. Curran, in the chancery side of Pulaski Circuit Court, against the Bank of the State of Arkansas, John M. Ross, Financial Receiver, and David W. Carroll, attorney of said Bank, the State of Arkansas, and Charles J. Krebbs, determined before the Hon. WM. H. FEILD, Chancellor, in February, 1850.

The bill alleged that, on the 2d November, 1836, by act of the General Assembly, the Bank of the State was incorporated, for banking purposes, with general powers of deposit, discount, and circulation, having all the privileges, franchises, and liabilities incident to such corporation, with a capital stock of one million

of dollars, to be raised by the sale of the bonds of said State. and also of all public funds belonging to said State to be therein deposited, said State becoming thereby a stockholder in said Bank to the amount so deposited; and it was further provided, in and by said act of incorporation, that said incorporation should consist of a Principal Bank, to be located at the city of Little Rock, and a branch thereof to be located at Fayetteville, another branch thereof at Batesville, and another branch thereof at Arkansas Post, each with power to issue bills and notes, to circulate as currency, and that the officers of said Bank should be managed and conducted by local boards of directors, to be elected by the General Assembly, and certain officers to be appointed by such boards, and by a general board composed of delegates from the principal Bank at Little Rock, and each of said Branches to hold its sessions at the principal Bank at Little Rock, having a general superintending and controling power over the business and management of said corporation. And it was in, and by said act further, and amongst other things, provided that the profits and dividends to be declared by said Bank, from time to time, should be added to the amounts deposited, as capital stock in said Bank by said State, and form a part of said capital; and that said Bank should at all times have on hand a sufficient amount of specie, or specie means, wherewith to pay and redeem all its outstanding circulation, and that the bills and notes of said Bank, issued for circulation, should be received in payment of all debts due to said State; and thereto the faith and credit of said State was, in and by the act aforesaid, in effect, pledged and guaranteed.

That said Bank went into operation in the year 1837, and the capital stock of said Bank, of one million of dollars, and the further sum of one hundred and forty-six thousand dollars, by subsequent act and authority of said General Assembly, was raised by the negotiation and sale of the bonds of said State, and the public funds of said State, derived from the Seminary and Common School, and Saline funds, proceeds of per centage derived from the sale of the public lands, and chiefly from the

surplus revenue of the United States, apportioned by the act of Congress to said State, amounting altogether to the sum of $350,753.00, were deposited in said Bank and made a part of the capital stock thereof, so that the capital stock of said Bank, actually realized and paid in, consisting wholly of specie, and specie means, amounted to the gross sum of one million four hundred and ninety-six thousand, seven hundred and fifty-three dollars and two cents.

That said Bank having gone into operation and issued bills and notes for circulation to a large amount, on the 7th day of November, 1839, by resolution of the general board thereof, definitely and finally suspended specie payments, and public notice of such suspension together with the alleged reasons therefor was, by order of said Bank, published in all the newspapers of this State, and thenceforward said Bank (with the exception of certain of her notes, comparatively trifling in amount, made payable at the Principal Bank aforesaid, and which were for a time redeemed at the counter thereof,) has ever and utterly and notoriously refused to pay or redeem in specie, any of her bills and notes issued to circulate as currency.

That on the 31st of January, 1843, said Bank continuing insolvent, and unable to meet and discharge its liabilities in specie, an act was passed by the General Assembly of said State to liquidate and settle the affairs of said Bank. At that time the assets of said Bank amounted to the sum of $1,832,120.45, consisting of bonds, bills, and notes due to, and discounted by her, and of notes of other Banks, specie on hand and Real Estate, and that more than four-fifths of such assets consisted in choses in action, and debts due to said Bank. At the same time the notes issued by said Bank in circulation, outstanding and unredeemed, amounted to the sum of $302,805, and her specie on hand to the sum of $90,301. And Orator avers that, at the same time, of the gross assets aforesaid of said Bank, the sum of $1,000,000 was good, available, and collectable. By the act last aforesaid, said Bank was deprived of all power to loan money, or to make any further issues of her bills, and notes for circula-

tion, the principal Bank, and each of said branches were placed in the hands of an Executive and Financial Receiver, and an Attorney to whom were turned over the assets thereof, and who were required to collect the debts due to said Bank, and to receive in payment of such debts, first, specie, or the notes of said Bank in circulation, and when the circulation was called in, then to receive in payment for such debts any of the bonds of said State, issued for capital stock of said Bank; and that (after reserving the sum of $2,000, in specie for expenses) said officers, were required specifically to apply all specie on hand, or that might thereafter be received, by paying the same as dividend pro rata, from time to time, to, and among the holders, of the notes of said Bank, until the circulation thereof should be wholly taken up, and then to distribute the specie remaining, pro rata, as dividend for the payment of interest in arrear, on the bonds of said State aforesaid, and after paying such interest, to report the residue of specie, if any, on hand to the next session of the General Assembly. By the same act, the corporate existence of said Bank, her power to contract, sue and be sued and so forth, was expressly reserved and retained to her, and it was thereby further enacted, that all bonds given by the State to said Bank, for moneys borrowed of her by the State, (and which orator avers amounted to the sum of at least $200,000) should be given up and cancelled, and the amount of the same, with the interest accrued thereon, should be a credit on the capital stock of said Bank, consisting of the surplus revenue, and other funds as aforesaid, put in by said State, and further enacted that no debtor of said Bank should be garnisheed on any debt, demand or judgment, owing by the Bank to any person or corporation.

At the same session by act passed over veto, on the 3d day of Feb., 1843, the officers of said Bank were required to set over to the credit of the State the sum of $15,000 in specie, on account of the capital stock put in by the State, and which sum was thereby declared to be an especial appropriation to pay members of that General Assembly, when at the same time, all other officers and public servants were required, by existing laws or usage,

to receive at par in payment of their compensation and salaries, the depreciated notes of said Bank and branches.

That no pro rata dividends or payments in specie, ever were made or declared to or among the holders of the notes of said Bank, as contemplated by said act of liquidation, and before any such dividends were or could be declared or made, the General Assembly, on the 4th day of January, 1845, by act to amend the act of liquidation, authorized the officers of said Bank to compromise debts due to her, and take property in payment, &c., for any such debts, and required said officers to receive in payment of debts due said Bank, the bonds of the State for capital stock of the Bank, notwithstanding her outstanding bills and notes for circulation might not be taken up; and by act passed over veto, on the 10th day of January, 1845, the General Assembly, at one sweep, took from said Bank all her specie or par funds, and required that all specie or par funds then, or that might thereafter be on hand, should be immediately transferred to the State Treasury, and which were especially set apart and appropriated, *first* and *before* any of said par funds were paid out for any other purpose whatever, to pay the members of that General Assembly both their per diem and mileage, &c., and by said act all the current expenses of said State thereafter accruing, were required to be paid in Treasury Warrants or State Scrip; no notes of said Bank were to be paid out, except for salaries or indebtedness previously accrued; that nothing should be received in payment for taxes or revenue, but par funds or Treasury Warrants. Section 28 (being the one pledging the faith of the State that the notes issued by said Bank or branches, would be received in payment of dues to the State,) and so much of section 13, of the charter of said Bank, as provided that certain public funds accruing to the State, should be deposited in the Bank and form part of its capital, was repealed, and all such funds in said Bank were declared to be a deposit there, to the credit of the State, subject to be drawn by appropriations, &c., and section 40 of chapter 18, of the Revised Statutes, requiring the State Treasurer to keep his deposits in said Bank, was repealed, and the

Treasury required to be kept by the Treasurer, in one of the vaults of the banking house at Little Rock, and by the same act the sum of $16,000 (in State scrip) was appropriated to pay the salaries of the officers of said Bank, and judgments that were or might thereafter be obtained against said Bank.

By act approved December 23d, 1846, the Financial Receivers of said Bank were authorized to pay off all judgments against the Bank by transfering to such judgment creditors the notes of certain non-resident debtors of the Bank, provided the same be taken in payment without recourse, and provided such judgment creditor would convey to the State of Arkansas by deed in fee simple, all Real Estate or property of the Bank, caused to be sold by him under any such judgment.

By another act of said General Assembly, approved December 23d, 1846, the title to all Real Estate and property of every kind purchased by said Bank or taken in payment of debts due to her, was declared to vest in the State of Arkansas, and that the title for Real Estate so taken should be taken in the name of the State. And by another act, approved December 23d, 1846, the salaries of the officers of said Bank were required to be paid out of the assets of the Bank.

By act of said General Assembly, approved January 9th, 1849, said Branches of said Bank were called in and abolished, the officers thereof, except the attorneys, dispensed with, and all the assets of said Branches concentrated at said principal Bank at Little Rock, and placed under the control and management thereof for collection; and by the same act the officers of said Bank were also required to receive in payment of debts due to said Bank, the bonds of said State, issued for capital of the Real Estate Bank of the State of Arkansas, (another Banking institution heretofore chartered by said General Assembly, the bonds therefore amounting, principal and interest in arrear, to at least $2,000,000, were collaterally secured by mortgage of Real Estate, and which said last mentioned Bank, was, and is insolvent) and it was thereby further enacted, that in any suit instituted by said State Bank, she should not be ruled to give security for costs, but

that the State should be liable to pay costs rendered against the Bank.

That since the passage of said liquidation act of the 31st of January, 1843, whereby the State arbitrarily declared the bonds of the State given to said Bank for moneys borrowed of her by the State, to be cancelled, and undertook to make herself a privileged and preferred creditor of said Bank, said State has from time to time, under various pretexts, wrongfully and arbitrarily taken from said Bank, and appropriated the same to her own use divers other large sums of money, in specie, notes of said State Bank and branches, and notes of other banks, amounting to the further gross sum of at least $200,000.

Orator further represents, that, on and prior to the 3d day of May, 1849; being the owner and holder of sundry of the bills and notes of said Bank of the State of Arkansas, and its branches, duly issued for circulation pursuant to the charter thereof, prior to the year 1843, amounting to the sum of $9,355, consisting of bills of the denomination of not more than one hundred nor less than five dollars, he instituted ninety-four suits thereon, numbered from one to ninety-four, both inclusive against said Bank, before John C. Peay, Esq., one of the Justices of the Peace of said State, for Big Rock township, (wherein said principal Bank is situated,) in said county of Pulaski; having filed said bills and notes with said justice therefor: whereupon said justice issued process of summons in due form of law, in each of said suits, against said defendant, the Bank of the State of Arkansas, returnable before the said justice at his next monthly court, to be thereafter holden by him, at his office in the city of Little Rock, in said township, on the 12th day of May, 1849; which said several suits of summons came to the hands of the constable of said township, and were by him duly served, &c., when and where the said defendant, the Bank of the State of Arkansas, by her attorney in that behalf, appeared, and upon trial had in each of said several suits before the said justice, orator, by the consideration of the said justice, recovered against said Bank for his debt and damages together with his costs in each of said suits, amounting in the

aggregate to the sum of $9,355, for his debt, and $5,314.25 for his damages, less a remitter for the sum of $8, (being $5 of the debt and $3 of the damages,) entered by orator before the said justice, on the 23d day of May, 1849, in one of said suits being case No. 89. Orator further represents, that on the 19th day of May, 1849, he sued out and caused to be issued by the said justice, a writ of *fieri facias* execution, of, and upon each of said judgments running, &c., returnable, &c., and directed to the constable of said township, whereby *after* reciting the several and respective judgments aforesaid, the said constable was thereby commanded, &c., and which said several writs of execution afterwards on the same day and year last aforesaid, came duly to the hands of said constable, and were by him afterwards on the 23d day of May, 1849, returned and filed before said justice, with the return of said constable endorsed on each of said writs, that said defendant, the Bank of the State of Arkansas, had no goods or chattels whereof to levy the same. And on the 28th day of May, 1849, orator caused to be made out by the said justice, a duly certified transcript of each and all of the judgments aforesaid, and caused the same to be filed by the clerk of Pulaski Circuit Court in his office, who thereupon, on the same day last aforesaid, entered each of said several judgments, in the docket of said court for judgments and decrees, and noted thereon the time of filing said transcripts respectively. And on the same day and year last aforesaid, orator sued out and caused to be issued from the office of the clerk of said court, a writ of *fieri facias* execution of and upon each of said docketed judgments, duly issued and tested and signed by said clerk, and under the seal of said court, and bearing date the day and year last aforesaid, and returnable to the second day of June term of said court in said year, running in the name of said State and directed to the sheriff of said county, whereby after reciting in each of said writs respectively, the recovery of the judgments aforesaid, the issuance and return of executions thereon, the filing of said transcript and docketings of said judgments as hereinbefore stated, the said sheriff was thereby commanded that of the goods and chattels,

lands and tenements of said defendant, the Bank of the State of Arkansas, he caused to be made the amount of debt, damages and costs in each of said executions respectively specified, which said several writs of executions afterwards on the same day last aforesaid came duly to the hands of said sheriff to be executed, and were by him, afterwards, on the 5th day of June, 1849, returned and filed in the office of said clerk, with the return of said sheriff endorsed on each and all of said last mentioned writs of execution, that said defendant, the Bank of State of Arkansas, had no property, goods or chattels, lands or tenements in his county, whereof to satisfy the same or any part thereof.

That the costs in each of said judgments so adjudged to your orator, including the cost of docketing said judgments in the office of said clerk and of issuing and returning said executions from this court, amount to the sum of $5.99, and in the aggregate to the sum of $563.06. All of which matters and things respecting the recovery of said several judgments by orator, and the issuance and return of executions thereon, would more fully appear in and by the record thereof, remaining on the law side of said court, a duly certified transcript whereof was exhibited, &c.

That in pursuance of the manifest policy and intention of said State, and of the combination between said State and said Bank, to hinder, delay and defraud the holders of the notes of said Bank, and among them orator, from having or recovering any payment or satisfaction of their just and lawful demands against said Bank, and to deprive such holders of all legal means and remedies for enforcing of said notes, and in effect to postpone them in favor of other creditors, when by law and usage, and the charter of said Bank, and the act of liquidation first above mentioned, the circulation of said Bank was, and ought to have been first paid, and redeemed, said Bank has from time to time purchased or received in payment of debts due and owing to her, from various persons, a large amount of real estate, but has falsely and fraudulently caused the title thereto to be taken and conveyed and assured directly from said Bank debtors to and in the name of said State, in some instances the consideration therefor purport-

ing to have been by said State, and in other instances by said Bank, when, in truth, no part of such consideration was in any instance paid by said State or out of public funds, but on the contrary thereof was paid by said Bank, or out of her means and assets; and of such fraudulent purchases and conveyances which have come to the knowledge of orator, he here enumerates the following, namely:

On the 12th day of March, 1847, James Lawson, as assignee in trust for Ebenezer Walters, by his deed of that date conveyed to said State lots numbered five and six, in block numbered three, in the city of Little Rock, west of the Quapaw line, with their appurtenances, &c., in fee, for the consideration expressed of $2,000, received from said Bank, and said Walters by his deed of same date conveyed and assured to said State the same premises and estate expressed to be for the same consideration, being in fact a debt due by said Walters to said Bank, thereby cancelled and paid, and the 12th day of September, 1848, His Excellency, Thomas S. Drew, as Governor of said State, by his deed of that date, under the seal of the State, conveyed and assured to one Adelaid Krebbs, the said lots numbered 5 and 6, in block 3, in said city of Little Rock, for the consideration of $2,000, paid by said grantee, but to whom the same was so paid is not therein stated, said deed purporting to be executed pursuant to act of Assembly entitled "an act to direct the officers of the Bank" of the State of Arkansas, to take title to "Real Estate, in the name of the State of Arkansas." And on the 13th day of September, 1848, the said defendant, Charles J. Krebbs, and said Adelaide, his wife, by their deed of that date, sold and conveyed said lots 5 and 6, in block 3, to one Charles P. Bertrand, by way of mortgage to indemnify said Bertrand, as to the security of said defendant, Charles J. Krebbs, for the sum of $900, the same being in part for the consideration of the sale and conveyance, as above stated from said State to said Adelaide Krebbs, and for which amount said Charles J. Krebbs, as principal and said Charles P. Bertrand, as his security, had executed their two notes under date of the 13th September, 1848, for the sum of $450, each payable to said

Bank of the State of Arkansas, in one and two years from the date thereof. And orator avers that in fact, said sale of said lots was made by said Bank to said Charles J. Krebbs, and the consideration therefor wholly received from him by said Bank, and that so much of said consideration being the sum of $900, as above stated, remains wholly due and unpaid, and that the terms of the contract between said Bank and said defendant, Charles J. Krebbs, is due and payable in specie. And orator submits that either said lots and appurtenances or the amount of the unpaid purchase money due therefor as aforesaid, in lieu thereof, ought, in equity, to be subjected to the satisfaction of the judgments against said Bank in favor of orator, as he should elect.

On the 4th day of December, 1847, Albert Pike, and Mary, his wife, by their deed of that date, conveyed to the State of Arkansas, lots numbered 1, 2, 3, 10, 11 and 12, in block numbered 7, in said city of Little Rock, west of the Quapaw line, for the consideration of $3,500, paid by said Bank therefor.

On the 2nd day of March, 1848, John Wassell, and Margaret, his wife, and David J. Baldwin, and Sarah Ann, his wife, by their deed of that date, conveyed to said State the north-west quarter of section 10, the south-west quarter of section 10, the south-west quarter of section 3, the east-half of the north-east quarter of section 9, the east-half of the south-east quarter of section 9, and the east-half of the south-east quarter of section 4, all in township 4 north, of range 9 west, containing 720 acres, with the appurtenances, situated in Prairie county, for the consideration of $5,532, therein expressed to have been paid to them by said State; and on the 8th day of March, 1848, said Wassell and wife, by their deed, made a further conveyance and assurance to said State, of, and for the same lands and premises last mentioned, expressed to be for a like amount of consideration, received in Arkansas bank notes, and orator avers, that in fact both of said last mentioned deeds were upon the same identical consideration.

On the 12th day of June, 1848, William G. Thornton, by his deed of that date, conveyed to said State, the west-half of lots

numbered 1, 2 and 3, in block numbered 81, in said city of Little Rock, west of Quapaw line, and improvements thereon and appurtenances, including the office and banking-house of said Principal Bank, for the consideration of $1,416, as therein expressed to have been paid him by E. N. Conway, as Auditor of Public Accounts, for said State, said deed only purporting to convey all the title acquired by said William G. Thornton, in or to said banking-house and lots, by purchase thereof made by him, under execution on a judgment in favor of the United States, against said Bank, rendered in the Circuit Court of the United States for the Arkansas District, and also under execution at sheriff's sale, on a judgment in favor of Alfred Wallace, against said Bank, rendered in this Honorable Court on the law side thereof. And orator, in fact says, that said real estate and premises last mentioned were sold and stricken off by said marshal at his sale aforesaid, to said William G. Thornton, on the 10th day of April, 1848, at, and for the sum of $750, bid therefor by said Thornton, and were accordingly conveyed in due form of law to him by said marshal, and that the same premises were sold and stricken off by said sheriff, at his sale aforesaid to said William G. Thornton on the 17th day of April, 1848, at and for the sum of $655, bid therefor by said William G. Thornton, and were accordingly conveyed to him in due form of law by said sheriff. That said William G. Thornton is the brother of Abner E. Thornton, Esq., who before said marshal's sale was and thence until and after said conveyance last mentioned to said State, continued to be the Financial Receiver of said Bank; that the amounts paid by said William G. Thornton upon and his bid at said marshal's and sheriff's sale, for the purchase of said real estate and premises, were advanced to him for that purpose by said Receiver, out of the moneys of said Bank, or loaned to him by said Receiver, who reimbursed himself therefor out of the assetts of said Bank so that said property was bid in for, and with the money of said Bank; that no consideration whatever was paid by said State or any officer thereof for her to said William G. Thornton, for his conveyance aforesaid to said State, and that no consideration

therefor was received by said William G. Thornton, other than the moneys of said Bank.

On the 16th day of October, 1848, Peter T. Crutchfield and Elizabeth Ann, his wife, by their deed of that date, conveyed to said State the south fractional half of the north-west fractional quarter, north of Arkansas river, and the south residuary half of the north-east quarter, north of Arkansas river, both in fractional section 36, in township 1, north of range 11 west, the west-half of section 26, in township 3, south of range 10 west, and lots numbered 7, 8 and 9, in block numbered 40, in said city of Little Rock, being the east-half of the half block on which said Crutchfield resided for the consideration of $6,666.66 expressed to be in payment of so much of the indebtedness of said Crutchfield to the Bank of the State of Arkansas, and for which amount he was thereby declared to have credit, &c. And on the 21st day of April, 1848, the said State, by the deed of His Excellency, the Governor thereof, of that date, under the seal of State, after reciting and setting forth a certificate from John M. Ross, Esq., as Financial Receiver of the Bank of the State of Arkansas, to the effect that said Peter T. Crutchfield had paid back to said Bank the sum of $2,000, at which price said Bank had received from him said lots 7, 8 and 9, in block 40, in said city, in payment of his indebtedness to her, &c., conveyed said lots to Francis Juliet Crutchfield for the consideration of the said sum of $2,000 such deed purporting to be so made by the request of the said Peter T., and on the same 21st day of April, 1849, said Peter T. Crutchfield and wife, by their deed of that date, conveyed to the State of Arkansas, the south-west quarter of section 27, the west-half of the north-west quarter of section 27, the south-east quarter of section 28, the south-half of the north-east quarter of section 28, and the west fractional half of the north-west fractional quarter of fractional section 34, all in township one, north of range 14 west, situate in Pulaski county, containing altogether, 525 acres of land, and expressed for the consideration of $3,400, paid to them by the officers of said Bank for said State.

On the 4th day of August, A. D. 1848, Luther Chase and

Rosina, his wife, by their deed of that date, conveyed to the State of Arkansas, lots numbered 1, 2, 3, 4, 5, 6, 7, 8 and 9, in block numbered 59, in said city of Little Rock, for the consideration expressed of $1,800, purporting to be paid by said grantee.

On the 2d day of November, 1848, said Albert Pike and wife, by their deed of that date, conveyed to said State lots numbered 10, 11, and 12, in block numbered 101, in said city of Little Rock, west of Quapaw line, for the consideration expressed of $3,700.

On the 10th day of February, 1849, Elias N. Conway, by his deed of that date, conveyed to said State lots numbered 1, 2, and 3, in fractional block 4, in Rectortown, adjoining said city of Little Rock, for the consideration expressed of $300, Arkansas Bank paper.

On the 13th day of March, 1849, Lorenzo Gibson, and Louisa C., his wife, and James Lawson and Absolom Fowler, by their deed of that date, conveyed to said State the south-west quarter of section 33, and the north-east quarter of the south-east quarter of section 32, in township 2 north of range 12 west, containing 200 acres, expressed to be for and in consideration that said Bank of the State of Arkansas, had agreed to, and did thereby, release a certain judgment in her favor rendered in this Court on the 12th day of November, 1846, against Gibson, Lawson and Fowler, for $4,184, with interest thereon, at 10 per cent. per annum, from the 8th day of December, 1843, until paid.

On the 5th day of April, 1849, Samuel D. Blackburn, and Elizabeth K., his wife, by their deed of that date, conveyed to said State, the east half of the north-east quarter containing 80 acres, the north-east fractional quarter south of Arkansas river, containing 87 75-100 acres, the north-east quarter of the south-east quarter containing 40 acres, and the north half of the south-east quarter of the south quarter, containing 20 acres, all in section 3, in township 3 north, of range 14 west, with improvements, &c., expressed to be for the consideration that the Bank of the State of Arkansas had agreed to, and did, release, said Samuel D., from a debt he owed to said Bank, amounting to the sum of $2,100.

On the 11th day of June, 1846, Thomas S. James, by his deed of that date, conveyed to said State, the north-east quarter and the east-half of the north-west quarter of section 27, in township 6 north, of range 9 west, containing 240 acres, expressed to be in consideration of $870 Arkansas money.

Orator further represents that said Bank of the State of Arkansas has purchased, and taken in payment of debts due to her from various persons, other real estate, as he is informed and believes, to a large amount, and fraudulently caused the same to be conveyed to said State, but the description of the lands so conveyed, and the names of the persons conveying the same, are unknown to orator, and cannot be ascertained without the aid of a discovery from said Bank.

And he further represents that said defendant, the Bank of the State of Arkansas, has in her possession, or in the hands, possession and custody for said Bank and belonging to her, of her officer, John M. Ross, the Financial Receiver, and David W. Carroll, the attorney of said Bank, or one of them, a large amount of the bills and notes for circulation issued by said Real Estate Bank of the State of Arkansas, but the amount and identity of such bills and notes are unknown to orator, and cannot be ascertained without a discovery of the same and the production thereof, by said defendant, the Bank of the State of Arkansas, or her officers aforesaid.

And he further represents that said defendant, the Bank of the State of Arkansas, has due and owing to her, from various persons, a large amount of debts which as orator is advised are subject to be paid in———equal annual installments from and after the passage of said act of liquidation first mentioned, and payable in the bills and notes of either of said Banks, or with any of the Bonds of State, issued for capital stock of either of said Banks, and therefore of an uncertain and contingent value, but the names of the persons owing such debts, the several amounts thereof, due by such persons respectively, how evidenced, and when due, or to become due and payable, are unknown to orator, nor can the same be ascertained without the aid of a dis-

covery from said defendant, the Bank of the State of Arkansas, or her officers aforesaid.

Orator further represents, that the judgments aforesaid in his favor against said defendant, the Bank of the State of Arkansas, remain wholly unsatisfied, and said defendants, although often requested thereto by orator, have refused, and do utterly neglect and refuse to pay the same in whole or in part, and that by means of the fraudulent acts and doings of said defendant, the Bank of the State of Arkansas, and said State, orator is deprived of all legal remedy to enforce the satisfaction of the same.

Prayer: that said defendants may set forth and discover, what Real Estate or other property, with a full and accurate description thereof, other than that hereinbefore enumerated and described, has been conveyed to said State, by any debtor of said Bank of the State of Arkansas, or in payment of debts due said Bank, and that they may also set forth and discover what amount of the bills and notes issued by said Real Estate Bank is now in possession or custody of said Bank of the State of Arkansas, or of either of her officers aforesaid, and belonging to her, and that may be produced and brought into court, subject to its decree in the premises—and that they may also set forth and discover, what debts, if any, are due and owing by any person or persons to said Bank of the State of Arkansas, and the several and respective amounts thereof, by whom the same are owing, how evidenced, and when due or to become due, and that by decree of this honorable court the said Charles J. Krebbs may be required to pay orator in satisfaction of so much of orator's judgments aforesaid against said Bank, the amounts so as aforesaid due or to become due from said Charles J. Krebbs to said Bank, in specie—and that all the real estate aforesaid, and all such as may be discovered as aforesaid, may be sold by a commissioner to be appointed for that purpose, as the property of said Bank, free and discharged of any false and pretended right or claim thereto on the part of said State, to satisfy orator's said judgments, and subjected to the payment thereof, and that all such bills and notes issued by said Real Estate, and belonging

to said State Bank, that may be so discovered and produced may also be subjected and condemned to the payment of orator's said judgments, and by such commissioner sold to satisfy the same—and that by such decree, if it should become necessary for the satisfaction of orator's said judgments, such persons, so ascertained and discovered to be indebted to said Bank of the State of Arkansas, (and who, when so discovered and ascertained, orator will make defendants hereto, with apt and proper words to charge in the premises to that end,) may be required to pay orator in further satisfaction and discharge of judgments, the amount or value thereof that may be due or to become due by them respectively, to the said Bank of the State of Arkansas; and that orator may have such other and further relief in the premises as the nature of his case may require.

The Bank demurred to the bill for want of equity.

Defendant Krebbs demurred to the bill on the grounds that it sought to compel him to pay money to the complainant by process similar to garnishment, when, on the face of the bill, it appeared that, by law, the debtors of the Bank could not be garnisheed.

The State, by the Attorney General, also demurred to the bill for want of equity.

The court overruled the demurrers, and defendants rested; whereupon a decree was rendered that defendant Krebbs pay to complainant the amount of his indebtedness to the Bank, when due according to the terms of his contract, &c.

That unless the Bank paid to complainant by a given day the residue of his debt, certain lots and lands described in the bill, as the property of the Bank, transferred to the State under the act referred to in the bill, be sold to satisfy the same, &c., by a commissioner appointed for the purpose.

That should the proceeds of the sale of said lots and lands be insufficient to satisfy the demand of complainant, the Financial Receiver of the Bank be required to turn over to the commissioner a sufficient amount of the notes of the Real Estate

Bank on hand to satisfy the same, and that they be sold for that purpose. Defendants appealed.

F. W. & P. TRAPNALL, for the State, contend:

1st. That the State is not suable of common right. 3 *Black.* 255-6. "No action will lie against the sovereign," and can only be sued in the mode pointed out by law. *United States v. Clarke,* 8 *Peters,* 444. A sovereign independent State is not suable except by its own consent. Per C. J. MARSHALL, *Cohens v. State of Va.,* 6 *Wheaton* 264. *United States v. Barney,* 3 *Hall's Law J.* 128. *United States v. Wells,* 2 *Wash.* 161. *Ex parte Madraggo,* 7 *Peters* 627. *Horner v. DeYoung,* 1 *Texas Rep.* 769. In the State of Mississippi, the State, by law, is suable by bill in chancery only, and cannot be sued in an action at law. 10 *Smedes & Marshall* 169. In *Divine v. Harise,* it is adjudged that the State cannot be sued, and although the constitution provides that "the General Assembly shall direct by law in what manner and in what courts suits may be brought against the commonwealth, yet as that body never complied with the direction, the only mode of relief was by petition to the Legislature. OWSLEY, Judge, in a dissenting opinion admitted that the State could not be sued.

2d. The State had an unquestionable right under the constitution to have the lands taken by the Bank conveyed to her. It was necessary to save them from a sacrifice ruinous to the country, and which would avail nothing to the creditors of the Bank, and this was not a fraud on them.

S. H. HEMPSTEAD, for the Bank.

WATKINS & CURRAN, contra.

Mr. Justice SCOTT delivered the opinion of the court.

The first question to be determined is that presented on the part of the State of Arkansas, who, by her counsel contends that no suit can be brought against the State, without her consent, and then only in the mode indicated by that consent, and insists

that, by the law arising upon the facts in this record, no such consent has been given as to make her amenable in this case. And this question is to be solved by an exposition of our constitutional and statutory provisions touching the point in the light thrown upon them by the principles of the common law and the regulations of the English statutes on this subject, or, in other words, by the general principles of public or municipal laws and the known usage of other enlightened nations.

And it may be safely assumed that it was never contemplated by the people when they instituted the government under which we live that the rights of property should be less secure under our institutions, than under those of other enlightened and refined nations that had before arisen in the world. Because, it was the great purpose of all our regulations to elevate individual man by securing for him all his more important rights that he might have a staid foundation and a free scope for the pursuit of happiness.

That the subject should be allowed to implead the sovereign in his own tribunals and have justice meted out to him according to law, has been, by no means, unknown in governments far less popular and free than our own. Even the more despotic governments have not entirely denied this privilege. To say nothing of the governments of the ancient world whose history affords examples in point, those of Spain, France, Prussia and England have almost always, in some form or other, allowed of this right in the subject and in some instances, have afforded him imperative process for its vindication. Indeed the principle from which it springs has been, in theory at least, openly avowed by most, if not all the governments as existing in their roots. In the coronation ceremony of the King of Arragon, not only was it avowed in the language used when the crown was bestowed, but also by interposing between the person of the bestower and the King elect, an impersonation of law, thereby more emphatically to declare that the law was greater than the King, and was to remain between his subject and himself. Nor was this altogether in effect but an idle phantasm in the constitution of the Spanish

monarchy, as is shown by the historical fact that after Don Diego, the son of Columbus, had wasted two years in fruitless solicitations at the court of Spain for the rights in the new world that had descended to him from his father, he resorted to the council of Indian affairs, and there obtained a legal sentence against Ferdinand. And thus by the integrity of that tribunal was placed in the enjoyment of rights that had been denied him by an unjust monarch.

And it was the boast of the great Frederick of Prussia, who disdained to avail himself of any of the privileges of sovereignty, when they conflicted with any of the rights of property of his subjects, that "in the estimation of justice all men are equal, whether the Prince complain of the peasant, or the peasant complain of the Prince."

And such was the law of the Saxon Kings, and up to the time of Edward I. of England. And the process by which these rights of the subject were conferred was not then precatory but mandatory and imperative, "command Henry, King of England." Nor is it known at what precise period the law of England was changed: it is known, however, that for several centuries last passed, the process has been changed to petition of right, that although the process has been changed for the enforcement of these rights, the rights themselves have not been otherwise any the less recognized.

Since the change of the law in this respect the subject, when a plaintiff, cannot proceed against the crown either for property or money, otherwise than by petition. But not so, however, when the crown enters the courts as a defendant in a suit instituted by itself as plaintiff. In that case, the crown disrobes itself of its privileges and comes down to the equality of the subject, and henceforward in the litigation of the rights touching that subject matter the subject has all the rights against the crown that under like circumstances he would have in the courts against another subject, his peer. And this will appear not only by the remarks of Lord SOMERS, in the Banker's case, (1 *Freeman*, 331. 5 *Mod.* 29. *Skinn.* 601,) when he instances the case of a title found for

the King by office, and the subject comes into the proceedings to traverse the King's title and show his own right to the thing, but by the other cases he cites. And is also the foundation of the Judge of the High Court of Admiralty in England in a case cited from *Cal. Jur.* 68, that, "In any case where the crown is a party it is to be observed that the crown can no more withhold evidence of documents in its possession than a private person. If the court think proper to order the production of any public instrument that order must be obeyed. It wants no insignia of an authority derived from the crown.

And doubtless upon the same foundation in a proper case, an injunction might issue from one of our courts against an unconscionable judgment obtained by the State against a citizen even in case the laws provided no means for making the State a defendant in any case. But although this might be so, and in such a case a bill in chancery, of the class of bills not original, would be the rightful remedy, this would lay no just foundation upon which the citizen could claim a right to every remedy against the State which could be achieved by all others of that class of bills, and thus include cases of wrong where the State had not by appearing in the courts as plaintiff, submitted to the jurisdiction, as seems to be contended for in argument: Because such a conclusion would be too broad for the premises, and consequently its greater part would have no logical connexion with that foundation.

Nor could the subject, when a plaintiff in a suit against the crown proceed, even by petition of right any further than the petition itself, until there had been first an act on the part of the crown, which, as an act on its part as defendant, was precisely equivalent to that which it does as plaintiff when it goes into the court as such; which act was an indorsement on the part of the King, "Let right be done to the party;" upon which being done, unless the Attorney General confessed the suggestion contained in the petition, and the relief was thereupon awarded, a commission was issued to the proper tribunal to inquire into its truth, where the King's Attorney pleads in bar,

and the merits were determined upon issues of fact or demurrer in every respect as between subject and subject.

This is all laid down in the old books, and is collected by the learning and industry of the several judges who deliver opinions *seriatim* in the case of *Chisholm's ex'r v. The State of Georgia,* (2 *Dallas R.* 419,) from which we learn also that the Petition of Right not only lay for every sort of estate in lands, but for chattels real and personal, and for rights growing out of civil injuries and those founded in contract express or implied. And that after the statute 8 Edward I, which so directed, all such petitions as touched the seal, came to the king through the hands of the chancellor; those which touched the exchequer, through the exchequer, and those which touched the justices or the laws of the land, through the hands of the justices, and all others through some chief minister.

But although there was so much uniformity in the mode of presentation, there was some contrariety as to the endorsement made upon them on the part of the crown. And this contrariety seems to have determined the destination of the petition so far as the tribunal was concerned, that was to be commissioned to dispense justice touching its subject matter. The usual endorsement, however, was in the general terms we have mentioned, and in all such cases the commission went to the chancellor. But if the endorsement was special as to a particular tribunal, or otherwise, the commission corresponded. This contrariety arose in some cases from the prayer of the petition itself, as if it was special that the command should be sent to the justices to proceed to examination, and award the justice due, the endorsement would be made accordingly, and then the justices might proceed without even any commission, the petition and the answer endorsed upon it giving them sufficient jurisdiction. And Lord Somers remarks, that, after thorough examination, he had been unable to find even a single case where the general endorsement had been made in any case belonging to the revenue, the usual endorsement in such case having been to the treasurer and Barons, commanding them to do justice; sometimes, however, a

writ was issued from the chancery, directing the payment of the money immediately, without taking notice of the Barons. Thus it appears that an endorsement on the part of the crown was necessary in every case, and that it served the double purpose of signifying a submission to the jurisdiction of some court, and to point out the particular tribunal; the remedy by petition, being as remarked by Blackstone, "matter of grace and not matter of compulsion," it could not proceed beyond the petition without a gracious dispensation on the part of the crown.

The extent of this remedy, as we have seen, seems to have been thus received as law until the time of Lord Mansfield, who, in the case of *Macbeath v. Haldeman,* (1 *Durn. & East* 172,) in support of the doubt suggested in that case, whether the petition would then lay for a money demand touching the public supplies, distinguished such cases concerning the current expenses and public supplies of government from the great mass of other cases where the subjects might have rights against the crown, upon the ground that, since the revolution of 1688, the "supplies had been always appropriated by parliament to particular purposes, and now whoever advanced money for public service, trusts to the faith of parliament." He did not, however, determine the doubt suggested, because, as he said, it was not necessary in the determination of the case before him. But he gave color to its validity not only by these remarks but by the further observation that, in such cases the proceedings would probably produce no effect," because "if there were a recovery against the crown, application must be made to parliament, and it would come under the head of supplies for the year."

Such then was the state of the law at the time of our separation from the mother country. And upon this foundation and the still deeper one that "the King is above the laws," which has been of the essence of the British constitution ever since the time when feudal institutions not only usurped all property in the land, but also the entire administration of justice, is based our American notion that a State cannot be sued by one of its own citizens without the consent of the Government ex-

pressed in a constitutional form. A notion which might have been plausibly challenged, if the question was an open one in the courts of this country, as a sickly exotic in American soil, where government is not prescribed to the people by a superior power, but is merely the organ of their own sovereignty and the creation of laws enacted by themselves, and which derive all their obligatory force from the mutual consent of those who are to render them obedience. Because in the absence of any affirmative law to create exemption from liability, and as between a citizen who created a State government and that government, on a question relating to any individual right intended to be secured to that citizen by the institution of that government, there could be no more reason for refusing the right according to the established forms of law, than there could be for refusing the same right against another corporation that was also created by the people, not by themselves in person, but by the exertion of the organ of their sovereignty, unless it could be shown that they had first delegated certain powers, and then surrendered to the government thus created all their other powers, which is directly in the face of the Bill of Rights. Because, otherwise, in a government purely of laws, and deriving all its authority from law, there could not be any power or capacity that was above and exempt from law. Such power ought to be inactive in the people, to be exerted according to the forms of the constitution, when deemed proper for a change of the laws; and such capacity might be created for the government by an affirmative exertion of those powers, but the government could not claim it as an inherent birth-right, otherwise than the feudal Kings did, by usurpation.

But the law is otherwise settled in all the courts of this country, and we shall so hold it, especially as it seems to have been so taken and accepted by the framers of our constitution, in making the provision that our Legislature should direct by law in what courts and in what manner suits may be commenced against the State. (*Const. of Ark., Dig., p.* 48, *sec.* 22.) In pursuance of this provision of the constitution, several statutes, more or less

touching this subject, were enacted by the legislature at their session of 1837-8, all of which, although approved on different days, took effect on the 20th March, 1839, and are to be construed together, as if passed on the same day, unless some of their provisions are repugnant to each other, and in that case the latter is to repeal the former provision. (*Dig., p.* 960, *sec.* 6.)

Upon examination, we are unable to perceive any conflict that amounts to repugnance, and therefore the provisions of all can stand and have effect. The provision, (*Dig., p.* 961, *sec.* 1) that "All actions against the State shall be brought in the Circuit Court of the county in which the seat of government is situated," is easily reconcilable with that making it the duty of "each attorney for the State," to "defend all suits brought against the State, or any county in his circuit," (*Dig., p.* 191, *sec.* 2,) by the provisions of the revenue laws touching actions "deemed local at common law," (*Dig., p.* 796, *sec.* 7,) and also by some of the provisions of the escheat law,(*Dig.,* 482, *sec.* 25, 26.) Beyond these apparent conflicts, we have observed no want of harmony in the various provisions of the several statutes touching this subject in chapters 20, 21, 41, 64, 126, and 127. That the legislature designed by the various provisions of these enactments, and by others touching the law of costs, to perform the duty directed by the provision of the constitution in question, is to be gathered no less from the subject matter of these provisions, than by the language used.

It is insisted, however, that, in ascertaining what the legislature did provide in this connection, a strict construction should prevail, and that nothing should be intended in favor of the citizen's rights to sue the State that is not within the express and explicit letter of the statute. No authority is produced for this except a case decided by the Supreme Court of Texas, (1 *Texas R., p.* 769,) where the court remarks "that no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent;" but no authority is cited or reason given, nor does it appear that the remark was made in reference to any question of construction, but simply to assert a gen-

eral doctrine of the law, which would certainly be true if consent was given and a "manner" of proceeding fixed, and all others excluded. But upon a question whether more than one manner was provided, it could have no application, except by asserting, by implication, a rule of strict construction at the same time that it concedes the right of the government to fix more "manners" of proceeding than one.

Nor has any good reason been elsewhere assigned, so far as our researches have extended, why a rule of strict construction should govern a question like this. We have seen that it is not inconsistent with the usages even of despotic governments for a subject to sue his sovereign in his own court of justice, and that this right in the subject was unqualified in the English government until the usurpation of the feudal Kings, and was afterwards always allowed in a qualified form. And that by our constitution it is affirmatively directed to be provided for by legislative enactment, and not silently transferred within the sphere of their discretion like many other matters without any notice. And it is known, as we have elsewhere said, (*Carnall v. Crawford, Co.* 6 *Eng., p.* 619 and 621,) that it was one of the objects of Magna Charta to place the right of Englishmen to apply to the courts of justice for the redress of grievances upon the footing of fundamental absolute rights, and this has certainly never been lost sight of in American institutions, but always kept plainly in view.

The right of a citizen to sue a State, then is not derogatory to common right, or subversive of the true principles of the common law, but is clearly in harmony with both, and it cannot be supposed that the people in convention, in directing that the Legislature should provide in what courts and in what manner suits may be commenced against the State, intended that these provisions should be any other than such as would advance this right in the citizen to "apply to the courts of justice for the redress of grievances." The spirit of the law then would rather demand a liberal than a strict construction. At any rate, we can perceive no valid reason, either intrinsic or extrinsic, why we should inter-

pret these acts of the Legislature as we would a criminal statute that had created a new crime, or misdemeanor, or a civil one that had taken from a citizen a common law right. With these observations, we now proceed to the construction.

If we restrict the right of the citizen to sue the State, to what are technically actions at law and exclude chancery proceedings, and then restrict these actions at law, still further, to the recovery of money demands, excluding the recovery of property, and then further restrict these particular actions to judgment merely. these various incongruities will appear in the law both intrinsic and extrinsic.

1. As to phraseology—"suits" is the word used in the constitution, and that word is defined in the Mirror to be "the lawful demand of one's right"—a definition that is amply broad to include every proceeding instituted in a court of law or chancery. The title of chapter 157 of the statute is, "suits by and against the State." In the third section of the same act are the words "all suits against the State." And in the second section of chapter 20, it is made the duty of the respective prosecuting attorneys to "defend all suits brought against the State." The word "suit," then, wherever it occurs, would have to be narrowed in its meaning to actions at law.

2. As to proceeding no further than to judgment. The same section (*Dig., p.* 962, *sec.* 5) that would restrict proceedings against the State to no progress beyond a final judgment, would seem to place the same restriction upon proceedings in favor of the State. The words of the act are "all suits by or against the State," &c. Besides the provisions of the next section, which directs the Auditor to transmit "to the General Assembly a copy of such judgment and the proceedings thereon," could have no effect so far as proceedings thereon are concerned, because that would be the end of the proceedings. And the act (*Dig.,* 193, *sec.* 4) making it the duty of the clerk of the Pulaski Circuit Court to keep a judgment docket for judgments by and against the State, cannot supply this defect even if that could be regarded as a pro-

ceeding on the judgment, because that was passed in the year 1843.

3. As to the restricting the proceedings to such demands only as would be recoverable by an action at law:

Even if it could be supposed that the convention and the Legislature had no eye to the security of the right of the citizen, and had only regard to the motive which seems to have induced the passage of the statute 8 *Edward* I, on the same subject, as disclosed by its preamble, to wit: "whereas the business of Parliament is interrupted by a multitude of petitions which might be redressed by the chancellor and the justices," that motive itself would seem to have been sufficient to have prevented a discrimination such as the supposed one: for surely there would be in general less interruption to legislation by the examination of the grounds of a claim recoverable at law than one founded upon accident or mistake or other subject of equitable cognizance. And when the design to secure justice to the citizen is admitted as a concurrent motive, the improbability of any such designed discrimination is greatly enhanced: for surely the right of the citizen is as worthy of regard in case of equitable as in a case of legal cognizance.

4. As to restricting the proceedings to money demands at least, excluding demands for property: This, more than either restriction, has less of reason for its basis, whether the interest of the State or that of the citizen is considered. Because a provision of law for a suit for property against the State *eo nomine* is at best much more matter of form than matter of substance, and the consideration of this point will develop how little the question we are considering deserved the prominence that has been given to it, and the gravity with which we have considered it. The most that such a provision can effect is to settle a question of title touching property between a citizen and the State by one suit instead of two. If such a proceeding was not authorized, the citizen claiming title to property held by the State would take proceedings against any officer of the government in the possession or occupancy of the property, and would recover it on the

strength of his own title shown. If the State had in fact paramount title, she would be driven to an after suit to regain it, not having thought proper to make her title available to her in the first action by way of defeating it. If in fact she had no paramount title, then no wrong is done her by the citizen's recovery in this indirect way. The case of *Wilcox v. Jackson,* 13 *Peters R.* 498, is a case of this class, where ejectment was sustained against the commander of a military post.

The interests of the State, when she chooses to assert them in such a case under the name of the party to the record, are as well defended as if she was in fact a party herself. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped merely by the assertion of title in the State. But the court will proceed to investigate the assertion and examine the title, and if the pretensions of the plaintiff are well founded, and those set up under the State are not, the plaintiff must recover the thing he sues for, and no wrong is done the State. If it was true that the court could not adjudicate between private parties upon any subject matter when the pecuniary interests of the State might be injuriously affected, because the State herself could not be sued without her consent, then no suit could be maintained by a non-resident against a citizen for the recovery of personal property because the removal of it might affect her revenues. So far from this, it is no objection if the State be the sole party in interest, and the contest be in fact one between the plaintiff and the State in truth and fact, although but nominally between the plaintiff and the defendant. The cases of *Osborn vs. The Bank of the United States,* (9 *Wheat.* 738,) and *The Michigan State Bank vs. Hastings,* (1 *Douglass Mich. R.* 225,) are of this kind, and there are other cases which go to the fullest extent in establishing this doctrine. It will be seen then, that, so far from such a restriction militating against the interest of the State, those interests will be promoted at least to the extent of preventing any temporary deprivation of the possession of property that she might hold by good title in any case.

But all these incongruities will disappear if the statute be con-

strued to allow the State to be sued as well in chancery as at law and as well for property as for money demands, and then every provision of the various statutes touching the subject will be found sensible, effective, and in harmony.

The process of summons is to be served upon the Auditor in the commencement of any suit against the State for several reasons; and whether the suit be for property or money, some of these concur to make him the most appropriate officer in the entire government to whom the summons should be sent, as will at once appear when we contemplate his public functions. The statute (*Dig., p.* 201, *sec.* 7) provides that he "shall be the general accountant of the State, and keep all public accounts, books, vouchers, documents, and all papers relating to the contracts of the State and its debts, revenues, and fiscal affairs, not required by law to be placed in some other office." Thus, whether the suit be for property or money, the papers relating to the title or the contract in question would in general be in his office, and thus afford data for advice by him to the appropriate prosecuting attorney, (*Dig.* 191, *sec.* 2,) for the proper defence of the State. If the suit had been for property, and the plaintiff had recovered against the State, and had been awarded possession, then no less is it the duty of the Auditor to "transmit to the legislature a copy of the judgment and the proceedings thereon, (which in that case would be the award of possession,) that "an appropriation might be made to satisfy the judgment," because such judgment would not be satisfied until the costs adjudged against the State had been paid, and this could only be done by an appropriation by the legislature, because of the provision of the statute exempting all property of the State, real and personal, from sale by execution. *Dig.* 278, *sec.* 15.

And besides, by this means, the legislature would be obviously advised that property had been recovered from the State; and would also have data for investigation into the official conduct of the prosecuting attorneys touching the conduct of such suit.

Adopting, then, the more liberal construction of the statute that make it effective and harmonious in all its provisions and

phrases, and which carries out fully the manifest design of the constitution, which, as we have said, was to advance the right of the citizen to resort to the courts of justice for the redress of grievances, we are of opinion that this objection raised on the part State cannot be sustained: on the contrary, the State was properly made a party.

This brings us to the consideration of the merits of this cause, which has rightly been considered by counsel as an important one. Not important, however, on account of the magnitude of the sum involved; for that, as was justly observed by Spencer Roane, in the case of *The Commonwealth v. Beaumarchais,* (3 *Call. R.* 145,) "is but a secondary consideration with any just government, and no consideration at all with any upright judge," but because that certain important principles of law are involved, and that in their discussion the honor and justice of the State have been in some sort implicated.

It is insisted with earnestness that the liquidation acts of our legislature are unconstitutional; and are unjust and iniquitous in operating to make the State a preferred creditor of the Bank. We must necessarily examine the first ground of objection, and whether or not the second will be responded to at all will depend, in a great measure, upon the result of such examination.

Certain principles, which seem to govern this question and elucidate it satisfactorily, are as well settled perhaps as any in the law. A law in force when a contract is made, cannot by its legitimate operation impair its obligation in the sense of the constitution of the United States, for the reason that the existing laws are to be regarded as entering into, and forming a part of any contract or stipulations between the parties. (*Blanchard v. Russell,* 13 *Mass. R.* 16.) And it was upon this foundation that the Supreme Court of the United States, in the case of *Ogden v. Sanders,* (12 *Wheat.* 213,) held that a bankrupt or insolvent law of any State, which discharges both the person of the debtor and his future acquisitions of property, was not a law impairing the obligation of a contract, so far as it respects debts contracted subsequent to the passage of such law. And this doctrine is

elsewhere recognized and is perhaps no where seriously contested.

It is also equally well settled that when an act of incorporation is a grant of political power, where it creates a civil institution to be employed in the administration of the government, or where the whole funds of the institution are public funds, the charter is completely within legislative control. (4 *Wheat.* 518.) Such corporations are created by the mere will of the legislature, and are in no way the result of contract; while those, however, through which the legislature seeks to accomplish some public purpose, by the instrumentality of a second party, who is to advance some money, labor or property, are the fruit and direct result of contract. The one is within the control of the legislature, as we have said, while the other cannot be dissolved, under the provision of the Federal constitution, otherwise than in pursuance of a power to do so reserved by the State to be exercised upon the happening of some contingency, and is therefore one of the stipulations of the contract out of which the incorporation sprung.

Thus, it will appear that much of the mystery that labor and learning have thrown about a dry point of law so plain, is the result of the ordinary division of corporations into public and private, instead of corporations that are either such as are independent of all contracts that respect property, or some object of value, or which confer rights which may be asserted in a court of justice, and such as are the fruit and direct result of such a contract. And this will the more plainly appear, when we consider that all constitutional corporations are, in some sense, public, as they must be designed to effect some public good, as contradistinguished from private advantage, otherwise they would be monopolies, that are declared in the Bill of Rights to be "contrary to the genius of a Republic." (See *Miller v. Williams,* 11 *Iredell R.* 511.)

That the State Bank of Arkansas was of the class of corporations that are within the legislative control, has never been seriously contested. And that it cannot be otherwise considered, will abundantly appear by the consideration that, as an institu-

tion to be employed in the administration of the Government, its funds were exclusively public funds; and its creation was in no way the fruit and result of a contract, there having been no second party whose concurrent act with the legislature was to give it life and being. This power over the entire charter necessarily embraced a like power over each one of its provisions as fully as the whole together, and authorized the legislature to take from the institution any power or capacity that had been conferred, whenever, in the exercise of their constitutional discretion, the public exigencies would seem to require such diminution.

And previous to the 11th January, A. D. 1843, when the legislature repealed the common law as to the effect of the expiration of a corporation, either by its own limitation, judgment of forfeiture, or by legislative enactment, and made other provisions of law in their stead, (*Dig., p.* 278, *ch.* 349, *sec.* 16,) had the legislature exerted this undoubted power of repeal, and dissolved the charter of the State Bank without making any further provision, which they had the power to withhold, all its real estate that remained in the corporation up to the moment of its expiration, would have reverted back to the original grantor, or his heirs, (see *Angell & Ames on Cor., ch.* 5, *sec.* 2, 3d edition, p. 159, and the numerous authorities there cited,) the personal property would have vested in the State, or the people, (*ib. p.* 160); and the debts due to and from the Bank would have been extinguished, (*ib. p.* 160, and authorities there cited, and the case of *The State Bank v. The State,* 1 *Blackf. R., p.* 283, 284,) where this point is examined on principle, as well as tested by authority, and *Fox v. Herch,* 1 *N. C. Eq. R.* 559, GASTON Judge, delivering the opinion of the court.

And in that case the holder of one of the bills of the State Bank would have had no remedy save only that which sprung out of his direct contract with the State, resting upon the 28th section of the Bank charter, whereby the State contracted with the bill-holder that the bills and notes of the Bank should be received in payment of all debts due to the State of Arkansas. And yet the bill-holder could not have complained that his contract with

the Bank for the payment of the bill (whether in that contract with the Bank it had been either stipulated or not that his bill should be paid first and in preference to any other debt due by the Bank,) had been in the slightest degree impaired within the meaning of the constitution of the United States; because all these laws that we have referred to were in existence and in full force at the time he made his contract with the Bank, and entered into and were part and parcel of the very contract and stipulation between him and the Bank for the payment of the bank bill on the part of the Bank. Every party contracting with a corporation being presumed by law to understand the nature and incidents of such a body politic, its liability to dissolution, and the consequences of such dissolution, the power of the legislature over its life and constitution and the legitimate sphere of the operation of the constitutional provision for the integrity of contracts; and is presumed to contract in reference to all those contingencies and regulations. (*Angell & Ames on Cor., p.* 160, and authorities there cited.)

If this were not so in reference to rights that had not become vested by inhering in things, the absurdity would result that the mere creature was greater than its creator, the stream higher than the fountain, and the disastrous consequences upon the State Governments would be incalculable, in rendering immutable many civil institutions that might be set on foot for purposes of its internal government, and which, to subserve those purposes, ought to vary with varying circumstances. Accordingly, Judge STORY remarks, in the case *Mumma v. The Potomac Co.,* (8 *Peters at p.* 287,) that "It would be a new doctrine in the law that the existence of a private contract of a corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

And this principle is alike applicable to the repeal of corporations which are the fruit and direct result of contract, when the power of repeal is expressly reserved to the legislature; and in neither case will the courts presume that the power of repeal has been improperly or unconscientiously exercised by the legis-

lature. (*McLaren v. Pennington,* 1 *Paige Ch. R.* 109.) Nor would the case be varied in principle if the note-holder's contract with the Bank for its payment was of a date subsequent to the change of the common law as to the consequences of the dissolution of the charter of the Bank, otherwise than as that statute varied this law, and to this extent varied his actual contract with the Bank. In neither case, then, could his contract have been impaired by an absolute repeal of the charter of the Bank, although, in the one case, his debt against the Bank would have been extinguished, and in the other, under the provisions of the statute, his rights, although preserved, would have been in abeyance until the action of the legislature should be had thereon, unless some provision otherwise was made by the legislative act of dissolution. (*Dig., p.* 278, *sec.* 16.)

This being the legitimate result as to the question of constitutionality, had the Legislature dissolved the charter of the Bank, instead of placing it in liquidation as it did, it cannot be any the less the result of those acts of liquidation unless a mathematical absurdity could be admitted that a part is not included within the whole. Because the true nature and character of these acts are of the caste of true acts of dissolution, and as such are clearly embraced within the power to destroy the Bank, which we have seen was within the legitimate discretion of the Legislature—in fact, are but the result of the exercise by that body of those very powers of destruction in a modified form and to a limited extent. And this is plainly enough to be seen in the intrinsic character of the various provisions of the liquidation acts in which it manifestly appears that, in the judgment of the Legislature, the bank had failed to accomplish the public purposes and ends in their view at its creation, and had ceased to be a safe custodian and depository of the public funds; and in this condition was a rightful subject of dissolution at their hands.

And thus these acts of the Legislature declare their own true source and character, and present themselves as legitimate instruments for the constitutional power of the Legislature over the life and constitution of the bank. And in thus exhibiting the

judgment of the Legislature upon the exigency of the bank's short comings and condition at the time when it was put in liquidation, and the true nature of the powers thereby exercised in the acts placing it in liquidation, all foundation is taken away for any argument that could be based upon the ground that, although the Legislature had the clear right to destroy the bank by a dissolution of its corporate character, they could not, constitutionally and by any and every capricious, arbitrary and unconscionable intermediate act, impair the obligation of the bank to a bill-holder

And, besides this consideration, we have already seen that the courts will never presume that the legislature has improperly and unconscientiously exerted such a power. And even if this was not so, in the case before us there is no possibility of any such presumption as to the acts in question; because the allegations of the complainant's bill abundantly show that the bank had failed to accomplish the public purposes in view at its creation before these acts were passed.

In the light of these views then, we hesitate not to declare it as our opinion that the liquidation acts in question are all constitutional.

These acts then being laws of the land, they must have force and sway in their legitimate scope without regard to their effect upon what would have been otherwise the complainant's rights under the general laws of the land. Because, as to his rights in the premises, as we have seen when considering the constitutional question, there was no defect of legislative power from constitutional limitations and restrictions upon it: and consequently they can only be claimed and meted out by the measure of the liquidation laws, in which we include all acts of the legislature touching the assets of the Bank that have passed since the day when that body, for public purposes and with public ends in view, legitimately placed that institution in liquidation.

The effect of these liquidation laws upon all the rights of the complainant founded upon the general law, as we shall more fully see in the sequel, being inevitably to place all such rights in abeyance at the legislative will to the extent that they may

come in conflict with these paramount laws. A state of being for these rights contracted for by the complainant in his executory contract with the Bank. Because the power of the legislature over the life and constitution of the Bank, and all that was embraced in that power was then the law and in force, and as such formed a part of this very contract or stipulation between the complainant and the Bank. And by this means the complainant, as to rights springing from this contract, and to this extent, voluntarily disrobed himself of what would have been otherwise his constitutional guaranties, by a like process as that by which a party voluntarily dispoils himself of such guaranties when he contracts for a summary judgment against himself. And although the public policy of a country may, and perhaps does, set some bounds to such relinquishments of private rights, none such are animadverted upon or held for nought by the law that falls short of a direct conflict with some known public policy: and in this case, so far from there being any such conflict, the voluntary conflict in question is in direct harmony and in furtherance of the policy of the State in the premises.

And in determining the true interpretation and legal effect of these various enactments, we are not to limit our examination to the provisions of those simply which are stated in the complainant's bill: but it is our province, in search of the law—facts being in general the proper subject of pleading—to go far beyond this and consider together all the enactments touching in any way the same subject matter, and also such uncontradicted history and public documents of the times of these several enactments that may shed light upon their various provisions. *Conway Ex parte,* 4 *Ark., p.* 367, 368. *Warner v. Brees,* 23 *Wend., pages* 134, 135, 136, 140.

And in these lights it may be remarked in reference to the origin or foundation of these enactments, that a civil institution with large money capital furnished by the State, and important powers for good or for evil, employed in the administration of the State government, and in that capacity entrusted with all the public funds, had abused its trust and signally failed to achieve

the public ends in view at its creation. And yet its operations had been such that the pecuniary interest of the great mass of the citizens of the State had become so blended with that of the State and both were so much identified with the fate of this institution, that its continued existence with its then powers and capacities, or its sudden destruction, would be alike disastrous to both. Thus an emergency arose which demanded conservative action on the part of the Legislature, looking both to the interest of the State and to that of the citizen, which stamps these laws, in an eminent degree, with the character of remedial laws, and authorizes that construction of them which shall be most consonant to their reason and spirit, and will best suppress the mischief and advance the remedy.

At the same session of the Legislature at which the first liquidation act became a law, another act of a general and permanent character also became a law, which provides that when "any corporation shall expire or cease to exist, either by its own limitation, judicial judgment of forfeiture or by legislative act, the common law in relation to corporations shall not be in force in relation thereto, but the goods and chattels, lands, tenements and hereditaments, and every right or profit issuing out of or appertaining thereto, moneys, credits and effects of such corporation shall immediately vest in the State, in trust for the uses and purposes by said charter contemplated; and each and every and all right, upon the expiration or dissolution of said corporation shall be and is in abeyance until the action of the Legislature shall be had thereon unless provision shall be made by law for the management of said corporation fund in contemplation of such dissolution." (*Dig., Ch.* 39, § 16, *p.* 278, 279.) This statute indicates, as the result of legislative wisdom, a permanent general policy for the State in reference to the civil death of corporations, having, among others, two leading features, that is to say, on such dissolution all rights which were of it, and in its favor, in its life shall vest in the State in trust, and all rights against it shall be in abeyance at the legislative will unless special provision of law be made to the contrary. And thus excluding all coercive

measure against the State in her capacity of trustee for the purposes contemplated by the charter of the dissolved corporation.

And this general policy, so set on foot, lays a reasonable foundation for the construction of laws by analogy, which have for their manifest object the preservation and equitable distribution of the assets of such institutions when placed by law in a state of liquidation, and persuasively urges that such laws should be so construed as to advance this policy. And by a state of liquidation we understand that intermediate condition of a corporation over whose life and constitution the Legislature has power in which it is placed by law in being shorn of its powers and capacities to progress as originally designed, but left with all its powers and capacities to retrograde and close up its affairs.

And especially would this analogous rule of construction seem reasonable when it was manifest that the Legislature had been superinduced to force such an institution into liquidation upon conservative considerations, because of exigencies that had arisen from the abuse of powers and trusts on the part of such corporation to the injury of the public, and that its pecuniary affairs were thereby in an insolvent condition. For in no other way than by allowing affective energy to such laws for the preservation and equitable distribution of the assets could the conservative interposition of the Legislature be advanced, although at the expense of a corresponding abatement of a right to proceed against such assets, founded upon the general law. And especially would such a rule be not unreasonable against one whose rights lived alone in the grace of the Legislature.

In the various acts of the legislative, and public documents to which we have seen it is our province to look for a true interpretation of the law as applicable to the case before us, we learn that the Bank capital was derived from two sources, to wit: from the sale of 1,169 bonds, executed by the State to the Bank to be sold for money to constitute its permanent capital: and 2d, from certain specific funds which were for the most part trust funds in the hands of the State, and which, by the 13th section of the Bank charter, were to be "deposited in the principal Bank and consti-

tute a part of the capital thereof;" but providing that the dividends declared by the Bank should be pro rata carried to the credit of each of such specific funds respectively; although the aggregate of all dividends should be subject to the control and disposal of the Legislature, and providing as to a portion of these specific funds, to wit: the seminary and school funds, that they might be at any time withdrawn—both principal and interest—without any action on the part of the Legislature. As all these specific funds were liable to be called for by the objects for which they were created, they could not reasonably be considered as a part of the permanent capital of the Bank in the same sense that the funds arising from the sale of the State bonds might be so considered; because to place them upon such a footing would pre-suppose a breach of trust on the part of the State, which cannot be presumed.

From like sources we learn that the Legislature has always regarded the Bank as being in an insolvent condition from the time that it was put in liquidation; although its condition might then have been regarded by them as more sound than it has been since shown to be by various public documents. By the act of 31st January, 1843, (*Sess. Acts, p.* 77,) by which the bank was shorn of its power to issue notes in discount of any check, promissory note, bill, bond or other obligation, or to loan money in any manner whatsoever, and all its affairs were placed in the hands of a board of managers, any vacancy in whose office in the recess of the legislature to be filed by the chancellor of the district, and abolishing its offices of president, cashier, clerk, teller and directors, and making various provisions of liquidation, it was among other things provided that no person indebted to the Bank should be subject to be garnisheed for the satisfaction of any debt, demand or judgment against that institution in favor of any individual, company or corporation whatever; (*ib. p.* 86, *sec.* 30,) and at the same time provision was made for the security and collection of all debts due the Bank and for the equitable distribution of their proceeds among various classes of creditors.

At the next session, by act passed the 10th January, 1845,

(*Sess. Acts, p.* 90,) $16,000 were appropriated out of the State Treasury to pay the salaries of the officers of the State Bank, "as other officers of the State," and to pay judgments that had been then or might thereafter be obtained against the Bank. And $200 were in like manner appropriated to pay an individual for services rendered in the collection of debts due the Bank. (*Ib., p.* 132.) And so much of the thirteenth section of the Bank charter was repealed which directed, as we have seen, that certain specific funds in the custody of the State should constitute a part of its capital. (*Session Acts, p.* 95, *sec.* 19,) and these funds declared subject to appropriation by the Legislature. And certain par funds, then on hand, in the Bank, and other such to be received, were directed to be paid into the Treasury to the credit of the Bank on account of the surplus revenue fund. And the Financial Receiver at Little Rock was authorized and required, if practicable, to exchange any notes of the Real Estate Bank and branches then on hand or to come on hand for State bonds sold by the State Bank, and providing for the cancellation of any such bonds so taken in.

At the next succeeding session, judgments against the Bank were authorized to be paid off with judgments in her favor or with notes of that class where the right of renewal had been forfeited, but upon certain conditions only; and among others, that a judgment creditor of the Bank should convey to the State by "fee simple deed" any real estate or other valuable property that he had theretofore caused to be sold by virtue of any judgment against the Bank, or so much of such as would be of equal amount to that so paid him. (*Sess. Acts, p.* 113, 114.) And by another act of the same session, (*ib.* 123, 124,) it was provided "that hereafter the title to all real estate and property of every kind purchased by the Bank or taken in payment of debts due said institution, shall vest in the State of Arkansas, and the title for real estate so taken shall be taken in the name of the State of Arkansas." And there was a further provision that the governor should be authorized to exchange any property so taken by the Bank for an equal amount of bonds of the State executed for the

benefit of the Bank, the value to be estimated at the price allowed by the Bank. And by an act passed the 11th January, 1851, all such lands on hand are directed to be sold by the State Land Agent.

And by an act passed the 9th January, 1849, (*Sess. Acts, p.* 73,) all State bonds on hand in the State Bank, taken in payment of debts due this institution, which were originally sold by the Real Estate Bank to realize her capital are directed to be exchanged for such bonds originally sold by the State Bank, or the coupons of such, and all such State bonds or coupons so received by exchange are directed to be cancelled. And further providing, that the State Bank shall not thereafter be ruled to give security for the costs of suit, but that the State shall be liable for all judgments for costs against the Bank. (*Ib.* 73.) And there are two other acts of the same session by which money is appropriated from the Treasury to redeem lands that had been previously sold by judgment creditors of the Bank. (*Sess. Acts* of 1849, *pages* 183, 184 *and* 204.)

There are various other provisions, of some of these several acts, which, although we have considered them, we do not deem it necessary particularly to specify: from all of which, however, when considered together, it seems to have been manifestly the intention of the Legislature, from the day when the Bank was put in liquidation, to preserve the assets from waste while in process of closing up its affairs, and to distribute the same upon some scale approximating to an equitable one among all parties interested; and that the whole process of closing up and of distribution should be within its own discretion.

That the legislature had the constitutional right to assume this attitude towards the Bank and all having dealings with it, we have already seen, and the only question is, whether or not they have actually so regulated and disposed of the assets of the Bank as to place them beyond the reach of the complainant by judicial process; and it is to determine this question that we have been examining all these various enactments of the legislature, and public documents, to arrive at their true meaning.

We have seen then what were the leading objects of the legislature as to the assets of the Bank, to wit: their equitable distribution upon a scale to be fixed by themselves and their preservation from waste; and we have also seen, in the source and object of these liquidation acts, that they were in an eminent degree remedial laws. How, then, shall that provision be construed, which enacts that no person indebted to the Bank shall be subject to be garnisheed by any person having a claim or debt against the Bank? Shall it be construed as simply cutting off that statutory process? What was the mischief? If we were to extend our examination no further than to the provision of that particular enactment in which this provision is, the 30th section, we should find abundant reason to doubt whether the construction should be so narrow; because in these we find a scale of priority fixed among the creditors of the Bank which could be as well disturbed by a creditor's bill as by process of garnishment; and the same remark may be made as to any advantage that it might be imagined was intended to be secured for the Bank debtor on account of the currency being at that time depreciated. When, however, we look beyond this statute and consider it in connexion with those subsequently passed, relating to the assets of the Bank, although we find this particular scale of priority abandoned, nevertheless we see in various enactments a steady and uniform purpose on the part of the legislature to control the outgoings, and apportion the avails of the Bank assets, as they themselves shall deem most equitable and just. A purpose that is directly in conflict with any right elsewhere to seize upon and appropriate such avails while in process of collection, and alike inhibits a creditor's bill from such an office, as the less searching statutory process of garnishment.

Then when the true mischief is considered, which was the insolvency of the Bank, the jeopardy of public faith and public credit, of public and trust funds and of private interests, all commingled and at hazard to an extent to call for the direct interposition of the sovereign power in whose justice all must trust, and that power not only interposed, but in affording the remedy

has signified a settled purpose to determine upon the outgoings of the scanty avails of this wreck of capital and of credit, it would seem to be worse than sticking to the bark to admit of a construction of the provision in question, that will thwart this settled purpose. Not that a sovereign should not be powerless before right, even before a right that exists only by his own grace, but that he should be alike just to himself and to all, and especially alike just to those who confide to him their trusts.

And the same course of observations apply to the paper of the Real Estate Bank, which the complainant seeks to make available. This has been turned by the legislature to the benefit of the bond-holders. The Financial Receiver is authorized and instructed to exchange it for bonds of the State sold by the State Bank, and these bonds, when so taken in, are directed to be cancelled in the Executive Department of the State government. And by a like process the bonds sold by the Real Estate Bank that may have been taken in by the Financial Receiver, are to be exchanged for bonds sold by the State Bank, and these in like manner cancelled.

And by act approved the 23d December, 1846, the lands were brought within the same rule of exemption by affirmative legislative action in relation to them like that legislative action in relation to the debts due the Bank, and the Real Estate Bank paper, and the Real Estate State bonds, which we have just considered; and this was required no less to sustain the general purpose for the legislative distribution of the avails of the assets of the Bank, than to prevent their waste in the sacrifice of lands at execution sales, that had so frequently occurred, as we learn from the face of several of the acts of liquidation.

And thus all the assets of the Bank are placed by law beyond the reach of judicial process at the suit of the complainant, as to whom as we have seen in examining the constitutional question, the power of the legislature so to place them was clear.

But it is insisted that nevertheless, all this is as but cob-web before the chancellor, because of alleged fraudulent combination between the Bank and the State to hinder and delay creditors,

since fraud vitiates every thing and holds fraudulent things as no things. If such acts and regulations be fraudulent, it is because the law makes them so; and these are the acts and regulations of the law itself, enacted by the power that made the law of fraud, and can therefore with equal power unmake that law as to these acts and regulations.

But although denied relief by law as to the Bank, why not be allowed it as against the State, who according to the law, as just declared, may be sued in chancery, as well as at law? This is but raising the constitutional question again in a new form, and is easily answered; because the State having interposed not in her corporate, but in her sovereign, capacity, by the terms of the very contract on which the complainant would seek relief as against this defendant, all his rights live but in grace, and his remedies exist in entreaty only. The chancellor's arm is therefore powerless for his aid, unless he could exhibit on his part the guarantees of the constitution, of which, as we have seen, he has voluntarily disrobed himself as against the State, in the capacity in which she is a party to this transaction.

Upon the whole case, we consider there is no equity in the complainant's bill, and therefore that the chancellor erred in overruling the demurrer interposed and rendering his decree. The decree must be reversed, and the cause remanded, with instructions to sustain the demurrer.