

VOLUME VII.
CONTAINING THE
O P I N I O N S
OF
HON. CALEB CUSHING,
OF MASSACHUSETTS.

FROM OCTOBER 9, 1854, TO JULY 9, 1856.

 Washington Aqueduct.

that the sum total of the grade does not exceed the statute standard.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

WASHINGTON AQUEDUCT.

The United States may lawfully make title to land in one of the States by expropriation as of the eminent domain of such State, and with assent thereof.

The act of the legislature of Maryland, empowering the United States to acquire land in said State for the use of the Washington Aqueduct, is not in conflict with the Constitution either of that State or of the United States.

The acquisition of land by the United States through the means of a statute process of expropriation, is a "purchase," which, if done in strict accordance with the form of the statute, may be certified by the Attorney General as vesting a valid title in the United States.

ATTORNEY GENERAL'S OFFICE,

April 24, 1855.

SIR: Your communication of the 17th instant transmits sundry papers in regard to private lands in the State of Maryland, acquired by the United States for the use of the Washington Aqueduct, and calls for my opinion of the validity of the titles thus acquired.

On examining the title papers, it appears that, in all these cases, the land has been obtained by means, not of purchase and deed from the proprietors, but by expropriation for public use. At the very foundation of the question of title in the cases, there lies a series of questions of public law, suggested by the parties, whose land has been thus expropriated in the name of the United States. I propose in this communication to dispose of these general questions only, and as to other points, to invite your attention to certain additional matters of information, which are indispensable to a determination of the questions of mere land title under the laws of the State of Maryland.

In the first place, I cannot suffer myself to doubt that the

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United States may, by some lawful means, take and hold lands in the State of Maryland, or in any other State, for the necessary purposes of the construction and maintenance of this aqueduct.

By express provision of the Constitution, Congress is empowered "to exercise exclusive legislation, in all cases whatsoever, over such district, not exceeding ten miles square, as may by the cession of particular States and the acceptance of Congress, become the seat of the Government of the United States."

In legislating for the District of Columbia, Congress remains the legislature of the Union, and its acts are the acts of the United States. (*Cohens v. Virginia*, vi *Wheat*. 264.) There is no division here between powers of state government and powers of general government; all these powers are alike vested in the Federal Government. (*Kendall v. The United States*, xii *Pet*. 524, 618.)

While the specific grant of power comprehends "all cases whatever," the constitutional means of exercising such power are given by the provision, which declares that Congress shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

It must be conceded, therefore, that Congress has ample power to make appropriations of public money, as it has done, for the construction of an aqueduct to supply water to the City of Washington. It may do this even as a matter of municipal administration and of public utility to the inhabitants of the city. It may do it as a matter of mere specific relation to the Federal Government as a government transacting its public business in Washington. As all governments must be administered by men, the due supply of potable water becomes a necessity of government, in the same way as, but to a greater degree than, public buildings, or any other subject-matter of local appropriation by Congress.

Upon this point, but one possible inquiry can arise, namely, whether the Federal Government, acting through Congress, may draw water for the use of the city from one of the adjoining States, and, as the incident of this, take and hold lands in such

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State? I speak now of taking and holding lands independently of the questions as to the manner of acquiring such lands, as whether by purchase of the proprietors *à l'aimable*, or whether by authoritative expropriation. And that the United States may lawfully hold lands in a State for the purpose of constructing an aqueduct for the use of the District, seems to me to be certain. It being admitted that the thing to be done is constitutionally rightful, it follows that the lawful means of doing it are the same as in other cases of rightful appropriation by Congress. Suppose, for instance, that a citadel is to be constructed at a given point, under the military power, it must be that the Federal Government may constitutionally hold, within a State, not only the land which constitutes the mere site of the citadel, but also the land requisite for conducting water to it, whether to be used to fill the fosses, work machinery, or supply potable water for the garrison. And the same doctrine applies to any other undertaking embraced by the recognised powers of the Federal Government.

Even if the land thus acquired could be considered as an addition to the District, still that would constitute no objection: because, in declaring that Congress may exercise exclusive legislation in a district, not exceeding ten miles square, ceded to become the seat of Government, the Constitution does not mean to prescribe the geometrical form, but only the superficial contents of such district, which, as at present constituted, is of a rhomboidal form, and much less than ten miles square in actual dimensions.

Objections of a more serious nature, or at least requiring more definite consideration, arise on the Constitution and laws of the State of Maryland.

The legislature of Maryland has passed a law of the following title: "An act giving the assent of the State of Maryland to such plan, as may be adopted by the President of the United States, for supplying the City of Washington with water."

Of this law, the provisions pertinent to the present question are the following:

"Sec. 1. Be it enacted by the General Assembly of Maryland, That if the plan adopted by the President of the United

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States for supplying the city of Washington with water, should require said water to be drawn from any source within the limits of this State, consent is hereby given to the United States to purchase such lands, and to construct such dams, reservoirs, buildings, and other works, and to exercise concurrently with the State of Maryland, such jurisdiction over the same as may be necessary for the said purpose.

“Sec. 2. And be it enacted, That if the United States, acting through such agent as may be appointed for that purpose, cannot agree with the owners for the purchase of any land which may be required for the purposes aforesaid, or for the purchase of any earth, timber, stone, or gravel, to be found thereon, which may be required for the construction of said works, or in case the owner thereof should be a feme covert or under age, non compos mentis or non-resident of the State, it shall nevertheless be lawful for the United States to enter upon such lands, and to take and use such materials, after having first made payment or tendered payment for the same, at the valuation assessed thereon in the manner hereinafter prescribed.

“Sec. 3. And be it enacted, That in the condemnation and assessment of such lands and materials as may be necessary for said purposes, the like proceedings in all respects shall be had, as by existing laws are required for the condemnation and assessment of lands and materials, for the use and construction of the Chesapeake and Ohio Canal and the works appurtenant thereto.

“Sec. 4. And be it enacted, That nothing in this act shall be so construed or understood, as to authorize the United States to interfere with the rights now vested in the Chesapeake and Ohio Canal Company, or the rights granted by said company to individuals.

“Sec. 5. And be it enacted, That this act shall take effect whenever the United States shall agree to such conditions as the Chesapeake and Ohio Canal Company may consider necessary to secure the canal from injury, in carrying into effect any plan that may be adopted for supplying the City of Washington with water as aforesaid.” (Act of May 3d, 1853, ch. 179.)

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This act, on its face, clears away from the subject all difficulties having relation to the sovereignty and jurisdiction of the State of Maryland.

But questions are presented as to the constitutionality of the act, and the legal effect of some of its provisions.

In the first place, has the legislature of Maryland constitutional power to authorize private property in that State to be expropriated in the behalf of the United States, without consent of the owners, for the use of the Washington Aqueduct?

The Constitution of Maryland contains the following article:

“The legislature shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation.” (Art. III, No. 46.)

This provision is to the same general effect as the clause of the fifth amendment of the Constitution of the United States, which declares that “No person shall be * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without due compensation.”

These provisions of constitution impliedly recognise the right of a government, whether that of the United States or of a State, as the case may be, to take private property for public use, provided just compensation be made to the proprietor.

This power is well understood in the legislative and judicial practice of Great Britain and the United States as the exercise of the right of eminent domain. (Bouvier, *sub voc.*) It is known well in all the countries of the civil law by the name of expropriation for the cause of public utility. (Daloz, *sub voc.*)

The Supreme Court of the United States, while recognising the existence of this power in the Federal Government, has adjudged that the fifth amendment applies to the United States only, and not to the States. (*Barron v. Baltimore*, vii Peters, p. 243; *Livingston v. Moore*, vii Peters, p. 469, 551; *Bonaparte v. Camden and Amboy Railroad Company*, Baldw. p. 205, 220.)

Meanwhile, all the authorities recognise the existence of this power in each of the States of the Union, with reference to matters within their social jurisdictions, the manner of compen-

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sation to the party whose property is expropriated for public use being equitably fixed by the legislature of the respective States. (See for example, in Massachusetts, *Perry v. Wilson*, vii Mass. R. 395, and *Boston Milldam v. Newman*, xii Pick. 467;—in New York, *Livingston v. City of New York*, viii Wend. 88;—in Pennsylvania, *Springs v. Russell*, iii Watts, 294;—in South Carolina, *Lindsay v. Commissioners*, ii Bay, 38.) In all these and the other numerous cases of the same class, the main question is of the necessity or measure of compensation, and of the forms of law to be employed in the act of expropriation.

This doctrine is fully adopted by the courts of the State of Maryland. (See, for example, *Canal Company v. Railroad Company*, iv G. & J. p. 1; *Tidewater Canal Company v. Archer*, ix G. & J. p. 479; *The Bellona Company's Case*, iii Bl. p. 386.)

This power is most frequently exercised in the case of roads and canals; but is applicable to numerous other objects of public utility. Aqueducts to convey potable water to a city are among the number of these objects. (*Haight v. Proprietor of the Morris Aqueduct*, iv Wash. C. C. 601.) If, in the present case, the State of Maryland had not authorized the expropriation of land, the power of the United States to take it might possibly be matter of controversy. I say possibly, because there is no act of Congress to define the mode in which, and the person by whom, private property shall be expropriated for the use of the United States; and there is an adjudication of one of the States (North Carolina) to the effect that without some legislative provision of this nature, a federal officer taking private property for the most admitted public use is a trespasser. (*Barrow v. Page*, v Hayw. 97.) But we have no occasion to explore that branch of the subject in the present case; since here the legislative authority has been conferred, so far as the legislature of Maryland has power to that end.

The objection suggested is that the power of the legislature under the Constitution of the State is confined to things enuring to the use of the State only, or its inhabitants; that such only is the "public use" of the Constitution of the State; and that a "public use" of the United States is not within the scope of that Constitution.

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I think there are two satisfactory answers to this suggestion.

One is, that the article of the Constitution of Maryland under review is of command only as to the matter of compensation. It assumes the power of the State to expropriate in the right of eminent domain, and looks by way of enactment to the single fact of guarding the citizens against loss by reason of the expropriation.

The second is, that a "public use" of the United States is a public use of every part of the United States, and therefore of each one of the States. The seat of the Federal Government is the seat of government of all the States in their federal relation, and is *pro tanto* a seat of government for the State of Maryland, at which she appears, not only by the Executive in whose election she participates, and her members of the House of Representatives, but more emphatically by Senators, who constitute the very ministers of her State sovereignty in the Congress of the United States.

I conclude, therefore, that the act of the legislature of Maryland, in so far as it authorizes the United States to acquire lands within that State for the site and construction of the aqueduct by *condemnation*, that is, expropriation as the payment of compensation to the owners according to the verdict of a jury, is not incompatible with the Constitution either of the United States or of the State of Maryland.

One other constitutional difficulty is presented by some of the parties interested.

The Constitution of the State of Maryland declares that "no law or section of law shall be revised, amended, or repealed by reference to its title or section only." (Art. XVII.)

The act of the legislature of Maryland provides "that in the condemnation and assessment of such lands and materials as may be necessary for said purposes, the like proceedings in all respects shall be had, as by existing laws are required for the condemnation and assessment of lands and materials for the use and construction of the Chesapeake and Ohio Canal, and the works appurtenant thereto."

And the question is, whether this mode of enactment is in conflict with the cited provision of the Constitution of Maryland.

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I think it is not. Clearly it is not revisal nor repeal of a law. Nor, in my opinion, is it amendment. Nothing in the law referred to is changed. That law makes provision for the means by which compensation is to be assessed on lands expropriated for a given class of public works. The present law designates another class of public works, the lands taken for which shall be assessed in the same way. It applies an existing law to a new case. It neither revises, nor amends, nor repeals that existing law. It is a convenient method of legislation, frequently followed in practice, and not open to any exception of want either of precision or certainty. On the contrary, for a new case there is no style of legislation so entirely sure and safe as to adopt unchanged a well-known pre-existing remedy or process of remedy.

It remains to discuss and dispose of another preliminary question, which arises on a certain act of Congress.

It is enacted that "no public money shall be expended upon any site or land hereafter to be purchased by the United States for the purposes aforesaid," (that is, "public buildings of any kind whatever,") "until the written opinion of the Attorney General shall be had in favor of the title, and also the consent of the legislature of the State in which that land or site may be, shall be given to the said purchaser." (v Stat. at Large, p. 468.)

Now, in common parlance, "purchase" imports the buying of property by contract, and therefore would not include the present case of acquisition by statute or by condemnation and expropriation.

But the legal meaning of "purchase," applied to real estate, goes much beyond this, for the phrase "title by purchase," is often employed to embrace all the forms of acquisition except that by "descent." (i Inst. 8, b.) When accurately defined, the distinction is between titles acquired through some agreement or other act of the party acquiring, which is "purchase;" and titles acquired by the mere devolution of law, without any act of the party, which is "descent." (iii Greenleaf's Cruise, 317, note; iv Kent's Com. 372.) Undoubtedly, the present case, of title to the United States by expropriation, is purchase

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within the scope of the statute, and is a form of acquisition justified by acts of Congress not less than by the Constitution of the United States.

As to all this part of the subject, then, my conclusion is that the acquisition of land by the United States for the use of the Washington Aqueduct, through the means of a statute process of expropriation, is a lawful "purchase," such as, if done in strict accordance with the form of the statute, may be certified by the Attorney General as vesting a valid title in the United States.

Having arrived at these general conclusions, I then proceeded to examine the title papers filed, with a view to determine whether they furnished proper evidence of title by condemnation according to the statute of Maryland, and on such examination found sundry deficiencies which need to be supplied. These deficiencies I have indicated verbally to Mr. Brewer, the counsel employed for the Government in the transaction of this business, and at the same time I have returned the papers to the Department.

I am, very respectfully

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

 BELLIGERENT ASYLUM.

Belligerent ships of war, privateers, and the prizes of either, are entitled, on the score of humanity, to temporary refuge in neutral waters from casualties of the sea and land.

By the law of nations, belligerent ships of war, with their prizes, enjoy asylum in neutral ports for the purpose of obtaining supplies or undergoing repairs, according to the discretion of the neutral sovereign, who may refuse the asylum absolutely, or grant it under such conditions of duration, place, and other circumstances, as he shall see fit, provided that he must be strictly impartial in this respect towards all the belligerent powers.

Where the neutral state has not signified its determination to refuse the privilege of asylum to belligerent ships of war, privateers, or their prizes, either belligerent has a right to assume its existence, and enter upon its enjoyment,