THE

AMERICAN BAR ASSOCIATION.

THE DARTMOUTH COLLEGE CASE AND PRIVATE CORPORATIONS.

A PAPER PRESENTED BY

WILLIAM P. WELLS,
OF DETROIT,

AT THE

Ninth Annual Meeting, August 19, 1886.

[*Reprinted from the Report of the Transactions of the Association.*]

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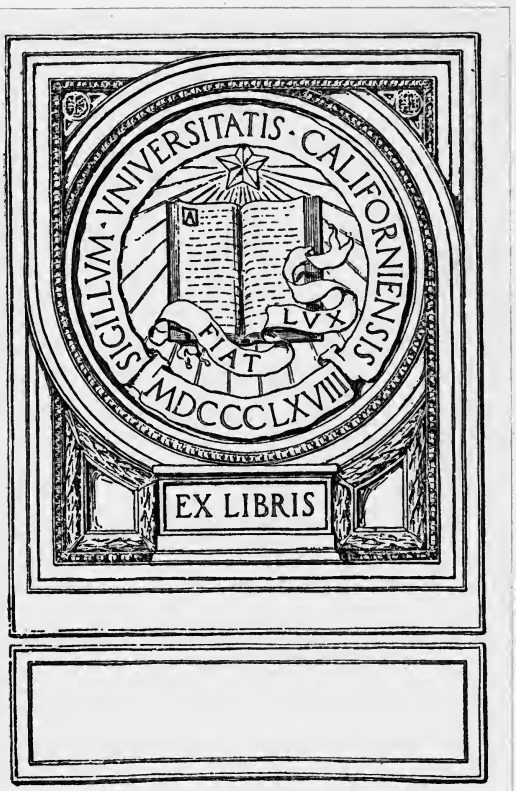
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The Dartmouth College Case and Private Corporations.

Chancellor Kent, writing in 1826, thus expressed himself concerning the Dartmouth College case: * "It contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports. The decision in that case did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of government and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country."

Another learned commentator, Mr. Justice Cooley, writing nearly fifty years later, adds to his statement of the doctrine established in that case the following: † "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations having greater influence in the country at large and upon the legislation of the country than the states to which they owe their corporate existence. Every privilege granted or right conferred, no matter by what means or on what pretence, being made inviolable by the constitution, the government is

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*1 Kent's Comm. 419.

† Cooley's Const. Lim., 279-80, n.

frequently found stripped of its authority in very important particulars by unwise, careless or corrupt legislation, and a clause in the federal constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil."

During the period which has elapsed since Chancellor Kent wrote, the great development of private corporations has taken place in this country, their wealth and strength have immensely increased, and they have become possessed, unquestionably, of vast and dangerous powers. And these contrasted statements of the effects of this decision present a most interesting inquiry. The first represents an opinion which prevailed in the profession and in the courts long after the decision was made, and which still receives strong support from the bar and from the decisions of the highest tribunals. But it must be acknowledged that the second of the foregoing statements is only a moderate expression of professional and public opinion upon this important subject. While, on the one hand, it is maintained that the original adjudication was not only right in itself, but has been rightly affirmed and applied in succeeding cases and should not be disturbed; that the court which originally pronounced it should not and will not take any backward steps in respect to the doctrine established; on the other hand, not only has the correctness of the decision been repeatedly challenged, but a swelling chorus of denunciation, proceeding from lawyers and the press and the people, assails it as *fons et origo* of monstrous wrong and pernicious consequences, and predictions manifold are not wanting that it must sooner or later be reviewed and reversed. It cannot, therefore, be inappropriate for an association of the bar of the country to consider whether the effect of this great judgment has been beneficent or evil; whether alleged abuses of corporate powers and alleged corporate encroachments upon public rights, which are at present engaging the solicitude of lawyers, legislators and the people alike, are chiefly attributable to or find support in the decision; whether corporations

find in the courts under it an "impregnable barrier" behind which they may do mischief, or only a just shelter for their clear rights; whether the judicial tribunals have only justly applied a clause of the federal constitution, or have pressed the decision too far, with evil consequences to the people. Such consideration, in other words, involves an inquiry into the connection, real or supposed, between the Dartmouth College case and the pressing questions of corporate power, responsibility and restraint which are now the subjects of great public anxiety. But the appropriate limits of the discussion only allow a suggestive rather than a thorough treatment of the topic.

The inquiry first requires a brief consideration of the doctrine established and its applications. But it is unnecessary to examine at any length the cases in the federal and state courts in which the principle of the leading case has been applied, for this would be only a repetition of familiar learning. It will be sufficient to notice the well-known rules flowing from the original decision, which have been administered for the protection of private business corporations. It will appear that the decisions, during a period of sixty-five years, have affirmed a body of legal rules, as applications of the doctrine of the leading case, which, to say the least, constitute a strong and valuable support of corporate privileges.

A strict statement of the decision in the principal case,* in 1819, is, that the charters of private corporations are contracts between the legislature and the corporations, having for their consideration the liabilities and duties which the corporations assume by accepting them, and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired, without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.

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* The Dartmouth College Case, 4 Wheaton, 518.

This principle, in subsequent cases, was held to embrace all contracts, executed and executory, between the state and private corporations;* and it was also settled that the inalidity of legislation impairing the contract does not depend upon the extent of the impairment.†

I. Let us consider, at the outset, the beneficial results to corporations of the Dartmouth College case. It was inevitable, when such a decision had been announced by the supreme tribunal of the federal government, that corporations would at once perceive its value to them, and be swift to seize upon the advantages it conferred upon them. A mere glance at the familiar classes of cases in which the principle has been applied, shows their variety and importance, and that business corporations have never failed to invoke its protection whenever their chartered rights have been drawn into controversy.

(1) In respect to the title to corporate property, derived from the state, other than franchises, it was soon established, by many decisions, that legislative grants to corporations vest an absolute title, which could not be afterwards resumed or controlled by the legislature, any more than an absolute grant to individuals. It having been previously decided that legislative grants are irrepealable,‡ the decision that a charter is a contract, brought all property granted by a charter within the protection given to grants to individuals. The value of such a principle to private business corporations is at once apparent. It is only necessary to refer to the history of state and federal legislation, which has conferred upon them profuse grants of property, to show how beneficial to corporations the administration of this rule of law has been. The disposition to

* Green *vs.* Biddle, 8 Wheat. 1; Bridge Proprietors *vs.* Hoboken, 1 Wall. 116.

† Planters' Bank *vs.* Sharp, 6 How. 327; Bronson *vs.* Kinzie, 1 How. 311.

‡ Fletcher *vs.* Peck, 6 Cranch, 87; Terrett *vs.* Taylor, 9 Cranch, 43; Town of Pawlet *vs.* Clark, *Ibid.* 292; Davis *vs.* Gray, 16 Wall. 203.

encourage corporate organization and effort, which was especially indulged in the early history of the country, has been wrought upon by corporations ever since with unflagging energy and persistence. The public funds, the public domain, seem to have been regarded as theirs by right, and state and federal legislatures, influenced by all manner of solicitation and importunity, and won by all the arts of conciliation and persuasion, have enriched corporations by abundant and overflowing donations, and thus established and strengthened the solid structure of their wealth and power.

(2) The same principle, by repeated adjudications, was held to apply to grants of the franchises of corporations. They were held to be property, and irrevocable by legislation, after acceptance by the corporations, on the terms of the charters. Great as have been the value and benefits of the large grants of property made to corporations, these are small compared with the worth of franchises which, once obtained, bestow special and ample powers for the acquisition of property, its consolidation in the hands of corporations, and afford to them the ability and present the strong temptation to act solely for their own aggrandizement, in disregard of the public interest. In the early history of corporations in this country all charters were special, each resting upon its own terms, and granting varied privileges, always specially valuable. The development of the country and its resources justified the liberal encouragement of corporate enterprises, and the grants and franchises conferred by charters were given upon sound considerations of public policy and benefit to the country. But all business corporations, by the subsequent application to them of the decision in the principal case, gained enormous power, and secured a firm foothold for action which inevitably resulted in aggressions upon the public.

If it be said, as must be conceded, that the inviolability of grants to corporations, other than franchises, confers upon them no rights beyond those given by grants to natural

persons, upon sufficient consideration, and rests upon principles of justice and morality applicable alike to natural and artificial persons, it may be replied that the chief advantage which has been derived by corporations from the Dartmouth College decision is the removal of their franchises from legislative control, the constant exercise of which is essential to the public welfare. By the bestowal of such franchises there are conferred upon corporate and associated capital powers which individuals cannot have, powers for good certainly, but also powers for evil, which have been exercised to such public detriment that the people have been stirred to their depths by a sense of the immediate and urgent necessity of finding, under the law and through the judicial tribunals, or above and outside of them, some effectual means of restraint upon corporate abuses.

(3) In respect to the use and enjoyment of corporate property and franchises, it must be admitted that the principal decision has been the source of the same priceless advantages to corporations. The special charters which were granted under the influence of the sentiment favorable to corporations, which prevailed alike in legislatures and in courts, generally included special privileges in the use of corporate franchises and the carrying on of corporate business. When secured, these are irrevocable. Corporations thereby become possessed of the power to determine, without restriction and without legislative control, the compensation they shall receive for services, the profits from the use of their property, "its use and the fruits of that use." In innumerable cases, in the state and federal courts, the special provisions of charters to this end have been held to be beyond legislative interference under the principle of the Dartmouth College decision. The benefits thereby secured to corporations need no description. The advantages are obvious which they have derived from the principle that the right to regulate and fix their own compensation for services results from their general power to carry on

the business for which they are organized, and that such compensation must be determined by the corporate body itself. The authorities to this effect were uniform* until the comparatively recent decisions of the Supreme Court as to the regulation of corporate business, which will be considered hereafter.

It is against this right and this power of corporations to determine their own charges, and the undeniable abuses thereof, that the public sentiment referred to has been especially directed, and which, not yet wholly allayed, though diminished, has, unintelligently perhaps, found in the leading case the sole source of corporate injuries to the public.

(4) The exemption of private corporations from taxation altogether and taxation at special and favorable rates, under charter provisions, have been of such advantage to them that, more than any other of their privileges, perhaps, these have encountered the disapproval and opposition of the people and the profession; and the established rules of law protecting such exemptions have challenged, probably, more severe criticism than any application of the Dartmouth College decision. The principle that the legislature may make an irrevocable contract of exemption from taxation does not rest in its origin upon that decision. It found its earliest assertion in the case of New Jersey *vs.* Wilson, † in 1812, and the succeeding cases which affirm the rule profess to rest upon that case.‡ The decision was, that under the constitution the repeal of a law granting total or partial exemption from

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* Penn. R. R. Co. *vs.* Sly, 65 Penn. St. 205; Phil., Wilm. & Balt. R. R. Co. *vs.* Bowers, 4 Houst. 506; Hamilton *vs.* Kutte, 5 Bush, (Ky.) 458.

† 7 Cranch, 164.

‡ Gordon *vs.* Appeal Tax Court, 3 How. 133; Piqua Bank *vs.* Knoop, 16 How. 369; Ohio Life and Trust Co. *vs.* Debolt, 16 How. 416; Dodge *vs.* Woolsey, 18 How. 331; Mech. and Traders Bank *vs.* Thomas, 18 How. 384; McGee *vs.* Mathis, 4 Wall. 143; Jefferson Bank *vs.* Skelly, 1 Black, 436; Home of the Friendless *vs.* Rouse, 8 Wall. 438; Wilmington Railroad *vs.* Reid, 13 Wall. 264; Farrington *vs.* Tennessee, 95 U. S. 679; Murray *vs.* Charleston, 96 U. S. 432.

taxation impairs the contract made by the grant of the privilege. Whether or not it was rightly decided that the prohibition of the constitution applied to the exemption in question in the case, it has remained as the basis of subsequent decisions and has been repeatedly affirmed by the Supreme Court, though not without most strenuous dissent by a strong minority of the court. But it is by virtue of the decision in the Dartmouth College case that the principle has its application to private corporations. The decision that a charter is a contract made available to them the doctrine that contracts of exemption from taxation are protected by the constitution, notwithstanding that the states are, by such contracts, deprived of the exercise of one of the powers of sovereignty. And the majority of the cases in which the principle established in New Jersey *vs.* Wilson has been affirmed have been cases where corporate charters providing for exemption from taxation have been drawn in question. In one of these cases it is said that "attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power."*

And this supervisory power the court has steadily exercised to declare void all state legislation impairing contracts of exemption made with corporations in their charters. Notwithstanding the earnest opposition and protests of the minority of the court, at all times, the majority has not failed to protect the contract of exemption when the provisions of the charter clearly expressed it. And one of the minority has not hesitated to say that the court has been "at times quick to discover a contract, that it might be protected, and slow to perceive that what are claimed to be contracts were not so, by reason of the want of authority in those who profess to bind others. This has been especially apparent in regard to contracts made by legislatures of states, and by those municipal

* Murray *vs.* Charleston, 96 U. S. 432.

bodies to whom, in a limited measure, some part of the legislative function has been confided."*

It is believed to be the general opinion of the profession that if the question whether a state legislature can release the sovereign power of taxation were *res integra*, it would be decided in the negative by every judicial tribunal, state and federal. Discriminations in respect to taxation, favorable to corporations, originally granted in conformity with the public sentiment, which, as has been said, encouraged them by favoring legislation, are now seen to be unwise and unnecessary. The time when corporations need such support or encouragement long ago passed away. The public, which once looked with favor upon their privileges, is now alarmed by their encroachments, and the profession and the public alike realize the consequences of the doctrine, that under the decision of the Dartmouth College case the essential sovereign powers of a state relating to revenue, which ought to be most sacredly guarded and conserved, may be bartered away in favor of corporations, whose influence upon legislation has been almost irresistible, and whose privileges have been often secured by the exercise of "the sly and stealthy arts to which state legislatures are exposed, and the greedy appetites of adventurers for monopolies and immunities from the state right of government."† If the Dartmouth College case had

* Miller, J., in Washington University *vs.* Rouse, 8 Wall. 442.

† Since the above was written, the decision in Given *vs.* Wright, 117 U. S. 648, has been announced, affirming anew the case of New Jersey *vs.* Wilson, and bringing to notice the singular fact, that the exemption sustained in that case, originally granted to the Delaware Indians, which passed to the purchasers of their lands, was not insisted upon by the holders of the lands, and taxes were paid for the whole period of about sixty years since the original decision. Given *vs.* Wright decides that the long acquiescence of the land-owners under the imposition of taxes, raised a presumption that the exemption which once existed had been surrendered, as it was a franchise or privilege which could be lost by acquiescence. The court expresses the opinion that if the question in New Jersey *vs.* Wilson were a new one, it might be differently decided.

been nothing more to corporations than the basis of their protection against taxation, it would have deserved, even then, as the principle has been actually applied, the protests found in the dissenting opinions of the judges, the criticism of the profession and the complaints of the people.

II. Here, then, we have the established principles, resting upon the Dartmouth College case, under which corporations have complete protection for their corporate rights and franchises, the title and use of corporate property, immunities and exemptions in respect to taxation, safety from any alteration or impairment of the rights and the proprietary condition secured by their charters. These are the direct results of that decision. But it is also the foundation upon which private business corporations in this country are grounded, for injurious as well as beneficent purposes. Under it they have found a position from which they are enabled to deliver the heavy fire, and carrry on the noxious warfare, of corporate abuses and injustice. It is the shelter under which the vast capital embarked in corporate business may be employed not only in serving the people but in oppressing them. The connection between this state of things and the decision may be traced by the simple inquiry, what would have been the condition of private corporations if the decision had not been made? The answer is, that they would have remained subject to complete legislative supervision and control. If this is desirable it would seem that it can only be brought about now by retracing the path in which the Dartmouth College case was the first step. Whether it is desirable or not there is a difference of opinion; whether it is likely to be accomplished is still more doubtful. But that the decision, strong and fixed in our jurisprudence by repeated affirmations, venerable and by many regarded with a veneration which stigmatizes as profane any criticism of its principles, stands, until explicitly reversed, in the way of the complete legislative restraint of corporations, is certain.

It is indisputable, therefore, that the beneficial results of the decision to private corporations have been inestimable. It has secured to them, beyond recall, enormous privileges and powers. It is the corner-stone of a structure of corporate wealth and influence, which has been broadening and rising higher with every succeeding year. It has encouraged them in independence of the legislative and popular will, and offers to them a constant temptation to wield their vast resources solely for their own aggrandizement. It forbids legislation, however desirable, which is often essential to the public welfare. All this may be fairly said without partaking of a spirit of unreasoning hostility to corporations. The criticism of the original decision which asserts that it has been the source of such priceless benefits to corporations is rational and just. No judicial mind could have anticipated, at the time of the decision, the extent of subsequent applications of a principle declared in the case of a college to business corporations, any more than the extensive and varied growth of corporations could have been foreseen. But, from the beginning, the application of the rule to the charters of business corporations has been asserted and defended as necessary to stimulate corporate enterprise and investments.* However this may have been, it is certain that there is some foundation for professional and public opinion that the principle of the leading case has been pressed too far in the courts; that not only has reasonable encouragement been afforded to corporate exertion, but that it has emboldened corporations in independence, in invasions of public right and in abuses of their lawful powers.

III. The larger part of professional and lay criticism upon the Dartmouth College case and its results has been directed against the Supreme Court, asserting that the principle has been pressed too far, to the advantage of corporations and the protection of vested interests; that it has "been made to

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*The Binghamton Bridge, 3 Wall. 74.

sustain grants which neither law nor justice nor sound principle can sanction;" that "the rule in that case has been perverted to the maintenance of corporate institutions invested with great public functions."* This is apart from the question of the soundness of the original decision, which has been repeatedly challenged and discussed with great research and ability,† but which is not within the purpose of this paper. In estimating the force and justice of such animadversions, it is necessary to consider the principal case and the later decisions founded upon it, and the course of decision in the Supreme Court alone, regarded as a body or system of legal doctrine. Of this the constituents are:

(1) The principle that the charter of a private corporation is a contract. The court has firmly and steadily applied this principle in cases of business corporations, and whenever the contract has been found in the charter it has been protected from impairment or violation, and legislation to that effect has been held invalid. Thus business corporations have been secured in the possession and enjoyment of every privilege, exemption and benefit clearly conferred by charters; in the irrevocable title to property and franchises granted; in the exclusion of competing corporate enterprises and works; in freedom from increased public burdens; in the right to the use and enjoyment of their property and franchises; in immunity from legislative control.‡ And the court has never

* See, as representative of such criticism, a very interesting and able address by Hon. John A. Jameson, of Chicago, before the Illinois State Bar Association, January 6, 1882, upon "Interference by Law with the Accumulation and Use of Capital."

† See especially "The Dartmouth College Case," vol. viii., American Law Review, p. 189, January, 1874, and Mr. Shirley's volume, "The Dartmouth College Causes and the Supreme Court of the United States," St. Louis, 1879.

‡ Planters' Bank *vs.* Sharp, 6 How. 301; Trustees of Vincennes Univ. *vs.* Indiana, 14 How. 268; The Binghamton Bridge, 3 Wall. 73; Davis *vs.* Gray, 16 Wall. 203; New Jersey *vs.* Yard, 95 U. S. 104; New Orleans Gas and Water Cases, 115 U. S. 650; and the whole series of taxation cases, cited *supra.*

failed to declare its adherence to the principal case and the improbability of its reversal in the most explicit terms, thus, "The principles they maintain are now axiomatic in American jurisprudence."* Again, "The question decided in that [the Dartmouth College] case has since been considered as finally settled in the jurisprudence of the entire country. Murmurs of doubt and dissatisfaction are occasionally heard, but there has been no re-argument here and none has been asked for."† And again, it is said that the courts "are estopped from questioning the doctrine."‡ Again, "The doctrines * * announced by this court more than sixty years ago have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the constitution itself."§

The legal profession will not readily unite in support of a demand, however urgently it may be pressed by popular opinion, that the Supreme Court shall reverse the original decision. Every sanction which establishes the maxim, *stare decisis*, forbids this. It was made upon the greatest deliberation. The authority of the greatest names in our judicial annals supports it. Their successors, through a period of more than sixty-five years, have affirmed and followed it. Whether right or wrong, it is now too late to overthrow it. Vested interests and rights, the investments of millions, great and beneficent works and enterprises depend upon its permanence. The language of Mr. Justice Davis is not too strong when he says that ‖"the security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. A departure from it *now* would involve dangers to society not to be foreseen, would shock the sense of justice of the country, and weaken if not destroy

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* Von Hoffman *vs.* Quincy, 4 Wall. 535.
† Farrington *vs.* Tennessee, 95 U. S. 685.
‡ The Binghamton Bridge, 3 Wall. 73.
§ Stone *vs.* Mississippi, 101 U. S. 816.
‖ The Binghamton Bridge, 3 Wall. 73.

that respect which has always been felt for the judicial department of the government." It is often said that every persistent popular demand finally obtains what it desires, even from the judicial tribunals. But there is little ground for the expectation that this case will be reversed under any conceivable pressure of public sentiment. It will continue to be the subject of adverse criticism, which will be intensified and strengthened, in the profession and outside of it, unless corporate abuses are restrained or come to an end. But the remedies for these, it is believed, will be found in some other way than in the reversal, by the court itself, of this memorable judgment.

(2) Although the leading case has thus been repeatedly affirmed and declared to be unassailable, we find it qualified and limited by important adjudications which have established principles operating in a high degree to confine and lessen its effect in encouraging the independence and aggressions of corporations. When it became settled that grants to them were not to be extended by construction, and that all charters were to be construed strictly against the grantees,* whatever criticism may be made upon the doctrine or its consistency with the Dartmouth College case, it is certain that a check was thereby laid upon the effect of the principal decision. And the rule established in the Charles River Bridge case has been repeatedly affirmed and stands as firmly as the rule that a charter is a contract. This principle has been steadily applied where corporations have invoked the protection of the constitutional inhibition, under charters which contained no clear contract, and in administering the rule the Supreme Court has denied the claims of many corporations to the exclusive privileges, beneficial exemptions and valuable grants

*Charles River Bridge *vs.* Warren Bridge, 11 Pet. 420; Richmond R. R. Co. *vs.* Louisa R. R. Co., 13 How. 71; Perrine *vs.* Canal Co., 9 How. 172; Turnpike Co. *vs.* State, 3 Wall. 210; Ruggles *vs.* Illinois, 108 U. S. 526.

asserted under charters. Under this principle corporations have been apprised that the securing of a loosely-drawn charter was not enough to confer upon them all the rights and privileges expected, that charters convey nothing by implication,* and that they are always subject to the scrutiny of the judicial power, under a rule of strict construction. The effect of such adjudications upon charter legislation has undoubtedly been beneficial. It has made legislatures aware that if it was intended to confer an irrevocable franchise, privilege or exemption, that purpose must be clearly expressed. Many a legislature, brought face to face with an explicit charter-contract, would hesitate to enact it, while a skillfully drawn charter, intended by its promoters to contain but not express a contract, might pass unchallenged. Thus, this important rule of the construction of charters, in its actual application, has been favorable to the public as against corporations.

(3) The Supreme Court has asserted and upheld the legislative authority over corporations in all cases where their charters, or the general laws, or the provisions of state

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* Especially in the taxation cases the court has held that the contract must be clearly expressed in the charter. Providence Bank *vs.* Billings, 4 Pet. 514; Salt Co. *vs.* East Saginaw, 13 Wall. 373; The Delaware R. R. Tax Cases, 18 Wall. 225; Tucker *vs.* Ferguson, 22 Wall. 527; New Jersey *vs.* Yard, 95 U. S. 104; Hoge *vs.* R. R. Co., 99 U. S. 348; Railway Co. *vs.* Philadelphia, 101 U. S. 539; Memphis Gas Light Co. *vs.* Shelby Tax District, 109 U. S. 398; Southwest. R. R. Co. *vs.* Wright, 116 U. S. 231; Vicksburg, etc., R. R. Co. *vs.* Dennis, 116 U. S. 668; Tennessee *s.* Whitworth, 117 U. S. 139–148. And the privilege of exemption from taxation is construed to be the special privilege of the corporation to which it is granted, and does not pass to its successor unless the law granting the exemption expresses a clear intent to that effect. Morgan *vs.* Louisiana, 93 U. S. 217; Wilson *vs.* Gaines, 103 U. S. 417; Louisville & Nashville R. R. Co. *vs.* Palmes, 109 U. S. 244; Memphis R. R. Co. *vs.* Commissioners, 112 U. S. 609. And exemptions from taxation which are mere bounties, or privileges granted without consideration, may be withdrawn or repealed by the legislature. Rector, etc., *vs* Philadelphia, 24 How. 301; Tucker *vs.* Ferguson, 22 Wall. 527; West Wisconsin *vs.* Board of Supervisors, 93 U. S. 595.

constitutions reserved to the legislature the power of amendment or repeal. This means of retaining the control of corporate charters, and of avoiding "the unalterable and irrepealable character of the contract," has been in force since the decision of the principal case, and a suggestion by Judge Story to that effect in his opinion was immediately followed, and many of the states, availing themselves of this mode of action, have maintained a supervision of corporations which has been effective in a high degree. The court has never failed to give the state and the public the benefit of this principle, whenever the charter, or general law, or the state constitution has reserved the power. In a multitude of cases, corporations have been denied the privileges asserted under charters claimed to be irrepealable, and have been subjected to the efficient action of the legislative power.*

As the power to amend and repeal charters would be ample in the state legislatures, in the absence of the provision of the federal constitution forbidding the impairment of the obligation of contracts, such a reservation leaves a state where any sovereignty would be, if unrestrained by express constitutional limitations. Whenever the power is reserved, it may be exercised to amend the charter to almost any extent to carry into effect the original purposes of the corporate organization and secure due administration of its affairs, or to repeal the charter altogether, so as to terminate absolutely the existence of the corporation by the abrogation of "the organic law on which the corporate existence depends."† But the exercise of the power of amendment or repeal cannot deprive corporations of their rights or property acquired by the use of their

* Pennsylvania College Cases, 13 Wall. 213; Miller *vs.* State, 15 Wall. 478; Tomlinson *vs.* Jessup, 15 Wall. 454; Shields *vs.* Ohio, 95 U. S. 319; Railway Co. *vs.* Maine, 96 U. S. 499; Sinking Fund Cases, 99 U. S. 700. Railway Co. *vs.* Georgia, 98 U. S. 359; Railway *vs.* Philadelphia, 101 U. S. 539; Greenwood *vs.* Freight Co., 105 U. S. 13; Spring Valley Water Works *vs.* Schottler, 110 U. S. 348.

† Miller *vs.* State, 15 Wall. 478; Shields *vs.* Ohio, 95 U. S. 319; Greenwood *vs.* Freight Co., 105 U. S. 19.

franchises.* Thus the rights of shareholders and creditors are protected. So that the reserved power of amendment or repeal is not unlimited, or destructive, or violative of vested rights.

To those whose indulgence in complaint of the encroachments of corporations is somewhat sweeping, it may be fairly suggested that the actual and practical operation of this reserved legislative power is a restraint upon corporations much more effectual than they are willing to acknowledge. The inquiry by statistics is difficult, but we venture the statement that the larger number of corporations existing in this country come under legislative control by virtue of provisions in their charters, or in the general laws or constitutions of the states. In the majority of the states, constitutional provisions forbid the granting of charters, except with a reservation of the power of amendment or repeal. The day of special charters is past. General laws, for the most part, are the basis of corporate organization. The present tendency of legislation is not, to say the least, favorable to corporations. And in estimating the necessity for more severe legislative action concerning them, the extent of the present control of them, under the reserved power, should not be under-estimated. And certainly, any criticism upon the effect of the Dartmouth College case, as encouraging corporate independence, should not leave out of view the consistent maintenance of this power by the Supreme Court.

(4) It is well settled that the legislature may exercise the power of eminent domain, to authorize the taking of the property of corporations, including their franchises, upon due compensation.† This principle places the most valuable and exclusive rights and franchises of corporations under legislative control, whenever the public interest appears to the legislature

*Miller *vs.* State, 15 Wall. 478; Shields *vs.* Ohio, 95 U. S. 319; Greenwood *vs.* Freight Co., 105 U. S. 19.

† West River Bridge Co. *vs.* Dix, 6 How. 507; Richmond, etc., R. R. Co. *vs.* Louisa R. R. Co., 13 How. 71; Greenwood *vs.* Freight Co., 105 U. S. 22; New Orleans Gas Light Co. *vs.* Louisiana, etc., Co., 115 U. S. 650.

to require that new corporations should be organized, and the constantly developing necessities of growing and progressive communities aided by new corporate undertakings. The practical operation of this principle is to keep the limits of the field of corporate exertion under the constant supervision of legislation, and to leave to the determination of the representatives of the people the question whether that field should be enlarged or restricted at any particular period. This end is subserved, and corporations which have acquired vested rights and interests receive just compensation for whatever is taken from them.

(5) The most important adjudications which form a part of the system of doctrine founded on the Dartmouth College case, are the comparatively recent decisions which sustained the exercise of the supervisory and controlling power of the legislature in the "Warehouse" and "Granger" cases, so denominated. These have provoked wide discussion and earnest criticism. They have been assailed by many in the profession; they were accompanied by strong dissent on the part of the minority of the court; they have been hailed with approval and congratulation in large sections of the country where public sentiment was most vigorous in antagonism to corporations; they have been regarded by many, in and out of the profession, as inconsistent in reasoning and principle with the leading case, as indicating a tendency in the court to review and reverse it, and as presaging its final abandonment and overthrow.

These cases were as follows:

In Munn *vs.* Illinois,* the question was as to the power of the legislature of Illinois to fix by law the maximum of charges for the storage of grain in warehouses, at Chicago and other places in the state having not less than one hundred thousand inhabitants, and to require persons doing business as private

*94 U. S. 113.

warehousemen to take out a license for such business, and to declare the business to be that of public warehousemen. The constitutionality of such legislation was sustained, and it was held that "where private property is devoted to a public use it is subject to public regulation;" that "property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

The "Granger Cases"* involved a consideration of the charters of different railroad companies and the extent of the power of the legislature in the regulation of their charges, as well in the absence of any reservation of a right to alter or repeal them, as where such reservation was embodied in the charters or in the constitutions or laws under which they were granted.

These cases decided that railroads are subject to the supervision and control of the legislature, like all carriers at common law, being engaged in a public employment affecting the public interest, and, therefore, under the decision of Munn *vs.* Illinois, subject to legislation as to their rates of fare and freight, unless protected by their charters; that in the absence of charter-contracts the charges by railroad companies for services within the state may be limited by the legislature and a maximum of charges prescribed; that where the state constitution reserves a right of amendment or repeal, the legislature may prescribe a maximum, although the charter

* Chicago, Burlington & Quincy R. R. Co. *vs.* Iowa, 94 U. S. 155; Peik *vs.* Chicago & Northwestern Railway Co., *Ibid.* 164; Chicago, Milwaukee, & St. Paul R. R. Co. *vs.* Ackley, *Ibid.* 179; Winona & St. Peter R. R. Co. *vs.* Blake, *Ibid.* 180; Stone *vs.* Wisconsin, *Ibid.* 181; Ruggles *vs.* Illinois, 108 U. S. 526.

authorizes such charges as are reasonable; that more than the maximum fixed by the legislature cannot be recovered by the company by showing that the amount charged was no more than reasonable for the services.

Taken together, these decisions assert the complete power of legislative regulation, whenever the business of the corporation is of such a nature, in the judgment of the court, as to affect the public interest.

The "Railroad Commission Cases,"* decided at the last term of the court, affirm the "Granger Cases" and go beyond them, sustaining the validity of a statute regulating rates of transportation and creating a state board of commissioners to supervise and enforce the same. The court holds that the creation of such a board does not violate the charter right of the corporation to manage its affairs through its own directors; that statutes regulating rates of charges do not deprive corporations of their property without due process of law; but it is declared that the power of regulation is not a power to destroy, that limitation is not equivalent to confiscation, and that under pretence of regulating charges, the state could not require a corporation to carry without reward nor do that which amounts in law to taking private property for public use without just compensation or due process of law. As no tariff of charges had been fixed by the commission in question, the court declines to say what action of the commission would have this effect. The power of regulation is declared to be one which cannot be bargained away without express grant. Justices Harlan and Field, dissenting, regard the statute in question as one impairing the charter-contract with the company and their right under the charter to fix their own charges and manage their own affairs through their own directors, officers and agents, though they concede that statutes may be valid establishing railroad commissions for many purposes.

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* 116 U. S. 307.

These decisions assert principles which have not received, and, as we believe, cannot receive, the assent of the most weighty professional opinion. The reasoning of the dissenting opinions seems to us to be unanswerable. These express, with cogent logic, abundant authority and masterly strength, the consequences of a doctrine that the legislative power can be unchecked, in its interference with business essentially private, or its prescription of the compensation which private and corporate owners shall receive for the use of their property. Without such decisions, all the rights of regulation of the use of property, and to prevent its abuse to the injury of the public, and for the protection of the public interest, can be effectually preserved, in all cases where special privileges are granted, under settled principles as to the exercise of the police power. To state the reasons of our conviction would be only to repeat the larger portions of the dissenting opinions. The decisions seem to us to be "subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference;" they hold that "all property and all business of the state are held at the mercy of the legislature;" they deprive private and corporate owners of their property absolutely, although under the guise of mere regulations as to its use and employment and non-interference with its title and possession. It seems indisputable that "If the legislature of a state under pretence of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive him of the property as completely as by a special act for its confiscation or destruction." "There is, indeed, no protection of any value, under the constitutional provision, which does not extend to the use and income of the property, as well as to its title and possession."

It is difficult to resist the conviction that the court, in deciding these cases, was not altogether insensible to the

pressure of that public sentiment which prevailed at the time —the "Granger" sentiment of the Great West.

That the principles of these decisions are inconsistent with the reasoning of the Dartmouth College case, is maintained in the dissenting opinions and insisted upon by professional criticism. The question "to what purpose can the constitutional prohibition upon the states, against impairing the obligation of contracts, be invoked, if the state can, in the face of a charter authorizing a company to charge reasonable rates, prescribe what rates shall be deemed reasonable for services rendered," can receive, it seems to us, but one answer, viz., the constitutional inhibition is of no effect. It is true that the court expressly declares its adherence to the leading case; that it holds that the railroad charters in question contained no contracts; that it considers that the College case and the "Granger Cases," can stand together; and certainly, so far as establishing the law is concerned, the court is the final judge of its own consistency. But it seems to us that the principle of these cases, that the use of property affecting the public generally clothes it with a public interest, conflicts with the decision that the college was a purely private corporation; that the decisions tend to justify unchecked legislative control of all private corporations; that the reasoning of the court is inconsistent with the protection of the contracts even where the charters expressly contain them, and tends to allow the impairment of the contracts of corporations with third persons, especially where securities have been issued upon corporate property.

The legislative regulation of corporations, thus maintained, is based upon the nature of the business carried on. The court establishes the general principle that whenever such business is of public consequence, and affects the community generally, the legislative power is complete to regulate. If individuals or corporations devote their property to uses in which the public has an interest, there is, in effect, a presumed

dedication of the property to public use, and an implied submission, on the part of the owners, to legislative control or the public good. The limits of this power of regulation, therefore, depend upon what the court may determine, in every case, as to the nature of the business. These limits are undefined, and although the court plants itself, professedly, upon the principle of dedication to public use, and an implied consent of the owners of the property, many regard the virtual ground of decision to be the police power, which is generally exercised *in invitum*. But the declared opinions of the court must be accepted as to the ground of their decision. The power of regulation is, therefore, left to the combined determination of the legislative and judicial authority as to the nature of the business. The most recent decisions, presently to be noticed, show that the court asserts its power to determine, in every case, what is business of a public nature, and what is ordinary business, and when and to what extent the police power may be exercised in respect to it. But may it not be fairly asked, is not this power of regulation equivalent, as thus asserted, to the power of the legislature over public corporations, and are not corporations virtually held to be public whenever it can be found that the business or purposes of the corporate organization affect the community generally?

The importance of the results of these decisions, alike to corporations and to the public, has been demonstrated in the period which has elapsed since they were announced. Upon the former they have had marked effect in discouraging corporate investments, and have rendered corporate rights and franchises less valuable. Whether the public has derived from the decisions the benefit claimed for them is at least open to question. That part of the people which is most hostile to corporations finds, in these decisions, encouragement for the expectation that the court will, at no distant day, reverse the principal case, an event by which it is supposed a millenium of relief for a corporation-oppressed people will at last arrive.

(6) In cases subsequent to the "Granger Cases," where the constitutional protection of contracts was invoked in behalf of corporations carrying on business injurious to the public health or morals, the court has declared the principles governing the exercise of the police power, and decided that charter-contracts do not preclude the legislature from enacting such laws as are necessary for the protection of the public; that the legislature "cannot bargain away the public health or public morals," and that authority granted by statute to corporations or individuals to engage in particular private business detrimental to the public, does not constitute a contract preventing the withdrawal of such authority.*

(7) So, in a later case, the principle of the leading case has been urged to protect the corporations from legislation concerning their business intended for the security of persons dealing with them, such as statutes regulating the business of life insurance companies. Such legislation was held not to be within the constitutional inhibition. It was decided that all grants of corporate privileges and franchises are subject to the condition that they shall not be abused, nor employed to defeat the ends for which they were conferred, and to an equally implied condition that the legislature may prescribe such reasonable regulations as will secure the ends for which the corporation is organized, provided such regulations do not interfere with or obstruct the enjoyment of the corporate privileges. This principle is expressly declared to be essential to the protection of the public against perils arising from the ignorance, misconduct or fraud of those who manage corporations.†

(8) The decisions in the New Orleans Gas and Water

* Beer Co. *vs.* Massachusetts, 97 U. S. 25; Fertilizing Co. *vs.* Hyde Park, *Ibid.* 660; Boyd *vs.* Alabama, 94 U. S. 645; Stone *vs.* Mississippi, 101 U. S. 814; Butchers' Union Co. *vs.* Crescent City Co., 111 U. S. 746.

† Chicago Life Ins. Co. *vs.* Needles, 113 U. S. 574; and see The Sinking Fund Cases, *ubi supra.*

cases,* at the last term of the court, maintain anew the validity of exclusive charters as contracts, and declare the consistency of all previous adjudications with the complete exercise of the police power by the state, to protect the public health, the public morals and the public safety. These cases involved the validity of charters granting to private corporations exclusive privileges to supply the city of New Orleans with gas and water by means of pipes, mains and other conduits laid in the public streets of the city. The court held that such charters were contracts, which could not be impaired by subsequent constitutional provisions by the state; that the business to be carried on was of a public character; that the power of a subsequent legislature to recall such grants could be limited by the charter-contracts, and exclusive privileges granted in such cases stand upon the same principle as exclusive grants to construct and maintain highways, bridges and ferries, and exemption from taxation by charters; that the former decisions of the court (Beer Co. *vs.* Massachusetts, Fertilizing Co. *vs.* Hyde Park and Stone *vs.* Mississippi) sustaining the exercise of the police power, rest on the principle that one legislature cannot limit the power of its successors in relation to private business affecting the public health or morals; that authority given by the legislature to corporations or individuals to engage in such particular private business does not constitute a contract preventing withdrawal of such authority or the granting of it to others; but that the business of supplying a city with gas or water is not ordinary business in which everyone may engage, but is of a public nature; and that even in such case a grant of exclusive privileges does not withdraw the business from the control of the police power, when the public health, morals or safety require its exercise.

These decisions affirm again the adherence of the court to the Dartmouth College case, but assert for the court the power to determine in every case whether the nature of the

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*115 U. S. 650–674.

business is private or public, and, consequently, when the police power may be applied. These cases, by those who hold that the decisions of the court cannot be reconciled, will be regarded as strengthening their view of the court's inconsistency, and as they consider the "Granger Cases" to be a radical departure from the principal case, they will only find in these recent decisions a new and variant step, not in the path of consistent legal principles. They will not hesitate, therefore, to insist that the court, in every future case, as in its later adjudications, will decide as their views of public policy at the time may require.

But if we can conceive the court, for a moment, as defending their own course of decision, they would say, "The settled law upholds the true purpose of the constitutional inhibition, rightly protects the just rights of corporations, secures due administration of their affairs, and consistently maintains the integrity of the sovereign powers of the state, the police power, the power of eminent domain, the reserved power of amendment and repeal, and thus establishes sufficient and effectual restraints upon corporations."

IV. This survey and examination of the principles established as law by the leading case and succeeding decisions resting upon it, considered together, has been undertaken with a purpose to exhibit a connected view of the system, if it may properly be so regarded. By such a view we may better estimate the force and conclusiveness of the criticism which has assailed the original decision and its consequences, and which will continue, probably, to arraign the court before the bar of public opinion. Public opinion, sooner or later, insensibly moulds the law.* Whatever we may desire as lawyers,

*"Public opinion may and does review the constitutional doctrines announced and acted upon by the Supreme Court of the United States, and sometimes this review has been followed by very practical consequences." Geo. Ticknor Curtis, in his discussion of "The Doctrine of Presumed Dedication of Private Property to Public Use" (John Wiley & Sons, N. Y., 1881), citing "The Dred Scott Case."

however much we may wish that the judicial tribunals shall be above the reach of popular opinion, nevertheless they are influenced by it. The law is the outgrowth of the necessities of the community. It is idle for the profession to ignore the serious charge that by reason of the decision in the Dartmouth College case, corporations possess almost sovereign powers, and that the doctrine of an inviolable charter-contract has suspended, in their favor, the exercise of the sovereign powers of the state. This charge must be met according to its gravity; it must be considered whether the need of restraint upon corporations is increasing or diminishing, and where the remedies for corporate abuses and aggression are to be found, if required. But this inquiry will not be prosecuted, either in the legal profession or in the judicial tribunals, in any spirit of undiscriminating enmity to corporations. The incalculable benefits they have conferred upon the country, the great work they have performed in its progress and development, are manifest. The legal profession can do much to influence and guide public opinion; to show that the demand for the reversal of the Dartmouth College case is impracticable; to maintain the integrity and permanence of principles which are, to say the least, settled law; to inculcate that respect for the highest judicial tribunal of the country to which it is entitled by its position, its history and the purity, abilities and learning of the judges. This may be done, and ample room will be left for free and enlightened criticism of its decisions. It is a reasonable expectation that the law will be finally settled in such a way as to reconcile complete protection of corporate rights and vested interests with the unimpaired exercise of the sovereign powers of the state. The majority of the court regard that as even now accomplished, but as to this there is a wide difference of opinion. One of the judges who has most strenuously resisted the doctrine that the taxing power can be restricted by charter-contract, predicts that it must be finally abandoned.* Whether this can

* Miller, J. in Washington University *vs.* Rouse, 8 Wall. 444.

be done without overthrowing the whole system of decisions is doubtful; because, as we have seen, the taxation cases are those wherein the principle that a charter is a contract has been most frequently and explicitly affirmed. If the principal case is not reversed, still less is it probable that the remedy suggested by the most earnest of its opponents, an amendment of the Federal Constitution, will be attained. It would be resisted by all the power of corporations, and such a measure could not be enacted unless by practical unanimity of all public interests and general concurrence of professional and public sentiment. If the aims, the ambitions, the independence of corporations should continue to be aggressive, and become dangerous to the public welfare, remedies must and will be found. What these shall be is not within the scope of the present discussion.

As lawyers and as citizens we may indulge the hope that these questions will be determined and these contentions composed, with complete conservation of the judicial and legislative powers of government, and with just regard for the interests of corporations, the protection of the public, and the welfare and progress of the nation.