GOVERNMENT AND EDUCATION

IN THE

UNITED STATES.

DISSERTATION IN PART FULFILLMENT OF THE CONDITIONS NECESSARY FOR THE DEGREE OF PH.D. IN THE SCHOOL OF POLITICAL SCIENCE, COLUMBIA COLLEGE.

BY

WILLARD C. HUMPHREYS, A. M.,

Seligman Prize Fellow.

PRESS OF A. E. CHASMAR & CO.,

833 BROADWAY, N. Y.

TABLE OF CONTENTS.

State Aid to and Control of Educational Institutions in the United States.

CHAPTER I.

INTRODUCTION.

It is the purpose of the following dissertation to indicate briefly the present condition of our educational system in its relations with the government. It will not include within its scope a history of the various phases of development through which our schools and colleges have passed, and still more foreign to its purpose would be any consideration of the internal management of our educational institutions or criticism of their methods and subjects of study: the former has very recently been thoroughly treated in the monographs of the Johns Hopkins University (1) and the more general works of Boone and others, (2) while the latter constitutes a larger part of the subject-matter of the State reports, and provides a theme of apparparently never-failing interest to the current reviews and magazines.

Concerning the utility of State interference in educational matters, and its legitimacy as an object of government, it is not necessary to speak at length in this place, except to call attention to the favor which such interference now finds with political economists, and the somewhat singular unanimity of assent

(1.) The monographs of this series are: The College of William and Mary, by Herbert B. Adams, 1888; Thomas Jefferson and the University of Virginia, by Herbert B. Adams, 1888; History of Education in North Carolina, by Charles L. Smith, 1888; History of Higher Education in South Carolina, by C. Meriwether, 1889; Education in Georgia, by Charles E. Jones, 1889; Education in Florida, by George G. Bush, 1889; History of Education in Wisconsin, by David Spencer and William F. Allen, 1889. Others are in preparation.

(2.) R. G. Boone, Education in the United States, 1889.

with which the general doctrine is received. This assent is the more remarkable because it is a growth of comparatively recent years. In 1775, Adam Smith, while not failing to recognize the value of mental attainments as an element of national excellence, still spoke with decided emphasis against the establishment of a general system of public instruction; (1) while to-day even the most consistent of the *laissiz faire* political writers proclaim popular education, supported and controlled by government authority to be a fundamental doctrine of all sound economic creeds. Whether this change of ideas is a natural, or perhaps even necessary, result of the growing prevalence of democratic tendencies, I will not venture to say; this, however, is certain, that all the arguments brought forward in support of compulsory public instruction apply with special fitness to a democratic community, and are further reinforced by the peculiar circumstances of the people of the United States. Washington was actuated by more far-seeing motives than a desire for rhetorical display when he urged upon the people the necessity of disseminating information among the people; (2) and Jefferson, with all his zeal for popular instruction, perhaps builded even better than he knew, when, by his untiring efforts to establish an effcient school system in Virginia, he set an example that has been followed with eagerness, if not always with wisdom, in all the States of the Union. (3)

The results which this movement has achieved, the principles which have guided it, and the condition in which the system now is, will constitute the subject of inquiry of the present essay.

(1) Adam Smith, Wealth of Nations, Book V., Chap I., Articles 2 and 3. Adam Smith was, it is true, fully alive to the advantages of generally diffused intelligence even among the poorest classes; but was opposed to any system of public instruction which should impart more than the rudiments of common education. And as to the maintenance of common or primary schools, while he does not deny the justice of forcing the whole society to contribute to it, he thinks that "this expense might with equal propriety and even with some advantage be defrayed altogether by those who receive the immediate benefit of such education and instruction" a sentiment utterly at variance with the opinions of more recent writers upon this subject. For a statement of what may be regarded as the generally adopted present view of this matter, see Henry Fawcett, Manual of Political Economy, Bk. II., Chap. VIII.

(2.) See especially his Farewell Address.

(3) See the Writings of Thomas Jefferson, Edited by by H. A. Washington, New York, 1855, especially Vol. IV., p. 317, and Vol. VI., pp. 517, 542, 564. The reservation, in the Ordinance of 1787, of lot number sixteen in each township was due to Thomas Jefferson's influence He had in May, 1784, as chairman of the Committee on the Organization of the Western Territory, recommended the reservation of "the central section of every township for the maintenance of public schools."

CHAPTER II.

GENERAL THEORY OF OUR SYSTEM AND EXTENT OF AID BY THE NATIONAL GOVERNMENT.

One of the most conspicuous features of the American school system is its representative character. The doctrine of the sovereignty of the people, which pervades all our social and political organizations, is carried to its furthest limits in our institutions of public instruction; and the principle to which we are most strongly attached is thus fitly exhibited in that feature of our civilization upon which we set the highest value. As stated by Bishop Fraser in his Report to the Schools Enquiry Commission: (1) "Local self-government is the underlying principle of democratic institutions; local self-government is the mainspring of the American school system." This circumstance that the schools are thus directly in the hands of the people, whence they derive a force which in great measure makes up for their other deficiencies, makes possible, and at the same time explains, the statement, often made in apparent disparagement, that there is no national system of education in the United States. Such a law would be very generally regarded as repugnant to one of the fundamental principles of our government, the avowed right of which is to secure to the people the largest amount of local discretion consistent with the recognition of national obligations. And this principle of local self-government upon which our political system is established, presupposes a desire for education in the community to whose action the control of such education is left. Its success, therefore, will always depend upon the degree of enlightenment of the district where it is applied. In a priest-ridden country a system of education depending chiefly upon popular suffrage would be a comparative failure. That which Massachusetts regards as her chief blessing, New Mexico looks upon with indifference or rejects with disdain. A striking illustration of the widely different lights in which popular education may be regarded

(1) James Fraser, Report to the Schools Enquiry Commission, London, 1861, p. 14. The same idea is expressed in De Tocqueville's great work, pp. 70, 77, ff.

is contained in two replies sent, while America was yet a dependency of Great Britain, from different colonies to questions put by the English Commissioners for Foreign Plantations. The Governor of Virginia answered, "I thank God there are no free schools or printing presses, and I hope we shall not have these hundred years." The Governor of Connecticut replied, "One-fourth the annual revenue of the colony is laid out in maintaining free schools for the education of our children." (1) These divergencies of opinion on the school question continued, though of course in a greatly modified form, until a comparatively recent date. As long as slavery existed it was impossible that the free school should find a permanent home in the South; and this should always be borne in mind in estimating the comparative rapidity of educational progress in the different sections of the country or their present relative conditions, which, it may be remarked in passing, are still very dissimilar. After the abolition of slavery, and as soon as the national excitement caused by the Rebellion had begun to subside, attention was repeatedly and urgently drawn to the lack of uniformity in educational methods and consequent condition of popular intelligence in different parts of the Union; and the question of the desirability of enforcing, by Federal laws, a compulsory system of common schools upon all the commonwealths was thoroughly agitated. (2) Although the evils of the then existing systen, or rather lack of system, were very generally acknowledged and deplored, all proposals for providing means by which the commonwealths could be compelled to take action in the matter met with disfavor and were rejected on the score of their unconstitutional interference with local State rights. But the propriety of the view that it was both the right and the duty of the national government to extend its aid to the cause of education in the commonwealths, was very generally admitted; and the same spirit which had led the people to look with favor upon the previous extensive grants of land and money for this purpose by the National

(1.) Francis Adams, The Free School System of the United States, London, 1875.

(2.) The Congressional Records for the years following the Rebellion make very frequent mention of the introduction of bills having this general end in view. A discussion of the subject is contained in the Proceedings of the National Education Association for 1871, p. 18, ff.

Congress now caused them to give glad assent to the establishment of the present Bureau of Education.

The following statement of the "theory of education in this country," as enumerated by a committee of a congress of State superintendents in 1872, is abridged from a publication of the Department of the Interior of that year: The American school system is an organic growth, having its origin in attempts made to supply social and political needs. By the Constitution of the United States no powers are vested in the central government of the nation, unless the same relate immediately to the support and defence of the whole people, to their intercourse with foreign powers, or to the subordination of the several States composing the Union. Military education for the army and navy only have been provided for directly by the national government; and the further action in aid of education has been limited to endowments in the form of land grants to the several States, or portions thereof, for the purpose of providing a fund for the support of common schools, or to found colleges for the promotion of scientific, agricultural and the mechanical arts. To the several States individually is left, for the most part, the local administration of justice, as well as the establishment of public agencies for the well-being of the civil and social community in its industrial, economical, social and spiritual aspects. The general form of the national government is largely copied in the civil organization of the particular States, and no powers or functions of an administrative character are ordinarily exercised by the States, as a whole, which concern only the particular interests and well-being of the subordinate organizations or corporations into which the State is divided for civil and municipal purposes; but the State usually vests these local powers and functions in the corporations themselves, such as counties, townships and cities. The power of the State over these corporations is complete, but they are usually allowed large legislative and administrative powers of a local character, while the State ordinarily confines its actions to matters in which the people of the whole State are interested. Upon the several States individually, in which is vested the power of defining the qualifications of the electors who choose by ballot the representatives that make and execute the laws of the land, rests the responsibility

of making provision for the education of those charged with the primary political functions. This responsibility has been generally recognized in the establishment, by legislative enactment, of free common schools, supported in part by State school funds accumulated from the national grants of land and from appropriations from the State revenue, and in part by local taxation made upon those directly benefited by the schools themselves. The national government and the State governments regard education as a proper subject for legislation, on the ground of the necessity of educated intelligence among a people that is to furnish law-making as well as law-abiding citizens; and the municipal or local corporations regard education in its social and economic aspects as well as in its more general political one. Thus the purposes of the State and the idea of civil society conspire in the production of the American system of public education, and to its maintenance and support the property of the community is made to contribute by taxation.

So much for the general principles which regulate the relations of the national, State and local authorities in educational matters; let us now briefly consider what has so far been done by the federal government in discharge of its share of the national duty. The policy of extending aid to education by grants from the general government was very early recognized, in fact dates from a period anterior to the adoption of the Federal Constitution. In 1785 Congress established an ordinance for disposing of the lands in the Western Territory, which contained the following provision: "There shall be reserved the lot No. 16 of every township for the maintenance of public schools within the said township (1.)" Two years later (July 13, 1787) the farmers "Ordinance for the government of the United States northwest of the river Ohio" was adopted, which contained the following clause (in Art. 3): "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged. The lot No. 16 in each township or fractional part of a township is to be given perpetually for the purposes named in said ordinance (of 1785); . . . not

(1.) Ordinance of May 20, 1785, Journals of Continental Congress IV, 520.

more than two complete townships to be given perpetually for the purpose of an university . . . to be applied to the intended object by the legislature of the State." The policy thus inaugurated was not confined to the northwest territory, but was fruitful of the most beneficent results to the whole nation. In an act of March 3, 1803, providing for the disposal of lands south of Tennesee, the reservation was made of lot No. 16 of each township for the purposes of common school and university education; and from that time until 1848 similar provisions were made upon the organization of each new Territory. In that year, upon the organization of Oregon Territory, the quantity of land reserved for the benefit of the public schools was doubled; and to each new Territory organized, and State admitted, since then (except West Virginia) the lots No. 16 and 36 of every township (one-eighteenth of the entire area) have been granted for public schools. Besides this, to each State admitted into the Union since 1800 (except Maine, Texas and West Virginia) and the Territories of New Mexico, Utah and Washington, have been granted two or more townships of land to endow a university; and Ohio, Florida, Wisconsin and Minnesota each received considerably more than two townships. Then on July 2, 1862, the law granting lands to each State to endow colleges of agriculture and the mechanic arts was enacted, and under this law some 9,600,000 acres have been granted. (It may be remarked that Texas, on her admission, retained her title to her public lands, and thus was excepted from the grants to endow common schools and universities; but shared the benefits of the act endowing colleges of agriculture, receiving as her share 180,000 acres.) In addition to these general grants, there have been special gifts to various institutions of learning in several States and territories, amounting in all to 51,000 acres, and 200,000 acres to the State of Tennessee. Finally, by an act of Sept. 4, 1841, 500,000 acres of land were to be granted for internal improvement to each of the following States: Alabama, Arkansas, Illinois, Lousiana, Michigan, Mississipi, Missouri and Ohio (1); and similar grants have been made to each State subsequently admitted to the Union; most of which land has been set aside by the respective States for the benefit of free schools.

Dunlap's Digest, p. 988; Report of the Commissioner of Education, 1876, p. xii.

Besides, thus encouraging the furtherance of education in the States by grants of land to them, Congress at an early period inaugurated the policy of giving a portion of the net proceeds of the sales of public lands to the several States in which they were situated. Thus, on March 3, 1803, an act was passed granting three per cent. of such net proceeds to the State of Ohio for purposes of internal improvements, and similar grants have since been made to each State admitted to the Union, except that in many cases the money is, by express declaration, intended to be devoted to the maintenance of schools and universities. Thus the terms of the grant to Illinois (approved Dec. 12, 1820) enact as follows: "... The Secretary of the Treasury shall from time to time and whenever the quarterly accounts of public moneys of the several land offices shall be settled, pay three per cent. of the net proceeds of the lands of the United States lying within the State of Illinois, which since Jan. 1, 1819, have been or hereafter may be sold by the United States, after deducting all expenses incidental to the same, to such person or persons as may be authorized by the legislature of the said State to receive the same, which sums thus paid shall be applied to the encouragement of learning within said State, &c." By a preceding act (April 18, 1818) it had been provided that one-sixth of the sums derived from the three per cent. net proceeds of public land sales should be "exclusively devoted to a college or university." The whole amount thus granted to the States to be devoted (either by the terms of the grant or by State constitutional provisions) makes up a total of over $6,000,000. (1.)

Finally, in addition to these grants of land and proceeds from the sale of lands, the general Government, under President Jackson's administration, passed an act (June 23, 1836), distributing among the various States the surplus which remained in the Treasury after the payment of the national debt contracted by the Revolutionary War and the purchase of Louisiana; and a large part of this fund (which in all amounted to $28,101,644.91) was devoted by the States to educational purposes. (2.)

(1.) The several items constituting this sum were given in a paper read by Mr. John Eaton before the Dept of Superintendence of the National Education Association on Dec. 11, 1877. Published by the Dept. as an appendix to Circular of Information No 2, 1879

(2) The distribution of this surplus is given in the above paper, and more fully by Mr. Bourne in his History of the Surplus of 1837. New York, 1885.

We have thus seen with what munificence Congress has thought fit to extend its aid to the cause of education in the several States; it remains to consider what its means are for insuring a proper application of its grants by exercising a control over the educational systems adopted by the State governments. And such a control, as might be expected from our previous considerations, is found to be wholly wanting, the whole tide of public sentiment in America being in favor of a perfectly unfettered working of the individual State systems. In fact it was not until 1867 that any department taking cognizance of national education existed at Washington at all. In that year the National Bureau of Education was established. This department has no control whatever over the school organization of the States. At the time of presenting the bill for the formation of the Bureau, General Garfield, by whom it was introduced, said "The genius of our Government does not allow us to establish a compulsory system of education as is done in some of the countries of Europe. There are States in this Union which have adopted a compulsory system, and perhaps that is well. It is for each State to determine. (1.)" Even in the territories, where the legislative power of Congress is supreme, the authority of the Bureau is confined to the collection of information. Its function is not to direct in any way the school affairs of the States, but to co-operate with them in the work of administering systems of public instruction. The act which created the Bureau defined the object it had to fulfill, and its sphere of action has never been extended. It was founded "for the purpose of collecting such statistics and facts as should show the condition and progress of education in the several States and Territories, and of diffusing such information respecting the organization and management of school systems and methods of teaching as should aid the people of the United States in the establishment and maintenance of effective school-systems and otherwise promote the cause of education." In accordance with its duty as thus prescribed, the Bureau of Education has confined itself to the issuing of an annual report showing the condition of the several States as respects their educational interests, and the occasional publication of a circu-

(1.) Garfield's bill was introduced on Feb. 14, 1866, and passed on March 1, 1867.

lar of information containing a detailed description of some special feature. These reports and circulars are compiled and edited with considerable care and skill, though for their information the officers of the Bureau are dependent upon the courtesy of the State Superintendents and others in charge of public and private educational institutions, and cannot exercise any means of compulsion in eliciting from them facts for publication. Concerning the extent to which Congress might go, and the means it might adopt, to secure a proper application by the various States of the funds which have been given them by the central government, and the authority which Congress might assume in the matter of centralizing the whole common-school system, without over-stepping the limits imposed upon it by the Constitution, there is much conflict of opinion. It will suffice to remark that as a matter of fact, under our present system, there is no central control whatever, and that the duty and power of the Bureau of Education is merely to exhort, but not direct, the commonwealths to discharge their national obligation of giving fit instruction to their citizens.

CHAPTER III.

EDUCATION IN THE COMMONWEALTHS.

It is not proposed to give in this chapter a complete description of the various and but slightly differing systems of common-school education at present in force in the several States; such a description would, in fact, occupy several hundred times the space allowed to the whole of the present dissertation (1.) I shall, on the contrary, content myself with indicating as briefly as possible the constitutional provisions adopted by the various States concerning the matter of public instruction, and give an outline of one typical system established thereunder, thus indicating the zealous spirit of the States in acknowledging the national duty of educating their citizens, and the method which they have introduced to fulfill this duty.

The American school systems as they exist to-day are the result of the independent action of forty-two States and six

(1.) Thus, for instance, the "Code of Public Institution," of New York, alone fills nearly eleven hundred closely printed octavo pages.

Territories, each acting for itself. The various statutes of these States and Territories relating to common schools would, as I have just said, fill volumes, and even the extracts from their constitutions on this subject alone form a good sized pamphlet. (1) But the result sought to be attained is the same in all. In some of the older States it is the growth of over two hundred years of practical experience, and this experience has inured to the benefit of the younger States. In many instances the new States have undoubtedly improved upon the old, and the old States have shown their ready appreciation by adopting the improvements. Hence, instead of such great diversities as might naturally be expected from the separate action of so many independent authorities, it happens that upon all material points there is a remarkable uniformity. As a general rule the people are slow to allow or assent to changes in their constitutional provisions, even when it is freely admitted that some changes are desirable. In almost every legislative body there will be found a class of statesmen who seem to have no doubt of their ability to improve upon any existing law or system, and the people seem to expect and submit to a certain degree of instability in the statute law. But when the proposition is to change constitutional provisions they must be satisfied that some urgent necessity demands the change ere they will consent to remove the legal restriction which bar any alterations of the fundamental law, and, as a general rule, the change, when proposed must be approved by the popular vote before it can become effective. Hence, when permanency is desired they secure it by incorporating the proposed ordinances in the constitution.

The doctrine lying at the foundation of the American school system has been said to be expressed in the apothegm, "An ignorant people may be governed, but only an educated people can govern themselves." The doctrine which has been incorporated into many of the State constitutions, and is the governing principle in all, is that "Knowledge and learning as well as virtue generally diffused throughout the community are essential to the preservation of a free government and of the rights and liberties of the people." This expression is embodied in eleven of the State constitutions, (2) which add that it shall

(1.) U. S. Bureau of Ed., Circ. of Inf. of July 7, 1875, 130 pp.

(2.) An abstract of these constitutional provisions is given in the Bureau of Education's Circular of Information No. 3, 1880, and more fully in No. 7, 1875.

therefore be the duty of the legislature to encourage the promotion of intellectual, moral, social, scientific and agricultural improvement; while eight say further that it shall be their duty to encourage schools and means of education. By the constitutions of all the States except New Hampshire and Delaware the legislature are required to provide a system of free schools; (1) and most of the States have gone further than this and provided for the setting apart of a special State school fund, the principal of which is not to be diminished and the interest on which is pledged for the support of schools and forbidden to be used for any other purpose; and in addition an annual State appropriation, or the levy of a special State tax is made for the same purpose. In many States it is required that at least one school be supported in every district for a certain specified time in each year as a mimimum limit; thus in the three States (2) the schools must be held at least six months, in three others, (3) four months, and in seven others, (4) three months in each year. In many of the constitutions there are also provisions for the appointment of supervisory officers who are to have charge of the educational interests of the State, and that of Virginia goes so far as substantially to establish the whole system, leaving but little except details to be provided by the legislature. Another general constitutional principle is that no public schools shall be under the influence of, and no public moneys be given to, any religious sects; such is declared to be the law in thirteen States, (5) while in six no sectarian instruction is to be permitted, either directly or indirectly, in any of the State schools, (6) and one (California) provides that no teacher or student shall ever be required to attend or participate in any religious service whatever. In order to insure that the people shall take advantage of the opportunities for instruction offered by the State, four constitutions provide that the legislature may enact laws requiring all children of a certain age to attend the free school for a certain length of time, (7) (as in Virginia) "such laws as shall not

(1.) Stimson's American Statute Law, p 10.

(2.) California, Nevada and South Carolina.

(3.) Missouri, Mississipi and South Carolina.

(4.) Michigan, Wisconsin, Iowa, Kansas, Colorado, Nebraska and Florida.

(5.) New Hampshire, Massachusetts, Pennsylvania, Illinois, Michigan, Wisconsin, Minnesota, Texas, Missouri, California, Colorado, Alabama and Louisiana.

(6.) Wisconsin, Nebraska, California, Nevada, Colorado and South Carolina.

(7.) North Carolina, South Carolina, Colorado and Nevada.

permit parents and guardians to allow their children to grow up in ignorance and vagrancy." Higher education is also an object of solictitude in most of the western and southern States; in eighteen of them the constitution provided for the establishment of a State university, (1) while in Massachusetts(2) and Connecticut (3) Harvard and Yale are especially recognized and provided for in the same way. All the provisions for the promotion of education in the various commonwealths, to which I have just alluded are embodied in the respective State constitutions. But it is not to be supposed that in those States whose constitutions make no such explicit authorization of common school systems, public sentiment is any the less in favor of popular instruction, or that the absence of constitutional provisions impliedly prohibit the legislature from establishing means of universal education, or from compelling their citizens to avail themselves of them. The fact that under our political organization the State governments are possessed of every power not expressly denied to them is too familiar to require mention, and I need only allude to the existence of free schools in all the States of the Union and to the absence of reported cases in which the power of the legislature to established them or to enforce attendance upon them has been called in question to put at rest any doubt concerning the constitutionality of such enactments.

Just as in their recognition of the importance of popular education, so also in their means of providing it, there is throughout the States and Territories great unanimity. I shall, as above stated, of course not attempt to give in this place a description of these several school systems; but a few general remarks on the features common to all, or most of them, followed by an outline sketch of one representative system, will, I think, make their plan of organization clear.

In all the States and Territories except Alaska, which has as yet, no systematic public school law, and New Mexico, where the provisions are extremely crude, the general supervision of educational interests is vested in a State or Territorial

(1.) Michigan, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, North Carolina, Missouri, Texas, California, Oregon, Nevada, Colorado, Georgia, Alabama, Florida, South Carolina and Louisiana.

(2.) Constitution 8, 1.

(3) Constitution 5, 1.

Superintendent with or without a State board of education. In some States, as Connecticut and Massachusetts, the substantial duties of the State superintendent are devolved upon the secretary of the State board. These State boards are in some cases merely trustees of the school fund, and have the care and management of the school lands ;(1) in some their functions are simply advisory upon matters referred to them by the State superintendent or commissioner ; while in others they are charged with the general supervision of the school system, with power to make and enforce rules and regulations for the government of the same. The State superintendents, with or without the direction of the State boards are charged with the general supervision of the educational interests of the State, and with the administration of the school laws. They are, for instance, to advise with and instruct the county superintendents and other subordinate school officers, to propose forms and blanks for reports and returns, examine into the workings of the system, collect statistics and information, devise plans for the improvement of the schools, and generally make themselves familiar with the wants and necessities of the system, and draw up full reports for the governor or legislature. They also have general supervision of the State normal schools and institutes for the education and instruction of teachers ; and it is their duty to apportion the State school moneys to the counties or towns in the way provided by law. In all the States outside of New England, (except Michigan and Ohio, which seem to have adopted substantially the New England School System, and Delaware, where there is no provision for any officers between the State superintendent and the district boards), there are county superintendents or county boards, or both ; in Louisiana the parish boards corresponding to what are in other States the county boards. These county boards or county superintendents generally occupy the same position with reference to the schools in the county, as the State superintendent does to those of the State, but subject to the State superintendent.(4) Under the New England system, the town

(1.) As in Nebraska. See Constitution, Art 8, § 1.
(2) As in Georgia. See Code, Part I, title XIII, Chap. V, § 1246.
(3.) See Code of Virginia, Chap. LXVI, § 1433.
(4.) See Code of Tennessee, Title 7, Chap. III, Art. 3, § 1181.

school committees or supervisors perform the duties in their several towns, which in the States which have adopted the county organization, are performed by the county commissioner. When the county is made the source of power, it is generally made the duty of the county school commissioner to divide the territory into convenient sub-districts, and establish in each a sufficient number of schools for the accommodation of all children of school age. In these States the duty of providing for schools beyond the State provision is imposed by law upon the county, or the county and school district, while in New England, and some of the other States, the town or township is the head, and upon it is imposed the duty of providing for the support of the schools. The school district is a territorial division of a county or town, which is recognized in all the States except Texas, where it seems probable that it may before long be introduced.(1) Under the laws of the New England States, while the towns were to a certain extent required to provide for the support of the schools, they were also to be divided into school districts, the extent and boundaries of which were to be determined by the town. The districts so formed were, for school purposes, independent municipal corporations. The town was required to levy a tax for the support of the schools, which was to be distributed to the several districts as provided by law or as it might direct. Aside from this, the district itself might vote such additional tax as it saw fit, for the same purpose. It provided its school houses, fixed their location, determined the time when the schools should open and close, and managed its own affairs through its own officers. It was bound to keep up its schools for a certain length of time under competent teachers, and the town committee determined who were competent teachers and had a general supervision of the schools. If the district neglected or refused to perform its statutory duties, the town or its committee might interfere, employ teachers, and establish and keep up the schools, and charge the expenses to the town or district.(2) The district system is, however, rapidly losing popularity, as its extreme application of the principle of local

(1.) See Report of Superintendent of Public Instruction for 1887-1889, (Texas).

(2.) Thus in New Hampshire the town had charge of the schools by act of the General Council of the Province, 1719, and the supervision over them was in the hands of the selectmen.

self-government has been found prejudicial to the best educational interests of the State. Hence in several States, laws have been passed authorizing the towns to abolish the district system and assume control of the schools,(1) for which purpose they therefore themselves became the school districts; and in Massachusetts the town system has been substituted for the old system throughout the State.(2) In most of the States outside of New England the law makes the city, borough, or township, the school district; and in States where the county is to be divided, the formation of districts too small in means or population to be effective, is sought to be avoided by forbidding the laying off of any district unless it contains a certain minimum number of children of school age. (3)

So much for the general features of the American educational system. As an example of the way in which it is worked out, somewhat more in detail, I shall select the organization of public instruction in New York; both because that is the largest and most influential State in the Union, and because its system of common schools appears to be fairly representative of the majority of the others. (4.)

In New York, the officers having charge of the public schools are the Superintendent of Public Instruction, the School Commissioners, and the District Trustees. The superintendent is elected for three years on joint ballot of both branches of the legislature. (5) He has the general supervision of all the schools in the State; apportions the school money; superintends the appointments by the commissioners; and sees that it is paid by the supervisors and expended by the trustees in the manner provided by law. (6) He hears and decides all appeals regarding school matters., and his decision is final. He is charged with the control and management of the so-called teachers' institutes, (7) and makes rules concerning district

(1.) The town has power to abolish the district system. See Howard's Local Constitutional History of the United States, Vol I., p. 235.

(2) Public Statutes, chap. 44.

(3.) See Boone's History of Education in the United States, p. 96, for a sketch of the district system and its faults.

(4) The following references are to the titles and sections of the Consolidated School Act of 1864, as amended and published in the Code of Public Instruction of 1887.

(5.) Tit. 1, § 1.

(6) Tit. 1, § 13-14. He has power to dismiss school commissioners for neglect of duty.

(7) Teachers' institutes are "assemblages of teachers of public schools, called together temporarily for the purpose of receiving professional instruction under the direction of the state school authorities."

libraries. He receives and compiles reports from all the school districts, and sends in an annual report to the legislature. (1)

The School Commissioners are elected for three years by the people of several school commissioner districts. (2) It is their duty to see that the boundaries of districts are correctly described; to visit and examine the schools; to advise with and counsel the trustees; to look after the condition of the school-houses, and condemn such as are unfit for use; to recommend studies and text-books; to examine and license teachers; to examine charges against teachers, and, on sufficient proof, to annul their certificates; and, when required by the superintendent, to take and report testimony in cases of appeal. (3)

The District Trustees, one or three in number in each district, are elected by the inhabitants. (4) The term of office of a sole trustee is one year; that of each of a board of three trustees, three years, one being elected annually. (5) The functions of these officers are to make out tax lists and warrants; to purchase or lease sites, to build or hire school-houses, and to have the custody of all district property; to employ and pay teachers; and to report annually to the school commissioners, school statistics and such other information as may be required. (6)

The *School District* is the smallest territorial subdivision of the State. (7) It is formed by the school commissioner, who makes an order defining its boundaries, and files it in the office of the clerk of the town in which the district is situated. (8) He may also change the limits of districts by a similar order. A joint district is one that lies partly in two or more school commissioners' districts, and it may lie partly in two or more counties. (9) There are, besides, so-called *Union Free School Districts*, formed under the law 1853, authorizing the inhabitants to organize a school in a district comprising more territory and population, and possessing greater powers, than an ordinary district. (10) In addition to these, over a hundred dis-

(1.) Tit. 1, § 14.
(2.) Tit 2, § 3.
(3.) Tit. 2, § 13-15.
(4.) Tit. 7, § 27.
(5.) Tit. 7, § 25.
(6.) Tit. 7, § 49.
(7.) There were in 1888, 11,245 school districts in this State.
(8.) Tit. 6, § 1.
(9.) Tit. 6, § 1, sec 2.
(10.) Title 9.

tricts have been formed by individual acts of the legislature, granting special powers and privileges. (1) The inhabitants, at the annual district meeting, have power to elect a chairman, one or three trustees, a district clerk, a collector, and a librarian, to designate a site for a school house, to vote taxes to pay for a site, to build and repair school-houses, and to furnish them with fuel and appendages, and also to make up deficiencies for teacher's wages. (2) They have also power to vote certain taxes not exceeding specified sums for particular purposes, and any sum necessary to insure the district property and pay the costs and reasonable expenses of suits at law in which the district may be interested. The librarian serves one year, and has (of course) charge of the district library. (3) The collector serves for one year, giving a bond for the faithful discharge of his duty in collecting the taxes and holding them subject to the order of the trustees. (4) The clerk of the district also holds office for one year, and it is his duty to keep a record of the district meetings; to notify persons elected as district officers; to report to the town clerk the names and addresses of district officers; to give the trustees notice of every resignation accepted by the supervisor; and to keep and preserve all records, books and papers belonging to the office. (5) The *town* clerk is required to keep in his office all books, &c., relating to to the school; to record the certificate of apportionment of school moneys, and to notify the trustees of such certified apportionments; to obtain from trustees their annual reports; to provide them with books and blanks; to file and record the final accounts of supervisors; to file and keep the description of district boundaries; and, when required, to take part in the formation or alteration of a school district. (6)

The school moneys apportioned to the several towns are paid by the county treasurer to the supervisor, after having been received by him from the State treasurer on the warrant of the superintendent of public instruction. (7) These moneys are

(1.) See N. Y. Code of Public Instruction, pp. 795, ff.
(2.) Tit. 7, § 15.
(3.) Tit. 7, § 38.
(4.) Tit. 7, § 16.
(5.) Tit. 7. § 37.
(6.) Tit. 5, § 1.
(7.) Tit. 3, § 3.

derived from the following sources: 1. The income of the common school fund, which in 1888 amounted to $170,000. 2. The amount the legislature may annually set apart from the income of the United States deposit fund (in 1888, $75,000). 3. A State tax, similar to the general property tax. (1) These moneys constitute the Free School Fund of the State, and in addition to its share of this fund each locality derives school moneys from, 4. District, village and city taxation. 5. The income from various local funds. The State Free School Funds are distributed in substantially the following manner: (2) The superintendent of public instruction, after ascertaining the amounts to be apportioned, sets apart from the income of the United States deposit fund: 1. The amount necessary to pay the salaries of the school commissioners. 2. To each city having a superintendent of common schools, or clerk of the board of education performing the duty of superintendent, the sum of $800, and in case any city is entitled to more than one member in the State assembly, $500 for each additional member for the free schools of the city. 3. For libraries, such sums as the legislature may appropriate. 4. He then sets apart from the free school fund, $4,000 for a contingent fund, and 5. A sum for the Indian schools, the same in proportion to their numbers as is apportioned to the regular schools. 6. He next ascertains the total so apportioned, and deducts it from the total school moneys appropriated, and divides the remainder into two parts, one of which, 7. Is divided by the whole number of qualified teachers in the State employed at least twenty-eight weeks a year, to ascertain the "district quota," and is distributed among the districts, one quota for each such teacher; and 8. the other of which, and also the library moneys, are divided among the counties according to their population. Finally, 9. He apportions an equitable sum for each separate neighborhood, which has duly reported to him, from the contingent fund. He then certifies the amount apportioned to each city or county to the city or county treasurer; (3) and the school commissioners having received such certificates meet, at the court-house in their respective counties, on the

(1.) This rate is frequently changed. In 1888 it was only one mill on the dollar.
(2.) Title 3,
(3.) Tit. 3, § 13.

third Tuesday in March in each year, and apportion the money to the districts as follows: (1) 1. They must set apart to each district the district quotas allowed by the State superintendent; 2. They set apart any money assigned to districts as equitable allowances; 3. They divide the remainder into two equal parts, one of which they distribute among the districts in proportion to the number of children of school age residing in each, and the other according to the average daily attendance of resident pupils; and 4. they apportion the library money also according to the number of children of school age. They then sign their apportionment in duplicate, sending one copy to the superintendent of public instruction and delivering the other to the county treasurer; and also certify to each supervisor the amount apportioned to each district in his town, designating the library money and that for teachers' wages.

The above sketch of the New York system of public instruction, its organization, and the sources and disposition of its income, omitting all consideration of features due to circumstances peculiar to this State, may fairly be taken as an illustration of the common school systems throughout the country; for, as stated before, while differing somewhat in their nomenclature and their details, their objects and in a general way their means of attaining them, are on the whole essentially similar. (2) One important divergence from, or rather further development of, the usual system of public instruction, is, however, to be noted. I refer to the plan of providing, in addition to the ordinary common schools for imparting mere primary instruction, a number of free schools or academies for secondary education, carefully graded, and regarded on the one hand as complimentary to the primary schools, and on the other as introductory to the courses of superior and professional instruction offered in the State University. This system, which has never been regarded with much favor in the Eastern States, is, while undeniably beneficial to the cause of scholarship and sound learning, as is evidenced by its results in those countries

(1.) Tit. 3, § 27.

(2.) The chief difference to be noticed in the plans of organization of the various school systems is the difference in the amount of control exercised by the central authority. As extremes, illustrating the two methods, Virginia and New Hampshire may be taken; the former having an almost completely centralized system, the latter leaving all control to the local authorities. See Code of Virginia, Section 1433; and General Laws of New Hampshire, Chap. 92.

of Europe where it has been most consistently applied, at the same time open to the grave charge of being, as it is somewhat vaguely expressed, "unconstitutional," or, more correctly, opposed to the spirit of our institutions. It is argued, and with some show of reason, that although a common school education is essential to the self-preservation of a democratic community, a college education is to be regarded as an intellectual luxury, to be paid for by the person desiring to obtain it, and not properly chargeable upon the people at large. This is the Eastern way of looking at it. In the West it is frequently held that whatever tends to further the advancement of science and the arts, even though the cultivation merely of a chosen few, tends indirectly but necessarily to better the community at large, and is thus a justifiable object of expenditure of the public money. The most signal instance of the systematic and apparently successful working-out of this high-school and university plan is to be found in Michigan, where it has been in operation for many years; and the application of the doctrine seems to be growing in extent throughout the Western States.

CHAPTER IV.

THE LEGAL RELATIONS OF THE PUBLIC SCHOOLS.

It must not be presumed from the heading of the present chapter, that it is intended to give anything like a complete exposition of the legal relations existing between the common-schools and the community. The immense number of these apparently humble, but all-important institutions; the great diversity of opinions necessarily subsisting among the widely different classes whose interests they must at the same time be made to serve; and the continually reviving suspicion that they are being used for sinister or party purposes—all conspire to render them a perpetual source of contention and a fruitful subject of litigation. The cases in the courts of last resort in the several States in which judicial interference has been invoked to put at rest disputes concerning questions involving public school matters, as abstracted in the United States Digest, (up to

and including 1887), number no less than one thousand six hundred and forty three (1643); and their legal status as thus determined is as full of complexity as it is void of interest. The circumstance that the common-school systems, and the powers, duties and liabilities of their officers are almost entirely regulated by express legislative, and often merely local action, or left to uncontrolled administrative ordinance, of course makes the several States quite independent of one another in point of school-law, and hence there are but few questions a judicial decision concerning which in one State could be confidently quoted, even as a reference, in the courts of another. There is, however, one of these questions which, both from its very general application and its extreme importance, bears directly on the subject of this essay, and to a brief consideration of which, as illustrated by a few reported cases, I shall devote the present chapter; I refer to the question concerning the constitutionality of legislative acts establishing and regulating systems of common schools.

It seems somewhat strange at first sight that, in view of the fact that the universal sentiment in civilized communities is in favor of regarding education, at least in its elements, as an unquestionably proper object of government expenditure, and that so many of our State constitutions have emphatically recognized the correctness of this view, there should still appear to be some doubt as to the constitutionality of legislative acts establishing a system of common-schools in those of the States where no such express provision exists. It is of course unquestioned that under the American system of government, the people are recognized as possessing in their primary organized capacity the absolute and complete power of legislation as fully and to the same extent as belongs to every uncontrolled sovereignty; that in the organization of the Federal and State systems of government, they have conferred upon the former, by the constitution of the United States, exclusive legislative power in respect to certain matters and prohibited its exercise in respect to others, and that, save as thus conferred or forbidden, they have in this condition entrusted the legislative departments which they have created, with the whole power of making laws which they originally possessed, subject only to such restrictions and limitations as they have prescribed in the State constitutions.

But these constitutions usually declare, expressly or by implication, that the citizens under them shall in no case be deprived of their property (as by taxation), except for purely public purposes; and the question then arises as to whether the maintenance of a system of government schools for free popular instruction is so useful or necessary for the community as really to be a public purpose justifying the levy of a general tax. This question was discussed at a comparatively recent date in Maine, when the legislature, before levying a tax for common schools, inquired of the Supreme Court concerning its constitutionality. The court decided that a clause in the State constitution empowering the legislature to make "all reasonable laws and regulations for the benefit of the people of the State, not repugnant to the constitution of this State nor to that of the United States," included the power to levy a school-tax, for "education being of benefit to the people, and taxation being incidental and essential to its promotion, the mill-tax, being for educational purposes, must be regarded as constitutional unless in some other portions of the constitution there be found a clause restricting or forbidding the raising of money by legislative action, for educational purposes, thereby limiting the power naturally inferable from § 1, which has already been quoted." Nor can the amount of this tax be in any way limited by the courts, "for it is not for the judicial department to determine when legitimate taxation ends, and spoliation by excessive taxation begins?" (*Opinion of the Justices*, 68 Me. 592).

And it has further been decided, (Stuart *vs.* District of Kalamazoo, 30 Mich., 69), that this power extends even to the levying of taxes for the support of high schools for instruction, (among other things), in ancient and modern languages; and that the school officers need not restrict themselves in their expenditures to such subjects of study as are ordinarily understood as pertaining to a common school education. In giving the opinion of the court, Judge Cooley said: "Neither in our State policy, in our constitution, nor in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose." So too in an Illinois case (Richards *vs.* Raymond,

92 Ill., 612), the court remarked: "While the constitution has not defined what a good common school education is, and has failed to prescribe a limit, it is no part of the duty of the courts of the state to declare by judicial construction, what particular branches of study shall constitute a good common school education." Upon the same principles the legislature or the executive may, when the state constitution makes provision for free schools, establish a system of normal schools, for it has been held (Briggs *vs.* Johnson County, 4 Dillion, 148), that "the [State] constitution having vested all legislative power not prohibited by the Constitution of the United States in the General Assembly, the establishing of normal or other schools than those named, it is fair to presume, was intended to be left with the legislature. That normal schools are public institutions, useful and necessary for the full development of free schools, is not disputed." The power of the State government when not limited by the constitution, is thus seen to be very great in the matter of public instruction. For the same reasons that the legislature has power to establish a school system, it also has power to abolish or otherwise change it, and the inhabitants of the school districts have no rights in the existence nor in any of the corporate functions of the district, which can be regarded as vested legal rights, or which can in any way be set up as beyond legislative control. This question arose in Massachusetts in consequence of the enactment of statutes abolishing school districts and establishing town systems, (to which I have referred above, *supra* p. 20,) and the court held that such statutes were not unconstitutional. For it was considered that, although before the enactment of these laws, school districts were indeed *quasi*-corporations, with the power to hold property, to raise money by taxation for the support of schools, and with certain defined public duties; still they were public and political as distinguished from private corporations, and their rights were held at the will of the legislature, to be modified or abolished as the public wellfare might require. Hence the property held by them for public use, was subject to such disposition in the promotion of the objects for which it was held, as the supreme legislative power might see fit to make. The laws in question did nothing more; they provided merely for the transfer of

public property, and of a public duty connected with its use from one public corporation to another. (Rawson *vs.* Spencer, 113 Mass., 40.)

But though the legislature or its agents thus have power under the constitution to establish or abolish school districts, and to empower them to raise money by taxation, the courts will hold them very strictly to applying the funds so raised for the exact purpose for which they were intended. So if a fund is provided by the constitution for free public schools, it can only be applied to such schools as are within the uniform system required, free from religious or sectarian control, and open to all children of school age, (Otkin *vs.* Lamkin, 56 Miss., 758; and in a case in Massachusetts, under a constitutional provision requiring moneys raised for public schools to be applied only to those under the charge of the public authorities, it was denied that a town could appropriate moneys raised for public schools to the support of a school founded by a bequest under which the management of the school was vested in trustees who, though most of them elected by the town, must be connected with certain religious societies. (Jenkins *vs.* Andover, 103 Mass., 94.)

Closely connected with this subject is one which has, next to the religious disputes, been a source of more frequent and more bitter controversy than any other of those concerning public schools; that is to say, the constitutionality of race distinctions in the extension of common school privileges. This question did not, of course, present itself for judicial consideration until after the passage of the Fourteenth Amendment; but during the years immediately following the rebellion, it was very thoroughly discussed, and definitely settled. The numerous decisions relative to the school rights of colored children, appear to justify the following propositions. In the first place, no person can be deprived of equal educational privileges with the whites, merely because he is colored. It has been held that the exclusion of colored children from schools where white children attend as pupils, cannot be supported except where separate schools are actually maintained for the education of colored children, and that unless such schools be, in fact, maintained, all children of the school district, whether white or colored, have an equal right to become

pupils at any common school organized under the laws of the state; (Ward *vs.* Flood, 48 Cal., 56;) and, as was remarked by Baxter, C. J., in his charge to the jury in the case of The United States *vs.* Buntin, 10 Fed. Rep., 735, "if you find tha the said colored school was so remote from the prosecuting witnesse's residence, that he could not attend it without going an unreasonable and oppressive distance; that he was thus placed at a material disadvantage with his white neighbors; that the school did not offer substantially the same facilities and educational advantages that were offered in the school established for the white children, and from which he had been excluded, then, and in that event, he was entitled to admission in said last named school, and his exclusion therefrom was a denial and a deprivation of his constitutional right."

But, secondly, it has been decided that such separate schools for the colored race are not forbidden by the Fourteenth Amendment; and that laws passed to establish such schools are not unconstitutional; for they do not attempt to deprive colored persons of their rights, but on the contrary expressly recognize their right to equal educational advantages, and only regulate the mode and manner in which the right shall be enjoyed. (Slate *vs.* McCann, 21 Ohio St., 210.) Thus in the case of Cory *vs.* Carter, 48 Ind, 362, the court declared that "the classification of scholars on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. In other words, the placing of the white children of the state in one class, and the negro children of the state in another class, and requiring these classes to be taught separately, provision being made for the same branches, according to age, capacity or advancement, with capable teachers, and to the extent of their pro rata share in the school revenue, does not amount to a denial of equal privileges to either, or conflict with the open character of the system required by the constitution. The system would be equally open to all. The tuition would be free. The privileges of the schools would be denied to none." It is, however, thirdly, to be remarked, that this power of separating the races is vested exclusively in the State Legislature, and that unless some statute can be found authoriz-

ing the establishment of special schools for colored children, no such authority exists. This was held in the case of Clark *vs.* The Board of Directors, 24 Iowa, 266, the substance of the decision in which is, that, as all the youth are equal before the law, and there is no discretion vested in the board of directors or elsewhere to disturb that equality, such board, while it may enforce uniform restrictions as to residence, age, etc., has no power to deny a youth admission to any particular school because of nationality or color.

So much for the decisions of the courts concerning the leading questions on the constitutionality of legislative enactments relative to the establishment of common schools, an outline of the general trend of which is, I hope, intelligibly indicated in the foregoing sketch. In the following chapter I shall endeavor to exhibit with more completeness, the legal status, powers, and duties of our higher institutions of learning, private as well as public.

CHAPTER V.

THE LEGAL RELATIONS OF THE AMERICAN COLLEGE.

In considering the legal relations of our American institutions of superior instruction, we are confronted at the outset with a two-fold difficulty: in the first place the college may be both instituted and controlled by the State in such a way as to make it a mere department or instrument of government, and thus, like the other departments, have its rights, duties and functions laid down in the act creating it, or it may be, as is more frequently the case, a private enterprise, subject to no control whatever, save that general restraint which is exercised over all persons, natural or legal, in protection of the private rights of society. In either case the interference of the courts can only be called into requisition under extraordinary circumstances, and the consequent infrequency of their action in matters pertaining to college management causes the number of reported cases on the subject, which constitute, of course, the only authentic literature concerning it to be very unsatisfactorily

scanty. This evil is further increased, or perhaps rather caused by the fact that our colleges have not, as have the analogous institutions both in England and on the Continent, any definitely fixed position in the mind of the community; they play no such determined part in our popular national life or, it is to be feared, in the development of our civilization. They have no prescriptive rights over the people, nor can the people make any claims upon them, other than those of ordinary contract. Hence the colleges are left largely to themselves, and govern themselves as they see fit; and no matter howbadly this, their self-government, may be managed, looked at from the standpoint of the public weal, still no person not showing direct personal damage and injury from such misdirection of powers or misappropriation of funds, would think of calling them to account or would have the assistance of the courts in case he attempted to do so. Neither, on the other hand, would the colleges venture to assume any prerogative rights in virtue of their collegiate character in imitation of their European prototypes, nor could such pretended privileges, in case of their possible assertion, be enforced. An examination of our educational system shows that in nearly all cases, the colleges are, as above intimated, either a superior branch of the general system of State instruction, or else connected with, and subject to the control of the State only in the way in which all other private corporations are, namely, by the fact that they have received from the State a charter of incorporation to whose provisions they are held more or less strictly to conform. The only notable exception to this rule, the only instance in which a State exercises (or professes to exercise) a general, indirect control over incorporated educational institutions of a private character, is to be found in the State of New York, of whose Board of Regents I shall hereafter speak more at length (*infra* p. 35.)

A more complete understanding of the nature of our college corporations, which I shall attempt to illustrate by a commentary on the cases preserved in the reports of the courts of last resort in the various States, will be obtained by a brief consideration of the organization of two colleges representative of the two classes into which, as I have above stated, nearly all institutions of this character may be divided. As an example of the corporations of a purely private character I have selected Dart-

mouth College, and as an example of those cases in which the college is looked upon as a public corporation or instrument of government, I have taken the University of Missouri; the first because it is a fair typical specimen of the American *college* as ordinarily understood and also because it was the subject of a famous law suit which definitely established the legal rights of such institutions as against the State; the second because it is a representative instance of the "State University."

The following was the method of organization of Dartmouth; and the same description, *mutatis mutandis*, may be said to be true of by far the greater number of the three or four hundred colleges now existing in this county. (1) A public-spirited individual (in the present instance a certain L. Wheelock) being charitably disposed and of the opinion that it was expedient for the advancement of learning that another college be established and endowed, both himself gave, and by his exertions and examples induced others to give, sums of money for beginning and carrying on the undertaking. These funds were put in the hands of trustees, to whom were given certain directions as to the disposal of them, whereupon these trustees, finding it necessary for the perpetuation of the trust to become a body corporate, applied to the legislature for a charter of incorporation. The charter was of course readily granted, and by its acceptance the college sprang into being. The charter determined the number and manner of appointing trustees, and enumerated their powers, enabling them to sue and be sued by a corporate name, to buy and hold lands for college purposes, to receive and hold property not exceeding a certain amount, to appoint and pay professors and instructors, to establish by-laws and ordinances, to have a common seal, to grant such degrees as were usually granted in Great Britain, &c., &c. Thus the college was instituted, and under this charter, which, it will be observed, does not reserve to the State any right of supervision, the trustees proceeded to act as best they saw fit, without the possibility of legal interference to control them in doing as they pleased on the score of "promoting learning." To what an extent this freedom may, in the opinion of the courts, be carried, I will presently (*infra* p. 44,) cite a reported case to show. Such, or

(1) See sketch of the early history of the college in Dartmouth College *vs.* Woodward, 4 Wheaton, 518.

similar, is the origin, and consequent independence of most collegiate institutions in this country.

Of an entirely different nature are the so-called State Universities, of which the University of Missouri may be taken as a typical example. (1) Here the college is not indebted for its birth or its continued existence to private donations. It is established by a legislative act, and the expenses of its erection and maintenance are defrayed from the public funds. It is considered to be a branch of the State government, just as are the public schools. It is declared to be a body politic, whose government is vested in a board of nine curators, appointed by the governor, with the consent of the senate. This board has power to appoint and remove, at its discretion, the president, professors and tutors of the university, and is obliged to submit regular reports to the legislature.

Institutions of this nature are thus seen to be mere instruments of government, and their officers are, like other public officials, controllable only by the regular writs or by special actions for damages. (See Head vs. Curators of the University of Missouri, 47 Mo., 220.) The circumstance that they are institutions of learning does not endow them with any peculiar features.

It is true that there are, between these two extremes of the scale, some institutions which, though of an essentially private character, are yet so organized as to be subject more or less to State control; but when such a relation exists, the connection is usually merely nominal, or, if the claims of the State are sought to be enforced, there result political jealousy and general dissatisfaction. Of such a character was, until 1866, the organization of Harvard University. The State, claiming as founder and patron, regarded the college as a State institution, over which it had a right to exercise a direct control through the legislature by its authority in the membership and the election of a so-called board of overseers; but the controversies and embarrassment attendant upon legislative action proved so prejudical to the best interests of the college that this plan had to be materially modified.

Before proceeding to a consideration of the legal status of our colleges in so far as it has been made a subject of judicial

(1.) See Missouri Revised Statutes, Chap. 156.

decisions, it remains to give some account of an institution to which I have already referred, and which is quite peculiar to this State—I mean the "Regents of the University of the State of New York." This institution is supposed to exercise a control over all the incorporated institutions of secondary and superior instruction in this State, and although its efficiency is, in my opinion, perhaps somewhat overrated, still, as it has been a subject of frequent encomium in the past, and may be an object of imitation in the future, a review of its organization and powers will not be out of place as bearing on the subject of this treatise.

The University of the State of New York is an organization including all the incorporated colleges of the State, together with the incorporated academies and the academical departments of public schools. The governing body is a Board of Regents, composed in part of State officers, who are members *ex officio*, and of others who are elected by the legislature. Their functions are those of supervision and inspection only, and not of instruction. The original theory was that of an English university, composed of separate and independent colleges, established not necessarily in the same locality, but distributed through the State, as circumstances might call for them; and the most ardent admirers of the institution still proudly compare it with the University of Oxford, though to one less interested the points of resemblance seem very few. The original act creating the University was passed by the legislature May 1, 1784, at its very first session after the close of the Revolutionary War, in response to a strong appeal from Governor Clinton. The plan of the institution established by this act proving incapable of satisfactory realization, it was made a subject of frequent amendment, until at present its organization and functions are substantially as follows. Omitting any consideration of its duties in connection with the State Library, the State Musenm, the Normal School at Albany, the determination of the State boundaries, and the publication of its reports and manuals, which do not immediately concern us; we may briefly review its organization and its powers of incorporation, visitation and granting degrees. The board consists of twenty-three members, of whom four are Regents *ex officio*, viz: the Governor, the Lieutenant-Governor, the

Secretary of State, and the Superintendent of Public Instruction, while the remaining nineteen are chosen by the legislature in the same manner as United States Senators, and hold their office during the legislature's pleasure. A regent must be a citizen of the State, and cannot be a trustee or any other officer of a college or academy under the visitation of the Board. The officers of the Board are a Chancellor, a Vice-Chancellor, a Secretary and Treasurer, and an Assistant Secretary, who are chosen by ballot by the regents. Nearly all the business of the Board is conducted by means of standing committees, of which there are in all ten.

The first important power of the Board of Regents is that of incorporating colleges and academies, which was given it by the act by which it was established. This power did not originally include that of incorporating medical colleges, which was, however, subsequently conferred (Laws of 1853, ch. 184, § 7) upon condition that the college applying should first secure property to the extent of $50,000 before a permanent charter could be granted. Later on the Board established, by general ordinance, similar provisions for the incorporation of literary colleges and academies, requiring that the former should secure $100,000 and the later $5,500 before receiving a charter. As incident to the power of incorporation, the Board is also authorized to annul and amend charters on due cause being shown. The second power of the regents is that of visitation. The Board is authorized to visit and inspect by its officers, committees and accredited agents all the colleges and academies which are or may be established in the State, and to "examine into the state and system of education therein." This authority of visitation extends, not merely to the institutions chartered by the board itself, but also to those receiving their charters from the legislature. Each such college and academy is required by law to make to the Board an annual report of its affairs, according to such instructions and forms as the Board may furnish; though it may be observed that to the breach of this law no special importance seems to be attached. This report pertains generally to its financial condition, its means of imparting instruction, its departments of study, and its statistics of attendance, and it is from the results of the information

gathered by the visitation, and from the returns made to the board, that the latter's annual report is compiled.

In the third place, and finally, the Regents have the power of granting, and of delegating to the colleges chartered by them the power of granting, literary and other degrees. The exact significance of learned degrees in this country would constitute, perhaps merely because of its vagueness, an interesting subject of special study. That such a degree is supposed to be a badge of honor conferred upon the recipient by the people at large, indirectly through the legislature, which may perhaps for this purpose be looked upon as its agents, may reasonably be inferred from the fact that the power to grant such degrees is always made a subject of special mention in the charters under which college corporations act. But what legal steps could be taken to prevent an unauthorized person from assuming, or an unauthorized body of men from conferring such academic titles, does not (in the absence of special statutes), seem clear. It would presumably be possible to restrain a corporation (not educational in character), from giving degrees, on the ground that it was acting *ultra vices* in doing something not incidental to the discharge of its ordinary business. But, as certainly seems at first blush and as has been decided, in fact, by the courts, (The State of Missouri, ex rel. Granville *vs.* Gregory, 83 mo. 123), since the conferring of degrees or certificates of proficiency is a natural incident of educational institutions, why such institutions, even after incorporation, should not have the power of so bestowing them without an express grant of this power by the legislature or (as in this State) its agents, does not seem at all evident. There are, as far as I have been able to determine, no express statutes (either in this State or any other) against the unwarranted assumption of degrees, except in the case of M. D., which is generally recognized as carrying with it certain privileges, the usurpation of which would be a fraud upon the public.(1) But as the possession of other academic titles as a rule confers, in spite of their somewhat imposing "*cum omnibus*

(1.) Thus it is provided in New York by Laws of 1887, chap. 647, § 6, that "any person who shall assume the title of doctor of medicine or append the letters 'M. D.' to his or her name without having received the degree of doctor of medicine from some school, college, or board empowered by law to confer said degree or title, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than two-hundred and fifty dollars, or imprisonment for six months for the first offence, and upon conviction of a subsequent offense by a fine of not less than five hundred dollars or imprisonment for not less than one year, or by both fine and imprisonment."

priviligiis ad istum gradum pertinenntibus," no privilege save the very inoffensive one of appending a few (frequently meaningless) capital letters as a sort of an erudite tail-piece to an otherwise undistinguished name, from an exercise of which privilege, no matter how unwarranted, a common-sense public would not probably consider itself to be specially wronged, the possession of this "right" of conferring degrees seems a rather ill-defined feature of a department of government. However, abandoning a speculation which, though entertaining and (I believe) hitherto untouched, is perhaps somewhat foreign to our present purpose, it is sufficient to state that this power *is* possessed by the Board of Regents, and that they are authorized by the people of the State of New York, represented in Senate and Assembly, "to give and grant to any of the students of the University, or to any persons thought worthy thereof, all such degrees as well in divinity, philosophy, civil and municipal laws, as in every other art, science, and faculty whatsoever, as are or may be conferred by all or any of the Universities in Europe."

Such is in substance the New York Board of Regents, remarkable because embodying the only systematic attempt on the part of a State Government to exercise a general supervision over collegiate corporations of a private character. It is true that there are in other States educational boards called Boards of Regents, but on inquiries I am informed that their functions and powers are not similar in nature or extent to those of the New York Board, and that in this feature of its educational system the Empire State stands quite alone.

So much for the general character of the American College: it now remains to see to what extent this character has been impressed upon it by the action of the courts, and what on the whole, has been their attitude in cases where their interference seemed justifiable. As before intimated, their jurisdiction over matters of internal collegiate management and discipline has always been very limited, and the judicial decisions upon this subject are few in number.

By far the most numerous class of cases in the law reports on topics connected with colleges and the like, are those which refer to the power of the trustees as incorporated bodies to deal with the funds entrusted to them by individuals or by the State, or to questions which (like that, for instance, of their right to

sue and be sued by a corporate name, &c.) are applicable to them only in so far as they are applicable to all other bodies, as corporations, irrespective of their eleemosynary character; such questions have of course no interest for us in this connection. Next in number and undoubtedly first in importance come the cases, headed by the famous Dartmouth College *vs.* Woodward, 4 Wheaton, 518, on the question of the public or private character of college corporations, which was in that case very thoroughly discussed, but which has, nevertheless, been made a subject of almost continual litigation ever since. It cannot, of course, well be denied that a college established for the promotion of education and for instruction in the liberal arts and sciences, is in some sense a public institution or corporation; for it is for the benefit of the public at large, or at any rate for all persons who are suitable objects of the bounty, and this is the popular sense in which the language is commonly used. And so in this sense any institution founded exclusively by private donors for purposes of general charity, such as a hospital for the poor, the sick, the disabled, or the insane, may well be called a public institution. But in the sense of the law, a far more limited, as well as more exact, meaning is intended by a public institution or corporation. "Public corporations" (says Chief Justice Marshall, in the great Dartmouth College case) are "generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests. But, strictly speaking, public corporations are such only as are founded by the government for public purposes, when the whole interests belong also to the government. If, therefore, the foundation be private, though under a charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or by the nature and objects of the institution. For instance a bank created by the government for its own use, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So is a hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government and its objects and operations partake of a public nature. . . .

This reasoning applies with all its full force to eleemosynary corporations. A hospital founded by a private benefactor is a private corporation in point of law, although dedicated by its charter to general charity. So is a college, founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class of the community, and this acquires the charter of a public institution. The fact that the charity is public affords no proof that the corporation is also public."

It is thus seen that a college, merely because it receives a charter from the government and is founded for a public purpose, is not thereby constituted a public corporation. The full significance of this fact is appreciated when we consider that if a corporation is public in character, it is subject to government control, but if private, it is not. In the Dartmouth case the New Hampshire Legislature attempted to make important changes in the college charter and the privileges bestowed thereunder, but was restrained from doing so on the ground that the college was a private corporation, whose charter therefore was of the nature of a contract, to impair the obligation of which would be unconstitutional. The same ruling was made in Allen *vs.* McKean, 1 Sumner, 271, where there court (per Judge Story,) further said : "Nor does it make any difference that the funds have been generally derived from the bounty of the government itself. The government may as well bestow its bounty upon a private corporation for charity, as upon a public corporation ; and its funds, once bestowed upon the former, become irrecoverable precisely in the same manner, and to the same extent, as if they had been bestowed upon a private individual. The government cannot resume a gift once absolutely made to a private person, neither can it resume a gift to a private corporation. It is true that a government may reserve such a power in granting a charter, if it chooses to do so, but then the power arises from the very terms of the grant,(1) and not from any implied authority derived from the bounty being for general charity, any more than it would from its being for private charity. Nor is the

(1.) Thus in the Pennsylvania College cases, (13 Wall. 190.) the Legislature had reserved in the charters of Jefferson College and Washington College, the right to change the college constitutions ; so that the courts held that an act consolidating those two colleges into one, was not unconstitutional.

internal management of an eleemosynary corporation, though founded or endorsed by the government, necessarily subject to such control as would be implied by a power of visitation by the government. The same authority, (Judge Story in Allen *vs.* McKean,) goes on to say . "To be sure, when the government is the founder of a college, it has certain rights and privileges attached to it in point of law, but in this respect it is not distinguishable from any private founder. Every founder of our eleemosynary corporation, (that is the *fundator perficiens*, or person who originally gives to it its funds and revenues,) and his heirs have a right to visit, inquire into, and correct all irregularities and abuses which may arise in the course of the administration of its funds, unless he has conferred, (which he has the right to do), the power upon some other person. This power is commonly known by the name of the visitatorial power, and it is a necessary incident to all eleemosynary corporations; for these corporations being composed of individuals subject to human frailties are liable, as well as private persons, to deviate from the end of their institution, and therefore ought to be subject to some supervision and control . . . But a founder may part with his visitatorial power and vest it in other persons; and when he does so, they exclusively succeed to his authority." This is commonly the case with college corporations; the founder, whether he be a private person or the state, vests the power of visitation in a board of visitors, and then he has no further right to interfere with its management than if he were a mere stranger. "The visitor (says Judge Bliss in the case of St. Charles College, State *ex rel.* Pittman *vs.* Adams, 44 Mo., 578,) is the judge and arbiter to decide all disputed questions not involving the integrity of the management of the fund or the observance of the statutes of the founder and he alone can make by-laws that shall bind the officers." It being thus settled that if a college corporation is private in character it is beyond the reach of state control, the question arises as to how we may determine under what circumstances it is private; what is the distinction between educational institutions of a private and those of a public nature? The answer to this question, as apparently determined by the Dartmouth College case, and the numerous subsequent cases upon the same point reciting upon it as an authority, is, in

general, that if the property possessed by the corporation is altogether the property of the state, if the corporators have done nothing amounting to a valuable consideration for the act of incorporation, in short, if there is no contract between the state and the corporators, it is a public, and not a private corporation. Further, if the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, so that the state alone may be said to be interested in its transactions, then it is a public corporation, and as such of course amenable to the pleasure of the legislature.

Litigations involving this distinction have been of comparatively frequent occurrence in the Western States, where the universities have usually either received important aid from, or have been immediately connected with, the government, and the question has thus been more frequently made a subject of judicial consideration there than it has in the Eastern States, where the colleges have been supported chiefly by private endowment, independent of government action. Thus the University of Alabama has been held (Trustees of the University of Alabama *vs.* Winston, 5 Stew. and P.. 25) to be a public corporation, on the ground that its funds were derived from public property, and that the character of an institution is not determined from its incorporation, but from the manner in which, and the object for which, it was formed. For similar reasons the University of Missouri was likewise considered to be a public corporation. (Head *vs.* Curators of the University of Missouri, 47 Mo., 220.) It was established by an act of the legislature, and as there were no grantees named in the grant, there were none to accept or reject the grant, and the creation of the institution was in no sense a contract. Hence, though the funds for its maintenance were derived largely from private gifts (in fact partly from Columbia College), the university was still a public corporation, and an appointment to a professorship was an appointment to a civil office. A similar case was similiarly decided in the courts of North Carolina (University of North Carolina *vs.* Maultsby, 8 Iredell, 257), where it was held that the donations of private individuals did not in any wise change the public nature of the university. So, too, the University of Nebraska (Regents *vs.* McConnell, 5 Neb., 423)

was held to be a public corporation, and the court said that "such public corporations are but part of the State machinery employed in carrying on the affairs of the State, and they are subject to be changed, modified or destroyed, as the exigencies of the public may demand." The same results were arrived at in the cases of the Medical College of Virginia, (Lewis *vs.* Whittle, 77 Va., 415,) and Straight University in Louisiana (State of Louisiana *ex rel.* Board of Trustees of Straight University *vs.* Graham). In one case (Weary *vs.* The State University, 42 Iowa, 335) the court went so far as the hold that the university (that of Iowa) was not even a corporation at all, either private or public, but merely a creation of the legislature and a branch of the government like other public eleemosynary institutions, such as State asylums for the insane, blind, deaf and dumb, &c.

Having considered in general to what extent colleges are amenable to State control according as they are in nature public or private, and having seen that, if they are private corporations they cannot be judicially interfered with, unless, being incorporated, they act distinctly *ultra vires*, we may now determine what acts have been considered by the courts to be beyond the range of the powers bestowed by a college charter and what have not. It may be premised that the courts are, as a rule, reluctant in deciding that a corporation has acted *ultra vires*, if the result of such decision would be to bring about a total forfeiture of its charter, but that they are less liberal if the object of the suit in which their intervention has been invoked, is merely to restrain the corporation by injunction from committing, or continuing to comit, action prejudicial to others' private rights. This tendency is strongly marked in cases where the corporations are of eleemosynary character, for these being for the benefit of the public at large, an interpretation of the terms of their charters such that unimportant violations of them would cause them to be altogether forfeited and put an end to the existence of the institutions, would work great public wrong.

In The State of Ohio ex Rel. *vs.* Farmers' College, (32 Ohio State, 487), the learned judge said, "The courts proceed with extreme caution in proceedings which have for their aim the forfeiture of corporate franchises, and such forfeitures are not to be allowed unless under express limitation of the charter or for

a plain abuse of power by which the corporation fails to fulfill the design and purposes of its organization," and the circumstances of this case afford an excellent example of the application of the doctrine. The avowed object of the Farmers' College, as declared by its acts of incorporation was "to direct and cultivate the minds of the students in a thorough and scientific course of studies particularly adopted to agricultural pursuits." The college authorities did then in fact establish a chair of agriculture and filled it with a competent professor, but scientific farming did not prove popular, and no one attended the agricultural course. The trustees further offered a full classical college course, and this attracted a fairly large number of students. An attempt was made to restrain the college from spending its funds on studies apparently so much at variance with the objects of its foundation, but the court held that classical studies were necessary to enable a farmer to understand fully the meaning of agricultural terms, and the charter was not forfeited. Still more extensive powers were considered to be vested in the trustees, by the court in The People *vs.* The President and Trustees of the College of California, 38 Cal., 166. In this case the college charter provided, among other things, that the trustees should have power "to sell, mortgage, lease, and otherwise use and dispose of such property, (the college property), in such manner as they shall deem most conducive to the prosperity of the college." The trustees actually did deem it expedient to put an end to the individual existence of the college altogether, by granting all its funds to another similar institution, and the court held that as long as they could be presumed to be acting *bona fide* with the intention of advancing the interests of higher education and thereby fulfilling the object for which the college was founded, they were not acting beyond the scope of their authority in terminating the college's very existence. Nor could the circumstance that a number of voluntary donations had been made to the institution be considered as of any weight in restraining them from properly disposing of the college property and surrendering its franchise; for, it was held, persons making such donations must be presumed to have known the law concerning the extent of the trustees' powers. A somewhat similar case is found in the New York Reports, (The People *vs.* the

Trustees of Geneva College, 5 Wend., 211; reversed in 26 N. Y., 217), though in this only a part of the college funds was to be devoted to the establishment of another institution. The Supreme Court held that Geneva College in Ontario Co. had not power to expend the college money in establishing a branch school in the city of New York to be called the Rutgers Medical Faculty of Geneva College, and that the establishment of the same and the appointing of professors to take charge thereof was an usurpation of a franchise for which an information in the nature of a *quo waraanto* might be filed. But this ruling was not sustained by the Court of Appeals, which declared that "the powers possessed by a college corporation should be liberally construed, and their exercise allowed with wide discretion within the field of its objects. Thus if the charter contains a provision that the object of the corporation is 'to promote education in general and to cultivate and advance literature, science, and the fine arts' it may even use its funds to pay the expenses of educating young men in other institutions. For it may pursue its object by any means not forbidden, and it may employ other teachers and other seminaries as preparatory to its own course or even as modes of dispensing the instruction it proposes to give." Thus in a Massachusetts case, (6 Pick., 427), an academy incorporated "to promote morality, piety, and religion and for the instruction of youth in the learned languages and in arts and sciences" was held capable of taking the promissory notes of individuals to constitute a fund to form another institution "for the classical or academical and collegiate education of young men with a view to the Christian ministry." On the other hand, the charter will sometimes be construed strictly, especially when, as I have before remarked, the results of such construction will not be a forfeiture of the franchise, but will merely result in an injunction restraining the college from the commission of a particular act. Thus in a case in this State, a college charter contained in its provisions a clause to the effect that if the trustees ahould desire to remove the college to some other location, they should be at liberty to do so upon notifying the Secretary of State of such intention; and the court construed this so strictly as to hold that the condition was not complied with within the meaning of the act of incorporation by a notification that the college was to be removed "to Rochester *or its*

vicinity." (Hascall *vs.* Madison University, 8 Barb., 174.) Another New York case in which the courts interfered to restrain a college from an exercise of power not warranted by its charter is interesting as illustrative of the rare attempts on the part of colleges to claim exceptional rights on the mere ground that they are colleges or universities and hence should have the same prerogatives as are possessed by bodies of similar name in England. I refer to the case of The Medical Institution of Geneva College *vs.* Pattison, 1 Denio, 61; in which Geneva College claimed the right of establishing *and incorporating* a medical school. The argument of the counsel for the plaintiff, which was both learned and ingenious was, briefly, that as the English universities (and especially Oxford) have the power of incorporating colleges, (which power was conferred by Parliament or by the Crown in their charters), and as Columbia College was endowed by the legislature (through the Board of Regents) with all the rights of the English universities, and as Geneva College (like all New York colleges) was endowed by the same authority with all the rights of Columbia College, therefore Geneva College was possessed of the right of incorporating other similar institutions. The court, however, failed to admit this reasoning, and held that as the organization of Columbia College was not on the whole at all similar to that of Oxford, (there being, for instance, no chancellor), neither it nor any other New York college had any power of incorporation.

Disputes have arisen concerning the extent to which a college may adopt a policy or pass by-laws inconsistent with the apparent intention of those who have contributed to the college funds upon the acceptance by the college of certain conditions. And in these cases it is held that a college is bound strictly to the performance of the conditions annexed to grants of money to it, and that conversely the acceptance of the conditions constitutes a valuable consideration, in virtue of which it may enforce the fulfillment of a promise of contributions. Thus in Hammond *vs.* Shepard, (40 How. Pr., 452,) it was held that an agreement on the part of the trustees "to hold their doors open on all moral questions," was a sufficient consideration to enforce the payment of a promissory note. And on the other hand, it has been decided (The Illinois Conference Female College *vs.* Cooper, 25 Ill., 148) that a college has no right

to adopt by-laws injuriously affecting the rights of others under prior contracts by annexing conditions not named in the contracts. So after the sale of a perpetual scholarship in an incorporated college, a by-law annexing a condition that the pupil presented under it shall board in the college and be subject to the collegiate charges therefor, is unauthorized and void. The same ruling was made in The Trustees of Howard College *vs.* Turner, (71 Alabama, 429,) to the effect that a certificate of permanent scholarship issued by the trustees, by which the holder, in consideration of money paid, becomes entitled to one pupil's tuition *in perpetuo* is a valid and binding contract, conferring upon the holder the right to send any fit person within his option to the college as a pupil to be educated subject to the usual regulations of the institution, free of tuition ; and imposing on the corporation a corresponding legal obligation, a breach of which is a ground of action. And such a breach is constituted by the refusal to permit such holder to make such appointment. In some of the Western States the law provides that each county shall have the right to send one or more pupils to the State university to receive tuition free of charge. In one instance, (McDonald *vs.* Hagins, 7 Blackf., 525,) the University of Indiana attempted to refuse to admit such free student to the law school, on the ground that the latter was not the "University." But the court held that all branches of the institution, even though the sessions and courses of instruction were shorter than those in most of the departments, were to be considered as the "University," and to come within the rule. Nor can a college, unless such provisions are included in its charter or by-laws, reject an applicant for admission on the ground that she is a female. Thus Hastings College attempted to do so, (Foltz *vs.* Hoge, 54 Cal., 28,) but it was held that as the only qualifications for admission expressed in the statutes were that the applicant must be a resident of the State, over fourteen years of age, and of good moral character, they must not be construed to imply a qualification of sex, and the trustees had no right to reject a woman merely because she was a woman.

An interesting case arose in Massachusetts concerning the power of the State Legislature to pass laws regulating the discipline of collegiate corporations, and concerning the constitutionality of such laws when they were apparently prejudicial

to the rights of third persons. In this case, (Soper *vs.* The President and Trustees of Harvard College, 1 Pick., 177,) it appeared that the legislature had passed an act providing that no livery stable keeper "shall give credit to any undergraduate of either of the colleges within this commonwealth without the consent of such officer or officers of the said colleges respectively, as may be authorized to act in such cases by the government of the same, or in violation of such rules and regulations as shall be from time to time established by the authority of said colleges respectively," and giving an action on the case against any person so giving credit, to recover a sum equal to the amount credited. The plaintiff, a livery-stable keeper, claimed that the act was unconstitutional, but his claim was not sustained. The opinion states that "the court entertained no doubt of the constitutionality of the law on which this action is founded. The object of it is clearly within legislative sanction, being relative to the discipline of public seminaries of learning. The common law renders void any promise made by an infant, the consideration of which is not for necessaries; but people will nevertheless give credit to them, and minister to their pleasures and dissipation, relying upon the honor of ingenuous young men to discharge debts so incurred. Thus the wholesome intention of the common law is evaded, and youths are exposed to temptations which it is difficult for them to resist, and thus parents are brought to expense, besides suffering the loss of their hopes in the education of the children. A general law, such as the one in question, is perhaps the only remedy for so great an evil; and this statute may be considered as passed in aid of the common law, being founded on similar principles; for youth assembled at a college for education are properly regarded as minors, whether of twenty-one years of age or under. An attempt was made to evade a similar law in Connecticut, (Morse *vs.* The State of Connecticut, 6 Conn., 9,) by claiming that the person to whom credit was given was not a "student of the college" (Yale), because according to the college by-laws no one was to be regarded as a regular member until he had been admitted to matriculation after six months' residence; but the court held that simply passing an entrance examination and attending lectures was sufficient to

constitute a person a student, he being under the government of the authority presiding over the institution.

In respect to the interesting question of academic degrees, to which I have already alluded, the only case I have been able to find bearing directly on the power of a college corporation to grant such degrees when not expressly authorized to do so by the State legislature in its charter, is The State of Missouri *ex rel.* Granville *vs.* Gregory, 83 Mo., 123. In this case the relator applied to the State Board of Health for a certificate to practice medicine, presenting a diploma from the Kansas City Hospital College of Medicine (of Missouri), but was refused such certificate partly on the ground that the said college had no authority to issue diplomas or grant degrees. This was held not to be a valid objection, and the opinion of the court, which was stated at some length, was in substance as follows: The medical college was incorporated under the provisions of a general law, by virtue of which, after the performance of certain conditions, the college incorporation was considered to be effected. Now, when the legislature authorized, by a general law to that effect, the incorporation of colleges, it must be presumed to have been conversant with the effect of such a general enactment, and to have intended that the usual incidents and consequences should flow from such incorporations. Among the incidents and consequences which have been customary with institutions of this character are those of conferring degrees upon those of the students who, having pursued the curriculum, have been graduated, and the issuance to them of diplomas bearing evidence of that fact. A diploma is said to be "a document bearing record of a degree conferred by a literary society or educational institution," or, in other words, a statement in writing, bearing the seal of the institution, setting forth that the student therein named has attained a certain rank, grade or degree in the studies he has pursued. If it be said that there is no express power granted to such an institution by the general law of its organization to confer degrees on its students, it may be replied that neither is express power bestowed by that law to prescribe the course of study the students shall pursue. In this country a corporation has authority to do any act which is expressly or impliedly authorized by its charter, and charters are to be construed in the

light of custom. These conditions induce the belief that the college of medicine, under power necessarily implied from its being incorporated for a certain purpose, could lawfully issue and deliver to its graduates diplomas giving evidence of the matters therein recited.

In a Massachusetts case, (Wright *vs.* Lanckton, 19 Pick., 288,) contention arose as to the time when a resolution by a board of trustees, to confer a degree, took effect. The plaintiff, it seems, sued the defendant to recover fees for medical services, and was met with the reply that he was not yet a doctor of medicine. He offered to prove that the trustees of Williams College had "voted that the honorary degree of doctor of medicine be conferred" upon him, and the defendant took exception to this proof offered to show the possession of the degree. At a regular meeting of the trustees (with whom, without further sanction, rests the authority to confer all degrees) it was voted that the honorary degree of doctor of medicine be conferred, &c. It was objected that this was prospective and incomplete; that it was a determination that a degree be conferred, but did not confer it; that it was rather an authority to the president and other competent officers to confer the degree, than the definite act conferring it. But the court overruled this exception, and declared the evidence to be competent, for "when an aggregate body is authorized to make an appointment or grant an authority or privilege, and no mode is specially directed in which it shall be done, or by which it shall be proved, a vote that the act be done, or the right granted, is an execution of the power; and a duly authenticated copy of the vote, a sufficient proof of it. A public annunciation or a diploma may be extremely suitable and appropriate modes of declaring and giving notoriety to the act, but they are not necessary," (citing Maibury *vs.* Madison, 1 Cranch, 137.)

Having illustrated, as far as possible, the cases in which the courts are considered competent to interfere with the action of corporations, it will not be inappropriate to state when and by whom such interference may be invoked. In The People *ex rel.* Drake *vs.* The Regents of the University of Michigan, 4 Mich., 98, it was held that as a general rule it is not competent for a private person in a matter in which he is not directly injured to compel a public board to the performance of a duty;

and that, therefore, as the financial and other interests of the University of Michigan were intrusted with wide discretionary powers to a board of regents, it was a sufficient answer to an application for a mandamus to show cause why they did not appoint to a professorship established by law, that the appointment in question requirred great deliberation. This ruling would probably apply, *a fortiori*, to corporate colleges of private nature.

CHAPTER VI.

CONCLUSION.

From the foregoing statement two inferences may fairly be drawn, or in other words, two facts seem clearly to appear. In the first place the citizens of the United States, and even before the United States existed as such the English colonists in America, have from the first proclaimed and still hold to the principal of popular education as a prime factor in national excellence and a legitimate or even imperative object of government expenditure. That this principle has everywhere and at all times obtained the same extent of recognition, it were vain to assert: in fact the variance of opinion which, especially at a very early date in our educational history, existed in different sections of this country was noted above. But the opposing views were so early reconciled that the general truth of this statement concerning the universality of the doctrine of free school instruction for the people is in no wise impaired. The chief topic of dispute concerning our American educational system has been, and still is, not whether the government should provide free instruction for the people and enforce them to avail themselves of its advantages by compulsory laws, but, granting that it should, whether this is a duty and a power remaining in the governments of the several commonwealths or whether it is also imposed or conferred upon the central government? The frequent endeavors to obtain the passage of bills through the National Congress providing for the establishment of a system of free schools maintained and controlled by the central government, and the constant opposition to such bills on the ground that the government has no such power under the Constitution, have made the arguments to be presented for and against such a system familiar to all.

The second fact which presents itself prominently to the observer of our educational system, as well as to the student of its history, is the extreme freedom from control by the central government over the internal management of our public educational system, and the almost entire absence of any government control whatever in the case of private, though incorporated, institutions of learning. The result of this is of course an utter lack of uniformity in matters of education, except in the merely external matters of organization and financial government, both in the ideas aimed at and in the methods adopted to attain them. The control exercised by our State governments over the common schools concern chiefly their financial relations, and any endeavor to prescribe in detail the studies to be pursued, or rather the doctrines to be inculcated in them, is looked upon very jealously as a possible prostitution of the school system to purposes of party politics. The immediate injurious effects of the heterogeneous nature of our public instruction consequent upon so great freedom of local action, are many and well known, and too much stress cannot be laid upon the ever-growing necessity of a more uniform system of primary instruction as a means of binding together the opposing elements of our mingled population by an ingrained sentiment of national unity. The absence of government or other centralized control, even with the existence of government patronage and protection, in our higher institutions of learning, results in a like want of uniformity with like deplorable results in our colleges and universities. There are at present upwards of 400 colleges in this country, each with its own standard of higher education, and each differing from all the rest in the aims and methods of its curriculum, but all presuming to be equal in rank and dignity, and all possessed of similar powers of conferring titular badges of academic distinction. The natural result is a general want of confidence in college training and a still greater disrespect for college honors and degrees.

The proper and only remedy for these evils is a system of university instruction such that a diploma from any incorporated college shall be an unimpeachable token of thorough work done, and the only way of thus giving the stamp of popular approval to a college degree is to have the college itself, and, in preparation for it, the schools, under the immediate and thorough control of a powerful and enlightened government.