IN THE

SUPREME COURT OF ILLINOIS.

CENTRAL GRAND DIVISION.

JANUARY TERM, 1876.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal from Douglas.

Brief for Appellant.

GEO. TRUMBULL.
GEO. W. WALL,
Att'ys for Appellant.

Beem & Richards, Prs., Tribune, Du Quoin, Ill.

ERRATA.

On page 14—5th line from bottom, for *work*, read *risk*.

.... 15—5th line from bottom, for *provisious*, read *provision*.

.... 22—10th line from bottom, for *purposes*, read *purpose*.

.... 25—5th line from top, for *laws*, read *Courts*.

.... 27—5th line from top, for *tax*, read *act*.

.... 29—1st line, for *charter*, read *charters*.

.... 49—10th and 20th lines from top, for *line*, read *Lim*.

.... 54—11th line from top, for *chatered*, read *chartered*.

.... 56—10th line from top, for *the*, read *this*.

.... 60—8th line from bottom, before the word *contracts*, insert the words, *applied to*.

.... 60—4th line from bottom, for *attainable*, read *obtainable*.

.... 66—6th line from top, erase *its judged or*.

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This was an action of debt, commenced by the Attorney General in favor of appellee against the appellant, under the provisions of an act of the General Assembly of the State of Illinois, entitled "An Act to prevent extortion and unjust discrimination in rates charged for "the transportation of passengers and freight on Railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in "relation thereto," &c., approved May 2d, 1873.

The Declaration is in the usual form, demanding debt $100,000.00, damages $5,000.00, and contains thirty-one counts: the seventeenth is as follows:

"And whereas, also, the said defendant heretofore, "to-wit: on the 30th day of March, A. D. 1874, to-wit, at "the county of Douglas, aforesaid, was a Railroad cor-

"poration, and then and there owning and operating a "certain railroad, lying wholly within said State of Illi- "nois, and running from said town of Tuscola, in said "county of Douglas, to Chicago, in the county of Cook, "in the State of Illinois, aforesaid, and then and there "doing business as a common carrier upon and over said "line of railroad, and that afterwards, to-wit: on the day "and year last aforesaid, at the county of Douglas, "aforesaid, the said defendant, as such common carrier, "at the special instance and request of John M. Maris, "carried and transported for said John M. Maris, from "Chicago aforesaid to Tuscola aforesaid, upon and over "said railroad, certain other goods, wares and merchan- "dise, to-wit: seventy barrels of salt, of a certain weight, "to-wit: of the weight in all of twenty thousand pounds, "of the goods and chattels of said John M. Maris, then "and there being, and that said defendant afterwards, "to-wit: on the day and year last aforesaid, at the county "of Douglas, aforesaid, charged, collected, demanded "and received of and from said John M. Maris, as and "for said defendant's toll and compensation for the said "carriage and transportation of said last mentioned "goods, wares and merchandise, upon and over said rail- "road, from said Chicago to said Tuscola, in manner "aforesaid, a large sum of money, to-wit: the sum of "twenty-eight dollars and thirty-five cents, and that "said mentioned sum of money so charged, collected, "demanded and received, by said defendant, of and from "said John M. Maris, for the carriage and transportation

"of said last mentioned goods, wares and merchandise, "as aforesaid, then and there exceeded a fair and rea- "sonable rate of toll and compensation for the carrying "and transporation thereof in manner aforesaid, in a "large sum of money, to-wit: in the sum of three dollars "and fifty-five cents, and was then and there unjust, un- "fair, unreasonable and extortionate, contrary to the "form of the statute in such case made and provided, "and against the peace and dignity of the said People "of the State of Illinois, and thereby, and by force of "said statute, an action has accrued to the said People "of the State of Illinois to demand and have of and from "the said defendant the sum of Five Thousand Dollars, "other parcel of the said sum above demanded."

At the October term, 1874, the cause was submitted to the Court without the intervention of a jury, upon the following

STIPULATION.

It is agreed between the parties to this suit, that it be submitted to the Court for trial without the intervention of a jury, and upon the part of the defendant it is admitted—

"1st—That the defendant charged and collected of the person named in the 17th count of plaintiff's declaration, twenty-eight dollars and thirty-five cents, for the transportation of seventy barrels of salt from the city of Chicago, Illinois, to Tuscola, in Douglas county, Illinois, as alleged in said 17th count."

"2d—That the maximum amount, fixed for the transportation of freight of like class and quantity, by the Railroad and Warehouse Commissioners of the State of Illinois, was before and at the time of such transportation, twenty-four dollars and eighty cents, as established by a schedule of rates for the defendant made, subscribed and published, by said Commissioners, and a table entitled "Classification of freight," which schedule of rates and tables of "Classification of freight" were made by said Commissioners, and were in force before the transportation of said salt, mentioned in said count, and were made and published in pursuance of an act of the General Assembly of the State of Illinois, approved May 2d, A. D. 1873, and in force July 1st, 1873, and entitled "An Act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State," &c., and this admission shall have the like force and effect as if said schedule of rates and tables of "Classification of freight" had been read in evidence on trial."

"3d—That the sum so charged by the defendant for such transportation in said 17th count mentioned, exceeds the rate as previously fixed by said Commissioners in the sum of three dollars and fifty-five cents."

"4th—It is admitted by the plaintiff and defendant as follows: that said Commissioners, in pursuance of the statute, have classified the different Railroad Companies of the State, and have established rates differing according to the classifications thus made, and in so making

such classifications, the rates established for defendant differ materially from the rates so fixed for some of the other railroads of this State."

"5th—That said sum as charged and collected by the defendant was the rate of toll previously directed and determined by a by-law of the Board of Directors of said defendant, in conformity with the provisions of its charter, and so continued to be the rate so established up to and at the time of said shipment."

"6th—The printed charter of defendant, attached hereto, marked A, approved February 10th, 1851, being an act passed by the General Assembly of the State of Illinois, entitled "An Act to incorporate the Illinois Central Railroad Company," is admitted as evidence in this case."

"7th—The defendant claims the right to direct and determine its rates of toll for the transportation of freight and passengers, by virtue of the provisions of its charter, and insists that the act of the General Assembly of the State of Illinois, approved May 2d, 1873, entitled "An Act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An Act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in the State for the transportation of freights on said roads, approved April 7th, 1871,'" in so far as it conflicts with the right

of the defendant to direct and determine its rate of toll for the transportation of freight and passengers, is in conflict with its charter, and the Constitution of the State of Illinois, and is repugnant to the Constitution of the United States, in this, that it impairs the obligation of said contract entered into between the defendant and the State of Illinois, and is unconstitutional and void.'

"8th—On the part of the plaintiff, it is insisted that said recited act is constitutional and valid."

"If, upon the foregoing facts, this Court finds for the plaintiff, it is agreed that a fine of $1,000 may be assessed by the Court; should the Court find for the defendant, the judgment is to be entered accordingly."

"Either party may appeal from the decision, finding and judgment of the Court."

The charter of the Company is set out at large in the Exhibit A. (See Abstract, p. 4, 9.)

The Court found the issues for the people, and assessed a fine of $1,000.00.

The defendant brings the Record to this Court.

I.

The Declaration is fatally defective, and the judgment must be reversed for this reason—

There are thirty-one counts in the Declaration, of which the first thirty are like the 17th, which is set out in full above. The 31st count is for unjust discrimination.

Under the authority of the case of C. B. & Q. R. R. Co. vs. The People, &c., reported in Chicago Legal News, Vol. VIII, page 59, we say the 17th count is wholly insufficient, because it does not aver that the Board of Commissioners had prepared and published schedules for the various railroads in this State, and that the rate charged by defendant was in excess of the rate fixed by such schedules for such service on defendan'ts road.

This averment is necessary, in order to bring the defendant within the operation of the act, for in the language of the Court in the case above cited, "a disregard of the schedule of rates prepared by the Railroad and Warehouse Commissioners, is a necessary element of the offense against which the statute is directed; that is, the charging more than the maximum rates fixed by said Board of Commissioners, which makes the Company guilty of extortion under the statute, within its true intent and meaning."

The last count, the 31st, was bad on its face because the amounts laid did not agree with the rate per hun-

dred pounds alleged, there being a patent error in the computation, and for the much more important reason that there was nothing to show why different rates might not have been charged upon the supposed shipments, the shipments being of different quantities, there not being, in fact, ANY discrimination averred, either just or unjust, between shipments of "a like quantity of the same class" of freight. Vide the case above cited.

But whether this count be good or bad, there was no evidence offered under it. The 17th was the only count under which the evidence offered could be considered, and if it "is so defective that it will not sustain "a judgment, advantage may be taken of the defect in "arrest of judgment or an error, although a good plea "might have been interposed."

Smith vs. Curry, 16 Ill. 147.
Brawner vs. Lomax, 23 Ill. 496.
Scholfield vs. Settley, 31 Ill. 515.
Wilson vs. Myrick, 26 Ill. 35.
The People vs. Cloud, 50 Ill. 439.
C. R. I. & P. R. R. vs. Morris, 26 Ill. 400.

This is a doctrine so well settled that reference to authorities seems wholly superfluous: but the last case cited so perfectly illustrates the rule as applicable here, that the Court will pardon us for referring to it.

It was an action to recover, under the statute, for causing the death of plaintiff's intestate, and the declaration was held bad for the reason that it did not aver

the existence of a widow and next of kin, to whom the damages could be distributed.

The objection was made for the first time in the Supreme Court, (the defendant having filed a plea of not guilty, upon which there was an issue and a trial in the Circuit Court) and though the plaintiff proved, upon the trial, that the deceased did leave such widow and next of kin, tacitly admitting the necessity of such averment, yet the Court reversed the judgment for this defect in the declaration.

The fact that this case was submitted on an agreed state of facts, does not, in any degree, affect the position. The stipulation was merely in lieu of evidence, the parties agreeing, for the sake of mutual convenience, upon certain facts which would have appeared if witnesses had been sworn, and it was agreed that if, upon "the foregoing facts," the Court should find for plaintiff, the fine should be $1,000.00, &c., it being expressly provided that "either party may appeal from the decision, finding and judgment of the Court." True, no plea was filed; but no advantage can be taken of this fact. A plea would have merely presented some issue upon the declaration, and would have been useful to the plaintiff in deciding how much proof was necessary. No objection was taken to the want of a plea in the Court below, and none can be taken here.

The question here presented, is whether the case, as made by plaintiff in his declaration, is sufficient, no matter how much or how little proof was offered. If the

defendant had not appeared, and a default had been entered, still on error, the sufficiency of the declaration might be questioned, and the judgment would be set aside if the declaration were found substantially defective. Or, if a good plea had been filed, and ample evidence offered to make out a case, and the declaration were found imperfect, still the Appellate Court must set aside the judgment.

A fortiori, must this be the ruling in the case at bar, where there has been no plea, and where the parties, by agreement, have stipulated that certain facts exist, this stipulation being taken instead of sworn evidence? At most, it is but a trial upon the 17th count, and all the consequences are the same.

II.

The penalties provided in the Act are excessive.

The Constitution of U. S. Amendment VIII, provides that "excessive fines shall not be imposed." The Constitution of Illinois, 1848, Sec. 14, Art. 13, declares that "All penalties shall be proportioned to the nature of the offense." Same, 1870, Sec. 11, Art. 2. What is an excessive fine, is perhaps not easy to define within precise limits. The fine ought, in all cases, to be in proportion to the offense, and ought to be measured to some extent, at least, by the penalties imposed for other statutory or common law offenses.

For the first violation of this act, a fine of not less than $1,000 nor more than $5,000, is imposed; for the

second, not less than $5,000 nor more than $10,000; for the third, not less than $10,000 nor more than $20,000; and for every subsequent offense, $25,000. This enormous fine of $25,000 is imposed for every violation of the provisions of the act after the third. It is not necessary that there should have been three violations of the same kind; that is, for charging the same rate in excess of a given rate fixed by the schedule; but after the third conviction of any "violation of the provisions of the act," the penalty must be $25,000, no matter how slight or trifling may be the excess.

No such a penalty has ever been imposed by any law of this State for any other offense.

An assault with a deadly weapon, never so brutal, is punishable by a fine of not less than $25 and not exceeding $1,000, or by imprisonment not exceeding one year. So the adulteration of food and medicine is punishable by a fine not exceeding $1,000, or by imprisonment not exceeding one year; false imprisonment by a fine not exceeding $500, or imprisonment one year; conspiracies by a fine not exceeding $1,000, or imprisonment not exceeding three years; obstructing the course of justice by causing witnesses to abscond, by a fine not exceeding $1,000, or imprisonment not exceeding one year.

Such are some of the heaviest fines provided in our criminal code, it thus appearing that the law makes, in several instances, a fine of $1,000 equivalent to the loss of liberty for one year; while for cruelty to children,

aiding prisoners to escape, destroying a dwelling house, and adultery, $500 is the maximum. For keeping lewd houses, disturbing religious worship or funeral processions, public indecency and stealing fruit, the maximum is $1,000.

Many other provisions of the criminal code might be presented to show what, in the judgment of the Legislature, based upon the administration of criminal law in this State for more than fifty years, is an adequate fine for grave and serious offenses against public morals, public decency and public safety.

Yet a railroad corporation must be mulcted in the sum of $25,000 for the heinous crime of charging ten cents too much on a car load of grain from Chicago to Cairo, and it is not provided in the act that the Commissioners appointed to fix the rates are required or expected to bring to their aid either experience or other assistance in the discharge of the almost impossible task of fixing a just and fair schedule of rates for the railroads of this State, for transporting the various articles of freight that may be brought to them at different points, for different destinations, in all directions, at all seasons of the year, and under all the possible contingencies of an ever changing traffic.

Is it not plain that these fines are excessive, wholly out of proportion to the offense, the outgrowth of a reckless, communistic spirit that, fortunately for the peace and good order of society, is manifest only at rare intervals!!

When an enactment provides for so small and trivial an offense, a fine that exceeds the private fortune of the great majority of the most successful men, it is clearly in violation of the Constitution, and ought to be condemned accordingly.

Such penalties, if enforceable, would soon exhaust the wealthiest corporations, while for the small companies, struggling with competition, with an undeveloped business, an unfinished property and a heavy load of debt, the result is speedy and complete destruction. It would seem that these railroads, which have, more than all else, developed and made available the vast natural capacities of the country, must now be made the subjects of spoliation and confiscation.

This suicidal course will inevitably and unfavorably react upon the public interest, for it is impossible thus to cripple such important factors in material and commercial affairs without, at the same time, injuriously affecting every other branch of industry. Capital, alarmed at such an exhibition of bad faith, withdraws from other enterprises; public confidence is lost, and the long train of monetary disasters and business failures sufficiently attest the ruinous and dangerous tendencies of such a policy.

The stereotyped complaint is, that these railroad corporations are monster monopolies; that they have grown powerful enough to oppress the public; that they assume sovereign prerogatives, and claim to be above

and beyond the reach of the people, whose creatures they are.

If these objections are well founded, what follows? Shall the companies be robbed until their possessions are diminished in value to an ideal standard? If so, why are individual fortunes exempt from the same leveling process? It is indeed strange, if these corporations, whose object is to serve the public, and whose existence is a continual competitive struggle for public patronage, and whose support depends entirely upon the patronage of the public, would long exercise a grinding monopoly, or long oppress their patrons.

The laws of competition demand and supply, and the sharp instincts of self interests may safely be depended upon to correct any evils of that sort. If they assume sovereign powers and do not possess them, the assumption will hurt nobody, and a supposed independence of the people will amount to nothing so long as they must depend upon the people for their daily support. Is not all this mere, empty declamation, and is there any practical reason why railroad corporations should be singled out for persecution rather than hotels, manufactories, steamship companies or individual capitalists? There is no department of business where the profit is so small in comparison with the work.

The record of many of the companies whose rails have been laid in this State, will show that the original capital invested has been lost. Almost every road built in Illinois since 1869, is to-day in the hands of a

Receiver, while luckless bondholders are anxiously enquiring for the fruits of the supposed monopoly and oppression against which this legislation is directed, and the most fortunate companies, whose lines have been built for fifteen or twenty years, a third or half of which period passed without a dividend, and along whose routes cities and towns have grown up, are unable to pay their stockholders a dividend equal to the lawful rate of interest upon loaned money.

If any one has conceived the opinion that these corporations are beyond the reach of the people, let him observe the course of litigation, and he will soon discover that in the Court House, if nowhere else, the humblest citizen has vastly the advantage over the greatest and richest company.

If any one has conceived the idea that the promoters of railways have realized large profits upon the money invested, an examination of the records will undeceive him.

And no one has denied that but for these agencies of progress, Illinois would be a generation behind her present position of wealth, population and power.

III.

This Act is in violation of the chartered rights of the Company, and is within the provisions of the Federal Constitution, which declares that no State shall pass any law impairing the obligation of contracts.

Const. U. S., Sec. 10, Art. 1.

Const. of Ill., 1848, Sec. 17, Art. 13.

Same, 1870, Sec. 14, Art. 2.

This charter is a contract.

This act impairs its obligation.

Ergo, the act is void.

The history of the Illinois Central Railroad Company is matter of public record.

Prior to 1850, railroads had not been extensively built. It had been only twenty years since the first one (the Boston & Lowell) had been devoted to the general business of a common carrier. The building of transcontinental lines was generally believed to be, if not impossible, at least impracticable. In the Western and Southern country, population was sparse, and capital wholly wanting. Illinois was still laboring, almost helplessly, under the burden of a public debt, contracted fifteen years before for the purpose of building a general system of railroads and canals.

Vast areas of tillable land within the State were practically worthless, because inaccessible.

It was definitely settled, by costly experience, that the construction and operation of "improved public highways" must be left to the skill and management of private enterprise, and that the State could not successfully maintain such undertakings.

On the 20th of September, 1850, Congress passed an act granting to the States of Illinois, Mississippi and Alabama, certain of the public lands lying within those States, to be used in the construction of a railroad from Chicago to Mobile.

The act contemplated the passage of a charter of incorporation by the State of Illinois. Recognizing the profitable effect upon lands not granted, the third section provided that the lands within the limit of grant, and not embraced by the grant of alternate sections, should be held at "not less than double the minimum price of the public lands when sold," thus securing the Government against any loss. The fourth section provided that the road "should be and remain a public highway for the use of the Government of the United States, free of toll or other charge upon the transportation of any property or troops of the United States," and the sixth section provided that the United States mail should at all times be transported "at such price as Congress may by law direct." Otherwise, the act contained no restrictions or limitations upon the powers to be conferred by the State and exercised by the corporation.

It should be remembered, in this connection, that by the decision of the Supreme Court of the United States, made many years before, the decision being acquiesced in and followed by the State Courts wherever the question had arisen, and approved by all text writers, it was absolutely determined that the charter of a corporation was a contract binding upon the State, and as such, protected by the Federal Constitution.

At the January session of the Legislature, 1851, the memorial of Robert Rantoul and his associates, was presented. It recited that they had examined and considered the provisions of said act of Congress, and the

proposed route, and offered to form a company to build the road by a given time, to make it in all respects first-class, and to equip it "in a manner suitable to the business to be accommodated thereby;" to pay to the State "annually — per cent. of the gross earnings of said road, without deduction or charge for expense, or for any other matter or cause, provided that the State of Illinois will grant to the subscribers a charter of incorporation, with terms mutually advantageous, with powers and limitations as they, in their wisdom, may think fit, as shall be accepted by said company, and as will sufficiently remunerate the subscribers for the care, labor and expenditure in that behalf incurred, and will enable them to avail themselves of the land donated by said act to raise funds, or some portion of the funds, necessary for the construction of said road." Vide Leg. Journal, 1851.

The State, duly appreciating the importance of the proposed undertaking, passed the charter of defendant, and it was approved on the 10th of February, 1851. Great care and caution was shown in the preparation of the document, and after having made provision for the location of the line, the following was provided for its operation:

"SEC. 8. The said company shall have power to make, ordain and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating and se-

curing the affairs, business and interests of the company: Provided, that the same be not repugnant to the Constitution of the United States, or of this State, or repugnant to this act. The Board of Directors shall have power to establish such rates of toll for the conveyance of persons and property upon the same as they shall from time to time by their by-laws direct and determine, and to levy and collect the same, for the use of said company. The transportation of persons and property; the width of track; the construction of wheels; the form and size of cars; the weight of loads; and all other matters and things respecting the use of said road, and the conveyance of passengers and property, shall be in conformity to such rules and regulations as said Board of Directors shall from time to time determine. Nothing in this act contained shall authorize said corporation to make a location of their track within any city, without the consent of the common council of said city."

That the State might reap an abundant return for the privileges conferred, the following sections were inserted:

"SEC. 18. In consideration of the grants, privileges and franchises herein conferred upon said company, for the purposes aforesaid, the said company shall, on the first Mondays of December and June in each year, pay into the Treasury of the State of Illinois, five per centum on the gross or total proceeds or receipts or income, derived from said road and branches, for the six months

then next preceding. The first payment of such per centage on the main trunk of said road to commence four years from the date of such deed of trust, and on the branches six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts or income, aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the Governor of the State of Illinois, the truth of which account shall be verified by the affidavits of the Treasurer and Secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the Governor of the State of Illinois, or any other person by law appointed to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons. And if any person so examined by the Governor or other authority, shall knowingly and wilfully swear falsely, or if the officers making such affidavits, shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury."

* * * * * *

"SEC. 22. The lands selected under said act of Congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this State until sold or conveyed by said corporation or trustees, and the stock, property and effects of said company

shall be in like manner exempt from taxation for the term of six years from the passage of this act. After the expiration of said six years, the stock, property and assets belonging to said company shall be listed by the President, Secretary, or other proper officer, with the Auditor of State, and an annual tax for State purposes shall be assessed by the Auditor upon all the property and assets, of every name, kind and description, belonging to said corporation. Whenever the taxes, levied for State purposes, shall exceed three-fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income, herein required to be paid by said corporation to the State, and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent. of gross or total proceeds, receipts or income aforesaid, shall be paid into the State Treasury, in money, and applied to the payment of interest, paying State indebtedness, until the extinction thereof: Provided, in case the five per cent. provided to be paid into the State Treasury, and the State taxes be paid by the corporation, do not amount to seven per cent. of the gross or total proceeds, receipts or income, then the said company shall pay into the State Treasury the difference, so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation."

Section 27 is as follows: "This act shall be deemed a public act, and shall be favorably construed for all

purposes therein expressed and disclosed in all Courts and places whatsoever, and shall be in force from and after its passage."

The State realized so handsomely from the seven per cent. of the gross earnings, that in 1870 a clause was inserted in the Constitution, by an overwhelming vote of the people, prohibiting the repeal or modification of the provision. Vide Const., 1870, "separate section Illinois Central Railroad."

It appears from the public records that the State has thus far received from this source alone, the sum of ————, thus most amply fulfilling the expectations of the Legislature granting this contract. The National Government quickly sold all its public lands along the line at double prices, and the building of this railway inaugurated a new era for Illinois, quickening every material and business interest within its broad domain.

The transaction thus briefly sketched has every substantial feature of a contract, made between parties amply competent for the purposes.

This charter is a contract, and is within the protection of the Federal Constitution.

We quote from 2 Kent Com., side page 306:

"A private corporation, whether civil or eleemosyn-
"ary, is a contract between the Government and the
"corporators: and the Legislature cannot repeal, impair
"or alter the rights and privileges conferred by the char-
"ter, against the consent and without the default of the
"corporation, judicially ascertained and declared. This

"great principle of constitutional law was settled in the "case of Dartmouth College vs. Woodward, 4 Wheat., "519, and it had been asserted and declared by the Su- "preme Court of the United States in several other cases "antecedent to that occasion." Citing Fletcher vs. Peck, 6 Cranch, 88; State of New Jersey vs. Wilson, 7 Ibid., 164; Terrett vs. Taylor, 9 Ibid., 43; Town of Pawlet vs. Clark, Ibid., 292.

We quote from Parsons on Contracts, 3d Ed., Vol. 2, page 683:

"Thus it has been very solemnly, and we hope au- "thoritatively, decided that a corporation is a person "who may take a grant, as well as an individual; that a "corporation created by the Legislature, or adopted by "the Legislature, and endowed with certain powers and "functions and property, the Legislature reserving no "interest in what is given them, and no control over the "succession of persons who form the corporation, or over "their functions. Such a corporation is a private cor- "poration, to whom a franchise has been given by a "grant, which is an executed contract; and that any "deprivation of their property, or any disturbance or "denial of their rights and functions, impairs the ob- "ligation of the contract. And if the Legislature have "reserved to themselves rights in the creation of such "corporation, or in any grant to them, these reservations "are to be strictly followed, whatever lies without them "being as if there were no reservations whatever." See Sedgwick on Const. Law, 619.

Before the case of Fletcher vs. Peck had been decided, this doctrine had been announced by the Supreme Court of Massachusetts—Wales vs. Stetson, 2 Mass., 146, Parsons C. J.—saying that "rights legally vested in any corporation cannot be controlled by, or destroyed by any subsequent statute, unless a power for that purpose be reserved to the Legislature in the act of incorporation."

In the case of Providence Bank vs. Bllings, 4 Peters, 460, the bank was resisting a tax imposed by the Legislature of Rhode Island. The charter contained no provision on the subject. The Court said, "The question is to be answered by the charter itself. It contains no stipulation promising exemption. The State has made no express contract which has been impaired by the act of which the plaintiff complains. No words have been found in the charter which in themselves would justify the opinion that the power of taxation was in the view of either of the parties," and upon this reasoning, the claim of exemption was denied.

In the Charles River Bridge case, there was no exclusive privilege given to the Company over the waters of the river above or below its bridge: no right to erect another bridge, or to prevent others from doing so, and on this reasoning the relief was refused.

In case of O. L. I. & T. Co. vs. Debolt, 16 How, 435, Ch. J. Taney, referring to the Providence Bank case and the Charles River Bridge case, says:

"In both these cases the Court in the clearest terms "recognizes the power of the State Legislature to bind the

"State by contract, and the cases were decided against the "corporations, because, according to the rule of construction "in such cases, the privilege or exemption claimed has not "been granted. But the power to make the contract was "not denied, and I am not aware of any decision of the laws "calling in question any of the principles maintained in "either of these leading cases."

In Gordon's case, 3 Howard, 133, the Court held that the question was the same as in the Debolt case, and upon the construction given to the words of the particular charter, it was held that the State had released its rights.

In Richmond, &c., R R Co. vs. Louisa R. R. Co., 13 Howard, 71, the same question as to the power of one Legislature to bind another by the terms of a private charter, was before the Court, and while it was held that the charter of the complainant did not grant the exclusive privilege, as claimed, yet it was expressly held that the Legislature had the power to make such an agreement, and if such an agreement had been made, it would have been inviolable.

In the case of State Bank of Ohio vs. Knoop, 16 How., 389, the Court say:

"That a State has power to make a contract which "shall bind it in the future, is so universally held by the "Courts of the United States, and the States, that a general "citation of authorities is unnecessary.

"There is no Constitutional objection to the exercise of the power to make a binding contract by a State.

"It necessarily exists in its sovereignty, and it has been so held by all the Courts in this country. A denial of this

is a denial of State sovereignty. It takes from the State a power essential to discharge its functions as sovereign.

"If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts the machinery of government is carried on. Money is borrowed, and obligations given for payment.

"Contracts are made with individuals who give bonds to the State. So in the granting of charter. If there be any force in the agreement, it applies to contracts made with individuals the same as with corporations.

"But it is said the State cannot barter away any part of its sovereignty. No one ever contended that it could. A State in granting privileges to a bank, with a view of affording a sound currency or advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, though all the other banks should be exempt from taxation. Having the power to make the contract and rights having vested under it, it can no more be disregarded, nor set aside by a subsequent legislation, than a grant for land. This act, so far from parting with any portion of sovereignty, is an exercise of it. Can any one deny the power to the Legislature? To deny either of these is to take away State sovereignty. It must be admitted the State has the sovereign power to do this, and it would have the sovereign power to impair or annul the contract so made, had not the Constitution of the United States inhibited the exercise of such a power.

"The vague and undefined and undefinable notion that every exemption from taxation, or a specific tax which withdraws certain objects from the general tax law, affects the sovereighty of the State, is indefensible."

And so the Court held that a subsequent tax, fixing a tax higher than that fixed by the charter, was void.

In the case of Thompson vs. Rutland & Burlington R. R. Co., 27th Vt., 145, the question was, whether the defendant could be required, by a subsequent act, to provide cattle guards, there being no provision on the subject in the charter. Ch. J. Redfield said, in the opinion of the Court, that natural and artificial persons stand upon the same ground, and that this is the true ground and the only one upon which equal rights and just liabilities and duties can be firmly based. He adds:

"To apply this rule to the present case it must be conceded that all which goes to the constitution of the corporation and its beneficial operation, is granted by the Legislature, and cannot be revoked, either directly or indirectly, without a violation of the grant which is regarded as impairing a contract, and so prohibited by the United States Constitution.

"And, if we suppose the Legislature to have made the same grant to a natural person which they did to defendant, and which they may undoubtedly do (Moor vs. Veasie, 4 Pet., 568), it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the benefits secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd.

"But it must, in fact, be the same thing when applied to a corporation, however extensive.

"In either case, the privilege of running the road and taking tolls of fare and freights, is the essential franchise conferred. ANY ACT ESSENTIALLY PARALYZING THIS FRANCHISE, OR DESTROYING THE PROFITS ARISING THEREFROM, WOULD NO DOUBT BE VOID But beyond that the entire power of legislative control resides in the Legislature, unless such power is expressly limited in the grant to the corporation as by exempting the property for taxation in consideration of a share of the profits, or a bonus, or the public duties assumed."

Here the distinction is very clearly drawn between such legislative powers as affect the life and health and general safety of the people, commonly known as police powers, which are supposed to be reserved, and the power "to interfere with the essential franchise conferred," which "essential franchise" is said to be the running of the road and taking tolls—and the learned judge declares that "any act essentially paralyzing this franchise, or destroying the profits arising therefrom, would be void," and it would seem that even if the charter did not expressly grant to the corporation the power to fix the rates, the power would be implied as a necessary consequence, and any interference with the power affecting the profits would be an infringement of "the essential franchise conferred" by the charter.

In the case of Washington Bridge Co. vs. State, 18 Conn., 64, the Court say:

"Ever since the case of Dartmouth College vs. Wood-"ward was decided by the National Court recognizing

"the charter of private corporations as contracts pro-
"tected from invasion by the Constitution of the United
"States, no other Court in this country has disregarded
"the doctrine, and we consider it now as obligatory, and
"settled beyond our reach either to deny or disregard,
"even if any of us should doubt its original propriety."

In Commonwealth vs. New Bedford Bridge, 2 Gray, 348, the Court say:

"Upon familiar and well settled principles, the act,
"(charter of company) when accepted by the defendants,
"was an executed contract between them and the Gov-
"ernment, by the terms of which, as contained in the
"charter, both parties are equally bound. The defend-
"ants cannot, without the consent of the Legislature,
"escape or evade any of the duties imposed upon or as-
"sumed by them under the act, nor can the Legislature,
"without the consent of the defendants, in any way af-
"fect or impair the original terms of the charter by
"annexing new conditions or imposing additional duties
"onerous in their nature, or inconsistent with a reasona-
"ble construction of the contract * The Common-
"wealth has no more power or authority to construe the
"charter than has the corporation. By becoming a party
"to a contract with its citizens, the Government divests
"itself of sovereignty with respect to the terms and con-
"ditions of the compact, and its construction and inter-
"pretation, and stands in the same position as a private
"individual. If it were otherwise, then the rights of
"parties contracting with the Government would be held

"at the caprice of the sovereign, and exposed to all the "risks arising from the corrupt or ill-judged use of mis- "guided power.

"The interpretation and construction of contracts, "when drawn in question between the parties, belongs "exclusively to the judicial branch of the Government."

In the Binghampton Bridge case, 3 Wallace, 72, the question arose whether the provision in the first charter, that no other bridge should be built within two miles either way, was binding upon subsequent Legislatures, and it was held that the provision was so binding, and the Court held void a charter afterwards granted authorizing another bridge to be built within the prescribed limits.

Mr. Justice Davis, in delivering the opinion of the Court, says:

"The Constitutional right of one Legislature to grant "corporate privileges and franchises, so as to bind and "conclude a succeeding one, has been denied. We have "supposed if anything was settled by an unbroken course "of decisions in the Federal and State Courts, it was "that an act of incorporation was a contract between "the State and the stockholders. All Courts at this day "are estopped from questioning the doctrine. The se- "curity of property rests upon it, and every successful "enterprise is undertaken in the unshaken belief that it "will never be forsaken. A departure from it now "would involve dangers to society that cannot be fore- "seen; it would shock the sense of justice of the coun- "try, unhinge its interests, and weaken, if not destroy

"that respect which has always been felt for the judicial "department of the Government. An attempt even to "reaffirm it, could only tend to lessen its force and obli- "gation. It received its ablest exposition in the case of "Dartmouth College vs. Woodward, which case has ever "since been considered a land-mark by the profession, "and no Court has since disregarded the doctrine that "the charters of private corporations are contracts pro- "tected from invasion by the United States. And it has "since so often received the solemn sanction of this "Court, that it would unnecessarily lengthen this opinion "to refer to the cases, or even enumerate them. The "principle is supported by reason as well as authority. "It was well remarked by the Chief Justice in the Dart- "mouth College case, that the objects for which a cor- "poration is created are universally such as the Govern- "ment wishes to promote. They are deemed beneficial "to the country, and this benefit constitutes the consid- "eration—and in most cases the sole consideration—for "the grant. The purposes to be attained are generally "beyond the reach of individual enterprise, and can only "be accomplished through the aid of associated wealth. "This will not be risked unless privileges are given and "securities furnished in an act of incorporation. The "wants of the public are often so imperative that a duty "is imposed on Government to provide for them, and as "experience has proved that a State should not directly "attempt to do this, it is necessary to confer on others "the faculty of doing what the sovereign power is un-

"willing to undertake. The Legislature therefore says "to public-spirlted citizens: 'If you will embark, with "your time, money and skill, in an enterprise which will "accommodate the public necessities, we will grant you, "for a limited time, or in perpetuity, privileges that will "justify the expenditure of your money and the employ- "ment of your time and skill.' Such a grant is a con- "tract, with mutual considerations and justice, and good "policy alike require that the protection of the law "should be assured to it."

In the case of Minot vs. P. W. & B. R. R. Co., 18 Wallace, 206, the Supreme Court of the United States again announced the same doctrine. They say—

"That the charter of a private corporation is a "contract between the State and the corporators, and "within the provision of the Constitution prohibiting "legislation impairing the obligation of contracts, has "been the settled law of this Court since the decision in "the Dartmouth College case.

"Nor does it make any difference that the uses of the corporation are public, if the corporation itself be private.

"The contract is equally protected from legislative "interference, whether the public be interested in the "exercise of its franchise, or the charter be granted for "the sole benefit of its corporators."

See, also, Home of the Friendless vs. Rouse, 8 Wallace, 431, and the University tax case, same volume.

In the case of O. & M. R. R. Co. vs. McClelland, 25 Ill. 140, this Court said:

"The decisions of the British and American Courts "are numerous, and believed to be uniform—that a char- "ter of a private corporation, not created for public or "municipal purposes, is a contract between the Govern- "ment and the corporators.

"When such a charter is granted and accepted, it "creates an implied agreement that they shall be per- "mitted to exercise the rights and franchises conferred, "and that they will, on their part, in good faith, accom- "plish the objects of their creation, and discharge all the "duties imposed by the charter. Being a contract, it "necessarily follows that any act of the Legislature "which repeals, materially impairs or alters their rights "without their assent, would be in contravention of this "Constitutional provision."

And in the case of Newstadt vs. Illinois Central Railroad Company, 31st Ill. 484, the question arose as to the validity of the provision of defendant's charter with regard to the payment of taxes. The Court sustained the provision, and remark:

"The act to incorporate the Illinois Central Railroad "Company, of which the above section is a part, is a con- "tract between the State and the company which cannot "be changed or annulled without the consent of both "contracting parties."

In this case, the city of LaSalle, under a charter passed subsequent to the charter of defendant, claimed

the right to impose taxes upon the property of defendant, in contravention of the provisions of defendant's charter upon that subject, and the decision so clearly and explicitly determines the character of defendant's charter, affirming it to be a contract incapable of repeal or modification by the State without the consent of the company, that further argument or citation of authorities would seem to be wholly unnecessary.

Again, in the case of Illinois Central Railroad Company vs. The City of Bloomington, Chicago Legal News, Vol. VII, p. 379, this Court was called upon to consider the liability of the company to erect and maintain crossings on streets subsequent to the building of the road, the city claiming the right under its charter to require all railroad companies to maintain such crossings; and it was held that the company not being required by any provision of its charter to bear such a burden, that it was not legally imposed. The burden was in effect a tax which was not only unequal and oppressive, but it was such as, under the provisions of the charter referred to in the Newstadt case, could not be enforced.

In the case of Phil., Wil. & Balt. R. R. Co. vs. Bowers' 4 Houston, 506, decided at June Term, 1873, the Court of Errors and Appeals of Delaware, was called upon to consider the validity of a legislative provision fixing a tariff of rates for the railroad in question.

The charter conferred upon the company the right to fix the rates, with no reservation of any power in the premises to the State.

The Court held that the subsequent act fixing the tariff was in contravention of the charter, and was void because it impaired the obligation of the contract. The Court say:

"In the first place, then, since the decision of the "celebrated Dartmouth case in 1819, it had ceased to be "a point for discussion that a corporate charter is a con- "tract within the prohibitory clause referred to; and "further, that a charter is none the less protected "against legislative interference, although the franchise "granted be one in the exercise of which the public are "interested, if, nevertheless, the corporation itself be a "private one. For the uses of a corporation may, in a "certain sense, be public, and yet the corporation, with "its franchises and property, be private, as much so as if "such franchise and property were vested in a single in- "dividual instead of in a company; and nothing can be "clearer than that franchises and property which in their "nature are private, must be equally inviolate, whether "vested in a corporation or in an individual. To this "class of private corporations for public uses, belong a "large number, such as colleges, banks, insurance, turn- "pike companies, &c."

* * * * * *

"The object and effect of the law under considera- "tion is to regulate, and so far restrict the power of the "railroad company to charge for the transportation of "passengers and freight. Of such a power, it is hardly "enough to say that it is one of value and importance to

"the company. It is essential to the enjoyment of the "franchise, and must be presumed to have been the con- "sideration for which the corporators accepted the char- "ter, invested their money, and assumed the obligations "imposed upon them.

"It was undoubtedly competent for the Legislature, "by a provision of the charter, to reserve to itself the "right to supervise and regulate, in the future, this "power of the Company; but upon a careful examination "of the original acts incorporating the several companies "now composing the Phil., Wil. & Balt. R. R. Co., we are "unable to find in them any reservation of such legisla- "tive control as is necessary to sustain the act under "consideration.

"The power to adjust the tariff of charges by its own "officers, according to their view of the necessities of busi- "ness and of justice to the public, without supervision, was "a part of the franchise as it was granted.

"The attempted regulation by the Legislature of this "power, materially abridges the beneficial exercise of it by "the corporation, and without doubt impairs the obliga- "tion of the contract in the sense of the Constitution, as "interpreted by the Dartmouth College case. The ques- "tion is not admissible in what degree the power of the "company is restricted by the statute, or whether the reg- "ulation enacted by it is, or is not a reasonable or proper "one."

The Supreme Court of Missouri, in the case of Sloane vs. Mo. Pac. R. R. Co., have recently had occasion to examine this subject. The opinion was filed on the 22d of

Nov., 1875, and it has not been published, we insert it entire. It is as follows:

"Napton, J., delivered the opinion of the Court.

"On the first day of April. 1872, the Legislature of this State passed an act entitled 'An Act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this State for transporation of freight on said road.' The first section of this act is as follaws:

" 'No railroad corporation organized or doing business in this State, under any act of incorporation or general law of this State, now in force or which may hereafter be enacted, shall directly or indirectly charge or collect for the transportation of goods, merchandise or property on its road, for any distance, any larger or greater amount as toll than is at the same [time] charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road; nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road, or roads connected therewith which it has a right to use; nor shall any such railroad corporation charge or collect for the transportation of goods, merchandise or property over any portion of its road a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation as fix, prescribe or establish any greater toll or compensa-

tion than is hereinbefore described, are hereby declared to be void.'

"The third section of this act prohibited any railroad company from increasing its rates of toll for transportation, etc., from one point to another, by reason of any decrease in its rates required by the first section, and declared that the rate of toll after the passage of the act should not be altered from what it was in the same month and day in the year, 1871.

"The fourth section declared a forfeiture of one thousand dollars for any breach of this act, to be recovered by any person aggrieved.

"This suit is for a violation of this act by the defendant, setting out thirty-one breaches of the act, and claiming $1,000 for each breach. In one count the allegation is that defendant charged and received a greater sum for transporting certain merchandise from St. Louis to Warrensburg than it charged for transporting the same class of freight in similar quantities from St. Louis to Kansas City, the distance from St. Louis to Kansas City being 63½ miles greater than from St. Louis to Warrensburg.

"The defendant answered, admitting the facts charged, but asserting that under its charter, dated March 12, 1849, and an amendatory act passed March 1, 1851, and under the act of March 31, 1868, the right to regulate its rates of freight, etc., was left exclusively to defendant. The answer moreover alleges that the rates were reasonable, and the discrepancy stated was owing to the competition which the road had to meet at Kansas City from other lines of railroad and from steamboats, and denies the validity of the act of 1872."

To this answer, the plaintiffs demurred for various reasons:

"First, because the provisions of defendant's charter are not impaired by the act of 1872

"Second, because the charter of defendant does not authorize it to make any such regulation of freights as is provided against in the act of 1872.

"Third, because the act of 1872 is a police regulation, authorized by the laws of the State and of the United States.

"Fourth, because defendant's road is a public highway, and the act of 1872 is not void.

"Fifth, because the charter of defendant does not exempt it from the operation of the law of April 1, 1872, under which the proceedings were had.

"The Court overruled the demurrer, and the plaintiffs electing to stand thereon, a judgment for defendant was entered, and the case comes here by appeal.

"The questions presented by this case have been discussed very elaborately and with great ablility on each side; but we think the determination of the case depends on the single question whether this act of 1872 is a valid act so far as the present defendant is concerned.

"It is scarcely necessary to refer to the original charter of the defendant, because the act of the Legislature of March 31, 1868, under which the present company bought the road, is a change of the original charter. The act declared that 'the said railroad company shall be subject to the provisions of the general laws of the State, now in force or hereafter to be enacted, classifying freights and fixing the regulation rates and charges for the transportation of

treights and passengers by the railroads of this State: Provided, that the provisions of this section, subjecting the Pacific Railroad to future legislation, shall not take effect for ten years after the passage of this act.'

"This act undoubtedly recognizes the fact that previous to its passage the Pacific Railroad was not subject to any regulations of the Legislature classifying freights or fixing the rates of transportation, but subjects the road to such legislative regulations after 1878.

"The charter of this company had provided that the company 'should determine the terms, conditions and manner in which merchandise, property and passengers should be transported thereon, and that such company should receive such tolls and freights as may be determined on by the Directors, and should keep up statements of the rates of tolls and freights to be charged'

"We hardly think it necessary to revert to the Dartmouth College case to justify the assertion that private corporations, although established for public use, are still entitled to such rights as the Legislature creating them have bestowed in their charter or acts of creation. If the rights so bestowed are inconsistent with, or embarrass the powers which the Legislatures cannot part with, then such renunciation by Legislatures would be of no avail, and not bind their successors. It is not contended in this case that a Legislature may not part with iss right of taxation—one of the most important attributes of sovereignty. The contrary has been asserted by the Supreme Court of the United States, and its decisions have been acquiesced in. The right to regulate the tolls on a road is a matter of inferior importance to the State; and if the right of taxation may

be abandoned, it is difficult to perceive why the right of regulation of tolls may not be transferred to the corporation.

"The power to regulate tolls is, then, granted to this defendant, not merely by its charter, but by the act of 1868, under which defendant bought. The right, it is conceded, is subject to the inherent right of the State to make police regulations, and to the common law right of every citizen to hold a common carrier responsible for every violation by the railroad company of its duty as a common carrier.

"The act of 1872 undertakes to define the obligations of railroad companies, and to declare that a charge for one distance, if it exceeds a charge for a longer one, is an unjust discrimination. It may be so; but whether it is or not, is a question for the courts to decide, and not the Legislature. The act of 1872 declares that such discrimination is an unjust one, without regard to any circumstances whatever. In other words, the Legislature, by this act, assumed a power which the charter had originally granted to the company, and which the act of 1868 had continued to confide in the company for ten years after the passage of that act; and the only question is whether the act of 1868, under which this road is held, is a valid one; for if it is, then primarily the defendant is invested with the power to fix its rates of freights and passage, subject to such police regulations as the State always retains power to make. The term police is a very indefinite one. Perhaps Judge Cooley's definition may be considered as exact a one as we shall find: 'Police regulations,' says the au-

thor, 'must have some reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter or curtailments of the corporate franchise.' This subject was thoroughly examined in the Court of Errors and Appeals of the State of Delaware, in the case of the Philadelphia, W. & B. R. Co. vs. Bowers, 4 Houston, 506, a case very much like the present in all respects.

"In that case it was held that the power of the company to adjust its tariffs of charges by its own officers, according to their views of the necessities of business and of justice to the public, having been confided in the franchise granted to the company, without any reservation of legislative supervision or control, the Legislature of the State has no right to assume control of such regulations, and undertake to fix by law different rates from what the company had fixed: that the power thus granted to the company was an essential one to the enjoyment of its franchise, and must be presumed to have been the consideration for which the corporators accepted the charter. And in regard to the police power it was held that the Legislature may at any time regulate the exercise of the corporate franchise by general laws passed for the peace, good order, health, comfort and health of society, but that under the color of such laws it could not destroy or impair the franchise, nor any right or power essential to its beneficial exercise.

"In this opinion of the Court of Appeals of Delaware we heartily concur, it being understood that any citizen has the right, without regard to charters, to hold the company responsible for any breach of its duty as a common carrier, in charging exorbitant freights or tolls, or in making unjust discriminations.

"The objection to the act of 1872 is that the Legislature undertook to pronounce unjust certain discriminations made by the company. This the Legislature had no power to do. The right to fix the tolls had already been confided to the defendant until the year 1878.

"An arbitrary rule was adopted by the Legislature, determining that certain rates were unjust. Whether they were so or not, was a matter depending on circumstances of which the Legislature were not made judges. The liability of defendant at common law and on general principles, not abrogated by the Legislature, was a matter for the determination of courts of justice with the aid of juries. New England Ex. Co. vs. Maine Central R. R. Co., 52 N. Hamp., 430; Att'y Gen. vs. R. R. Cos., 35 Wisconsin, 432.

"We were therefore all of opinion that the act of the Legislature of April 1, 1872, was invalid so far as it affects the defendant. Judgment affirmed. The other judges concur."

In view of the foregoing citations we submit that if there be any force in judicial decisions, the proposition that such a charter is a contract, and within the protection of the Constitution, is not be denied. In the language of Mr. Justice Davis, "All courts, at this day, are estopped from questioning the doctrine. * A departure from it now would involve dangers to society that cannot be fore-

seen; it would shock the sense of justice of the country, unhinge its interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government." There can be no departure from it, nor can there be any modification of it. If not recognized fully, and followed accordingly, it must be abandoned in toto. The early statesmen foresaw the necessity of this constitutional provision In the frequent change of officers, and the consequent temptation to try new theories, and above all the natural disposition to fly to the government for relief, in times of commercial and monetary depression, it was foreseen that private rights based upon contract, must often be disregarded, unless protected by the stern and stable power of the Federal Constitution. Aside from the injustice of such an invasion, it was perceived that there could be no more fruitful source of public misfortune, and the people in their sober second thought, after the passion of the hour has subsided, will rejoice that they are thus protected from self-injury.

But is said by those who affirm the validity of this legislation, that legislative authority is a trust which the Legislature cannot irrevocably delegate or abandon. It follows, then, that under pretense of exercising a power which could not be abandoned or delegated, the Legislature might disregard its most solemn obligations,

refuse to perform its most solemn contracts, and repudiate its most solemn pledges. In support of this view, that the Legislature cannot delegate or abandon its powers, certain adjudications are sometimes cited, all being substantially alike in the principle they affirm, and of which the following are fair examples:

The Presbyterian Church vs. The City of New York, 5 Cowen, 538.

Coates vs. the same, 7 Cowen, 585.

These cases involved the power of the City of New York to cancel privileges previously given by the municipal authorities to use certain grounds perpetually for the purposes of interment. After the lapse of many years, the growth of the city about the neighborhood rendered it manifestly unsafe and dangerous to the public health longer to permit the grounds to be used for that purpose, and it was held that the city had no right, in the first instance, to grant such a privilege irrevocably, for it was in plain violation of the duty to protect public health and guard human life, and hence the cancellation was good.

In the case of People, &c., vs. Mayor, &c., of New York, 32 Barbour, 102, it was held that in regard to ferries over the waters belonging to the State, the right to regulate the tolls is an ancient and well settled prerogative of the sovereign, and the grantee of a ferry franchise must be presumed to accept subject to this implied right, and where the GRANT IS SILENT ON THIS POINT, the right of regulation remains in the State.

In the case of Commonwealth vs. Alger, 7 Cushing, 84, the question was as to the right of the State to make the regulation in question, which was in regard to the erection of wharves upon the flats along the sea shore subject to the ebb and flow of the tide, by which wharves was prevented a reasonable enjoyment by the public of the free navigation of the harbor. And it was held that this regulation stood upon the same ground as other police regulations—such as those affecting slaughter houses, cemeteries, hospitals, wooden buildings, powder magazines, and the like. And the decision rested upon the right of the public to fish or anchor upon, or sail over the ground in question, when the sea was in; this right, being fairly deducible from the provisions of the ancient charter and laws of the Colony on the subject, and it followed that any proceeding interfering with such public rights would be illegal.

In the case of the Mayor, &c., of Baltimore vs. The Board of Police, 15 Md., 389, the question was as to the powers of a public corporation, to-wit: the city of Baltimore.

Such political bodies are mere agencies of the State for the better government of a locality, and it is not doubted that the State may at pleasure modify or repeal the municipal powers, taking care that no private rights that have vested under the original authority, be materially affected.

The case of O. & M. R. R. Co. vs. McClelland, 25 Ill. 140, illustrates another class of cases, quite numerous,

standing upon confessedly good grounds, nowise in conflict with the position assumed by appellant in the case at bar.

The question was whether a statute requiring railroads to fence their track was constitutional, and it was solved in the affirmative upon reasons of acknowledged force. The statute was held to be the exercise of a police power necessary for the protection of human life, and it was likened to the statutes requiring the fencing of saltpetre ~~cars~~ Caves and castor bean crops, prohibiting stock from running at large when affected with contagious diseases, quarantine regulations, &c.; but the Court distinctly recognized the general doctrine of chartered rights to be settled as above stated, and as will be seen from a quotation heretofore given from the opinion.

Again, it is urged by those who affirm the validity of this legislation, that it is but a competent exercise of the police power of the State which is acknowledged to be reserved in all cases. What is meant by this term?

Blackstone defines the public police and economy as "the due regulation and domestic order of the kingdom, "whereby the inhabitants of a State, like members of a "well governed family, are bound to conform their general "behavior to the rules of propriety, good neighborhood, and "good manners, and to be decent, industrious and inoffen-"sive in their respective stations." 4 Bl. Com., 162.

"The police of a State, in a comprehensive sense, "embraces its system of internal regulation, by which it "is sought not only to preserve the public order and to "prevent offenses against the State, but also to establish "for the intercourse of citizen with citizen those rules of "good manners and good neighborhood which are calcu- "lated to prevent a conflict of rights, and to insure to each "the uninterrupted enjoyment of his own, so far as is rea- "sonably consistent with a like enjoyment of rights by "others." Cooley Const. Line, 572.

Says another jurist, Judge Redfield: "The police "power of the State extends to the protection of the "lives, limbs, health, comfort and quiet of all persons, "and the protection of all property within the State. "According to the maxim, '*sic utere tuo, ut alienum non lædas,*' "which being of unviversal application, it must of course "be within the range of legislative action to define the "mode and manner in which every one may so use his "own as not to injure others."

Cooley (Const. Line, 577) observes: "The limit to "the exercise of the police power in these cases (cor- "porations acting under legislative charter) must be "this: The regulations must have reference to the com- "fort, safety or welfare of society; they must not be in "conflict with any of the provisions of the charter; and "they must not, under pretense of regulation, take from "the corporation any of the essential rights and privileges "which the charter confers. In short, they must be po-

"lice regulations in fact, and not amendments of the "charter in curtailment of the corporate franchise.

"The maxim, '*sic utere tuo, ut alienum non lædas*,' is that "which lies at the foundation of the power, and to what- "ever enactment affecting the management and business "of private corporations it cannot fairly be applied, the "power itself will not extend. It has accordingly been "held that where a corporation was chartered with the "right to take toll from passengers over their road, a sub- "sequent statute authorizing a certain class of persons "to go toll free, was void." Pingrey vs. Washburn, 1 Aiken, 268.

"This was not a regulation of existing rights, but it "took from the corporation that which they before pos- "sessed, namely, the right to tolls, and conferred upon "individuals that which before they had not, namely, "the privilege to pass over the road free of toll."

See The People, &c., vs. Jackson & M. P. R. R. Co., 9 Mich., 307.

In the State vs. Noyes, 47 Maine, 214, it was sought by statute to compel all railroads to wait at least twenty minutes at the crossing of other roads, to enable passengers to make close connections, and it was urged that this regulation was a proper exercise of the police power. The Court held otherwise, saying:

"It is not believed that those who travel or cause "goods to be transported on railroads have a legal claim "for the security of convenience by statute laws, requir- "ing duties of the proprietors of such roads (which duties

"are additional to those prescribed in their respective "charters, and which the Legislature has precluded it- "self from imposing) which those who undertake to "travel in stage coaches, or have goods carried by other "common carriers, have not."

Again, on page 216, the same Judge says:

"But if chartered rights may be impaired and new "duties imposed upon a corporation, without compensa- "tion is effectually secured, with success, in contraven- "tion of the stipulations in the charter, under the prin- "ciple that it is merely the exercise of the police power "to promote public convenience, it is a new and easy "mode by which this constitutional security of private "property and privileges may be broken down."

In the case of Phil., Wil. & Balt. R. R. vs. Bowers, cited above, the Court of Errors and Appeals of Delaware, thus discuss the subject of police powers:

"The police power of the State comprehends all "those general laws of internal regulation which are "necessary to secure the peace, good order, health and "comfort of society. We are now concerned, not so "much to discuss this power at large, as to ascertain, "with sufficient precision for the case before us, what "is the proper limit of the State police power in its "bearings upon chartered rights and privileges, as these "are protected by the Constitution of the United States.

"It is not difficult to ascertain a rule sufficiently defi- "nite to be applied to cases, and one securing all inter- "ests involved—saving to the State on the one hand all

"needful authority for the legitimate purposes of police "regulations, and yet on the other hand not intrenching "upon the constitutional protection of chartered rights.

"Such a rule would seem to be this: That the Leg- "islature may at all times regulate the exercise of the "corporate franchise by general laws passed in good faith "for the legitimate ends contemplated by the State police "power; that is, for the peace, good order, health, com- "fort and welfare of society; but that it cannot, under "color of such laws, destroy or impair the franchise it- "self, nor any of those rights or powers which are essen- "tial to its beneficial exercise. Thus acts regulating the "mode of carriage of passengers with a view to their "safety, or regulating the speed of travel through towns "and cities, or prescribing certain regulations for the "public safety at crossings, or requiring the erection of "fences, etc., are proper exercises of the power of police "regulation. Such acts leave the franchise unimpaired, "and simply regulate the exercise of it in the same par- "ticulars essential to the general safety, health and "comfort of society. But quite different are acts which "directly touch the constitution of the corporation, or "abridge or modify any of those corporate powers which "are essential to the very ends of its creation—such "powers, for example, as the right to operate a railroad "at all, the right to take tolls or fares and freights, or to "adjust their tariff of such charges. These are not po- "lice regulations, but are in substance and effect amend- "ments of the charter, and it is most obvious that if,

under color of the police power, corporations may be thus dealt with, the Constitutional provision, so solemnly adjudged by the Supreme Court to be a protection to their rights, is, after all, as to them wholly nugatory." *

The instances of an appeal to the police power in defense of an act abrogating rights granted by previous legislation, are not uncommon.

In the Binghampton Bridge case, 3 Wallace, it appeared that a former generation had thought it wise to grant an exclusive franchise for bridge purposes, for two miles in each direction. At the time the grant was made, it was the best contract the State could possibly obtain, and was highly satisfactory to the public.

Afterwards more bridges were wanted, and it was proposed to build them irrespective of the rights granted to the first company, and without compensation for an invasion of the exclusive privileges.

In the New Bedford Bridge case, 2 Gray, 339, the Legislature proposed to interfere in behalf of the public, in aid of navigation, to compel the building of wider draws.

In the Boston & Lowell R R. case, 2 Gray, 1, the same interference was proposed in behalf of the public, to secure another railroad between given points.

In 47 Maine, 214, State vs. Noyes, the object was to obtain close connections at the expense of the company.

In all these instances the Courts refused the demand, holding that, while it might be highly desirable to afford the additional conveniences sought for, yet it could not be done without compensation.

It is not insisted that there is any peculiar sanctity at-

taching to a railroad franchise. No one claims that railroad property is entitled to any more or other protection than is guaranteed to private possessions. It is only urged that the same rules should prevail in considering either kind of property.

The effect of the charter granted to these defendants is to enable them, as an artificial person in their corporate capacity, to operate a business that might be as well operated by a private citizen having sufficient means to acquire or build the road, and operate it. In thus creating the corporation certain distinct powers are granted, and among them the following:

"The Board of Directors shall have power to estab-"lish such rates of toll for the conveyance of persons and "property upon the same, as they shall from time to "time by their by-laws direct and determine, and to levy "and collect the same, for the use of said company."

This provision is not indefinite or ambiguous—it is plain, positive, direct.

It was inserted in view of the then well settled law of the land, which regarded this charter as a contract, which could not be altered, modified or repealed, except by consent of both parties. Suppose this clause had been omitted, then the company would have stood upon the same ground as a private citizen, exercising the functions of a common carrier—such as a stage coach proprietor, the owner of a steamboat, or of any other vessel or vehicle used in serving the public by carrying passengers and freight from point to point. The right to take reasonable tolls would have been a necessary incident to the business, but it never would have been supposed that under our system of government, the

Legislature could have judicially ascertained and fixed upon certain rates as being reasonable.

We admit, to the fullest extent, the police power of the State over individuals and corporations alike, restraining evil or immoral practices, unwholesome or dangerous occupations, requiring such safeguards as may be necessary for public health or safety, inthe performance of lawful acts, establishing quarantine regulations, supervising the management of hospitals and cemeteries; but we respectfully submit that the private rights cannot be invaded. chatered privileges, monopolies if you please, (for these may be lawful), cannot be broken down to subserve the public convenience, or to increase the profits or gains of particular classes of persons. It might subserve the public interests if all freights and passengers could be carried gratis It would doubtless please the consumers of grain if the freights from the cornfield to the seaboard were reduced one-half, yet it can hardly be termed an exercise of the police power for the Legislature to pass a law to that effect. As well might the same sovereign will determine the charges of hotels or the profits of manufactories, because these happen to be operated under a charter granted by a previous Legislature, no such power being reserved to the State in the charter. It was never contended that there could be a legislative schedule of prices for produce or manufactured articles, for the services of professional men, the wages of laborers, or the profits of any other branch of trade.

There is no mystery about a railroad franchise; it is nothing more or less than an authority to an artificial per-

son to perform certain acts which a natural person might do without the authority.

The consideration operating upon the mind of the creator, is to further some object of conceded benefit or advantage to the public. The terms and conditions of the grant are plainly phrased, and these measure the rights and privileges of the corporation. The franchise may not be valuable at first, the enterprise is one of doubtful propriety; its success is contingent upon many circumstances as yet unknown; it may prove a total failure, and every dollar invested, and much personal fortune, may be swallowed up; the corporators take the risk. If it succeeds, the franchise is valuable. Great risks ought to bring the right to enjoy great gains: but if the police power may be invoked on all convenient occasions, to trim the profits of every business to an ideal standard for the benefit of those whose means and courage have not contributed to the fortunate growth of the business, then we shall soon put an effectual check upon all commercial enterprises. What incentive to prosecute great undertakings, to overcome natural obstacles and risk immense sums in uncertain ventures, if the law will not protect the promotor in his profits. Such an agrarian view, if carried into practice, would soon remit us to primitive conditions, mentally, morally, and financially.

It was for the Legislature granting the charter to decide whether such an arrangement would be sufficiently advantageous to the State. This was for them to say in view of their then condition, and in so saying they were able to bind those who might come after them. But

whether they made a fortunate arrangement, looking at it in view of present interests and prospects, is not an admissible question. We must abide the result, and must construe the rights of the parties by known rules established for the guidance and protection of all.

As a matter of fact the public has no right to complain, since the result has been full of prosperity and wealth to the State, but that is not material in passing upon the legal rights of the parties.

But it is urged by those who affirm the validity of the legislation, that the company can only charge reasonable rates, and that this act is merely to fix such rates and punish the taking in excess thereof.

We deny that the corporation can be held, either by statute or at common law, for taking an unreasonable rate.

If it be conceded that at common law, one exercising the business of a common carrier was liable for charging unreasonably, yet we say that the rule cannot operate upon this corporation. But what was the rule?

It is stated thus by Chancellor Kent, Vol. 2, side p. 599.

"As they (common carriers) hold themselves to the world as common carriers for a reasonable compensation, they assume to do what is required of them in the course of their employment, if they have the requisite convenience, to carry, and are offered a reasonable or customary price,

and if they refuse without some just ground, they are liable."

This assumes an implied or supposed holding out to world that they will carry for reasonable or customary compensation, upon which assumption one wishing their services or acting with reference to them (as for instance engaging to deliver goods at a given point on the carrier's route) would have a right to rely; and the liability of the carrier rests mainly upon the ground that he has disappointed the just and reasonable expectation of the patron, (who, but for this expectation would presumably have taken a different action) rather than upon any supposed miscon duct in asking too much. It will be noticed, also, that he might demand (and must accept if offered) a customary price, whether moderate or not

Now, is such an assumption to be implied of a corporation acting under a charter which gives it the absolute power "to establish such rates of toll for the conveyance of persons and property as they (directors) shall from time to time by their by-laws direct and determine, and to levy and collect the same for the use of said company?"

We submit that this would rather be the form of the undertaking: THAT IT WOULD CARRY FOR ALL, TO THE EXTENT OF ITS CAPACITY, AT CERTAIN RATES ESTABLISHED BY THE BY-LAWS, AND USUALLY MADE PUBLIC IN THE FORM OF PRINTED SCHEDULES.

So we say, whatever might be the rule, if the charter were silent upon the point, yet as it contains this provision the defendant is not simply authorized to carry—the right to receive a reasonable and customary compensation being implied—but it is also authorized "to levy and collect" for

its services such rates as the directors "shall from time to time, by their by-laws, direct and determine."

If it be said that these rates must be reasonable or customary, we answer: It is not so provided. If such a condition is impliedly attached, then this provision is absolutely without value. It has no significance. The charter would have been the same if this clause had been omitted, for the right to demand reasonable or customary compensation would have been implied if nothing had been said.

We distinctly affirm that it is a fair construction of the language to say that the charge may be high or low, reasonable or unreasonable, so long as it is fixed by the by-laws; and the only way of correcting the fancied evil, is by the natural remedy, flowing from the conditions of trade, demand and supply, as affected by the sharp competition already grown up in the immense carrying business of the State. The keen instincts of self interest may be safely depended upon to furnish the needed relief, and it will be found that unreasonable rates will not long be maintained, because self destructive.

But if it be conceded that the rates must be reasonable, that this is an implied condition, limited upon the express power to charge, what follows?

Can the Legislature judicially find and ascertain what is reasonable? It cannot, for this is an invasion of another department of governmental function.

If we are answered that by this act the Legislature do not judicially find and fix the rate, but only provide a mode by which a PRIMA FACIE rate can be ascertained, and that the act then merely affixes a punishment for taking in excess of this rate, we reply by again quoting from the New Bedford Bridge case:

"The Commonwealth has no more power or authority "to construe the charter than has the corporation. By be- "coming a party to a contract with its citizens, the govern- "ment divests itself of sovereignty with respect to the terms "and conditions of the contract, its construction and inter- "pretation, and stands in the same position as a private "individual.

"If it were otherwise, then the rights of parties con- "tracting with the Government would be at the caprice "of the sovereign, and exposed to all the risks arising "from the corrupt or ill-judged use of misguided power. "The interpretation and construction of contracts drawn "in question between the parties, belongs exclusively to "the judicial branch of the Government."

In State vs. Noyes, 47 Maine, 204, the Court say:

"The right was conferred so that the directors of the "company should prescribe rules and regulations ac- "cording to their own judment, without any interference "of the Legislature, unless the company should in some "way abuse the privileges granted; and in determining "whether they had been so abused, the power to judge "is not left with the department of the Government "which conferred the privileges, but according to the

"act of incorporation itself, as before stated, by due pro-
"cess of law, though the Legislature might provide, by
"general legislation, fines and penalties for abuses, and
"modes in which they might be imposed; but whether
"abuses of the privileges granted had taken place in
"given cases, is exclusively with another department of
"the Government to find. New Bedford Bridge case, 2
"Gray, 339. The company being thus secured in its in-
"dependence of the Legislature, and having the right,
"by its directors, to establish a toll, for the sole benefit
"of the corporation, upon all passengers and property of
"all descriptions which might be conveyed or transported
"by them on the road, it was induced to construct the
"road and put it in operation as the consideration of the
"grant in the charter.

"The act of the Legislature thus became a contract
"between the Government, acting in its sovereign ca-
"pacity, with the company, formed on the mutual con-
"siderations, moving from one party to the other. This
"contract is to be construed by the tribunal established
"for such purposes generally, on the same principles
"which are to be contracts between private individuals,
"and in both classes the great question presented is,
"what was the intention of the parties? And the an-
"swer to this question, and the construction to be given
"to all such contracts generally, is the appropriate and
"exclusive business of the judicial department."

Now, we ask if the Legislature cannot judicially find what is reasonable, if this is strictly a judicial function,

if the Legislature cannot give a construction to the contract, how is it possible for the Legislature to pass a law by which it shall say to the judiciary, "Consider THIS a "reasonable rate, treat it, as *prima facie*, the maximum of "reasonable charges, and unless this rate is, by the "weight of the evidence, shown not be reasonable, fix "the liability of the corporation"? If the contract is beyond the power of the Legislature to construe, it must be so in toto, and surely it is not admissible for the Legislature to give it a *prima facie* construction—a construction *sub modo*, throwing the burden of proof upon the company to overcome a *prima facie* case made by their own arbitrary decree.

The company have the right to fix rates in the first instance. These rates must be reasonable, (it is assumed) and it is highly penal to make them excessive. The presumption of course is, that the company performs its duty properly and fairly, and the burden of proof would be upon the State, to show the contrary.

Now, the State having no power to construe the contract, having no right to judicially find in the premises, arbitrarily fixes a rate, and makes out its own case, in the first instance, by declaring, in its own favor and interest, that the rate so fixed is the maximum of reasonable charges. There is, in principle, no difference between this and an absolute finding—a conclusive adjustment.

The difference is in degree only, not at all in princi-

ple, and either act would be obnoxious to the same objection.

If the Legislature can say what shall be a *prima facie* case, it can say that a certain *modicum* of proof should be required to overcome such *prima facie* case. In a word, the allowance of such a power would be (to quote from the case of State vs. Noyes, 47 Me.) "a new and easy "mode by which this constitutional security of private "property and privileges may be broken down."

All reasoning upon this point must necessarily result thus. The Legislature, in the charter, gave the company the right to fix the rates. This right was given absolutely and without conditions, and any subsequent legislative act affecting this power, either by directly fixing a conclusive rate, or indirectly by making a *prima facie* standard, does impair the contract, for it is not necessary that the contract shall be wholly abrogated. It is not to be IMPAIRED in any substantial degree.

Here is a clear case of the taking of property without due process of law. It is necessary, according to the due process of law, that before condemnation, there shall be a hearing, and that judgment shall rest upon proof, the party affected having due notice and opportunity of defense.

But here there is no notice: no evidence; only a judgment.

And, worse than all, this judgment is rendered by a department of the Government to which all judicial power has been expressly denied by the Constitution,

We quote from the *American Law Register*, Vol. 14, page 392 the following syllabus of the case of Francis vs. Baker, 11 R. I. The Report is not within our reach:

A statute provided for the appointment of auditors in certain cases of assumpsit, debt, etc., involving the settlement of accounts, and for a trial by jury on demand, after the confirmation of the Report of the Auditors; and that upon such trial the report should be *prima facie* evidence of all matters embraced in the order. Held that this statute was void so far as it made the report *prima facie* evidence for the jury, it being in conflict with the provisions of the State Constitution, which declared that the right of trial by jury should be inviolate.

and by a party to a contract, the terms whereof, present the substantial issue in the case.

It is sometimes urged by those who support this legislation, that because the State has exercised the power of eminent domain in opening a right of way for this railroad, therefore it has retained, by implication, the right to contradict and set aside the clause above quoted, and regulate the rates.

This is a *non sequitur*. No such right was reserved. The supposition of such a reservation is at war with express and positive language of the grant. There is nothing ambiguous, no doubtful clause, no room for construction.

The power to condemn was given in express terms, and without the supposed condition.

It might have been a proper subject of consideration; it doubtless was, when the charter was given, whether this power should be asserted for the purpose in view. The question was then solved in the affirmative, and no doubt wisely. Without it, the necessary right of way was perhaps not attainable, for one obstinate freeholder, or one tract owned by persons incapable of consent, might have prevented the opening of this great thoroughfare for years, perhaps for all time.

producing incalculable injury to the material interests of the whole community.

As a matter of fact, it does not appear from the record that the power was ever brought into exercise, and so far as the record shows, it never was. In truth, the company's tracks were laid in part over its own lands, and in part over lands where, by purchase or donation, the right of way was procured without resort to the process of condemation.

If it be said that the exercise of this right of eminent domain is only justifiable because of a great public need, and that this need renders public the use to which the road is applied, nothing is added to the position, for the State did not guarantee that it would furnish transportation at given rates, or at reasonable rates, nor that the corporation should do so, nor is the public use of a species of property, evidence of the public ownership of the property. The use of a hotel, or a newspaper, is public, though the property is private. Many occupations are public in the same sense, yet the persons pursuing them have never been called upon to regulate their charges by a legislative scale.

In the People, &c. vs State, 20th Michigan, 478.

Cooley J. says of railroads:

"I have said that railroads are often spoken of as a "species of highway. They are such in the sense that they "accommodate the public travel, and that they are regu- "lated by law with a view to preclude partiality in their "accommodations.

"But their resemblance to the highways which belong

"to the public, which the people make and keep in repair, "and which are open to the whole public to be used at will "and with such means of locomotion as taste or pleasure or "convenience may dictate, is rather fanciful than otherwise, "and has been made prominent, perhaps, from the necessity "of resorting to the right of eminent domain for their estab- "lishment, than for any other reason.

"They are not, when in private hands, the people's "highways; but they are private property, whose owners "make it their business to transport persons and merchan- "dise in their own carriages, over their own land, for such "pecuniary compensation as may be stipulated. These "owners carry on, for their own benefit, a business which "has indeed its public aspect, inasmuch as it accommodates "a public want; and its establishment is consequently, in a "certain sense, a public purpose.

"But it is not such a purpose in any other or different "sense than would be the opening of a hotel, the estab- "lishment of a line of stages, or the putting in operation of "a grist mill; each of which may, under proper circum- "stances, be regarded as a local necessity, in which the "local public may take an interest beyond what they would "feel in other objects for which the right to impose taxa- "tion would be unquestionable.

"The business of railroading, in private hands, is not "to be distinguished in its legal characteristics from either "of the other kinds of business here named, or from many "others which might be mentioned."

The small part of a roadway that may be obtained by condemnation is so insignificant compared with the amounts expended in the construction and equipment of

the whole property, that it would seem grossly unreasonable to suppose that because this small item, bought and paid for at its appraised value, under valid legal proceedings, was procured through the exercise of a public power, therefore the ownership of the whole property is public, and subject to the risks of its judged or misjudged public regulations.

The ownership of the property must be, and necessarily is, private. Because the State has donated to a railroad company a piece of land in aid of the construction of the road, does it follow that the public may ever after interfere in the use of that land? The assets of the company become the private property of the stockholders, bought and paid for with their own money, and they may fairly object to any process that would either take their property from them at once, or by diminishing its producing power, render it without value.

If the power of earning money in sufficient amounts to pay dividends be taken away, then the property is practically worthless; and though it may happen that a small or an important element in the estate was derived from the exercise of a public function of the sovereign enabling the company to acquire a right of way as a last resort, yet this was not done without compensation; before the condemnation could be made effectual, the price must be paid—not by the State, but by the company out of its private funds. Nor was there any peculiar sanctity impressed upon the property so acquired. And thus it appears that the most important consideration in the case of eminent domain is the necessity of accomplishing some

public good which is not otherwise practicable, and the law does not so much regard the means as the need. Yet those whose money pays the damages, would be unwilling to make the investment, and would never do it if they were warned in advance that this peculiar feature of a small part of the property would give cast and color to the whole, and by the forms of a legal fiction, render public and worthless what was before private and profitable.

Trusting that we have not unduly taxed the patience of the Court in the discussion of a question already threadbare by reason of its prominence in the popular controversies of the day, in the press, and at the bar, but of infinite importance because of the interests involved and the momentous consequences attending its decision, we beg to repeat—

Any act impairing the obligation of a contract is void.

This charter is a contract.

This act impairs its obligation.

This act is void.

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