1894

The Dartmouth College Case: History and Sequence

Elmer Ebenezer Studley
Cornell Law School

Follow this and additional works at: http://scholarship.law.cornell.edu/historical_theses

Recommended Citation
Studley, Elmer Ebenezer, "The Dartmouth College Case: History and Sequence" (1894). Historical Theses and Dissertations Collection. Paper 17.

This Thesis is brought to you for free and open access by the Historical Cornell Law School at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Historical Theses and Dissertations Collection by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
THE DARTMOUTH COLLEGE CASE;
HISTORY AND SEQUENCE

WRITTEN FOR THE DEGREE OF
BACHELOR OF LAWS

—by—
ELMER EBENEZER STUDLEY, A. B.

CORNELL UNIVERSITY -- SCHOOL OF LAW
1894
In writing this thesis I have endeavored, as far as possible, to gather my material from the original sources, both for the historical and the legal portion of the work. This has occasionally been impossible or inexpedient. In such cases I have been driven to the secondary authorities, and have consulted standard works of history, and text books on the law involved in the case.

It was at first my purpose to study the sequence features more thoroughly and in detail; but the work has already projected itself many pages beyond my expectations. For myself, at least, this research has had an interest and fascination which arouses a purpose to continue, at a future day, this most interesting of studies.

E. E. S.

Cornell University,

Ithaca, N. Y.

May, 1894.
<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allen v. Dartmouth College</td>
<td>13</td>
</tr>
<tr>
<td>Beer Co. v. Massachusetts</td>
<td>53</td>
</tr>
<tr>
<td>Binghamton Bridge Case</td>
<td>57, 66</td>
</tr>
<tr>
<td>Citizens Street Railway Co. v. City Co.</td>
<td>59, 66</td>
</tr>
<tr>
<td>Commonwealth et al. v. Owensboro Railroad Co.</td>
<td>61, 66</td>
</tr>
<tr>
<td>Dartmouth College v. Woodward</td>
<td>13</td>
</tr>
<tr>
<td>Delaware Railroad Tax Case</td>
<td>59</td>
</tr>
<tr>
<td>Dingman v. People</td>
<td>53</td>
</tr>
<tr>
<td>Farrington v. Tennessee</td>
<td>53, 65</td>
</tr>
<tr>
<td>Gordon v. The Appeal Tax Court</td>
<td>59</td>
</tr>
<tr>
<td>Hatch v. Lang</td>
<td>13</td>
</tr>
<tr>
<td>Manhattan Trust Co. v. City of Dayton</td>
<td>63, 67</td>
</tr>
<tr>
<td>Marsh v. Allen</td>
<td>13</td>
</tr>
<tr>
<td>Ohio Life etc. Co. v. Debolt</td>
<td>59</td>
</tr>
<tr>
<td>People v. The Commissioners</td>
<td>59</td>
</tr>
<tr>
<td>Pierce v. Gilbert</td>
<td>13</td>
</tr>
<tr>
<td>Providence Bank v. Billings</td>
<td>53</td>
</tr>
<tr>
<td>Railroad Co. v. McClure</td>
<td>50</td>
</tr>
<tr>
<td>Regents of University v. Williams</td>
<td>53</td>
</tr>
<tr>
<td>Case</td>
<td>Page</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Royal v. Alabama</td>
<td>53</td>
</tr>
<tr>
<td>State v. Woodward</td>
<td>53</td>
</tr>
<tr>
<td>Sinking Fund Cases</td>
<td>52, 53</td>
</tr>
<tr>
<td>Stone v. Mississippi</td>
<td>53</td>
</tr>
<tr>
<td>Tomlinson v. Jessup</td>
<td>61</td>
</tr>
<tr>
<td>VanAllen v. The Assessors</td>
<td>59</td>
</tr>
</tbody>
</table>
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>ORIGIN OF THE CASE</td>
<td>4</td>
</tr>
<tr>
<td>THE TECHNIQUE OF THE CASE</td>
<td>10</td>
</tr>
<tr>
<td>IN THE NEW HAMPSHIRE COURT</td>
<td>16</td>
</tr>
<tr>
<td>BEFORE THE FEDERAL TRIBUNAL</td>
<td>23</td>
</tr>
<tr>
<td>THE STATE CONSTITUTIONS</td>
<td>34</td>
</tr>
<tr>
<td>FRANCHISES AND CONSTITUTIONAL PROHIBITIONS</td>
<td>49</td>
</tr>
<tr>
<td>SEQUENCE FEATURES AS PORTRAYED IN LEADING CASES</td>
<td>54</td>
</tr>
<tr>
<td>A NOVEL FEATURE IN THE NEW YORK STATUTES</td>
<td>68</td>
</tr>
</tbody>
</table>
INTRODUCTION.

In the history of trials, and from out the dry and dusty pages of law reports, there are occasional flashes of intellect and wit, bursts of forensic eloquence and oratory, that cause even the work-a-day lawyer to pause, and thrill with admiration. In all the history of our law there are but few such causes. The case which surpasses all others, and has not in English Jurisprudence had an equal, since the trial of Warren Hastings, is that of Dartmouth College. It involved a vital principle of constitutional law, and the prestige of such names as Mason, Webster, Story, and Marshall have made it a landmark among trials.

For more than half a century the case slumbered in the time-stained pages of the United States Law Reports. In the subsequent cases which arose, as the sequence of the doctrine, there are occasional references to 4 Wheaton, citing the rule there established as law. These are mere sparks of light scattered here and there, which show that the case is not entirely lost in oblivion; but they are few and far apart. The cloud that
hung over a dark spot remained unbroken, and the secrets of a great case slumbered in faded letters, and in musty manuscripts.

In 1879 Mr. John M. Shirley published a volume designated "The College Causes". It contained a report of the suits in which the little New Hampshire college was involved, some of the personal correspondence of the principal participants in the case, and valuable collections of well-nigh forgotten material. The work has been criticised as bungling, and unsystematic. This is doubtless true. The author boggles and stumbles often; but he was working in the dark, and in an unexplored territory.

When properly sifted and arranged, his work throws a flood of light on a heretofore dark spot, and the Dartmouth College Case is made luminous by a burst of new sunshine. He has rescued from the limbo of historical rubbish a most fascinating incident, to which is added the magnetism and attractiveness of personal and political history. From the publication of this book, the Dartmouth College Case has suddenly sprung into prominence. No life of Webster or of Jeremiah Mason is complete without a special chapter on this now wonder-
ful case. The law periodicals, and the magazines teem with accounts of it. Staid and sedate judges review the case, accept a long settled precedent, or condemn with mild praise. In my brief research I have found articles both praising and condemning the final decision. There are essays and commentaries on the case in the Legal Gazette, American Law Review, American Bar Association, Harvard Law Review, and Albany Law Journal. These articles have all had their rise in the past ten or twelve years.

The cause arose in the bitterness of a religious controversy. It was fostered by sectarianism for a generation; and was handed from father to son, and from master to pupil. Its sponsor on the one hand was Liberalism, and on the other Conservatism. It was Jacobinism against the Church. It easily drifted into politics, and Federalism and Democracy faced each other on a new issue. A fierce political campaign, an ephemeral rise of the triumphant Democrats, an unsummary dismissal of some college officials, and the affair was brought before the New Hampshire court for adjudication. Let us now look briefly into the details of the origin of this case.
CHAPTER I.

ORIGIN OF THE CASE.

In the early days of Dartmouth College, Mr. Eleazer Wheelock, the founder of the college, had much religious controversy with Dr. Bellamy of Connecticut, who was like himself a graduate of Yale. Wheelock was a Presbyterian and a liberal. Bellamy was a Congregationalist and strictly orthodox. By the charter the college was free from any religious discrimination. But by will Wheelock provided that his son should succeed him as president of Dartmouth College.

In 1793 Judge Niles, a pupil of Bellamy, became a trustee of the college, and he and John Wheelock represented the opposite views which they had respectively inherited from tutor and father. They were formed for mutual hostility, and the contest began some twelve years before it reached the public. The trustees and president were then all Federalists, and there was no difference either of a political, or of a religious nature. The trouble arose from a resistance of a minori-
ty of the trustees to what they termed the Family Dynasty. Wheelock maintained his ascendancy until 1809, when his enemies obtained a majority in the board of trustees, and thereafter admitted no friend of the president to the government, and used every effort to subdue the dominant dynasty.

At this period the Federalists were the ruling party in New Hampshire, and the Congregationalists formed the state church. The Congregational ministers were firm Federalists, and most of their parishioners were of the same party. Dartmouth College was therefore one of the Federal and Congregational strongholds. Some years of hopeless and bitter conflict ensued. The Wheelock party finally in 1815 brought their grievances before the public in an elaborate pamphlet. This led to a rejoinder, and a war of pamphlets ensued, creating a great sensation and profound interest. Wheelock now contemplated legal proceedings. The president, therefore, went to Mr. Webster and consulted him professionally, paid him a fee, and obtained a promise of future services. About the time of the consultation Wheelock sent a memorial to the legislature charging the trustees with misap-
plication of the funds, and various breaches of trust, religious intolerance, and a violation of the charter in their attacks upon the presidential office, and prayed for a committee of investigation. The trustees met him boldly and offered sturdy resistance, denying all the charges, and especially that of religious intolerance; but the committee was given by the vote of a large majority. When Wheelock heard that the committee had been voted and was to have a hearing, he wrote to Mr. Webster and asked him to appear before them. But Mr. Webster did not come, and Wheelock went on without him. Webster was much criticised for his failure to appear before the committee, but excused himself with the reply, that he did not regard a summons to appear before a legislative committee a professional call, and that he was by no means sure that the president was in the right.

However, the truth seems to be that most of Mr. Webster's personal and political friends were either trustees themselves, or were closely associated with him in the control of the Federal party. During the interval between the consultation with Wheelock and the committee hearing, these friends and leaders saw Mr. Webster, and
pointed out to him that he must not desert them, as this college controversy was rapidly developing into a party question. Mr. Webster was accordingly convinced, and left Wheelock in the lurch making, as has been seen, a very unsatisfactory explanation of his conduct. He was thereafter irrevocably engaged on the side of the trustees, and in him they had won their most powerful ally.

But events took a sharp turn now and moved with spirit. Without heeding the advice of their eminent counsel, Mr. Jeremiah Mason, the trustees at once removed Wheelock from the presidency, and appointed in his place Rev. Francis Brown. At such defiance of the legislative committee the spark of popular excitement burst into a blaze of wrath, and the whole question was at once thrown into politics.

As Mr. Mason had foreseen, when he had warned the trustees against hasty action, all members of every other sect except the Congregationalists and all the other liberal element were united against the trustees, and therefore against the Federalists. Wheelock, who was a Federalist, went over to the opposition taking his supporters with him. When the election came on, Mr. Plumer,
the Democratic candidate, was elected governor, and with him a Democratic legislature. The position of the trustees was now precarious. Efforts were made to soothe the now rampant Democrats. It was noised about that a new college was to be founded, but the struggle was in vain. The governor in his message to the legislature declared against the trustees, and in June the legislature passed an act to reorganize the college, and virtually to place it within the control of the state.

Both boards of trustees assembled. The old board turned out Judge Woodward, their secretary, who was a friend of Wheelock, and secretary also of the new board. He resolved to fight having received money to carry it on from a friend. President Brown refused to obey the summons of the new trustees, who expelled the old board by resolution. Thereupon the old board brought suit against Woodward for the college seal and other property, and the case came on for trial in May, 1817. The writ was sued out on February 8 and the declaration was trover; Mr. Mason and Judge Smith appeared for the college, while George Sullivan and Ichabod Bartlett for Woodward and the state board. The case was argued, and went over to the
September term of the same year, when Mason and Smith were joined by Mr. Webster.¹

(1) Dartmouth College Causes, by Shirley. Curtis' Life of Webster. Lodge's Life of Webster. Private Correspondence of Webster by Fletcher Webster.
CHAPTER II.
THE TECHNIQUE OF THE CASE.

In the "College Causes" Mr. Shirley enumerates some five distinct cases that were before the courts during this rather prolonged controversy. Four of these were to test the validity of the act of the New Hampshire legislature of June, 1816,--"to amend the charter, and enlarge and improve the corporation of Dartmouth College", and the supplementary act of December 13 and 26 of the same year.

The principal changes made in the charter by the acts of the New Hampshire legislature on June 27, 1816 and December 16 and 26 of the same year were:

(1) The name is changed to "The Trustees of Dartmouth University."

(2) The number of trustees is increased from twelve to twenty-one, a majority of whom shall constitute a quorum. The nine new trustees are to be appointed by the governor and his counsel.1

---

(1) The act of December 16 repealed that part of the act of June 27 which made a majority of the trustees necessary to constitute a quorum, and made nine trustees a quorum instead.
(3) The trustees shall have power to organize colleges in the university, and to establish an institute and elect fellows and members thereof.

(4) A board of overseers, twenty-five in number, is created; the members to be appointed by the governor and counsel. The overseers are to have power to disapprove and negative votes of the trustees relative to the appointment and removal of the president, professors, and officers; relative to salaries; and also relative to the establishment of colleges and professorships, and other erection of new college buildings.

(5) Each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

Dr. Eleazer Wheelock applied to the crown for a charter, and the king in 1769, granted the charter of Dartmouth College. The charter of the above date recites in substance as follows:

That there shall be a college erected in New Hampshire, Dartmouth College by name for the education of Indian and English youth; and that there shall be in said college "from henceforth and forever" a body corpor-
ate and politic, consisting of trustees of said college, "the whole number of said trustees consisting, and hereafter forever to consist of twelve and no more." The charter expresses the intent that the corporation shall have perpetual succession and continuance forever. It also appoints Dr. Wheelock and eleven other persons as trustees. From the preamble it is to be presumed that not less than six of the eleven were the same persons who had already been named as trustees by Dr. Wheelock in his will. Seven trustees constitute a quorum. The board of trustees fill vacancies in their own number. The usual corporate privileges and powers are conferred upon the trustees and their successors forever. The charter styles Dr. Woodward the "Founder of the College", and appoints him president.

The law amending the charter of Dartmouth College was passed in December, 1817. At the time of its passage in the New Hampshire legislature, a protest was entered upon the records of the house by those who had opposed it, upon the ground that the Charter was a contract, and therefore beyond the reach of legislative control. This is said to be the first instance on rec-
ord where the "contract theory" in regard to a corporate franchise was ever invoked under our constitution, and then only as a matter of justice, and not of constitutional right.

The different suits in which the college was involved during this extended litigation were:


(2) Hatch v. Lang. Action, -- in ejectment for $3,000. This was also carried to the Supreme Court of the United States.

(3) Pierce v. Gilbert. Action, -- ejectment; damages claimed $2,000.


(5) Allen v. Dartmouth College. Action, -- assumpsit $1,000. claimed for services as president of the college.

We are concerned in this article only with the case of Trustees of Dartmouth College v. Woodward, reported in the lower court in 1 New Hampshire Reports, 111; and in the United States court in 4 Wheaton. The question
as presented in this case to the court was:

Did the Constitution under the clause, "No state shall . . . . . . pass any . . . . law impairing the obligation of contract", establish the doctrine that every charter granted by the state legislature is a contract, and as such irrevocable by act of the legislature?

The action was commenced at the court of common please, Grafton County, February term, 1817. The writ was sued out on the 8th and served on the 10th of the same month. The declaration was trover for the books of record purporting to contain the records of all the doings and proceedings of the trustees of Dartmouth College from the organization of the corporation until the 7th of October, 1816 of the value of $5,000,-- the original letters patent constituting the college, of the value of $10,000,-- the common seal, of the value of $1,000,-- and four volumes or books of accounts purporting to contain the charges and accounts in favor of the college of the value of $10,000. The conversion is alleged to have been made on the 7th of October, 1816. Plaintiff's damages are laid at $50,000.

Note.-- In the act of December 26, 1816, a fine of $500 was imposed upon any man "who shall di-
We now turn to the management and argument of the case before the New Hampshire tribunal.

rectly or indirectly wilfully impede or hinder any officer or officers . . . in the free and entire discharge of the duties of their respective offices.
CHAPTER III.
IN THE NEW HAMPSHIRE COURT.

In a previous chapter it was shown, that in the first argument of the case the interests of the college were left with Jeremiah Mason and Judge Smith, assisted later by Mr. Webster, while Mr. Woodward's attorneys were Sullivan and Bartlett. The sensation of the second trial was Mr. Webster's speech,-- a brilliant rhetorical effort,-- which was later used, in modified form, so effectively before the Supreme Court of the United States.

The argument of the case, and the opinion of Judge Richardson is given in 1 New Hampshire, ill. The opinion is vigorous and hostile, and is against the college. It holds that—

(1) The corporation of Dartmouth College is a public corporation. (The opposite of this is set forth in the court above by Chief-Justice Marshall.)

(2) An act of the legislature, adding new members to the corporation, without the consent of the old corporation, is not repugnant to the constitution of this state.

(3) The charter of the king, creating the corpora-
tion of Dartmouth College, is not a contract within the meaning of that clause of the constitution of the United States which prohibits states from passing laws impairing the obligation of contracts.

In proceeding to the opinion the court states, that it has witnessed a display of learning, talent, and eloquence that is highly complimentary to the legal profession of the state. That the failure of the plaintiff's counsel to convince the bench of the correctness of their position is not owing to any want of diligence in research, or ingenuity in reasoning; but to a want of solid and substantial grounds on which to rest their arguments.

The court then proceeds to point out, that the college is a public corporation, since its franchises were exercised for public purposes. Dartmouth College is a public corporation in the same manner in which a bank would be a corporation, if the state should purchase all the shares of the company. So also if the legislature should incorporate a number of individuals for the purpose of making a canal, and should reserve all the profit arising from it to the state, even though all the
funds might be given to the corporation by individuals, it would in fact be a public corporation. In both these cases the property and franchise of the corporation would in fact be public property. Therefore, a gift to a corporation created for public purposes is, in reality, a gift to the public.

But if, on the other hand, the legislature should incorporate a banking company for the benefit of the corporators, and should give the corporators all the necessary funds, it would be a private corporation; because a gift to such a corporation would be only a gift to the corporators. Thus it seems that whether a corporation is to be considered as public or private depends upon the objects for which its franchises are to be exercised.

The court then proceeds, that it is not necessary to state whether an incorporated college, founded and endowed by an individual, who had reserved to himself a control over its affairs as a private visitor, is a private or a public corporation, since it does not appear that Dartmouth College was subject to any private visitation whatever. How much different is the view of
this situation taken by Chief-Justice Marshall will be seen when we turn to the reports of the case in the Federal Court.

The wording of the charter of the college itself tends to the conclusion that the college is a public corporation, since its purpose was to "spread the knowledge of the great Redeemer" among the savages, and to furnish "the best means of education" to the youth of New Hampshire. These purposes must certainly be matters of public concern. For who has any private interest either in the objects, or the property of this institution? The office of trustee of Dartmouth College is in fact a public trust as much as is the office of governor, or of judge of this court; and for any breach of this trust the state has the unquestionable right through its courts of justice to hail them, and call them to account.

One of the statutes of New Hampshire, passed December 11, 1812 (New Hampshire Laws, 184) makes the shares and interests of any person, in any incorporated company, liable to be seized and sold on execution, and gives to the purchaser all the privileges appertaining thereto. It makes him therefore a member of the corporation. But
the thought probably never occurred to any man that when a new member is added by virtue of an act, the corporation is thereby dissolved and a new one created. Yet that act has at least as much dissolving and as much creating force as the act now under consideration.

As to the question of contract the gist of the argument for the plaintiff is this: A statute which attempts to compel the members of a corporation to become members of that corporation differently organized, without their consent is invalid. "Neither of these propositions are true", says the court, "and if they are true, the legitimate conclusion to be drawn from them is wholly irrelevant to the question in the case". There is no doubt of the power in the legislature to compel individuals to accept the office of trustee of Dartmouth College, however the corporation may be organized, any more than there is doubt of the right of the legislature to compel individuals to serve as town officers, or to be enrolled in the militia, or to be members of a municipal corporation, as of a city or township. This principal is as old as the Bill of Rights, and is a fundamental principle of all governments, that the state
has a paramount right to the personal services of its citizens.

If the charter of a public institution, like that of Dartmouth College, is to be construed as a contract within the intent of the constitution of the United States, it will be difficult to say what powers in relation to their public institutions, if any, are left to the states. It is a construction repugnant to every principle of good government, because it places all the public institutions of that state beyond legislative control. For it is clear that Congress possesses no power on the subject. It is clear therefore that the charter of Dartmouth College is not a contract within the meaning of this clause of the constitution of the United States. But supposing it is a contract, how can it be construed? Is it a contract on the part of the king with the corporators, whom he appointed, and their successors that they should be forever free from all legislative interference, and that their number should not be augmented or diminished however strongly public interest might require it? Such a contract would be absurd, and repugnant to the principles of all government. The king has

Note.-- In the argument before the New Hampshire
no power to make such a contract, neither has the legis-
lature.

court Mr. Jeremiah Mason arranged his brief under
three heads.—
(1) The act is not within the general scope of
legislative power.
(2) It is in conflict with the constitution of
New Hampshire restraining legislative power.
(3) It is incompatible with the clause of the
Constitution of the United States which forbids
states to pass laws impairing the obligation of
contracts.

The case went to the United States Supreme Court
on the single point of contract. This feature of
the question was first raised by a layman, was con-
sidered of no value by lawyers, and received but
slight attention at the hands of Mr. Mason in his
argument before the New Hampshire court. And yet
in the court above it was sufficient to win the case
It was a dramatic moment in the life of the young New Hampshire lawyer, when he stood before the court to present his case. He had mastered the argument emanating from the keen and penetrating minds of Jeremiah Mason and Judge Smith. He was in possession of the facts of the case, and the legal and political bearing of every point. He knew the judges upon the bench, their political history, their hopes, their ambitions; their political passions, caprices, and prejudices. To all this was added the magnetic personality of one of the great orators of history.

As the argument of the case proceeded, the genius of the New Hampshire lawyer became apparent. He dwelt with great force and strength upon the legal and constitutional arguments advanced by Mason and Smith in the court below. He frankly acknowledged himself a compiler of the argument, and stated that the material was furnished by Smith and Mason, and that he had clumsily
but this putting together, this compilation meant much when it was done by such a master as was Mr. Webster. A high cast of mind that knows how to judiciously take and use the work of other men is rare, but this was his, and he did the work with consummate skill.

He finally turned to the political features of the question. So delicately, with such art did he turn to this aspect of the question, that even the great court seemed apparently unconscious, that he was straying beyond the realm of mere legal logic and reason, into the field of political passion and prejudice. He pictured the prosperity of this little college, under the wise administration of Federalism and the Church. Then it was strong and vigorous. Now it was invaded by Jacobins and Freethinkers. They had sought to wreck the young republic, to involve it in European wars, to engender a new revolution. Now they were raising their sacrilegious hands against the temples of learning.

As the strain of this resistless and solemn eloquence flowed on, the Chief-Justice was thrilled by its plaintive yet mighty appeal. A paean of war was chanted in
his ear. He was carried back to the early days of the century, when, in the flush of young manhood, at the head of his court, he had faced the triumphant Democrats. Then he had preserved the ark of the constitution, had saved the last bulwark of sound government. Then he had seen the turbulent waves of threatened revolution and anarchy breaking harmlessly at his feet. Then he had held at bay the maddened frenzy instigated by Genet and the bloodhounds of the French Revolution. Should de-Democracy further intrench upon the constitution? Should the shrines of learning be defiled by rampant Jacobinates and Freethinkers? Should the unity of these states be further threatened? The joy of battle was once more on. Again it was Federalism against Democracy. Again it was Marshall against Jefferson; again the Chief-Justice against the President. He grasped anew his weapons, and with all the force of an imperious will prepared to raise yet another constitutional barrier across the path of his ancient enemies. The strain of resistless and solemn eloquence flowed on.

When Mr. Webster had apparently finished, he stood silent before the court for some moments. Then drawing
himself up to his full height, assuming that imperious, regal air which was as native to him as to a wild stag, he proceeded,—

"This, sir, is my case. It is the case not merely of that humble institution, it is the case of every college in our land . . . . . . Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do so you must carry through your work. You must extinguish one after another all those greater lights of science which for more than a century have thrown their radiance over our land. It is, sir, as I have said, a small college. And yet there are those who love it."

Here his feelings mastered him. His eyes filled with tears, and for some moments he was unable to proceed. In a moment he had regained his composure.

"Sir", said he in that deep tone with which he thrilled his hearers, "I know not how others may feel (glancing at the opponents of the college before him), but for myself, when I see my Alma Mater surrounded, like Caesar in the Senate-House, by those who are rereterating
stab after stab, I would not, for this right hand, have her turn to me, and say 'and thou too, my son!'

This burst of feeling was perfectly genuine on Mr. Webster's part. Great orator that he was, he, for the moment at least, felt profoundly the words he was speaking. It no doubt had its influence on the court. Mr. Goodrich, an eye witness of the trial, has left us an account of it. He says that Chief-Justice Marshall's eyes were suffused with tears, and that the countenance of Mr. Justice Washington was as pale and livid as marble. The other members of the court were also deeply moved, while the entire audience seemed spell-bound. After such a master effort, the speeches of the opposing counsel seemed cheap and ineffective.

Chief-Justice Marshall announced at the close of the argument, that the judges could not come to any agreement. There was at that time doubtless a majority against the college. During the vacation which followed, there was some very effective log-rolling done by Mr. Webster and Mr. Mason aided by their associates. Supplemental briefs were sent to certain members of the bench, and as studiously withheld from others. Chancellor Kent
was quietly influenced to take in hand Mr. Justice Livingston and Mr. Justice Johnson; the work of Mr. Justice Story of Massachusetts was by no means ineffective. Such a thing would scarcely be attempted at this time, but in this case the whole matter was as carefully and astutely managed as a political campaign.

In the interim preparation was made by the defendants for a rehearing of the case. Mr. Pinkney, at that time probably the ablest lawyer in the United States, was retained, but at this late stage he could be of little use. The case was practically lost to the defendants, and the retention of eminent counsel was vain. Already had the rains descended, and the floods come, and had beaten upon this case; and it had fallen. At the opening of the term of court in the following October, a rehearing of the case was moved by Mr. Pinkney, but Chief-Justice Marshall announced that during the vacation the judges had come to an agreement. He then proceeded to read one of his great opinions, in which he held the charter of Dartmouth College to be a contract, and there-

Note.—In this chapter, I make no effort to justify Mason or Webster or their associates in their conduct during the management of this case. I am simply concerned in setting forth the facts as I have found them to be.
fore irreparable by state laws.

The Chief-Justice speaks of the caution and circumspection with which the court approaches a case which calls in question the validity of an act of a state legislature. He says that in no doubtful case will the court take upon itself the task of declaring a legislative act contrary to the constitution. But the American People have said in the Constitution of the United States, "No state shall pass a law impairing the obligation of contracts, and in the same instrument they have declared that the judicial power shall extend to all cases in law and equity arising under the Constitution." The court therefore has a duty imposed upon it from which it dare not shrink.

The heads under which the opinion is set forth are:

(1) Is this contract protected by the Constitution of the United States?

(2) Is it impaired by the acts under which the defendant holds?

He first shows what species of contracts are included in the constitutional prohibition of the state laws impairing the obligation of contracts, and points
out the fallacy of extending to the word contract the broadest possible meaning. Thus this section of the Constitution was never intended to extend to other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court. It was not intended to restrict the legislature, for example, on the subject of divorce.

Next he takes up and discusses through several pages the proposition that Dartmouth College is a private, eleemosynary corporation, from the fact that the funds given by the original grantor were the sources of payment of instructor's salaries, and these salaries lessened the expense of education to students. It is then an eleemosynary institution, and so far as respects its funds, a private corporation. This is in sharp contrast with the opinion of the court below. In the next place the court takes up the proposition that the charter of Dartmouth College is a contract, the obligation of which cannot be impaired by a state law.

The donors of the original grants, even if they could be found, have now no interest in the property, and are therefore unaffected by any change that may be
made by the legislature in the college charter. These founders do not complain, neither do the youth for whose benefit it was founded, of the changes made in the charter. Does this case therefore come under the constitution? "Contracts, the parties to which have a vested, beneficial interest, and those only," it has been said, "are the objects about which the constitution is solicitous, and to which its protection is extended." According to the theory of the British Constitution their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion. If the Parliament had, at the emanation of the charter, annulled the instrument, "the perfidy of this action would have been almost universally acknowledged. Yet then, as now, the same situation and state of facts exist. The donors would have had no right in the property, neither would the students have had rights to be violated, nor the trustees have any private, beneficial, individual interest in the property. Therefore in reason, in justice, and in law, it is now what it was in 1769. This charter is then a contract; the donors, the trustees, and the crown were the original parties.

It is a contract made on a valuable consideration,
for the security and disposition of property, for the conveyance of real and personal estate. It is a contract within the letter and the spirit of the Constitution, unless the fact that the property is invested by the donors in trustees for the promotion of religious and educational ends, for the benefit of persons who are continually changing, though the object remains the same, shall create a particular exception taking this case out of the prohibition contained in the constitution.

The court next proceeds to show that the act of the New Hampshire legislature of June 27, and December 13 and 26, 1816, impaired the obligation of the charter of Dartmouth College. It is too clear to require argument, that all rights respecting property remain unchanged by the Revolution. The obligation in the new were therefore the same as in the old government. The power of the government was therefore the same.

The next point touched upon by the court is, that the trustees of Dartmouth College have a beneficial interest therein, because the charter provides, that in case of a vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president; until the trustees shall make choice
of and appoint a president. But the court later says that it is unnecessary to elaborate this point, being of opinion on general principles, that in these private, eleemosynary institutions, the body corporate possesses the whole legal and equitable interest, and completely represents the donors for the purpose of executing the trust. So the body corporate has rights which are protected by the constitution.

Mr. Justice Washington concurs in an opinion of considerable length extending over some eleven pages. Mr. Justice Johnson concurred for reasons given by the Chief-Justice; while Mr. Justice Livingston concurred for reasons stated by the Chief-Justice, and Justices Washington and Story. Mr. Justice Story concurs in an elaborate opinion of nearly fifty pages in length; while Mr. Justice Duvall dissented without opinion.
CHAPTER V.

THE STATE CONSTITUTIONS.

Their Provisions for Revoking a Corporate Franchise.

No sooner was the decision in the Dartmouth College case rendered, than we perceive a reaction setting in from many directions, to circumvent what seemed an unjust rule. It was feared that this decision tolled the death knell of state sovereignty, and laid a precedent for state suicide. Corporations under their charters could now, without fear of state interference, reach out, and gather to themselves dominion and power. The independence conferred upon these corporations was such as the East India Company in its palmiest days never possessed, nor ever aspired to attain. It was a Magna Charta of corporations. We turn now to the state constitutions in their amendments and revisions, and first come upon this determination to be rid of a cumbersome and laborious rule.

Judge Cooley in his Constitutional Law points out that where, by the charter the legislature reserves the right to alter, amend, or repeal it, it is plain that no
interference with vested rights can follow; because then an alteration, amendment or repeal is in accordance with the contract, and not hostile to it. So if the constitution of the state, or by its general laws in force when the charter was granted, it is provided that all charters shall be subject to legislative control and alteration, this provision in legal effect becomes a part of the charter, and therefore a part of the contract.

Let us now turn to the subject of the reservation of power by the state to revoke a corporate franchise as laid down in the different state constitutions.

(1) Constitution of Alabama, 1875. Art. XIII, Sec. 3 & 10 says,--"The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any general or special law for the benefit of such corporation, other than in execution of a trust enacted by law or by contract, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution.

"The general assembly shall have the power to alter, revoke or amend any charter of incorporation now exist-
ing, and revocable at the ratification of this constitution, or any that may hereafter be created whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators. No law hereafter enacted shall create, renew or extend the charter of more than one corporation."

(2) Constitution of New York, 1846. Art.VIII, Sec.1 of Corporations says,-- ", . . . . All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

(3) Constitution of Arkansas, 1874. Art.XII, Sec.6, "Corporations may be founded under general laws, which laws may from time to time be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing, and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporators."

(4) Constitution of California, 1879. Art.XII, Sec. l
"Corporations may be formed under general laws but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

(5) Constitution of Colorado, 1876. Art.XV, Sec.3, "The general assembly shall have power to alter, revoke, or annul any charter of a corporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporators."

(6) Constitution of Connecticut, 1818. Art.X, Sec.3, "The rights and duties of all corporations shall remain as if this constitution had not been adopted; with the exception of such regulations and restrictions as are contained in this constitution."

(7) Constitution of Delaware, 1831. Amendment ratified January 28, 1875. Art.I, Sec.17, "The legislature shall have power to enact a general incorporation act to provide for incorporation of religious, charitable and manufacturing purposes; . . . . and no attempt shall
be made in such act or otherwise, to limit or qualify the power of revocation reserved to the legislature in 
this section".

(8) Constitution of Florida,1868. Art.XVII,Sec.24, "The property of all corporations, whether heretofore or 
hereafter incorporated, shall be subject to taxation, 
unless such corporation be for religious, educational, 
or charitable purposes". This is all there is on the 
subject of corporations in the Constitution of Florida, 
but it was amended in 1875 so as to read,— "Unless such 
property be held and used exclusively for religious, 
educational, or charitable purposes".

(9) Constitution of Georgia,1868. On the question 
of the revocation of a corporate franchise the Constitu-
tion of Georgia is silent. It prohibits the granting 
of corporate powers to private companies except to bank-
ing, insurance, railroad, canal, navigation, mining, 
express, lumber manufacturing, and telegraph companies.

(10) Constitution of Illinois,1870. Art.II, Sec.15, "The general assembly shall pass laws to correct abuses, 
and prevent unjust discrimination and extortion in the 
rates of freight and passenger tariffs on the different
railroads in the state, and enforce such laws by adequate penalties to the extent if necessary for that purpose, of forfeiture of their property and franchises."

(11) Constitution of Indiana, 1851. The constitution of Indiana is silent on the general subject of the revocation of a corporate franchise, except in the case of municipal corporations. Art. XVI, Sec. 4 provides, "All acts of corporation for municipal purposes shall continue under this constitution until such time as the general assembly shall, in its discretion, modify or repeal the same". Section 16, which is an extension of the same doctrine provides, "The general assembly may order or amend the charter of Clarksville, and make such regulations as may be necessary for carrying into effect the objects contemplated in granting the same; and the funds belonging to said town shall be applied according to the intention of the grantors."

(12) Constitution of Iowa, 1857. Art.VIII, Sec.12,- "The general assembly shall have power to amend or repeal all laws for the organization of, or creation of corporations, or granting of special or exclusive privileges, or immunities by a vote of two-thirds of each
branch of the general assembly; and no exclusive privileges, except as in this article provided shall ever be granted."

(13) Constitution of Arkansas, 1859. Art.XII, Sec.1, "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

(14) The Constitution of Kentucky of 1850 is silent on the subject of the corporate franchise.

(15) The Constitution of Louisiana, 1868, is also silent on the revocation of a corporate franchise.

(16) The Constitution of Maine, 1820, is also silent on the question of corporations. But in the amendment to that instrument in 1876, Article IV, Section 14, provides, -- "Corporations shall be formed under general laws, and shall not be created by special acts of the legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained; and however formed they shall forever be subject to the general laws of the state".

(17) Constitution of Maryland, 1867. Art.III, Sec.48 provides, -- "All charters granted (to corporations) and
heretofore granted and created subject to repeal or modification, may be altered, from time to time, or repealed; provided, nothing herein contained shall be construed to extend to banks or the incorporation thereof."

(18) Constitution of Massachusetts, 1780. In the Constitution of Massachusetts the subject of corporations is but once mentioned, and then to the effect that no corporation or man has either advantage or privilege distinct from those of the community.

(19) Constitution of Michigan, 1850. Amendment to Article XV, Section 1, "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered, or repealed".

(20) Constitution of Minnesota, 1857. In its section devoted to corporations the Constitution of Minnesota says nothing about the power of the legislature to revoke a charter, or to alter or change such charter after it has been granted.

(21) Constitution of Mississippi. This document says nothing about the power of the legislature to alter
or revise a corporate charter once granted, except as provided in Article XII, Section 17, "Liabilities of corporations shall be secured by legislative enactment".

(22) Constitution of Missouri, 1875. Art.XII, Sec.3, "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter, or amend such forfeited charter, or pass any other general or special laws for the benefit of such corporation".

(23) Constitution of Nebraska, 1875. Art.XI, Sec.7, "The legislature shall pass laws to prevent abuses and prevent unjust discrimination and extortion in all charges of express, telegraph, and railroad companies in this state; and enforce such laws by adequate penalties, to the extent if necessary for that purpose of forfeiture of their property and franchises".

(24) Constitution of Nevada, 1864. Art.VIII, Sec.1, "Corporations may be formed under general laws, and all such laws may from time to time be altered or repealed". Section 4 provides, "Corporations created by or under the laws of the territory of Nevada shall be subject to the provision of such laws until the legislature shall pass laws regulating the same in pursuance of the pro-
visions of this constitution."

(25) Constitution of New Hampshire, 1792. Bill of Rights, Art. XV provides,—"That no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by judgment of his peers or the law of the land." This point is argued by Mr. Mason in his brief before the New Hampshire court at considerable length. That part of the brief devoted to this point covers some ten pages in Farrar's Report of the famous trial. As corporations are a creation of the later statutes, there is but little in the early constitutions regarding them. The charter of New Hampshire, 1792, is silent on the subject of corporations. Amendment to Article IV, Section 11 says,—"Corporate powers of every nature obtained shall . . . . be subject to repeal or alteration at the will of the legislature".

(26) Constitution of North Carolina, 1868. Art.VIII, Sec. 1,—". . . . all general laws and special acts passed pursuant to this section may be altered, from time to time, or repealed." Amendment to the Constitution of North Carolina, 1876, Article VIII, Sec. 1,—
"All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

(27) Constitution of Ohio, 1851. Art. XVII, Sec. 2, - "Corporations may be formed under general laws; but all such laws may from time to time be altered or repealed."

(28) Constitution of Oregon, 1857. Art. XI, Corporations, Sec. 2, -- "All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

(29) Constitution of Pennsylvania, 1873. Art. XVI, Corporations, Sec. 10, -- "The general assembly shall have the power to alter, revoke, or amend any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth; in such manner however, that no injustice shall be done to the corporators."

(30) Constitution of Rhode Island, 1842 says nothing about the revoking or revising of charters by the legislative power.

(31) Constitution of South Carolina, 1868. Art. XI,
Corporations, Sec. 1, -- "Corporations may be formed under the general laws; but all such laws may from time to time be altered or repealed".

(32) Constitution of Tennessee, 1870. Art. XI, Sec. 8,-- "The general assembly shall provide by general laws for the organization of all corporations hereafter created which laws may at any time be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested."

(33) Constitution of Texas, 1876. Art. XII, Private Corporations, Sec. 3,-- "The right to authorize and regulate freights, tolls, fares . . . . shall never be relinquished or abandoned by the state, but shall always be under legislative control, and depend upon legislative authority."

(34) Constitution of Vermont, 1793 and the Amendments down to 1870, are silent as to the legislative power to revoke a corporate charter. Constitution of Vermont of 1777 provides that the legislature may grant charters of incorporation.

(35) Constitution of Virginia, 1870 is also silent on the power of the legislature to revoke or amend a
corporate charter. It provides for power to tax corporations the same as other property.

(36) Constitution of West Virginia, 1872. Art. IX, Sec. 5, -- "No charter of incorporation shall be granted . . . . unless the right be reserved to alter or amend such charter at the pleasure of the legislature to be declared by general laws."

(37) Constitution of Wisconsin, 1848. Art. XI, Corporations, says, -- "All general laws, or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

(38) Constitution of North Dakota, 1889. Art. VIII, Corporations, Sec. 13], -- " . . . any laws so passed (according to this section) shall be subject to future repeal or alteration."

(39) Constitution of South Dakota, 1889. Art. XVII, Sec. 9, -- "The legislature shall have power to alter, revise or amend any charter of any corporation now existing and revocable at the taking effect of this constitution, or any that may be created . . . . in such a manner that no injustice shall be done to the incorporators."
(40) Constitution of Montana, 1889. Art. XV, Corporations, Sec. 2,--"Any such laws shall be subject to future repeal, or alteration by the legislative assembly!"

(41) Constitution of Washington, 1889, Article XII, Corporations, Sec. 1,-- "All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law."

(42) Constitution of Idaho, 1889. Art. XI, Corporations, Sec. 2,-- "... Any such general law shall be subject to future repeal or alteration by the legislature."

(43) Constitution of Wyoming, 1889. Art. X, Corporations, Sec. 1,-- "All laws relating to corporations may be altered, amended, or repealed by the legislature at any time when necessary for the public good, and general welfare, and all corporations doing business in this state may as to such business be regulated, limited, or restrained by laws not in conflict with the Constitution of the United States."
(44) The Constitutions of New Jersey are all silent, containing not a word on the subject of corporations.
CHAPTER VI.

FRANCHISES AND CONSTITUTIONAL PROHIBITIONS.

Having traced the provisions of the different state constitutions regarding the corporate franchise, we will now turn briefly aside to look at the more particular meaning of this term. What is a franchise, and what is the principle underneath all which has restricted the legislature in the revocation of this privilege?

A franchise is a right or privilege conferred by law. It is a special privilege conferred by government upon individuals, and which does not belong to the citizens of the country generally, of common right. It is essential to the character of a franchise, that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state. Thus when the legislature grants a charter of incorporation, it confers upon the grantees the rights of forming a corporation, and of acting within certain prescribed limits. It is conferred upon the individual grantees, together with such other persons as may become members of the association.
either by transfer of shares, or by the creation of new shares which the legislature has authorized the company to issue. Charters sometimes confer powers to take private property for public use, but most of the constitutions of the states provide, that no corporation shall take private property for public use without the due compensation required under the Constitution of the United States.¹

Article I, Sec. 10 of the Constitution of the United States provides that, "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts". A state constitution adopted by a vote of the people is a law within this prohibition.²

The XIV Amendment of the Constitution provides that no state "shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction, the equal protection of the laws".

The V Amendment, limiting the power of the Federal Government, provides that no person shall "be deprived

(1) Railroad Company v. McClure, 10 Wallace, 511.
(2) Morawetz on Corporations.
of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation". Similar provisions in the constitutions of the several states limit the powers of the state legislatures.

All these provisions are designed to enforce a general principle of right which lies at the foundation of all political liberty. The principle is that all men have a natural, and inherent right to life, liberty, and property; or life, liberty, and the pursuit of happiness. To secure these rights governments are instituted among men, and any interference with inherent rights can be justified only as a means of securing the most fundamental rights, and then only at the demand of public safety, or public security.

A state is prohibited by the constitution from passing a law altering the purpose of a corporation, as set out in the charter, because such a law would impair the contract existing between the members of the association. Such a law would violate the rights of each individual shareholder; and the majority could not by their assent dispose of the rights of the minority. A law such as is here mentioned would be unconstitutional, because it
would be without due process of law, and without due compensation.\textsuperscript{1} This point was dwelt upon by Mr. Mason before the New Hampshire court in the Dartmouth College case at great length. His effort was to show that the act of the New Hampshire legislature took away from the corporation its invested funds, and put them in new hands,—namely, the new Board of Trustees.

A law dissolving a corporation, or rendering the future transaction of its business, and the performance of the agreement of association illegal, would likewise be unconstitutional irrespective of any contract between the state and the corporators. The constitutionality of a law, altering the charter of a charitable institution, depends upon the effect of such a law upon the funds of the institution. The members of a purely charitable corporation are not united like the members of a business company. Their duties are those of trustees, who are to administer the funds according to the terms of the charter.

The term contract is used in the constitution in its broadest sense.\textsuperscript{2} It applies to all contractual obliga-

\begin{itemize}
\item[(1)] Sinking Fund Cases, 99 U.S., 737.
\item[(2)] Chief-Justice Marshall in his opinion in the Dartmouth College Case construes the word contract as used in the Constitution in a more limited sense.
\end{itemize}
tions whether they be called contracts in technical phraseology or not. Grants, as well as unexecuted agreements, trusts and common law agreements are protected.¹

The doctrine that a grant of franchise by act of the legislature, when accepted by the grantees, becomes a contract within the protection of the constitution of the United States, implies that the legislature making the grant had not only the intention, but also the power to make a contract or treaty on behalf of the state that the franchise shall be irrevocable. It is well settled by the highest authority that such a power does exist to a limited extent, unless it is expressly taken away by the state constitution. It is also well settled that each state has certain powers which no legislature can limit even in a particular case by a contract, or irrevocable grant of franchise. These are the police powers. It is therefore in excess of the power delegated by the people to the legislature to abridge these powers by contract, or grant of franchises.²

---

¹ Sinking Fund Cases, 99 U.S., 749.
CHAPTER VII.

SEQUENCE FEATURES AS PORTRAYED IN LEADING CASES.

The sequence features of this case might be traced through a considerable period; but in a work necessarily brief like this it seems best to look only at some later phases of the doctrine. A glance at the cases will readily show how far we have drifted on the stream of legal dicta and of constitutional controversy from the rule enunciated by Chief-Justice Marshall more than seventy-five years ago.

In the case of Matthews v. The St. Louis & S.F. Railroad Company, 24 S.W. Reporter, 591, an action was brought by the plaintiff for damages caused by fire set by sparks from a locomotive owned and operated by the defendant. In the answer to the complaint, the defendant averred that the act of the legislature making the company an insurer was illegal, unconstitutional, and void, in that it denies to the defendant the equal protection of the laws contrary to the provisions of Article XIV, Section 1 of the amendments to the Constitution of the United States; and that it deprives the defendant
of his property without due process of law, contrary to the provisions of Article V of the amendments of the Constitution of the United States; and in this that it impairs the obligation of contracts made between the state of Missouri and the defendant by the terms of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel locomotive engines and cars attached thereto, and to be responsible for the negligent and careless use thereof.

In the matter of the impairment of the obligation of contracts the Supreme Court of Missouri, speaking through Judge Gantt, denied that the statute did so impair the obligation of contracts, as set forth in the Dartmouth College case. It does not impair or revoke vested rights. The court says that the defendant's charter is a contract with the state; but that this statutory regulation, requiring the company to take the risk of an insurer, and so become responsible in damages to every person and corporation whose property may be injured or destroyed by fire, communicated directly or indirectly by locomotive engines in use upon the
railroad owned and operated by such railroad corporations, does not impair the obligation of such contract. It has often been held that this clause of the Constitution of the United States does not so far remove from state control the rights and properties which depend for their existence, or enforcement, upon contracts as to relieve them from the operation of such general regulations for the good government of the state, and the protection of the rights of individuals as may be deemed important. All contracts and all rights are subject to this power; and all such regulations must from time to time be subject to such change as the well being of the community requires.

Therefore if the legislature regards it necessary to pass a law fixing the liability of railroads for fires kindled by their locomotives in order to protect the property of neighboring citizens, there is nothing in the state or Federal Constitutions that can curtail this power. The state has and can have no higher function than to care for and protect the property of its citizens and their own safety. All laws and all charters are passed subject to this duty whenever it may
arise.

The Binghamton Bridge Case, 3 Wallace, 51, is one that stands on the rule laid down in the Dartmouth College case. Here the state had incorporated a company to build a toll bridge, and to take tolls. In the same act it had provided that it should not be lawful for any person or persons to erect any bridge within two miles either above or below that bridge. This statute is held to mean, not only that no person or association of persons shall erect such a bridge without legislative authority, but that the legislature itself will not make it lawful for any person or association of persons to do so by giving them authority.

A subsequent act of the legislature, granting a charter to another bridge company who built a bridge a few rods above the old one, was held void as impairing the obligation of contract. The case of Dartmouth College v. Woodward was cited and approved.

Chief-Justice Chase and Justices Field and Grier dissented from the opinion of Mr. Justice Davis in this case. Mr. Justice Grier delivered the dissenting opinion which seems sound in its principles, and vigorous in
its clear-cut discrimination.

In Farrington v. Tennessee, 95 United States, 679, the charter of a bank, granted by the legislature of Tennessee, provides that the bank, "shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock subscribed which shall be in lieu of all other taxes". The rule was laid down in this case that the provision is a contract between the state and the bank limiting the amount of tax to each share of the stock; and that a subsequent revenue law of the state, imposing an additional tax on the shares in the hands of stockholders, impairs the obligation of that contract and is void. Case of Dartmouth College v. Woodward is cited and affirmed.

To this opinion of the court Mr. Justice Strong with whom concurred Justices Clifford and Field dissented.

"If there be any doctrine founded in justice", says Mr. Justice Strong, "and necessary to the safety and continued existence of a state, it is that all presumptions are against the legislative intent to relinquish the power of taxation over a species of property."

Citing the Providence Bank v. Billings, 4 Peters, 514,
in support of this he quotes from the words of Chief-Judge Marshall, "As the whole community is interested in retaining it (the power to tax) undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear".


In the case of the Citizens Street Railway Company v. The City Railway Company, 56 Federal Reporter, 746, the question as to what is a contract under the clause of the Constitution of the United States forbidding the impairing of the obligation of contracts is taken up. In this case it was held that city ordinances, made in pursuance of law and granting to a corporation the right to build and operate Street Railway lines in the city after acceptance by the corporation, and the expenditure of large sums of money on the faith thereof, constitute
a contract protected by the Constitution of the United States.

The case is this. In March, 1891, the legislature of Indiana passed a law conferring upon the city of Indianapolis the power, by contract, when approved by the ordinance of the Common Council, to grant franchises to Street Railroad Companies. The Board of Public Works accordingly exercised this power with the approval of the Common Council, and conferred upon a new company the right to operate and construct a street railway. The old company which had now been in operation some years, brought suit against the new company. Defendant filed bill to have complaint dismissed. The act of the Common Council was held to be a law within the meaning of the Constitution of the United States, Article I, Section 10.

Now the complainant in this case, a corporation, had derived its rights under ordinances of the city of Indianapolis adopted pursuant to law in the years 1864, 1865, 1880, 1888, and 1889. These ordinances expressly provided that "the said city of Indianapolis shall not during all the time to which the privileges hereby grant-
ed to said company shall extend, grant to, or confer upon any person or corporation any privilege which will impair or destroy the rights and privileges herein granted to said company." The act was clearly an infringement upon a vested right, as the plaintiff had suffered, or was about to suffer great damages. The court accordingly held that the grant of rights, privileges, and immunities to the complainant, coupled with the acceptance and the expenditure of large sums of money on faith thereof was a contract under the protection of the Constitution of the United States. The motion of the defendant to dismiss the complaint was accordingly overruled.

In Commonwealth v. Owensboro et al. Railroad Companies, 23 S.W. Reporter, 868, the rule is laid down that an act, passed in 1856, reserving to the legislature the right to repeal or amend charter privileges, granted by the legislature to particular persons, does not enable the legislature to repeal the act of 1884, -- exempting railroads from taxation for a space of five years-- since it is clearly a case of impairment of a contract obligation.

Quoting from Tomlinson v. Jessup, 15 Wallace, 454,
a leading case on the subject, the court says,—"Immunity from taxation, constituting in these cases a part of the contract with the government, is by the reservation of the power, such as is contained in the law of 1856, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interest that the revocation shall be made". But the court goes on to say that if this proposition were applied to the persons who had accepted the offer of the state to exempt from taxation certain property for five years, and had on the strength of the promise of the state acquired rights and interests, and had invested money in this enterprise, it would be unjust in an extraordinary degree. Upon the adoption of the act of exemption from taxation, no contract was made with any person, natural or artificial, though by accepting its terms certain rights might be secured thereunder of the nature of contract rights. But no reservation, express or implied, can be said to have been made therein by virtue of the act of 1856. The law is general, and therefore revocable at pleasure; but from this it does not follow that it might be revoked so as to injuriously
affect the citizens accepting its provision, in violation of the pledge of the state and the common principles of justice. To promote the ends of development, to afford greater facilities for transportation, and to bring into its borders an increased volume of property shortly to help bear the common tax burden, the state says to the railroad people,—"Expend your capital and build up your enterprises among us, and in consideration of your effort, we will give you a brief respite from the burdens of taxation." The state cannot withdraw its pledge of immunity from those who acted upon the assurances of this act.

In the case of the Manhattan Trust Company v. The City of Dayton, 59 Federal Reporter, 327, the question as to whether a provision of the Common Council, fixing the maximum price of gas, is a contract, or an exercise of the power to regulate, and a limitation on the license granted, is raised. The rule laid down in the case was, that when a municipal council is authorized by statute to contract for a period not exceeding ten years, its contract for twenty years, or for an indefinite time cannot be sustained as a contract for ten years,
but is entirely void.

Under a statute empowering municipal councils to regulate from time to time the price of gas, and authorizing them to bind themselves by contract not to reduce the price below an agreed minimum for ten years, a council contracted for minimum schedule rates by "mixture measure" for five years. Afterwards it passed an ordinance providing in one section that consumers might elect to have gas furnished by meter, instead of at the schedule rates, in which case a maximum price was fixed without any limitation of time. A subsequent section declared that the contract before made should continue in force, "except as herein altered", for the unexpired time thereof. It was held that the provision for a maximum price was not a contract, but a regulation, and therefore alterable at pleasure.

We find, therefore, that the law as laid down in the Dartmouth College case has been somewhat changed and restricted. The constitutions of the states have in almost all cases asserted their authority to repeal, alter, revoke, or amend, in whatsoever way they may please, all charters granted to corporations. As the
The constitution is law, and as all persons know the law, the constitution is therefore a part of the charter and so of the contract. The changes made by the legislature are, of course, to be within the bounds of the constitution of the United States (Article I, Sec. 10) prohibiting any law impairing the obligation of contracts, and the disruption of vested rights. In most of those states where the constitutions are silent, as to the power of the legislature to alter or revoke a charter, the statutes confer this power. This is the case in Massachusetts, while in other states the power is both statutory and constitutional. This virtually eliminates the contract feature from the charter of a corporation, so far as the United States Constitution is concerned, and leaves that charter at the caprice of the legislature. This is no doubt the correct theory as is shown in some of the dissenting opinions cited in this chapter, (Farrington v. Tennessee, 95 U.S., 679) since the State is of more value than any corporation.

But to define what is a contract, and what is a law, under the United States Constitution, are still matters

---

(1) Stimson's American Statute Law.
of legal controversy. We have found that a law making
a railroad company an insurer for all damages arising
from fire set by its locomotives does not impair a con-
tract obligation. (Matthews v. The St. Louis & S.F. Rail-
road Company, 24 S.W. Reporter, 591). Again where the
state incorporates a company to exclusively carry on
certain business, and subsequently grants to another
company power to do a like business, it is held to
impair a contract obligation. (The Binghamton Bridge Case
3 Wallace, 51.) So a promise of the state to tax
a corporation a certain per cent. and no more is a
contract, and a subsequent revenue law imposing an extra
burden is void. (Commonwealth v. Owensboro et al.
Railroad Companies, 23 S.W. Reporter, 868.)

Again a city ordinance passed by the consent of the
legislature is held a law, and as it impaired the obliga-
tion of a former contract of the corporation with the
state, it also is void. (Citizens Street Railway Com-
pany v. The City Railway Company, 56 Federal Reporter,
746.) And lastly, a provision of a city's Common
Council, making a certain agreement under statutory
authority with the citizens of the city, was altered so
as to give the citizens a choice of two methods of carrying out the original contract. The former contract was by the terms of the new agreement said to be in force except "as herein altered". This alteration of the provision was held not a law, but a regulation of the Common Council, and therefore not under the prohibitory clause of the Constitution of the United States. (Manhattan Trust Company v. The City of Dayton, 59 Federal Reporter, 327.)
A NOVEL FEATURE IN THE NEW YORK STATUTES.

An interesting and novel feature of the power of the legislature to revoke a corporate franchise lately occurred in New York State. It is in substance this:

In 1890 the legislature repealed the clause of Part I, Ch.18,Title III,Sec.8, Revised Statutes, which reads thus, "The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." This section was repealed upon the supposition that substantially the same ground was covered by the clause of the New York Constitution of 1846, which provides that,-- "All general laws and special acts passed pursuant to this section may be altered from time to time or repealed"-- (Art. VIII, Sec. 1 Const. N. Y.).

The legislature has since found itself in this difficulty. Those corporations which had received their charters previous to the adoption of the constitution of 1846 were formed under the statute here repealed, and
could not therefore be brought within the power of the constitutional clause. The previous constitution of 1821 contains no word on the subject of corporations; so that upon the repeal of the statute, these corporations were given the rights, powers, and privileges appurtenant to corporations under the old doctrine of the Dartmouth College case. Their charters were therefore irrevocable, unalterable, and perpetual, and are protected by Art. I, Sec. 10 of the Constitution of the United States as contracts, and the state can pass no law impairing their obligations.

But cannot the state re-enact? Is it impossible to incorporate into the statutes the clause that was repealed? Here we have another interesting and novel feature. To do this the state must pass a law that is to reach back to the time of the repeal, and at the same time not be retro-active as impairing the obligation of contracts, or disturbing vested rights. It is as if the State and the Corporation had entered into a contract. After its consummation the State says to the Corporation "I will relinquish my rights under a certain clause of our contract. We will therefore strike this clause out
of our agreement." At a later period, the state seeing its mistake, comes to the corporation with,-- "I wish to reinstate into our contract the clause stricken out some time ago." The corporation, unwilling to relinquish its power, meets this request with the argument that it has acquired vested rights under the charter, and therefore proposes to throw itself on its constitutional privilege, and set up Article I, Sec. 10 of the United States Constitution together with the Dartmouth College case as a defense.

The state is now in a dilemma. If it re-enacts the law, the corporation sets up its constitutional rights and privileges. If it does not we have the corporation unrestrained, and it goes on gathering to itself dominion and power. There has been no litigation on the subject, so far as I can find, but a suit on this feature of the law would be of vital importance and would revive a dramatic moment in the laws of the corporate franchise.
BIBLIOGRAPHY.


Pamphlets containing Constitutions of the States admitted in 1829, on Shelf 49 of the General Reference Library or Cornell University.
Private Corporations; 1 vol. By Charles Fisk Beach, Jr.

Private Correspondence of Daniel Webster; 2 vols. Edited

Reports of Case of Dartmouth College v. Woodward; 1 vol.
By Timothy Farrar. Portsmouth, N. H., 1819.

Sketch of the History of Dartmouth College and Woors' Charity School, from 1779 to 1815. By John Wheelock Publishers not given.


Ultra Vires, by Seward Brice; second American edition