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AN HISTORICAL DEVELOPMENT OF THE CONTRACT THEORY IN THE DARTMOUTH COLLEGE CASE

THE theory enunciated in the famous *Dartmouth College Case* may be said to date back to the very beginnings of corporations. Just when were the beginnings of corporations and corporation law is, however, a question that has long been a much mooted one, some claiming that they were not known until the middle ages, while others put their inception as far back as the time of Solon in Greece;[1] still others name Numa as the true founder of corporations, by reason of his classification of the Romans into societies according to the manual trade each followed,[2] but the first really authentic source of information we have on the subject of corporation law, is found in the Institutes of Justinian—A. D. 533—wherein the whole law seems to be laid down as settled and well crystallized, in fact, so well crystallized that many of the rules there stated are the ground work of our system today.

The Roman corporation was one of four kinds of artificial "personae"—which were juridically recognized by the state, and for which special laws and rules were enacted.[3] It personified an entirety and was regarded as an individual possessed of rights and liabilities entirely separate and apart from any rights or liabilities which might have attached to the individuals who went to make up the body corporate,[4] and so far, in fact, was it separated from its individual members, that it could only be recognized under

[1] Dig. 47, 22, 4. Kent, Commentaries. Ed. 9, p 307.

[2] Waterman, Corporations. Vol I, p. 43. Colquhoun, Summary of Roman Civil Law. Vol. I, p. 643.

[3] Morey, Outlines of Roman Law. Ed. 8, p. 262.

[4] Mackeldey, Handbook of Roman Law. Dropsie's Transl. 155. Dig. 46, 1, 22.

a common name which was not the name of any of the members.[5] The fact that the corporations did so completely shut out the individuality of their members, may be said to be one of the chief reasons for their prosperity. They controlled many of the industries such as shipping, mining, etc.,[6] and in this way afforded a very lucrative and at the same time ample cloak, under the cover of which the members of the patrician element were enabled to engage in trade and thus increase or replenish their fortunes, a thing from which they otherwise would have been barred as individuals.[7] Naturally, with this great advantage attaching to the privilege of becoming a member of a corporation, much importance was attached to the assumption and exercise of corporate functions, which gave rise to many legislative restrictions on corporate acts.[8] A corporation could not be created by mere private agreement, but required the authority of a statute, or the constitution of an Emperor,[9] and under Julius Cæsar, each charter that was applied for had to be submitted to him, with the object of the corporation clearly defined therein, in order to receive the approval necessary to make it a recognized and legal corporation (collegium licitum),[10] and unless such authority was received, any society meeting without it was deemed illegal (collegium illicitum), to have been organized contrary to the decree of the senate and the imperial commands, and to be subject to dissolution at any time.[11] This view, however, has been controverted by some writers, who insist that, notwithstanding Dig. 3, 4, 1; 47, 22, 3, 1; no special authority was necessary so long as the organization was for a lawful purpose, and created a fund of property which was separate and distinct from that of the individuals in the association.[12] This position, however, is on its face untenable, for the very words of the laws themselves confine legal corporations to such as have acquired their powers by the special authority of the senate, or of emperor, or by prescription.[13]

After it had once come into existence, the corporation, unless created for a specified term of years, had perpetual existence, and,

[5] Hunter, Roman Law. Ed. 2, p. 314. Dig. 3, 4, 2; 3, 4, 7, 1.

[6] Hunter, Roman Law. Ed. 2, p. 315.

[7] Elliott, Corporations. Ed. 3, p. 2. Mommsen, History of Rome, B. III, ch. 2.

[8] Dig. 3, 4, 1; 47, 22, 1.

[9] Justinian, Institutes. Monro's Transl. Vol. I, p. 172. Dig. 3, 4, 1; 47, 22, 1.

[10] Elliott, Corporations. Ed. 3, p. 4. Citing: Mommsen, History of Rome. B. V., ch. II. Hunter, Roman Law. 314.

[11] Dig. 47, 22, 3.

[12] Smith, Dictionary of Greek and Roman Antiq., p. 977. "Universitas" citing Wundscheid, Lehrbuch. 60, note 3.

[13] Dig. 3, 4, 1; 47, 22, 3, 1, but see Colquhoun, Summary of the Roman Civil Law. Vol. I, p. 649.

like the corporation of today, was not in any way affected by the changing hands of the interests of the members, or their death, for as long as one member lived, so did the corporation.[14] The internal management of the corporation and the selection of members was entirely in the hands of the members themselves to do with as they pleased,[15] but no person was allowed to belong to more than one corporation at a time.[16] The corporate property was all that could be applied to corporate debts, and the members were expressly exempted from any individual liability whatsoever.[17] The position of the corporation in the courts is best shown by the following extract from the Digest of Justinian as to the manner of proceeding against a corporation which is in default: "Where any persons are permitted to constitute a corporation, in the way of a guild or company, or any other body, they have the special right to have, like a municipal body, common property, a common chest and an actor or syndicus, by whose agency anything that has to be transacted or done in the general behalf can be transacted or done accordingly as in a municipal body. If nobody defends any action at law against the society, the pro-consul declares that he will order such common property as they have to be taken into possession, and if, after due notice given, they do not bestir themselves to defend their case, he will order such property sold."[18] All the foregoing will show the similarity of the Roman corporation to the corporation of today, as well as the importance with which it was viewed by the state, but the analogy is still more forcibly borne out when the manner of dissolving the Roman corporation is investigated.

There were four ways by which the Roman corporation could cease to exist: A. By expiration of the term for which it was created, if it was incorporated for only a definite length of time; B. By voluntary surrender of the privileges; C. By death or withdrawal of all the members, when it was organized for a private purpose; D. By an act of state, declaring it dissolved, which might occur if the corporation transcended its legitimate purposes.[19] The last of these methods is, however, the only one of interest when considering them in their relation to the modern theory in the *Dartmouth College Case.*

That the State could and did sometimes dissolve corporations is

[14] Dig. 3, 4, 7, 2. Justinian, Institutes. Monro's Transl. Vol. I, p. 172. Hunter, Roman Law, pp. 314-5.

[15] Hunter, Roman Law, p. 315.

[16] Dig. 47, 22, 1.

[17] Dig. 3, 4, 7.

[18] Justinian, Digest. Monro's Transl. Vol. I, p. 172.

[19] Morey, Outline of the Roman Law. Ed. 8, p. 266.

an undisputed fact, but the theory upon which this was done is by no means a settled question, nor is it certain that a corporation could be dissolved at any time the Senate desired, and without assigning any cause for such dissolution, although, at first glance, such would seem to be the case from the fact that in 64 B. C. a sort of general dissolving order was passed by the Senate, which put an end to a large number of near-corporations thriving at that time; but it must be remembered that in the Roman Law there was no action to correspond to our modern quo warranto, and so the only method left by which an offending corporation could be disciplined was by an act of the Senate. As to municipal corporations, there does not seem to be any doubt but that they were regarded merely as a branch of the State and could be dissolved at any time. The most noted instance of the exercise of this power is, perhaps, the entire deprivation of the City of Capua of its corporate rights,[20] but the act of 64 B. C. seems to be the only definitely recorded instance of the actual dissolution of private corporations in Rome, and this act was called for as a measure of protection for the government. There had long been many organizations in Rome which partook of the nature of clubs—they were not organized for any definite object other than merely social and convivial purposes,[21] and these "collegia," as they were called, had taken upon themselves many corporate powers, after the manner of the "collegium illicitum," above referred to. For a long period they were endured by the State as merely harmless creatures—but by the early part of the first century B. C. they began to lose their social and convivial character, and later became the home of practically all the secret intrigue and political plotting that was carried on, until they became really dangerous to the State, and had to be suppressed to preserve order as well as to punish them for overstepping even their assumed powers.[22] According to Savigny, this prohibition and dissolution could not have applied to any assemblies not injurious to the public peace, and certainly not to the old "collegia" of the mechanics, which had obtained full rights by prescription and were therefore "collegia licita" and certain in their objects. It applied only to unincorporated associations, acting for no certain legal purpose. and not to the regularly chartered bodies.[23]

Thus we see the aspect of the Roman Law as regards its corpora-

[20] Colquhoun, Summary of Roman Civil Law. Vol I, p. 665.

[21] Colquhoun, Summary of Roman Civil Law. Vol. I, p. 640.

[22] Smith, Dictionary of Greek and Roman Antiq. Vol. I, p. 470, "collegium." Elliott, Corporations. Ed. 3, p. 4. Colquhoun, Summary of Roman Civil Law. Vol I, p. 919.

[23] Savigny, System des Heutigen Romischen Recht; l. c. p. 257.

tions. The corporate franchise was a valuable right, regarded as property vested absolutely in the corporators, who could only be deprived of it if they abused or misused their privilege. Upon what theory this view was taken and upheld I will not attempt to say; it was hardly the theory of a contract, for it could not be brought within any of the strict Roman forms of contract, nor can it be based upon any theory of consideration, for the Romans never conceived of consideration as such,[24] but it is natural justice that such things should be so, and inasmuch as natural justice played such a part in the formation of Rome's law, this theory may well be traced to that source for its origin.

After Rome had ceased to flourish and exercise her world power, and up until the Middle Ages, practically all the lay corporations disappeared, and with them, also, went the very conception of a corporation. So completely did the corporate idea drop out of existence, that even as late as the time of Bracton the conception was not clear, for Bracton himself merely repeats the words of the Roman lawyers without displaying any distinct understanding of their meaning;[25] in fact, the English jurists may be said to have never grasped the Roman idea until they had, by their own effort, built up a complete system of corporation laws for their own use, which, when finished, was found to correspond, almost in every respect, to that used centuries before by their Roman brothers.

The first lay corporations, or organizations of the nature of lay corporations found in English history, are the peace guilds. These guilds were mere voluntary organizations of the persons residing in one neighborhood, for the purposes of mutual protection; but they were the starting points for many of the later municipal corporations as well as the guilds of the mechanics, which grew out of the peace guilds as cliques of those of one trade in that locality, and which later gradually expanded so as to take in all of the same trade in other localities as well.[26] These guilds at first corresponded in their corporate organization to the "collegia" of Rome, being not true corporations but only organizations which might acquire corporate powers by prescription, if they were not later actually incorporated by charter. As a matter of fact, they soon came to have a powerful political influence in the kingdom, and to be the objects of much jealousy in the King, who, much against his will, only incorporated them, or rather, formally granted them the privilege of existence, in the first part of the fourteenth century.[27] Aside from the Society

[24] Freund, Contract and Consideration in the Roman Law. 2 Col. L. T. 167.

[25] Compare Bracton, 1 Twiss Transl. 59, and Justinian, Institutes 2, 1, 6. Pollock & Maitland, History of English Law. Ed. 1, Vol I, p. 473.

[26] Bretano, History of Guilds.

[27] Stubbs, Constitutional History of England. Vol. I, p. 417.

of Staplers, of which record is found as early as 1267, and of whose history not a great deal is known,[28] the first of these guilds of which we have record was the guild of Weavers, who were granted by Henry II the same liberties they had enjoyed under Henry I. After the Weavers came the Goldsmiths in 1327, the Mercers in 1373, and many others, until by the end of the fifteenth century practically every trade in England was organized and conducted under a guild.[29] Up to this time, although the lawyers had now begun fairly to grasp the proper idea of a corporation, still they did not at any time seem to have any doubt as to the exceptional qualities of a corporation, and, realizing that it was something of an entirely different nature, and having powers different from anything else in the kingdom, they had always looked to the King as the proper source of these powers. Thus as early as the middle of the fourteenth century it was plain that no corporation could be created but by the consent and grant of the King.[30] This was probably due to the direct influence of the feudal ideas, for, according to the laws of feudalism, the King was the proprietor of all the land of the kingdom, and the fountain from whence all franchises were derived; and the right to exercise the powers of a corporation was a franchise of the highest sort,—this was recognized from the very first,[31] and so it was, that one who would use the rights that rested in the King had first to obtain his consent, and get the right to the use from him. This idea that the power to grant any privilege rested solely in the King continued for several centuries, and under it the great trading companies were chartered without consulting Parliament, and were given absolute monopolies over the trade in certain districts; of these, the Russia Company, chartered in 1555; the East India Company, in 1600; the Canary Company, in 1665; and the Hudson's Bay Company, in 1670, were perhaps the most famous. It was shortly after the exercise of these monopolistic franchises began to be felt by the other traders that Parliament awoke to the fact that the King was usurping too much power in the matter of making grants, and, maintaining that any monopolistic franchises granted except by Parliament were of no avail, passed statutes regulating the acts of the Russia and East India Companies, and entirely revoking the patent granted to the Canary Company, after the courts had decided that they had no right to a monopoly, even though the King had granted

[28] Anderson, History of Commerce.

[29] Williston, History of the Law of Business Corporations before 1800. 2 Harv. L. Rev. 139. Anderson, History of Commerce.

[30] Bracton, 1 Twiss Transl. 443. Kyd, Corporations. Vol. I, pp. 42-44. 49 Edw. III. 3.

[31] King v. London (1692). I Show. 274. Pollock & Maitland, History of English Law. Vol. I, p. 493. Kyd, Corporations. Vol. I, 14, 41-4. Vol. II, p. 395.

it.[32] This led to much and bitter conflict between the King and Parliament, which finally resulted in the situation where the King still had the power and authority to grant the franchise to be a corporation, but any monopoly or other special privilege could only be had through an act of Parliament.[33]

After a corporate franchise had once been granted in England there were only two ways in which the corporators could be dispossessed of it against their will: first, by an action in the nature of quo warranto brought for abuse or misuse of it, upon proof of which it could be taken from them by the King, and second, by an act of Parliament declaring it revoked. That the idea of the absolute character of the franchise as property, of which the King could not arbitrarily dispossess the owner, was one of the first to grow up with the conception of corporations in England is seen by the statements of Bracton, wherein he says that grants of privileges can only be lost by abuse or non-user,[34] and in the *Case of Sutton's Hospital,* where the early existence of the idea that the right to be a corporation was something more than a mere privilege, once it was granted and accepted, is shown by the following statement: "No Hospital was founded by Sutton & therefore the Incorporation failed: because Sutton had the King's license to Found, Erect and Establish an Hospital, which was an Act precedent to be performed by Sutton before the Incorporation, which he hath not done: and so he has not pursued his License: which License the King might have countermanded, and which was countermanded in Law by the Death of Sutton,"[35] and by 1692, the inability of the King to dissolve a corporation was finally settled by the case of *King* v. *London,*[36] in which Sergt. Pemberton makes the following statement: "A corporation is an artificial body, consisting of particular persons, as members constituent thereof, and like unto a natural body to many purposes; that which doth unite them is the liberties and privileges granted for that purpose. It is but a franchise granted originally to them by king or parliament. *In all concessions of liberties and franchises, there is a tacit condition annexed to them that they use them well, which upon doing otherwise determines them, and abuser forfeits them all. The way for the King to take advantage of such an abuser, is a quo warranto, or an information in the nature of it; that is the King's writ of right:*

[32] Horn *v.* Ivy (1670), I Vent. 47. Williston, History of the Law of Business Corporations before 1800. 2 Harv. L. Rev. 114.

[33] Willlston, History, etc. See note 32.

[34] Bracton, I Twiss Transl. 445, 451-3.

[35] In the Case of Sutton's Hospital (1613), 10 Coke 1, 23.

[36] I Show. 274.

here these abusers are examined and judgment is either given for acquittal, or for the King." This statement is approved in the same case by Mr. Solicitor General Somers, who admits it, and then goes still further to explain instances when this sort of dissolution has taken place by saying,—"That a corporation may not be dissolved or forfeited was never thought of at the time of the dissolution of the abbies; the majority of the judges in the lords' house were of this opinion, that it could not be,"[37] and then, in the opinion of Justice EYERS in the same case, he sums up the entire arguments by the statement that a corporation cannot be seized so as to bring it out of the members and into the crown. This case may be taken to have definitely settled the doctrine that when the King has once granted corporate powers, they are gone from him forever, and that the only way in which he can regain them is by a legal action to try whether the corporation has used them so as to make them subject to a forfeiture.[38] Thus we see that the corporate franchise has always had a positive value in the eyes, not only of the corporators, but of the sovereign and the law as well.

The franchise has always been treated like any other property granted one, in that it had to be accepted by the one to whose benefit it was expected to inure in order to become effective. This also was one of the earliest doctrines of the English law of corporations, as is shown by the above quotation from the *Case of Sutton's Hospital*,[39] nor can it be forced on anyone without his consent, for as has been said, it cannot become effective without acceptance; this rule has been held from the very first, and as early as 1611 it was held, "that the inhabitants of a town cannot be incorporated without the consent of the major part of them, and incorporation without their consent is void;"[40] nor was this the limit to which this doctrine was carried, for in 1765, Lord MANSFIELD makes an important extention to it by declaring that not only can a body not be incorporated against its will, but that, "a corporation already existing, are *not* obliged to accept the new charter *in toto*, and to receive either all or none of it: they may act *partly* under it, and *partly* under their old charter or prescription. Whatever might be the notion in former times, it is most certain *now*, 'That the corporations of the Universities are *lay-corporations;* and that the crown *cannot take away from them* any rights that have been formerly subsisting in them

[37] I Show. 274.

[38] Kyd, Corporations. Vol. II, 395, 446. Rex *v.* Larwood (1694), I Ld., Raym. 29-32. Rex *v.* Cambridge (1765), 3 Burr. 1647.

[39] Case of Sutton's Hospital (1613), 10 Coke 1, 23.

[40] Hammond *v.* Jethro (1611), 2 Brownl. 97; King *v.* Amery (1787), 1 D. & E. 363; King *v.* Larwood (1694), 1 Ld. Raym. 29-32.

under old charters or prescriptive usage.' The validity of these *new* charters must turn upon the *acceptance* of the university."[41] The relation of the King to the corporation both before and after the grant of the power to establish it has been made and accepted, the importance that was attached to the grant, the necessity for the grant from the King, and the absolute quality of the right to retain the franchise, provided it was properly used, are thus made clear by these cases.

As has been said, the theoretical as well as the logical source to which the right of the King to grant royal charters conferring corporate franchises is traced, was the feudal idea that the King was the proprietor of all the lands in the kingdom, and the fountain from whence all franchises were derived. In the working out of this idea with regard to the holding of land, it was always very strictly observed that when once granted by the King, subject to some service, as it always was, the land became the property of the grantee, and that all he had to do in order to continue to hold it, was to obey the law and render the service. This may be said to be the gist of the feudal law on this subject, for if the holder of land failed in either of these, he forfeited his land; and so it grew up that a grant of land made by the King was absolute. The land was property, it was valuable, and as long as the grantee fulfilled the requirements, tacit and expressed upon which it was granted, to deprive him of it would have been most unjust: it was as though there had been an absolute contract relation between the King and the grantee; a grant by the King in consideration for the service, etc., and as soon as the service ceased, a right in the King to revoke his contract.

When the King had granted away his land, and began to grant his intangible franchises, among which were corporate charters, the old lawyers at once turned to the old feudal idea and declared that once a franchise had been granted, it stood on exactly the same ground as a grant of land, and was so far gone from the King that it could not be resumed by him, nor granted to another unless those to whom it had been granted had made it subject to forfeiture by abuse or non-user,[42] and this rule has never been lost sight of in the English law. That it was well recognized by the early Kings, is shown in the charter granted by Charles II in 1685, to the city of Chester, wherein he had inserted a clause enabling him or his successors, by an order of privy council, to put an end to the corporation by a power of amoving them without assigning any cause, and making that one of the conditions in the grant; this power, it may

[41] Kyd, Corporations. Vol. I, p. 65. Rex *v.* Cambridge (1765), 3 Burr. 1647-1656. King *v.* Pasmore (1789), 3 D. & E. 240.

[42] Bracton, I Twiss Transl. 451.

be remarked, was taken advantage of by James II, on August 12, 1688.[43].

The exact character of the idea that was in the mind of the sovereign when charters of incorporation were first granted, would be hard to define without a great deal of guess-work, still there is no doubt but that they were granted with much the same end in view that was found in land grants. It is true that at the time when the feudal system prevailed in England, the lawyers did not have a much more definite idea of a contract than the Romans had had, and to them also, the idea of consideration, as such, was unknown until about the sixteenth century;[44] still a very cursory examination of the customs, habits and practices of the time will show that the idea of consideration was dormantly present in every transaction. The grant of land was made by the King to insure his military strength, and in consideration of the rendition of services that would tend to accomplish that; so also with incorporeal grants of franchises and charters, he made them because he felt that a benefit would arise from their exercise according to the tenor of the instrument containing the grant: this fact is stated in the charters of all the great trading companies, wherein the King recites that the project to be undertaken is a large one, too large for an individual successfully to handle, that the public interest attaching to the accomplishment of so large an undertaking is great because of the benefits it will bring to England in the way of increased commerce, etc., and because he is desirous to promote the public good of the nation and the welfare of the people, he gives and grants the corporate powers prayed for. Such provisions as this are found in practically all the charters to the early English commercial corporations,[45] which goes far toward proving that the King did not go about granting his royal charters for nothing, and expecting nothing in return for them. He had a number of important ends in view, namely: to improve the internal political government of his kingdom, to extend its territories and to expand its commerce. This was the end to be accomplished by corporations as an institution, and to accomplish it, each had its own purpose and was given its own special powers for the accomplishment of that purpose. Each corporation was a cog in the great wheels of the government, with its separate part to perform and no more, and the successful performance of its part by each corporation was expected to lead to the final accomplishment of the great end aimed at by the King when all were

[43] King *v.* Amery (1787), 1 D. & E. 363.

[44] Ames, History of Assumpsit. 2 Harv. L. Rev. 18.

[45] Cawston & Keane, The Early Chartered Companies, p. 278. Williston, History of Business Corporations, etc., p. 114.

created. Thus the theory of consideration may be seen to lie dormant, and unexpressed in the granting of the corporate charters, but as a matter of fact, it was very much alive and an important factor in the grant. Both parties wanted something—the corporators, the charter, the King, the increased power that the creation of the corporation would tend to give him; both got what they asked for, theoretically at least, and so the consideration did actually exist. It was on this theory that the feudal land grants were made irrevocable, and on the same theory, the courts have ever since held that a grant of a corporate franchise by the King is irrevocable without a sufficient cause shown. It is as though the King had said, "I want a thing done, and if you will do it, I will incorporate you for that purpose and will give you certain powers and privileges, on condition that you use them well and for that purpose only." In short, there is no way in which the idea that the King has entered into a contract by his Royal Charter, in view of all the circumstances, can be avoided, nor can it be much more clearly expressed; and, without regarding the many theories as to the power of a sovereign to contract away his prerogative right to change his mind, nevertheless, he has not been allowed so to change it, nor is it more than just and right that, after having made such a contract, he should be compelled to live up to the letter of it.

By what has been said above, it is not the intention of the writer to assert that in England, a corporation cannot be arbitrarily dissolved, for such a statement would be palpably untrue in view of the omnipotence of the British Parliament. Parliament is the voice of the people of England, who, in fact, rule the country, and so it is that "Parliament can do no wrong," nor is any power denied it. It is, however, only because of this boundless power that the Parliament can dissolve a corporation without just cause expressed and found. Such are the views of all the early authorities, for Blackstone says, "A corporation may be dissolved by Parliament, which is boundless in its operation,"[46] and Kyd agrees by taking an even more positive stand on the subject when he says, "That a corporation may be dissolved by act of Parliament, is a consequence of the omnipotence of that body in all matters of political institutions."[47] But Parliament, while it possesses a power that might ruin the commerce and business of the country by a single word, has rarely used it, and then only in the most conservative ways. Hardly an occasion has yet come before that body, when the dissolution of a corporation was the issue, but that the first question asked, debated and decided

[46] I Blackstone 485.

[47] Kyd, Corporations. Vol. II, 446.

has been,—"Will the dissolution benefit the people, or will the continuance of the corporation cause hardships, and is it just that it should be dissolved?" Thus the Parliament has assumed a role more of the nature of a quo warranto court, and unless the legal right and the natural justice of the proposition coincide, the rule has been not to declare a dissolution. This cannot be said to be the undeviating rule, for oftentimes politics must enter largely into the acts of that body, but the general practice under ordinary circumstances has always been as stated. Perhaps the best examples of the light in which these legislators viewed their extraordinary power, are the debates in the House of Commons and the House of Lords in 1783, when Mr. Fox introduced his bill to place the management of the East India Company in the hands of a committee, who were to act in the nature of receivers for the company. At the first reading of this bill, those who spoke, admitted that Parliament had power to pass *any* law affecting the rights of the company, but the opposition was based upon the lack of natural justice in the bill, in depriving the company of its rights in this manner; much argument was also put forth that it was an unprecedented attempt to infringe chartered rights, but this was answered by citing other bills that had been passed at various times, infringing their rights.[48] Mr. Burke placed his support of the bill on the ground of necessity by maintaining that inasmuch as Parliament had given the power by allowing the use of it, the company was accountable to Parliament for such use, and that any abuse of the powers would allow Parliament to act regarding it, as would also necessity. The same views were taken by the Lords when the question came before them.[49]

Thus we have seen that franchises came from the King because they were his originally, according to the feudal law; that at first, franchises were granted because a direct benefit was expected from them, and that when they had once been granted, the King could only resume them after he had proved that the conditions on which the grant was made had not been lived up to. We have seen that the corporate franchise has always been regarded as valuable, and that, even Parliament, which is restrained as to its acts in no way, will not declare a forfeiture without good cause. It has been shown that every time the King grants a corporate charter, he contracts with the incoporators that they shall have corporate powers as long as they shall pursue the course laid down for them in their charter, and they agree with him that they will form the corporation and act accordingly, if he will grant the charter; and, having made

[48] Hansard's Parliamentary Debates. Vol. 23, p. 1228; Vol. 17, pp. 682, 905, 914.
[49] Hansard's Parliamentary Debates. Vol. 24, p. 122.

this contract, the King has always been restrained from revoking it before a breach, to determine which, the quo warranto proceedings are held. It has also been shown that only because of the omnipotence of Parliament can that body deprive the corporators of their charter without trial. From this, it is plain to be seen that the corporations of England have, from the first, been looked upon as possessing a quality of stability essentially different from that which would result if their franchises were mere licenses. Their fictitious personality stamps them with the same rights as go to natural persons, even to the rights of life and property, and of these rights they cannot be deprived unless they, by their own acts, have brought the punishment upon themselves.

The situation in the English American colonies was but little different from that in England. By the colonists, the charters to the various companies were considered as inviolable as were those of any other English corporation, and it was the violation of these charters by the King and Parliament which created much of the bitterness toward the mother country that existed in America. It was recognized that even here, the King could not arbitrarily resume a charter at any time he saw fit, so that, when he did wish to do so, he was put to many trickeries in order to accomplish his ends. Thus in July, 1685, just after James II had come to the throne and when he was trying to centralize his power, a quo warranto was issued to the Governor and Company of Connecticut, commanding an appearance in such a ridiculously short time that the representative of the colony could not possibly arrive in England on the day set for the appearance, and although judgment was never entered on this particular information, such was the method the King was forced to adopt in order to resume the charters of The London, the Bermuda, and The Massachusetts Companies on the ground that failure to appear in such a suit was always regarded as sufficient abuse to justify a revocation. As to Connecticut, the new governor, Andros, was instructed to receive the company's charter *if they would resign it.* This they refused to do, but made a tentative proposition to the crown which was construed into a technical resignation, upon which ground the charter was declared to have been resumed by the King. This was not the intention of the colonists, nor did this action meet with the approval of the people in any way, as is shown by the following document:

"I am of opinion that such submission as is put in this case doth not invalidate the charter, or any of the powers therein, which were granted under the great seal; and that the charter not being surrendered under the common seal, and that surrender duly enrolled of

record, nor any judgment of record entered against it, the same remains good and valid in law; and the said corporation may lawfully execute the powers and privileges thereby granted, notwithstanding such submission and appointment of a governor as aforesaid. EDWARD WARD.

2nd August, 1690.

I am of the same opinion. J. SOMERS.

I am of the same opinion and as this matter is stated, there is no ground of doubt. GEO. TREBY."[50]

In 1684, the charter of the Massachusetts Company was taken from them by proceedings in the chancery court,[51] and later still, in 1704, a bill was introduced into Parliament, to provide for the resumption of all chartered privileges in the colonies and revesting them in the King. This bill was not received with acclaim either in England or in the colonies, and was strenuously opposed by Sir Henry Ashurst who was the champion of Connecticut in particular. He seemed to strike the key note to the entire situation when he advanced the following propositions why the bill should not be adopted: 1. Because of the important considerations and services performed for the charter; 2. Because of the great expense that had been attached to the founding of the colony; 3. Because to take away the charter would be to take away that on which the title to all the land was based; 4. Because to do so would destroy all confidence in royal patents; 5. Because it would set a precedent that would endanger all corporate interests in the kingdom. This is the first instance of record where the contract idea has found expression and here it is only hinted at, as is seen by the reference to the considerations performed for the charter, and even that would seem to have crept in spontaneously, and without fully impressing its meaning, for this is also the last time it was given expression to in England during that century.

In the eyes of the colonists themselves, the sacredness of chartered rights was generally much more clearly recognized than in England, as is seen by the action of the assembly of Connecticut in regard to the New London Society for Trade and Commerce, when, although the Assembly had the right to revoke the charter arbitrarily, they would not do so, but in February, 1733, cited the society to show cause why its franchises should not be forfeited for illegally issuing certain bills of credit, and, after the company had made its appearance, tried the cause before a special Assembly as it would have

[50] Trumbull, History of Connecticut. Vol. I, p. 387.
[51] Palfrey, History of New England. Vol. III, p. 391.

been tried in any court, proved the illegality of the issue and then declared the franchises forfeited.[52] Also by the action in Pennsylvania, when the Charitable School of Philadelphia, chartered in 1753, was dissolved by the Assembly in 1779 and its interests transferred to the newly incorporated University of Pennsylvania, but owing to the glaring injustice of the act, had all its rights restored to it in 1789, at which time the reason given for the restoration was that the former act was "repugnant to justice, a violation of the constitution of this Commonwealth, and dangerous in its precedent to all corporate bodies and the rights and franchises thereof."[53] This same sacredness was given voice to in the Declaration of Independence, wherein one of the reasons given for renouncing allegiance to George III was that he had given assent to acts of the Parliament "for taking away our charters * * * and altering fundamentally the powers of our governments."

After the revolution, and as soon as the states had been organized and legislatures assembled in accordance with their various constitutions, these bodies were possessed of the same powers as had originally rested in Parliament, and they were just as boundless, except in so far as they were restricted by the state constitutions and, after its adoption, by the Constitution of the United States. This fact brings us to the fundamental difference between the English and American governmental systems. In England, the Acts of Parliament are the constitution, and they are of force only so long as they remain unaltered or unrepealed. In America, the various constitutions under which the state and national governments are conducted, are statements of iron-clad rules, made by the people and capable of being changed only by the people. The constitution is paramount in America, and all other acts must coincide with it to be of force. This subserviency of the law making power to the constitution, is nowhere put in better terms than by Mr. Lowell in the following passage: "Apart from the fact that the central principle of the English Constitution is the omnipotence of Parliament and that the court would find no ground to build its decisions upon, no court in England could possibly have power to hold acts of Parliament invalid, because Parliament is, in effect, a meeting of the people acting through their representatives.

Complete sovereignty resides, therefore, in Parliament, and to oppose the will of that body is to oppose the will of the people. But the American Congress has not complete sovereignty, nor has any

[52] Colonial Records of Connecticut. Vol. VII, p. 420.

[53] Penn. Laws (Carey & Bioren Ed.). Vol. II, Chap. DCCCLX, p. 223. Id., Vol. III, Chap. MCCCLXXXII, p. 302. Thorpe, Benj. Franklin and the University of Pennsylvania, pp. 68, 221.

department of the government, state or federal, nor have all of them acting together. Congress has no authority to declare the will of the people, except within the limits prescribed by the Constitution; for the Constitution itself is the final expression of the popular will, and is binding upon every officer of the government as the supreme law of the land. I am not speaking of the Constitution from a legal standpoint alone. I am speaking of it as it is regarded by the people themselves; for if this view of the matter were entertained only by the lawyers, no court which assumed power to set aside an act of Congress would be tolerated for a moment. The power of our courts, then, to pass judgment upon the validity of a statute, depends upon the fact that the voice of Congress is not the voice of the people. But if a parliamentary form of government were to be introduced into this country, Congress, like the British Parliament, would acquire authority to declare the will of the people, and then no court could long withstand its power."[54] It is unnecessary, however, for the purposes of this article, to enter into a general discussion of the subject of constitutional law, but only to consider one clause of the Constitution of the United States, and to show, if possible, how and why it came to have the meaning now given it; that clause is that part of Section 10, Article 1, which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts." We have seen that the words of the Constitution must control the acts of the legislatures and the courts in the United States, so that the next thing to be determined is the meaning of the words and their application.

Whatever was the intention of those who drew the Constitution, how the clause above referred to should be applied has been the source of much learned discussion,[55] which it would be useless to attempt to review, but it might be worth while at least to examine the ideas of the person who was originally responsible for the clause in question. There is but little doubt that the author of this bone of contention, or "the obligation clause," as it has often been called, was Mr. James Wilson,[56] later one of the justices of the Supreme Court of the United States, and a very learned lawyer, who had always contended that acts of a legislative body were of the nature of compacts, particularly when rights were vested under them; and there is also but little doubt that he was aiming at just this when he urged the insertion of that clause in the Constitution. To be sure, he probably was also looking to the shutting off of the many laws

[54] Lowell, Essays on Government, p. 44.

[55] Shirley, The Dartmouth College Causes, p. 213.

[56] Shirley, The Dartmouth College Causes, p. 216. Sturgis *v.* Crowninshield (1819). 4 Wheat. 151.

which were being passed by the state legislatures making indebtedness payable with practically worthless bills of credit issued by them, etc., but that he was also looking further is shown by the stand he took in the Pennsylvania legislature in 1785, and before the adoption of the Constitution of the United States, when a bill was submitted which provided for the repeal of the act of April, 1782, by which the subscribers to the Bank of North America were incorporated in Pennsylvania. Mr. Wilson was one of the most bitter opponents of this bill, and it was during this controversy that the principle was first enunciated in America, upon which the case of *Trustees of Dartmouth College* v. *Woodward*, the case which finally settled the application of the clause to corporations at least, was decided.[57] It is best, in order to illustrate his views, to give as much of Mr. Wilson's argument in this controversy, as applies to this proposition, in full, for only in that way can the entire meaning be appreciated; it was as follows; "The act in question formed a charter of compact between the legislature of this state and the President, Directors and Company of the Bank of North America. The latter asked for nothing but what was proper and reasonable; the former granted nothing but what was proper and reasonable. The terms of the compact were, therefore, fair and honest; while these terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other.

It may be asked * * * has not the state power over her own laws? May she not alter, amend, extend, restrain and repeal them at her pleasure?

I am far from opposing the legislative authority of the state, but it must be observed that, according to the practice of the legislature, public acts of very different kinds are drawn and promulgated under the same form. A law to vest or confirm an estate in an individual, a law to incorporate a congregation or other society, a law respecting the rights and properties of all the citizens of the state, are all passed in the same manner, are all clothed in the same dress of legislative formality, and are all equally acts of the representatives of the free-men of this Commonwealth. But surely it will not be pretended, that after laws of these different kinds are passed, the legislature possesses over each the same discretionary powers of repeal. In a law respecting the rights and properties of all the citizens of the state, this power may be safely exercised by the legislature. Why? Because in this case the interest of those who make the law (the members of the Assembly and their constituents) and the interest of those who are affected by the law (the mem-

[57] Trustees of Dartmouth College *v.* Woodward (1819). 4 Wheat. 518.

bers of the Assembly and their constituents) is the same. It is common cause and may, therefore, be safely trusted to the representatives of the community. None can hurt another without, at the same time, hurting himself. Very different is the case with regard to a law, by which the state grants privileges to a congregation or other society. Here two parties are instituted, and two distinct interests subsist. Rules of justice, of faith, and of honor must, therefore, be established between them; for, if interest alone is to be viewed, the congregation or society must always lie at the mercy of the community. Still more different is the case with a law, by which an estate is vested or confirmed in an individual; if in this case, the legislature may, at discretion, and without any reason assigned, divest or destroy his estate, then a person seized of an estate in fee-simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will.

For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered as a compact, and to be interpreted according to the rules and maxims by which compacts are governed. A foreigner is naturalized by law: Is he a citizen only during pleasure? He is no more, if, without any cause of forfeiture assigned and established, the law, by which he was naturalized, may at pleasure be repealed. To receive the legislative stamp of stability and permanency, acts of incorporation are applied for from the legislature. If these acts may be repealed without notice, without accusation, without hearing, without proof, without forfeiture, where is the stamp of their stability? Their motto should be, 'Levity.' If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, a precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the State, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politics, and will float wildly, backwards and forwards on the irregular and impetuous tides of party and faction."[58] After reading such a statement as this by the man who was the author of the clause upon which we are trying to put a construction, it will be hard to say that he, at least, had any doubt as to how it should apply to charters that had been granted by the government, whether they were grants of corporeal property or mere intangible franchises, so long as rights vested under them. It

[58] Wilson, Works. Ed. of 1896. Vol I, pp. 566-567. Id., Vol. II, p. 498.

must be admitted that the application was not so clear to many others and to many of the courts of the country, for as has been said, it was the subject of much discussion, and also gave rise to much litigation which was perhaps not contemplated at the time, by any or by very few besides Mr. Wilson; for instance, grants of land made by a state to an individual were held to be as absolute as grants made *by* an individual and that they would come within the letter of the Constitution of the United States,[59] as would exemptions from taxation where land had been purchased from the Indians;[60] but New York held that a grant of the exclusive right for a term of years, to build and operate steamboats on the Hudson River was a mere license or permission, and that it was not a right that would afford an action if invaded by another party.[61] Thus a diversity of opinion is shown to have existed in determining what grants were and what were not contracts: but the diversity was still wider when they came to the consideration of laws affecting the chartered rights of corporations. The cry went up, and has been raised many times since, that the clause in the Constitution prohibiting laws impairing the obligation of contracts was intended to apply only to such contracts as were executory, and not such as had been executed, in which class were placed charters of incorporation. Mr. Thompson, in his attack on the decision in the *Dartmouth College Case,* has sounded the cry of those who were opposed to the application of the restriction to acts affecting corporate rights, in the following statement: "The Constitution of the United States did not say that no state shall impair the effect of contracts, nor divest rights vested through contracts; those safeguards of property rights are left to the State Constitutions; it said that no state shall impair the *obligation* of contracts. Now what is the obligation of a contract? It is merely the duty which either of the contracting parties has assumed towards the other for the consideration named. This duty exists only so long as the contract remains executory. When the contract is performed on either side, the obligation of the contract assumed by that party is discharged and at an end * * *"

But Marshall did not hesitate over such a trifling difficulty of interpretation. He discovered an obligation in an executed contract. That obligation is the implied obligation not to take back the gift."[62] Mr. Thompson, in this article, has evidently missed the entire conception of the theory upon which corporate charters were granted. As has been shown, the idea of the English Kings in making grants,

[59] Fletcher *v.* Peck (1810). 10 U. S. (6 Cranch) 87.
[60] State of New Jersey *v.* Wilson (1812). 11 U. S. (7 Cranch.) 164.
[61] Livingston *v.* Van Ingen (1812). 9 Johns (N. Y.) 506.
[62] Thompson, Abuses of Corporate Privileges. 26 Am. L. Rev. 175.

was that the corporators should possess the corporate privileges as long as they used them well, and the same was and is true in America. Instead of being a contract which is executed the moment the charter is granted, it is a contract of the sort which is always executed *"In futuro,"* it is a continuous contract. The state not only grants the power to become and exercise the rights of a corporation, but, like the King, also contracts with the corporators that they shall continue to enjoy their privileges unmolested, only so long as they use them properly, and in this way, the contract can never become executed until it has become inoperative. So also, the same will apply with equal force to the corporators who have received their charter in consideration of forming the corporation and making a proper use of the powers vested by it. Their obligation is also a continuing one, for the continued proper use of the corporate powers is in turn a consideration for the continued right to use them undisturbed. Each terminates with the other, and with them also ends all obligation under the contract, for with their termination the very corporation itself comes to an end. Thus the idea of an executed contract becomes impossible, for the obligation remains as long as the corporation exists, and any act affecting the rights under the charter cannot help but be an act impairing the obligations above set forth.

As has been said, the state governments, upon becoming independent of England, assumed the same powers over the state that had formerly been held by Parliament, and in the exercise of these powers, were restricted only by their own constitutions, and, after the adoption of the Constitution of the United States, by it. But before the Constitution of the United States was adopted, the state legislatures had almost boundless powers, and were certainly no more restricted in their acts towards the corporations than had been Parliament before them; thus in 1784, the Legislature of Virginia incorporated the Ministers and Vestry of the Protestant Episcopal Church in Virginia, and in 1786, repealed the incorporating act without having reserved to itself any right to do so; so also in Pennsylvania in regard to the Bank of North America above referred to, which was incorporated in 1782, and dissolved in 1785. But after the Constitution of the United States was adopted, an immediate change came over most of the legislatures, and they at once began to recognize that a chartered right was something that could not be tampered with too promiscuously, as is seen by the action which was taken when the Constitution of Massachusetts was adopted, when the grant of 1636, under which Harvard University was incorporated, was ratified and confirmed, but with the right reserved to

the legislature to make such alterations in the government of the university as might be done by the legislature of the Province,[63] and also in the charters to Williams and Bowdoin Colleges, incorporated in 1793 and 1794 respectively,[64] [65] wherein the legislature reserved the power to "alter, limit, annul or restrain any powers vested by this act." In Pennsylvania, in 1807, when an act amending certain of the powers previously granted to the Philadelphia and Lancaster Turnpike Company, was passed, it contained a proviso that the act should not be of any effect until the company had accepted it in writing,[66] and in 1809, a charter of incorporation was granted to the Marine Insurance Company, of Philadelphia, in which the right was reserved to the legislature to revoke the charter if it should think that the powers granted were injurious to the people;[67] also in New York, in 1806, when the legislature, in incorporating the Medical Society of the State of New York, reserved the power to repeal or amend the charter at any time it saw fit.[68] These instances merely mark the beginning of the practice of the legislatures to reserve the right to repeal or amend when they thought they might care to do so in later years, but at the same time, they are most conclusive in showing the light in which the legislators viewed the charters, as well as their idea of the extent of their control over chartered rights after they have been granted to a corporation,[69] as will also the very common provision found in the charters to manufacturing companies and others that would tend to promote home industry, to the effect that they were revocable only for abuse or misuse of the powers they contain.[70] This, however, was not the unanimous opinion at the time, for, although the Massachusetts court had held as early as 1806, that, "The rights legally vested in * * * any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation,"[71] and Justice STORY had stated in the Supreme Court of the United States in 1815, that statutes repealing the acts creating private corporations were con-

[63] Shirley, The Dartmouth College Causes. 167.

[64] Laws of Massachusetts. Vol. II, 198.

[65] Laws of Massachusetts. Vol. II, 246.

[66] Pennsylvania Laws (1806-07), 265.

[67] Pennsylvania Laws (1808-09), 65.

[68] Laws of New York. Vol. IV, 537.

[69] Laws of New York. Vol. V, 8; Id., Vol. V, 83; Id., Vol. V, 105. Penn. Laws (1809-10), 40; Id. (1810-11), 240; Id. (1815-16), 275. General Bank Act. Mar. 21, 1814. Penn. Laws (1813-14), 154, and other acts not mentioned in this list.

[70] Penn. Laws (1809-10), 191; Id. (1811-12), 240; Id. (1813-14), 30, and many others not mentioned in this list.

[71] Wales *v.* Stetson (1806). 2 Mass. 143.

trary to the principles of natural justice, and the spirit and letter of the Constitution of the United States,[72] still the Virginia court declared itself in 1809, to be against the idea of the contract theory as applied to corporate charters in the following words: "Are the hands of a succeeding legislature tied up from revoking the privilege? My answer is that they are not, etc."[73] The Supreme Court of New Hampshire was just as positive that the charter was not a contract, when it decided the case of *Trustees of Dartmouth College* v. *Woodward*,[74] but it was this decision which was taken to the Supreme Court of the United States in order finally to decide the great question, and here, under the influence of the natural justice in the situation, and the sentiment of all the law as placed before the court by Mr. Webster, it was settled for once and always, that a charter of incorporation is a contract, and as such, any act passed by any state legislature impairing the rights existing under it, is such an act is will come under Section 10 of Article 1, of the Constitution of the United States, and hence cannot stand as valid.

Although it may truthfully be said that the doctrine of the *Dartmouth College Case* has been so often re-affirmed and asserted as to have become firmly established as one of the canons of American Jurisprudence, still it has not been allowed to rest entirely undisturbed, free from modification and outright attacks. It is also true that a large majority of these attacks have been of a political nature, the most violent of which have been by those who may be classed as State Rights exponents. In fact, this theory has been the cause for practically all the modifications, as will be seen from the fact that the courts making the modifications have, in almost every case, been those in which the supporters of the States' Rights doctrine have predominated. But whether the modifications of the doctrine have been political or otherwise, still they must be looked upon as coming in the course of the natural growth of the nation and the law. There has never been any general rule laid down by the courts, which has not, sooner or later, been recognized as too broad in its application to particular cases and has been consequently subjected to some restrictions. So it was with the *Dartmouth College Case.* The courts recognized what a power for evil it could be made and how it could hardly help but bring down upon the people a veritable avalanche of abuse of power by those corporations which held irrevocable powers under it, hence, as soon as the maximum scope of

[72] Terrett *v.* Taylor (1815). 13 U. S. (9 Cranch.) 43.
[73] Currie's Adm'rs *v.* Mutual Assurance Co. (1809). 4 Hen. & M. 315.
[74] Trustees of Dartmouth College *v.* Woodward 1817). 1 N. H. 111, 65 N. H. 473.

the unrestricted rule was seen, the courts wisely began to define its boundaries.

The first case which is said to be a direct modification of this theory, was the *Charles River Bridge Case,* decided in 1837 by Mr. Chief Justice TANEY.[75] In this case, the court held that the corporate franchise must be construed most strictly, and to be said to give no more than is expressly stated in it. This was stated as applying to a grant of an exclusive privilege which the court held could not be inferred from the grant of a mere bare privilege with nothing said as to it being exclusive. As a matter of fact, however, this case does not seem to conflict with the *Dartmouth College Case,* nor does the chief justice once refer to that decision in his opinion. He does hold, however, that, "It is well settled by the decisions of this court that a state law may be retrospective in its character, and may divest vested rights and yet not violate the Constitution of the United States unless it impairs the obligation of a contract," and then he goes on to show that in this case there is no contract to impair. This case turns, not upon the proposition of a contract which has had the obligation of it impaired by an act of the legislature, but upon the point that if the ferry had an exclusive right, that was destroyed when the ferry was destroyed and the bridge erected, and also on the proposition that the proprietors of the bridge had never had the rights of Harvard College conveyed to them.

The *Charles River Bridge Case,* if it can be said to be a real modification of the *Dartmouth College Case,* was the result of the consideration of a court which combined farsightedness with the Anti-Federal views of its members to a good end. As an example of the cases in the opposite class, in which the *Dartmouth College Case* was in controversy and was directly upheld by the court, is the decision in the *Binghampton Bridge Case,*[76] which not only upheld and enforced the doctrine of the *Dartmouth College Case,* but also commented upon and approved the *Charles River Bridge Case.*

Among other violent attacks upon the Dartmouth College decision are the article by Judge THOMPSON above referred to,[77] and an address by Judge RUSSELL,[78] in which he first attacks the application of the "obligation clause" of the Constitution of the United States by stating that it had its origin in the idea that it was intended only to prevent legislative action in the passing of bankruptcy laws by the various states, which would favor their citizens at the expense of the citizens of other states and in support of this, cites Mr. Justice

[75] Cbarles River Bridge Co. *v.* Warren Bridge (1837). 11 Pet. 420.
[76] (1865). 3 Wall. 51.
[77] See Note 62, this article.
[78] 30 Am. L. Rev. 327.

BRADLEY in the *Sinking Fund Cases*[79] as holding that, inasmuch as the restriction was imposed on the legislatures of the States only, it must have had its origin in the above consideration. He also cites Mr. Justice SWAYNE[80] as saying that the point decided in the *Dartmouth College Case* had never occurred to anyone when the Constitution was adopted by the people. How untrue all this argument is may be seen from the reference above made to the views of James Wilson and the manner in which he expressed them. But the judge, in his argument, does not seem to meet the issue of his statements squarely; on the contrary, he seems to uphold the case as it applies to private corporations, and then goes off at a tangent by saying that the theory enunciated should never have been applied in the *Dartmouth College Case* for the reason that it was not a private but a purely public and civil institution.

Another class of cases which have been said to be modifications of the *Dartmouth College Case* are those in which the corporate franchises have been affected by the exercise of the police power, or where they have been taken for a public use under the power of eminent domain. Such were the cases of *Stone* v. *Mississippi*,[81] wherein the court allowed an act to stand as valid which prohibited the corporation the use of its power to conduct lotteries, and the case of *Fertilizing Co.* v. *Hyde Park*,[82] wherein the court allowed an ordinance to stand which classed the business of the corporation as a nuisance and prohibited the carrying on of the same within the limits of the city. In *Boyd* v. *Alabama*[83] a ruling was made similar to the one in *Stone* v. *Mississippi*. So also in *Butcher's Union* v. *C. C. Co.*[84] the exercise of the corporate powers were enjoined to promote the public health, while in *Bridge Co.* v. *Dix*[85] the court did not hesitate to allow the corporate franchises to be taken for a public use under the power of eminent domain. The courts will, however, examine most closely any police regulation which abridges the corporate functions, for they will not tolerate an amendment in disguise for the mere purpose of curtailing the corporate franchises.[86]

Whether or not the cases which have been stated are modifications of the *Dartmouth College Case*, we cannot help but recognize the

[79] (1878). 99 U. S. 745.
[80] Edwards *v.* Kearzey (1877). 96 U. S. 595.
[81] (1879). 101 U. S. 814.
[82] (1877). 97 U. S. 689.
[83] (1876). 94 U. S. 645.
[84] (1883). 111 U. S. 746.
[85] (1847). 6 How. 507.
[86] In Judge Russell's address he gives a very exhaustive list of all the cases in which the Dartmouth College theory has been touched upon or in any way departed from. See 30 Am. L. Rev. 338.

wisdom of the original rule and the manner in which it has been applied in subsequent cases. It often happens that our judges are compelled to act as legislators, if not in theory, certainly in fact. They are forced by the exigencies of the case, the peculiar facts, the advancement of ideas since the formation of the rule, and a hundred other circumstances, to pronounce an application of the rule which never had been dreamed of by those who went before. So it is that apparently new rules arise, because as has been seen they, or at least a great number of them, become indispensable to later development. The judges look over the entire field. They see the past, the present, the effect of past laws on the present, they measure the effect of present laws upon the future and wisely rule accordingly. They must temper their decisions and the applications of the rules to allow for the expansion that must come with time, else advancement would cease. Such was the effect of the *Charles River Bridge Case,* the first modification of the *Dartmouth College Case.* The court did not attempt to affirm, overrule, or modify that case, but did intend to set the wheels of progress on their way, untrammelled by the weight of legal decisions which would hold them to the antiquated and inadequate views of the exclusive nature of franchises, and which would unduly hamper individual liberty or prevent the state from preserving and protecting the public interest. The original rule gave stability to private interests and beneficence. Later cases have only fixed reasonable limits in the interest of the public welfare.

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