THE EVOLUTION OF A PRINCIPLE

The entrance to law is like the penetration of a thicket—hard, thorny, devious and distressing. Each traveler must find the way for himself, and none can show another. Law is in fact a growth of experience rather than a creation of art. Useful principles spring up but are smothered by the rank growths of tradition or the wilder suggestions of cunning and cupidity. Nothing excellent can show all its fair proportions, and the fine discoveries of great jurists are hid away beneath the entangling encroachments of preposterous technicalities. Depending upon men's minds as well as their experience, upon their intelligence as well as their knowledge, law partakes of the infirmities of those who think it, and can never arrive nearer to perfection than the faculty which conceives and shapes it. For this reason it is a distressing science, now baffling by the obscurities of its doctrines, now offending by the boldness of its iniquities. A word misspelled, a letter omitted, stands between an atrocious crime and its merited punishment. A word too much in a testament may defeat the benevolence of a father. Equity halts and hesitates; it will reform and also enforce a contract, but it will not at the same time reform and enforce. The old maxim, *"Ubi jus ibi remedium,"* is a delusion and a snare, for remedies are sometimes withheld from obvious rights and where justice is evident it is often denied because precedent is lacking. Judges pretend to do what has been done, *Jus dicere non jus dare,* but they make a wrong use of a right judgment. Declaring that hard cases make bad law, they force bad law to make hard cases. The trouble lies not in the law, since that may be anything men will have it, but in those who aim at justice and cannot perceive it. Students are slow to understand. Not all are of equal capacity. Some lack diligence. Human experience cannot be mastered easily. We have not yet learned how to select the best men for office, and where judges are elected some bad lawyers must sit in judgment. In view of these obvious influences, it is remarkable not that law is as bad but that it is as good as we find it. It is on the whole an excellent science—the very best achievement of man's wit and experience—but its excellences are as hard to perceive as its deficiencies are to pardon. A good rule is good because its consequences are good, but we must know those consequences in order to appreciate either the meaning or the value of the rule.

I propose to discuss a case, which has perhaps been as influential in the development of American constitutional law as any contained in the books, in the hope that I may thereby show the origin of law, its necessity, its constant mutation, its flexibility and adaptability, its high purpose, its occasional futility and its abiding usefulness.

The Dartmouth College case came on for hearing before the United States Supreme Court nearly a century ago. It was argued by Webster and a greater lawyer than Webster, one Mason, on behalf of the college. The judgment was written by Mr. Justice Story, Chief Justice Marshall concurring in a separate opinion. It decided that the charter of a private educational corporation conferred by law was a contract within the meaning of the federal constitution which could not be impaired by a subsequent law. The facts presented to the court need not be discussed. They were such as to provoke the moral resentment of an honest man. As the decision corrected what was deemed a wrong, it was approved by everybody at that time. It declared, however, a principle, and from that principle, sound as it seemed, unnumbered troubles have proceeded. If a court says a particular act is wrong, and it is wrong, the court has done no harm; but if it says that this act and all similar acts are wrong, it has declared a principle which may do more or less harm as the authority of the court is more or less extended. The Supreme Court of the United States has jurisdiction over all the states of the Union. The principle therefore declared by it in the Dartmouth College case controlled these states.

Another case arose which involved the principle, and the court was suddenly confronted by its consequences. A corporation was chartered to build a bridge across the Charles river, and did so. Afterwards another company was chartered with power to build a bridge across the same stream, and the effect of its construction was to impair the value of the first company's charter. The first company contended that its charter rights were inviolable, but the court held otherwise upon the ground that the immunity claimed was not expressly conferred. It will be observed that the injustice complained of seems to have been identical in both cases. In the one, property conveyed to certain trustees was put under the management of others selected by the state; in the other, property appropriated to public use was destroyed by a subsequent act of the legislature. The court modified its principle, but not expressly. They declared that charters were

still to be regarded as contracts, but as contracts, should be strictly construed, and no right should be implied which was not expressly conferred. Later, acting upon the suggestion of Mr. Justice Story, the states of the Union began to avoid the principle altogether by enacting general or special laws which provided that all charters should be subject to alteration, amendment or repeal by the legislature; and thereupon the principle so elaborately established, so excellently fortified, so evidently just, seemed in danger of extinction. It was saved from this fate by the prudence of business men. They would not embark their resources in an enterprise which depended upon the caprice of the legislature, and to avoid this risk demanded and received charters which expressly provided that they should not be subject to alteration, amendment or repeal notwithstanding the general law. The Dartmouth College case again became the keystone of all public enterprises. Mischief followed. Rights became vested which were found injurious to the general welfare, and to remedy this evil the people of various states put in their constitutions a prohibition against special unalterable charters and required all corporations to be created by general laws. Again the principle of the Dartmouth College case became ineffectual with respect to all charters conferred by the state. Later, however, a new use was found for it.

A state is an unwieldy body, incompetent to perform all the responsibilities of government. To assist it, counties, cities, towns and villages were created, each having local authority with respect to local matters. These municipalities were endowed with powers requisite for their usefulness and among others with power to control the use of highways and contract for water, light and public work. In the course of time they conferred franchises or local privileges deemed sufficient to induce private enterprise to undertake a general service. Water and gas companies created under general laws in this manner derived local franchises of great value, which were unguarded by the repeal and alteration provision.

Again the principle of the Dartmouth College case became of importance and the courts of the land were crowded with suits which invoked its application. The principle on the whole was a sound one and the courts enforced it wherever a manifest wrong was attempted. It seemed unjust that today men should be offered an inducement to public service and tomorrow deprived of all fruits of their investment. The principle was therefore reasserted in all its original vigor

and for years men and lawyers again regarded it with a sort of religious veneration.

Then began a train of evils which aroused a general indignation. Not all men are honest. Corrupt men sought and obtained office, and other corrupt men inaugurated schemes which involved a private benefit at the general expense. Franchises of great value were purchased and courts were confronted by the inviolability of legislative contracts upon the one hand and the public welfare upon the other. When such cases came before the Supreme Court of the United States, it inclined instinctively to afford relief and having such a propensity availed itself of the doctrine of the Charles River Bridge case to refine away the obnoxious parts of such grants or so modify them as to deprive them of their injurious consequences. Franchises were so strictly construed as to leave nothing in them. A right to charge not more than five cents was held to mean a right to charge so much less than five cents as the legislature required. Considerations were inquired into as well as the terms used, and where it did not appear that the grant made was offered for a consideration reserved, the franchise was held not to be contractual in character. Other refinements were invented, and in the course of time hardly a remnant of the principle of the Dartmouth College case could be discovered in the opinions of the judges. Lawyers cited it with diffidence and none ventured to rely upon it. All charters became alterable, if not in terms yet in effect.

Now followed a succession of wrongs which none could contemplate without shame. Availing themselves of the new doctrine with respect to legislative contracts, local bodies began to confiscate property appropriated to the public service. Rates were imposed which left no profit to the owners and private management was interfered with. The public service became hateful to investors. Alterable grants were so changed as to leave nothing of value. The taxing power was employed where the reserved power of alteration was ineffectual. The Dartmouth College case after a century had become a historical incident, interesting as showing the development of law but influential no longer. Today the doctrine of the United Railways case is paramount and men have ceased to rely upon a principle which time had made venerable. Our ancestors thought it a very Rock of Gibraltar, but it has crumbled before modern artillery and the itinerant student of law will gaze upon its ruins with that melancholy interest

which is apt to be inspired by some remnant of antiquity, obsolete now but once useful and admired.

The sequel is interesting. Dimly perceiving that injustice cannot long result in good, public service commissions have been set up to correct local wrongs, and now we are trying out a new experiment. The courts, repenting perhaps the consequences of their judgments, have invented a new doctrine which is still in the making. Having disposed of the Dartmouth College case, they have availed themselves of another provision of the federal constitution to afford relief in all desperate cases. The reserved power to alter, amend or repeal now universal has been hemmed in by the limitation that no person shall be deprived of property without due process of law. A grant in terms alterable may not be so altered as to deprive the grantee of all substantial benefit intended to be conferred.

And so the principle has swung to and fro like an unwieldy pendulum, now inclining this way, now that, now fruitless, now efficacious, always, however, vacillating toward some righteous purpose and never departing far from justice. I append for the use of those who

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[1] A valid charter granted to the trustees of Dartmouth College is a contract within the meaning of that clause of the constitution of the United States which declares that no state shall make any law impairing the obligation of contracts.

Dartmouth College vs. Woodward, 4 Wheat. 518.

[2] Public grants must be strictly construed. The grant of power to erect a bridge and exact tolls does not prevent a subsequent grant of power to another corporation to erect a bridge over the same stream where the effect of the construction of the latter bridge is to impair the revenues of the first grantee.

Charles River Bridge vs. Warren Bridge, 11 Pet. 420.

[3] The rule for the construction of charters is that they shall be most strongly construed against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to a claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.

Northern Co. vs. Hyde Park, 97 U. S. 659.
Newton vs. County Commrs., 100 U. S. 548.
Pearsall vs. R. R. Co., 161 U. S. 664.
Freeport Water Co. vs. Freeport, 180 U. S. 587.
Stanislau Co. vs. S. I. Co., 192 U. S. 201.

[4] Where a charter confers a right, privilege or immunity but no consideration is provided to be given to the state or the company is required to do nothing in return for such right, privilege or immunity, the grant is a nude pact and may be revoked.

Christ Church vs. Philadelphia, 65 U. S. 300.
Salt Co. vs. E. Saginaw, 80 U. S. 373.
Tucker vs. Ferguson, 89 U. S. 527.
R. R. Co. vs. Miller, 132 U. S. 75.
Grand Lodge vs. N. O., 166 U. S. 143.

wish to trace the course of those events which I have currently described, a table which contains the significant cases decided by the United States Supreme Court upon the subject. The table is necessarily incomplete. Other cases will have to be decided. There has arisen in the City of St. Louis a difficulty which will tax the ingenuity of the lawyers and the flexibility and usefulness of law. The McKinley System is engaged in interstate commerce. It sought and received from the City of St. Louis a franchise to operate over certain streets upon condition that it should not charge more than five cents for carrying a passenger from St. Louis to East St. Louis. Its franchise is alterable, amendable and repealable, since it so provides. After a time it was discovered that five cents was not a remunerative rate for the service rendered, and thereupon the corporation applied to the Interstate Commerce Commission for permission to charge ten cents. Its prayer was granted. St. Louis, however, insisted upon the observance of the condition of its grant, and now threatens to revoke the franchise. The question presented is: Has the city such power? It is perhaps proper to add that no contract may be made even by a

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[5] An alterable, amendable or repealable charter cannot be regarded as a contract within the meaning of that clause of the federal constitution which prohibits a state to pass a law impairing the obligation of a contract.

Piqua Bank vs. Knoop, 57 U. S. 369.
Sherman vs. Smith, 67 U. S. 587.
Hamilton Gas Co. vs. Hamilton, 146 U. S. 258.
Bienville Water Co. vs. Mobile, 186 U. S. 219.

a. Where by such a charter the stock and real estate of a corporation are exempt from taxation, a subsequent law imposing a tax on such property is valid.

Tomlinson vs. Jessup, 82 U. S. 454.
Water Co. vs. Clark, 143 U. S. 1.
Stearns vs. Minnesota, 179 U. S. 240.

b. Where by such a charter no special provision is made for the payment of a debt, a subsequent law may require a sinking fund to be established and maintained.

Sinking Fund Cases, 99 U. S. 700.

c. Where by such a charter it is provided that a state may elect four directors of a corporation, a subsequent law giving the city the right to elect seven is valid.

Miller vs. New York, 82 U. S. 478.
Spring Valley Water Co. vs. Schottler, 110 U. S. 347.

d. Where by such a charter conferred upon a railroad nothing is said with respect to telegraph lines, a subsequent law requiring the company to maintain and operate such lines is valid.

U. S. vs. R. R. Co., 160 U. S. 1.

e. Where such a charter provides that a corporation shall pave part of a street between its rails, a subsequent law requiring it to pave outside its rails is valid.

Sioux City Ry. Co. vs. Sioux City, 138 U. S. 98.
Worcester vs. Ry. Co., 196 U. S. 539.

municipality which will impair the authority of Congress with respect to interstate commerce, and that that authority has been conferred by a valid law upon the Interstate Commerce Commission. The question is an interesting one. He will be a wise man who can predict the judgment of the court. Upon the one hand stands a repealable charter granted upon a condition which has been violated; upon the other stands the paramount power of Congress with respect to interstate commerce. How can the two be reconciled? It is not incredible that a federal court will decide that a local franchise involving interstate commerce was intended to be exercised in subordination to the authority of Congress, and that a corporation shall not be punished for complying with such authority or doing what such authority requires it to do. There is another clause in the constitution to which I have already referred—that no person shall be deprived of property without due process of law. To grant a franchise today which involves the investment of large sums of money

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f. Where by such a charter an exclusive right to sell gas within a city is granted, a subsequent law authorizing another company to sell gas within the city is valid.

Hamilton Gas. Co. vs. Hamilton, 146 U. S. 258.

g. Where under such a charter a railroad has been constructed, the legislature may require the corporation to abandon its established route and extend its tracks in a different direction into a union station.

Worcester vs. Ry. Co., 109 Mass. 103.

Shields vs. Ohio, 95 U. S. 319.

h. Where such a law exempts shareholders from personal liability, a subsequent law imposing such liability with respect to future debts is valid.

Sherman vs. Smith, 67 U. S. 587.

Looker vs. Maynard, 179 U. S. 51.

i. However harshly a subsequent law may operate, it cannot be held to impair the obligation of a contract if the charter be alterable, amendable or repealable in terms. The corporation by accepting the grant subject to the legislative power must be held to have assented to such reservation.

Hamilton Gas Co. vs. Hamilton, 146 U. S. 256.

Erie R. R. Co. vs. Williams, 233 U. S. 685.

j. Where such a charter is repealed, every right, privilege and franchise conferred by the charter is revoked.

Piqua vs. Knoop, 57 U. S. 369.

Pa. College Cases, 80 U. S. 190.

Tomlinson vs. Jessup, 82 U. S. 454.

Maine Central R. R. Co. vs. Maine, 96 U. S. 499.

Greenwood vs. Union Freight Co., 105 U. S. 13.

[6] That the reserve power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under a charter or deprive the corporation of the fruits actually reduced to possession or contracts lawfully made.

Miller vs. N. Y., 82 U. S. 478.

R. R. Co. vs. Paul, 173 U S. 404.

and to revoke it tomorrow without just cause is to confiscate the investment, and it is altogether probable that this clause will afford protection against the injury proposed. If the court shall so decide, this extraordinary result will follow. After a century of experiment, long after the principle of the Dartmouth College case has become in fact obsolete, charters which that case cannot be invoked to protect because in terms they are alterable, amendable and repealable, will be protected under the due process of law clause of the constitution. The old principle under a new guise will be as influential in the development of law as, notwithstanding its constant neglect and present discredit, the old principle used to be. It was designed to prevent injustice. It was roughly used perhaps, but it is essentially sound.

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[7] Where under a repealable charter a corporation is required to pay a special tax or render a special service as a consideration for an exemption from a general tax, a subsequent law cannot impose a property tax and also insist upon the special tax or service.

Water Co. vs. Clark, 143 U. S. 1.
Stearns vs. Minnesota, 179 U. S. 240.

[8] The power of alteration, amendment or repeal is not without limit. The alterations must be reasonable; they must be made in good faith and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of alteration and amendment. Beyond the sphere of the reserve power, the vested rights of property of the corporation are surrounded by the same sanctions and are as inviolable as in other cases.

Shields vs. Ohio, 95 U. S. 319.
Sinking Fund Cases, 99 U. S. 700.
R. R. Co. vs. Smith, 173 U. S. 684.

[9] The United Railways Co. case is entitled "St. Louis vs. United Railways Co.," and may be found in 263 Mo., p. 387, and 210 U. S. 266.