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LEGISLATIVE POWER TO AMEND CHARTERS.

SINCE the *Dartmouth College Case*, it has been admitted on all hands, that the charters of incorporated companies are contracts, which the legislature cannot alter or amend without express power so to do, reserved. In consequence of the decision in that case, a general law was spread upon the statute book of nearly all, if not quite all, the states of the Union, reserving to the legislature power to alter or modify all such charters as should be thereafter granted, according to its will and pleasure. The limits of this power, if it has any limits, and the effect which any amendment engrafted by the legislature is to have upon the operations of an incorporated company, form one of the most interesting and important of the unsettled questions of the day. Its presence is perhaps more frequently felt in discussions growing out of the attempt to consolidate separate and distinct lines of railway into one, than in any other cases; and the vital importance of the subject could not find an apter occasion for its illustration. Every day we are brought acquainted with instances where the prospect of greatly increased profits, or the plea of public necessity, serves a majority of corporators for an excuse in procuring the legislature to crowd an unwilling minority into enterprises which they never agreed to go into and are unwilling to enter upon. He who founds his faith upon the eternal principles of right, rather than upon the temporary and shifting prospect of present advantage, may

well pause and strive to mark out the boundaries of even legislative will upon this subject.

In the case of *Zabriskie* v. *Hackensack & N. Y. R. R. Co.*, 6 Am. Law Reg. N. S. 420; s. c., 3 C. E. Green 178, a company was chartered to build a road from Hackensack to the Paterson and Hudson River Railroad, a distance of five miles, which was accordingly built and operated for a number of years. Subsequently, the legislature authorized the company to extend their road to Nanuet on the Erie Railroad, a distance of about twelve miles, and the company, under this liberty, made preparations to construct about two and a half miles of this extension. The Chancellor enjoined them at the suit of a stockholder, from using the funds of the company to construct this extension. There was at the time the company was incorporated, a general statute in the New Jersey laws, authorizing the legislature to alter, modify, or repeal charters to be granted in the future.

The theory of the case is this: that a simple legislative *permission* to the company to enlarge their enterprise, is in no sense *mandatory* in its character; that the original agreement between the corporators was to build a road of five miles length, and they could not have extended it further without legislative authority: when this legislative authority was given, it required another agreement, in which all should unite, in order that the new enterprise might be sanctioned, and unless this unanimous assent was obtained, the original purpose must be taken as the measure of the company's powers.

In the case of *Durfee* v. *Old Colony and Fall River Railroad*, 5 Allen 230, an incorporated company had constructed a road from Fall River to Boston. Subsequently, the legislature authorized it to extend the road to the Rhode Island line, there to connect with another line which was so located as to appear to be a consistent and component part of the original enterprise of this company, upon the extension being approved of by two-thirds of the stockholders. The court, at the suit of a stockholder who had voted against the extension, refused to enjoin the company in the undertaking.

We understand the argument of the case to be about this:—

That where stockholders enter into an agreement to construct a road from A. to B., with notice that the legislature reserves to itself power to alter or amend their charter, they thereby agree,

that in case the legislature subsequently authorizes an extension of the road from B. to C. that they will also go into the enterprise of constructing the road from B. to C., *provided*, that the extension is simply ancillary to the design which was had in building the road from A. to B., or, in other words, so that the extension is but an enlargement or expansion of the original design, *and provided also*, that the extension be voted for by a majority of the stockholders.

That where stockholders go into an incorporation, it becomes a fundamental contract, that the majority shall manage the affairs of the corporation, and use its means and resources in any manner that they may think best to carry out the design which was had in forming the incorporation, provided they do not use them in the prosecution of an enterprise which is outside of the general purpose had in view at the beginning.

That the future prospect thereby guaranteed to them of extending the road from B. to C. when they should be in a condition to do it, may have been one of the most influential and controlling considerations to the majority in inducing them to go into the enterprise of constructing the road from A. to B.: that therefore, when they are in a condition to make the extension, the minority have no right to stop short and say that the majority may go, but they, the minority, will not, but the minority must go also into the new enterprise, as the faith that they would do it, provided it should be within the scope of the original purpose, and voted for by the majority, was what led the majority to go into the first plan with them. See also *Hanna* v. *The Cincinnati and Fort Wayne R. R. Co.*, 20 Ind. 30; *Curry* v. *Scott*, 54 Penn. 270; *Bailey* v. *Hollister*, 26 N. Y. 112; *Pacific R. R. Co.* v. *Hayes*, 22 Missouri 291; *Northern R. R. Co.* v. *Miller*, 10 Barb. 260; *Schenectady and Saratoga Plank Road Co.* v. *Thatcher*, 1 Kern. 102; *McLaren* v. *Pennington*, 1 Paige R. 102; *State, Jersey City and Bergen R. R. Co.* v. *Mayor*, 31 N. J. L. R. 579; *Anderson* v. *Commonwealth*, 18 Gratt. 285.

It is impossible to reconcile the reasoning of the case of *Durfee* v. *Old Colony R. R. Co.* with that of *Zabriskie* v. *The Hackensack R. R. Co.* The one proceeds upon the theory, that when the legislature authorizes the extension of a road, even though but an expansion of the original undertaking, every stockholder must assent to the extension before it can be undertaken; while

the other assumes, that when the first enterprise is undertaken, with notice that the legislature reserves to itself power to alter the charter, every stockholder agrees that he will go into the new enterprise, when the legislature shall tack it on, provided it be but an expansion of the original design, and provided it be voted for by a majority of the stockholders.

This case may fairly be regarded as an authority for the last proposition. So that, under it, the single question before the court when such a case arises, is, whether the majority have wrongly judged, in concluding that a particular extension is no more than a bare expansion of the original design.

It would seem, in the case before the court, to have been a considerable tax upon the powers of inference, to assume that an agreement to construct a road from Fall River to Boston, contemplated a future extension of the road to the Rhode Island line. As to this, see 1 Redfield on Railways 614 note, ed. 1869.

Before leaving this case, it is as well to call attention to what is said by the court in the conclusion of the opinion, as to what it was intended to decide by the case. In order, it would seem, to prevent any misapprehension in regard to what the case decided, the court say, "all that we mean to determine is, that the obligation of the contract which subsists between the corporation and a stockholder, by virtue of his being a proprietor of shares in the corporate stock, is not impaired by an act of the legislature which amends and alters the charter, and authorizes the corporation to undertake new and additional enterprises of a nature similar to those embraced within the original grant of power, if such act is accepted by a majority of the stockholders in the mode provided by law."

Reading this passage in the light of the case at large, we take it to mean, that the corporators contract to go into all "new and additional enterprises of a *nature similar* to those embraced within the original" purposes of the incorporation. We feel constrained to believe that this language was inadvertently used. The court had the case before it in its mind, and intended to use language applicable to it. It had concluded that the extension of the road from Fall River to the Rhode Island line, was but an amplification of the original plan of building a road from Fall River to Boston; therefore, we feel constrained to believe that it intended to say, that when the new enterprise is one, [not of *a nature similar*

to that embraced within the original purpose, but,] which is simply an expansion of the original enterprise, to longer proportions, in that case, the stockholders must be held to have contracted to go into it, if the majority require it. For, if this reading be refused, what interpretation are we to give to the expression, "of *a nature similar* to those embraced within the original" purposes? Are we to conclude that the court intended to say, that a corporator going into the enterprise of building a road from Fall River to Boston, contracts to go into every enterprise of *a nature similar* to that one? What would be an enterprise of *a nature similar* to that one? Building another road from Fall River to Boston, or building a road from one village of local traffic, on the coast of Massachusetts, to another village of like traffic upon the same coast?

To interpret the judge's language literally, would be to hold that an engagement to build one railroad, is an engagement to build any other railroad, for, building any railroad, is of *a nature similar* to building any other railroad; a proposition for which we suppose no one would contend.

But, though we confine the case to what it really did decide, viz., that stockholders who go into an enterprise with notice that the legislature reserves to itself power to alter or amend their charter, thereby contract that they will go into such future enterprises as the legislature may authorize, provided they be within the scope of the original design, and approved of by the majority, can it then be supported upon principle?

It seems difficult to put the limit upon the corporator's contract as to the future, which the court puts, if the principle that it may be enlarged, is admitted at all. No reason is apparent why, if it be once admitted that the majority is to be at liberty to go one step beyond the very purpose which the corporators set about accomplishing, they may not go a dozen steps beyond. It seems difficult to say, that the corporator *does* contract that the majority may carry him into such new enterprises as are an expansion simply, of the first, but that he *does not* contract that they may carry him into *all* such enterprises as they may choose if the legislature authorizes them.

When a corporator contracts to build a road from A. to B., if nothing is said at the time about extending it to C., we can see no more reason for assuming that he impliedly gives the majority

authority to carry it to C. than for assuming that he gives them authority to carry it to any other place. It is true he contracts that the majority shall direct the operations and shape the policy of the incorporation, *within the particular charter given to them*, but only within the limits of that. To continue the use of the illustration just used, the corporator may have property in A. and B. but none in C., and the controlling motive with him may have been to improve those two places. He may have been violently antagonistic to the interests of C., and if it had been mooted at the time the contract was made, whether the road should be continued to C., even though an apparent amplification simply of the first design he might have said that he would not go into the enterprise at all. Indeed, we can conceive of no new enterprise which will be simply an expansion of the old. A road from A. to B. is one thing, an extension of it to C. is quite another: and when the simple expansion is undertaken, the old purpose and design is wholly abandoned. Therefore, if the principle is admitted, that the corporator contracts that the majority may take him into *some* new enterprises, it is difficult to perceive where the majority is to find its limit, and how the corporator can refuse to go into every future and new enterprise. There is no more reason for saying that he is willing to extend the road from B. to C. than there is that he is willing to extend it to the Rocky Mountains. There is no more authority for saying that he is willing to enlarge the particular enterprise, than there is for saying that he is willing to go into all enterprises.

In a case to be cited directly, it is urged that it would be exceedingly hard for the holder of one single share in an incorporated company, to have it in his power to restrain the owners of millions of dollars worth, from putting their capital into some new enterprises that promised them great returns. In answer it may be said that it would be equally hard for the owners of millions of dollars worth to force the single shareholder into an enterprise that he did not wish to go into, and had never contracted to go into. But with reference to either, if he had contracted in such manner as to give the other that power, all that could be said would be, "*hoc perquam durum est, sed ita lex scripta est.*"

But the hardship suggested, is one that is imaginary rather than real. There is a lawful way by which the majority stockholder can go into the new enterprise, consistently with his

contract with the minority stockholder, and without carrying him, *nolens volens*, into the new scheme. It is incident to every corporation not incorporated for a specified time, that it shall be subject to dissolution by a vote of the majority of the stockholders. Therefore if the majority are unwilling to continue the old enterprise without adding the new, let them dissolve the corporation, sell the property, pay off the debts, and turn over the surplus to the stockholders. They may then take their proportion and engage in any new scheme that they like. Would not this be done in every case of a partnership, where the partners could not agree? And what more is a corporation, *quoad hoc*, than a partnership?

The case of *Lauman* v. *The Lebanon Valley R. R. Co.*, 30 Penna. 42, recognises this principle, but, as we shall endeavor to show, falls most egregiously short in its application of it. In that case, the legislature authorized two railroads to consolidate into one, and provided that the stockholders should by a majority vote, agree upon the terms upon which the consolidation should be effected. By a majority vote of the corporation to be merged, the stockholders agreed to merge their corporation into the other, and voted that one share of the stock of the merging company should be taken by each shareholder of the merged company in place of this share in his own company. A stockholder who voted against this arrangement, applied to the court to have it annulled. The court held that no consolidation could be effected without the assistance of an act of the legislature; that the vote for a consolidation under the Act of Assembly, was equivalent to a vote for a dissolution, and an acceptance by the legislature of the surrender, and that all the stockholder, who was plaintiff, could claim, was his equitable share of the value of the corporate property. Therefore upon the corporation executing a bond to pay the plaintiff the market value of his shares when that should be ascertained, the court dismissed the cause.

We would remark in passing, that we can perceive no principle upon which this vote for a consolidation could be held equivalent to a vote for a dissolution. *Non constat*, because a majority of the stockholders were willing to consolidate with another road, that they would therefore have been willing to dissolve their corporation, if the question before them had been dissolution or not. But this objection aside: if the court proposed that the plaintiff's

right to object to the consolidation was to be taken from him upon his being paid the market value of his stock, to be determined by some species of appraisement, [how the value was to be ascertained does not appear from the report, but we are bound to presume that it was to be done by appraisement]—then the court was guilty of a most palpable violation of the plaintiff's rights. One of the incidents to the dissolution of a corporation is, that the property shall be sold to the highest bidder at public auction, and the proceeds, after paying off the debts, divided amongst the shareholders. This is one of the most valuable rights incident to the contract between the co-corporators. When they go into an enterprise, they contract with each other, that each shall have his proportionate share of the largest sum of money which the enterprise can be made to produce, whatever shape events may take. Now the market value per share of stock, in many instances falls far short of affording any index to what that shareholder's real interest in the property of the corporation really is, if it should be sold at public auction, which his contract gives him a right to have done. For instance, there may be a railroad, in which the stock is worth in the market per share, no more than twenty-five dollars, yet, because of its location, and the possibility of developing it into a great affair, there may be two rival corporations of immense means, both of which are anxious to have it. Now, if the shareholder's interest is appraised, he will receive twenty-five dollars only; whereas if the road were put up at public auction, where these two strong corporate bodies could have an opportunity of bidding for it, it might bring the shareholder far more than twenty-five dollars. A most remarkable instance of this very sort occurred in this state (Virginia) within the past year. The state's interest in the road connecting Richmond with Petersburg was to be sold. It was sufficiently large to give the purchaser the management of the road. Two rival corporations of large means wanted it. Now, while the stock was only worth thirty dollars per share in the market, yet after this strife commenced, one of the corporations actually made a *bonâ fide* and binding offer of two hundred dollars per share for it. It may be said in answer to this argument, that, under a series of decided cases, the road-bed and franchises cannot be sold except by permission of the legislature. Without stopping to discuss this proposition, we reply that we propose to confine

these remarks to cases where the road is under mortgage by permission of the legislature (the case, we apprehend, with most roads), in which case, by selling under the mortgage, the legislative permission to sell is carried.

It will be borne in mind that these remarks have been addressed entirely to a case in which the legislature *authorizes* a new enterprise; not to one where it commands it. Perhaps such a case should be entitled to a separate discussion, though it would seem to be disposed of by a single consideration. These reservations of power are clearly made for the purpose of *protection.*

They are to avoid the danger of corporations becoming unmanageable from their growth. They are not for the purpose of forcing a company into new enterprises, but of prohibiting the future prosecution of the old, except upon conditions which the public safety is found to require. Whereas, before the liberty to amend was reserved, the company was entitled to prosecute their enterprise through all time on the terms and conditions originally accorded to them, yet, now the legislature has acquired power to say, the enterprise shall not be prosecuted, except it be prosecuted upon new terms and conditions. Thus the legislature may say, that a railroad company shall not operate its road from A. to B. unless it also builds a road to C.; but it has no power to force the company to build the road to C. Whether the company will build the road to C. is a matter for the company itself to determine, and it cannot be done unless every stockholder agrees to it. The legislature has power to put them into the condition of choosing between the alternatives of giving up their enterprise, or of continuing it by extending the road. When it requires the new enterprise to be added, then any stockholder may say, I never bargained to go into this additional scheme, and I am unwilling to go into it. I prefer to adopt the alternative of abandoning the old one. Then let us dissolve, sell out and divide.

Our propositions then are:—

I. That the power to alter or amend charters, gives the legislature no authority to *force* a company into any new enterprise, or into any enlargement of the old; but only to prescribe new conditions upon which the old shall be conducted.

II. That when the legislature *authorizes* a new enterprise, or an enlargement of the old, it can only be undertaken upon every stockholder agreeing to it.

III. That there is no more authority for assuming that a stockholder who contracts to build a road from A. to B. with notice that the legislature reserves power to amend his charter, impliedly contracts that he will extend it to C. when the legislature authorizes such extension, than there is for assuming that he thereby contracts to extend it to any other place, or to build any other road.

IV. That when the legislature authorizes a new enterprise, or an enlargement of the old, if a majority wish to undertake it, the only way in which it can be done, in spite of an unwilling minority, is for the majority to dissolve the corporation, sell the property *at public auction*, and divide out the proceeds.

A class of cases already cited in a foregoing part of this paper is apparently inconsistent with this argument. They are cases where a shareholder has subscribed to stock in a company, has paid only a portion of the subscription price, and has given his note for the balance; subsequently the legislature authorizes a new enterprise, which the majority resolve to go into; whereupon the subscriber refuses to pay up what is due upon his subscription upon the ground that the enterprise now is a different one from that which he agreed to go into. In a number of such cases, the courts have compelled the unwilling subscriber to pay up the full amount of the subscription. These cases are in no degree in conflict with the theory which this paper has sought to disclose. There is not in one of them, an intimation even, *that the subscriber is under any obligation to go into the new enterprise;* all that they decide is that he must pay up what he agreed to pay when he subscribed to the stock. When he gave his note for the subscription price, he was as much a stockholder as though he had paid money. The corporation agreed to take his note in lieu of money, and that note became then as much corporation assets as the money would have been. He is a stockholder, entitled to all the rights of a stockholder; the corporation is his creditor entitled to enforce payment of the debt, irrespective of any future operations of the company. He may say, here is the money due upon my stock, now give me my share of the corporation property. Here is the debt which I owe you in respect to the enterprise which we agreed to go into, now give me my share of the corpus, as you wish to carry yours into another enterprise which I do not wish to go into.