THE

AMERICAN LAW REGISTER.

FEBRUARY 1887.

LIMITATIONS ON LEGISLATIVE CONTRACTS.

SOVEREIGNTY is defined as the union and exercise of all human power possessed in a state; it is a combination of all powers; is the power to do everything in a state without accountability: Story Const. § 207. Abstractly it resides in the people, and its powers are exercised by delegated authority. An absolute monarch is such only by the consent of the people, and so long as the people *permit* him to be *the* monarch, he exercises the functions of government without limitation. While in a republic sovereignty is in the body of the nation, yet its exercise is limited, and the agency exercises a delegated power. "The United States of America" is a sovereign power so far as the nations of the earth are concerned, but at home it is otherwise, for it cannot make all the laws for all the United States in the sense that France may legislate for all of France.

Each state is permitted to exercise some of the functions of sovereignty, but limited by the Federal Constitution. The states may be likened to so many planets, each with its peculiar laws, its diurnal motion, its atmosphere, its mountains with snow-clad peaks, its oceans with their tides, and all of them revolving around one central sun, whose light and heat and influence are ever present and potential—all composing one grand system.

Generally, all powers of government, being in the people, are inherent, because they are derived from no source *above* the people.

This inherent power must always remain so, and *with* the people, though they may for the good of society establish political agencies, limiting their duties and authority. For the time being these agencies constitute the lawful authority, and while the authority continues the body of the people is bound, and thus the people may for a time limit themselves. But the questions which we are to consider do not relate to those things the people might do in the exercise of their primary power, but rather to those which affect political agencies. Were there no federal government, no Constitution of the United States, each state might be considered a sovereign power; but under one system, it is but one of the political agencies of all the people of the Union charged with a portion of the sovereign power of the people to be exercised within certain territorial limit; and the government of the United States is another political agency, charged with certain other political powers. The government of the state is limited *first*, by the federal constitution, *second*, by its own constitution, and *third*, by certain principles and rules of action which permeates all constitutions, forming, as it were, the very foundation of all government. And so it is said that the common law is "the perfection of wisdom." Compacts and constitutions and laws are considered in its light, and the rights of the citizen are measured by the rules of that noble structure, which the architecture of centuries enrich by the experience of ages and the civil law, and inspired by an inborn and God-given sense of justice. As was said by Hooker of the common law, "It has its seat in the bosom of God, and its voice in the harmony of the world."

The question before us is not so much what a state may do, but rather what it cannot do. The Constitution of the United States, being a delegation of power, the Congress may pass such laws as are thereby permitted, but a state constitution, being a reservation of power, a state legislature may pass any law not prohibited.

The particular question under present consideration is that provision of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract.

However much the profession may have been surprised by the decision in *Dartmouth College* v. *Woodward*, it is now so well settled that a charter granted by a state to a corporation is a contract within the purview of the above provision, no authorities need be cited. To what extent may a state bind itself irrevocably—what

grant away without power of recalling—what contract is protected, are questions which have given rise to wider range of discussion, and more decisions than any other.

The right to levy taxes is an inherent power of sovereignty.

The law is well settled that a state may make an irrevocable contract by which it parts with the inherent power of taxation, notwithstanding the ever present pertinent question propounded by Judge COOLEY: "Whether, for instance, it (the state) can agree that it will not exercise the power of taxation, or the police power of the state, or right of eminent domain, as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle that the legislature cannot diminish the power of its successors by irreparable legislation, and that any other rule might cripple and eventually destroy the government itself." See also *Lynn* v. *Polk*, 21 Am. Law Reg. (N. S.) 321.

While the courts say that the state cannot part with its inherent police power, yet it may tie up its revenues—part with them, barter them away for a consideration which brings no money, so that it will have no money with which to enforce what would be under such circumstances a *barren* police power. Many of the cases in which the question arose related to universities and schools, and an educational sentiment prevailed. Again, under the guise of a contract to be protected by the Constitution of the United States, the legislature may grant to a person or corporation exclusive franchises. This doctrine has been adhered to all the way down from *West River Bridge Co.* v. *Dix*, 6 How. 507, to *New Orleans Gas-Light Co.* v. *The Louisiana Light and Steam Producing Manufacturing Co.*, in United States Supreme Court, 115 U. S. Rep. 650. But here, however, a distinction is made and a limitation steps in, though not expressed in any constitution, viz., the limitation of the common law, so that an *exclusive* privilege to do trade in a given territory cannot be granted, for what everybody can do the state cannot prohibit unless it contravenes public health and good morals. The courts have a way of invoking this principle, this unexpressed limitation, in cases of eminent domain and the police power, but with them it seems to have no force in case of taxation. The granting of an *exclusive* right necessarily creates a monopoly, which is, however, obnoxious to the common law, but finds its palliation in the case of a franchise which relates to the public service; hence,

it is competent to grant the exclusive right to operate a ferry, although an express wagon is operated on a different principle.

Another limitation on the power of the legislature to make a contract is, what is not expressed, in regard to the general *police* power of the state. This, it is said, is inherent, and cannot be granted away—that no contract is binding by which the state absolves itself from its exercise, notwithstanding the state may by contract remitting taxes deprive itself of the means to enforce the power. Here again we are brought back to consider the elements of sovereignty. No contract is held valid which deprives the state of the power to protect the citizen in his rights. A nuisance cannot be incorporated. Public policy seems to be paramount, and wisely so, for it is of the essence of government.

We come now to the question of the exercise of the power of *eminent domain*—that is, the power to take the property of the citizen, for a public purpose. It is of course an inherent right. Had not the framers of every constitution in the Union supposed this to be an inherent power of sovereignty, exercisable at the will of the sovereign, it would have scarcely been necessary to insert in every constitution that private property should not be taken without just compensation.

The common law was regarded as sufficient to protect the citizen in an honest avocation, and a perfect limitation on legislative power, but when the taking of his property was involved, and for a public purpose, that "perfection of reason" seemed to be too frail; hence express limitations were imposed. The state could traffic regarding taxes, and compel the unfortunates to supply the deficiency; it could engage in the business of granting *exclusive* franchises, *without let or hindrance*; but when the state proposed to take land, it had no obstacle in the way; the perfection of reason did not avail; so, to avoid this harshness, the forefathers interposed a limitation, and it is that the land must be paid for. The possessor of an exclusive franchise is presumed to do something which the state might do, and this is the consideration. The corporation whose taxes are remitted by what is deemed a contract, is supposed to save the state so much, but when the state desires to take the property of a citizen for a public purpose, though the state has solemnly agreed it would not take it, the fact that the citizen has expended thousands of dollars, cuts no figure, for the right of eminent domain is inher-

ent—one of the essential elements of sovereignty, which sovereignty cannot divest itself of.

It has been intimated in scores of cases where exclusive franchises were granted, that the state may condemn the property and franchise, but in those cases it did not appear there was *an express* agreement on the part of the state that it *would not* exercise that power. And in some cases it has been intimated with equal force that an express provision to the effect that the power would not be exercised would be binding. In *West River Bridge Co.* v. *Dix*, *supra*, Justice WOODBURY, in delivering one of the opinions of the court said: "I concur in the views of the court that this or other property of corporations may be taken for the purpose of a highway, under the right of eminent domain, and that the laws of Vermont authorizing it are not in that respect and to that extent violations of the object of any contract made by it with the corporation (citing authorities)—because there was no covenant or condition in the charter or contract, that the property owned by it should not be liable to be taken, like all other property in the state, for public uses on highways. Because, without such covenant, all their property, as property, must be liable to proper public use, either by necessity or the sovereignty of the state over it, or by implied agreement. And because, on a like principle, taxes may be imposed on such property, as well as all other property, though coming by grant from the state, and may be done without violating the obligation of the contract, when there is no bonus paid or stipulation made in the charter not to tax it." And citing a great number of authorities. This clearly agrees with the rule of the Supreme Court of the state of Illinois in *Ill. and Mich. Canal* v. *The Rock Island Rd.*, 14 Ill. 319.

In the last case, the question was, had the state, through its legislature, deprived itself of the right to authorize the railroad company to condemn certain canal lands?

The opinion delivered by CATON, J., holds that to determine the question, it is necessary to determine what the intention of the legislature was. That the surrender of such power cannot be *presumed*, but says (p. 316): "If such was the intention of the legislature; if such was the design of the contracting parties; if such are the provisions of the contract, then they must be enforced." And on page 318: "If the state, in making the conveyance of these lands, relinquishes the right of eminent domain over them, then, indeed, she

could not confer the right of condemnation upon the defendants." And on page 321: "A state ought never to be *presumed* to have surrendered this power, because, like the *taxing power*, the whole community have an interest in preserving it undiminished."

In no case the writer has been able to examine has the question of an *express exemption* from the exercise of the power of eminent domain been considered, until the case of *Village of Hyde Park* v. *Oakwoods Cemetery Ass.*, in the Supreme Court of Illinois (not yet regularly reported), but to be found in 7 N. E. Rep. 627. The Oakwoods Cemetery Association was incorporated by the General Assembly, with the usual incidents of a corporation, and with power to establish and maintain a public cemetery. The following was stated in the charter, "no road, street, alley or thoroughfare shall be laid out or opened through said grounds, or any part thereof, without the consent of the directors; nor shall any corporation, now existing, or hereafter created, be authorized to take, hold or possess any portion of said cemetery by condemnation without such consent."

The question whether this was a contract which the Constitution of the United States protects, was squarely presented to the court, and the court said: "We now come to the question whether the statute, exempting the lands acquired by the association from being taken for road or street purposes, was a valid enactment. It is claimed that the acts of the legislature creating the Cemetery Association when accepted, and the purchase of the lands under said acts and the dedication of the same to public use, constituted a contract between the state and the corporators of the association within the provision of sect. 10 of art. 1 of the Constitution of the United States, which prohibits legislation impairing the obligation of contracts. If this position was correct, it is plain that any future legislation authorizing the taking of the lands could not be sustained, as the legislature has no authority to enact a law impairing the obligation of a contract. But the rule invoked has no application to a case of this character. The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the state, and does not fall within the inhibition of the Constitution of the United States. Cooley, in his work on Const. Lim., 3d ed. 525, in the discussion of this question says, that any legislative bargain in restraint of the complete, continuous and repeated exercise of the right of emi-