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IN EXECUTORY CONTRACTS FOR THE SALE OF REAL PROPERTY, SHOULD THE RISK OF LOSS BE UPON THE VENDEE FROM THE TIME OF THE AGREEMENT?

"His (Lord Eldon's) opinion that the risk of loss by accidental injury to or destruction of the property is upon the buyer from the time of the bargain has been followed generally in this country as well as in England."[1]

It is true that in most of the fifty-four cases cited by Professor Ames in support of this rule substantially this statement is made, and the case of *Paine v. Meller* is quoted again and again as having been the first to establish it; but it is equally true that in very few of these cases were the facts such as to require a broad and unqualified application of the rule.[2] Because few courts have really applied the doctrine to its fullest extent, and because there is some authority and more reason against it, it has seemed worth while to examine the authorities and the arguments *pro* and *con*, in order to discover if some qualification should not be made.

Classified according to the extent to which they really, as decisions, support the statement first quoted, the fifty-four cases

[1] Ames, *Cases in Equity Jurisdiction*, Vol. I, p. 228, note 1.

[2] 6 Vesey, 349.

cited by Professor Ames fall into several distinct groups, as follows:

I. Cases where the vendee had gone into possession under the agreement, and where, for anything that appears, he might have had specific performance at any time by tendering the price; that is, the loss did not occur before the date fixed by the contract for conveyance.[3] In these fourteen cases it was not necessary for the court to apply the rule without restriction. The words of Chief Justice Marshall in the case of *Columbian Co. v. Lawrence* are worthy of notice in this connection: "The destruction of the property is a real loss to the person in possession who claims under an executory contract. * * * No time for performance is fixed."

II. Cases where the vendee could, for anything that appears, have had specific performance upon tender of payment before the day of the loss, although he was not in possession.[4]

III. Miscellaneous cases, where the loss fell on the vendor, or where the sale was one of personalty, or where the damage resulted from the act of the vendee so that the rule, though quoted, was not necessary to the decision of the court.[5] Out of the fifty-four cases cited as in general accord with this proposition, therefore, we have forty-one in which it was not necessary

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[3] *Columbian Co. v. Lawrence,* 2 Pet., 25; *Willis v. Wozencraft,* 22 Cal., 607; *Stevenson v. Loehr,* 57 Ill., 509; *Cottingham v. Firemen's Co.,* 90 Ky., 439; *Walker v. Owen,* 79 Mo., 563; *Franklin Fire Ins. Co. v. Martin,* 40 N. J., 568; *Aetna Fire Ins. Co. v. Tyler,* 16 Wend., 385; *Rood v. N. Y. & Erie Co.,* 18 Barb., 80; *Falls v. Carpenter,* 1 Dev. & B. Eq., 237; *Ins. Co. v. Updegraff,* 21 Pa., 513; *Morgan v. Scott,* 26 Pa., 50; *Miller v. Zufall,* 113 Pa., 317; *Imp. Co. v. Dunham,* 117 Pa., 460; *Brakhage v. Tracy,* 13 S. Dak., 343.

[4] *Acland v. Cuming,* 2 Madd., 28; *Robertson v. Skelton,* 12 Beav., 260; *Poole v. Adams,* 33 L. J. Ch., 639; *Coles v. Bristowe,* 6 Eq., 149; *Skinner & Sons' Co. v. Houghton,* 92 Md., 68; *Gates v. Smith,* 4 Edw. Ch., 702; *McKechnie v. Sterling,* 48 Barb., 330; *Elliot v. Ashland Co.,* 117 Pa., 548.

[5] *Harford v. Purrier,* 1 Madd., 532; *Ex parte Minor,* 11 Ves., 559; *Twigg v. Fifield,* 13 Ves., 517; *Rawlins v. Burgis,* 2 V. & B., 382; *Paramore v. Greenslade,* 1 Sm. & G., 541; *Revell v. Hussey,* 2 Ba. & Be.,280; *Osborn v. Nicholson,* 13 Wall., 654; *Mackey v. Bowles,* 98 Ga., 730; *Phinizy v. Guernsey,* 111 Ga., 346; *Gammon v. Blaisdell,* 45 Kan., 221; *Durrett v. Simpson,* 3 Monr., 517; *Calhoon v. Belden,* 3 Bush., 674; *Tufts v. Wynne,* 45 Mo. Ap., 42; *Clinton v. Hope Ins. Co.,* 45 N. Y., 454; *Gilbert v. Port,* 28 Oh. St., 276; *Richter v. Selin,* 8 S. & R., 425; *Demmy's Ap.,* 43 Pa., 155; *Huguenin v. Courtenay,* 21 S. Ca., 403; *Christian v. Cabell,* 22 Grat., 82.

for the court to accept it unqualifiedly for the purposes of the decision.

IV. Cases which hold explicitly that a loss occurring after the bargain, but before the date set for conveyance has arrived, and so before the vendee has any right to possession or to specific performance, falls on the vendee.[6] Here are thirteen cases, in eight jurisdictions, which can fairly be said to support the rule literally as above stated. Of these jurisdictions, New York furnishes at least as much authority for the opposite side, as will be shown later. Now in these thirteen cases, the courts do not thrash out the question on its merits, but treat it as settled on the authority of *Paine v. Meller,* decided by Lord Eldon in 1801. An examination of this case ought to show whether or not it was really an authority for these thirteen decisions.

At the time of the loss, in *Paine v. Meller,* the time set for the conveyance had passed, the vendor was able to make good title, and the vendee could have had specific performance at any time. It would seem, indeed, that Lord Eldon was not oblivious to these facts, and that he placed considerable weight upon them is shown by the following words, which should be considered in view of the fact that the bargain was entered into on September first: "If the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation in which they would have been if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burnt down on the quarter day."

Lord Eldon, it will be observed, is really stating two conditions precedent to the vesting of the risk of loss in the buyer.

I. That the vendor be able to make good title. This condition is, of course, universally recognized, because without its fulfillment specific performance would be impossible.[7]

II. That, if a date for conveyance has been set, it must have arrived before the loss occurs, because, without its fulfillment,

[6] *Castellain v. Preston,* 11 Q. B. Div., 380; *Davidson v. Hawkeye Ins. Co.,* 71 Iowa, 532; *Kuhn v. Freeman,* 15 Kan., 423; *Johnston v. Jones,* 12 B. Monr., 326; *Martin v. Carver,* 1 S. W. R., 199; *Marks v. Tichenor,* 85 Ky., 536; *Brewer v. Herbert,* 30 Md., 301; *Snyder v. Snyder,* 51 Mo., 175; *Mott v. Coddington,* 1 Abb. Pr. n. s. 290; *Dunn c. Yakish,* 10 Okl., 388; *Robb v. Mann.,* 11 Pa., 300; *Reed v. Lukens,* 44 Pa., 200; *Milville Co. v. Wilgus,* 88 Pa., 107.

[7] *Christian v. Cabell,* 22 Grat., 82; *Mackey v. Bowles,* 98 Ga., 730.

the vendee would not be in a position to enforce specific performance on the day of the loss.

The next question is, is there any other authority for the adoption of this second rule, which imposes so important a limitation on the rule stated in the beginning? Disregarding those cases which hold absolutely that loss follows the legal title,[8] we find three decisions which place upon the vendor the loss occurring before the time set for conveyance.[9] Of these, *Smith v. McCluskey* and *Wicks v. Bowman,* being both New York cases, should outweigh *Mott v. Coddington,* the New York case cited above.[6] In *Wicks v. Bowman,* Chief Justice Daly places his decision squarely on the following ground: "The doctrine that a vendee is to be treated, in certain cases, as the owner, is founded in the application of the equitable maxim, that what ought to be done is considered, in equity, as done; a maxim that does not apply where the contemporaneous acts—the payment of the purchase money and the delivery of the deed—were to take place on a day subsequent to the time when the building was destroyed by fire."

In the last analysis, therefore, the authority in favor of the rule first stated is by no means overwhelming, and we have some well considered decisions in favor of qualification. It is also apparent that many of the courts which adopt the former view have based it upon a misinterpretation of *Paine v. Meller.*

In closing, a brief statement of the arguments in favor of qualification should be made. To maintain an action for the breach of a contract in a court of law, it is now usually necessary for the plaintiff to allege substantial performance, or tender of performance, of his own obligation. This doctrine is equitable in its origin. No one can deny that the real meaning of the vendor's promise, when he agrees to convey land, as understood by both parties, is, that he will convey the land substantially in its then condition. If a court of equity now forces the vendee to perform without getting what he was promised, it will have to justify its decision on some other ground than that of contract. The ground usually stated is, that the vendee, having the benefits of ownership, should bear the burdens. Let us see just what these bene-

[8] *Thompson v. Gould,* 20 Pick., 134; *Wilson v. Clark,* 60 N. H., 352; *Listman v. Hickey,* 65 Hun., 8; *Powell v. Dayton Co.,* 12 Ore., 488.

[9] *Gould v. Murch,* 70 Me., 288; *Wicks v. Bowman,* 5 Daly, 225; *Smith v. McCluskey,* 45 Barb., 610.

fits are, before the time has arrived when he can compel specific performance. First, he is not entitled to possession, except by special contract, and then he usually pays an extra consideration, and becomes virtually a tenant.[10] The vendor or his heir, therefore, is entitled to the rents and profits.[11]

Second, he is neither in the position of a mortgagor or of a *cestui que* trust, though many cases infer that he is, and on that basis decide that he ought to bear the loss. The vendor has a beneficial interest, namely, the right to the rents and profits, which the trustee and the mortgagee, generally speaking, have not, and, conversely, the vendee has not the beneficial interest which the *cestui que* trust and the mortgagor have. In the absence of recording acts, the vendee is at the mercy of the *bona fide* purchaser for value and without notice, while the mortgagor at least, in the American form of mortgage, is not. It is a strange misuse of language to call one who can neither have the use of certain premises in the present, nor be certain of having it in the future, the beneficial owner of those premises.

It is therefore suggested that the rule stated in the beginning ought to be amended as follows:

"The risk of loss by accidental injury to or destruction of the property is upon the buyer from the moment that the latter has it in his power to demand and get specific performance of the contract."

CUSTOM AS AN APPARENT EXCUSE FOR NEGLIGENCE.

In the recent case of *Korab v. Chicago, R. I. & P. R. Co.,* 143 N. W., 876 (Iowa), it was held not error to refuse an instruction to the effect that where the undisputed evidence showed that railroads at the time of the accident used both blocked and unblocked frogs, and that it was questionable which was the safer for the business of the roads, then the use of the unblocked frog was not negligence.

This is a question upon which there is much difference of opinion in the courts. Perhaps it will be helpful at the outset of the discussion to ascertain just what negligence consists of.

The best definition of negligence is that of Judge Cooley,[1] who

[10] *Clinton v. Hope Ins. Co.,* 45 N. Y., 454.

[11] *Lumsden v. Fraser,* 12 Simons, 263; *Cyc.,* Vol. 39, p. 1629, pp. c., and cases cited.

[1] *Cooley on Torts,* 3d. Ed., Vol. 2, p. 1324.

states that negligence is "the failure to observe, for the protection of the interests of another person, that degree of care, precaution, or vigilance which the circumstances justly demand, whereby such other person suffers injury." This has been widely adopted,[2] and it has been generally held that the question whether a given state of facts falls within this definition is a question of fact for the jury and if there is any evidence upon which the jury might find for the plaintiff, the question of negligence must be submitted to them.[3]

So if the evidence is conflicting the jury must decide whether negligence is present or not.[4] Since, therefore negligence is determined, to put it shortly, by the measure of due care, that care is a fact to be weighed by the jury in each case.[5]

It is conceded as a general rule that evidence that an instrumentality was or was not in common use is competent *as tending to show* whether or not the defendant was in the exercise of due care.[6] This seems reasonable and fair, since it is evidence of what others as a class do in similar businesses, which are presumably conducted in a normal and cautious manner. However, it is held in many jurisdictions that evidence of a custom cannot ever be regarded as conclusively establishing lack of negligence.[7] This holding, we respectfully submit, states the correct rule.

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[2] *Barret v. So. Pac. R. Co.,* 91 Cal., 296; *Fisher v. New Bern,* 140 N. C., 506; *Black v. Virginia Portland Cement Co.,* 104 Va., 450.

[3] *Chicago R. Co. v. Maloney,* 99 Ill., 623; *Powers v. Pere Marquette R. Co.,* 143 Mich., 379; *Baulec v. New York Central R. Co.,* 59 N. Y., 356.

[4] *Price v. St. Louis,* 75 Ark., 479; *Central Pass R. Co. v. Chattanooga,* 17 Ky. Law Rep., 5; *McIntyre v. Detroit Safe Co.,* 129 Mich., 385; *Swift v. Staten Island R. Co.,* 123 N. Y., 645.

[5] *Littlefield v. Biddeford,* 29 Me., 310; *Grand Trunk R. Co. v. State,* 144 U. S., 408; *Augusta v. Killian,* 79 Ga., 234.

[6] *Labbatt on Master and Servant,* Vol. I, par. 44; *Wabash R. Co. v. McDaniels,* 107 U. S., 454; *Meyers v. Hudson Iron Co.,* 150 Mass., 130; *Austin v. Chicago, R. I. & P. R. Co.,* 93 Iowa, 236; *Pennsylvania Co. v. Hankey,* 93 Ill., 580.

[7] *Cass v. Boston, etc., R. Co.,* 14 Allen. (Mass.), 448; *Derosia v. Winona R. Co.,* 18 Minn., 133; *Wabash R. Co. v. McDaniels, supra; Martin v. California C. R. Co.,* 94 Cal., 326; *McCormick Harvesting Co. v. Burandt,* 136 Ill., 170; but see *Camp Point Mfg. Co. v. Ballow,* 71 Ill., 417; *Hosic v. Chicago, R.-I. & P. R. Co.,* 75 Iowa, 683; *Sawyer v. Arnold Shoe Co.,* 90 Me., 369; *Craver v. Christian,* 36 Minn., 413; *Reichla v. Gruensfelder,* 52 Mo. App., 43; *Lowrimore v. Paliver Mfg. Co.,* 60 S. C., 153; *Sincere v. Union Compress & Warehouse Co.,* 40 S. W., 326.

As said by Willes, J., in a leading English case, "no usage could establish that what in fact is unnecessarily dangerous was in law reasonably safe against those toward whom there was a duty to be reasonably careful"[8] The custom relied on may, in truth, be a negligent one. Shall one be heard to say that because others have been negligent he may be so too, and not under a liability, merely because he has followed the flock? Such a holding would seem a clear invasion of the province of the jury to pass upon questions of fact.

Now if the rule contended for be correct, it must apply to the case in hand. If one custom is not conclusive as to negligence, it does not alter matters that there are two, for both may be such courses of proceeding as to be negligent. Therefore the case under consideration is not distinguishable in principle from those cited *supra* in note 7.

Nevertheless, plain as this may seem, the numerical weight of authority takes the contrary view; is opposed to the case under discussion and holds that when one has followed such a custom he is, as a matter of law, not chargeable with negligence.[9]

Thus the Nebraska court under a state of facts exactly similar to the case under discussion held the defendant railroad company freed from negligence as a matter of law, and said "that it was not a case analogous to that of supplying defective machinery or of omitting to use a device generally approved but a mere error of judgment.[10] Why it is not analogous we fail to see. Half the railroads in the country may use instrumentalities so defective that they are chargeable with negligence, yet that would constitute a custom and be using a generally approved device. Also we are of opinion that there may be an error in judgment so gross as to render one liable.

In Pennsylvania an extreme doctrine exists. There it has been held that reasonably safe appliances mean safe according to the usage of the business and that this must establish the standard of care. The court has said that no jury can say that the ordinary way of doing things is a negligent way. We may well ask what

[8] *Inderman v. Dames,* L. R. 1 C. P., 274.

[9] *Kehler v. Schwenk,* 144 Pa. St., 348; *Bohn v. Chicago, R. I. & P. R. Co.,* 106 Mo., 429; *King v. Ford River Lumber C.o,* 93 Mich., 172; *Davis v. Augusta Factory Co.,* 92 Ga., 712; *Baylor v. Delaware, L. & W. R. Co.,* 40 N. J. L., 410; *Washington Asphalt Co. v. Mackey,* 15 App. D. C., 410; *Saffenfield v. Main St. & Agri. Park R. Co.,* 91 Cal., 48.

[10] *O'Neill v. C. R. I. & P. R. Co.,* 66 Neb., 638.

is a jury for but to determine such matters? The standard of care must vary with varying circumstances. Some one must apply the test of negligence to the facts and no rule of law can be so framed to cover every possible contingency so that the jury may be relieved from their duty of determining the question of negligence involved.

This same court, in a somewhat later case than the one noticed,[11] held, where a city was sued for damages, claimed for a fall into an areaway, which protruded into the street, that "no usage could justify an encroachment on a public highway," and held evidence of custom inadmissable on the question of negligence.[12]

But the court remarked, in the course of the opinion, that the evidence offered of the custom of having these areaways did not show that the other areaways were exactly similar to the one in question, in that they did not protrude into the street. It seems doubtful whether the cases are reconcilable. The doctrine of the earlier case has been re-affirmed in so far as it applies to cases in which the public are not directly concerned at least.[13]

The New York court, in passing upon a similar question, stated "that if the doctrine of the majority were not adopted someone could always be found to testify that there was a better appliance than the one used and that, therefore, the defendant would always be liable.[14] This conclusion seems erroneous, since in order to avoid being negligent one does not have to use the best appliances, but only proper ones,[15] and it does not follow that he will be liable simply because there may be a better appliance in existence than the one he uses.

A more formidable objection is advanced in Michigan,[16] namely, that a jury verdict in a case like the principal one would be no protection to the defendant, for a verdict makes no precedent and another jury on precisely the same state of facts may reach the opposite conclusion. So if there were a later suit against the defendant in which he was attacked for rejecting the same appliance which he had just been held liable for adopting there might be a finding against him in both instances.

[11] *Titus v. Bradford B. K. R. Co.*, 136 Pa. St., 618; *Reese v. Hershey*, 163 Pa. St., 253.

[12] *McNerney v. Reading*, 150 Pa. St., 611.

[13] *Reese v. Hershey, supra.*

[14] *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y., 31.

[15] *Titus v. Bradford, supra.*

[16] *McGinnis v. Canada So. Bridge Co.*, 49 Mich., 472.

To this the obvious answer is that the cause of such a result lies in a defect of our jury system and not in the law, that such an objection is applicable to any succession of civil suits, and that there is no more reason to establish an artificial standard of care in the given case than in any other.

The Arkansas authorities are of the opinion that they can conceive of no other way of determining what ordinary care is than by ascertaining what men of prudence do in like circumstances.[17] This ignores the possibility of expert testimony from well-informed railroad men and would be a rather negligible objection.

It remains to be noticed that the Supreme Court of the United States has held that such an instruction as that asked for in the principal case should have been given and it was even decided that the defendant was entitled to a pre-emptory instruction in his favor,[18] but in that case it appeared that the evidence tended slightly to show that the unblocked frog which was used was better than the blocked one under the particular circumstances.

On the whole we adhere to the rule of the principal case. It is common knowledge that many customs widely adopted are productive of unfortunate results. Allowing one to justify himself for his own carelessness by setting up the carelessness of others is to our mind contrary to reason and justice.

PUBLIC USE IN EMINENT DOMAIN.

Eminent domain is the right of a sovereignty to take private property for public use.[1] The holdings of the courts as to what constitutes a public use resolve themselves into two classes:[2] one, adhering to a strict construction, holding that a use or right of use on the part of the public is an essential element;[3] the other, the more liberal view, holding that great public utility or benefit

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[17] *Kansas T. Coal Co. v. Brownlie,* 60 Ark., 582.

[18] *Southern Pac. R. Co. v. Seley,* 152 U. S., 145.

[1] *Hale v. Lawrence,* 21 N. J. Law, (1 Zab.) 714, 728; *Groff v. Bird-in-Hand Turnpike Co.,* 128 Pa. St., 621, 5 L. R. A., 661.

[2] 10 Am. & Eng. Ency., 1062; *Lewis on Eminent Domain* (3d Ed.), sec. 257.

[3] *Brown v. Gerald,* 100 Me., 351; *Board of Health v. Van Hoesan,* 87 Mich., 533; *Scudder v. Trenton Delaware Falls Co.,* 1 N. J. Eq., 694; *Varner v. Martin,* 21 W. Va., 534.

may constitute a public use.[4] Both of these views are open to criticism. Under the strict view it is impossible to develop the natural resources of the state except by public corporations. Unless manufacturing concerns can exercise the right of flowage, the water power of the smaller streams cannot be utilized.[5] Unless land can be condemned for irrigation purposes large districts must remain non-productive.[6] The second view, holding that public use is co-extensive with public welfare seems too broad. The difficulty in adopting this rule is brought out by Chief Justice Cooley in the case of *Ryerson v. Brown*,[7] where he said, in repudiating the rule, that every lawful business in a sense confers a public benefit. Under this rule the courts have no fixed principle to guide them, but must use their own discretion in each individual case in deciding whether the benefit to the public is sufficient to justify the exercise of eminent domain.[8]

The Connecticut Supreme Court in the recent case of *The Connecticut College for Women v. Calvert*[9] defines public use as a use governmental in its nature, and one in which the public has or can acquire a common right on equal terms to the use or benefit of the property taken, except only that the use or right of use by the public may be dispensed with when a public benefit results which cannot otherwise be realized, and which continues to exist although the public has no use or benefit of the property taken. This rule seems to cover practically all of the cases in which eminent domain has been granted, and is free from the objections to the other rules given. The exception permitting the taking when a public benefit results which cannot otherwise be realized, permits the utilization of natural resources and justi-

[4] *Olmstead v. Camp*, 33 Conn., 532; *Talbot v. Hudson*, 16 Gray (Mass.), 417; *Matter of Townsend*, 39 N. Y., 171; by public use is meant for the use of many or where the public is interested, *Seeley v. Sebastian*, 4 Oregon, 25.

[5] *Camp v. Olmstead, supra; Talbot v. Hudson, supra.*

[6] *Rialto Irrigation Dist. v. Brandon*, 103 Cal., 384; *Ellinghouse vc. Taylor*, 19 Mont., 462; *Shoemaker v. Hatch*, 13 Nev., 261; *Umatilla Irrigation Co. v. Barnhart*, 22 Oregon, 389.

[7] 35 Mich., 332.

[8] The existence of a public use so largely depends upon the peculiar circumstances and conditions surrounding the locality in which the case arises, that no definite rule can be laid down in regard to it. *Clark v. Nash*, 198 U. S., 361, followed in *Baillie v. Larson*, 138 Fed., 177.

[9] 88 Atl., 633.

fies the earlier Connecticut cases granting the right of flowage.[10] It sufficiently safeguards private property rights by prohibiting taking for public use generally, and only permitting the taking when the benefit to the public could not otherwise be realized or where the public has a right to the use or benefit.

Although all the earlier Connecticut decisions, allowing the exercise of eminent domain can be brought under this rule, the rule followed in those cases was the broad definition of a public use as a public benefit or as a great public utility.[11] The court has in this case, therefore, narrowed the former doctrine.

The question before the court in this case was whether a legislative grant of the right to exercise eminent domain to the Connecticut College for Women, owned and controlled by a private corporation, was constitutional. The court held, Wheeler, J. dissenting, that such a grant was unconstitutional, since the charter of the college, stating that its purpose was the higher education of women, did not state that the public generally had the right to enjoy the benefits of the college. As stated in the opinion, the question whether universities and colleges when owned and controlled by private corporations administer a public use so as to justify a grant of eminent domain to them has apparently never been before the courts.

Under the broad definition of a public use such a grant would seem justifiable. Such was evidently the opinion of Governor Baldwin, former Chief Justice, when he signed the bill. Under the definition given by the court the holding is clearly sound. The charter of the college[12] by not stating that the public have a common right upon equal terms, leaves it to the corporation to fix any limitations upon admittance it may see fit. Nor does it appear that the existence of the right of eminent domain is essential to the life of the college.

REVOCATION OF FRANCHISE BY MUNICIPALITY.

By a division of five to four the Supreme Court of the United States in the case of *City of Owensboro v. Cumberland Telephone & Telegraph Company*[1] recently affirmed the doctrine of

[10] *Olmstead v. Camp, supra; Austin v. Todd,* 34 Conn., 78.

[11] *Bradley v. Railroad Co.,* 21 Conn., 294; *Olmstead v. Camp, supra; Austin v. Todd, supra; Railroad Co. v. Offield,* 77 Conn., 417, 421.

[12] 16 Sp. L. Conn., 1911, p. 101.

[1] 33 Sup. Ct. Rep., 988.

the *Dartmouth College Case,* holding that the grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant; and that the general authority given by a city charter to "make, publish, and repeal all ordinances" of such character cannot be construed as a reservation of the power to revoke that grant. Quoting the opinion of the court: "When that grant was accepted and acted upon by the grantee it became a contract between the city and the telephone company which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved. * * * In the absence of an express provision in the contractual ordinance, or an express delegation of power to revoke contracts under such ordinances, we think no such extraordinary power is to be implied. * * * That the right may be reserved to destroy a contract may be conceded; but when such a right is claimed, it must be clear and explicit."

Mr. Justice Day, the author of the minority opinion, contends that legislative grants of municipal authority should be construed most favorably to the public and against persons claiming thereunder, and that the same law which gave the city the right, which otherwise would have rested with the legislature alone, of authorizing the use of its streets for telephone purposes, in unmistakable terms made such authority subject to "the clearly stated and definite limitation named," *i. e.,* section 10 of the city charter which provides that "the common council shall have control of the finances and all property, * * * belonging to the city, and shall have full power to make, publish, and repeal all ordinances for the following purposes, viz:" sub-section 27, "to regulate the streets, alleys, and sidewalks, and all repairs thereof." He relies on the cases of *Greenwood v. Union Freight R. Co.,*[2] *Calder v. Michigan,*[3] and *Lake Roland Elev. R. Co. v. Baltimore.*[4] None of them are exactly in point. In the first case a general law of the state made "every act of incorporation subject to amendment,

[2] 105 U. S., 13.
[3] 218 U. S., 591.
[4] 77 Md., 352.

alteration, or repeal, at the pleasure of the legislature"; in the second, there was a similar provision in the State Constitution; in the third, a statute passed to confirm a grant of a franchise by a municipality contained a reservation to the municipality "of the same power and control thereafter in reference to the enforcement, amendment or repeal of" the ordinance as it had or would have had in respect to any ordinance passed under its general powers. In each of these cases it was held that a repeal of the franchise was not a violation of the constitutional prohibition of impairment of contract obligations by state laws.

It is generally conceded that an ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which requires the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. But if the grant contains an unqualified condition that it may be revoked at the pleasure of the municipality, it is a bare license and is revocable without cause at the will of the city.[5] It has also been generally held, where the State Constitution or a statute provides a reservation of the right to amend, alter or repeal corporate franchises granted under special or general laws, that this reservation qualifies the grant; and a subsequent exercise of the reserved power is not within the prohibition of the Federal Constitution, as an act impairing the obligation of a contract, even though the corporate charter contains no allusion to the reservation, which is deemed to be embodied in the charter.[6] The cases on which the minority bases its opinion are all in accord with this doctrine. In all of these cases there was mention in the Constitution, statute, or charter, of the application of the reservation specifically to corporate charters, but in the clause in the municipal charter under consideration there was no reference to franchises, simply a general grant of the power to repeal ordinances made in execution of the delegated authority to legislate. Under

[5] 3 *Dillon on Municipal Corporations,* 5th Ed., §1306.

[6] *West Wisconsin R. Co. v. Trempealeau,* 35 Wis., 257; *State v. Chi. & N. W. Ry.,* 128 Wis., 449; *Pennsylvania College Cases,* 80 U. S. (13 Wall.), 190; *Tomlinson v. Jessup,* 82 U. S. (15 Wall.), 459; *Railroad Co. v. Georgia,* 98 U. S., 359; *Spring Valley & C. v. Schottler,* 110 U. S., 347; *Mo. Pac. Ry. v. State,* 216 U. S., 262.

these circumstances we are led to follow the opinion of the court and construe the mention in the city charter of the power to repeal to be mere surplusage, especially in view of the fact that the *Dartmouth College Case* was decided in the face of the rule of law that the power to legislate necessarily comprehends full power to amend and repeal laws legislative in character.[7]

The opinion of the court can also be supported on the further ground that in exercising the reserved power, the legislature may not deprive a corporation of property already acquired or the proceeds of contracts previously made.[8] A Pennsylvania case considers the charter under such circumstances to be a quasi-contract.[9]

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[7] *Milan, etc. v. Husted,* 3 Ohio State, 578, 581.

[8] *People v. O'Brien,* 111 N. Y., 1; *N. Y. C. & H. R. R. v. Williams,* 199 N. Y., 108; *Sinking Fund Cases,* 99 U. S., 700; *Union Pacific v. Mason City, etc.,* 199 U. S., 160.

[9] *Manheim Borough v. Manheim Water Co.,* 229 Pa., 177.