

1900 the average income of the attorneys of the city did not exceed \$750. But even placing it at the more liberal amount of \$1,000, it is plain that at least 2,000 of the members of the legal profession in Chicago do not make as much as the income of a brick mason under the union scale. It is estimated that perhaps six or eight lawyers in Chicago average \$40,000 a year, while a large number touch the \$30,000 mark. A considerable number, who count themselves among the successful, make between \$10,000 and \$20,000 a year, while the attorney who can figure up \$5,000 a year is by no means to be despised. This leaves a startlingly small amount as the average income of the less fortunate half of the legal profession. And all this increase in the number of lawyers is in spite of the fact that it is very much more difficult to secure admission to the bar at present than it was a few years ago. According to the Tribune, the conditions which prevail in Chicago are duplicated all over the country. In 1870, the total number of regularly enrolled law students in the United States was 1,653. In 1890, they numbered no less than 11,874. In the last-named year the total number of graduates from law schools was 3,140 or nearly twice as many as were enrolled thirty years before. It is apparent, therefore, that while the difficulties of securing admission to the bar have increased many fold within the last quarter of a century, the number of graduates has more than kept pace with it. The difficulty of making a living, to say nothing about amassing a competency under conditions such as we have described, is apparent at a glance; any bright young man can figure out for himself his chances. Yet, with all these facts before them, the ambitious young men of the country persist in crowding the law schools to a greater extent every year.

WHAT CONSTITUTES A CONTRACT?

BY WM. UNDERHILL MOORE.

The significance of the term "contract," as employed in article 1, section 10 of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of contracts, seems at first blush, so obvious, that a discussion of its real import would be declared more likely to confuse than to enlighten. To the student of private

law a wide divergence of opinion appears highly improbable, if not quite impossible. Yet, there is, perhaps no clause in the Constitution which has been so prolific of litigation and far-reaching decisions as the contract clause. The term contract has on the one hand been strictly limited in definition to the most narrow conception of private law in order to meet the requirements of an intensely particularistic theory of constitutional interpretation; on the other hand, it has been extended, by a court national in sentiments, far beyond its ordinary meanings to offer a much needed protection to vested rights. It has been developed along lines exhibiting no settled principles of judicial exposition, but has suffered rather a process of expansion and contraction according as one or the other of the two conflicting doctrines of our constitutional law has preponderated in the deliberations of the Supreme Court.

Since the adoption of the Fourteenth Amendment, however, which expressly places the protection of private property in the Federal government, many cases, which before, upon questionable principles of contract law, but upon undoubtedly sound principles of political science, might have been brought within the purview of the clause under discussion, are now properly decided under that amendment. It is no longer necessary, in order to restrain a State from confiscation of property rights, to have recourse to the contract clause. It seems fair to say, then, that the extremes to which the definition of a contract will be extended, have for the most part been reached, and that from now on, the court, relieved of the necessity of following doubtful precedents, and of creating anomalous innovations, will confine itself more strictly to the application of the law of contractual obligations in determining the existence of a contract within the meaning of the Constitution.

The study of the cases themselves suggests, perhaps, the most logical, as well as the most convenient method of treating the subject. It will be taken up under the following topics: (1) Parties to the contract; (2) Grants of land; (3) Charters and franchises; (4) A contract distinguished from an office; (5) Quasi-contracts; (6) Marriage; and (7) State constitutions.

Parties to the Contract.

Under the head of parties to the contract, it seems hardly necessary to say more than that any contract, the parties to which are persons capable of entering into contractual obligations at common law, is within the meaning of the Constitution. The contract may be between a state in its corporate capacity and an individual or several individuals. Thus, in *Fletcher v. Peck* (6 Cranch. 136 [1810]), in which case it was held that a grant of land from a State to a private party was within the contract clause, Chief Justice Marshall said: "If, under a fair construction of the Constitution, grants are comprehended under the term 'contract,' is a grant from

the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description" (see, also, cases cited in topics 2, 3 and 4, *infra*).

Again the contract may be between two States as in *Green v. Biddle* (8 Wheaton 1 [1823]) and *Hawkins v. Barney* (5 Peters, 457 [1831]). In both of these cases the dispute arose in regard to certain land ceded by Virginia to Kentucky, upon the formation of the latter State, under an agreement whereby Kentucky bound herself in her Constitution not to destroy rights vested under the laws of Virginia before the separation. The Supreme Court of the United States held that this agreement between the States was a contract and that any law of Kentucky violating the compact was void under the Constitution of the United States as impairing the obligation of contracts.

It seems, too, from a late case that the United States may be a party to a contract with a State of the Union (*Walsh v. Columbus, etc., R. R. Co.*, 176 U. S. 479 [1899]). In *Walsh v. Columbus, etc., R. R.* it appears that congress had passed an act in which it was provided that certain lands should be granted to Ohio, if that State would accept them and agree to use them for canals, over which the United States should have free transportation. The proposition was accepted by an appropriate act of the Ohio legislature. Subsequently the use of the lands in question was granted by the State to the defendant, and the plaintiff, a private person, brings this action on the ground that the law granting to the defendant the privilege of use of the land for railroad purposes, was a law impairing the obligation of contracts. It was held that although a contract existed between the United States and Ohio in regard to the land, the plaintiff, not being a party to it, had no cause to complain of a breach. Mr. Justice Brown, in delivering the opinion of the court, said: "The plaintiff stands in no position to take advantage of a default of the State in this particular. He was not a party to the contract between the State and the federal government; his rights are entirely subsidiary to those of the government; and if the latter chose to acquiesce in the abandonment of the canals, as it seems to have done, he has no right to complain. The only contract in this case was between the State of Ohio and the United States. Plaintiff was neither a party nor privy to such a contract. It was within the power of the government to prosecute the State for breach of it, or to condone such breach if it saw fit."

Grants of Land.

That a grant of land, either from a State to an individual, or from one individual to another, is a contract within the Constitution, has been so often

stated in the books as to have become almost an axiom of our public law. However, when the anomalous character of any rule of constitutional law, which classes grants as contracts, is considered for a moment, the necessity of a careful review of the earlier cases becomes obvious.

In *Fletcher v. Peck* (6 Cranch. 87 [1810]), the first case which brought the contract clause directly before the Supreme Court, it appears that the legislature of Georgia had authorized the sale of a large tract of land, and that a grant was made by letters patent to the Georgia company. Fletcher held a deed from Peck for a part of this land, under a title derived from the patent; and in the deed Peck covenanted that the letters patent from the State of Georgia were lawfully issued, and that the title had not since been legally impaired. The question arose as to the constitutionality of an act of the legislature of Georgia which repealed the law under which the letters patent were issued, and declared them null and void. The court held that the law, under which the letters patent were authorized, was in the nature of an executed contract, and absolute rights having vested under that contract, a subsequent act of the legislature attempting to invalidate those rights was unconstitutional, as impairing the obligation of contracts. The grant from the State of Georgia was a contract within the Constitution, for a grant amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.

It seems clear that what the court was really doing in this case was protecting vested rights of property, but not true contract rights. As a matter of principle nothing could be further from a contract than a grant. Under a contract the promisee gets simply a right *in personam* against his promisor, a right which exists merely because of the relation the parties have assumed towards one another. By virtue of a grant, however, the grantee gets no greater rights against his grantor than he gets against the whole world; he acquires under a grant a right *in rem*, existing, not because of his relation to any person, but because of his relation to a particular thing which he has acquired under the grant. A grant is a means of transferring already existing rights while a contract creates new rights. Therefore, in *Fletcher v. Peck*, when the grantees of the State acquired a fee simple estate in the property in question, they got an estate which bore no single peculiar characteristic because it was granted immediately from the State, and there was no more a contract on the part of Georgia not to reassert a right of ownership in respect to this property, than there was a similar contract in respect to every parcel of land within the State.

But it is to be remembered that between 1798, when it was decided in the case of *Calder v. Bull* (3 Dallas, 387 [1798]), that the prohibition in the Constitution against *ex post facto* laws (art. 1, sec. 10) was directly only against legislation as to crimes, and the adoption of the Fourteenth Amendment,

there was absolutely nothing in the United States Constitution to prevent the State legislatures from wholesale confiscation of property, unless the contract clause was construed so as to accomplish that result. It seems then, that the court was justified as a matter of public policy, in resorting to the fiction of calling a grant an executed contract.

It is to be noted, furthermore, in this connection, that in the early decades of the last century, before the tremendous influence of French revolutionary thought had begun to disappear, and while men's minds were still hopelessly tangled in the social compact theory, the statement that all property rights were the result of contract, would have been considered in no wise as extraordinary. Thus, in *Calder v. Bull* (3 Dallas, 394), Mr. Justice Chase said: "It seems to me that the *right of property*, in the origin, could only arise from *compact express*, or *implied*, and I think it is the better opinion, that the *right*, as well as the *mode*, or *manner*, of acquiring property, and of alienating or transferring, inheriting or transmitting it, is conferred by society."

In the same case, and following up the same line of thought, Mr. Justice Chase clearly pointed out the way for the decision in *Fletcher v. Peck* (*supra*). In arguing that the *ex post facto* clause was intended only as a restraint on criminal legislation, he said (3 Dallas, 390): "I do not think it is inserted to secure the citizen in his *private rights*, of either *property* or *contracts*. The prohibitions not to make anything but gold and silver a tender in payment of *debts*, and not to pass any law impairing the obligation of contracts, were inserted to secure *private rights*. * * * If the prohibition against making *ex post facto* laws were intended to secure *personal rights* from being affected, or injured, by such laws, and the prohibition is sufficiently extensive for that object, the *other* restraints I have enumerated, were unnecessary and, therefore, improper."

The doctrine of *Fletcher v. Peck* (*supra*), was followed and applied to two cases, presenting substantially the same state of facts as that case, which arose about five years later (*Terrett v. Taylor*, 9 Cranch, 43, and *Town of Pawlet v. Clark*, 9 Cranch, 292 [1815]); but before the court had an opportunity to extend this doctrine to its logical conclusion, and hold that all vested property rights were within the protection of the contract clause, the particularistic theories in regard to the federal system of government, which so characterized the public law of the thirty years or so preceding the Rebellion, had gained such a foothold, that any invasion of a State's prerogative not clearly required by precedent, or a literal interpretation of the Constitution was not to be expected.

Accordingly in *Satterlee v. Matthewson* (2 Peters, 380 [1829]), the Supreme Court refused to apply the rule of *Fletcher v. Peck* (*supra*) to a state of facts which seems to be quite within the meaning of that case. It appears that *Satterlee* was a tenant, under a lease from *Matthewson*, of certain premises, the fee to which *Matthewson* had under a Connecticut title.

While the lease was still in existence *Satterlee* acquired a title to the land under a grant from Pennsylvania and in an action of ejectment brought by *Matthewson*, the Supreme Court of Pennsylvania held that inasmuch as the relation of landlord and tenant could not exist between Pennsylvania and Connecticut claimants, *Satterlee* was not estopped to deny his landlord's title, and was, therefore, entitled to the land in question. The legislature of Pennsylvania then passed an act declaring that such a relation might exist between Pennsylvania and Connecticut claimants, and under this statute *Satterlee* was deprived of the premises. The case was brought to the Supreme Court of the United States on the ground that the act of the Pennsylvania legislature impaired the obligation of the contract between that State and *Satterlee*, its grantee. It was held, however, that such was not the case, the law in question not in terms revoking the grant to *Satterlee*. The court recognized *Fletcher v. Peck*, but limited its application to statutes actually revoking grants of land. Mr. Justice Washington, in delivering the opinion of the court, said: "The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is certainly no part of the Constitution of the United States which applies to a State law of that description; nor are we aware of any decision of this or of any circuit court, which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract."

In another case, *Wilkinson v. Leland* (2 Peters, 627 [1829]), which came up for decision in the same year as *Satterlee v. Matthewson* (*supra*), the Supreme Court maintained the validity of a State statute which ratified a void sale of land by an executrix, and thereby divested the devisees of the title to the land which had vested in them upon the death of the testator.

These two cases seem to have settled the law, and Mr. Justice Baldwin, in delivering his opinion in *Bennett v. Boggs* (1 Baldwin, 74 [1830]), well sums up the state of the law before the adoption of the Fourteenth Amendment: "The Supreme Court have decided, *Satterlee v. Matthewson* (2 Peters, 412-414), that a State law, though an unwise and unjust exercise of legislative power — retrospective in its operations — passed in the exercise of judicial function — creating a contract between the parties to a pending suit where none existed previous to the law — declaring a contract in existence prior to the law, founded on an immoral or illegal consideration, to be valid and binding on the parties — or divesting rights which were previously vested in one of the parties — is neither *ex post facto*, a law impairing the obligation of contracts, or repugnant to the Constitution of the United States" (accord: *Watson v. Mercer*, 8 Peters, 110 [1834]; *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 Howard, 395 [1850]).

After the adoption of the Fourteenth Amendment,

however, the question how far a grant of land may be considered a contract within the Constitution, has become of little practical importance. Any attempt on the part of a State to annul grants or to confiscate property rights would now be met by the provision of that amendment, that no State shall deprive a person of property without due process of law, and it is no longer necessary to resort to a fiction in order to protect an individual in his vested rights of property.

Charters and Franchises.

The leading case of *Dartmouth College v. Woodward* (4 Wheaton, 518 [1819]), decided that the charter of a private corporation constituted in itself a contract within the meaning of the Constitution, and protected by it. The argument by which the Supreme Court reached this conclusion is summed up in the opinion of Mr. Justice Washington, as follows: "To this grant, or this franchise, the parties are, the king, and the persons for whose benefit it is created, or trustees for them. The assent of both is necessary. The subjects of the grant are not only privileges and immunities, but property, or which is the same thing, a capacity to acquire and to hold property in perpetuity. Certain obligations are created, binding both on the grantor and the grantees. On the part of the former, it amounts to an extinguishment of the king's prerogative to bestow the same identical franchise on another corporate body, because it would prejudice his prior grant. It implies, therefore, a contract not to reassert the right to grant the franchise to another, or to impair it" (4 Wheaton, 657).

The doctrine of the *Dartmouth College* case (*supra*) has become so thoroughly settled in the jurisprudence of the United States that anything more than a few examples of its application seems unnecessary. In *The Binghamton Bridge* (3 Wallace, 51 [1865]), it appears that the legislature of New York had granted a charter to a corporation, in which charter the corporation was authorized to build and maintain a bridge. The charter stipulated that it should not be lawful for any other persons to erect a bridge within two miles of the bridge erected by the corporation. After the bridge had been built some years, the legislature passed an act incorporating the *Binghamton Bridge Company*, which company, in accordance with the provisions of its charter, constructed a bridge a few rods away from the first bridge. It was held that the act incorporating the *Binghamton Bridge Company* was void as impairing the contract existing between the first corporation and the State.

So, in *New Orleans Water Works Co. v. Rivers* (115 U. S. 674 [1885]), the same principle was applied. It appears that the plaintiff had a charter granting to it the exclusive privilege of supplying water in the city of New Orleans. The Constitution of 1879 of Louisiana, abolished, in terms, all monopolistic features in the charters of then existing corporations, except certain railroads; and in accordance

with this provision the defendant had procured a city ordinance to be passed allowing him to supply his hotel, situated in New Orleans, with water by pipes laid direct to the Mississippi. It was held that the charter to the plaintiff, giving him the exclusive privilege of supplying water within the city, was a contract within of the Constitution, and that in consequence, the charter was irrevocable even by a constitutional provision, and the ordinance in question was void. (Accord: *St. Tammany Water Works Co. v. New Orleans Water Works Co.*, 120 U. S. 64 [1886]; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 [1885]. See, also, *Bridge Co. v. Kentucky*, 154 U. S. 204 [1893]).

In *Wilmington R. R. v. Reid* (13 Wallace, 266 [1870]), after a review of the cases, Mr. Justice Davis thus commented upon the law in respect to charters: "It has so often been decided by this court that a charter of incorporation granted by a State creates a contract between the State and the incorporators, which the State cannot violate, that it would be supererogation to repeat the reasons on which the argument is founded. * * * If the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests."

However, the courts have refused to extend the doctrine any further than necessary, and, unless an exclusive privilege is expressly granted, another franchise for precisely the same privilege may be granted, although this second grant, for all practical purposes, destroys the first. Thus in *Charles River Bridge v. Warren Bridge* (11 Peters, 576 [1837]) it was held that inasmuch as the grant to a toll bridge company did not, in terms, import an exclusive grant, there was nothing to prevent the State from authorizing a free bridge to be built within a few rods of the company's bridge, although the erection of the free bridge destroyed absolutely the value of the franchise to maintain the toll bridge. The court placed its decision on the ground that the law authorizing the free bridge did not purport to repeal the earlier franchise, nor to alter it in any material or immaterial part.

In the *Turnpike Company v. State of Maryland* (3 Wallace, 213 [1865]), in which case it was held that the State might charter a railroad company, giving it the right to build so near to a turnpike, previously constructed under a franchise from the State, as to effectually extinguish all benefits accruing under the earlier franchise, the court said: "The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defense is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may

have been the general injurious effects and consequences to the company from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress."

Moreover, if a special franchise be conferred upon a public or municipal corporation, it will not be construed to be irrevocable. In *East Hartford v. Hartford Bridge Company* (10 Howard, 533 [1850]) the court held that an act of the Connecticut legislature revoking a ferry franchise previously conferred upon the town of East Hartford, and granting it to a bridge company was valid. The principle of the decision was stated by Mr. Justice Woodbury in the opinion as follows: "The legislature was acting here on one part and public, municipal and political corporations on the other. They are acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From the standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes were liable to have their public powers, rights and duties modified or abolished at any moment by the legislature."

But, by far, the most extensive and salutary limitation upon the power of a State legislature to pass irrevocable laws, is that which denies them the right to barter away their police power. A State cannot give up its power to legislate in furtherance of the public health and morals, be the charter ever so irrevocable in form. Accordingly in *Stone v. Mississippi* (101 U. S. 821, et seq. [1880]), it was held that a lottery charter, although, in terms, to run for a fixed period, and under which the grantor received certain annual dividends, was held to be repealable at any time. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "No legislature can bargain away the public health or the public morals—the supervision of both these subjects of government is continuing in its nature, and they are to be dealt with as the exigencies of the moment may require. Government is organized with a view to their preservation, and it cannot divest itself of the power to provide for them. * * * Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people in their sovereign" (governmental?) "capacity and through their properly-constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not paid for. * * * He has, in legal effect, nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign" (governmental?) "power of the State" (Accord: *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [1878];

Butchers' Union Co. v. Crescent City, 111 U. S. 746 [1883]; *Boyd v. Alabama*, 94 U. S. 645 [1876]).

Nor is a contract created by the issuance of a license to do business, even if the license be granted upon consideration, if the business concerned can possibly be regarded as one subject to regulation under the police power of the State. Thus in *Mutual Life Ins. Co. v. Spratley* (172 U. S. 621 [1898]) it was held that a license granting to a foreign corporation the right to carry on an insurance business within a State, is revocable by that State at any time it sees fit to exercise its prerogative. Mr. Justice Peckham, in delivering the opinion of the court, said: "Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State, but it may alter them at pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrevocable law, because they are what are termed 'governmental objects,' and hence within the category which permits the legislature of a State to legislate upon those subjects from time to time as the public interests may seem to it to require" (see *Gray v. Connecticut*, 159 U. S. 73 [1895]).

The case of *Newton v. Commissions* (100 U. S. 548 [1879]) seems to suggest an extension of the principle that a State cannot barter away its police power by laying down the rule that any matter which may be considered properly of public interest, or a public subject as within the scope of internal government, is within the police power. It was held, in that case, that a law whereby it was provided that upon the performance of certain conditions by the citizens of Canfield that the county seat of the county in which Canfield was situated, should be permanently established in that town, was repealable at any time, even after the conditions were completely fulfilled. If it is contended that the establishment of county seats is not to be classed as one of a State's police powers, the decision may then be readily supported on the broader ground that it is a governmental power vested in the legislature by the Constitution of the State, and, therefore, a power of which the legislature could not constitutionally divest itself.

Notwithstanding the principle that a legislature cannot lawfully divest itself of governmental functions which are vested in it by the Constitution of the State, it has become a well-recognized rule that a State may by contract bind itself not to exercise the power of taxation, or to exercise it only within certain limits. This anomalous doctrine seems to have originated in the case of *New Jersey v. Wilson* (7 Cranch, 164 [1811]). It was there held that an act of the New Jersey legislature purporting to repeal a law whereby it was stipulated that if cer-

tain Indians would give up the lands they occupied, other lands, which were conveyed to trustees for their use, would be exempt from taxation, was held unconstitutional as impairing the obligation of the contract between the State and the Indians.

But the rule, in its operation, has been confined almost exclusively to exemptions from taxation incidental to the grant of corporate privileges. Thus in *Pacific R. R. Co. v. Maguire* (20 Wallace, 42 [1873]) it was held that an exemption from taxation contained in a charter to a railroad corporation was absolute and irrevocable by the State legislature. Mr. Justice Hunt, in delivering the opinion of the court, said: "The right of taxation is a sovereign right, and, presumptively, belongs to the State in regard to every species of property and to an unlimited extent. The right may be waived in certain instances, but this can only be done by a clear expression of the legislative will. The cases of *Tomlinson v. Branch* (15 Wall. 469) and *Tomlinson v. Jessup* (Id. 454), in this court, show that when a contract of exemption from taxation is thus established, it is binding upon the State, and the action of the State in the passage of laws violating its terms will not be sustained" (Accord: *New Jersey v. Yard*, 95 U. S. 104 [1877]; *Farrington v. Tennessee*, Id. 679; *Osborn v. Mobile*, 16 Wallace, 481 [1872]; *Humphrey v. Peques*, Id. 247; *Dodge v. Woolsey*, 18 Howard, 331 [1855]; *Bank v. Knoop*, 16 Howard, 369 [1853]; *Gordon v. Tax Court*, 3 Howard, 133 [1845]; *Bank v. Skelly*, 1 Black, 436 [1862]; *University v. People*, 99 U. S. 309 [1878]).

However, it is necessary to distinguish sharply between cases where the exemption is held binding, there being a consideration upon which the contract can be based, and cases where the law offering the exemption is construed to be a mere gratuity, repealable at any time. In *Grand Lodge v. New Orleans* (166 U. S. 146 [1896]), it appears that the legislature of Louisiana had passed an act exempting the hall of a certain Grand Lodge from taxation so long as it was occupied by a certain order of Masons. The Masons were already in occupation of the hall when the law was passed, but, in reliance upon this law, went to considerable expense in repairing the hall. It was held that inasmuch as the law provided in no way for an acceptance of its terms, and since, therefore, it could not be said that there was a consideration, the exemption was a bounty, revocable at will. Mr. Justice Brown said: "If the act of 1855 be regarded as a contract within *Dartmouth College v. Woodward* (4 Wheat. 518), then it is clear that the exemption from taxation was valid and beyond the power of the legislature to abrogate. * * * To make such a contract, however, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer"

(Accord: *Rector v. Philadelphia*, 24 Howard, 300 [1860]; *Tucker v. Ferguson*, 22 Wallace, 527 [1874]; *West Wisconsin Ry. v. Supervisors*, 93 U. S. 595 [1876]).

Although it is impossible to distinguish, as a matter of principle, between the power of a State to grant away its right of eminent domain and its power to grant an exemption from taxation, both being essentially governmental powers, the law is well settled that a State cannot divest itself of the right of eminent domain, nor create in an individual a right against the future exercise of that power upon the same property. Any law whereby it is attempted to barter away the right in question will be treated by the courts as subject to withdrawal at the pleasure of the government (*Boom Co. v. Patterson*, 98 U. S. 403 [1878]; see, also, *Burgess, Political Science and Constitutional Law*, vol. 1, 239, *et seq.*)

In the charters of banking corporations it is frequently stipulated that the notes or bonds of the corporation shall be received by the State in payment of taxes and debts. Thus in *Woodruff v. Trapnall* (10 Howard, 511 [1850]), it appears that Kentucky had, in a law incorporating a bank, declared that all its bank bills should be receivable in payment of debts due the State. The section of the law relating to bills was repealable, and this case was an application for a writ of mandamus to compel the State treasurer to receive some of the bills in payment of a judgment. The bills tendered had been issued before the repealing act, but it did not appear whether or not the relator had gotten the bills before the repeal. It was held that the statute in question constituted a contract between the State and the holders of bills issued before the repeal, and the application was granted. Mr. Justice Davis, in commenting upon a substantially similar state of facts in *Furman v. Nichol* (8 Wallace, 59-60 [1868]), said: "That this guarantee was until withdrawn by the State, a contract between the State and every noteholder of the bank, obliging the State to receive the notes for taxes, cannot admit of serious question. * * * In such a transaction the benefit is mutual between the parties. The bank get the interest on the notes as long as they are unredeemed, and the holder of the bills has a ready and convenient mode of paying taxes. The State did, therefore, in the charter creating the bank of Tennessee, on good consideration, contract with the billholders to receive from them the paper of the bank for all taxes they owed the State. Until the legislature, in some proper way, notifies the public that the guarantee thus furnished has been withdrawn, such contract is binding upon the State and within the protection of the Constitution of the United States. * * * The guarantee is in no sense a personal one. It attaches to the note—is part of it, as much so as if written on the back of it—goes with the note everywhere, and invites everyone who has taxes to pay to take it."

These cases are similar in principle to the cases where a State itself issues bonds and the law authorizing the bond issue makes the coupons receivable in payment of debts due the State. In such cases it is uniformly held that a contract results between the State and the holders of the bonds (*McCullock v. Virginia*, 172 U. S. 102 [1898]; *Hartman v. Greenhow*, 102 U. S. 679 [1880]).

A Contract Distinguished from an Office.

The question whether a State has a right to repeal or amend a statute, under the terms of which persons have been appointed or employed, depends upon whether the statute in question has created an office or authorized a contract. The grant of an office, like the charter of a public corporation, is a delegation of governmental authority and revocable at pleasure by the State, on the principle that where authority is vested in the legislature by the Constitution of a State, it is impossible for the legislature by contract or any other means to deprive itself of its inherent prerogatives. The law creating an office, therefore, may be repealed, or the salary of the incumbent reduced during his term, without impairing the obligation of a contract. Thus in the case of *Butler v. Pennsylvania* (10 Howard, 417 [1850]), where it appeared that the statute, under which certain canal commissioners had been appointed, had been amended during the commissioners' term of office, so as to reduce the rate of their compensation, it was held that the original statute had created an office, and that, therefore, the amending act was not unconstitutional as impairing the obligation of a contract. Mr. Justice Daniel, in delivering the opinion of the court, said: "We have already shown that the appointment to and tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contract*, or, in other words, the vested, private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if, indeed, they can, under any circumstances, be justified in surrendering them" (Accord: *Connor v. New York*, 1 Selden [N. Y.], 285 [1851]; *Warner v. People*, 7 Hill [N. Y.], 81 [1844]; see, also, *United States v. Hartwell*, 6 Wallace, 393 [1867]; *Hare*, American Constitutional Law, vol. 1, 650, and State decisions there collected; *United States v. Maurice*, 2 Brockenbrough [1823]).

If, however, a statute authorizing the employment of a person does not involve the delegation of governmental functions, but looks rather to the performance of services, the end or accomplishment of which may be a governmental function, but the actual doing of which requires the exercise of no governmental authority, then a contract may be

found between the State and the appointee, so as to make the statute irrepealable. Accordingly it was held in *Hall v. Wisconsin* (103 U. S. 5 [1880]) that a law, under the provisions of which certain parties were employed for a fixed period and for a fixed compensation, to make a geological survey of the State, was irrevocable. The commission of surveyors, the persons who were appointed under the statute, were not State officers. Mr. Justice Swayne, in delivering the opinion, said: "The term civil officers * * * embraces only those officers in whom a portion of the sovereignty" (governmental authority?) "is vested, or to whom the enforcement of municipal regulations, or the control of the general interests of society is confided."

Quasi-contracts.

The question as to how far a quasi-contract, *i. e.*, a contract implied in law, may be considered a contract within the meaning of the Constitution, seems, under the decisions of the Supreme Court, to be an open one. It is fair to say, however, that if the obligation imposed by law is in the nature of a statutory obligation, the law under which the quasi-contract right has arisen may not be repealed so as to impair rights already vested under its provisions. Thus where public offices are abolished, it is held that the officer is entitled to recover for his services rendered before the repeal of the law by virtue of which his office had existed at the rate of compensation fixed in that law. After services have been rendered under a law, resolution or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is complete, its obligation is perfect and it is beyond the operation of a repealing act (*Fisk v. Jefferson Police Jury*, 116 U. S. 131 [1885]; *Butler v. Pennsylvania*, 10 Howard, 402 [1850]).

The principle is well illustrated by the case of *Steamship Co. v. Joliffe* (2 Wallace, 457 [1864]). It appears that Joliffe, a pilot, had tendered his services to the Steamship Company, and upon the refusal of the company to accept them he became entitled, under a statute of California, to half-pilotage fees. The statute under which the half-pilotage fees were claimed was subsequently repealed in form by a law which substantially re-enacted all the provisions of the original statute. And, although the case went off on the ground that the original statute had not, in fact, been repealed, it was pointed out that even if such had been the case, Joliffe's claim, being a contract right within the protection of the contract clause, would not have been affected. Mr. Justice Field, in delivering the opinion of the court, said: "The transaction in the latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi-contract. * * * In such case the party makes no promise on the subject; but the law 'consulting the interests of morality' implies one; and the liability thus arising is said to be a liability

upon an implied contract. The claim for the half-pilotage fees stands upon substantially similar grounds. * * * When a right has arisen upon a contract or transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement."

However, as to judgments, another species of quasi-contracts, the law seems to be settled that they are not within the protection of the constitutional prohibition under discussion. In a *dictum* in the case of *Garrison v. New York* (21 Wallace, 203 [1874]), it was doubted whether a judgment, not founded upon an agreement, express or implied, is a contract within the meaning of the Constitution.

This *dictum* of the court was adopted as law in the later case of *Louisiana v. New Orleans* (109 U. S. 288 [1883]). In this case it appeared that the State legislature had passed a law taking away from the city of New Orleans the power to raise taxes to a sufficient amount to pay certain judgments which the relator held against the city. The legislation so limiting the taxing power of the municipality had been passed after the judgments had been acquired, and it was sought to have it declared unconstitutional as impairing the obligation of the judgments in question. It was held, however, that the judgments were not contract within the meaning of the Constitution. Mr. Justice Field, who delivered the opinion, said: "A judgment for damages, estimated in money, is sometimes called by the text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by fiction of law, a promise is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment (*Chitty on Contracts* [Perkins' Ed.], 87). But this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it. * * * The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against State action. Where a transaction is not based upon the assent of the parties it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition."

It is submitted that any distinction between a statutory obligation like that in *Steamship Co. v. Joliffe* (*supra*) and in *Fisk v. Jefferson Police Jury* (*supra*), and a judgment is entirely unfounded in principle. Both are equally obligations imposed on parties, regardless of their intention, and in many cases in spite of their actual dissent. In both instances the parties are bound, not because of their assent or because they have willed to be bound, but because the law has imposed the obligation (*Keener, Quasi-contracts*, 16). It is difficult, then, to see why the court should distinguish between

the two cases merely because of the difference of form in which the quasi-contractual obligation appears in the cases.

Marriage.

Notwithstanding the *dicta* of both Chief Justice Marshall and Justice Story, in *Dartmouth College v. Woodward* (4 Wheaton, 650, 721 app.), that marriage might well be considered a contract within the meaning of the contract clause, and that, therefore, a State legislature could not dissolve a marriage, unless there had been a breach on either side, it may be stated as a principle of law, now well settled, that marriage is a civil status rather than a contract. A legislative divorce, in consequence, would not be invalid as impairing the obligation of contracts (1 Bishop, *Marriage and Divorce*, secs. 3, 667-669, and State decisions there collected; see, also, 3 Parsons on Contracts, 545; 2 Wharton on Contracts, sec. 1069).

It is to be noted, however, that the point never seems to have been raised for decision before the Supreme Court; but the principle of law that marriage is a status is so clearly sound, as demonstrated in the opinions of the learned commentators above cited, that there can scarcely be room for doubt as to the disposition that tribunal would make of the question.

State Constitutions.

That the fiction of the political science of the eighteenth century, by which a Constitution was considered a contract, should have survived to the last quarter of the nineteenth century with sufficient vigor to form the basis of an argument before the Supreme Court of the United States seems almost incomprehensible. Yet such is, in fact, the case. In *Church v. Kelsey* (121 U. S. 282 [1886]) it was urged by counsel that, as the Constitution of a State is the "fundamental contract made between the collective body of citizens and each individual citizen," a State statute, which violates the State Constitution is a law impairing the obligation of contracts. It was held, however, that a State Constitution, being the fundamental law adopted by the people for their government, was not a contract within the meaning of the Constitution of the United States.

To summarize the conclusions reached after our review of the cases, it may be said:

- (1) Any persons capable of entering into contractual obligations at common law may be parties to a contract which is within the meaning of the Constitution. Thus the contract may be
 - (a) Between individuals.
 - (b) Between a State in its corporate capacity and an individual or individuals.
 - (c) Between two States; or
 - (d) Between the United States government and a State

(2) A grant of land is a contract within the meaning of the Constitution, and, therefore, even before the adoption of the Fourteenth Amendment, could not be revoked by a State.

(a) But it seems that, although a State could not, in terms, annul a grant, it could, in fact, divest a grantee of property accruing to him under the grant.

(3) A grant of a corporate charter or a franchise is a contract within the contract clause, and the law granting the charter is, therefore, irrevocable.

(a) However, in the case of a franchise, unless an exclusive privilege is expressly granted, there is nothing to prevent a State from effectually destroying its grant by giving the same privilege to another party

(b) But a State cannot grant away irrevocably its governmental authority, either by a formal charter, irrevocable in terms, or by a license given upon consideration. Thus

(x) A State cannot barter away its police power.

(y) It cannot exempt by contract any property from the exercise of its power of eminent domain.

(z) But a State can, upon anomalous principles, make a contract within the protection of the federal Constitution to exempt property from taxation.

(c) The stipulation in the charters of banking corporations that their notes shall be receivable for all debts due the State, constitutes a contract between the State and a holder of the notes.

(4) Although a law creating an office is revocable at the will of the legislature, if a statute authorizing the employment of a person does not involve the delegation of governmental authority, but looks rather to the performance of services, not requiring the exercise of governmental power, then a contract may come into existence between the State and the appointee, so as to make a repeal of the statute unconstitutional as impairing the obligation of contracts.

(5) A quasi-contract in the nature of a statutory obligation is a contract within the meaning of the Constitution; but the court, upon

no distinguishable principle, has refused to consider a quasi-contract in the form of a judgment, as within the protection of the contract clause.

(6) Although the point has never been raised for decision before the Supreme Court, there seems to be no question, as a matter of principle, but that marriage is a status, rather than a contract. It cannot, therefore, be considered as within the meaning of that term as employed in the Constitution.

(7) A State Constitution is not a contract; a State law, therefore, violating a State Constitution, is not void under the federal Constitution as impairing the obligation of contracts

WM. UNDERHILL MOORE.

NEW YORK CITY, August, 1901.

THE DEVELOPMENT OF LAW DURING THE MIDDLE AGES, ESPECIALLY IN FRANCE AND ENGLAND.

BY GEO. D. FERGUSON.

Gibbon, in the forty-fourth chapter of his very remarkable work, that chapter in which he treats of the development of Roman law, makes the very suggestive remark that the laws of a nation form the most instructive portion of its history. This remark is, after all, little more than the reiteration of what had been said long before both by Plato and Aristotle. But few men were more capable than Gibbon of forming a clear and unprejudiced opinion on the subject, or of tracing the development of the Roman law from the Twelve Tables down to the Pandects of Justinian. He saw how clearly that development was bound up with the growth of the Roman people, and that the legal development could not be separated from the development of their social and national life.

Arnold, the German legist, in his "Cultur und Rechtsleben," expresses this idea in another way when he says: "It is perfectly evident that the state of the laws in its dependence on the other elements of life can only be simply the expression of the contemporary culture of the people. And it is quite true that each stage, not merely in the world's history, but in the history of each nation, has been marked by the existence of characteristic laws, and their embodiment in corresponding institutions, and, therefore, a study of these laws must reveal a picture of the time at which they were in force."

In proportion as man emerges out of a state of savagery and progresses towards civilization, so his relations of life become more complex, and the social organization needs to be regulated by laws adapted to his improved social development. If we examine the statute book of any of the civilized