American Legal History – Russell

***The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 11 Peters 420 (1837).**

Mr. Chief Justice Taney delivered the opinion of the Court.

The questions involved in this case are of the gravest character, and the Court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may no doubt be seriously affected in their pecuniary interests by any decision which the Court may pronounce; and the questions which have been raised as to the power of the several states, in relation to the corporations they have chartered, are pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The Court are fully sensible that it is their duty in exercising the high powers conferred on them by the constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, so far as they have the power to do so, the rights of property, and at the same time, carefully abstaining from any encroachment on the rights reserved to the states.

It appears, from the record, that in the year 1650, the legislature of Massachusetts granted to the president of Harvard college "the liberty and power," to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf, and for the behoof of the college; and that under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it until 1785. In the last-mentioned year, a petition was presented to the legislature, by Thomas Russell and others, stating the inconvenience of the transportation by ferries, over Charles river, and the public advantages that would result from a bridge; and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March, 1785, passed an act incorporating a company, by the name of "The Proprietors of the Charles River Bridge," for the purposes mentioned in the petition. Under this charter the company were empowered to erect a bridge, in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to forty years from the first opening of the bridge for passengers; and from the time the toll commenced, until the

expiration of this term, the company were to pay two hundred pounds, annually, to Harvard College; and at the expiration of the forty years, the bridge was to be the property of the commonwealth; "saving (as the law expresses it) to the said college or university, a reasonable annual compensation, for the annual income of the ferry, which they might have received, had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June 1786. In 1792, the charter was extended to seventy years, from the opening of the bridge; and at the expiration of that time it was to belong to the commonwealth. The corporations have regularly paid to the college the annual sum of two hundred pounds, and have performed all of the duties imposed on them by the terms of their charter.

In 1828, the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge over Charles river. This bridge is only sixteen rods, at its commencement, on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart, at their termination on the Boston side. The travellers who pass over either bridge, proceed from Charlestown square, which receives the travel of many great public roads leading from the country; and the passengers and travellers who go to and from Boston, used to pass over the Charles River Bridge, from and through this square, before the erection of the Warren Bridge.

The Warren Bridge, by the terms of its charter, was to be surrendered to the state, as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren Bridge had not been built; and the bill was filed after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged as a ground for relief, that the act for the erection of the Warren Bridge impaired the obligation of the contract between the commonwealth and the proprietors of the Charles River Bridge; and was therefore repugnant to the constitution of the United States. Afterwards, a supplemental bill was filed, stating that the bridge had then been so far completed, that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll, which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge has been so far completed, that foot passengers could pass; but denied, that any persons but the workmen and the superintendents had passed over,

with their consent. In this state of the pleadings, the cause came on for hearing in the supreme judicial Court for the county of Suffolk, in the commonwealth of Massachusetts, at November term 1829; and the Court decided that the act incorporating the Warren Bridge, did not impair the obligation of the contract with the proprietors of the Charles River Bridge, and dismissed the complainants' bill; and the case is brought here by writ of error from that decision. It is, however, proper to state, that it is understood, that the state Court was equally divided upon the question; and that the decree dismissing the bill upon the ground above stated, was pronounced by a majority of the Court, for the purpose of enabling the complainants to bring the question for decision before this Court.

In the argument here, it was admitted that since the filing of the supplemental bill, a sufficient amount of toll had been reserved by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the state, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River Bridge, has by this means been entirely destroyed.

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The plaintiffs in error insist, [that] the legislature of Massachusetts of 1785, and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the state; and that the law authorizing the erection of the Warren Bridge in 1828, impairs the obligation of one or both of these contracts.

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This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The Court think there can be no serious difficulty on that head. It is the grant of certain franchises, by the public, to a private corporation, and in a matter

where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In 2 Barn. & Adol. 795, in the case of the Proprietors of the Stourbridge Canal against Wheeley and others, the court say, "the canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down in abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one, as could well be imagined, for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed *"through any one or more of the locks,"* and had said nothing as to toll for navigating one of the levels; the Court held, that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labours, and used the canal freely and extensively for their own profit. Still, the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there any thing in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle, where corporations are concerned? Are we to apply to acts of incorporation, a rule of construction differing from that of the English law, and, by implication, make the terms of a charter, in one of the states, more unfavourable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English Court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse

rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the Courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the Courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of community, than would be done in a like case in an English Court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this Court; and the rule of construction, above stated, fully established. In the case of the United States v. Arredondo, 8 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the Court; and the principle recognised, that in grants by the public, nothing passes by implication.

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But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this Court above quoted, "that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the state to abandon it does not appear." The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the Court, was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on

the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the state is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the state, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles river, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the state, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it, or from it, less convenient. None of the faculties or franchises granted to that corporation, have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended, that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property; if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to

show, that the legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated, that contract, by the erection of the Warren Bridge.

The inquiry then, is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none--no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question? In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this Court to Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state; unless it shall appear by plain words, that it was intended to be done.

But the case before the Court is even still stronger against any such implied contract, as the plaintiffs in error contend for. The Charles River Bridge was completed in 1786; the time limited for the duration of the corporation, by their original charter, expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges and franchises of the company, must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company, to build a bridge over Charles river; furnishing another communication with Boston, and distant only between one and two miles from the old bridge. The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties of that corporation. In the 7th section, there is the following recital: "And whereas, the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of

West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years, from the day the bridge was completed; subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing, that the state did not suppose, that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem, that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired. On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and 'for the encouragement of enterprise.' The extension was given, because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated, might diminish the emoluments they had expected to receive from it.

It results from this statement, that the legislature, in the very law extending the charter, asserts its rights to authorize improvements over Charles river which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the state. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter, an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found, where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required, and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer it from the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the state, to make such a contract.

Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, rail roads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the state. Amid the multitude of cases which have occurred, and have been daily occurring, for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this Court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither states, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws, never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts, on the part of the states, and of property in a line of travel, by a corporation, if it would now be sanctioned by this Court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this Court should establish the principles now contended for, what is to become of the numerous rail roads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood, that such charters carry with them these implied contracts, and give

this unknown and undefined property in a line of travelling; and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this Court to put down the improvements which have taken their place. The millions of property which have been invested in rail roads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied; and they shall consent to permit these states to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This Court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another, had been made, no railroad or canal, between these two points, could afterwards be established. This Court are not prepared to sanction principles which must lead to such results.

Many other questions, of the deepest importance, have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the Court deem it proper to avoid volunteering an opinion on any question, involving the construction of the constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.

Some questions, also, of a purely technical character, have been made and argued, as to the form of proceeding and the right to relief. But enough appears on the record, to bring out the great question in contest; and it is the interest of all parties concerned, that the real controversy should be settled, without further delay: and as the opinion of the Court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding, in which the parties have brought it before the Court.

The judgment of the supreme judicial Court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

Story, J., dissenting

I go further, and maintain, not only that it is not a case for strict construction; but that the charter upon its very face, by its terms, and for its professed objects, demands from the Court, upon undeniable principles of law, a favorable construction for the grantees. In the first place, the legislature has declared, that the erecting of the bridge will be of great public utility; and this exposition of its own motives for the grant, requires the Court to give a liberal interpretation, in order to promote, and not to destroy, an enterprise of great public utility. In the next place, the grant is a contract for a valuable consideration, and a full and adequate consideration. The proprietors are to lay out a large sum of money, (and in those times it was a very large outlay of capital,) in erecting a bridge; they are to keep it in repair during the whole period of forty years; they are to surrender it in good repair at the end of that period to the state, as its own property; they are to pay, during the whole period, an annuity of two hundred pounds to Harvard College; and they are to incur other heavy expenses and burthens, for the public accommodation. In return for all these charges, they are entitled to no more than the receipt of the tolls during the forty years, for their reimbursement of capital, interest and expenses. With all this, they are to take upon themselves the chances of success; and if the enterprise fails, the loss is exclusively their own. Nor let any man imagine, that there was not, at the time when this charter was granted, much solid ground for doubting success. In order to entertain a just view of this subject, we must go back to that period of general bankruptcy, and distress and difficulty. The constitution of the United States was not only not then in existence, but it was not then even dreamed of. The union of the states was crumbling into ruins, under the old confederation. Agriculture, manufactures and commerce were at their lowest ebb. There was infinite danger to all the states, from local interests and jealousies, and from the apparent impossibility of a much longer adherence to that shadow of a government, the continental congress. And even four years afterwards, when every evil had been greatly aggravated, and civil war was added to other calamities, the constitution of the United States was all but shipwrecked, in passing through the state conventions. It was adopted by very slender majorities. These are historical facts, which required no colouring to give them effect, and admitted of no concealment to seduce men into schemes of future aggrandizement. I would even now put it to the common sense of every man, whether, if the constitution of the United States had not been adopted, the charter would have been worth a forty years' purchase of the tolls.

This is not all. It is well known, historically, that this was the very first bridge ever constructed in New England, over navigable tide-waters so near the sea. The rigours of our climate, the dangers from sudden thaws and freezing, and the obstructions from ice in a rapid current, were deemed by many persons to be

insuperable obstacles to the success of such a project. It was believed, that the bridge would scarcely stand a single severe winter. And I myself am old enough to know, that in regard to other arms of the sea, at much later periods, the same doubts have had a strong and depressing influence upon public enterprises. If Charles River Bridge had been carried away during the first or second season after its erection, it is far from being certain, that up to this moment, another bridge, upon such an arm of the sea, would ever have been erected in Massachusetts. I state these things, which are of public notoriety, to repel the notion that the legislature was surprised into an incautious grant, or that the reward was more than adequate to the perils. There was a full and adequate consideration, in a pecuniary sense, for the charter. But, in a more general sense, the erection of the bridge, as a matter of accommodation, has been incalcuably beneficial to the public. Unless, therefore, we are wholly to disregard the declarations of the legislature, and the objects of the charter, and the historical facts of the times; and indulge in mere private speculations of profit and loss by our present lights and experience; it seems to me, that the Court is bound to come to the interpretation of this charter, with a persuasion that it was granted in furtherance, and not in derogation, of the public good.

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Now, I put it to the common sense of every man, whether if at the moment of granting the charter, the legislature had said to the proprietors; you shall build the bridge; you shall bear the burthens; you shall be bound by the charges; and your sole reimbursement shall be from the tolls of forty years: and yet we will not even guaranty you any certainty of receiving any tolls. On the contrary we reserve to ourselves the full power and authority to erect other bridges, toll, or free bridges, according to our own free will and pleasure, contiguous to yours, and having the same termini with yours; and if you are successful we may thus supplant you, divide, destroy your profits, and annihilate your tolls, without annihilating your burthens: if, I say, such had been the language of the legislature, is there a man living of ordinary discretion or prudence, who would have accepted such a charter upon such terms? I fearlessly answer, no. There would have been such a gross inadequacy of consideration, and such a total insecurity of all the rights of property, under such circumstances, that the project would have dropped still born. And I put the question further, whether any legislature, meaning to promote a project of permanent public utility, (such as this confessedly was) would ever have dreamed of such a qualification of its own grant, when it sought to enlist private capital and private patronage to insure the accomplishment of it?

Yet, this is the very form and pressure of the present case. It is not an imaginary and extravagant case. Warren Bridge has been erected, under such a supposed reserved authority, in the immediate neighborhood of Charles River Bridge; and with the same termini, to accommodate the same line of travel. For a half dozen years, it was to be a toll bridge for the benefit of the proprietors, to reimburse them for their expenditures. At the end of that period, the bridge is to become the property of the state, and free of toll; unless the legislature should thereafter impose one. In point of fact, it has since become, and now is, under the sanction of the act of incorporation, and other subsequent acts, a free bridge without the payment of any tolls for all persons. So that, in truth, here now is a free bridge, owned by and erected under the authority of the commonwealth, which necessarily takes away all the tolls from Charles River Bridge; while its prolonged charter has twenty years to run. And yet the act of the legislature establishing Warren Bridge, is said to be no violation of the franchise granted to the Charles River Bridge. The legislature may annihilate, nay, has annihilated by its own acts all chance of receiving tolls, by withdrawing the whole travel; though it is admitted that it cannot take away the barren right to gather tolls, if any should occur, when there is no travel to bring a dollar. According to the same course of argument, the legislature would have a perfect right to block up every avenue to the bridge, and to obstruct every highway which should lead to it, without any violation of the chartered rights of Charles River Bridge; and at the same might require every burden to be punctiliously discharged by the proprietors, during the prolonged period of seventy years. I confess, that the very statement of such propositions is so startling to my mind, and so irreconcilable with all my notions of good faith, and of any fair interpretation of the legislative intentions; that I should always doubt the soundness of any reasoning which should conduct me to such results. * * *

The truth is, that the whole argument of the defendants turns upon an implied reservation of power in the legislature to defeat and destroy its own grant. The grant, construed upon its own terms, upon the plain principles of construction of the common law, by which alone it ought to be judged, is an exclusive grant. It is the grant of a franchise, publici juris, with a right of tolls; and in all such case the common law asserts the grant to be exclusive, so as to prevent injurious competition. The argument seeks to exclude the common law from touching the grant, by implying an exception in favour of the legislative authority to make any new grant. And let us change the position of the question as often as we may, it comes to this, as a necessary result; that the legislature has reserved the power to destroy its own grant, and annihilate the right of pontage of the Charles River Bridge. If it stops short of this exercise of its power; it is its own choice, and not its duty. Now, I maintain, that such a reservation is equivalent to a power to resume

the grant; and yet it has never been for a moment contended, that the legislature was competent to resume it.

To the answer already given to the objection, that, unless such a reservation of power exists, there will be a stop put to the progress of all public improvements; I wish, in this connexion, to add, that there never can any such consequence follow upon the opposite doctrine. If the public exigencies and interests require that the franchise of Charles River Bridge should be taken away, or impaired; it may be lawfully done upon making due compensation to the proprietors. "Whenever" says the constitution of Massachusetts, "the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor:" and this franchise is property; is fixed, determinate property.

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Not a shadow of authority has been introduced, to establish the position of the defendants, that the franchise of a toll-bridge is confined to the planks of the bridge; and yet it seems to me, that the onus probandi is on them; for all the analogies of the common law are against them. They are driven, indeed, to contend, that the same principles apply to ferries, which are limited to the ferry ways, unless some prescription has given them a more extensive range. But here, unless I am entirely mistaken, they have failed to establish their position. As I understand the authorities, they are, unequivocally, the other way. Are we then to desert the wholesome principles of the common law, the bulwark of our public liberties, and the protecting shield of our private property; and assume a doctrine, which substantially annihilates the security of all franchises affected with public easements?

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