SUITS AGAINST THE CHURCH.

(Continued from Page 645.)

power thus vested in that department of the Federal Government in the framing of territorial organizations and authorizing territorial legislatures. And we have to-day under consideration one of these acts, the act passed in 1850 for the organization of the Territory of Utah. And I may say to your honors in passing that it was my fortune to be in Congress at that time, and to vote for the passage of that law. I do not say this, that your honors may suppose that I am going to assert that because of that fact I know anything more of its true meaning than your honors will know, when you come to examine it. That act provided for the organization of a Territorial Legislature, a law-making power in the Territory, and conferred upon it the right to legislate upon all rightful subjects of legislation; reserving to Congress the power to annul and disallow any acts passed by that Legislature. The Supreme Court more recently has said, and properly said, that that right would have existed without reservation, so far as the mere repealing of the acts of the Territorial Legislature were concerned. But it was expressly reserved; and the important question comes up, how far does this

RESERVED RIGHT,

inherent—if you see proper to so regard it, in the Congress of the United States, expressed in this act, control the question under consideration here? In order that there might not be any delay on the part of Congress on that subject, the act goes on to provide that it shall be the duty of the Secretary of the Territory to report to Congress the acts that are passed as soon after their passage as it is convenient to do so. The law always presumes that an officer discharges his duty, until the contrary appears, and therefore your honors will presume, as a question of law, that these several acts of the Legislature—the Act of 1851, the confirmatory and validating Act of 1855—were in due time reported to Congress. There has never been any negation of either of them, except what is to be found in the acts under consideration. Now, before I consider the effect of lapse of time I wish to say one word or two in regard to the limitation of the power of Congress itself. I have said that all rightful power of legislation was vested in Congress. But what does that embrace? Is it an omnipotent power? Is it the power of the British Parliament? Is it an absolute power? Not so long as the institutions of this country stand. The Supreme Court of the United States has fully illustrated the difference, if practical difference there is, between the legislative authority, exercised by legislative assemblies under our republican form of government, and that claimed for the Parliament of England. This difference is fully stated in the case read by my colleague, which came up from the State of Virginia with respect to the rights in property of the Episcopal Church. There it was distinctly laid down by Mr. Justice Story that this absolute power that was claimed for the Parliament of England under the British Constitution

DID NOT MIGRATE

to the United States and never had a foothold in this country. It is an axiom in connection with the British laws and Constitution that there is no limit upon the power of Parliament. And yet, one of the greatest judges of that country, or perhaps any other, Chief Justice Coke, has stated, in unmistakable terms, that there were limitations even upon that; the Parliament had no power to pass laws that were in conflict with natural rights. Now, that precise question has never received a judicial determination from the simple fact that the Parliament of England, whatever may be its theoretical power, has never in point of practice or effect, passed any such law. Since the days of Magna Charta down to the present time, practically, there has not been any absolute power in the government of Great Britain. But Congress possessed no more power than it undertook to confer upon the Territorial legislature of the Territory of Utah—and that is, to legislate upon all rightful subjects of legislation. One of the inhibited subjects is the interference with vested rights, and the disturbance of the solemnity of contracts. Parties differed once as to the significance of the facts that—when the Constitutional Convention was expressly taking away from the states the power to pass a law impairing the obligations of contracts, if they ever possessed it—the Constitution was silent as to the Federal government; but whatever differences of opinion may have existed theoretically upon that subject in regard to the power of Congress on account of the prohibition applying to the states and not to the Federal Government, the Supreme Court of the United States has put that to rest, in the decisions rendered in the

SINKING FUND CASES.

Let me call your honors' attention for one moment to the language used by the Court in those cases, and then to the language of one of the distinguished judges. Your honors know something of course, of the law under consideration at that time. It was the Sinking Fund Act, passed by Congress in 1878, and commonly known as the "Thurman Act." It was challenged by the railroad companies, as being unconstitutional, as interfering with vested rights, as affecting the obligation of a contract between the United States and those roads. A majority of the Supreme Court held that it did not invalidate the contract, that it did not take away any vested rights. The court was unanimous that if it had been of that character it would have been invalid. Three of the distinguished members of that court—Judge Strong, Judge Field and Judge Bradley—dissented from the majority of the court upon the question of the application of the law, and held that it did impair the obligation of a contract. But in deciding that it did not, the Chief Justice said:

The United States cannot, any more than a state, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents states from passing laws impairing the obligations of contracts, but, equally with the states, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they, by legislation, compel the corporation to discharge its obligations in respect to the subsidy bonds, otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations it is as much repudiation, with all the wrong and reproach that that term implies, as it would be if the repudiator had been a state, or a municipality, or a citizen. No change can be made in the title created by the grant of the land, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

Now, a majority of the court speaking through the Chief Justice, held that that law did not undertake to work a change in any of these important particulars, but simply to make certain provisions, anticipating the falling due of the debt to the government. But as I have already said to your honors, three strong men on that bench, two of them still there, held that it impaired the contract and that it was therefore void, and I wish to read to you what one of these judges said upon that subject, because it is

SO STRIKING

in its character and so like what he would most probably have said in regard to this legislation if it had been before him, that I wish to call special attention to it. Mr. Justice Bradley said:

I think that Congress had no power to pass the act of May 7, 1878, either as it regards the Union or the Central Pacific Railroad Company. The power of Congress, even over those subjects upon which it has the right to legislate, is not despotic, but is subject to certain constitutional limitations.

I wish before proceeding further to call your honors' attention to another element in this case, and that is, the acts of 1862 and 1864, which conferred these rights and privileges and which conferred the corporate franchise upon the Union Pacific Railroad reserved the right to amend or to repeal.

Now, Mr. Justice Bradley in continuing to give his dissenting opinion said:

One of these limitations is that no person shall be deprived of life, liberty or property without due process of law; another is, that private property shall not be taken for public use without just compensation; and a third is that the judicial power of the United States is vested in the Supreme and inferior Courts, and not in Congress. It seems to me that the law in question is violative of all these restrictions, of their spirit at least, if not of their letter, and a law which violates the spirit of the Constitution is as much unconstitutional as one that violates its letter.

SPEAKING OF THAT SPECIFIC ACT

and its character, the learned Judge further says:

Congress takes up the question *ex parte*, discusses and decides it, passes judgment, and proposes to issue execution and to subject the companies to heavy penalties if they do not comply.

Now, he says that Congress cannot do that under our system of government; it cannot take up a question that stands between the United States and the other contracting party, *ex parte*, pass judgment upon it and order execution, and yet that is precisely what Congress has undertaken to do in this case—nothing more, nothing less. Now, with respect to this ordinance of incorporation, the Assistant District Attorney said that it was by its own terms creative of a corporation. I do not think that is correct. It granted a charter. It is what we now call a special charter in contradistinction to other charters formed under general laws. It is of precisely the same character in every respect as the letters patent issued by the King of Great Britain to the Trustees of Dartmouth College. That, so far as the terms of the patent were concerned, created a corporation. That is, granted a special charter to the Trustees of Dartmouth College; but before it became a corporation, before there was any contract, it required the acceptance by the parties named, and the formation of a corporation under the authority thus given. This is what it is to form a corporation. The mere grant of the sovereign could not do it. The legislature of the Territory of Utah could not do it; but it was upon its acceptance that it became a charter, and when it became a charter then the rights of those who had thus accepted it became vested in it.

AND WHAT IS A CHARTER?

What are the rights vested by it? Primarily and at the very foundation so far as the right is concerned it is the franchise to be a corporation upon the terms and conditions tendered in the charter. That is what it is; and when it has become invested with these rights it is an estate. Judge Clifford, in one of the cases that have been read to your honors—has called it an estate. He has simply called it by that name by which it has been known in the law from the time corporations were first formed. "An estate." What kind of an estate? An incorporeal hereditament, exercisable within things corporate; a contract. That is what the Supreme Court of the United States said when it decided that the State of New Hampshire could not invalidate, by her act of 1816, the charter of Dartmouth College. That is what the Supreme Court of the United States has maintained, from that time down to the present, not merely against state legislation, but against Congressional legislation, as is shown in the Sinking Fund cases to which I have referred your honors.

Now that incorporeal hereditament—that estate—was created here. Does it still continue to exist? Has its term been extinguished? If so, how? As to the particular character of this corporation, I shall not take up time in discussing it. As to whether it was a corporation aggregate or sole is of little consequence. It has some features of both, more particular as a corporation sole with the power of endless succession. But has its existence terminated? Is

LEGAL EXISTENCE WAS RECOGNIZED

by the Congress of the United States in 1862, so far as corporate rights were concerned. So far as its right to be a corporation, its franchise, its estate were concerned, that act did not undertake to dissolve it. I want to call your honors' attention for a moment to that act of 1862; and yet I do not know that I need to take up your honors' time upon it, because this bill filed by the United States recognizes the fact that that act did not repeal the charter. It is not so claimed in the bill. On the contrary the bill goes upon the assumption that the civil corporation, the artificial person created by the territorial acts and in existence, continued to be in existence after the passage of the act of 1862, and that is the only conclusion that your honors would arrive at on examination of that act. I will read a section or two of that act:

SEC. 2. And be it further enacted that the following ordinance of the provisional government of the state of Deseret, so-called namely: "An Ordinance Incorporating the Church of Jesus Christ of Latter-day Saints," passed February 18th, in the year 1851, and adopted, re-enacted and made valid by the Governor and Legislative Assembly of the Territory of Utah by an act passed January nineteenth, in the year eighteen hundred and fifty five, entitled "An act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution," and all other acts and parts of acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, maintain, support, shield, or countenance polygamy, be and the same hereby are disapproved and annulled.

Now, if it stopped there I would grant at once that there would be no question but what it was an attempt then, if it was still in the power of Congress, to exercise this reserved right and to annul the law. But the act does not stop there, for it continues and say:

Provided, that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right "to worship God according to the dictates of conscience," but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations or other contrivances.

That was the purpose of it. Congress understood in some way, or believed, that this corporation—created under the act of the provisional government, validated by the Territorial legislature, and in force and organized—favored a practice which Congress was endeavoring to strike down; and therefore it said that all of that law—or whatever there is in it intended to countenance the practice of polygamy—is hereby annulled, but the right to hold property and the right to worship God according to the dictates of conscience are not affected, and to that extent, and for these purposes that act has to be regarded as approved. There is a limitation attempted to be put upon this Church corporation and upon all churches and church corporations or associations in regard to the further acquisition of real estate to be owned or held hereafter, by the 3rd section, but the right to hold and enjoy property, and the right to worship God according to the dictates of the conscience of those who are members of it, were

LEFT IN FULL FORCE.

But my friend who addressed the court yesterday insisted that the right to annul and set aside the acts of the Territorial legislature is a perpetual right, and that it not only extends to the ordinary legislation of a Territory, but to all legislation, or everything that is classed as legislation, whatever may be its character, and that it may be exercised at any time; that a charter granted in 1851, under the full power conferred by Congress upon the Territorial legislature to legislate upon all rightful subjects of legislation could now be annulled, and that this general power is to be regarded as if it was embraced in each one of the acts of incorporation passed, and was accepted by parties to the contract between the government and the corporations. For I say to you that if this is a contract, it is not a contract between the Territory of Utah and this corporation; it is a contract between the United States of America and the corporation. The territorial government of Utah was but its instrument, its agent, and the doctrine of agency applies to this as well as to anything else *qui facit per alium facit per se*. What the government did through the agency of this legislature in regard to this matter, it did of itself, and if there could have been any question at all about the power originally granted, the doctrine of

SUBSEQUENT RATIFICATION

comes in, and your honors understand perfectly well what that is. That is always equivalent to original authority where the principal ratifies. But what has the Supreme Court of the United States said in regard to this limitation, and in what manner it must be exercised? We are not entirely without light on that subject. There was another act of the Territory of Utah under consideration before the Supreme Court before this one. That related to the summoning and selection of jurors. The question was whether the jurors of the Territory should be selected or summoned under the Territorial act or whether the general act of Congress relating to the selection of jurors for federal courts should apply. Now, if Congress had made a special act for the Territory of Utah, as it might have done in the exercise of its legitimate powers, or as it has done in this case, such action could not be questioned, as a matter of course. There was, however on the statute books of Utah Territory, an act passed by the legislature of the territory, that provided how the selection of jurors should be made, and that was brought in question in the Supreme Court and was passed upon in the case of Clinton v. Englebrecht. This case will be found in 13th Wallace, p. 446, where the following language occurs:

In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the Statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by Congress at any time, would have annulled it. It is no unreasonable inference therefore that it was approved by that body.

Now, what becomes of the doctrine that my friend insisted on so strenuously yesterday—that

NOTHING CAN BE INFERRED

against the government? There are certain high rights and privileges which the government has retained that are not to be invaded; but the Supreme Court does not seem to regard the reservation of this right to repeal, or alter, or to refuse to ratify or negative these acts of a Territorial Legislature to be of that character. On the contrary it says that this act which had been standing on the statute books for twelve years; an act under which no vested right could be secured; an act that could have been repealed by that Legislative Assembly, the next day or at the next session, or an act might have been substituted by Congress at any time; that such an act as that was presumed to have been ratified and affirmed by the lapse of twelve years—by the fact that it must necessarily, as a territorial act, have gone before Congress, and in the language of the case just quoted could have been disapproved at any time by that body—that is at any time that would have been proper or within a reasonable time after its passage. There is no particular time, and I am not going to fix any, but the Supreme Court has said twelve years was too long. But, your honors, what would be said by the Supreme Court of the position of the government upon this question, in the light of these authorities, when in 1862, seven years after the validating act, twelve years after the ordinance and the first validating act had been passed, that Congress should solemnly, as it did in the act of 1862, recognize those acts as valid as to all rights of property and for the worship of God according to the dictates of conscience, and then undertake in 1887—as by this act of 1887 it has undertaken to do—to claim the power to revise and annul them as if exercising the simple power reserved in the organic act of the Territory? But our friends have contended, and the contention has

BEEN SO CLEARLY MET

by my colleague that I feel like asking pardon for taking up any further time upon it, that because Congress has this power of repeal, because it has reserved this power to annul, that therefore all acts of the legislature, of whatever kind, whether they amount to contracts between the United States and private parties or not, are subject to alteration, amendment or repeal. And to support that proposition they have referred to a number of decisions in the different states some of which have been passed upon by the Supreme Court, where the reservation by the states of this power has been held to be valid and that their exercise of it afterwards did not impair the obligation of the contract—that is, a contract to be a corporation; for I want your honors to bear that distinction in mind all the time. The Supreme Court of the United States has never held, nor has any state court ever held that the exercise of that right by a state could divest property, or that any alteration, amendment or repeal of a charter under the power reserved could affect rights that had been vested before that power was exercised. I say no state has ever so held. The Supreme Court has never intimated anything of the kind and never will. But the estate, the franchise, the right to be a corporation may be repealed and may be amended; not absolutely, because in the sinking fund cases your honors will find the Supreme Court have made a distinction. While the power to repeal is not impaired, yet if Congress, as in the case just quoted, chooses to exercise the power of amendment the amendments must be reasonable, they must not interfere with the substantial rights of the grantees. Now let me discuss that question for a moment by way of additional illustration only. Without that reservation, as my colleague clearly demonstrated yesterday, referring to the subject of the granting of the charter, the franchise could not be recalled, the

CONTRACT COULD NOT BE BROKEN

by a state, but reserving that right it may annul that contract in the future. Our friends say that because Congress has reserved the right to annul acts of the Territorial Legislature, that is equivalent to the reserved power, under state laws and under state constitutions. I respectfully submit, your honors, that there is wide difference between the two. The legislature of a state did not have to reserve any right to repeal a law. That right was always existing. The Congress of the United States does not have to reserve any right to repeal a law for that is always existing. One legislative assembly cannot bind another, not even bind itself; for what it passes today it may repeal to-morrow, and that reaches all laws and it would reach all charters that had not been accepted and become contracts. However solemn might be the terms of the grant; however direct and positive might be the provisions in regard to the formation of the corporation, until it became a corporation, until the corporators had accepted the grant, until it had clothed itself with the franchise therein contained, the legislative power over it, whether that be Congress or a state, was unqualified. But the Supreme Court held that where there was no reservation of the right, then the acceptance of the

CONTRACT WAS UNCONDITIONAL;

where there was a reservation of the right then the acceptance was upon the condition contained in the reservation, and that was all there was of it. If the corporators accepted a conditional contract they accepted it with its frailties; but if it was unconditional, it was covered by a clause of the Constitution of the United States in direct terms as to the States, and by those broad provisions of Magna Charta that have been incorporated into the Constitution of the United States, as to the United States, as explained by Justice Bradley in the Sinking Fund cases. Now, then, if there was the necessity to make this reservation, was it not just as important that Congress should make it as the legislatures of the states? A charter tendered without limitation as to time and without reserve, either in the general law applicable to that charter or in the terms of the act itself, by which the charter is granted, is an unconditional charter. Now, how can Congress change an unconditional charter into one that is conditional without the consent of the party that owns the estate? How can it be done? I know of no legal legerdemain by which it can be accomplished under our government.

Then, gentlemen of the court, we have here a contract which has vested in this corporation—an unconditional estate. If that is so, what force or effect can be given to the act of 1887, by which that condition is said to be broken? What is a contract? Whenever the government of the United States enters into solemn covenant with any parties and is party to that contract it stands just like any other party to contracts. So says Chief Justice Waite. It can no more violate a contract than a private citizen, or a municipal corporation, or a state. A contract requires two parties, and where ever such a doctrine suggested or held that one party to a contract could annul it at his own volition against the consent of the other? Was that doctrine ever held anywhere? Did any court ever sanction the doctrine that where contract obligations have been entered into, one party could annul the contract without the consent of the other? It is true that a party may be strong enough to refuse execution; may have the power to set the other party at defiance, but it only makes the repudiation the greater sin.

THE SHAME THE GREATER.

That is in substance the language of Chief Justice Waite stated, in these Sinking Fund cases.

Then, your honors, it seems to me unnecessary to take a great deal of time over this act of 1887; it undertakes to annul or set aside the franchise of the corporation. And if it is inoperative for that purpose then the bill filed in this case must be dismissed. This bill can have no effect or standing in this court except what it derives from the force and effect of the act of 1887. My friends say that although it is in the form of a bill in equity it is also in the nature of a *quo warranto*. Your honors, sitting as a court of equity, would not entertain a bill in the nature of *quo warranto*. *Quo warranto* is a common law procedure, a common law action; that is what it is and it is nothing else; and it is brought for the purpose of declaring forfeiture. That is the par-