SUITS AGAINST THE CHURCH.

Arguments Delivered Oct 20 and 21, 1887, respectively, before the Supreme Court of Utah.

BY HON. JAMES O. BROADHEAD AND SENATOR JOS. E. McDONALD,

Of Council for Defense in the Suits Brought Against the Church by the Government.

COL. BROADHEAD:

If your honors please: I will proceed to say what little I have to say upon the questions before this court; they are purely questions of law. We have agreed upon a statement of facts which are to govern in the determination of the motion for the appointment of a Receiver; and the only questions for the consideration of the court are two: First, whether the facts themselves as presented are sufficient to authorize the appointment of a Receiver, and, second, whether the law is sufficient in the opinion of this court to

AUTHORIZE THE APPOINTMENT

of a Receiver or to take any further action in this case. This proceeding on the part of the court—on the part of any court, whether a court of equity or a court of law under the provisions of a statute authorizing it to take possession of the property of a defendant, to take it out of his custody before there is any determination of the rights involved in the litigation between the parties, is, in the language of the books, an extraordinary remedy. It is put upon the same footing in a general sense with an injunction; with this difference, however: An injunction gives some protection to the defendant, by reason that before any steps can be taken a bond must be given to protect him. But it is an extraordinary remedy and would only be adopted by the courts of justice when such facts are presented as show to the satisfaction of the court that the property sought to be taken out of the possession of the defendant, in any case, is liable to be wasted or destroyed; that the defendant is insolvent; or that the defendant is a dishonest or improper person; or that the defendant has been guilty of some fraudulent acts which justify the interference of a court of chancery in reaching out the

STRONG ARM OF THE LAW,

and taking possession of the property before there is any determination of rights in controversy between the parties. Now, in this case the only averments upon this point are those contained in the ninth and tenth paragraphs of the bill. They are as follows:

Ninth.—That the said corporation of the Church of Jesus Christ of Latter-day Saints and the successor of the said John Taylor (whose name is to this plaintiff unknown) as Trustee-in-Trust, and Wilford Woodruff, Lorenzo Snow, Erastus Snow, Franklin D. Richards, Brigham Young, Moses Thatcher, Francis M. Lyman, John Henry Smith, George Teasdale, Heber J. Grant and John W. Taylor, Assistant Trustees, the defendants, wrongfully and in violation of the laws of the United States, still claim to hold and do exercise the powers which were held and exercised by the said corporation of the Church of Jesus Christ of Latter-day Saints as stated in paragraph first of this bill, and are unlawfully possessing and using the real estate referred to in the fourth paragraph of this bill, and are receiving and unlawfully applying to its and their own use the rents, issues and profits thereof, and falsely and wrongfully claim the right to sell, use and dispose of the same.

Tenth.—That since the 19th day of February, 1887, there has been and is no person lawfully authorized to take charge of, manage, preserve or control the property, real and personal, which on or before the day and year last aforesaid was held, owned, possessed and used by the corporation of the Church of Jesus Christ of Latter-day Saints, and by reason thereof all the said property as referred to in the third paragraph of this bill is subject to irreparable and irremediable loss and destruction.

Then why, now, is this property subject to irreparable and irremediable loss and destruction?

ARE THERE ANY FACTS

stated in the bill? It will not do to deal in general terms. Are there any facts stated in this bill which show, or tend to show, that this property, or any of it, is subject to irreparable or irremediable loss or destruction? The bill itself avers that it is in the possession of these defendants, one of whom, however, is dead. But that leaves the others in possession as averred in this bill. It is in possession of these defendants. Does it appear that they have been guilty of any fraudulent acts by which they seek to avoid the process of law to get rid of that property, so that when the final judgment of the court comes to be had, the property will not be there to answer the requirements of the judgment? Does it show that any of these parties are insolvent; that when the final judgment of the court comes to be rendered the property will be lost, or in such a position that it cannot meet the requirements of the law? Certainly not.

It simply avers that they are not authorized to hold it. The question presented by the bill itself is as to whether they are entitled to this property or not. Why, such a question as that arises in every case where there is controversy. The plaintiff avers he is

ENTITLED TO THE PROPERTY

and that the defendant is wrongfully holding the same. The defendant holds to the contrary. But does it follow that because there is litigation wherein the plaintiff denies the right of the defendant—the right to the possession of property—that a court of equity will stretch out the strong arm of the law and take it out of the possession of the defendant and put it in the custody of the court?

It is averred that the corporation is dissolved. Suppose it is. Here are the representatives of the corporation in the custody of their property; but then, further, the question as to whether there has been a dissolution is a question for the consideration of this court. I say that there must be some averment, some tangible facts stated, and shown by affidavit or other evidence in every application for the appointment of a receiver before the court of equity can be justified in exercising that extraordinary power.

I will read from High on Receivers, sections 17, 19 and 106 to show what the

GENERAL DOCTRINE

is on this subject:

SEC. 17. Ordinarily, unless perhaps in the case of infants and lunatics, a suit must be actually pending to justify a court of equity in appointing a Receiver; and it follows, necessarily, that the person whose property it is sought to place in the Receiver's hands must be made a party to the suit, in order that he may have an opportunity of resisting the application, the granting of which might result in irreparable injury to his interests. And the facts relied upon as the ground for the relief should be distinctly and specifically set forth, in order that defendant may be fully apprised thereof and have an opportunity to resist the application. It will not, therefore, suffice to allege in general terms that plaintiff is entitled on principles of equity to the interposition of the court, but the facts relied upon should specifically appear. And while fraudulent conduct on the part of defendant, or danger to the property or fund in controversy, is frequently made the foundation for a receivership, it will not suffice merely to allege such fraud or danger upon information generally, without specifying the sources of the information. And a bill whose only allegations upon these points are thus vague and general, does not present such a case as to justify the court in interfering by a Receiver.

SEC. 19. As against a defendant in the possession and enjoyment of property which is the subject matter of the litigation, equity always proceeds with extreme caution in appointing a Receiver. Where the property has been held and enjoyed by defendants in possession for a long series of years, and plaintiff shows no real danger, a Receiver will not ordinarily be appointed *in limine*. And where plaintiff's object is to assert a right to property possessed by defendant, a Receiver, if appointed at all, is appointed only upon the principle of preserving the subject matter pending a litigation which is to determine the rights of the parties. In all such cases a court of equity necessarily exercises a large discretion as to whether it will or will not take possession of the property by its Receiver, and this discretion is governed by a consideration of all the circumstances of the case.

SEC. 106. While the practice of appointing Receivers before answer, in cases of emergency is thus shown to be well established and generally followed by courts of equity in this country, yet the grounds which will induce the court to interfere at this stage of a cause must be very strong, and there must be clear proof of fraud, or of immediate danger to the property unless it is taken into the custody of the court. And where there are no allegations of defendant's insolvency or of danger to the property and interest concerned, the relief will not be granted before answer. So where insolvency is the ground relied upon, but the affidavit on which the application is based merely states that defendant is not deemed a responsible man by those who know him, and the affidavit of defendant fully negatives the insolvency, a Receiver will be refused.

That is an illustration given for the purpose of showing that there must be

SOME FACTS AVERRED,

some tangible allegations made, which the court and the parties can take hold of, supported by sufficient evidence, in order to justify the court in making the appointment of a Receiver. I make this as the first objection which comes to this effect: Admitting all the facts, which we do admit in the statement of facts submitted to this court, yet there are no averments contained in the bill and no facts shown which tend to establish the fact that there is any danger of this property being lost. It may have been conveyed in this way or that way; but if it is in the hands of responsible parties and nothing appears to the contrary, the court in the exercise of a sound discretion and in pursuance of well established principles of equity, will suffer the property to remain where it is until there is a further showing of facts or until the final determination of the controversy between the parties. So much, if your honors please, as to that objection and I will not dwell upon it.

Now as to the points presented so ably by the gentleman on the other side involving the

QUESTIONS OF CONSTITUTIONAL LAW,

questions of deep significance, some of which have not yet been decided by the courts of justice, I proceed to offer a few remarks.

This court, the highest court of this Territory, especially constituted by the Congress of the United States for the purpose of determining those grave questions arising under the acts passed by that Congress, has been set apart especially for that purpose. I am here to discuss purely questions of law, questions of constitutional law. These questions are always proper subjects to be discussed and determined by any tribunal, especially by a tribunal so high as this. It is fortunate for this country, fortunate for the liberty of the people of this country that the judiciary of this country are impartial. They are supposed to be impartial, and they really are, so far as my observation has extended; to them is entrusted the determination of this and other questions without being governed by prejudice or passion. Taken as they are from a profession which in its very nature and from its education is charitable—they are disposed to look upon all questions in the light of charity which, let me say, before any tribunal is itself the foundation of justice. No man can be just who is not charitable. To such an enlightened and impartial tribunal has been peculiarly entrusted the decision of these questions. They have the power to override the Legislature; they have the power to override the Executive; they have the power to determine that acts of Congress and acts of the executive part of the government are not valid because they are in conflict with the fundamental law of the land.

Now, the gentleman on the opposite side spent a great deal of his time in referring to authorities and discussing principles which I apprehend no man on this side of the question for a moment controverts—and that is, that a charter of incorporation, where there has been reserved the power to alter, amend or repeal that grant, really does not amount to a franchise, but is

A MERE LICENSE,

and may be repealed and taken away by the legislative department of the government, which has granted that license, at any time. Or if there be a general law in force referring to the subject of the creation of corporations, that general law has to be taken as a part of the charter, and that the Legislature has the right under the provisions of that general law to alter, repeal or amend that charter at any time.

I say we do not controvert this proposition. There is no man here, particularly in the light of all the decisions that have been made by the Supreme Court of the United States and by the supreme courts of the states themselves, who would controvert any such proposition. The question arises in this case then, whether there be such a special reservation, or whether there be such a general law. I admit in its full force that the doctrine laid down by the decisions of the Supreme Court of the United States is not to be controverted; that from whatsoever force that power may be derived, whether it be from a provision in the Constitution, which declares that Congress shall have power to dispose of the territory and other property of the United States, or whether it be derived—which I think is the better opinion, the better judicial opinion—from the implied power which belongs to the government from

THE POWER TO ACQUIRE TERRITORY,

the power of Congress to legislate for the territories is complete. It matters not whether it be from one or the other source of power, admitting its full force, the Congress of the United States has supreme legislative control over the territories. And when I say supreme legislative control, I mean in that sense, and in that sense only, in which it can be said that any government, any representative government, whether it be the government of the United States, or the government of a particular state, has supreme control in the matter of legislation. There are some things that are beyond and above the government of the states and the government of the United States; but we use the term in that limited sense. It has been held by the Supreme Court of the United States that they have the right to legislate over the territories to the same extent that the states have the authority to legislate over the people of the states. That is about the substance of the declaration made in the Sinking Fund cases (in the 99 U. S.) and also in the case referred to by the gentleman yesterday—the case in 13 Wall—and the case in 101 U. S. of the National Bank vs. Yankton.

They have the legislative power, the same legislative power in its extent, as the states have, and that is conceding a great deal; but that is the substance of the decision of the Supreme Court of the United States. Of course it was formerly held differently. But that doctrine has long since been overruled. We have all heard of the Dred Scott case; but that has been set at rest by judicial determination long since. But when it is admitted and said that they have the legislative power over the territories, all the legislative power which may be exercised over a particular community residing in a territory which has been set apart as a separate political subdivision of the United States, or rather the territory of the United States, what does that mean?

Now, in regard to the subject of

CHARTER FRANCHISES,

they are contracts, as we all admit; they are, under the decisions of the Supreme Court of the United States, from the time of the Dartmouth College case down to the present time. If a State Legislature were to pass a law granting a charter to an incorporation for religious purposes, or for any purpose, giving the power to acquire real estate and personal estate, giving the power to be sued or to sue, creating an artificial person under the law, and there were no provisions contained in the charter itself, nor in the general law on the subject of corporations, vesting in the legislature the power to alter or repeal that law, then I take it there would be no question. That would be a contract, an executed contract, which could not be repealed by legislation, which could not be altered or amended by any act of the Legislative Department of the Government.

When the organic act of this Territory was passed in 1850, that organic act vested in the Territorial Legislature, as Congress has vested the same power in the Legislature of other territories, the power to legislate upon all rightful subjects of legislation.

Of course it will not be disputed that one of the rightful powers of legislation is the power to create corporations. That is admitted. The fact that such corporations have been created and sanctioned by the Congress of the United States, a fact that has never been denied and is not denied in this case, is sufficient to establish the fact that this is one of the rightful subjects of legislation; that it is one of the rightful powers of the legislative department. In one sense it is a misnomer to call it a law, although it has the force and effect of law. It is something more than a law. It has been so decided by the courts that the granting of these franchises and their acceptance on the part of the corporators constitutes

AN EXECUTED CONTRACT

between the government and the corporation. That will not be controverted, because it is in accordance with the decisions of the court to which I have referred. It is an agreement, binding in all its terms. If there is a provision in the charter that it may be repealed by the power granting it—that the artificial person created by that act may be destroyed — then it is a part of the contract. If by a general provision relating to the subject of corporations, declaring substantially that the charter may be amended, that the state reserves to itself the right to alter or amend, then it is a part of the contract. But I think I may defy the gentleman to produce any decision of any court which goes further than that.

Now, it is claimed here, that because by the organic act of the Territory, the United States government has reserved to itself the right to disapprove the acts passed by the Territorial Legislature, it is a reservation upon all the grants of power contained in that section of the organic act, or rather in that part of the section which gives them the right to legislate upon all rightful subjects of legislation. I say no.

The gentleman on the opposite side has referred to a great many cases, and I refer to the same cases; not all of them, but to a few, for the purpose of illustrating the position which I assume in this case. They refer to the work of Angell and Ames on corporations, a well recognized authority in courts of justice upon these questions. Section 767, after laying down the doctrine that a grant is irrevocable, or something which cannot be changed by the legislature, goes on to say:

In consequence of the construction that has been put upon the clause of the Constitution above quoted, it has become usual for legislatures, in acts of incorporation for private purposes, either to make the duration of the charter conditional, or to reserve to themselves a power to alter, modify or repeal the charter at their pleasure; and as the power of modification and repeal is thus made a qualifying part of the grant of franchises, the exercise of that power cannot, of course, impair the obligation of the grant. Such alterations or modifications are to be made in accordance with the forms prescribed by the Constitution which is in force when the alteration is made, and not according to the forms prescribed at the time the charter was granted. Sometimes the power is reserved by a general act applicable to all corporations, in which case it may be exercised upon any corporation, as a railroad company, whose charter had been granted since the passage of the general act, although no special clause containing or alluding to such reserved power be inserted in the company's charter.

I call your honors' attention to the language because it

SOUNDS THE KEY NOTE

to the doctrine announced in the decisions in all the cases to which the gentleman has referred. And the same doctrine is announced in almost the same language in Field and Morawetz and all the works on corporations. There has been a provision in the charter itself reserving the power of the Legislature to alter or amend it, or there has been some general law on the subject of corporations which reserves to the state the power to alter or amend, referring to the subject matter of corporations. Now is there any such law here? There is no provision in the charter, which was granted to the Church of Jesus Christ of Latter-day Saints, nor is there any provision in the Organic Act, which reserves to Congress the power to disapprove any act which may be passed by the Legislature which refers to this subject of corporations. And there is a principle and reason in this. The grant of a corporation, as I said before, is a solemn contract, a contract made in the exercise of legislative power, not a law, in the general acceptation of the term—because a law in its general sense is a rule of action for all citizens.

Now, I call your honors' attention to Miller v. State, which has been referred to by the gentlemen on the other side; it is found in 15th Wall. Judge Clifford says:

Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserve power cannot be regarded as an act within the prohibition of the Constitution. Such power, also, that is, the power to alter, modify or repeal an act of incorporation, is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be; in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation.

In the case of the Railroad Company v. Georgia, 98 U. S., page 108, the court says:

If, then, the old Atlantic and Gulf Railroad Company, and the Savannah, Albany and Gulf Railroad Company, went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges and immunities ceased with them, and they have no existence, except by virtue of the grant of corporate powers and privileges made by the consolidation act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises and privileges which had previously been granted to the two companies, but which they could no longer enjoy. It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted. And the code of the State, which came in force on the first of January, 1863, before the charter was granted, contained the following provisions:

"SEC. 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of the creator; they are called corporations."

"SEC. 1082. In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

Now there is a general provision of the act applicable to all corporations. These two railroad corporations had consolidated and organized a new company under the consolidation code of Georgia, and thereby became a new company under that code. But being a new organization, a new corporation created under the consolidation act, they became subject to this general provision, which expressly reserves in regard to corporations the power in the Legislature to alter or modify any charter at will. There the provision is a general provision—a general law applicable to all corporations, carrying out the declaration made by Angell and Ames on this subject, that where a general law is passed applicable to corporations, of course that constitutes

A PART OF THE CHARTER

at the time that the franchise was granted by the State. So in the case of Greenwood v. Union Freight Company, 105 U. S., page 15, the court says:

We think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the general statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter, which makes it "subject to all the duties, restrictions and liabilities set forth in the general laws, which now are, or may hereafter be in force, relating to street railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in section 41 of chapter 68 of the general statutes of Massachusetts, in the following language: "Every act of incorporation passed after the 11th day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration or repeal at the pleasure of the legislature." It would be difficult to supply language more comprehensive or expressive than this.

Referring to the subject of corporations I may say that in none of the cases referred to by the gentleman on the other side—and I wont trouble the court by going over them again—can there be found any other doctrine laid down than that the reservation under which it is claimed that the legislative department has a right to alter or amend a charter, must either be contained in some provision of the charter itself, or in some general law relating to corporations. That I take to be the law; that at least is my opinion of the law. When, then, the Congress of the United States reserved to itself the power to disapprove any legislative act passed by the Territorial Legislature of Utah it would naturally be supposed to pertain to general subjects of legislation.

It has said to the Territorial Legislature of Utah, and to the people of Utah: "We give you the right to legislate upon rightful subjects of legislation, but mind you, we do not give you the absolute power to legislate. You are not a state. You have not the authority of a state. The Congress of the United States has the legitimate and absolute and supreme authority to legislate for this Territory, and we want you to understand that we may alter or amend or change your general laws, just as any legislative department of any state may alter, amend or change a law."