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THE

Historical Society

OF MINNESOTA.

WHAT IS IT?
OF WHOM COMPOSED?
WHAT ARE THE RIGHTS, POWERS AND DUTIES OF ITS MEMBERS?

AN OPINION,

PREPARED BY WILLIAM BARRETT, ESQ.,

AT THE REQUEST OF GEN. HENRY H. SIBLEY AND OTHERS OF THE BOARD OF TRUSTEES OF THE CORPORATION.

WITH

AN APPENDIX,

CONTAINING THE ORIGINAL CHARTER, THE AMENDATORY ACTS OF 1856 AND 1875;

ALSO,

THE RECORDS AND BY-LAWS OF THE CORPORATION, AND THE MAJORITY AND MINORITY REPORTS OF A COMMITTEE OF THE EXECUTIVE COUNCIL OF THE SOCIETY.

ST. PAUL, MINN.
H. M. SMYTH & CO., PRINTERS.
1877.

GEN. HENRY H. SIBLEY,

President of the Board of Trustees of the Minnesota Historical Society.

DEAR SIR:

Your favor of September 25, enclosing a copy of the Charter of the Minnesota Historical Society, and the Acts amendatory thereto; also a copy of the Proceedings of the Corporation, together with copies of the Majority and Minority Reports of a Committee of the Executive Council of the Society, and certain extracts from the recorded Proceedings of said Council, desiring me to examine the same and to prepare an opinion upon the questions raised and suggested in the two Reports, was duly received and contents noted.

In reply, I have to say, that I have examined with no little care the law bearing upon the several questions put in issue by the Reports of the Majority and Minority of the Committee, and herewith submit the result of that examination for your consideration.

It is somewhat longer than I could wish, but I do not see how I could well make it more brief, and at the same time, give to the questions involved that consideration which their importance merit.

I have endeavored to give to you the law as I believe it to be at the present time. To do this, I have been obliged to quote somewhat freely from the text writers and from the Reports, believing that by so doing I could best present the case. The views submitted are not new or original.

Hoping that the opinion I have the pleasure to submit, may meet with your approval, and that of your associates in the Board of Trustees, and at the same time be of some service to you,

I am, very truly yours, &c.,

WILLIAM BARRETT.

St. Paul, Minn., December 1, 1877.

Historical Society of Minnesota.

What is it? Of whom is it composed? And what are the Rights, Privileges, and Duties of its Members?

By an Act of the Legislative Assembly of the Territory of Minnesota, approved October 20th, 1849, H. H. Sibley and eighteen other gentlemen were constituted and made a body corporate and politic by the name and style of the "Minnesota Historical Society," with all the immunities, privileges and capacities which belong and attach to corporations at common law.

In the act of incorporation, there was no reservation of any rights or powers, either express or implied. The grant to the Society was full, absolute and complete.

The Society was located at the seat of government, then, as now, Saint Paul.

The object of said Society is by said Act declared to "be the collection and preservation of a Library, Mineralogical and Geological Specimens, Indian Curiosities, and other matters and things connected with and calculated to illustrate and perpetuate the history and settlement of said Territory."

The Act also provides, "that any five members may, at any meeting of said Society, constitute a quorum to do business."

By an Act of the Legislative Assembly of the Territory of Minnesota, approved March 1st, 1856, the charter of said Society was amended, and, "in addition to the privileges and immunities granted, and duties assigned to the Minnesota Historical Society" by its charter, the Society was "allowed to receive by bequest, donation or purchase, any amount of prop-

erty, real or personal, and to hold the same in *perpetuity*, as a sacred trust, for the uses and purposes of the Society."

Section one (1), *Chapter XV, Session Laws of Minnesota*, 1856.

The amendatory Act of March 1st, 1856, also inhibited the Society from mortgaging or otherwise encumbering the property then in its possession, or that which might thereafter be acquired. It also exempted the property of the Society from any liability for the debts of the Society, and also from taxation.

Section 2 of this Act provides for the creation of an Executive Council, which was to be elected by the Society, and was to consist of not more than twenty-five members. It also prescribed and defined the duties of said council.

The third (3) section of the Act provided that, "the objects of said Society, with the enlarged powers and duties herein provided, shall be, in addition to the collection and preservation of publications, manuscripts, antiquities, curiosities, and other things pertaining to the social, political and natural history of Minnesota, to cultivate among the citizens thereof, a knowledge of the useful and liberal arts, science and literature."

The fourth (4) section of the last mentioned Act, repealed all acts and parts of acts inconsistent with the provisions of this Act of March 1st, 1856.

The Act of March 1st, 1856, amending "the Act to incorporate the Historical Society of Minnesota," was, by an Act of the Legislature of the State of Minnesota, approved February 19th, 1875, amended, so as to increase the number of members composing the Executive Council to thirty.

By section two (2) of the Act of 1875, "the Governor, Lieutenant Governor, Secretary, Auditor and Treasurer of State, and the Attorney General," were made *ex officio* members of the Executive Council.

This is the substance of all the legislation that has been had with reference to the Minnesota Historical Society from the time of its charter (1849) to the present.

Hereafter, these several acts of legislation will be referred to as the *Charter* (Act of Oct. 20th, 1849), the amendatory act of 1856, and the Act of 1875.

It is claimed by the incorporators named in the charter of the Minnesota Historical Society, that they were created the trustees of the franchises of the corporation, to receive and hold the same, together with all the funds and property that thereafter might in any way be acquired in *perpetuity*, as a sacred trust committed to them, and their successors duly elected.

They also claim, that the granting of the charter by the Territorial Legislature, and its acceptance by them, was a *contract* between the State and the corporators (trustees), the obligation of which cannot be impaired without violating the constitution of the United States.

They also claim that the Historical Society is a *private* corporation, created for private purposes, as distinguished from that class of corporations which are purely *public* in their purposes and objects.

They also claim that the body known as the Executive Council, excepting so far as the same is composed of the original corporators and their successors by them duly elected, has no legal existence as a part of the corporation of the Minnesota Historical Society.

They also further claim, that the rules of law to be applied in determining the rights, powers, and duties of the trustees of a corporation, of the nature and character of the Minnesota Historical Society, are, in some important particulars, entirely different from those which are to be applied in determining the rights, powers and duties of similar officers of *public* corporations, and of similar officers of those private corporations which are of a commercial and business character.

Are these claims well founded, and can they be sustained in law, and upon principle? These are the questions that present themselves for consideration, and in order that they may be fairly, fully and satisfactorily answered, a somewhat elaborate examination of the law and the authority bearing upon the subject matter of corporations will be required.

It will be admitted by every one, that the Act of October 20, 1849, created a corporation of some kind, public or private, civil or eleemosynary.

The first question, therefore, to be determined is, What kind of a corporation is the Minnesota Historical Society? The decision of this question, in one way or the other, must necessarily, to a very considerable degree, determine the other questions, viz: of whom is the Society composed, and what are the rights, duties and powers of its members.

The laws of this country, of England, and of other civilized nations, recognize various kinds of corporations, and their privileges, immunities and capacities, under those laws, are determined not by their charters alone, but by their charters, taken in connection with the particular objects and ends which they are intended to promote, and the particular purposes to which they are to be devoted.

The elementary books have given various definitions, in substance the same, of what a corporation is.

1 *Blackstone's Commentaries*, 469, 475.
2 *Kent Com.* 291, (*7th Ed.*)
Kyd on Corporations, 13.
Angel & Ames on Corporations, *Sec.* 1.
Dillon on Municipal Corporations, *Sec.* 9 *a.*

In the Reports, learned judges have also given to us their definition of corporations, one of the best and most comprehensive being that of Chief Justice Marshall, in *Dartmouth College vs. Woodward*, 4 *Wheat.* 636.

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a

single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be."

A great variety of these corporations exist in every country governed by the common law, and wherever the common law obtains the immunities, privileges and capacities of a corporation, as such, whatever may be the particular class to which it belongs, will be construed and determined by an application of the well known and well understood principles and rules of the common law.

At the time of the granting of the charter to the Historical Society, by the Territorial Legislature of Minnesota, (October 20th, 1849,) the common law obtained in the Territory.

Minnesota was a part of the great Northwest Territory, and as such, was governed by the common law.

Ordinance of 1787, *United States at Large, vol.* 1, *page* 51, *note a.*

It will not, I presume, be contended that the Legislative Assembly of the Territory of Minnesota could not grant charters to corporations. "A Territory of the United States may establish corporations; such power falling within the general legislative powers conferred by Congress." Such grants may be made "by virtue of the familiar maxim, *facit per alium, facit per se.*"

Angel & Ames on Cor., Sec. 75.

This being so, it follows, then, as a matter of course, that the Historical Society, as a corporation, is to be governed and controlled by the common law, the law in force at the time its charter was granted.

This Corporation (Historical Society) was created and constituted, "for the collection and preservation of a Library, Mineralogical and Geological Specimens, Indian Curiosities, and other matters and things connected with and calculated to illustrate and *perpetuate* the history and settlement" of the Territory of Minnesota.

It was created for the *perpetuation* of a private trust, a trust to be sure in which the public have a large interest, but not such an interest, I claim, as would make the Society a public corporation, as distinguished from a private one.

It is not, nor was it intended to be a public corporation, in the sense that the *whole* interest in the foundation of the Society belongs to the public.

The charter grants certain privileges and powers to the corporators (the trustees) and their successors, "for the benefit of said Society," not for the *sole* benefit of the public, that is, the State.

Section 1, *Chapter* 44, *Laws* 1849.

And this grant, "for the benefit of said Society," is absolute and complete. There is no reservation, either express or implied, to the State.

Public corporations strictly speaking, are such only as are founded by the government for *public political purposes*, such as towns, cities, parishes and counties, where the *whole* interests belong to the government.

If the foundation be private, though made under the grant of a charter, by the government, and though even the government be the principal, and at the time of its creation the sole benefactor, the corporation is nevertheless private, no matter how extensive may be the uses to which it is devoted, either by the bounty of the founder, or by the nature and objects of the institution.

Story, J., Dartmouth College vs. Woodward, 4 *Wheat.*, 569.

The uses may, in a certain sense, be called public, whenever and wherever the public are, in a greater or less degree, to reap the benefits arising therefrom, but the corporation is private, if the foundation be private, as clearly as if the franchises were vested in a single person.

It is now a well settled principle of the law of corporations, in this country, at least, that an institution, founded for the purposes of charity or education, either by the State or by a private benefactor, is a private corporation, although dedicated by its charter to general purposes.

This is the unequivocal doctrine of the authorities, and in the language of one of the most eminent and learned jurists that this country has produced, it "cannot be shaken but by undermining the most solid foundations of the common law."

Judge Story, Dartmouth College vs Woodward, 4 *Wheaton*, 673.
Phillips vs. Berry, 2 *T. Rep.* 346.

Who is the founder of a corporation?

"The founder of all corporations, (says Blackstone,) in the strictest and original sense, is the King alone, (in this country, the State, or the United States,) for he alone can incorporate a society, and in civil incorporations, such as mayor, commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the King, but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens*, or the incorporation, in which sense the King is the general founder of all colleges and hospitals; the other *fundatio perficiens*, or the donation of it, in which sense the first gift of the revenue is the foundation, and he who gives them is in law the founder, and it is in this last sense we generally call a man the founder of a college or hospital."

1 *Blackstone's Commentaries*, 480.

The Historical Society, I claim, belongs to the same class of corporations as colleges and hospitals. I claim that it is, like them, a private corporation, of an eleemosynary character; I do not claim that it is an eleemosynary institution in the sense that its objects and purposes are to distribute alms, but in the same sense that universities, colleges and academies are eleemosynary. This last class of institutions are devoted to the interests of learning. So is this Society. It is to collect and preserve a Library, Mineralogical and Geological Specimens, Indian curiosities, and other things calculated to illustrate and perpetuate the history of the Territory, &c., and so to afford to the public the means and facilities of obtaining that special education with reference to their own State, which they would not otherwise have. It was not intended to distribute alms, but to disseminate the benefits of learning and useful information. It was founded upon a *principle* of charity.

If I am correct in the position that, like our colleges and academies and hospitals, the Historical Society is an eleemosynary corporation, then, I claim that the same principles of law should, and I believe will, be applied to it that have been applied to them, whenever the occasion arises which shall require the interference of the courts to determine who are its members and what their rights, powers and duties are.

The charter of the Historical Society, like the charters of our colleges, hospitals and other eleemosynary institutions, created a *perpetual* trust. The right to exercise and discharge the powers and duties imposed by the creation of the trust, was conferred upon the *nineteen persons named in the charter*, and *their successors*, by them duly elected, and upon *them* alone. Their relation to this trust is fixed and determined by the original act of incorporation, and cannot be changed by any subsequent act of legislation which shall in any way impair, restrain or control the legitimate exercise of their powers and duties, or which shall transfer those powers and duties to other persons, because such legislation would be a violation of the obligations of the charter, no such right having been reserved therein.

It is admitted that, in one sense, the State was the founder of the Society. It was the founder of the Society, in the sense that it was its *creator*, and in that sense only. It granted to the Society its charter. In the original charter there was no endowment by the State. The State was *fundatio incipiens*, and not *fundatio perficiens*.

It is true that the State has been for many years the most munificent patron and benefactor of the Society, but this fact cannot change the character of the corporation from a private to a public one.

"If the foundation be private at first, no subsequent endowment of it by the State can change the nature of the foundation."

"That the mere act of incorporation will not change the charity from a private to a public one is most distinctly asserted in the authorities."

Story J. Dart. Coll. vs. Woodward, supra.

"The charter of the crown cannot make a charity more or less public; but only more permanent than it would otherwise be."

Lord Hardwick in Phillips vs. Burry, supra.

"Whether a corporation be public or private depends upon the nature of the franchise granted, and not upon the expected beneficial results to the community, from the possession and exercise of those franchises."

Regents of the University of Maryland vs. Joseph B. Williams, 9 *Gill & John.* (*Md.*) 365.

This is the doctrine of all the authorities and cannot be controverted.

This Society then, upon the principle of law just stated, although founded, or rather *created*, by the State, is a private corporation; and in no true sense can it properly be claimed or said to be a public corporation.

It is admitted that the objects and purposes of the Society are largely of a public nature, in which all the citizens of Minnesota have a like interest, but it does not follow, that because the objects and purposes for which a Society was created are of a public nature, that the *corporation* is therefore necessarily public.

Regents, &c., Maryland vs. Williams, supra.

Although it is admitted that the whole community may be the proper objects and recipients of the bounty conferred by the State, and by others upon the Society, yet it is expressly denied that the State, as the *guardian* of the public interests, have the *sole* right to direct, regulate and control the affairs of this corporation, together with its franchises, funds and property, at its sovereign will and pleasure.

Unless the State has this *sole* right, in its sovereign capacity, this Society is not a public corporation.

I do not understand that the State, or that any person or persons authorized to represent the State, has ever claimed to exercise any such *sole* right in the management of the affairs of the Society. That claim will probably be reserved for some one who is willing to make the attempt "to undermine the most solid foundations of the common law."

"Such an authority" (the exercise of the sole and exclusive control and management of corporations by the government creating them) "does not exist in the government, except where the corporation is in the strictest sense public, that is, where its *whole interests* and *franchises* are the exclusive property and domain of the government itself."

Story, J., Dart. Col. vs. Woodward, supra.

The act of incorporation of the Historical Society vested in the corporators, and their successors, as trustees, the entire and exclusive control and management of the affairs of the Society.

The rights and powers of the trustees of this Society are paramount, and subject to no supervision, except that of the court.

"Where trustees or governors are incorporated to manage and control the charity, all the powers of the corporation are deemed to belong to them in their corporate capacity. * * * But they are not therefore placed

beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the Court of Chancery, not as itself possessing a visitatorial power, or a right to control the charity, but as possessing a general jurisdiction in all cases of an abuse of trusts, to redress grievances and suppress frauds. And where a corporation is a mere trustee of a charity, a court of equity will go yet farther; and though it cannot appoint or remove a corporation, it will yet in a case of gross fraud or abuse of trust, take away the trust from the corporation and vest it in other hands."

Dart. Col. vs. Woodward, supra.

Where, as in the case of the Historical Society, the State has not in the charter reserved to itself the right to alter or amend it, it (the State) can no more exercise a control over the affairs of the corporation, than an individual.

"Where a private eleemosynary corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the Crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter or divest the corporation of any of its franchises, or add to them or add to or diminish the number of the trustees, or remove any of the members or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn and well settled doctrines of the common law."

Per Story, J. Dart. Col. vs. Woodward, supra.

This is the law as settled by the courts of last resort in this country and in England, in cases too numerous for citation.

There being no reservation in its charter, the Historical Society is subject only, under the supervisory powers of the courts, to the general law of the land.

It cannot forfeit its corporate franchises by a misuser or a non-user of them, except through the intervention of the courts. There must first be a default, and that default must be judicially ascertained and declared before there can be a forfeiture.

"A private corporation created by the legislature may lose its franchises by a *misuser* or a *non-user* of them; and they may be resumed by the government under a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture."

Terrell et al. vs. Taylor et al., 9 *Cranch*, 43.
Dart. Coll. vs. Woodward, per Washington, J.

"A corporation is not to be deemed dissolved by reason of any *misuser* or *non-user* of its franchises, until the default has been judicially ascertained and declared.

2 *Kent*, 312.

Angel & Ames on Cor., *Sec.* 777.
Canal Co. vs. Railroad Co., 4 *Gill & Johnson*, 121.
Minnesota R. R. Co. vs. Melvin, 21 *Minn.*, 339.

The State by legislation cannot declare the franchises of a corporation forfeited any more than it can amend or alter or repeal a charter, or force a new charter upon the corporation, where such right is not reserved in the grant of the franchise.

"Neither *misuser* nor *non-user* of corporate franchises granted to such corporations, has ever been held sufficient to authorize the granting of the same franchises to others, before a forfeiture has been judicially declared."

Regents of the University of Maryland vs. Williams, 9 *Gill & John.*, 365.

THE CHARTER A CONTRACT.

The charter is a contract between the State and the persons named in the act of incorporation, and as such, as has been already stated, is protected and preserved inviolate from legislative interference, by section ten (10) of article one (1) of the constitution of the United States.

Dartmouth College vs. Woodward, *supra.*
Allen vs. McKean, 1 *Sum. C. C. R.*, 276.
Regents of the University of Maryland vs. Williams, *Gill & John.*, 365.
State ex rel Plummer et al. vs. Adams et al., 44 *Mo.*, 570.
Chicago, Burlington & Quincy R. R. Co. vs. Iowa, 94 *U. S. S. C. Rept.* (4 *Otto*,) 155.

The general doctrine of the Dartmouth College case, that a corporate charter is a contract protected by the Federal Constitution, has been recognized, and the case itself followed as an authority in the following cases, in the State Courts of last resort.

Charles River Bridge vs. Warren Bridge, 7 *Pick.*, 371.
Boston & Lowell R. R. Co. vs. Salem & Lowell, &c. R. R. Co., 2 *Gray*, 1.
Enfield Toll Bridge Co. vs. Connecticut River Co., 7 *Conn.*, 28.
Derby Turnpike Co. vs. Parks, 10 *Conn.*, 522.
Enfield Toll Bridge Co. vs. Hartford & New Haven R. R. Co., 17 *Conn.*, 40.
Washington Bridge Co. vs. Connecticut, 18 *Conn.*, 53.
Piscataqua Bridge Co. vs. New Hampshire Bridge Co., 7 *N. H.*, 35.
Pingry vs. Washburn, 1 *Aik.* (*Vt.*), 264.
State vs. Branin, 3 *Zabr.* (*N. J.*), 484.
Commonwealth vs. United States Bank, 2 *Ashm.* (*Pa.*), 349.
Brown vs. Hummel, 6 *Barr.*, 86.
State vs. Commercial Bank of Cincinnati, 7 *Ohio*, 125.
Michigan Bank vs. Hastings, 1 *Doug.*, 225.
Smead vs. Indianapolis, &c. R. R. Co., 11 *Ind.*, 104.
Young vs. Harrison, 6 *Ga.*, 130.
Macon & Western R. R. vs. Davis, 13 *Ga.*, 68.
City of Louisville vs. University of Louisville, 15 *B. Monr.*, 642.

Woodfork vs. Union Bank, 3 *Coldr*, 488.
Nevill vs. Bank of Port Gibson, 6 *Smed. & M.*, 513, 563.
Gorman vs. Pacific R. R. Co., 26 *Mo.*, 441.
Mechanics' & Traders' Bank vs. Debolt, 18 *How.*, 380; *U. S. C. R.*

In delivering the opinion of the court in the Dartmouth College case, Marshall, C. J., said, "In the United States, although the charter of a public corporation may be altered or repealed at pleasure, the charter of a private corporation, whether granted by the King of Great Britain, previous to the Revolution, or by the Legislature of any of the States since, is, unless in the latter case express power be for that purpose reserved, within the protection of that clause of the constitution of the United States which, among other things, forbids a State from passing any law impairing the obligation of contracts."

Under this provision of the constitution, it is settled and determined—the Supreme Court of the United States having so held as early as 1819, in the Dartmouth College case, and that case has been almost uniformly followed in a long series of decisions in the Federal and State Courts, for nearly sixty years, so that the doctrine there enunciated cannot any longer be seriously questioned without undermining the whole superstructure of the law of private corporations as founded in this country, upon the case last above cited—that the charter of a private corporation, whether civil or eleemosynary, is an executed contract between the government and the corporation, and that the legislature cannot repeal, alter or impair it, against the consent, or without the default of the corporation judicially ascertained and declared.

It is believed that no one can now be found who will seriously claim that the charter of a private corporation is not a contract between the government and the corporation, and therefore protected by that provision of the constitution of the United States above cited. I am aware that there are those who have questioned the soundness and the policy of the law, as laid down by the court in the Dartmouth College case, and that there are also some who have seriously questioned the influences brought to bear upon the court, and the motives which induced it to render the decision made in that case, (I allude, among others, to the author of a series of very able and exhaustive articles which lately appeared in the "Southern Law Review," but recently, one of the best and most efficient of our State Reporters,*) but I am not aware that any one now claims that the doctrine enunciated in that case is not the law of the land. If there has hitherto been any question about this matter, it would seem that, since the rendering of the opinion, by the Supreme Court of the United States, in the case of the Chicago, Burlington & Quincy Railroad *vs.* Iowa, there should now be no doubt about it. Waite, C. J., after quoting the substance of the provisions of the charter of that corporation, said, "*This is in substance its charter, and to that extent it is protected as by a*

*John M. Shirley, Esq., of New Hampshire.

contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured, subject only to the limitations and reservations in the charter, or in the laws or constitutions which govern it."
94 *U. S. S. C. R.* (4 *Otto*), 155.

This is one of the well known Granger cases, recently decided by the United States Supreme Court, and is the latest exposition, by that court, of the law bearing upon the question, whether the grant of a charter to a corporation, by a State, forms a contract between the State and the corporation, within the meaning of that clause of the federal constitution above cited (Sec. 10 of Art. 1); and upon this question, the opinion of the court fully sustains the Dartmouth College case, and subsequent cases, and is authoritative and conclusive upon the courts,—State as well as Federal,—until reversed or overruled in some subsequent case.

The statement in the report of the committee, (See Exhibit "C" in the Appendix,) recently made to this Society, that "The decisions of our own Supreme Court, and recently the Supreme Court of the United States, establish the doctrine that the right of the Legislature to alter, amend or repeal a Corporate act, is omnipotent, unless the Act is of a private character, and apt and specific words of contract inhibit such an exercise of power," is incorrect in fact and in law, as decided and held in the case last cited (4 *Otto*, 155). "To what decisions of our own Supreme Court" the committee refer for their authority for such a statement, I do not know. (They cite no decisions.) I have been unable to find a single decision of the Supreme Court of this State, that warrants the use of any such language. On the contrary, I find that the court have, by implication, at least, held the exact reverse of what the committee assert.

In *Perrin vs. Oliver*, 1 *Minn.*, 202, Welch, C. J., delivering the opinion of the court, said, "The power of the Legislature to amend and repeal a charter, where it has the power reserved to do so in the charter itself, is, in my judgment, too plain and well settled to admit of a doubt." But where the power "to *amend and repeal*," is not reserved in the charter, the court say, by inference and by implication, as plain as the words themselves could make it, that the Legislature have not that power.

And again in *Blake et al. vs. The Winona and St. Peter Railroad Co.*, 19 *Minn.*, 423, the court, by Ripley, C. J., said, "Its charter may be amended by any subsequent legislature in any manner not destroying or affecting defendant's vested rights." By implication, if the amendment to the charter would affect or destroy the defendant's vested rights, then the Legislature would not have the power to make it.

In the *Winona & St. Peter R. R. Co. vs. Waldron et al.*, 11 *Minn.*, 515, McMillan, J., said, "That the charter of a private corporation is a contract there is no doubt, and that in the absence of express limitation or restriction, the corporation takes the franchises with all reasonable and necessary incidents to accomplish the object of its existence, granted by the

charter as vested rights, will not be doubted; but that the Legislature may control and regulate the action of those artificial beings in the exercise of their rights just as a natural person may be controlled and regulated is as well settled. * * If the Legislature can deprive itself of this power in any instance, it certainly can only be done by express grant, and not by implication."

Is there anything in the cases just cited that can warrant or justify the statement of the committee above quoted? I can see nothing; on the contrary, I claim that they are unequivocal authorities for the positions I have taken. These are the only cases I have found bearing upon the matter suggested by the committee's statement

Are there any recent decisions of the Supreme Court of the United States that justify the statement of the committee? As the committee do not cite authorities, I presume they refer to *Munn vs. Illinois* (4 *Otto*, 113), known as the Elevator case; and the *Chicago, Burlington & Quincy R. R. Co. vs. Iowa, &c., supra; Peck vs. Chicago & Northwestern Railway Co.*, 4 *Otto*, 164; *Winona & St. Peter Railroad Co. vs. Blake*, 4 *Otto*, 180; and *Stone vs. Wisconsin*, 4 *Otto*, 181, known as the Granger cases;—as these cases are the only ones recently decided by that court, bearing upon any of the questions now under consideration.

In *Munn vs. Illinois*, the question whether a charter by the State to a corporation is a *contract*, did not arise.

Waite, C. J., who delivered the opinion of the court, said:

"The *question* to be determined in this case is, whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved.

"It is claimed that such a law is repugnant—

"1. To that part of Sec. 8, Art. 1, of the Constitution of the United States, which confers upon Congress the power to regulate commerce with foreign nations and among the several States;

"2. To that part of section 9 of the same article which provides that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;' and

"3. To that part of Amendment 14 which ordains that no State shall 'deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'"

From the above quotations it must be apparent that the question of whether a charter was a *contract* did not arise in that case. There is not

a single sentence in that opinion upon which the committee's statement can be fairly based.

The quotation, made by the committee, "When, in the language of the Supreme Court of the United States, 'the private property is affected with a public interest, it ceases to be *juris privati* only,'" does not appear to have any meaning when applied to the Historical Society. In fact, it is not the language of the Supreme Court at all. It was selected by the committee from a quotation from the opinion of Le Blanc, J., in *Aldnutt vs. Inglis*, 12 *East.* 541, which was cited with approbation by the judge delivering the opinion in *Munn vs. Illinois.*

This question did arise in the railroad cases above cited, and was passed upon in the case of the *Chicago, Burlington & Quincy Railroad Co. vs. Iowa;* and the court in that case said, "Whatever is *granted* is secured, subject only to the limitations and reservations in the charter, or in the laws or constitutions which govern it." And again, "It is now too late to contend that the charter of a corporation is not a contract," &c.

Now, unless the State has made some reservation or limitation in the charter of a corporation, or unless there be such reservation or limitation in the general laws or constitution of the State granting the charter to a corporation (and such cannot be the case of the Historical Society, for at the time its charter was granted, Minnesota was a Territory of the United States, and its constitution was not adopted until many years thereafter. In the constitution, however, as adopted, the Historical Society is recognized. See Art. 15, Sec. 1, of the Constitution of Minnesota), not of a wholly public character, the State cannot alter, amend, or repeal the charter, without the consent of the corporation, for such a charter is a *contract*, and as such "is protected by that clause of the constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract," &c.

This statement of the majority of the committee (there was a minority report—Exhibit "D," Appendix), in the report above referred to, is calculated to deceive and mislead the unprofessional reader or hearer.

That this was not the intention of the author of that report, is to be presumed. It is apprehended that the committee have been misled in their conclusions, by taking it for granted, without an examination of the law and the authorities, that the Minnesota Historical Society is a *public*, and not a *private* corporation, within the meaning, definition, and contemplation of the law of corporations.

I repeat that the Historical Society is a private corporation, of an eleemosynary character, differing entirely from a purely public corporation, and differing also, as entirely, in its purposes and objects, as well as in the law applicable to it, from those private corporations, which are of a commercial, or money making character, generally known as stock corporations.

Let us then consider the question, more particularly as to whether the position, last above taken, is sound and tenable, within the meaning and

definition of law, as laid down in the text books, and as determined by the decisions of the courts.

"A *fundamental division* of corporations is into *public* and *private*.

"The importance of this distinction cannot be too much emphasized, since upon it are based the legal principles which so broadly distinguish the two classes of corporations. * * *

"Both classes are alike created by the Legislature, and in the same way --by special charter or under general incorporation acts.

"*Private corporations* are created for *private*, as distinguished from purely *public* purposes, and they are not, in contemplation of law, *public*, because it may have been supposed by the Legislature that their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative. But when assented to, the legislative grant is irrevocable, and it cannot, without the consent of the corporation, be impaired or destroyed by any subsequent act of legislation, unless the right to do so was reserved at the time. * * * A law materially altering the charter of such a corporation is unconstitutional, unless the power to alter it was reserved when the grant was made.

"*Public Corporations* are called into being at the pleasure of the State, and while the State may, it need not obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal (public) corporation is in no sense a *contract* between the State and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not, indeed, in favor of the corporation, may arise under it. Public corporations, within the meaning of this rule, are such as are established for public purposes, exclusively—that is, for purposes connected with the administration of civil or local government—and corporations are public only when, in the language of Chief Justice Marshall, (the quotation should have been credited to Mr. Justice Story. See opinion of Story, J., *Dart. Coll. vs. Woodward*, 4 *Wheat.*, 672,) '*the whole interests* and franchises are the exclusive property and domain of the government itself, such as *quasi* corporations (so called), counties and towns or cities, upon which are conferred the powers of local administration.' With the exception of certain constitutional limitations presently to be noticed, the power of the legislature over such corporations is *supreme* and *transcendent;* it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require."

Dillon on Mun. Cor., vol. 1, *secs.* 29, 30.

"Corporations are public or private :—

"*Public* corporations are such as have been created for the purposes of municipal government, including all the inhabitants within a certain district or territory ; such are cities, towns, boroughs, &c.

"*Private* corporations include properly all others—religious, literary, charitable, manufacturing, insuring, or money lending associations, as well

as railway, canal, bridge and turnpike companies. * * Charters of incorporation granted by the legislatures of the States to all private corporations are considered as *executed contracts* within the protection of Art. 1, Sec. 10 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are all created for the public benefit. Yet, if the *whole interest* does not belong to the government, or if the corporation is not created for the administration of political or municipal power, it is a private corporation. Thus, all bank, bridge, turnpike, railroad and canal companies are private corporations. In these and other similar cases, the uses may, in a certain sense, be called public; but the corporations are private, as much so as if the franchises were vested in a single person."

Blackstone's Com. (*Sharswood's Ed.*) 468, *note* 1.

"Civil corporations are established for a variety of purposes, and they are either *public* or *private*. Public corporations are such as are created by the government for political purposes, as counties, cities, towns and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the Legislature of the State. * * *

"If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. * * But a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may have become a partner in the association, by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person. A hospital, founded by a private benefactor, is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner, is a private charity, though, from its general and beneficent objects, it may acquire the character of a public institution.

"If the uses of an eleemosynary corporation be for general charity, yet such purposes will not of themselves constitute it a public corporation. Every charity which is extensive in its object, may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private to a public one. * * *

"In respect to public or municipal corporations, which exist *only* for public purposes, as counties, cities, and towns, the Legislature, under proper limitations, have a right to change, modify, enlarge, restrain, or destroy them; securing, however, the property for the uses of those for

whom it was purchased.* A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the Legislature, because such a corporation is not a contract within the purview of the constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public. A private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the Legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default, of the corporation, judicially ascertained and declared."

2 *Kent Com.* 304 *and* 352 (*7th Ed.*)

"The main distinction between public and private corporations is, that over the former the Legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control; and, acting as such, as it may create, so it may modify, or destroy, as public exigency requires or recommends, or the public interest will be best subserved. The right to establish, alter, or abolish such corporations, seems to be a principle inherent in the very nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. Such institutions are the auxilliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a *contract* between them and the Legislature; because there can be no reciprocity of stipulation; and because their object and duties are incompatible with everything of the nature of *compact*. And a municipal (public) corporation may be abolished, although it is the trustee of a public charity. * * *

"*Private* corporations, on the other hand, are created by an act of the Legislature, which, in connection with its acceptance, is regarded as a *compact*, and one which, so long as the body corporate faithfully observes, the Legislature is constitutionally restrained from impairing, by annexing new terms and conditions, onerous in their operation, or inconsistent with a reasonable construction of the compact. * * * Private corporations are indisputably the creatures of public policy, and, in the popular meaning of the term, may be called public; but yet, if the whole interest does not belong to the government (as, if the corporation is created for the administration of civil or municipal power), the corporation is private. A *bank*, for instance, may be created by the government for its own uses; but if the stock is owned by private persons, it is a private corporation,

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*Town of Marietta vs. Fearing, 4 Ham. (O.) 427. Berlin vs. Gorham, 34 N. H. 266. County of Richland vs. County of Lawrence, 12 Ill. 1. 21 Wend. 679. Layton vs. New Orleans, 12 La. An. 515. Robertson et al. vs. City of Rockford, 21 Ill. 451. People vs. Morris, 13 Wend. East Hartford vs. Hartford Bridge Co., 10 How. 511.

A town or other municipal corporation may be abolished, although it is the trustee of a public charity. Town of Montpelier vs. Town of East Montpelier, 29 Vt. 12.

although it is erected by the sanction of public authority, and its objects and operations partake of a public nature."

Bank of the United States vs. Georgia, 9 *Wheat.* 907.
Miners' Bank vs. United States, 1 *Greene* (*Iowa*), 553.

"Railroads are private corporations, and 'generally speaking,'—say the court, in the case of *Bonaparte vs. Camden &c. Railroad Company*, 'public corporations are towns, cities, counties, parishes, existing for public purposes; *private* corporations are for banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals, but their use may be public.' In all the last named, and other like corporations, the acts done by them, are done with a view to their own interest, and if thereby they incidentally promote that of the public, it cannot reasonably be supposed they do it from any spirit of liberality they have beyond that of their fellow citizens. Both the property and the sole object of every such corporation are essentially private, and from them the individuals composing the company corporate are to derive profit. Nor does it make any difference that the State has an interest as one of the corporators, for it does not by such participation identify itself with the corporation. Says Marshall, C. J., 'The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.' And, says he, 'It is a sound principle of law, that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.'"

9 *Wheat.* 907.

"In the case of the *State Bank of South Carolina vs. Gibbs* (3 *McCord*, 377), the State owned not only a portion, but the whole of the interests in the bank, and the court held that the case was not distinguishable from the Planters' Bank of Georgia, and was therefore not a *public* but a private corporation. * * * But where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as the organs of the State, in effecting a great public improvement, it is a public corporation." * * *

Sayre vs. Northwestern Turnpike Company, 10 *Leigh*, 454.

"A *hospital* founded by private benefaction, and a *college* founded and endowed in the same manner, though dedicated by its charter to the public, and for the general promotion of learning, are private corporations, and so are *academies* and societies founded and endowed for similar purposes, whether founded by private benefaction, or by the bounty of the government."

Angel and Ames on Corporations, secs. 31, 32, *and the numerous cases there cited.*

"An institution, merely because it receives a charter from a government, is not thereby constituted a public corporation, controllable by the government creating it, nor does it make any difference, in that respect,

that the funds have been generally derived from the bounty of the government itself."

Allen vs. McKean, 1 *Sum. C. C. R.* 276.

"*Public* corporations are political corporations, or such as are founded wholly for public purposes, and the *whole* interest in which is in the public.

"The fact of the public having an interest in the works or the property or the object of a corporation, does not make it a public corporation. All corporations, whether public or private, are, in contemplation of law, founded upon the principle that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is, in the eye of the law, designed for public benefit. A turnpike or a canal company is a private company, yet the public have an interest in the use of their works, subject to such tolls and restrictions as the charter has imposed. The interest, therefore, which the public may have in the property or in the objects of a corporation, whether direct or incidental (unless it has the *whole* interest), does not determine its character as a public or private corporation."

Ten Eyck vs. Canal Company, 3 *Harrison* (*N. J.*) 200.

"Some corporations are created by the *mere will* of the Legislature, there being no other *party interested or concerned*. To this body a portion of the power of the Legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of a *contract*. The Legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a *second party*. These two make a contract. The expectation of benefit to the public is the moving consideration on one side, that of expected remuneration for the outlay is the consideration on the other. *It is a contract*, and, therefore, cannot be modified, changed, or annulled without the consent of both parties. Counties are an instance of the former, railroad and turnpike companies of the latter, class of corporations."

Milne vs. Williams, 11 *Ire.* (*N. C.*) *Law*, 558.

"A *public* corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the Legislature and its members, officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c."

Regents of the University of Maryland vs. Williams, 9 *Gill. & John.* 368.

"Towns and cities which are public municipal and political bodies, are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders nor joint partners in any co-operative estate, which they can sell or devise to others, or which can be attached or levied on for their

debts. Hence, generally, the doings between them and the Legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions named, and, therefore, to be considered as not violated by subsequent legislative changes."

East Hartford vs. Hartford Company, 10 *How.* (*U. S.*) 511.

"Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the State, but, being wholly political, exist only during the will of the general Legislature. * * * Such powers may at any time be repealed or abrogated by the Legislature, either by a general law acting upon the whole State, or by a special act altering the powers of the corporation."

Sloan vs. State, 8 *Blackf.* (*Ind.*) 361.

"The laws which establish and regulate municipal (public) corporations are not *contracts*, but ordinary acts of legislation, and the powers they confer are nothing more than mandates of the sovereign power, and those laws may be repealed or altered at the will of the legislature."

Police Jury vs. Shreveport, 5 *La. An.* 661.

"A corporation is *private* as distinguished from *public*, unless the *whole interest* belongs to the government, or it is vested with political or municipal power."

Rundle vs. Del. & R. Canal, 1 *Wallace C. C. R.* 275.

"The State does not possess unrestrained power over a corporation not invested with political power, nor created to be employed and partake in the administration of government, or to control funds belonging to the State, or to conduct transactions in which the State alone is interested. It has unrestrained power over such corporations only as may be characterized as the agents or instruments of the government. A university is not such a corporation, and funds bestowed upon it by a city are beyond legislative control."

City of Louisville vs. University of Louisville, 15 *B. Monr.* 642.

"Public corporations are such as are created for political purposes, with powers to be exercised for the public good. * * * Corporations are not public because their object is of a public character."

Tinsman vs. Belvidere Delaware R. R. Co., 2 *Dutch.* (*N. J.*) 148.

"The charter of a private corporation is a *contract*, but the charter of a *public* corporation *is not* a *contract.*"

Upon any application, then, of the rules and principles of law, as laid down in the text books and in the reports, I claim that it is settled, beyond question, that the Minnesota Historical Society is a *private* corporation, and, therefore, that the Legislature has not the right nor the power to make any alteration in, or amendment to, its charter, without the consent of the corporation—such right not having been reserved in the charter.

Having determined, by the authorities above cited, and upon general

principles, that this Society is a *private* corporation, the next question to be determined is, what kind of a private corporation is it, within the meaning and contemplation of law? or, in other words, to what particular class of private corporations does it belong?

"Private corporations are of several kinds, and are known by certain appellations, according to the objects for which they are created. The first division is into *ecclesiastical* and *lay*."

1 *Blackstone's Com. sec.* 470.
2 *Kent Com.* 304.
Angel & Ames on Cor. 36.

It is not claimed by any one that the Historical Society is an ecclesiastical corporation, therefore nothing need be here said about that class of corporations.

"*Lay* corporations are divided into *eleemosynary* and *civil*. *Eleemosynary* corporations are such as are instituted upon a *principle* of *charity;* their object being the perpetual distribution of the bounty of the founder of them to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent and sick, or deaf and dumb. And of this kind, also, are all colleges and academies (and societies), which are founded, where assistance is given to the members thereof, in order to enable them to prosecute their studies, or *devotion*, with ease and assiduity. * * *

"*Civil* corporations include not only those which are *public*, as cities and towns, but private corporations, created for an infinite variety of temporal purposes. * * But the most numerous, and, in a secular and commercial point of view, the most important class of *private* civil corporations, and which are very often called 'companies,' consists, at the present day, of banking, insurance, manufacturing, and extensive trading corporations; and likewise of turnpike, bridge, canal and railroad corporations."

Angel and Ames on Cor. secs. 39, 40.
2 *Kent Com.* 304.
1 *Blackstone's Com.* 471.

I have, more than once, said that this Society is a *private* corporation, of an *eleemosynary character*, and the authorities I have cited sustain the assertion, and I have also, in substance, said that the rule of law affecting the transactions of private corporations, and applicable thereto, is to be determined only by the character of the particular private corporation to be affected thereby. If the corporation is one of an eleemosynary character, principles of law, now well settled, will be applied, and, if of a commercial and business character, then other principles of law, equally well settled, must be applied; and in this connection, it may be said that it is apprehended that herein the committee above referred to have again fallen into error, and are laboring under a misapprehension as to the law, and have therefore unintentionally erred as to the nature and character of

the Historical Society—that is, as to what particular division or class of private corporations it belongs.

The committee say (Exhibit "C"), "We are not aware of any instance in this country, where the power to perpetuate the corporate board has been exercised by the original corporators, except where that course was provided for by the Act creating the body. We are aware that in strictly eleemosynary corporations, founded for purposes of charity, the founder names the trustees of his bounty, and they choose their successors; but we cannot agree that this institution belongs to that class—these are of a private character, this in the nature of a public one; its creation was not for the investment of private capital for gain, nor for private ends of any sort, but for public benefit, in a broad sense, like a department for statistics, a medical or school department of the State."

I think the above quotation from the committee's report justifies the inference that they have misapprehended the law, as well as the fact, to say the least.

I think the authorities heretofore cited establish the fact, beyond all question, that the Historical Society is *not* a *public* but a *private* corporation, of an eleemosynary character. It is a corporation established,—not upon *charity* in the general acceptation of the use and meaning of that word, for the distribution of alms and bounty,—but upon a *principle* of charity. The *principle of charity* underlies the foundation of the Society.

Are the corporators and their successors duly elected—the trustees—public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? No one will claim this. Whence, then, comes the idea that the Historical Society is a public corporation?

"These corporations," say the committee (eleemosynary corporations), "are of a private character." I reply, that although they are private corporations, their whole object, intent and purposes are to promote the public interests and the general welfare, and in this I am sustained by all the authorities. I repeat that "Whether a corporation be *public* or *private* depends upon the nature of the franchise granted, and not upon expected beneficial results to the community from the possession and exercise of those franchises." I agree with the committee in the statement, properly understood, "That this" (the Historical Society) is "in the nature of a public one," meaning thereby, as has been repeatedly stated, that the purposes and objects intended to be promoted are largely *public* in their nature, and that the public have a very great interest in perpetuating the trust. And I also admit, that its creation was not for the investment of private capital for private gain, nor for private ends of any sort, but for public benefit in a broad sense," not, however, "like a department for statistics * * of the State," but like colleges, academies, schools and hospitals.

By a little change in the language of Mr. Justice Story, in the Dart-

mouth College case, it may be made to meet and to answer this assumption of the committee.

When, then, the committee assume, that because the objects and purposes of the Society are public, the corporation is public, they manifestly confound the popular with the strictly legal sense of the terms. And if they stopped here, it would not be very material to correct the error. But it is on this foundation that a superstructure is erected, which is to compel an ouster of the original corporators and their successors by them elected, and instate in their places other gentlemen, and this, too, without any judicial proceedings, by which a default or a forfeiture has been first ascertained and declared. When the Historical Society is said by the committee to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustee of the public interests, to regulate, control, and direct the corporation, and its funds and franchises, at its own good will and pleasure. "Now, such an authority does not exist in the government, except where the corporation is in the strictest sense public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself. If it had been otherwise, courts of law would have been spared many laborious adjudications in respect to eleemosynary corporations, and the visitatorial powers over them, from the time of Lord Holt down to the present day. Nay, more, private trustees for charitable purposes would have been liable to have the property confided to their care taken away from them without assent or default on their part, and the administration submitted, not to the control of law and equity, but to the arbitrary discretion of the government. Yet, whoever thought before, that the munificent gifts of private donors for general charity became instantaneously the property of the government; and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments; and we should find as little of public policy as we now find of law to sustain it."

Neither public policy nor law sustain the position assumed by the committee.

The committee say that "Its" (the Society's) "creation was not for the investment of private capital for gain, nor for private ends of any sort." In this statement they are quite right, and I not only agree with them upon this point, but I would go even further, and say that the trustees of this Society cannot have *any private interest* in the property which they hold as a *perpetual trust.*

MONEYED CORPORATIONS.

In moneyed corporations—which include all corporations of a commercial and business character, established for the investment of private

capital for private gain—the grantees, directors, governors, or trustees, by whatsoever name they are called, have no general power. They are simply the agents of the shareholders, and are under their direction and control. The directors or trustees, &c., of such corporations, are elected for stated periods of time. and the original grantees, or a certain number of them, are, in the act of incorporation, authorized to call the first meeting, for the purpose of accepting the charter and organizing the corporation. It is of this class of corporations that the following quotation from the report of the majority of the committtee is, in a measure, and in a somewhat qualified sense, true. The committee say, "In creating corporations, it has been the almost universal practice of the Congress of the United States, and of the States of the Union, to name corporators in the act, to meet as such, and provide for organizing the corporation. They were understood to hold the corporate existence in a sort of trust, until, by the election of directors or other agents, provided for in the Organic Act, or pursuant to by-laws which they are empowered to create, a new executive body should be created, and instantly the functions of the corporators would cease."

The committee are simply mistaken when they say, "they were understood to hold the corporate existence in a sort of trust," &c. In this class of corporations there is nothing "to hold in a sort of trust," until the act of incorporation is, in some way, accepted by the grantees or corporators. The corporators, in a strictly legal sense, have no corporate existence until they accept the charter. The corporators, or some specified number of them, are authorized to call the first meeting of the corporators. This, generally, is the extent of their power and authority, and their powers cease not, as the committee claim, "when a new executive body should be created," but when they have called the first meeting of the corporators and their associates, in the manner prescribed in the Organic Act, and, at the meeting so called and held, have accepted the charter, they may elect all of the directors or trustees from the persons named in the charter, or they may elect some, or all of them, from among those persons whom they subsequently associate with themselves and admit to membership. The corporators of these moneyed corporations may have associates to any extent they please, not exceeding in number the whole number of shares of the capital stock of the corporation, as limited in the charter. They (the shareholders) may accept a new charter, or they may surrender their charter and wind up the affairs of the corporation. If the acts of the agents do not meet with the approval of the shareholders, they may rid themselves of their agents by refusing to re-elect them, or by other methods provided by law. They (the agents) are responsible to their principals—the shareholders—for all their official acts.

The corporation may, as a general rule, accept amendments to their charter, "for it would be unreasonable to prevent those who make a contract for their own use, from consenting to a change of terms." But this consent must be the act of the corporators or shareholders themselves, and not that of their trustees or directors.

State ex rel. Plummer vs. Adams, 44 *Mo.*, *supra*.
Regents, &c., of Maryland vs. Williams, *supra*.

In those moneyed corporations, where the whole body of stock or shareholders compose the corporation, the right of assenting to any proposed change in the charter resides in them, though they be generally represented by a board of directors or trustees, charged with the exercise of the corporate powers. These, in their capacity of directors or trustees, have no authority to call for, or to assent to, a change of the charter. Their assent to an amendment of the charter cannot be deemed to amount to an acceptance on the part of the corporation.

Commonwealth vs. Cullen, 13 *Pa. St.* 133.

These amendments of a charter must be ancillary or auxiliary, and not fundamental, otherwise such amendments would be binding upon the corporation only, when the acceptance is the unanimous act of all the shareholders.

Woodfork vs. Union Bank, 3 *Coldw.* 488.

ELEEMOSYNARY CORPORATIONS.

In eleemosynary corporations there are no stock or shareholders; the corporators (trustees) and their successors are not the owners of the funds and property of the corporation, nor are they held to their use; they are simply trustees, holding them (the funds and property) for the benefit of the public. There are no individual and personal rights acquired by the acceptance of the charter, nor can there be any such rights thereafter acquired. By the charter a trust is created, and the grantees named in the charter—that is, the corporation—are the trustees of a trust that cannot be assigned, nor can the powers and duties of the trustees be delegated to other persons, such acts being obnoxious to the law of trusts. They cannot have any associates in the execution of the trust, because upon them (the trustees) is imposed the duty and obligation, if accepted by them, of executing the trust. They cannot surrender the charter and thereby defeat the trust, nor can they accept a new charter that would tend to accomplish the same thing. They cannot, as trustees, consent to a change in the disposition of the funds and property of the trust, contrary to the will and manifest intention of the founder of the corporation. Such consent, if given, would not affect their own property, but that of others, who can no longer personally control it; their office and duty, as trustees, so far from giving them any power to make or consent to any such changes, impose upon them the solemn and sacred obligation of seeing that the will and intention of the founder is most strictly and rigidly carried out. No action of the trustees can give life and vitality to any act not within the powers contemplated by the act creating the trust. Various changes, to be sure, may be found necessary in furtherance, or in aid of, the objects of such a corporation, which its trustees might, and probably would, have authority to make, or to assent to, and accept, even if such objects should require amendments to the charter.

"If the general consent to legislative amendments should be lodged in the trustees, there would and could not be any security whatever in eleemosynary institutions." The true doctrine undoubtedly is, that the trustees of an eleemosynary institution, the grant of which, by the Legislature, is *absolute*, subject only to the conditions imposed and the trust confided, have *no power* over the charter, but on the contrary, it is their creator, and their only and absolute rule of conduct. And this for the reason above stated, that "the beneficial interest in the funds and property of the trust belongs neither to the State, nor to the trustees, but to the beneficiaries only, who from the nature of the case, cannot assent to any changes in the charter." Hence its essential conditions are permanent, so far as any change depends on consent to any amendments to the charter which are not strictly in aid of the objects intended to be promoted.

This principle applies with much stronger force to the action of individual members of the trustees of such a corporation. If the trustees as a whole, as a body, cannot give life and vitality to an act not within the powers contemplated in the act creating the trust, certainly it must follow, that no individual member or members of the trustees can give life to such an act.

The acts or declarations of particular members, do not bind the corporation; nor can the assent of a corporation to an act altering or amending its charter, be inferred from the fact that individual members accepted and held office under the charter as altered or amended.

They (the trustees) cannot by any action of their own, add to or diminish the number of those who are to execute the trust, nor can they assent to and accept any legislative amendment which adds to or diminishes their number, nor to one that in any way changes the terms and conditions of the trust contrary to the will of the founder, nor to any act in amendment of the charter, that impairs, takes from, or destroys any of the rights, powers and duties of the original corporators and their successors, as created by the charter.

All such amendments as those above enumerated are unconstitutional and void, and no act of the trustees can give them life and vitality.

Dartmouth College vs. Woodward, supra.
Allen vs. McKean, 1 *Sum. C. C. R.* 276.
Regents, &c., Maryland vs. Williams, supra.
State ex rel. Plummer vs. Adams, 44 *Mo.*, 570.

There is another important difference between civil and eleemosynary corporations that ought to be noticed, and that is, the power of *visitation*.

"To render the charter, or constitutions, ordinances, and by-laws of corporations, of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land.

"Civil corporations are visited by the government itself, through the medium of the courts of justice; but the internal affairs of ecclesiastical

and eleemosynary corporations are, in general, inspected and controlled by a private visitor. This difference in the tribunals naturally results from a difference in the nature and objects of corporations.

"Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of the sovereign power, whose duty it is to take care of the public interests; whereas corporations, whose object is the distribution of a private benefaction, may well find jealous guardians, in the zeal or vanity of the founder, his heirs or appointees."

Angel & Ames on Cor., sec. 684.

This visitatorial power is a necessary incident to all eleemosynary corporations, for the purpose of visiting, enquiring into, and correcting all irregularities and abuses in such corporations, and to compel a faithful fulfillment of the original purposes of the charity Generally, where the foundation is private, the founder and his heirs are the legal visitors, unless the founder has appointed and assigned other persons to be visitors.

No technical terms are necessary to assign or vest the visitatorial power; it is sufficient if, from the nature of the duties to be performed by particular persons under the charter, it can be inferred the founder meant to part with it in their favor.

Where trustees or governors are incorporated to manage a charity, the visitatorial power is deemed to belong to them in their corporate capacity.

In this country, this power over eleemosynary corporations, together with all other powers, franchises, and rights of property belonging to them, are generally vested in boards of trustees or overseers, created by charter, who have a permanent title to their offices, which can be divested only in the manner pointed out in the charter.

Dartmouth College vs. Woodward, supra.

Allen vs. McKean, 1 *Sum. C. C. R.* 276.

Bracken vs. William and Mary College, 1 *Call.* 161; 3 *Call.* 573.

Sanderson vs. White, 18 *Pick.* 338.

The trustees of the Historical Society, having been incorporated by the State under the charter of October 20, 1849, they, in their corporate capacity, are the legal visitors of the corporation.

The above considerations, and the authorities upon which they are founded, justify the conclusion that the Historical Society is a *private* corporation of an eleemosynary character.

Of whom, then, is it composed?

Before answering this question, it is proper to remark—because it is a material consideration and of vital importance—that the original corporators have not, at any time since the granting of the charter and their acceptance of the trust created thereby, been reduced in number, by death or otherwise, below that designated in the charter for a quorum.

On the second day of May, 1877, there were living of the original corporators, seven gentlemen, viz.: Henry H. Sibley, Aaron Goodrich,

J. C. Ramsey, Henry M. Rice, Franklin Steele, David D. Loomis, and Morton S. Wilkinson. On that day, (May 2d, 1877;) these surviving corporators, by virtue of the powers conferred upon them by their charter, duly "elected, constituted and appointed Lathrop E. Reed, George L. Becker, Henry Hale, Rensselaer R. Nelson, John M Berry, Earle S. Goodrich, Norman W. Kittson, John Ireland, John S. Prince, Henry P. Upham, and Ignatius Donnelly, members of said corporation, in the place and stead of said deceased charter members." (See Exhibit "B" in the Appendix.) These gentlemen have accepted and entered upon the discharge of the duties of the trust.

I now answer, that the corporation is composed of the original corporators, who, as trustees of the trust created by the charter, accepted that trust, and their successors, by them duly elected. No one else can be a member of the corporation. If other persons, believing that they were members, have attempted to so act, they have acted upon a wrong impression, and have thereby acquired no rights. *The* original act of incorporation gave them no right of membership therein, the trustees could not give them any, they have acquired none by prescription. If, as stated in the report of the committee above referred to, "some of the original incorporators so understood their powers, that they elected at their first meeting, as their executive officer, one who was not named in the act, and proceeded by By-Laws, to provide for associates and successors, for an Executive Council who should represent the corporation," and for fees for membership, it does not alter the fact, nor change the law. All acts which were not within the scope of their authority, in the discharge of their duties as trustees of the trust created by the charter, were illegal and void. They could not, by an election of one not a corporator, at a time when there were no vacancies in the Board of Original Corporators, and therefore not eligible to the office, give that person any rights not contemplated in the charter. The corporators, by their act of election, could not give life and vitality to an illegal and void act, nor could the person elected to office, by his act of acceptance, and subsequent acts, give it any life and vitality.

The corporators, while they might undoubtedly make provision, in their By-Laws, for electing their successors, when a vacancy or vacancies occurred, could not elect a successor or successors, until a vacancy *did in fact* occur.

Angel & Ames on Corporations, sec. 123.

The action of the trustees providing for membership fees was also illegal and void, because there was not, and could not be any members of the corporation, but the original corporators and their successors, no other membership being contemplated in the charter which created *them*, and *them* only, the members of the corporation; and also because they could not provide for *assessing themselves* for membership fees, which, if paid, would invest them with an indirect interest, at least, and thus undermine one of the foundations upon which such trusts are founded, to-wit; that the trustees shall *have no interest* in the trust. All such acts, I repeat,

although doubtless well intended, and done with a view to promote the welfare and financial prosperity of the corporation, were illegal and void. But such acts did not destroy or defeat the trust—and any repetition of them has not destroyed and defeated, and cannot destroy and defeat that. Such acts did not, and will not authorize the Legislature to revoke the trust created by the charter, and confer the grant upon others.

"Neither *misuser* nor non-user of corporate franchises granted to such corporations, has ever been held sufficient to authorize the granting of the same franchises to others, before a forfeiture has been judicially declared."

Regents of University of Maryland vs. Williams, supra.

But the committee say: "The legal standing of the present council, however, rests upon the amendatory act of 1856. The legislative power to make the amendment has never before been questioned, and with due deference to the gentlemen who presented the paper now before us, we think can never be judicially impeached."

If the law, as laid down in the authorities cited, is correct, and I think there cannot be any question upon that point, the committee are here, in this position, by them assumed, laboring under a serious misapprehension.

In what way does the amendatory act of 1856 give the Executive Council any right of membership in the corporation? I claim that the Executive Council could not acquire any rights under the act of 1856, for two reasons; first, because the second section of that act is unconstitutional and void; and secondly, because, if the act was constitutional, it has never been accepted and assented to by the corporation, by any corporate act of the trustees.

The act of 1856 is unconstitutional and void because, first, it undertakes to increase the number of members of the corporation from nineteen to twenty-five; and secondly, because it undertakes to impair the rights, powers and duties of the original corporators and their successors by them duly elected, and to change and control the administration of the funds and property of the corporation. "*The Executive Council shall have the custody of all the property, real and personal, of the Society*, and shall frame such by-laws and constitution for their government as they may deem expedient, and to do all things not inconsistent with this act, essential to the prosperity of the Society."

This section (second) of the act of 1856 was intended to work a radical change in the management of the affairs of the society; it would deprive the original corporators and their successors of the rights and powers conferred upon them by the act of incorporation. It would completely annihilate the original corporators. The Legislature does not possess this power. The attempt to exercise such a power is a violation of Section 10, of Art. 1, of the federal constitution.

"Where a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown, than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue

of its prerogative, without the assent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn and well settled doctrines of the common law."

Story, J., Dart. College vs. Woodward, supra.

"Such alterations and amendments are unconstitutional and void."

Allen vs. McKean, and the other cases above cited.

State legislatures can have no greater power and authority over such corporations of their creation than has the crown, where the power is not reserved; they cannot, by amendments to the charter, increase or diminish the number of the trustees of a corporation.

"It is a happy feature in the constitution of our own government, that the power of the Legislatures of the different States resembles in this particular the prerogative of the King of Great Britain, who may create, but cannot dissolve, a corporation, or without its consent, alter or amend its charter."

Angel & Ames on Cor. Sec. 767.

"If a law increases or diminishes the number of the trustees, they are not the persons which the grantor agreed should be the managers of the fund. * * * And can it be seriously contended, that a law which changes so materially the terms of a contract, does not impair it? * * If the assent of all parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old charter? * * * A charter is a contract, to the validity of which the consent of both parties is essential, and, therefore, it cannot be altered or added to without such consent."

Per Washington, J., Dartmouth College vs. Woodward, 4 Wheat. 662-3.

The second section of the amendatory act of 1856, undertakes to do just this thing (to add to the number of the trustees, by creating an Executive Council of twenty-five), and is, therefore, as I have said, unconstitutional and void, unless such power was reserved in the act of incorporation—and as we have said, there was no such reservation. The provisions of the other sections of the act of 1856, viz.: sections one (1), three (3), and four (4), may be constitutional, and, therefore, operative and binding upon the corporation if, at any time, by its corporate act, it (the corporation) has assented to and accepted the provisions of those sections (sections 1, 3, and 4), and not otherwise.

The passing of the act by the Legislative Assembly, and offering it to the corporation, does not give such assent. The assent must be by an actual acceptance of the act by the corporation, and not by those who may have claimed to act with some one or more of the trustees, without

authority so to do. The acceptance must be the corporate act of the corporation.

Allen vs. McKean, supra.

I am informed that the corporation never accepted the act of 1856, as a whole (they may have "acquiesced" in it). By a reference to Exhibit "B," in the Appendix, it will be seen that on the twenty-third day of May, 1877, the corporation did, at a legal meeting of the corporation, by its corporate act, adopt the provisions contained in sections one, three, and four, and rejected the provisions contained in section two, or, rather, declined to accept them. This they had an undoubted right to do; and so much of the act of 1856 as was then and there so accepted, is operative, and, therefore, binding upon the corporation, unless it be inconsistent with and in violation of the essential purposes and objects of the trust created by the charter. It has been held by the courts, as a principle of the law of corporations, that although the original charter must be accepted as a whole—as an entirety, and without condition—yet, after the acceptance of the charter, a corporation may accept a part or parts of a legislative act in amendment of its charter; and so much of such acts as are accepted will be binding upon the corporation, provided that such amendatory acts, or such parts of such acts as are accepted, are not inconsistent with, or repugnant to, the essential objects and purposes of the trust. "In the *King vs. Passmore*, Lord Kenyon says, that an existing corporation cannot have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter."

3 *Term R.* 246.

Dartmouth College vs. Woodward, per Washington, J., supra.

Angel & Ames on Cor., sec. 85.

Granting, however, for the sake of the argument, that section two of the act of 1856 is constitutional, the question then arises, has the act of 1856, as a whole, ever been accepted and assented to by the corporation? It is claimed by the committee that the corporation has accepted and assented to the amendatory act. Let us examine the records kept by the Executive Council. First, however, let us examine the record of the proceedings of the Society at the meeting last immediately preceding the passage of the act of March 1, 1856. The entry in the record is as follows:

"FEBRUARY 1, 1856.

"The Society assembled at the First Presbyterian Church, and listened to the Annual Address by Hon. H. H. Sibley. On motion of Mr. Neill, a copy was requested for publication.

"On motion of D. A. Robertson, Dr. E. K. Kane was elected an honorary member.

"Society then adjourned."

This is all there is of the record. When the meeting adjourned, it adjourned without day. It does not appear that any notice was given at this meeting of a special meeting to be held at some future time.

The next meeting of the Society, of which there is any record, was held on the twenty-first day of March, 1856. And as it was at this meeting, if ever, that the Society accepted the amendatory act, I here insert so much of the record of the proceedings of that meeting as bear upon the question of acceptance.

"SPECIAL MEETING, FRIDAY, MARCH 21ST, 1856, 3 O'CLOCK P. M.

"Society met pursuant to notice. * * * The act amendatory of the charter of the Society, passed by the last Legislature, was read by the Secretary.

"On motion of D. A. Robertson—

"Resolved, That the amendatory act be accepted by the Society, and that we now proceed to the election of an Executive Council.

"A committee of three was appointed to report names of persons to compose the Council.

"Messrs. Robertson, Selby, and Owens were appointed said committee. They retired, and soon reported the following Executive Council." (Here follows the list of twenty-five names, but three of which were members of the corporation—the committee reporting themselves as members of the Council. Thus was the Society largely increased in the number of its members.)

"The gentlemen nominated were unanimously elected as the Council.

"On motion, the Secretary was instructed to inform the members of the Council of their election, and to call a meeting of the same at such time as he may designate.

"On motion of J. P. Owens—

"Resolved, That the Building Committee be instructed to open a correspondence with the railroad and steamboat companies between St. Paul and distant parts, to solicit their co-operation to the extent of twenty free tickets, for scientific and literary gents, to the celebration of laying the corner stone of the Society building."

(The above is all that the Executive Council has ever done, or attempted to do, in the way of adopting the act of 1856.)

This would seem to be a little the most remarkable meeting of a society of which we have any account in ancient or modern times, in history, sacred or profane.

It was a *special meeting*. There is no record of any notice of the meeting. The records do not indicate where the meeting was held, or who was present at the meeting, except the following named gentlemen: Alexander Ramsey, D. A. Robertson, J. W. Selby, J. P. Owens, and E. D. Neill. It does not appear that any other person was present. Neither one of these gentlemen was an original corporator, nor had any one of them been elected, by the original corporators, as the successor of any one of the original corporators. It was at such a meeting that it is now claimed the amendatory act of 1856 was accepted and assented to. It was

on the motion of Col. Robertson that the act was accepted, and he was one of a committee, with Messrs. Selby and Owens, to report names of persons to compose the Executive Council. The gentlemen nominated by this committee were unanimously elected as members of the Council. This action was had at a special meeting, no notice of which was ever received by the original corporators; so far as appears from the record, not a single one of the original corporators was present. The meeting was held—no one knows where—and the highly important business of acting upon the question of the acceptance of the amendment to the charter was transacted, and the Executive Council elected—and by whom? By five gentlemen who were not of the corporators, and who could no more bind the corporation, or give its assent to the act of 1856, than five gentlemen from Kamschatka.

Will any one for a moment seriously claim that this action of the five gentlemen above named, at this special meeting—held, no one knows where—was an acceptance of the act of 1856, by the corporation, and that it (the corporation) then and there consented to the amendatory act? Such a claim is too absurd to receive any serious consideration.

It may be claimed, and it is in fact claimed by the committee—for they say in their report (Exhibit "C"), "If there had been any doubt of the legislative right to amend, that has been waived by the original corporators themselves, who, acting through their recognized officers, formally accepted the act, and for twenty years have acted under it, accepting the recognition and bounty of the State, acquiring property through the contributions of life and other memberships, who relied upon the validity of the act,"—that if the corporation, by its board of trustees, has not accepted the provisions of section two (2) of the amendatory act of 1856, it has, nevertheless, acquiesced in and acted under the provisions of said section. To such claim, if it is made (and it is), I answer, that mere acquiescence in such legislation is not sufficient; nay, more, if it had been accepted by the corporation, it would not avail anything, for the reason that that section (2) of the act of 1856 is clearly unconstitutional, and its acceptance, in good faith, by the corporation, by a consent given by its corporate act, could not give it any validity or effect.

In the case of *Allen vs. McKean* (the Bowdoin College case), Judge Story said: "But it is said that the boards have assented to the act, and have adopted it; and it has, therefore, become binding upon the college. I think that the argument is not correct. The boards have not adopted it, they have merely '*acquiesced*' in it, a phrase evidently chosen *ex industria* by the boards as expressive of mere submission to the legislative will, and not of approbation of a course, which might naturally be adopted, to avoid a direct collision with the Legislature, and as a respectful appeal for a future revision of the act by the Legislature itself. But if the acquiescence of the boards could be construed into an approval of the act (as, I think, it ought not to be), still that approval cannot give effect to an unconstitutional act. The Legislature and the boards are not the only parties upon such constitutional questions. The people have a deep and vested inter-

est in maintaining all the constitutional limitations upon the exercise of legislative powers; and no private arrangements between such parties can supercede them."

Allen vs. McKean, 1 *Sum. C. C. R.* 276.

In this connection, upon the reasoning of Judge Story, it may be said that, even if the trustees of the Historical Society have "acquiesced" in permitting strangers to the trust to act with them in executing the trust, those strangers have not acquired any rights, either vested or otherwise. The trustees had no right to do so, it was not within their power. It was an illegal act; and any private arrangement between the trustees and such strangers to the trust, could not make it legal.

No act, or part of any act, which has not been accepted by the corporation, is of any binding force or effect upon it; therefore, the Executive Council of twenty-five, created by the amendatory act of 1856, and which, by the act of 1875 was increased to thirty, has no legal existence, as a part of this corporation, except in so far as the same is composed of the original corporators and their successors, by them elected.

The alleged acceptance of the act of 1856, by the gentlemen present at a special meeting of themselves, held somewhere, on the twenty-first day of March, 1856, was not the act of the corporation. Had it been the corporate act of the Society, it would not avail anything, because, from the authorities, it is clear that the second section of that act is unconstitutional, and therefore void. It follows therefore, that inasmuch as "the legal standing of the present council rests upon the amendatory act of 1856," the claim of the committee, "that this council is the legal representative of the corporate powers of the Society," must fall to the ground. The second section of the act of 1856, being unconstitutional, no acceptance of, or assent to its provisions by the corporation, can give it life and effect. If this be true of an act of the corporation, how much more true is it of the action of the five gentlemen who somewhere held a special meeting on the twenty-first of March, 1856.

The committee claim that the Executive Council is the legal representative of the corporate powers of the Society. In their report they say:

"If the position taken by the corporators is correct, that this council is not the legal representative of the corporate powers of the Society, then clearly the minutes we keep are not the records of the Society, but a record book of "patrons," and for twenty years or more, there have been no legal meetings of the corporation; while, on the other hand, if we are the legal controlling body, then the old corporators are '*functus officio*,' and their action of no force, and should have no place on our records."

I am quite willing to admit that "the minutes we keep are not the records" of the corporation; they are the records of the self constituted Executive Council. Admit, if desired, for the sake of argument, that "for twenty years or more there have been no legal meetings of the corporation." What of it? Does that fact of itself and alone, if true, make the Executive Council the legal representative of the corporate powers of the cor-

poration? Certainly not. A non-user of corporate franchises for more than twenty years even, will not dissolve a corporation, until the default has been judicially ascertained and declared. When, and by what judicial process were Gen. Sibley and his fellow members of the Board of Corporators ousted from the trust? What court has, by judicial investigation, upon the complaint of any one, first ascertained and then declared a default?

Who, I ask, placed the corporate franchises of the Society in the hands of the Executive Council without first removing the corporators through the intervention and by the instrumentality of the courts? The Legislature could not do it. It does not possess the power to do such an act. This delicate, difficult and highly important act appears to have been attempted by the five gentlemen who composed the special meeting of March 21st, 1856.

It would seem fitting and proper, under the circumstances, that the corporators should refuse to recognize the jurisdiction of that tribunal, and decline to be ousted by any such star-chamber proceedings.

As has been said, the Executive Council has not gained by prescription any rights over the corporate franchises of the Society. If they have, for more than twenty years, exercised certain powers, which have been "acquiesced" in by the corporators "to avoid a direct collision" with the Council, it does not avail anything, and they have not gained any rights thereby, and the corporators have not lost any rights. In the language of Waite, C. J., in delivering the opinion of the court in the case of the Chicago, Burlington & Quincy Railroad Company vs. Iowa, "It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user."

If the corporation has lost nothing during these twenty years by a non-user of some of its powers, then it is quite certain that those members of the Executive Council, who are not of the corporators, or the successor or successors of some one or more of the original corporators, have gained nothing by such non-user. The whole power of the corporation was conferred by the charter upon the nineteen corporators, and it follows, that if they have lost none of that power, then no one can have acquired any. This proposition does not require argument.

Having failed to establish, as the committee claim, the legal existence of the Executive Council as a part of the corporation, under the provisions of section two of the amendatory act of 1856, another question arises, which perhaps is entitled to receive some consideration at this time. The question is this: Does the word "associates" in the original act of incorporation, give to those claiming under it, any rights, any legal status, as members of this corporation?

Has the word "associates" in the charter any technical meaning or significance?

If we are right in the position assumed in the argument, and based upon the authorities, that the Historical Society is a private corporation of an eleemosynary character, then the word "associates" has no significance whatever, for the trustees of a charitable trust can have no associates in the trust created by the charter, and confided to them. The duty of executing the trust is imposed upon the corporators—the trustees—and their successors duly elected This trust cannot be assigned, its powers and duties cannot be delegated. The word "associates" here in the charter has no meaning, no force; it is mere surplusage, and by a fair construction of the charter, taken as a whole, it must be so held to be. The word "associates" is almost always found in the charters of commercial and business corporations, and properly so, because it has, in such charters, a technical meaning and significance. Shareholders may associate with themselves others, who are willing to confederate and join with them in the investment of private funds for gain, for their mutual advantage. But in trust corporations it should never, for the reasons above stated, be found. This word in the charter of the Historical Society was doubtless inadvertently inserted by the person who drafted the act, and cannot give to anyone, any rights or powers not otherwise given to him by the charter.

The office and duties of trustees being matters of confidence, cannot be delegated by them to others. They cannot add to their number "associates" to aid in the execution of the trust.

Suppose, however, that the position assumed by the committee is correct, and that the trustees of the corporation have the right and power, with the sanction of legislative authority, to add to the membership of the corporation, by associating with themselves, in the trust, twenty-five life members, with the same rights, powers, and duties as themselves; may they not, with equal right and propriety, add fifty, five hundred, five thousand, or even five hundred thousand, if that number can be found—and I can see reason why that number cannot be found, if the trustee have the right, in seeking for such associates, to go over the United States, and even Europe, for them—who are willing to become life members? What would be the result? How would this vast membership act in the execution of the trust? How would the trust be managed? Is it the policy of the law of trusts to so enlarge the number of those who are to execute the trust, that the responsibility of carrying out the will and intention of its founder shall become so disintegrated and weakened, that it can nowhere be fixed and placed, and no one reached and punished for malfeasance in the execution of the trust? If this be so, then there can no longer be any security to eleemosynary grants. The policy of the law, however, is to fix this responsibility upon a comparatively small and compact body of men who can be reached, and can be compelled to execute the trust according to the will and intention of its founder.

The position assumed by the committee, that the trustees have the right to so act, would tend to destroy all faith and confidence in trusts, and would ultimately annihilate them, because if the trustees may, with the

aid of the Legislature, in this way (adding to their number) defeat the will and intention of the founder of a trust, then they may in any and every other way, until nothing remains of the trust created.

In the St. Charles College case, 44 Mo. 570, above cited, Bliss, J., in delivering the opinion of the court, said: "If the Legislature had power, with the concurrence of the curators, to make the amendment of 1847, to the charter of St. Charles College, is there any limit in this regard? May not any changes be made? If the original trust, in all its requirements, is not obligatory, where shall the line be drawn? And what is to hinder a total perversion of the fund? If a change can be made so material as one affecting the choice of curators, I can see no limit, and there would be no security in eleemosynary grants."

And Judge Story, in the Bowdoin College case, said: "If the Legislature could add one new member of its own choice, and not of the choice of the charter boards, it could add any number whatever—five, or fifty, or five hundred. It could annihilate the powers and privileges of the charter boards, under the pretence of alteration and extension."

In this connection, it seems to me, there is a pertinent enquiry that may be made, and that is this: Is there any occasion, that can be suggested, why—even if it could be done—the number of trustees (that is, members) of the Historical Society should be increased? Is it claimed that at any time, since the creation of the corporation, the corporators and their successors have failed to appreciate the responsibilities of their trust, or that they have neglected and refused to perform and discharge all the duties imposed, with impartiality and fidelity, and with an eye single to the interests of the Society, and the public, who are so deeply interested in it? I am confident that no person can be found who ever has, or will make any such claim; but if there should be, the trustees may point with just pride to the monument—"more lasting than brass"—that has been erected within the walls of the Capitol, under their watchful care and supervision, and ask, Wherein have we failed in the execution of this great trust? "Faithful unto the end," has been their motto, and faithful unto the end have they been.

That they have comprehended and appreciated *the* responsibilities of this great trust is shown not only by the work they have done, but also by the written record of their proceedings, which is found in the Appendix, Exhibit "B."

Let this record of the proceedings of the corporators be contrasted with one of the acts of the so called Executive Council. I quote from the records of the Council. At a meeting of the Council in January, 1865, "*On motion of Col. D. A. Robertson, it was resolved that a committee of three be appointed to enquire into the expediency of disposing of the lots owned by the Society.*" And this was an attempt to pervert the trust, and was in violation of the act of incorporation as amended by section one of the act of 1856.

The committee say, "The active devotion to the interests of our body,

on the part of gentlemen acting with the old corporators, forbids the belief that they had in view any object but the well being of the Society."

From such "active devotion" as is indicated in the resolution just quoted, the corporation and the public may well exclaim "Good Lord deliver us."

The disposition of the property of the corporation in the manner contemplated by the mover of the resolution would not be very likely to promote "the well being of the Society."

The Executive Council which claims to represent the corporate powers of the Society, soon after the enactment of the amendatory act of 1856, adopted a Constitution and some By-Laws. Let me make a single quotation from those By-Laws. Article eight defines the duties of the "Business Committee," and is as follows: "The duties of the Business Committee shall be to propose appropriate subjects of enquiry, and suggest the best means of promoting the object of the Society, to appoint a committee to edit and superintend the publication of any works authorized by the Society, to appoint persons residing in different sections of the country as commissioners, (which appointment shall constitute such persons members of said Society); to call special meetings of the Society; to direct the correspondence of the Secretary; to order the disbursements; to audit all accounts presented; *to fill vacancies* occasioned by death, removal or resignation of officers; to procure suitable persons to deliver, at the annual meetings, (and at such other times as the Council may decide,) addresses before the Society, and do such other business as may not be specially delegated by the Society. *Three shall constitute a quorum for the transaction of business.*"

Here we have a wheel within a wheel, or to make use of a common expression "a ring within a ring." The whole power of the Society, as represented by the Executive Council, is concentrated in three persons. *They may make members of the Society*, they may *appoint its officers*, and do anything which a quorum of the corporators under the charter might do. The charter makes five members a quorum. This provision substantially makes three members of the Business Committee a quorum, because, by this article of the By-Laws, they are invested with sweeping powers. This is a substantial violation of the act of incorporation.

Under this provision of the By-Laws, at a meeting of the Business Committee, held at the Capitol May 6th, 1858, four of its members being present, nine active members of the Historical Society were elected.

The following is the minute of the proceedings of the meeting, as appears from the record:

"MAY 6th, 1858.

"Business Committee met at room in Capitol. Present, Messrs. Ramsey, Marshall, Neill, and Payne. Minutes of last meeting read. The following nine members were proposed and elected as active members."

Is it claimed that this Business Committee of the Executive Council possess the power to do that which the corporators, under the charter,

could not do? This is what they attempted to do. The corporators could not make members in this way.

The charter provides for the following officers: A President, *two* Vice Presidents, a Treasurer, and a Secretary.

The constitution adopted by the Council provides for a President, *three* Vice Presidents, Treasurer, and a Secretary.

These are only instances of similar transactions, but I forbear to make further quotations. I have made these for the purpose of showing the views taken by members of the Executive Council, of the responsibilities of a trust like that which was, by the charter of the Historical Society, confided to the corporators and their successors.

I understand that a *resume* of the proceedings of the Executive Council is now being prepared by one who is familiar with them; and as a further examination of the records is not required in this paper, I leave them, with the suggestion, that a careful examination of the records from which the foregoing extracts were taken, will probably satisfy those who are interested in perpetuating the trust created by the charter of the Historical Society, that the object and purposes of its founder, and the interests of the public, will be best promoted by continuing the powers conferred, and the duties imposed by the trust, in the conservative hands of those named in the act of incorporation, and their duly elected successors.

THE STATUS OF LIFE MEMBERS.

The trustees doubtless have the right, in the proper execution of their trust, to compliment and honor those gentlemen who have, from time to time, deeply interested themselves in behalf of, and conferred lasting benefits upon the Society; the same right, probably, which universities, colleges and other institutions of learning, charity, science and art, exercise in conferring honorary degrees upon their benefactors and patrons, and others who have distinguished themselves in the liberal professions, literature, and in the arts and sciences.

The trustees did a right and proper thing, in making these distinguished, benevolent and public spirited gentlemen, "Patrons" of the Society.

For the honor bestowed and for the purpose of aiding and promoting the objects and purposes of the Society, these gentlemen cheerfully gave the small fee required, and could not have expected thereby to become members of the corporation. The trustees could not make them members—they could not confer powers which they did not possess.

"The company could not grant or pledge more than it had to give."
Waite, C. J., Chicago, Burlington & Quincy Railroad Company vs. Iowa, 4 *Otto*, 162.

The life members of the Society are "Patrons," and as such, have the same rights that any citizen of the State may have to the privileges and benefits of the Society, and nothing more.

THE RIGHTS, POWERS AND DUTIES OF THE TRUSTEES.

But little can be said upon this branch of the case, because, from the nature of the case, questions may arise, from time to time, which cannot be anticipated, and which can only be answered as they arise. It is safe, however, to assert the general proposition, that the rights of the members of the corporation are such, and such only, as are conferred upon them by the charter which created them, and the trust which they have accepted, and which they are in honor and in conscience bound to execute; that their powers are such, and such only, as are given to them by the laws of the land, to enable them to execute the trust according to the terms and conditions thereof, and to carry out the will and intention of its founder; and that their duties are to faithfully and impartially execute the trust, and thus carry out that will and intention, and to transmit, through their successors, that trust, unimpaired, in perpetuity, so that all who shall come after them may share and enjoy the ever increasing privileges and blessings that will surely flow therefrom.

APPENDIX.

EXHIBIT "A."

CHARTER.

"AN ACT TO INCORPORATE THE HISTORICAL SOCIETY OF MINNESOTA."

[Approved October 20, 1849.]

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

That C. K. Smith, David Olmsted, H. H. Sibley, Aaron Goodrich, David Cooper, B. B. Meeker, A. M. Mitchell, T. R. Potts, J. C. Ramsey, H. M. Rice, F. Steele, Charles W. Borup, D. B. Loomis, M. S. Wilkinson, L. A. Babcock, Henry Jackson, W. D. Phillips, Wm. H. Forbes, Martin McLeod, (and their associates,*) be and they are hereby constituted a body corporate and politic, by the name and style of the "Minnesota Historical Society," and by that name, they and their successors shall be, and they are hereby made capable in law, to contract and be contracted with, sue and be sued, plead and be impleaded, prosecute and defend, answer and be answered, in any court of record or elsewhere, and to hold any estate, real, personal, or mixed (and the same to grant, sell, lease, mortgage, or otherwise dispose of for the benefit of said Society), and to receive donations to be applied as the donor may direct, and to devise and keep a common seal; and to make and enforce any by-laws not contrary to the constitution and laws of the United States or this Territory; and to enjoy all the privileges and franchises incident to a corporation (and that the property which the Society may be allowed to hold, shall not exceed five thousand dollars).

SEC. 2. Be it further enacted, That any five members may, at any meeting of said Society, constitute a quorum to do business, and shall, within one year from and after the passage of this act, organize, and, under such regulations as they may adopt, elect a President, two Vice Presidents, a

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* Passages in parenthesis are supposed to be inoperative. (See Act of 1856, next page.)

Treasurer, and a Secretary, who shall record the proceedings, do the correspondence, and file all communications he may receive touching the object of the Society; which said officers shall hold their offices respectively until their successors are elected, which may take place every three years. The regular meetings of said Society shall take place on the second Monday succeeding the annual meeting of the Legislative Assembly of said Territory, at the seat of government, and the object of said Society shall be the collection and preservation of a Library, Mineralogical and Geological specimens, Indian curiosities, and other matters and things connected with, and calculated to illustrate and perpetuate the history and settlement of said Territory.

"AN ACT TO AMEND AN ACT, ENTITLED, 'AN ACT TO INCORPORATE THE HISTORICAL SOCIETY OF MINNESOTA.'"

[Approved March 1, 1856.]

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

SECTION 1. That in addition to the privileges and immunities granted, and duties assigned to the Minnesota Historical Society, by the act approved October 20, 1849, the said Society shall be allowed to receive by bequest, donation, or purchase, any amount of property, real or personal, and shall hold the same in perpetuity, as a sacred trust, for the uses and purposes of said Society, without in any manner mortgaging, or by debts encumbering such property now in possession, or thereafter to be acquired; nor shall any such property be liable, in any manner or form whatever, for any debt contracted by said Society; and the real property now vested in the Society, in the city of St. Paul, and the building hereafter to be located thereon, as a hall for the same, and the personal property of the Society, shall be exempt from taxation.

SEC. 2. (As soon as convenient after the passage of this act, the Society shall elect an Executive Council, consisting of not more than twenty-five members of the Society, who shall hold their office for the term of three years, and until their successors are elected, which election shall thereafter take place triennially. The Executive Committee shall elect and appoint all officers, and such agents and collaborators of the Society, resident and non-resident, as they may deem necessary or useful, and the Executive Council shall have the custody of all the property, real and personal, of the Society, and shall frame such By-Laws and constitution for their government as they may deem expedient, and do all other things not inconsistent with this act, essential to the prosperity of the Society.)*

"SEC. 3. The objects of said Society, with the enlarged powers and duties herein provided, shall be, in addition to the collection and preservation of publications, manuscripts, antiquities, curiosities, and other

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* Section 2 of this Act has not been adopted by the Corporation, and is not supposed to be valid. (See opinion to which this is appended.)

things pertaining to the social, political and natural history of Minnesota, to cultivate among the citizens thereof a knowledge of the useful and liberal arts, science, and literature."

"SEC. 4. That all acts and parts of acts, so far as they are inconsistent with the provisions of this act, are hereby repealed."

AN ACT TO AMEND CHAPTER XV, SESSION LAWS OF 1856, IN RELATION TO THE HISTORICAL SOCIETY.

[Approved Feb. 19, 1875.]

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That chapter XV of the Session Laws of 1856, entitled "An act to amend an act entitled 'An act to incorporate the Historical Society of Minnesota,'" be and is hereby amended so as to increase the number of members composing the Executive Council to thirty.

SEC. 2. The Governor, Lieutenant Governor, Secretary, Auditor, and Treasurer of State, and the Attorney General, shall be ex-officio members of the Executive Council.

SEC. 3. This act shall take effect and be in force from and after its passage.

[EXTRACT FROM THE CONSTITUTION OF THE STATE, ART. XV, SEC. 1.]

In the event of the seat of government being removed from the city of St. Paul to any other place in the State, the Capitol building and grounds shall be dedicated to an institution for the promotion of science, literature, and the arts, to be organized by the Legislature of the State, and of which institution the Minnesota Historical Society shall always be a department.

THE OLD SETTLERS' ASSOCIATION.

At the meeting to organize the "Old Settlers Association of Minnesota," it was resolved:

"WHEREAS, The objects of this Association, and the individuals composing the same, are closely allied to and identified with that of the 'Historical Society of Minnesota,' therefore,

"RESOLVED, That up to the period in which this Association shall possess a Hall in which to meet, its place of meeting shall be the Hall of said Historical Society."

The archives, records, and property of the "Old Settlers Association" are deposited with the Historical Society, and will ultimately become its property.

EXHIBIT "B."

RECORDS AND BY-LAWS OF THE CORPORATION OF THE HISTORICAL SOCIETY OF MINNESOTA.

At a meeting of the surviving corporators, or charter members, of this Society, held at the office of Gen. H. H. Sibley, in the city of St. Paul, on Wednesday, the 2d day of May, 1877, the following members being

present, to-wit: Henry H. Sibley, Henry M. Rice, J. C. Ramsey, Franklin Steele, and Aaron Goodrich, the following proceedings were had:

Henry H. Sibley was elected President, and Henry M. Rice chosen Secretary. During the session, matters of interest to the State, as well as the corporation, were briefly discussed. An inspection of the charter, revealing the melancholy fact that a majority of the corporators had departed this life. upon the suggestion of their deaths, an instrument, of which the following is a copy, was signed, sealed, and ordered to be spread upon the journals, and filed in the office of the Secretary of State.

CORPORATION OF THE HISTORICAL SOCIETY OF MINNESOTA, ST. PAUL.

To Whom it may Concern:

WHEREAS, Of the *Charter* members, created by an act incorporating the MINNESOTA HISTORICAL SOCIETY, approved October 20th, 1849, those whose names are hereunder written, have departed this life, to-wit:

Charles W. Borup,
Lorenzo A. Babcock,
William H. Forbes,
Henry Jackson,
Bradley B. Meeker,
A. M. Mitchell,
Martin McLeod,
David Olmsted,
William D. Phillips,
Thomas R. Potts,
C. K. Smith.

—Thereby causing *eleven* vacancies in the Board of Corporators.

Therefore, Know Ye, that the undersigned surviving members and corporators, named in said act of incorporation, or *Charter*, that they may maintain that *perpetual succession* therein contemplated, *have elected, constituted, and appointed*, and by these presents do elect, constitute, and appoint—

Lathrop E. Reed,
Henry Hale,
John M. Berry,
Norman W. Kittson,
John S. Prince,
George L. Becker,
Rensselaer R. Nelson,
Earle S. Goodrich,
John Ireland,
Henry P. Upham,
Ignatius Donnelly,

Members of said *Corporation*, in the place and stead of said deceased charter members.

IN TESTIMONY WHEREOF, we hereunto subscribe our names, and affix our seals, this second day of May, 1877.

[*Done in duplicate.*]

HENRY H. SIBLEY. [Seal.]
AARON GOODRICH. [Seal.]
J. C. RAMSEY. [Seal.]
HENRY M. RICE. [Seal.]
FRANKLIN STEELE. [Seal.]
DAVID B. LOOMIS. [Seal.]
MORTON S. WILKINSON. [Seal.]

To which is appended the following certificate:

STATE OF MINNESOTA,
OFFICE OF SECRETARY OF STATE.

I hereby certify that the original instrument, of which the foregoing is a copy, was filed in this office on the 22d day of May, 1877.

{ Great Seal of the State. }

T. M. METCALF,
Ass't Sec'y of State.

Whereupon the meeting adjourned until the 23d instant, at 11 A. M.

HENRY H. SIBLEY,
President.

Attest: H. M. RICE,
Secretary.

ADJOURNED MEETING OF THE CORPORATION.

ST. PAUL, May 23d, 1877.

An adjourned meeting of the corporators was this day held at the office of Gen. Henry H. Sibley, the following members being present, to-wit:

Henry H. Sibley, Norman W. Kittson, Henry M. Rice, John S. Prince, Lathrop E. Reed, Earle S. Goodrich, and Aaron Goodrich.

President Sibley in the chair. Earle S. Goodrich acted as Secretary.

The minutes of the last meeting were read and approved.

Various measures were considered, and the following adopted:

Resolved, That a committee of three be appointed by the chair, instructed to report upon the legal propositions involved in the questions hereinafter propounded.

Whereupon the chairman appointed Aaron Goodrich, L. E. Reed, and John S. Prince such committee, who, after consultation, submitted the following

REPORT.

QUESTION 1ST.—*What are the attributes of the corporation known as* THE HISTORICAL SOCIETY OF MINNESOTA, *chartered October 20th*, 1849?

That institution is a body politic and corporate, and represented by the nineteen (19) corporators (or trustees) named in the act creating the same; these and their successors having perpetual succession.

QUESTION 2D.—*When vacancies occur in the Board of Corporators of that institution, by what process should they be filled?*

All vacancies should be filled by the surviving corporators, the right of substitution being inherent in that body.

QUESTION 3D.— *Who are members of the Historical Society of Minnesota?*

The nineteen (19) original corporators, selected and entrusted by the State, and after their demise, their successors duly elected by a quorum of the surviving corporators, or *their* successors, should ever constitute the membership of said corporation or Society.

QUESTION 4TH.—*Can the number of corporators in said Society be increased, and, if so, by what process?*

These corporators cannot add to their numbers, for the reason that the charter does not confer this power; neither can the State, as it did not, in the charter, reserve the right to repeal, alter, or amend that instrument; therefore, that charter stands out in the nature of a *contract*, the obligations of which cannot be impaired, either by the corporation or the State. Herein reside those vital "checks and balances" so essential to the stability and perpetuity of all institutions of this character, without which, neither public faith nor private confidence can be inspired or maintained.

QUESTION 5TH.—*Can these corporators lawfully confide the management of The Historical Society, or its property, to parties outside the corporation, and strangers to its trusts?*

These corporators, being the *fiduciary* agents or guardians of a trust declared to be sacred and perpetual, possessing no property interest in the institution, or disposing power over its assets, cannot transfer this trust to parties outside the corporation—*the agency of an agency* being obnoxious to the law of trusts. Hence it is the duty of each corporator, so far as he may, while living, to act wisely and faithfully in giving to posterity the benefits for which this institution was created.

QUESTION 6TH.—*Are there life members or memberships attached to this corporation, and if so, by what authority were they created?*

The Legislature has never created such members or memberships, save of those named in the charter, or attempted to confer the power upon this corporation to do so, save in the matter of electing successors to demised corporators; it would seem, therefore, to follow, as a necessary consequence, that, in legal contemplation, there are none. This being an *executive*, not a *legislative*, body, the creature of the charter by which it was created, to the powers and scope of this instrument the corporation can add nothing, even under the pretext of enacting by-laws, the faithful execution of the trust therein created constituting its sole mission. This is not a business, working, or money corporation, in which the agents represent their personal interests. We repeat, it is a *trust*, in the management of which they may take no outside risks, form no alliances, while its by-laws should be little more than formulated rules, defining the order of its business, always remembering that the powers of the corporators are defined in the charter, and that these cannot be increased by the adoption of by-laws.

Question 7th.—*What action should be taken, if any, by this corporation, in relation to, "An act to amend an act entitled an act to incorporate the Historical Society of Minnesota," approved March* 1st, 1856; *also, in regard to "life" and other memberships?*

Responsive to this *seventh* proposition, your Committee offer the following:

Resolved, That the provisions contained in sections one (1), three (3), and four (4), of the act above mentioned, be and the same are hereby accepted, adopted, and declared to constitute a portion of the fundamental law of this corporation. And be it

Resolved, That all persons outside of this corporation, heretofore regarded by some as life members of the Historical Society of Minnesota, be, and they are hereby declared to be, *patrons* and *honorary life members* thereof. And be it

Resolved, That, for the purposes of defining the legal *status* of this corporation, or enabling its corporators to perform their duty under the charter, no further legislation is required. And be it further

Resolved, That the principles involved in the above questions, answers, and resolutions, be regarded as furnishing a guide to the action of this corporation, in all matters to which they may justly apply.

All of which is respectfully submitted.

AARON GOODRICH,
LATHROP E. REED,
JOHN S. PRINCE.

The report was unanimously adopted.

It was further

Resolved, That a committee of three be appointed by the chair, instructed to report, to a subsequent meeting, a brief code of by-laws, intended as a guide to this Board in the conduct of its corporate business.

Whereupon, the chair appointed Aaron Goodrich, L. E. Reed, and John S. Prince, such committee.

Mr. Reed declining, on account of pressing business engagements, Earle S. Goodrich was appointed in his stead.

On motion of John S. Prince, it was

Resolved, That the proceedings of this, and the last preceding meeting of this Board, be engrossed, and presented to the Executive Council of the Historical Society, with the request that the same be spread upon its journals.*

R. R. Nelson, Aaron Goodrich, and H. P. Upham, were constituted a

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* Of the above record of the Board of Corporators, Messrs. Drake, Sanborn, and Robertson say (see Exhibit "C"):

"The proceedings referred to we are requested to place on the files or records of this Society. We cannot recommend that the request be granted."

committee, and instructed to present the above named proceedings, resolutions, and request to said Executive Council.

On motion of Henry M. Rice, the Board adjourned, to meet at the office of Gen. H. H. Sibley, on Monday, 11th of June next, at 11.30 A. M.

ADJOURNED MEETING OF THE CORPORATION OF THE HISTORICAL SOCIETY.

ST. PAUL, Monday, June 11th, 11½ o'clock A. M. 1877.

An adjourned meeting of the corporation was this day held at the office of Gen. H. H. Sibley. Members present: Henry H. Sibley, Henry M. Rice, J. C. Ramsey, Franklin Steele, R. R. Nelson, George L. Becker, John S. Prince, H. P. Upham, and Aaron Goodrich. President Sibley in the chair.

The minutes of the last meeting were read and approved.

BY-LAWS OF THE HISTORICAL SOCIETY OF MINNESOTA.

[Adopted June 11th, 1877.]

The undersigned Committee on By-Laws submit the following

REPORT.

Objects, Powers, and Duties.

SECTION 1. The objects, powers, and duties of this corporation are defined in its charter.

These powers cannot be increased by the action of its members, neither should its objects or duties be disregarded; among the latter are, the collection and preservation of a Library, Maps, Charts, Manuscripts, Pamphlets, Paintings, Mineral and Archæological Curiosities, material illustrative of the Civil, Religious, Literary, and Natural History of the State; to note the presence and decay of the Indian tribes once within our borders, to rescue from oblivion the memory of the early pioneers, to obtain narratives of their exploits, perils, and adventures, to exhibit the past and present resources of Minnesota, to promote the study of history, and diffuse information touching the general progress of the State.

Members.

SEC. 2. This corporation is composed of those named in the charter, and their successors duly elected. This body may declare those who have aided the institution, either by means or influence, to be patrons, honorary, life, or corresponding members, and on their demise, shall cause such memorials of said members, their lives, and acts of munificence, to be published in its annals, as shall be just to their memories.

Vacancies in the Board.

SEC. 3. It shall be the duty of the Secretary to advise the President of the demise of any member of the Board of Corporators, at the next quarterly meeting after the same shall occur (*see section* 13), when, at the next quarterly meeting succeeding such announcement, the Board shall elect his successor. Two negative votes shall prevent an election.

Vacancies in Office.

SEC. 4. Official vacancies shall be filled by special election, at the next quarterly meeting after the same shall occur; those thus elected shall serve during the unexpired term of their predecessor.

Government.

SEC. 5. The government of this Society is vested in the Board of Corporators, upon whom devolves the duty of executing the perpetual trust created by the charter. To these powers the corporators, standing in the attitude of trustees, can add nothing. Neither can they lease, or otherwise encumber, either the grounds now belonging to this corporation, or the buildings to be erected thereon, or permit the occupation thereof, save by this corporation, and for its sole use and benefit. (*See Interrogatory No.* 5.)

Officers.

SEC. 6. The officers of this corporation shall be a President, a First Vice-President, a Second Vice-President, a Secretary, a Librarian, and a Treasurer. These shall be elected by ballot, at the triennial meetings, and shall serve for the term of three years.

None shall be eligible to the above offices, those of Secretary and Librarian excepted, save members of the Board of Corporators.

Elections, when Held.

SEC. 7. A triennial election of officers shall be held on the second Monday succeeding the meeting of the Legislature in 1878, and every three years thereafter. (*See Charter, section* 2.)

Meetings Annual.

SEC. 8. The annual meeting of this corporation shall be held on the second Monday succeeding the meeting of the Legislature. (*See Charter, section* 2.)

Quarterly Meetings.

SEC. 9. The Board shall meet on the first Monday in January, April, July and October.

Special Meetings.

SEC. 10. The President may order a special meeting, should an exigency arise, upon the written request of five members of the Board. All meetings, unless otherwise ordered, shall be held in the rooms or hall of the corporation.

Quorum.

SEC. 11. Five members shall constitute a quorum for the transaction of business. A lesser number may adjourn. (*See Charter, section* 2.)

Presiding Officer.

SEC. 12. The President, or in his absence, a Vice President, or in the absence of these, a chairman *pro tempore*, shall preside at all meetings, and shall have a casting vote. He shall decide questions of order, subject to an appeal, and shall appoint all committees, not otherwise provided for. Parliamentary questions shall be determined in accordance with the rules contained in Cushing's Manual.

Secretary.

SEC. 13. The Secretary shall keep the records of the corporation, furnish diplomas to members, give notice of the quarterly, annual, and triennial meetings, and attend to the correspondence of the Board, preserving all letters and laying the same before its members, at their quarterly meetings, and shall, on being advised of the death of a member, record it, carefully noting time, place and circumstance, and report the same to the next meeting; he shall also make a written report of the operations of the Society, at the annual meetings, and may perform the duties of Librarian. For which services he shall receive such compensation as may be determined by the Board. (*See Librarian, also section* 3.)

Librarian.

SEC. 14. The Librarian shall have charge of the Library and cabinet, the care and arrangement of books, manuscripts, maps, pamphlets, etc., and shall arrange, classify, and keep the same in order, and shall prepare a catalogue thereof, and keep a book, in which shall be recorded all donations to the Society, with the name of the donor, and date of donation, and shall acknowledge the receipt thereof, and label such donations with the title of this Society and name of the donor, and shall, under no circumstances, permit any book, manuscript, document, or any article belonging to the Society, to be removed from its rooms. At each quarterly meeting, he shall report the donations received since last meeting, and at the annual meeting, shall make a full report of the condition of the Library, and he shall receive such compensation as shall be fixed by the Board. (*See Secretary.*)

Treasurer.

SEC. 15. The Treasurer shall receive all moneys belonging to the corporation, and disburse the same only on the order of the Board, signed by the President and attested by the Secretary; and shall keep a true account of the receipts and payments, and report the same to the Board at its annual meetings, or oftener, if required.

Change in By-Laws.

SEC. 16. No alteration shall be made in these by-laws unless the same shall have been proposed, in writing, at a regular meeting of the Board, at least three months previous, and shall be adopted by the vote of a majority of *all the members* comprising the same; nor shall any rule of action, or by-law, be suspended or its requirements disregarded, save by *such* majority vote.

All by-laws and rules for the government of this corporation, not herein contained, are hereby abrogated.

Standing Committees.

SEC. 17. The Standing Committees shall be as follows:

1. *A Committee on Corporate Rights*, charged with the duty of maintaining the constitutional rights of the corporation.

2. *A Committee on Permanent Building*, who shall devise the best means for securing a building for the corporation.

3. *A Committee on Finance*, who shall examine and report upon all claims against the corporation, including the accounts of the Treasurer.

4. *A Committee on Library*, who shall, with the Secretary and Librarian, have the general superintendence of the library, the exchange of publications, procuring suitable furniture, &c., &c.

5. *A Committee on Publication*, who shall examine all manuscripts, and select those suitable for publication, which they shall edit and supervise, when ordered printed.

6. *A Committee on Property*, who shall have the supervision, under the direction of the Board, of the property of the corporation.

7. *A Committee on Archæology and Ethnology*, who shall discover and record such facts, concerning the history, religion, customs, and habits of the early tribes and present Indian races of Minnesota, as shall be deemed important, and collect and preserve such curiosities as may best illustrate these facts.

8. *A Committee on Obituaries*, who shall be charged with the preparation of memoirs of deceased members and patrons, or the collection of material for the same.

9. *A Committee on Lectures*, who shall make arrangements for such addresses, to be delivered before the Society, as the corporation shall direct.

10. *A Committee on Fine Arts*, who shall arrange such works of art as may become the property of the Society, or be confided to its care.

11. *A Committee on Endowment*, who shall devise plans for the increase of the corporation funds, and their profitable employment.

12. *A Committee on Ante-Columbian Discoveries in America*, who shall, by research and investigation, procure facts pertaining to that period of American history. (This has been erected into a *department* of the Society.)

All Committees, both standing and special, shall report upon the subjects referred, at the next succeeding meeting, if practicable; such report must be in writing, and signed by the members of said committee.

Order of Business.

I. The presiding officer takes the chair.
II. Roll of members called.
III. Minutes read.
IV. Donations received since last meeting reported.
V. Correspondence read.
VI. Reports of standing committees.

VII. Reports of special committees.
VIII. Lectures, papers and obituary addresses read.
IX. Unfinished business.
X. New business.

All of which is respectfully submitted.

ST. PAUL, June 11th, 1877.

AARON GOODRICH,
EARLE S. GOODRICH,
JOHN S. PRINCE.

The report was adopted without amendment or dissent.

CORPORATION OF THE HISTORICAL SOCIETY.
ST. PAUL, December the 8th, 1877.

The matters contained in Exhibit "B" are transcripts from the records of this corporation.

HENRY H. SIBLEY,
President.

Attest:
AARON GOODRICH, Secretary.

EXHIBIT "C."

MAJORITY REPORT OF COMMITTEE.

The committee to whom was referred certain proceedings of a portion of the original corporators of this Society, make the following report:

The proceedings referred to we are requested to place on the files or records of this Society.

We cannot recommend that the request be granted. If the position taken by the corporators is correct, that this council is not the legal representative of the corporate powers of the Society, then clearly the minutes we keep are not the records of the Society, but a record book of "patrons," and for twenty years, or more, there have been no legal meetings of the corporation, while, on the other hand, if we are the legal controlling body, then the old corporators are "*functus officio*," and their action of no force, and should have no place on our records.

In view of the high personal character of all, and the well known legal attainments of several of the gentlemen participating in the proceedings we are called upon to consider, it is proper that we should notice particularly some of the positions taken by them.

It is undoubtedly true that, by the terms of the Organic Act, the parties named therein, or so many of them as consented to and did act, constituted the body corporate, with full power to make rules and by-laws by which others could be admitted as associates, and could become succes-

sors; the original corporators so understood their powers, and at the first meeting elected, as their executive officer, one who was not named in the act; they proceeded, by by-laws, to provide for associates and successors, for an Executive Council who should represent the corporation. Fees for membership were prescribed, and the general working organization provided for, through other agencies than the original corporators as such.

In creating corporations, it has been the almost universal practice of the Congress of the United States, and of the States of the Union, to name corporators in the act, to meet as such, and provide for organizing the corporation. They were understood to hold the corporate existence in a sort of trust, until by the election of directors, or other agents provided for in the Organic Act, or pursuant to by-laws which they are empowered to create, a new executive body should be created, and instantly the functions of the corporators would cease.

We are not aware of any instance, in this country, where the power to perpetuate the corporate board has been exercised by the original corporators, except where that course was provided for by the act creating the body. We are aware that in strictly eleemosynary corporations, founded for purposes of charity, the founder names the trustees of his bounty, and they choose their successors; but we cannot agree that this institution belongs to that class, these are of a private character, this in the nature of a public one, its creation was not for the investment of private capital for gain, nor for private ends of any sort, but for public benefit, in a broad sense, like a department for statistics, a medical or school department of the State. The legal standing of the present Council, however, rests upon the amendatory act of 1856. The legislative power to make the amendment has never before been questioned, and with due deference to the gentlemen who presented the paper now before us, we think can never be judicially impeached. The decisions of our own Supreme Court, and recently the Supreme Court of the United States, establish the doctrine that the right of the Legislature to alter, amend, or repeal a corporate act, is omnipotent, unless the act is of a private character, and apt and specific words of contract inhibit such an exercise of power. This power has been deemed to exist even when its exercise inflicted loss and injury to private property, when, in the language of the Supreme Court of the United States, "The private property is affected with a public interest, it ceases to be *juris privati* only." How much stronger in the case before us is the right of the law making power? In this case neither private right nor private property are affected, but the good of the whole public is involved in the existence of the organization.

If there had been any doubt of the Legislative right to amend, that has been waived by the original corporators themselves, who, acting through their recognized officers, formally accepted the act, and for twenty years have acted under it, accepting the recognition and bounty of the State, acquiring property through the contributions of life and other memberships, who relied upon the validity of the act. Under the present management, this Society has prospered in numbers of its members, in collect-

ing a library, and rescuing from oblivion valuable historical facts. It is believed it possesses the respect and confidence of the people of the State, the Legislature, and of sister societies. We cannot perceive that any necessity exists for raising questions as to the legality of its present organization. The active devotion to the interests of our body on the part of gentlemen acting with the old corporators, forbids the belief that they had in view any object but the well being of the Society, at the same time we feel that their action is calculated to produce discord among those who have heretofore co-operated for the . dvancement of the objects of its creation. Finally, we conclude that the body of gentlemen whose actions are set forth in the paper referred to us, as a body, are not officers, nor in any manner connected with the organization known as the Minnesota Historical Society incorporated October 20th, 1849. That the Executive Council here represented is a lawful body, and that the Society represented by this Council is the Historical Society of Minnesota. If we are correct in this conclusion, it follows that the paper submitted to us can have no proper place on the records, or in the archives of this Society, and we recommend that it be respectfully returned to the gentlemen presenting it.

(Signed,) E. F. DRAKE,
JOHN B. SANBORN,
D. A. ROBERTSON.

4th September, 1877.

EXHIBIT "D."

MINORITY REPORT.

The undersigned minority of a committee appointed by the Executive Council of the Minnesota Historical Society, to examine and report upon the document submitted by the surviving corporators at a late meeting, respectfully, but earnestly, dissent from the arguments, conclusions, and recommendations of the majority report.

First, They believe that the report takes a wrong position in classifying the Society with ordinary corporations formed for business objects, and in assuming that it is a public corporation, for the reasons set forth in the paper under review, presented by the surviving corporators, the legal points in which do not seem to have been duly considered, far less rebutted.

Second, The undersigned can state emphatically, that the surviving corporators deliberated long and carefully before taking the action referred to, and that nothing but a sense of duty to the institution and to the State actuated them in the premises. They regard it as of vital importance to the success and the perpetuity of the Society, that its legal *status* be established beyond question, and any errors, omissions, or irregu-

larities, should such have occurred, be corrected without unnecessary delay.

Third, The majority report is signed by three prominent and able gentlemen, whose opinions and judgment are entitled to great weight, but we respectfully submit that they are but the peers in legal ability of some of the corporators, who have given the whole question a thorough examination before arriving at the conclusions indicated in their written document, and the undersigned particularly protest against the closing recommendation in the majority report, as highly discourteous, and calculated, if adopted, to produce dissatisfaction and discord in the Society, when there should be harmony and unanimity of purpose among the members, and where no personal or private interests should be allowed to interfere, with the legitimate ends for which the corporation was originally created.

Fourth, The undersigned are advised that an elaborate legal opinion is in course of preparation, in reply to the report of the majority of the committee, and they therefore respectfully recommend that no action be taken upon that report until all the documents relating to the subject matter shall be before the Council.

Respectfully submitted,

H. H. SIBLEY,
GEO. L. BECKER.

ST. PAUL, Oct. 1st, 1877.