future, a State banking system shall be needed, these laws, or similar ones, may be enacted, with such changes as will obviate the difficulties which are now encountered. Section 1684, Rev. provides that the State bank laws may be at any time repealed by the General Assembly, and the general banking law, known as the free bank act, may be repealed now without impairing any obligation, as no bank, so far as I am advised, has ever been organized under its provisions.

These acts repealed, the shares in national banks may be taxed at the same rate as other moneyed capital conformable to the limitation contained in section 41 of the Act of Congress establishing national banks. Chapter 108 of the Acts of the 11th General Assembly, will then become operative, and indeed regardless of the provisions of that act, this species of property like all other property would be taxable under the general revenue laws of the State. No good reason can be assigned why this species of property conceded to be at present very profitable and productive to its fortunate owners, should not be compelled to bear its fair and equal share of the public burdens of the State.

The burdens of taxation at present in our State are heavy and severely felt by tax-payers, and the complaint is loud and general that while the merchant, the manufacturer and the farmer is obliged to pay annually from two to four per cent on the value of his property, as State, county, school, and municipal taxes, the man who is fortunate or shrewd enough to get all his property into national bank stock, gets a better and surer return from it, escapes all the burdens of taxation, and at the same time receives equal benefit and protection from the laws and institutions which his less fortunate neighbor pays taxes to maintain, but which costs him nothing.

HENRY O'CONNOR,
Attorney General.

OPINION

OF

THE ATTORNEY GENERAL

ON THE

POWERS OF THE LEGISLATURE

TO

REGULATE TARIFFS ON RAILROADS

IN THE

STATE OF IOWA.

DES MOINES:
F. W. PALMER, STATE PRINTER.
1868.

OPINION.

STATE OF IOWA, OFFICE OF ATTORNEY GENERAL,
DES MOINES, February 3, 1868.

To the House of Representatives:

I have the honor to acknowledge the receipt of the following resolution, from your honorable body, viz:

"That the Attorney General be directed to communicate to this House as early as practicable, his opinion as to whether there is any constitutional or legal barrier to the enactment of a law by the General Assembly of Iowa to restrict and regulate the charges of railroad companies in this State for the transportation of freight and passengers."

In reply I beg leave to state that in my opinion there exists no constitutional or legal objection to the exercise of such power; that the General Assembly possesses full and complete power, under the Constitution and Laws of the State, including the laws of incorporation under which said railroad companies are formed, to pass any and all laws regulating and restricting the rate of compensation for the transportation of freight and passengers, which in the wisdom of the Legislature may be deemed necessary, or which the public good may demand.

While the view here indicated is the result of the most careful thought and examination I am able to bring to the subject, I express it with unaffected diffidence. The subject is deemed one of great importance to the present and future interest of the people of the State, and involving as it is believed it does a question of the highest pecuniary interest to the railroad companies, it has within the last two or three years commanded and received the careful attention as

well as exhausting investigation of many of the leading legal minds of the State, both within and without the Legislative Halls. This embarrassment is increased in no small degree by the fact that my lamented predecessor, a gentleman justly distinguished in his profession for great learning and ability, and whose high character as a citizen, lent new dignity to his position and additional weight to his opinion, after an unusually careful investigation came to an opposite conclusion.

I proceed to submit such reasons and authorities as in my judgment support this view, and as I claim nothing in it original, gladly avail myself (among other aids) of the able arguments of the Hon. W. T. Barker and Hon. G. G. Bennett delivered in the House of Representatives two years ago.

It may be well, at the outset of this inquiry, to examine in what light — with what spirit the people of this State, in their fundamental law, have looked at this question of granting exclusive privileges, by sacred and inviolable *charter*. Certainly, I think it must be admitted, that such grants have been watched — watched and guarded with jealousy, rather than looked upon with favor. The old Constitution provides as follows:

"Corporations shall not be created in this State by special laws, except for political or municipal purposes, but the General Assembly shall provide by general laws for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. *The stockholders shall be subject to such liabilities and restrictions as shall be provided by law.* The State shall not directly or indirectly become a stockholder in any corporation." — *Article* 8, *sec.* 2.

The new Constitution says: "No corporation shall be created by special laws, but the General Assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided."

Article 8, sec. 1, and section 12, same Article, reads: "Subject to the provisions of this Article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of *special or exclusive privileges or immunities* by a vote of two-thirds of each branch of the General Assembly, and no exclusive privileges, except as provided in this article, *shall ever be granted.*"

Certainly such terms do not bespeak a disposition in the people to cede away their sovereign rights on the theory or principles of a *King's Grant* as the law is expounded in the oft-quoted Dartmouth College case. The doctrine of that case, so much relied on by the champions of exclusive privileges, and profitable chartered monopolies, has, I respectfully submit, no application whatever to the question involved in your resolution.

It has always been considered as somewhat startling in its application to American institutions. True, it was the law when announced,

It is supported by the powerful argument of Webster, and the clear and unerring judgment of Marshall. It would be the hight of arrogant assumption here to attempt to combat the one, or question the other. But it is worthy of notice that three of our present Judges of the U. S. Supreme Court, including Chief Justice Chase, have recently announced, that its doctrine is not the law in this country now, and that the doctrine more consonant with American institutions, viz., — that unless expressly provided in the creating act of a corporation, that the particular privilege shall be and remain inviolate. The Legislature shall have power by legislation to regulate, restrict, enlarge, revoke in part, or repeal altogether the privileges granted to any corporation by law.

In other words, that in this country, under our constitutions, no corporation can be created with exclusive privileges or immunities which places it beyond the control of the sovereign power of the State. It is needless to add that this power is the General Assembly, nor can it, I think, be seriously questioned that this is the spirit and manifest intent of the Constitution of Iowa, as gathered from the provisions above quoted.

These provisions of the Constitution then, with the laws of incorporation, (hereinafter cited) I assume in this argument, make up the charter of every railroad company in this State, and this view of the relation which railroad ocmpanies stand in to the State, instead

of being in conflict with the authorities, relied on by those who maintain the opposite side of the question, is supported by those authorities.

The Providence Bank *vs.* Billings and Pittman, 4 Peters, U. S. Sup. Court Reports, is a leading case on the constitutional question of a legislative act impairing the obligation of contracts. It is a case relied on by the late Attorney General, and also by Judge Wilson in his very able and elaborate arguments, against the power herein claimed for the legislative authority. The case was decided in 1830, and the opinion delivered by Chief Justice Marshall. Let us see what the doctrine of that case is:

In 1791 the Legislature of Rhode Island granted a charter to certain individuals, who had associated for the purpose of banking. They were incorporated by the name of the President, Directors and Company of the Providence Bank, with the ordinary powers of such associations. In 1822 the Legislature passed an Act, imposing a tax on every bank in the State, except the bank of the United States. The Providence Bank refused to pay the tax, alleging that the Act of the Legislature in passing the tax, was repugnant to the Constitution of the United States, as it impaired the obligation of the contract contained in the charter. *Held*, that the law imposing the tax on the Providence Bank, did not impair the obligation of the contract contained in the charter granted to the bank, and that it is not in conflict with the Constitution of the United States." And the reason given for the decision, it seems to me, settles the whole question. It is the inviolability of the Legislature or sovereign power of the State, and not the "oft-told tale" of the *sacred* character of charters of incorporation. Let the illustrious jurist, Marshall, speak for the Court:

"That the taxing power is of vital importance; that it is essential to the existence of Government, are truths which it can not be necessary to re-affirm; they are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it for a consideration sufficiently valuable. But as the whole community is interested in retaining it undiminished, that community has a right

to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.

"The plaintiff would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be employed because the power to tax may be so wielded as to defeat the purpose for which the charter was granted; and may not this be said with equal truth of other legislative powers. Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods, as well as trading in money. If the policy of the State should lead to a tax on unincorporated compnies, could those which might be incorporated claim an exemption in virtue of a charter which does not indicate such an intention?"

"The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempted from this duty as the mere consequence of its charter? The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it or they do not exist." I have quoted thus liberally from this admirable opinion, which should be read entire, as the best argument that can be made in support of the power claimed in the present instance. It is sustained by the same Court in the cases of Fletcher *v.* Peck; Calder *v.* Bull, 3d Dallas, 386; Cooper *v.* Telfair, 4th Dallas, 14; and even in the Dartmouth College case, 4th Wheaton, 125, the court say that in no doubtful case would it pronounce a legislative Act to be contrary to the Constitution. Authorities might be multiplied, as indeed they are on the other side of this question. But I submit that a long list of cases does not always strengthen a legal position. Authorities, like witnesses, should be *weighed* not *counted*.

Let us now take another case, being also one of the authorities

relied on to support the opposite view. In this case the Legislature for a consideration had ceded away its power of control, by *express* provision in the charter of incorporations.

The Legislature of Ohio in 1845 granted a bank charter, specifying in the charter an amount of taxes which the bank should pay in lieu of all other taxes. In 1852 the Legislature imposed another and additional tax and on a different principle. This was held because of the express provision in the charter to be a violation of the Constitution of the United States, and to impair the obligation of the contract. Dodge *vs.* Woolsey, 18 Howard, 331.

The man who runs may read the clear distinction between these cases; and the case of Swan *vs.* Williams, 2d Michigan, 427, relied upon by Mr. Barker, is in every respect consistent with the doctrine of the United States Supreme Court cases above cited, and is, as it seems to me, decisive of this question of the power of the Legislature to regulate and restrict railroad companies in their rates of compensation for the transportation of passengers and freight.

The case of The People *vs.* Supervisors of Westchester 4, Barbour (New York) 64, recognizes and sustains the same doctrine. I have carefully and critically examined the long list of cases (with the exception of three that were not in our library) cited by the late Attorney General, and also by Judge Wilson, and if those cases, or any of them, sustain the doctrine claimed to be deduced from them I confess I am unable to see it.

Let me now apply this general doctrine to the matter in hand, viz: The force and effect of the acts of incorporation under which Iowa railroad companies exist and enjoy their franchises. Section 1311 of the Revision of 1860 provides as follows, viz.

"Said railroad companies accepting the provisions of this Act shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the General Assembly of Iowa not inconsistent with the provisions of this Act and the Act of Congress making the grant."

It is not pretended that there is any express provisions in the several Acts of the Iowa Legislature, the General Incorporation Act, or the Act of Congress, *expressly* waiving or ceding away the power

of the Legislature. The Acts of the General Assembly and the provisions of the Constitution of Iowa heretofore cited, make up the charter—the life, so to say—of the railroad companies, and it is claimed that within the fair meaning and intent of these laws or charter is found by necessary implication the power in the incorporations to charge and collect compensation for the transportation of passengers and freight over their respective roads.

Granted. But how shall that power be exercised by the company? Shall it be exercised arbitrarily, according to the whim, caprice, or avarice of the corporation, utterly regardless of the public interest, and the rights of individuals? Shall it be used impartially, reasonably, and justly, as natural persons use and enjoy their privileges, with due regard to the rights of others? or may it be discriminatingly and unjustly abused in its exercise, regardless of the best interests of the State and the welfare of the public?

The law says it must be exercised reasonably, and with due regard to the rights of other people, and the lowest sense of justice, and the plainest dictates of common sense, sanction and approve the law. It is not to restrict or limit the reasonable use of the power, but to limit and control the corporation in the abuse of the power, that the legislative authority of the State may be invoked, and whenever such abuse becomes manifest, and the public good require it, the power, it seems to me, should be unhesitatingly exercised. You can regulate the toll of a miller, or the rates of a ferryman; or confer the power on a petty municipal city or town to say to the drayman, the hack- or the cab-man, you shall charge twenty-five cents for such a distance, and one dollar for this much, and if you violate this regulation, you will be fined and your license (franchise) taken away. But a railroad company traversing the State three hundred miles from eastern to western boundary, has an implied sacredness about its character which puts it beyond your power of regulation, and a company running a continuous line from New York to San Francisco, may bid defiance to the sovereign power of all the States through which it passes. It may discriminate as its interest or its avarice dictates; it may, by unjust discrimination in its rates, build up one city and annihilate the trade of another; make the market rates at

any given point, and yet the Legislature can not interfere. Such a claim has no foundation in law or justice. It is simply monstrous, and shocks the most elementary notions of law. It is wholly inconsistent with the plainest notions of our institutions, and at war with the whole theory of our government. The right has been exercised by the British Parliament long anterior to the establishment of railroads. It was vindicated in the instance of the Duke of Bridgwater's canal more than fifty years ago.

The question of whether railroad companies are private or public corporations is much discussed in the arguments *pro* and *con* on this question. I do not consider it very material to the inquiry. It is, however, most satisfactorily answered in the learned opinion of Judge Martin in the case of Swan *v.* Williams, 2 Michigan, 435. He says they are *quasi* public corporations, and may with far more propriety, be styled public than private corporations. The distinction between private and public corporations is based on an arbitrary rule of law announced and established long anterior to the existence of modern railroads. Law, more than anything else, must adapt itself to the growth and wants of society; and rules and precedents must give way to the necessities created by the progress of society, the development of commerce and industry. The inviolability of the right to the free navigation of the Mississippi was considered one of the most clearly established rights of the citizens of this country, and twenty-five years ago no lawyer in the country would have hesitated to pronounce against the right to bridge that river, or in any way to interfere with or impede its free navigation. The growth of the country and the necessities of commerce demanded a new construction of the fundamental law — a more liberal rule. The question is settled now; settled by the legislation of Congress, and settled too in favor of railroads, and of constructing bridges across that great natural highway, and no one thinks of questioning the constitutionality of such legislation. "The public good is the supreme law."

In this connection, the remarks of that learned and eminent jurist, Judge Redfield, are full of significant meaning. The Judge says:

"When it is considered that these private corporations, possessing such vast capital, have engrossed almost the entire travel and traffic

of the country, and that their powers and functions come in daily contact with the material interests of almost every citizen of this great empire, the importance of their being subjected to a wise and just supervision can scarcely be over-estimated. This can only be permanently secured by wise and prudent legislation."

That the terms, "rules and regulations," as used in section 1311 of the Revision, contemplate and mean laws passed by the General Assembly, I think there can be no doubt.

Webster (not Daniel, but Noah,) says in that very interesting book which I presume, you have all read, the Dictionary, under the word "regulate":

"To adjust by rule, method or established mode, as to regulate weights and measures, assizes of bread — our moral conduct, &c. To put in good order, as to regulate the disordered state of a nation or its finances; to subject to rules or restrictions, as to regulate trade."

But the terms used in the section of the law under consideration (1311) "such rules and regulations as may from time time be *enacted* and provided by the General Assembly, puts the meaning of the Legislature beyond dispute.

I take the liberty of quoting here as much better than anything I could say, the remarks of the Hon. G. G. Bennett on this branch of the case, which I find in a copy of a speech delivered by that gentleman in the House of Representatives two years ago. Mr. Bennett says:

"But I do not think this question is left to be determined alone upon general principles. I wish to examine carefully the law under which the companies were incorporated. This law, being Chapter 52 of the Revision of 1860, was enacted some time prior to 1850, under the old Constitution of the State. By the provisions of this Act, corporations have conferred on them certain powers and privileges, not possessed by natural persons, enumerated in Section 1151. Subdivision 7 of this section, reads as follows:

"To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, *in accordance with law, and not incompatible with an honest purpose.*" Now the language

used in this section must be so construed as to mean *something*, if it can be done consistently with other provisions of the Act. If these companies are to manage their affairs in accordance with law, I will ask what law is referred to, and who is to enact this law? Is it claimed to refer to this particular statute? Then why was it not so worded, instead of using the broad language here employed? I think it may be safely stated, that where powers are granted or privileges conferred, and they are required to be exercised and enjoyed according to law, or as the law may direct, it does not simply refer to present existing statutes; but must be understood to mean all laws that may be enacted affecting such powers and privileges so long as the same may be exercised or enjoyed. Consequently, I think this "management" must not only accord with the laws in existence at the date of such incorporation, but with all subsequent laws that may be enacted relating thereto, so long as the company continues to transact business under its charter.

It has been stated that these grants must be construed strictly, giving to the companies nothing but what is clearly denominated — conferring no powers by implication, and reserving all that is not positively granted, or absolutely necessary to the enjoyment of the grant. Under the application of this well defined rule, the legislature I think has expressly reserved in this language the right to make the law by which these companies are to be so regulated in every respect."

It is urged, however, and with seeming soundness, that the right to limit or restrict is the right to exclude or forbid, and because the legislature may, in the exercise of the power, at some time enact that the railroad companies shall carry freight and passengers free of charge; therefore the denial of the power to legislate at all on the subject. I submit, with great respect, that this argument, if argument it may be called, is beneath the dignity of the question involved in the resolution of the House, and with what grace, I ask, does it come from the advocates of exclusive right in the railroad companies to fix their own rates of tariff, when the very complaint is that in the exercise of that right, instead of being guided by reason and justice, they have abused the

power and acted in a spirit of discrimination, partiality and injustice, and a total disregard of the rights of the citizen, and the interests of the State. That blade cuts both ways.

This same argument was urged in the case of the Providence Bank v. Billings, above cited, 4 Peters, 519, and Chief Justice Marshall answers it "thuswise":

"The same may be said of any other power of the Legislature; but that a power may be abused in its exercise has never been considered in this court as a reason why the existence of the power should be denied."

But the argument itself is predicated on an assumption unsound in law, philosophy and political ethics. The presumption always obtains, that the legislature will act justly, not capriciously; that unmoved by passion and uninfluenced by prejudice, they will legislate justly and impartially, with an eye single to the best interests of the State and the highest welfare of the people. The possession of the power is one thing, the expediency of its exercise quite another.

In answering the question as to the right and power of the Legislature my duty ends. To add any suggestions as to the expediency of its exercise would be impertinence on my part; but I trust I may be pardoned for adding that as a citizen I would hesitate long and deliberate carefully as to its exercise. Millions of dollars have been spent in constructing our railroads; they have served in a great measure to develop the untold wealth of our prairies, in coal, and grain, and their various productions. Railroads have done much to make us what we are as a State, and the disposition of the people should be, as I believe it is, to foster and encourage, not to oppress them.

In conclusion I have only to add that I have no doubt of the power of the Legislature to regulate and restrict, by law, the rates of fare and freight tariff on railroads.

HENRY O'CONNOR,
Attorney General.