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A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union

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A TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS.

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April 1

A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

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SEVENTH EDITION,

WITH LARGE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES,

BY VICTOR H. LANE,

PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN

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PREFACE TO THE SEVENTH EDITION.

At the request of the heirs of the late Judge Cooley I have undertaken the preparation of this edition of the Constitutional Limitations. It seemed desirable, in view of all the circumstances, that the text of the last edition should stand as the text for this, and the work of the present editor has been confined to the bringing of the book down to date, by the addition of such matter to the notes as will fairly present the development of this branch of the law since the publication of the last edition. No effort has been made to exhaust the cases reported in this period, but a judicious selection from such cases has been attempted, and the additions appear in the bracketed matter of the notes. Where it seemed more appropriate to add the new matter through new references from the text, that course has been followed, and such matter is found in the single column annotations. The other new matter is incorporated in the old notes. The particular experience, or better judgment of some, will suggest a different selection in some cases, but it is hoped that what has been done will meet reasonably well the common need. When equally desirable on other grounds, cases found in one or the other, and sometimes in both, the Lawyers' Reports Annotated and the American State Reports have been chosen, that they might be available to a greater number. For a like reason, citations to the National Reporter System of reports have been added, not only for the new cases cited, but for the old cases as well so far as found in the Reporters. The editor desires to acknowledge his obligation to William J. Meyers for his most valuable assistance in preparing this edition.

VICTOR H. LANE.

University of Michigan,
Ann Arbor, September, 1903.

PREFACE TO THE SECOND EDITION.

In the Preface to the first edition of this work, the author stated its purpose to be, to furnish to the practitioner and the student of the law such a presentation of elementary constitutional principles as should serve, with the aid of its references to judicial decisions, legal treatises, and historical events, as a convenient guide in the examination of questions respecting the constitutional limitations which rest upon the power of the several State legislatures. In the accomplishment of that purpose, the author further stated that he had faithfully endeavored to give the law as it had been settled by the authorities, rather than to present his own views. At the same time, he did not attempt to deny — what he supposed would be sufficiently apparent — that he had written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of government, and with faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, rather than in reliance upon a judicious, prudent, and just exercise of authority, when confided without restriction to any one man or body of men, whether sitting in legislative capacity or judicial. In this sympathy and faith, he had written of jury trials and the other safeguards to personal liberty, of liberty of the press, and of vested rights; and he had also endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions. But while not predisposed to discover in any part of our system the rightful existence of any unlimited power, created by the Constitution,

neither on the other hand had he designed to advance new doctrines, or to do more than state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions.

The unexpected favor with which the work has been received having made a new edition necessary, the author has reviewed every part of it with care, but without finding occasion to change in any important particular the conclusions before given. Further reflection has only tended to confirm him in his previous views of the need of constitutional restraints at every point where agents are to exercise the delegated authority of the people; and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints. The reader will find numerous additional references to new cases and other authorities; and some modifications have been made in the phraseology of the text, with a view to clearer and more accurate expression of his views. Trusting that these modifications and additions will be found not without value, he again submits his work "to the judgment of an enlightened and generous profession."

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,
ANN ARBOR, July, 1871.

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CONSTITUTIONAL LIMITATIONS.

CONSTITUTIONAL LIMITATIONS.

CHAPTER I.

DEFINITIONS.

A STATE is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.[1] The terms *nation* and *State* are frequently employed, not only in the law of nations, but in common parlance, as importing the same thing;[2] but the term *nation* is more strictly synonymous with *people*, and while a single State may embrace different nations or peoples, a single nation will sometimes be so divided politically as to constitute several States.

In American constitutional law the word *State* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the federal government.

Sovereignty, as applied to States, imports the supreme, absolute, uncontrollable power by which any State is governed.[3] A State is called a sovereign State when this supreme power resides within itself, whether resting in a single individual, or in a number of individuals, or in the whole body of the people.[4] In the view of international law, all sovereign States are and must be equal

[1] Vattel, b. 1, c. 1, § 1; Story on Const. § 207: Wheat. Int. Law. pt. 1, c. 2, § 2; Halleck, Int. Law, 63; Bouv. Law Dict. "State." "A multitude of people united together by a communion of interest, and by common laws, to which they submit with one accord." Burlamaqui, Politic Law, c. 5. See Chisholm *v.* Georgia, 2 Dall. 457; Georgia *v.* Stanton, 6 Wall. 65.

[2] *Thompson*, J., in Cherokee Nation *v.* Georgia, 5 Pet. 1, 52; *Chase*, Ch. J., in Texas *v.* White, 7 Wall. 700, 720; Vattel, *supra*.

[3] Story on Const. § 207; 1 Black. Com. 49; Wheat. Int. Law, pt 1, c. 2, § 5; Halleck, Int. Law, 63, 64; Austin, Province of Jurisprudence, Lec. VI.; Chipman on Government, 137. "The right of commanding finally in civil society." Burlamaqui, Politic Law, c. 5.

[4] Vattel, b. 1, c. 1, § 2; Story on Const. § 207; Halleck, Int. Law, 65. In other words, when it is an *independent* State. Chipman on Government, 137.

in rights, because from the very definition of sovereign State, it is impossible that there should be, in respect to it, any political superior.

The sovereignty of a State commonly extends to all the subjects of government within the territorial limits occupied by the associated people who compose it; and, except upon the high seas, which belong equally to all men, like the air, and no part of which can rightfully be appropriated by any nation,[1] the dividing line between sovereignties is usually a territorial line. In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects: the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power, within their respective territorial limits, over other subjects.[2] In regard to certain other subjects, the States possess powers of regulation which are not sovereign powers, inasmuch as they are liable to be controlled, or for the time being to become altogether dormant, by the exercise of a superior power vested in the general government in respect to the same subjects.

A *constitution* is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.[3] Perhaps an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.

In a much qualified and very imperfect sense every State may be said to possess a constitution; that is to say, some leading

[1] Vattel, b. 1, c. 23, § 281; Wheat. Int. Law, pt. 2, c. 4, § 10.

[2] *McLean*, J., in License Cases, 5 How. 504, 588. "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." *Taney*, Ch. J., in Ableman *v.* Booth, 21 How. 506, 516. See Tarble's Case, 13 Wall. 397. That the general division of powers between the federal and State governments has not been disturbed by the new amendments to the federal Constitution, see United States *v.* Cruikshank, 92 U. S. Rep. 542.

[3] 1 Bouv. Inst. 9; Duer, Const. Juris. 26. "By the constitution of a State I mean the body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects." Mackintosh on the Study of the Law of Nature and Nations.

principle has prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded; like the hereditary principle in most monarchies, and the custom of choosing the chieftain by the body of the people, which prevails among some barbarous tribes. But the term *constitutional government* is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power.[1] The number of these is not great, and the protection they afford to individual rights is far from being uniform.[2]

In American constitutional law, the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void.

The term *unconstitutional law* must have different meanings in different States, according as the powers of sovereignty are or are not possessed by the individual or body which exercises the powers of ordinary legislation. Where the law-making department of a State is restricted in its powers by a written fundamental law, as in the American States, we understand by unconstitutional law one which, being opposed to the fundamental law, is therefore in excess of legislative authority, and void. Indeed, the term *unconstitutional law*, as employed in American jurisprudence, is a misnomer, and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all. But where, by the theory of the government, the exercise of

[1] Calhoun's Disquisition on Government, Works, I. p. 11.

[2] Absolute monarchs, under a pressure of necessity, or to win the favor of their people, sometimes grant them what is called a constitution; but this, so long as the power of the monarch is recognized as supreme, can be no more than his promise that he will observe its provisions. and conduct the government accordingly. The mere grant of a constitution does not make the government a constitutional government, until the monarch is deprived of power to set it aside at will. The grant of Magna Charta did not make the English a constitutional monarchy; it was only after repeated violations and confirmations of that instrument, and when a further disregard of its provisions had become dangerous to the Crown, that fundamental rights could be said to have constitutional guaranties, and the government to be constitutional.

complete sovereignty is vested in the same individual or body which enacts the ordinary laws, any enactment, being an exercise of power by the sovereign authority, must be obligatory, and, if it varies from or conflicts with any existing constitutional principle, it must have the effect to modify or abrogate such principle, instead of being nullified by it. This must be so in Great Britain with every law not in harmony with pre-existing constitutional principles; since, by the theory of its government, Parliament exercises sovereign authority, and may even change the constitution at any time, as in many instances it has done, by declaring its will to that effect.[1] And when thus the power to control and modify the constitution resides in the ordinary law-making power of the State, the term *unconstitutional law* can mean no more than this; a law which, being opposed to the settled maxims upon which the government has habitually been conducted, *ought not* to be, or to have been, adopted.[2] It follows, therefore, that in Great Britain constitutional questions are for the most part to be discussed before the people or the Parliament, since the declared will of the Parliament is the final law; but in America, after a constitutional question has been passed upon by the legislature, there is generally a right of appeal to the courts when it is attempted to put the will of the legislature in force. For the will of the people, as declared in the Constitution, is the final law; and the will of the legislature is law only when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen.[3]

[1] 1 Black. Com. 161; De Tocqueville, Democracy in America, c. 6; Broom, Const. Law, 795; Fischel, English Constitution, b. 7, c. 5. In the Dominion of Canada, where the powers of sovereignty are confided for exercise, in part to the Dominion Parliament and in part to the Provincial Parliaments, with a superintending authority over all in the imperial government, the term unconstitutional law has a meaning corresponding to its use in the United States. Severn *v.* Regina, 2 Sup. Ct. R. (Ont.) 70; Leprohn *v.* Ottawa, 2 App. R. 522.

[2] Mr. Austin, in his Province of Jurisprudence, Lec. VI., explains and enlarges upon this idea, and gives illustrations to show that in England, and indeed under most governments, a rule prescribed by the law-making authority may be unconstitutional, and yet legal and obligatory.

[3] See Chapter VII. *post*.

CHAPTER II.

THE CONSTITUTION OF THE UNITED STATES.

THE government of the United States is the existing representative of the national government which has always in some form existed over the American States. Before the Revolution, the powers of government, which were exercised over all the colonies in common, were so exercised as pertaining either to the Crown of Great Britain or to the Parliament; but the extent of those powers, and how far vested in the Crown and how far in the Parliament, were questions never definitely settled, and which constituted subjects of dispute between the mother country and the people of the colonies, finally resulting in hostilities.[1] That the power over peace and war, the general direction of commercial intercourse with other nations, and the general control of such subjects as fall within the province of international law, were vested in the home government, and that the colonies were not, therefore, sovereign States in the full and proper sense of that term, were propositions never seriously disputed in America, and indeed were often formally conceded; and the disputes related to questions as to what were or were not matters of internal regulation, the control of which the colonists insisted should be left exclusively to themselves.

Besides the tie uniting the several colonies through the Crown of Great Britain, there had always been a strong tendency to a more intimate and voluntary union, whenever circumstances of danger threatened them; and this tendency led to the New England Confederacy of 1643, to the temporary Congress of 1690, to the plan of union agreed upon in Convention of 1754, but rejected by the Colonies as well as the Crown, to the Stamp Act Congress of 1765, and finally to the Continental Congress of 1774. When the difficulties with Great Britain culminated in actual war, the Congress of 1775 assumed to itself those powers of external control which before had been conceded to the Crown

[1] 1 Pitkin's Hist. U. S. c. 6; Life and Works of John Adams, Vol. I. pp. 122, 161; Vol. II. p. 311; Works of Jefferson, Vol. IX. p. 294; 2 Marshall's Washington, c. 2; Declaration of Rights by Colonial Congress of 1765; Ramsay's Revolution in South Carolina, pp. 6–11; 5 Bancroft's U. S. c. 18; 1 Webster's Works, 128; Von Holst, Const. Hist. c. 1; Story on Const. § 183 *et seq.*

or to the Parliament, together with such other powers of sovereignty as it seemed essential a general government should exercise, and thus became the national government of the United Colonies. By this body, war was conducted, independence declared, treaties formed, and admiralty jurisdiction exercised. It is evident, therefore, that the States, though declared to be "sovereign and independent," were never strictly so in their individual character, but were always, in respect to the higher powers of sovereignty, subject to the control of a central authority, and were never separately known as members of the family of nations.[1] The Declaration of Independence made them sovereign and independent States, by altogether abolishing the foreign jurisdiction, and substituting a national government of their own creation.

But while national powers were assumed by and conceded to the Congress of 1775–76, that body was nevertheless strictly revolutionary in its character, and, like all revolutionary bodies, its

[1] "All the country now possessed by the United States was [prior to the Revolution] a part of the dominions appertaining to the Crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that Crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here flowed from the head of the British empire. They were in a strict sense fellow-subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, namely, only that affinity and social connection which result from the mere circumstance of being governed by one prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

"The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions and other temporary arrangements. From the Crown of Great Britain the sovereignty of their country passed to the people of it; and it was not then an uncommon opinion that the unappropriated lands which belonged to the Crown passed, not to the people of the colony or State within whose limits they were situated, but to the whole people. On whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly. Afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective capacity established the present Constitution." Per *Jay*, Ch. J., in Chisholm *v.* Georgia, 2 Dall. 419, 470. See this point forcibly put and elaborated by Mr. A. J. Dallas, in his Life and Writings by G. M. Dallas, 200–207. Also in Texas *v.* White, 7 Wall. 724. Professor Von Holst, in his Constitutional History of the United States, c. 1, presents the same view clearly and fully. Compare Hurd, Theory of National Existence, 125.

authority was undefined, and could be limited only, *first*, by instructions to individual delegates by the States choosing them; *second*, by the will of the Congress; and *third*, by the power to enforce that will.[1] As in the latter particular it was essentially feeble, the necessity for a clear specification of powers which should be exercised by the national government became speedily apparent, and led to the adoption of the Articles of Confederation. But those articles did not concede the full measure of power essential to the efficiency of a national government at home, the enforcement of respect abroad, or the preservation of the public faith or public credit; and the difficulties experienced induced the election of delegates to the Constitutional Convention held in 1787, by which a constitution was formed which was put into operation in 1789. As much larger powers were vested by this instrument in the general government than had ever been exercised in this country by either the Crown, the Parliament, or the Revolutionary Congress, and larger than those conceded to the Congress under the Articles of Confederation, the assent of the people of the several States was essential to its acceptance, and a provision was inserted in the Constitution that the ratification of the conventions of nine States should be sufficient for the establishment of the Constitution between the States so ratifying the same. In fact, the Constitution was ratified by conventions of delegates chosen by the people in eleven of the States, before the new government was organized under it; and the remaining two, North Carolina and Rhode Island, by their refusal to accept, and by the action of the others in proceeding separately, were excluded altogether from that national jurisdiction which before had embraced them. This exclusion was not warranted by anything contained in the Articles of Confederation, which purported to be articles of "perpetual union;" and the action of the eleven States in making radical revision of the Constitution, and excluding their associates for refusal to assent, was really revolutionary in character,[2] and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government.[3]

[1] See remarks of *Iredell*, J., in Penhallow *v.* Doane's Adm'r, 3 Dall. 54, 91, and of *Blair*, J., in the same case, p. 111. The true doctrine on this subject is very clearly explained by *Chase*, J., in Ware *v.* Hylton, 3 Dall. 199, 231.

[2] Mr. Van Buren has said of it that it was "an heroic, though perhaps a lawless, act." Political Parties, p. 50.

[3] "Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the confederation, which stands in the form of a solemn compact among the States, can be superseded without the unanimous consent of the parties to it; 2. What relation is to subsist between the nine or more States, ratifying the Constitution, and the re-

Left at liberty now to assume complete powers of sovereignty as independent governments, these two States saw fit soon to resume their place in the American family, under a permission contained in the Constitution; and new States have since been added from time to time, all of them, with a single exception, organized by the consent of the general government, and embracing territory previously under its control. The exception was Texas, which had previously been an independent sovereign State, but which, by the conjoint action of its government and that of the United States, was received into the Union on an equal footing with the other States.

Without, therefore, discussing, or even designing to allude to any abstract theories as to the precise position and actual power of the several States at the time of forming the present Constitution,[1] it may be said of them generally that they have at all times been subject to some common national government, which has exercised control over the subjects of war and peace, and other

maining few who do not become parties to it. The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. *Perhaps*, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted, among the defects of the confederation, that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocality seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all of the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate. The second question is not less delicate, and the flattering prospect of its being merely hypothetical forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncancelled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and above all the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain *moderation* on one side, and *prudence* on the other." Federalist, No. 43 (by *Madison*).

[1] See this subject discussed in Gibbons *v.* Ogden, 9 Wheat. 1.

matters pertaining to external sovereignty; and that when the only three States which ever exercised complete sovereignty accepted the Constitution and came into the Union, on an equal footing with all the other States, they thereby accepted the same relative position to the general government, and divested themselves permanently of those national powers which the others had never exercised. And the assent once given to the Union was irrevocable. "The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."[1]

The government of the United States is one of *enumerated powers;* the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess.[2] In this respect it differs from the constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess. The general purpose of the Constitution of the United States is declared by its founders to be, "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." To accomplish these purposes, the Congress is empowered by the eighth section of article one:—

[1] *Chase*, Ch. J., in Texas *v.* White, 7 Wall. 700, 725. See United States *v.* Cathcart, 1 Bond, 556.

[2] "The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." Per *Marshall*, Ch. J., in Martin *v.* Hunter's Lessee, 1 Wheat. 304, 326. "This instrument contains an enumeration of the powers expressly granted by the people to their government." *Marshall*, Ch. J., in Gibbons *v.* Ogden, 9 Wheat. 1, 187. See Calder *v.* Bull, 3 Dall. 386; Briscoe *v.* Bank of Kentucky, 11 Pet. 257; Gilman *v.* Philadelphia, 3 Wall. 713; United States *v.* Cruikshank, 92 U. S. 542, 550, 551, per *Waite*, Ch. J.; United States *v.* Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601; Weister *v.* Hade, 52 Pa. St. 474; Sporrer *v.* Eifler, 1 Heisk. 633. The tenth amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." No power is conferred by the Constitution upon Congress to establish mere police regulations within the States. United States *v.* Dewitt, 9 Wall. 41. Nor is power conferred to provide for copyrighting trademarks. Trademark Cases, 100 U. S. 82. The fourteenth amendment does not take from the States police powers reserved to them at the time of the adoption of the Constitution. See Slaughter House Cases, 16 Wall. 36; Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273. [But it prevents their making, under the guise of police regulations, rules which abridge the liberty of the citizen to acquire contract rights outside his own State and to enjoy the same. Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. p. 427, rev. 48 La. Ann. 104, 18 S. W. 904. See note, *infra*, §33.]

As to the general division of powers between the Dominion of Canada and the provinces, see Citizens' Ins. Co. *v* Parsons, 4 Can. Sup. Ct. 215.

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States. But all duties, imposts, and excises shall be uniform throughout the United States. (*a*)

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes.[1]

4. To establish a uniform rule of naturalization, (*b*) and uniform laws on the subject of bankruptcy, throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish post-offices and post-roads.[2]

8. To promote the progress of science and the useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries.[3]

[1] Commerce on the high seas, though between ports of the same State, is held to be under the controlling power of Congress. Lord *v.* Steamship Co., 102 U. S. 541. See cases *infra*, 688, 847. [Acts committed by Indians within the limits of their reservations are not subject to the criminal laws of the State wherein the reservation lies. State *v.* Campbell, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169 and note on jurisdiction to punish crimes by or against Indians. As to what lands of tribal Indians cannot be taxed by State, see Allen Co. Commrs. *v.* Simons, 129 Ind. 193, 28 N. E. 420, 13 L. R. A. 512.]

[2] As to the power to exclude matter from the mail, see *Ex parte* Jackson, 96 U. S. 727.

[3] This power is exclusive. The States cannot pass laws regulating the sale of patents. Hollida *v.* Hunt, 70 Ill. 109,

(*a*) [Some interesting legal questions have grown out of the acquisition of the island of Porto Rico under the treaty with Spain, following the Spanish War, and among them the status of the island under the revenue clauses of the Constitution.

In Downes *v.* Bidwell, 182 U. S. 244, 21 Sup. Ct. Rep. 770, it is held that by the treaty of cession Porto Rico became territory appurtenant to the United States but not a part of it within the meaning of those clauses of the Constitution. That Section 8 of Article 1, requiring duties, imposts, and excises to be uniform "throughout the United States" did not apply to the island of Porto Rico.

The other "Insular Cases," so called, involving the status of Porto Rico under the revenue clauses of the Constitution are De Lima *v.* Bidwell, 182 U. S. 1, 21 Sup. Ct. Rep. 743; Goetz *v.* United States and Crossman *v.* United States, 182 U. S. 221, 21 Sup. Ct. Rep. 742; Dooley *v.* United States, 182 U. S. 222, 21 Sup. Ct. Rep. 762; Armstrong *v.* United States, 243, and Huus *v.* New York & Porto Rico Steamship Company, 182 U. S. 392, 21 Sup. Ct. Rep. 827. The same doctrine with reference to the Phillipine Islands is announced in Dooley *v.* United States, 183 U. S. 151, 22 Sup. Ct. Rep. 62, and Fourteen Diamond Rings *v.* United States, 183 U. S. 176, 22 Sup. Ct. Rep. 59.]

(*b*) [Naturalization may be by treaty, and also by organic act creating a State. Boyd *v.* Nebraska, 143 U. S. 135, 12 Sup. Ct. Rep. 375, and cases there cited. But such naturalization applies only to those who were citizens of the admitted territory or country at the time of such admission. Contzen *v.* United States, 179 U. S. 191, 21 Sup. Ct. Rep. 98.]

9. To constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed upon the high seas, and offences against the law of nations.

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

12. To provide and maintain a navy.

13. To make rules for the government and regulation of the land and naval forces.

14. To provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.

15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.[1]

16. To exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. (*a*)

17. To make all laws which shall be necessary and proper

22 Am. Rep. 63; Crittenden *v.* White, 23 Minn. 24, 23 Am. Rep. 676; Cranson *v.* Smith, 37 Mich. 309, 26 Am. Rep. 514; *Ex parte* Robinson, 2 Biss. 309; Woollen *v.* Banker, 2 Flipp. 33, *Swayne*, J. In some States, however, statutes are upheld which require that notes given for a patent right shall express their purpose on the face of the paper. Tod *v.* Wick, 36 Ohio St. 370; Herdic *v.* Roessler, 109 N. Y. 127, 16 N. E. 198; Shires *v.* Com., 120 Pa. St. 368, 14 Atl. 251; New *v.* Walker, 108 Ind. 365, 9 N. E. 386; [Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. 327; Bohon's Assignee *v.* Brown, 101 Ky. 354, 41 S. W. 273, 38 L. R. A. 503.] The States may pass laws regulating the use of patented articles. Patterson *v.* Kentucky, 11 Bush, 311; 21 Am. Rep. 220; s. c. in error, 97 U. S. 501; State *v.* Telephone Co., 36 Ohio St. 296; 38 Am. Rep. 583. One who peddles articles made under a patent may be required to comply with an ordinance requiring licenses for all peddlers. People *v.* Russell, 49 Mich. 617, 14 N. W. 578. [State cannot require vendor of patent-rights to take out license. Com. *v.* Petty, 96 Ky. 462, 29 S. W. 291, 29 L. R. A. 786; and upon power of State over patent-rights, see note hereto in L. R. A.]

[1] Houston *v.* Moore, 5 Wheat. 1; Martin *v.* Mott, 12 Wheat. 19; Kneedler *v.* Lane, 45 Penn. St. 238; Dunne *v.* People, 94 Ill. 120, 34 Am. Rep. 213.

(*a*) [Perjury committed in a State court holden by permission of State law and of federal officials in a federal building, is not outside the jurisdiction of the State to punish. Exum *v.* State, 90 Tenn. 501, 17 S. W. 107, 15 L. R. A. 381.]

for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.[1]

Congress is also empowered by the thirteenth, fourteenth, and fifteenth amendments to the Constitution to enforce the same by appropriate legislation. The thirteenth amendment abolishes slavery and involuntary servitude, (*a*) except as a punishment for crime, throughout the United States and all places subject to their jurisdiction. The fourteenth amendment (*b*) has several objects. 1. It declares all persons born or naturalized in the United States, and subject to the jurisdiction thereof, to be citizens of the United States and of the State wherein they reside; (*c*) and it forbids any State to make or enforce any law

[1] Within the legitimate scope of this grant Congress can determine for itself what is necessary. *Ex parte* Curtis, 106 U. S. 371. "Congress as the legislature of a sovereign nation, being expressly empowered by the Constitution 'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin;' and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.'" *Gray*, J., in Legal Tender Case, 110 U. S. 421.

Congress has implied power to protect voters at federal elections from intimidation: *Ex parte* Yarbrough, 110 U. S. 651; to protect the right to make homestead entry upon public lands. United States *v.* Waddell, 112 U. S. 76.

(*a*) [This does not extend to the case of seamen compelled to serve in fulfilment of their contracts. Robertson *v.* Baldwin, 165 U. S. 275, 17 Sup. Ct. Rep. 326. Dissent by *Harlan, J.* But a law authorizing the hiring out of a vagrant to the highest bidder for a specified term is void. Thompson *v.* Bunton, 117 Mo. 83, 22 S. W. 863, 20 L. R. A. 462.]

(*b*) [The adoption of the fourteenth amendment has not extended to the several States of the Union the restrictions imposed by the first ten amendments to the Constitution of the United States upon the Federal Government. See Maxwell *v.* Dow, 176 U. S. 581, 20 Sup. Ct. Rep. 448; Brown *v.* New Jersey, 175 U. S. 172, 20 Sup. Ct. Rep. 77; Leeper *v.* Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577; Caldwell *v.* Texas, 137 U. S. 692, 11 Sup. Ct. Rep. 224; *Re* Converse, 137 U. S. 624, 11 Sup. Ct. Rep. 191; Missouri *v.* Lewis, 101 U. S. 22; United States *v.* Cruikshank, 92 U. S. 542; Slaughter House Cases, 16 Wall. 36.]

(*c*) [A child of alien parentage born in this country is a citizen. Wong Kim Ark's Case, 169 U. S. 649, 18 Sup. Ct. Rep. 456. See Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 Sup. Ct. Rep. 1016.]

which shall abridge the privileges or immunities of citizens of the United States,[1] or to deprive any person of life, liberty, or property, without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. (*a*)

[1] As to this clause, see p. 567, note 4, *infra*.

(*a*) [A discrimination between agricultural lands and other lands with regard to the right of a city to annex them by extension of its corporate limits so as to include them is no denial of the equal protection of the laws. A State may classify the objects of legislation so long as its attempted classification is not clearly arbitrary and unreasonable. Clark *v.* Kansas City, 176 U. S. 114, 20 Sup. Ct. Rep. 284, aff. 59 Kan. 427, 53 Pac. 468. Many cases upon the power of the legislature to annex rural lands to municipalities are collected in a note to this case in 44 L. ed. U. S. 392. Nor does a statute making a railroad company liable to an employee injured by the negligence of a fellow-servant deny to such company the equal protection of the laws, since there are peculiar hazards in the operation of a railroad which warrant the discrimination between railroad companies and ordinary employers in this regard. Tullis *v.* Lake Erie & Western R. Co., 175 U. S. 348, 20 Sup. Ct. Rep. 136. The act (Burns's An. Stat. of Ind., Rev. of 1894, §§ 7083–7) applies in terms only to corporations. The point was raised in the defence that this discrimination between corporations operating railroads and other persons or associations operating railroads was unconstitutional, but it was not noticed by the court. That the exception of a dummy railroad operated by steam or of an electric railroad from an ordinance limiting the speed with which railroad trains may run within the city limits is not an arbitrary and unreasonable classification in denial of the equal protection of the laws, see Erb *v.* Morasch, 177 U. S. 584, 20 Sup. Ct. Rep. 819, aff. 60 Kan. 251, 56 Pac. 133. On validity of ordinance requiring possession of good character and reputation in one seeking license to sell cigarettes and vesting mayor with power to determine whether or not applicant possesses such, see Gundling *v.* Chicago, 177 U. S. 183, 20 Sup. Ct. Rep. 633, aff. 176 Ill. 340, 52 N. E. 44.

A county board of education maintained primary schools for white children and for negro children. They also maintained a high school for white children, but had discontinued a high school for negro children for the reason that the funds were needed for primary schools for a much larger number of negro children than attended the negro high school. Such discontinuance of high school privileges for negroes while high school privileges are continued for white children cannot be corrected by injunction against maintenance of high school for white children, and refusal to grant such injunction is no denial of the equal protection of the laws nor of any privileges and immunities of citizens of the United States. Cumming *v.* Board of Education, 175 U. S. 528, 20 Sup. Ct. Rep. 197, aff. 103 Ga. 641, 29 S. E. 488.

Upon equality of exemption under State taxation, see People *v.* Roberts, 171 U. S. 658, 19 Sup. Ct. Rep. 58, aff. 91 Hun, 158, 149 N. Y. 608, 44 N. E. 1127. State may abridge right of trial by jury in city courts without making same provision for county courts, Chappell Chem. & Fertilizer Co. *v.* Sulphur Mines Co., 172 U. S. 474, 19 Sup. Ct. Rep. 268, citing Hayes *v.* Missouri, 120 U. S. 68, 7 Sup. Ct. Rep. 350, and Missouri *v.* Lewis, 101 U. S. 22. Jury trial is not necessary in a commitment for contempt of court. Tinsley *v.* Anderson, 171 U. S. 101, 18 Sup. Ct. Rep. 805. Nor in disbarment proceedings, Shepard's Case, 109 Mich. 631, 67 N. W. 971.

State may provide that plaintiff in an action against a railroad company for loss by fire caused by operation of the road shall, if successful, recover a reasonable attorney's fee in addition to damages, while, if unsuccessful, no attorney's fee shall be assessed against him. Atchison, T. & S. F. Ry. Co. *v.* Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609. See in this case a vigorous dissenting opinion of *Harlan*, J., concurred in by *Brown*, *Peckham*, and *McKenna*, JJ. That state may require railroad companies to pay discharged employees at regular rate until time of full payment, not to exceed sixty days after discharge, see St. Louis, I. M. & S. R.

2. It provides that when the right to vote at any election for the choice of electors (*a*) for President or Vice-President of the

Co. *v.* Paul, 173 U. S. 404, 19 Sup. Ct. Rep. 419, aff. 64 Ark. 88, 40 S. W. 705, 37 L. R. A. 504.

A statute providing that if a tramp shall threaten to injure the person or property of any person he shall be imprisoned in the penitentiary, is not void as denying equal protection. State *v.* Hogan, 63 Ohio, 202, 58 N. E. 572, 81 Am. St. 626. The equal protection of the laws is not denied to negroes by those provisions of the Constitution of Mississippi which place burdens and limitations upon persons subject to vices and guilty of crimes that are characteristic of the negro race, nor is there any discrimination thus brought about against the race itself. Williams *v.* Mississippi, 170 U. S. 213, 18 Sup. Ct. Rep. 583. Or by a law requiring whites and negroes to occupy different compartments of passenger-cars. Plessy *v.* Ferguson, 163 U. S. 537, 16 Sup. Ct. Rep. 1138. See Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, and Anderson *v.* Louisville & N. Ry. Co., 62 Fed. 46. Accused cannot insist that his race be represented upon the jury, either trial or grand. Wood *v.* Brush, 140 U. S. 278, 370, 11 Sup. Ct. Rep. 738, 942; Jugiro *v.* Brush, 140 U. S. 291, 11 Sup. Ct. Rep. 770.

A State may abolish the fellow-servant rule with regard to a particular class of employers only, *e.g.* railroad companies. Chicago, K. & W. R. Co. *v.* Pontius, 157 U. S. 209, 15 Sup. Ct. Rep. 585. State may provide that coming into court to challenge the validity of an alleged service upon the defendant shall constitute a general appearance. York *v.* Texas, 137 U. S. 15, 11 Sup. Ct. Rep. 9; Kauffman *v.* Wooters, 138 U. S. 285, 11 Sup. Ct. Rep. 298. Exemption by statute of "planters and farmers grinding and refining their own sugar and molasses" from a license tax upon persons and corporations carrying on the business of refining sugar and molasses is not a denial of the equal protection of the laws to the persons taxed. Am Sugar Ref. Co. *v.* Louisiana, 179 U. S. 89, 21 Sup. Ct. Rep. 43. State may levy a specific tax upon persons engaged in the business of hiring laborers to be employed beyond the limits of the State, while levying none upon those hiring laborers to be employed within the State. Williams *v.* Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128, aff. 110 Ga. 584, 35 S. E. 699. A person cannot complain that he is denied the equal protection of the laws when valid laws are fairly administered as to him, although there is maladministration as to his neighbors, as, *e.g.* by under-assessment of property for taxation, New York *v.* Barker, 179 U. S. 279, 21 Sup. Ct. Rep. 121. The levy of a tax upon owners of lands abutting on streets along which conduits for public water supply run, in excess of that levied upon owners of lands not so located, upon the theory that better fire protection is afforded is unconstitutional. Lemont *v.* Jenks, 197 Ill. 363, 64 N. E. 362. State may classify cities for regulation of registration of voters. Mason *v.* Missouri, 179 U. S. 328, 21 Sup. Ct. Rep. 125. In Cotting *v.* Kansas City Stock Yards Co. *et al.*, 183 U. S. 79, 22 Sup. Ct. Rep. 30, a statute of Kansas defining what shall constitute public stock yards and regulating all charges thereof, is held to be in conflict with the fourteenth amendment for the reason that the definition of a "public stock yard" was made to depend upon the volume of business done and the facts showed that the Kansas City Stock Yards Co. was the only one within the definition, and the legislation was therefore a denial to the Kansas City Co. of the equal protection of the law.

For other cases on "equal protection," see Lowe *v.* Kansas, 163 U. S. 81, 16 Sup. Ct. Rep. 1031; Jones *v.* Brim, 165 U. S. 180, 17 Sup. Ct. Rep. 282; Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255, rev. 87 Tex. 19; 26 S. W. 985; St. L. & S. F. R. Co. *v.* Mathews, 165 U. S. 1, 17 Sup. Ct. Rep. 243; Merchant *v.* Pa. R. Co., 153 U. S. 380, 14 Sup. Ct. Rep. 894; Jennings *v.* Coal Ridge Imp. & Coal Co., 147 U. S. 147, 13 Sup. Ct. Rep. 282; Fielden *v.* Illinois, 143 U. S. 452, 12 Sup. Ct. Rep. 528; Commercial Nat'l Bank *v.* Chambers, 182 U. S. 556, 21 Sup. Ct. Rep. 863, aff. 21 Utah, 324, 61 Pac. 560; Estate of Mahoney, 133 Cal. 180, 65 Pac. 389, 85 Am. St. 155.]

(*a*) [The appointment and mode of appointment of electors from a State are within the power of the State acting in such manner as its legislature may direct;

United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or is in any way abridged, except for participation in rebellion or other crime, the basis of congressional representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. 3. It disqualifies from holding Federal or State offices certain persons who shall have engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof. 4. It declares the inviolability of the public debt of the United States, and forbids the United States or any State assuming or paying any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.[1] The fifteenth amendment declares that

[1] "That amendment was undoubtedly proposed for the purpose of fully protecting the newly-made citizens of the African race in the enjoyment of their freedom, and to prevent discriminating State legislation against them. The generality of the language used necessarily extends its provisions to all persons, of every race and color. Previously to its adoption, the Civil Rights Act had been passed, which declared that citizens of the United States of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, should have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, own, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and should be subject to like punishments, pains, and penalties, and to none other. The validity of this act was questioned in many quarters, and complaints were made that, notwithstanding the abolition of slavery and involuntary servitude, the freedmen were in some portions of the country subjected to disabilities from which others were exempt. There were also complaints of the existence in certain sections of the Southern States of a feeling of enmity, growing out of the collisions of the war, towards citizens of the North. Whether these complaints had any just foundation is immaterial; they were believed by many to be well founded, and to prevent any possible legislation hostile to any class from the causes mentioned, and to obviate objections to legislation similar to that embodied in the Civil Rights Act, the fourteenth amendment was adopted. This is manifest from the discussions in Congress with reference to it. There was no diversity of opinion as to its object between those who favored and those who opposed its adoption." Mr. Justice *Field* in San Mateo County *v.* Sou. Pac. R. R. Co., 13 Fed. Rep. 722.

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean

and a law directing that one elector and one alternate shall be elected from each congressional district, and one elector and one alternate shall be elected at large in each of two districts into which the legislature divides the State for the purpose of electing the remaining two electors, is a valid exercise of the power of the legislature in this regard. McPherson *v.* Blacker, 146 U. S. 1, 13 Sup. Ct. Rep. 3, aff. 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. 587.]

the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude.[1]

that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a State government deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Strong*, J., in *Ex parte* Virginia, 100 U. S. 339. Approved, Neal *v.* Delaware, 103 U. S. 370, 397. An act of Congress declaring that certain acts committed by individuals shall be deemed offences and punished in the United States courts is invalid. The fourteenth amendment does not "invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation or State action of the kinds referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment." *Bradley*, J., in Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18. See also United States *v.* Harris, 106 U. S. 629, 1 Sup. Ct. Rep. 601; Baldwin *v.* Franks, 120 U. S. 678, 7 Sup. Ct. Rep. 656. But Congress may punish the intimidation by individuals of voters at federal elections. *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152.

[1] See, as to these amendments, Story on Const. (4th ed.) c. 46, 47, 48, and App. to Vol. II. The adoption of an amendment to the Federal Constitution has the effect to nullify all provisions of State constitutions and State laws which conflict therewith. *Ex parte* Turner, Chase Dec. 157; Neal *v.* Delaware, 103 U. S. 370; Wood *v.* Fitzgerald, 3 Oreg. 568; Portland *v.* Bangor, 65 Me. 120, 20 Am. Rep. 681. See Griffin's Case, Chase Dec. 368. The new amendments do not enlarge the privilege of suffrage so as to entitle women to vote. Bradwell *v.* State, 16 Wall. 130; Minor *v.* Happersett, 21 Wall. 162. They do not prevent a State forbidding a body to parade without license from the Governor. The privilege of citizens of the United States is not thereby infringed. Presser *v.* Illinois, 116 U. S. 252, 6 Sup. Ct. Rep. 580. The fourteenth amendment does not entitle persons as of right to sell intoxicating drinks against the prohibitions of State laws; Barbemeyer *v.* Iowa, 13 Wall. 129; nor is property taken without due process of law by such a law, although without compensation an existing brewery is rendered valueless thereby: Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; it is not violated by the grant by a State, under its police power, of an exclusive right for a term of years to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for slaughter, within certain specified parishes: Slaughter House Cases, 16 Wall. 36; nor by denying the right of jury trial in State courts: Walker *v.* Sauvinet, 92 U. S. 90; it does not preclude a State from taxing its citizens for debts owing to them from foreign debtors: Kirtland *v.* Hotchkiss, 100 U. S. 491; nor from regulating warehouse charges; Munn *v.* Illinois, 94 U. S. 113; or charges for the transportation of freight and passengers by common carriers: Chicago, &c. R. R. Co. *v.* Iowa, 94 U. S. 155; Railroad Com. Cases, 116 U. S. 307, 6 Sup. Ct. Rep. 388; Dow *v.* Beidleman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028; nor from making railroads, and not other masters, liable to servants for the negligence of fellow-servants: Missouri Pac. Ry. Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. Ry. Co. *v.* Herrick, *id.* 210; nor from giving double damages for killing stock through failure to fence: Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. Ry. Co. *v.* Beckwith, 129 U. S. 26, 9 Sup. Ct. Rep. 3; nor from

The executive power is vested in a president, who is made commander-in-chief of the army and navy, and of the militia of

requiring a railroad to pay for examination of its servants for color-blindness: Nashville, C. & St. L. Ry. Co. *v.* Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28; *contra*, Louisville & N. R. R. Co. *v.* Baldwin, 85 Ala. 619, 5 So. 311.

The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities may and do exist in these respects in different States. One may have the common law and trial by jury; another the civil law and trial by the court. But like diversities may also exist in different parts of the same State. The States frame their laws and organize their courts with some regard to local peculiarities and special needs, and this violates no constitutional requirement. All that one can demand under the last clause of § 1 of the fourteenth amendment is, that he shall not be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. Missouri *v.* Lewis, 101 U. S. 22; Hayes *v.* Missouri, 120 U. S. 68, 7 Sup. Ct. Rep. 350. So railroads, as a class, may be taxed differently from other property, and if the law provides for a hearing and judicial contest, it is due process of law. Kentucky R. R. Tax Cases, 115 U. S. 321, 6 Sup. Ct. Rep. 57.

The fourteenth amendment not only gave citizenship to colored persons, but by necessary implication it conferred upon them the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from discriminations imposed by public authority which imply legal inferiority in civil society, lessen the security of their rights, and are steps towards reducing them to the condition of a subject race. The denial by State authority of the right and privilege in colored persons to participate as jurors in the administration of justice is a violation of this amendment. Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339; Neal *v.* Delaware, 103 U. S. 370; [Bush *v.* Kentucky, 107 U. S. 110, 1 Sup. Ct. Rep. 625; Gibson *v.* Mississippi, 162 U. S. 565, 16 Sup. Ct. Rep. 904; Carter *v.* Texas, 177 U. S. 442, 20 Sup. Ct. Rep. 687. On negroes as grand jurors see note to 44 L. ed. U. S. 839. State may require negroes and whites to occupy separate compartments in passenger cars on roads operating wholly within the State. Plessy *v.* Ferguson, 163 U. S. 537, 16 Sup. Ct. Rep. 1138, aff. 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.] A trial jury may be made up entirely of whites, if negroes are not excluded from jury lists, but an indictment is bad, if found by a grand jury on which whites only are allowed by law. Bush *v.* Kentucky, 107 U. S. 110, 1 Sup. Ct. Rep. 625. See, further, United States *v.* Reese, 92 U. S. 214; [Lewis *v.* State, 29 Tex. Ct. Ap. 201, 59 S. W. 1116, 25 Am. St. 720. Negroes called for jury-service may be peremptorily challenged if peremptory challenges are not yet exhausted. Whitney *v.* State, — Tex. Cr. Ap. —, 63 S. W. 879.] A law prohibiting adultery between a white and a negro under heavier penalty than between two whites or two blacks, is valid. Pace *v.* Alabama, 106 U. S. 583, 1 Sup. Ct. Rep. 637. See Plunkard *v.* State, 67 Md. 364. Since these amendments, as before, sovereignty for the protection of life and personal liberty within the respective States rests alone with the States; and the United States cannot take cognizance of invasions of the privilege of suffrage when race, color, or previous condition is not the ground thereof, United States *v.* Reese, 92 U. S. 214; United States *v.* Cruikshank, *id.* 542. Police regulations which affect alike all persons similarly situated are valid: Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; so of regulations of the practice of medicine: Dent *v.* West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 231; [State *v.* Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695;] but the administration of such police ordinances so as to deny to Chinese rights accorded to whites in similar circumstances is prohibited. Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064.

Corporations are "persons" within the meaning of the amendment. Santa Clara Co. *v.* Southern Pac. R. R. Co., 118 U. S.

the several States when called into the service of the United States; and who has power, by and with the consent of the

394, 6 Sup. Ct. Rep. 1132; Missouri Pac. Ry. Co. *v.* Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; [Smyth *v.* Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418; Hawley *v.* Hurd *et al.*, 72 Vt. 122, 47 Atl. 401. But are not "citizens" within the meaning of that term as used in the fourteenth amendment. Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281; Hawley *v.* Hurd *et al.*, *supra*;] but a foreign corporation is not deprived of equal protection of the laws because it is taxed by the State at as high a rate as are corporations of that State in its home State. Phila. Fire Ass. *v.* New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108.

The repeal of a limitation statute after a personal debt is barred by it, does not deprive the debtor of property without due process of law. Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209. See, further, Railroad Co. *v.* Brown, 17 Wall. 446; Kennard *v.* Louisiana, 92 U. S. 480; Pennoyer *v.* Neff, 95 U. S. 714; Pearson *v.* Yewdall, 95 U. S. 294; McMillen *v.* Anderson, 95 U. S. 37; Davidson *v.* New Orleans, 96 U. S. 97; Kirkland *v.* Hotchkiss, 100 U. S. 491; Tennessee *v.* Davis, 100 U. S. 257; Louisiana *v.* New Orleans, 109 U. S. 285, 3 Sup. Ct Rep. 211; Provident Inst. *v.* Jersey City, 113 U. S. 506, 5 Sup. Ct. Rep. 612; RoBards *v.* Lamb, 127 U. S. 58, 8 Sup. Ct. Rep. 1031; Walston *v.* Nevin, 128 U. S. 578, 9 Sup. Ct. Rep. 192; Freeland *v.* Williams, 131 U. S. 405, 9 Sup. Ct. Rep. 794; Board of Com'rs *v.* Merchant, 103 N. Y. 143; State *v.* Ryan, 70 Wis. 676, 36 N. W. 823; Warren *v.* Sohn, 112 Ind. 213, 13 N. E. 863; State *v.* Dent, 25 W. Va. 1; Allen *v.* Wyckoff, 48 N. J. L. 90, 2 Atl. 659. [Upon what constitutes "due process of law," see cases collected in valuable notes upon this topic appended to 42 L. ed. U. S. 865, and 24 L. ed. U. S. 436; see also latter part of note 1, page 505, and note 1, page 568, *post*. Personal service on non-residents outside the jurisdiction of the court may, if reasonable time is given in which to appear and answer, be due process of law in a suit for the foreclosure of a lien upon land within the jurisdiction of the court; but five days' notice, one of those days being a Sunday, is insufficient when, with the utmost diligence and without any accident or delay whatever, the party notified could not reach the court with less than four days of constant travelling, and the fact that by the local practice there would be several days after return day before the case could be called for trial or default taken, or that the court would probably, in view of the circumstances, set aside any default that might have been entered, will not negative this conclusion of insufficiency, since non-residents are not presumed to know the law and practice of the State. Roller *v.* Holly, 176 U. S. 398, 20 Sup. Ct. Rep. 410, rev. 13 Tex. Civ. Ap. 636, 35 S. W. 1074. "It is no longer open to contention that the due process clause of the fourteenth amendment . . . does not control mere forms of procedure in State courts or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend. Iowa C. R. Co. *v.* Iowa, 160 U. S. 389, 16 Sup. Ct. Rep. 344; Wilson *v.* North Carolina, 169 U. S. 586, 18 Sup. Ct. Rep. 435," per Mr. Justice *White* in Louisville & N. R. Co. *v.* Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. Rep. 620, aff. 99 Ky. 148, 35 S. W. 135, 36 S. W. 168. In this case the L. & N. R. Co. had been an actual defendant, although never served with notice and not a party to the record. After judgment it was brought in by rule to show cause and upon appearing and claiming a set-off it was condemned to pay the judgment. The garnishment of a resident debtor of a non-resident defendant to reach a debt due from the latter who has no other property within the jurisdiction of the court does not deprive him of his property without due process of law, the situs of debt being, for purposes of attachment, with the debtor. King *v.* Cross, 175 U. S. 396, 20 Sup. Ct. Rep. 131; Chicago, R. I. & P. R. Co. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. Rep. 797. Upon right to correct gross undervaluations of property assessed for taxation in prior years, even when ownership has since changed, see

Senate, to make treaties, provided two-thirds of the Senate concur, and, with the same advice and consent, to appoint

Weyerhauser *v.* Minnesota, 176 U. S. 550, 20 Sup. Ct. Rep. 485, *aff.* 72 Minn. 519, 75 N. W. 718, in which right of State so to do is sustained. Assessment and collection of taxes upon money loaned within the State is not a taking without due process merely because creditor resides without the State, and such taxes if unpaid may be made a lien enforceable against estate of decedent creditor except as limited by Statute of Limitations. Bristol *v.* Washington County, 177 U. S. 133, 20 Sup. Ct. Rep. 585.

A State may tax the interest of the non-resident mortgagee of lands within its boundaries, even though he holds the mortgage at his residence. Savings & L. Society *v.* Multonomah County, 169 U. S. 421, 18 Sup. Ct. Rep. 392. As to taxes on judgments, see Kingman Co. Com'rs *v.* Leonard, 57 Kan. 531, 46 Pac. 960, 34 L. R. A. 810; moneys of non-residents deposited in State, *Re* Houdayer, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 225, 55 Am. St. 642; place of taxation of trust property, Richmond County Acad. *v.* Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151, and note. Subjecting the logs of an individual who voluntarily runs them into a boom to a lien in favor of the surveyor-general for services of inspection compelled by law and rendered indiscriminately upon all logs in the boom is not a taking without due process. Lindsay & Phelps Co. *v.* Mullen, 176 U. S. 126, 20 Sup. Ct. Rep. 325. Legislation restricting a landowner's right to permit natural gas to escape from his oil wells and go to waste does not deprive him of property without due process. Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576. Denying a right of action for defamatory words used in a pleading is not a taking of property without due process, even if reputation could be considered property. Abbott *v.* National Bank of Commerce, 175 U. S. 409, 20 Sup. Ct. Rep. 153, aff. 20 Wash. 552, 56 Pac. 376. On power of State to declare keeping of barber-shops open on Sunday not a work of charity or necessity, see Petit *v.* Minnesota, 177 U. S. 164, 20 Sup. Ct. Rep. 666. On power of city to restrict prostitutes to certain localities, even though such restriction depreciates the property in those localities, see L'Hote *v.* New Orleans, 177 U. S. 587, 20 Sup. Ct. Rep. 788. Valid commitment for contempt does not deprive of liberty without due process, and jury trial is unnecessary. Tinsley *v.* Anderson, 171 U. S. 101, 18 Sup. Ct. Rep. 805. In the distribution of the assets of an insolvent, postponing a foreign corporation's claims until after those of residents of the State are satisfied, is not a denial of due process. Blake *v.* McClung, 172 U. S. 239, 19 Sup. Ct. Rep. 165. Nor is making the face of the policy conclusive as to the value of the property insured in case of total loss. Orient Insurance Co. *v.* Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281, aff. 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. 638. But see Missouri, K. & T. Ry. Co. *v.* Simonson, — Kan.—, 68 Pac. 653, where it is held that statute making statement of weight in a bill of lading conclusive evidence between the carrier and shipper was void. Nor is requirement of bond in attachment against a resident while none is required against a non-resident. Central Loan & T. Co. *v.* Campbell Commn. Co., 173 U. S. 84, 19 Sup. Ct. Rep. 340. State may forfeit lands for non-payment of taxes if reasonable opportunity is given the owner to redeem by payment of taxes and charges. King *v.* Mullins, 171 U. S. 404, 18 Sup. Ct. Rep. 925. Consequential damage arising from allowing an obstruction of a street is not a taking without due process. Meyer *v.* Richmond, 172 U. S. 82, 19 Sup. Ct. Rep. 106. Discretion may be vested in a single officer to permit or refuse to permit a building to be moved through the streets. Wilson *v.* Eureka City, 173 U. S. 32, 19 Sup. Ct. Rep. 317. State cannot impose upon a non-resident lot owner a liability *in personam* in respect of the lot. Dewey *v.* Des Moines, 173 U. S. 193, 19 Sup. Ct. Rep. 379. For note on what constitutes due process of law, see 2 L. R. A. 258. In appropriation under eminent domain, the State may provide that the appropriator may go into possession upon giving adequate security that the duly assessed compensation will be paid, and may also

ambassadors and other public ministers and consuls, judges of the Supreme Court, and other officers of the United States, whose appointments are not otherwise provided for.[1]

The judicial power of the United States extends to all cases (*a*) in law and equity arising under the national Constitution, the

provide different tribunals for passing matter within the jurisdiction of the court is not a denial of due process. *Ex parte* Converse, 137 U. S. 624, 11 Sup. Ct. Rep. 191. Execution of a criminal by one officer or another, the executioner being duly appointed under the statute, is no part of due process. Davis *v.* Burke, 179 U. S. 399, 21 Sup. Ct. Rep. 210. For other important cases on due process, see Missouri Pac. Ry. *v.* Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130; Allen *v.* Georgia, 166 U. S. 138, 17 Sup. Ct. Rep. 525; Lowe *v.* Kansas, 163 U. S. 81, 16 Sup. Ct. Rep. 1031; Jones *v.* Brim, 165 U. S. 180, 17 Sup. Ct. Rep. 282; Kohl *v.* Lehlback, 160 U. S. 293, 16 Sup. Ct. Rep. 304; Winona & St. Peter Land Co. *v.* Minnesota, 159 U. S. 526, 16 Sup. Ct. Rep. 83; Hamilton *v.* Brown, 161 U. S. 256, 16 Sup. Ct. Rep. 585; Iowa C. Ry. Co. *v.* Iowa, 160 U. S. 389, 16 Sup. Ct. Rep. 344; Cram *v.* United States, 162 U. S. 625, 16 Sup. Ct. Rep. 952; Owens *v.* Henry, 161 U. S. 642, 16 Sup. Ct. Rep. 693; Andrews *v.* Swartz, 156 U. S. 272, 15 Sup. Ct. Rep. 389; Bergeman *v.* Backer, 157 U. S. 655, 15 Sup. Ct. Rep. 727; Duncan *v.* Missouri, 152 U. S. 377, 14 Sup. Ct. Rep. 570; McKane *v.* Durston, 153 U. S. 684, 14 Sup. Ct. Rep. 913; Marchant *v.* Penn. Ry. Co., 153 U. S. 380, 14 Sup. Ct. Rep. 894; Giozza *v.* Tiernan, 148 U. S. 657, 13 Sup. Ct. Rep. 721; Passavant *v.* United States, 148 U. S. 214, 13 Sup. Ct. Rep. 572; Paulsen *v.* City of Portland, 149 U. S. 30, 13 Sup. Ct. Rep. 750; Schwab *v.* Berggren, 143 U. S. 442, 12 Sup. Ct. Rep. 525; Davis *v.* Texas, 139 U. S. 651, 11 Sup. Ct. Rep. 675; Leeper *v.* Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577; Lent *v.* Tillson, 140 U. S. 316, 11 Sup. Ct. Rep. 825. See also cases in note 1, page 568, *post*.]

[1] U. S. Const. art. 2.

upon the necessity of the appropriation and upon the amount of compensation. Backus *v.* Fort St. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. Rep. 445. If during the pendency of an appeal, the day set for the execution of a death sentence passes, it is no denial of due process to set another day, particularly when such is in conformity to the statute of the State. Craemer *v.* Washington, 168 U. S. 124, 18 Sup. Ct. Rep. 1. An information which charges a crime in the general words of a statute without specifying kind, quantity, price, etc., but sets out these and other particulars in a specification attached to the information, which specification the accused might lawfully require but has not in fact required, is not too defective to be due process. Hodgson *v.* Vermont, 168 U. S. 262, 18 Sup. Ct. Rep. 80, aff. 66 Vt. 134, 28 Atl. 1089. State may confiscate, without judicial process, nets and seines used in violation of its fish and game laws. Lawton *v.* Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, aff. 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134. Indictment by grand jury not necessary. McNulty *v.* California, 149 U. S. 645, 13 Sup. Ct. Rep. 959, aff. 93 Cal. 427, 26 Pac. 597, 29 Pac. 61. State can impeach title to lands granted by it only by suing in equity. A second patent to the lands issued before such impeachment of the former is void. Chandler *v.* Calumet & H. M. Co., 149 U. S. 79, 13 Sup. Ct. Rep. 798; Noble *v.* Union Riv. Logging R. Co., 147 U. S. 165, 13 Sup. Ct. Rep. 271.

The State may provide that the acts of its *de facto* officers shall be valid. Manning *v.* Weeks, 139 U. S. 504, 11 Sup. Ct. Rep. 624. An erroneous decision upon a

(*a*) [Includes a proceeding for mandamus. Am. Express Co. *v.* Michigan, 177 U. S. 404, 20 Sup. Ct. Rep. 695, reversing 118 Mich. 682, 77 N. W. 317. "Judicial power of United States extends only to the trial and determination of 'cases' in courts of record, and . . . Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts, not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to per-

laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls;(*a*) to all cases of admiralty and maritime jurisdiction;(*b*) to controversies to which the United States shall be a party;(*c*) to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or citizens thereof and foreign States, citizens or subjects.[1] But a State is not subject to be sued in the courts of the United States by citizens of another State, or by citizens or subjects of any foreign State.[2]

[1] U. S. Const. art. 3, § 2. A State cannot make it a condition to the doing of business by a foreign corporation within its limits that the corporation shall agree not to remove cases against it to the Federal courts. Barron *v.* Burnside, 121 U. S. 186, 7 Sup. Ct. Rep. 931; Goodrel *v.* Kreichbaum, 70 Iowa, 362, 30 N. W. 872. See Elston *v.* Piggott, 94 Ind. 14.

Congress may vest exclusive jurisdiction in Federal courts of suits arising from acts done under color of authority of the United States, and may regulate all incidents of such suits. Mitchell *v.* Clark, 110 U. S. 633, 4 Sup. Ct. Rep. 170. So, in an action to recover money exacted by a customs collector, the United States limitation law governs. Arnson *v.* Murphy, 109 U. S. 238, 3 Sup. Ct. Rep. 184. [Federal courts have jurisdiction in a case of conspiracy, charging persons with conspiring to kill one in the custody of the United States Marshal. Logan *v.* United States, 144 U. S. 263, 12 Sup. Ct. Rep. 617. A mere maladministration of the quarantine laws of one State to the injury of the citizens of another does not constitute a controversy among States. Louisiana *v.* Texas, 176 U. S. 1, 20 Sup. Ct. Rep. 251. Application of interstate commerce to a Federal court for the punishment of disobedience of the command of the subpœna of the commission is not a "case" within the meaning of the Constitution, and the court has not jurisdiction. *Re* Inter-State Commerce Commission, 53 Fed. 476.]

[2] U. S. Const. 11th Amendment. But a suit in a State court, to which a State is a party, may be removed to the Federal court for trial if a federal question is involved. Railroad Co. *v.* Mississippi, 102

form such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself." Robertson *v.* Baldwin, 165 U. S. 275, 17 Sup. Ct. Rep. 326, holding that Congress may authorize justices of the peace to arrest deserting seamen and return them to their ships.]

(*a*) [If a consul wishes to enjoy his exemption from the jurisdiction of a State court, he must specially plead it, and must plead it at the proper time. Wilcox *v.* Luco, 118 Cal. 639, 45 Pac. 676, 50 Pac. 768, 45 L. R. A. 579, 62 Am. St. 305, upon privileges and exemptions of consuls, see note to this case in L. R. A. And upon jurisdiction of consuls over actions between citizens of their own nations, temporarily in a State, to the exclusion of the State courts, see Telefsen *v.* Fee, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481 and note, 60 Am. St. 379.]

(*b*) [A bill to enforce a lien for towage by foreclosure of the lien on a raft of lumber in complainant's possession, the suit being brought against individual defendants and seeking a decree against them and in default of payment a sale of the lumber to satisfy it is not a proceeding *in rem* within exclusive admiralty jurisdiction, but is a suit *in personam* and may be brought in a State court. Knapp, Stout, &c. Co. *v.* McCaffrey, 177 U. S. 638, 20 Sup. Ct. Rep. 824, aff. 178 Ill. 107, 52 N. E. 898; 69 Am. St. 290.]

(*c*) [This includes a suit by the United States against a State. United States Texas, 143 U. S. 621, 12 Sup. Ct. Rep. 488.]

The Constitution and the laws of the United States, made in pursuance thereof, and all treaties made under the authority of the United States, are declared to be the supreme law of the land;[1] and the judges of every State are to be bound thereby,

U. S. 135. That States are not suable except with their own consent, see Railroad Co. *v.* Tennessee, 101 U. S. 337; Railroad Co. *v.* Alabama, 101 U. S. 832. A State by appearing in a suit against it may waive its immunity. Clark *v.* Barnard, 108 U. S. 436, 2 Sup. Ct. Rep. 878. It may attach any conditions it pleases to its consent. DeSaussure *v.* Gaillard, 127 U. S. 216, 8 Sup. Ct. Rep. 1053. But apart from such conditions its liability must be determined like that of an individual. Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; Bowen *v.* State, 108 N. Y. 166, 15 N. E. 56. [Statutes permitting suits against the State are to be strictly construed. Interest is not allowable on the claim unless the statute expressly so provides. Western & A. R. Co. *v.* State, — Ga. —, 14 L. R. A. 438. And upon suits against a State, see in general, Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370 and note; 22 Am. St. 624; Hans *v.* Louisiana, 134 U. S. 1, 10 Sup. Ct. Rep. 504; North Carolina *v.* Temple, 134 U. S. 22, 10 Sup. Ct. Rep. 509. A suit by one State against another will not lie, if in legal effect prosecuted in the name of the State by citizens thereof as the real parties in interest. New Hampshire *v.* Louisiana, 108 U. S. 76. A suit nominally against an officer, but really against a State, to enforce performance of its obligation in its political capacity, will not lie. Louisiana *v.* Jumel, 107 U. S. 711, 2 Sup. Ct. Rep. 128; Hagood *v.* Southern, 117 U. S. 52, 6 Sup. Ct. Rep. 608; *In re* Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 104; [Smith *v.* Reeves, 178 U. S. 436, 20 Sup. Ct. Rep. 919. And as to suits against States, see notes to 33 L. ed. U. S. 842; 11 L. R. A. 370; 8 L. R. A. 399. See also Fitts *v.* McGhee, 172 U. S. 516, 19 Sup. Ct. Rep. 269.] Otherwise if officers, claiming to act as such, invade private right under color of unconstitutional laws. United States *v.* Lee, 106 U. S. 196, 1 Sup. Ct. Rep. 240; Cunningham *v.* Macon, &c. R. R. Co., 109 U. S. 446, 3 Sup. Ct. Rep. 292; Poindexter *v.* Greenhow, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962; [Smyth *v.* Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418; Scott *v.* Donald, 165 U. S. 58, 107, 17 Sup. Ct. Rep. 265, 262; Reagan *v.* Farmers' L. & J. Co., 154 U. S. 362, 14 Sup. Ct. Rep. 1047; *Ex parte* Tyler, 149 U. S. 164, 13 Sup. Ct. Rep. 785; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 Sup. Ct. Rep. 699. Where individuals claiming to be in possession as officers of a State, holding for the State, are sued in an action of ejectment and the State does not intervene and become a party to the record, the suit is not one against the State. Tindal *v.* Wesley, 167 U. S. 204, 17 Sup. Ct. Rep. 770.] See Antoni *v.* Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91. Allen *v.* Baltimore & O. R. R. Co., 114 U. S. 311, 5 Sup. Ct. Rep. 425, 962. An action lies to compel an officer to do what the statute requires. Rolston *v.* Missouri Fund Com'rs, 120 U. S. 390, 7 Sup. Ct. Rep. 599. No claim arises against any government in favor of an individual, by reason of the misfeasance, laches, or unauthorized exercise of power by its officers or agents. Gibbons *v.* United States, 8 Wall. 269; Clodfelter *v.* State, 86 N. C. 51, 53; Langford *v.* United States, 101 U. S. 341. [Upon what claims constitute valid demands against a State, see Northwestern & P. H. Bank *v.* State, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33, and note. See, on suits against a State, 34 Am. L. Rev. 670.]

[1] "The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it." *Strong*, J., in Tennessee *v.* Davis, 100 U. S. 257, 263. [Iowa statute excluding aliens from holding lands is overridden by treaty with Bavaria. Opel *v.* Shoup, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A.

any thing in the constitution or laws of any State to the contrary notwithstanding.[1]

It is essential to the protection of the national jurisdiction, and to prevent collision between State and national authority, (*a*)

583. And the Louisiana statute taxing inheritances and legacies received by foreigners is overridden by the treaty with Italy. Succession of Rixner, 48 La. Ann. 552, 19 So. 597, 32 L. R. A. 177; upon effect of treaties upon aliens' right to inherit, see note hereto in L. R. A.]

[1] U. S. Const. art. 6; Owings *v.* Norwood's Lessee, 5 Cranch, 344; McCulloch *v.* Maryland, 4 Wheat. 316; Foster *v.* Neilson, 2 Pet. 253, 314; Cook *v.* Moffat, 5 How. 295; Dodge *v.* Woolsey, 18 How. 331. A State constitution cannot prohibit federal judges from charging juries as to matters of fact. St. Louis, &c. Ry. Co. *v.* Vickers, 122 U. S. 360, 7 Sup. Ct. Rep. 1216. Congress may empower a corporation to take soil under navigable water between two States for the building of a bridge for use in interstate commerce, although the legislature of one of the States protests against it. Decker *v.* Baltimore, &c. R. R. Co., 30 Fed. Rep. 723. When a treaty has been ratified by the proper formalities, it is, by the Constitution, the supreme law of the land, and the courts have no power to inquire into the authority of the persons by whom it was entered into on behalf of the foreign nation. Doe *v.* Braden, 16 How. 635, 657; or the powers or rights recognized by it in the nation with which it was made. Maiden *v.* Ingersoll, 6 even take away private property without compensation. Cornet *v.* Winton, 2 Yerg. 143. It may operate retroactively. Hauenstein *v.* Lynham, 100 U. S. 483. A State law in conflict with it must give way to its superior authority. Ware *v.* Hylton, 3 Dall. 99; Yeaker *v.* Yeaker, 4 Met. (Ky.) 33; People *v.* Gerke, 5 Cal. 381. So, a provision in a State constitution. Parrott's Chinese Case, 6 Sawy. 349. See, further, United States *v.* Aredondo, 6 Pet. 691; United States *v.* Percheman, 7 Pet. 51; Garcia *v.* Lee, 12 Pet. 511; Hauenstein *v.* Lynham, 100 U. S. 483; Ropes *v.* Clinch, 8 Blatch. 304; United States *v.* Tobacco Factory, 1 Dill. 264; The Cherokee Tobacco, 11 Wall. 616. In this last case it is decided, as before it had been at the Circuit, that a law of Congress repugnant to a treaty, to that extent abrogates it. To the same effect are Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247; Whitney *v.* Robertson, 124 U. S. 190, 8 Sup. Ct. Rep. 456; Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. Rep. 623. [A provision of a State constitution against limitation of liability for injuries resulting in death is overridden by an act of Congress permitting such limitation in maritime affairs. Loughin *v.* McCaulley, 186 Pa. 517, 40 Atl. 1020, 48 L. R. A. 33, 65 Am. St. 872.]

(*a*) ["The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and State courts. Peck *v.* Jenness, 7 How. 612; Freeman *v.* Howe, 24 How. 450; Moran *v.* Sturges, 154 U. S. 256, 14 Sup. Ct. Rep. 1019; Central Nat'l Bank *v.* Stevens, 169 U. S. 432, 18 Sup. Ct. Rep. 403; Harkrader *v.* Wadley, 172 U. S. 148, 19 Sup. Ct. Rep. 119." Per *Shiras*, J., in Farmers' Loan & T. Co. *v.* Lake St. Elevated R. Co., 177 U. S. 51, 20 Sup. Ct. Rep. 564, rev. 173 Ill. 430, 51 N. E. 55. Under U. S. Rev. Stat. § 720, a Federal court is precluded from granting an injunc-

that the final decision upon all questions arising in regard thereto should rest with the courts of the Union;[1] and as such questions

[1] Martin *v.* Hunter's Lessee, 1 Wheat. 304, 334; Cohens *v.* Virginia, 6 Wheat. 264; Bank of United States *v.* Norton, 3 Marsh. 423; Braynard *v.* Marshall, 8 Pick. 194, per *Parker*, Ch. J., Spangler's Case, 11 Mich. 298; Tarble's Case, 13 Wall. 397; Tennessee *v.* Davis, 100 U. S. 257. [Upon necessity of federal question in jurisdiction of Federal over State courts, see notes to 42 L. ed. U. S. 998, and 37 L. ed. U. S. 267. Upon what is federal question, see note to 39 L. ed. U. S. 884. That decision by a State court that a certain act of legislature does not impair obligation of contract raises a federal question, see Walsh *v.* Columbus, H. V. & A. R. Co., 176 U. S. 469, 20 Sup. Ct. Rep. 393; also Bellingham Bay & B. C. R. Co. *v.* New Whatcom, 172 U. S. 314, 19 Sup. Ct. Rep. 205. Whether an act, authorized by legislation decided by the courts of a State to be in conformity to its Constitution, amounts to a taking of property without due process is a federal question. Wheeler *v.* N. Y., N. H. & H. R. Co., 178 U. S. 321, 20 Sup. Ct. Rep. 949.]

tion against enforcing claims against Indians in a State court. U. S. *v.* Parkhurst-Davis Mercantile Co., 176 U. S. 317, 20 Sup. Ct. Rep. 423. See, upon injunctions restraining proceedings in State courts, notes to 16 C. C. A. 90, and 27 C. C. A. 575. No State court has authority to order execution against a national bank in the hands of a receiver for the enforcement of a lien in attachment against the bank as garnishee, even though the lien were obtained before the receiver's appointment. Earle *v.* Pennsylvania, 178 U. S. 449, 20 Sup. Ct. Rep. 915. But the State court may entertain an action in attachment against such bank and its receiver, and the receiver must report such fact and the judgment upon the action to the Comptroller of the Currency whose duty it is to hold the proceeds of the bank's assets subject to all rights acquired by the plaintiff through the attachment proceedings. Earle *v.* Pennsylvania, above; Earle *v.* Conway, 178 U. S. 456, 20 Sup. Ct. Rep. 918, aff. 189 Pa. 610, 42 Atl. 303. A Federal court controlling receivership of bank cannot restrain a prosecution brought by State against an officer of the bank for crime committed in respect to the bank property before the civil suit was brought. Harkrader *v.* Wadley, 172 U. S. 148, 19 Sup. Ct. Rep. 119. A receiver appointed by a Federal court voluntarily going into a State court cannot question the right of the State court to determine the controversy. Grant *v.* Buckner, 172 U. S. 232, 19 Sup. Ct. Rep. 163, aff. 49 La. Ann. 668, 21 So. 580. A State court cannot compel the complainants in a suit pending in a Federal court to come into the State court and there relitigate the question in controversy in the Federal court, nor can it by injunction restrain them from proceeding under the final decree of sale of the Federal court, and from enforcing the other remedies adjudged to them by that decree. Central Nat. Bk. *v.* Stevens, 169 U. S. 432, 18 Sup. Ct. Rep. 403. Proceedings *in rem* for the enforcement of a lien against a vessel given by a State statute for repairs made upon her in her home port under contract with her owners or their agent are within the exclusive jurisdiction of the Federal courts, being in admiralty. The Glide, 167 U. S. 606, 17 Sup. Ct. Rep. 930, rev. 157 Mass. 525, 33 N. E. 163, 159 Mass. 60, 34 N. E. 258. That such lien will be enforced in admiralty, see The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. Rep. 498. The same act may be a crime against both a State and the United States, and each then has jurisdiction to punish it. Crossley *v.* California, 168 U. S. 640, 18 Sup. Ct. Rep. 242, s. c. below; People *v.* Worden, 113 Cal. 569, 45 Pac. 844. Where the question of the validity of a patent arises collaterally, the State court has jurisdiction to pass upon it. Pratt *v.* Paris Gaslight & Coke Co., 168 U. S. 255, 18 Sup. Ct. Rep. 62: see also Marsh *v.* Nichols, Shepard and Co., 140 U. S. 344, 11 Sup. Ct. Rep. 798. The rights of riparian owners are determined by the State law. St. Anthony Falls Water Power Co. *v.* Board of Water Com'rs, 168 U. S. 349, 18 Sup. Ct. Rep. 157; Eldredge *v.* Trezevant, 160 U. S. 452, 16 Sup. Ct. Rep. 345. State courts have jurisdiction of crimes committed on Indian reservations where crime is neither by nor against Indians. Draper *v.* United States, 164 U. S. 240, 17 Sup. Ct. Rep. 107. National banks are subject to State authority in

must frequently arise first in the State courts, provision is made by the Judiciary Act for removing to the Supreme Court of the

all respects except where the attempted exercise of such authority "expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created." Davis *v.* Elmira Sav. Bk., 161 U. S. 283, 16 Sup. Ct. Rep. 502; and the power vested in a national bank by federal law to take property "such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings" is not infringed by a State statute making such conveyances voidable in case of insolvency within a limited period thereafter by the transferor. McClellan *v.* Chipman, 164 U. S. 347, 17 Sup. Ct. Rep. 85. Appointment of a receiver by a Federal court does not divest a State court of its previously acquired control of the assets of a corporation. Mo. Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 Sup. Ct. Rep. 389; Shields *v.* Coleman, 157 U. S. 168, 15 Sup. Ct. Rep. 570. Upon effect of judgment of State court upon United States title to lands, see Stanley *v.* Schwalby, 162 U. S. 255, 16 Sup. Ct. Rep. 754. Federal court will not revise views of State court upon principles of general law. Sayward *v.* Denny, 158 U. S. 180, 15 Sup. Ct. Rep. 777. State decisions control interpretation of wills. Roberts *v.* Lewis, 153 U. S. 367, 14 Sup. Ct. Rep. 945. When a Federal court of competent jurisdiction has acquired possession of property, and is proceeding to determine a controversy concerning it, a State court cannot enjoin the plaintiffs in the Federal court from proceeding in the case. Moran *v.* Sturges, 154 U. S. 256, 14 Sup. Ct. Rep. 1019, rev. 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391. A State court cannot adjudicate upon a maritime lien, nor can any action of such court divest property of such lien when it has once attached. Moran *v.* Sturges, above. State statutes of limitation are not binding upon the United States, but the United States may take advantage of them. Stanley *v.* Schwalby, 147 U. S. 508, 13 Sup. Ct. Rep. 418. Although the statutes of the State regulate the administration and descent of the assets of descendants, and exclusive jurisdiction of such matters may be conferred upon the State's probate courts, so far as its own citizens are concerned, the Federal courts have jurisdiction to adjudicate upon claims concerning such assets as between citizens of different States. Hayes *v.* Pratt, 147 U. S. 557, 13 Sup. Ct. Rep. 503. But if the probate court has secured possession of the assets, the Federal court cannot deprive it of such possession. Byers *v.* McAuley, 149 U. S. 608, 13 Sup. Ct. Rep. 906; see the dissenting opinion of Mr. Justice *Shiras* in this case, concurred in by Chief Justice *Fuller*. The jurisdiction of the Federal courts over suits between citizens of different States cannot be impaired by any statutory regulations of a State concerning the manner in which the validity of demands against its counties shall be established. Chicot County *v.* Sherwood, 148 U. S. 529, 13 Sup. Ct. Rep. 695. In absence of congressional legislation Federal courts follow State statutes of limitation. Bauserman *v.* Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466. Federal courts will not entertain suit against a receiver appointed by State court without permission of such court. Porter *v.* Sabin, 149 U. S. 473, 13 Sup. Ct. Rep. 1008. Property in the hands of a receiver of a Federal court cannot be levied upon by a State officer to enforce the payment of taxes. *Ex parte* Tyler, 149 U. S. 164, 13 Sup. Ct. Rep. 785. Assignee in bankruptcy is bound if he appears in a State court and answers. Ludeling *v.* Chaffe, 143 U. S. 301, 12 Sup. Ct. Rep. 439; s. c. 40 La. Ann. 645, 4 So. 586. Federal courts are not bound by the rules of constructive notice and summons followed in the State courts. Tripp *v.* Santa Rosa St. R. Co., 144 U. S. 126, 12 Sup. Ct. Rep. 655. A State can neither enlarge nor restrict the jurisdiction of the Federal courts. Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44; Parker *v.* Ormsby, 141 U. S. 81, 11 Sup. Ct. Rep. 912. Nor can it regulate the practice thereof. Scott *v.* Neely, 140 U. S. 106, 11 Sup. Ct. Rep. 712. Nor can a State court readjudicate matters determined by a Federal court. Leadville Coal Co. *v.* McCreery, 141 U. S. 475, 12 Sup. Ct. Rep. 28. Where an administrator appointed under the laws of one State appears,

United States the final judgment or decree in any suit, rendered in the highest court of law or equity of a State in which a decision could be had, in which is drawn in question the validity of a treaty, or statute of, or authority exercised under the United States, and the decision is against its validity; (*a*) or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of its being repugnant

without authority from the court appointing him, and defends upon the merits a suit brought against him in a Federal circuit court in another State, and the decree goes against him, and he later appears and files a bill of review in that court, the laws of the second State permitting administrators of other States to sue as such in its courts, the Federal court gets jurisdiction of the administrator and the decree in the suit for review is binding upon him and must be given full faith and credit in other States. Lawrence *v.* Nelson, 143 U. S. 215, 12 Sup. Ct. Rep. 440. "Judgments and decrees of a circuit court of the United States are to be accorded in the State courts the same effect as would be accorded to the judgments and decrees of a State tribunal of equal authority." Pendleton *v.* Russell, 144 U. S. 640, 12 Sup. Ct. Rep. 743. Federal Supreme Court will not issue mandamus to State Supreme Court to reinstate a disbarred attorney. *Re* Green, 141 U. S. 325, 11 Sup. Ct. Rep. 11. Federal practice not subject to State control. Fishburn *v.* Chicago, M. & St. P. R. Co., 137 U. S. 60, 11 Sup. Ct. Rep. 8. A State court will not be permitted to try a United States marshal, deputed to protect one of the Federal judges in the performance of his duties, for an alleged murder where the killing was done by the marshal in affording such protection and was necessary thereto. Cunningham *v.* Neagle, 135 U. S. 1, 10 Sup. Ct. Rep. 658. Receivers appointed by Federal court are, by act of Congress, suable in State courts. Gableman *v.* Peoria, D. & E. R. Co., 179 U. S. 335, 21 Sup. Ct. Rep. 171. Upon administration of federal laws in State courts, see valuable note in 48 L. R. A. 33. Except by permission of Congress a State cannot determine the territorial extent to which a judgment of a Federal court shall be a lien. Blair *v.* Ostrander, 109 Iowa, 204, 80 N. W. 330, 47 L. R. A. 469, 77 Am. St. 532; upon liens of judgments in Federal courts, see note to this case in L. R. A. That a State court will set aside a judgment obtained by fraud in a Federal court, see Wonderly *v.* La Fayette Co., 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. 474. That Congress cannot compel State courts to entertain and act upon applications for naturalization, see State *v.* Judges of Inf. Ct. of Com. Pleas, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761. Liens arising from federal decrees are not subject to State recording laws. Stewart *v.* W. & L. E. R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.]

(*a*) [When the decision is in favor of its validity there is no ground for review. Abbott *v.* Nat'l Bk. of Commerce, 175 U. S. 409, 20 Sup. Ct. Rep. 153. Upon when validity is drawn in question, see Linford *v.* Ellison, 155 U. S. 503, 15 Sup. Ct. Rep. 179. Where officers of the United States are in possession of lands and claim to hold for the United States, and are sued as trespassers, the case may be reviewed in the Federal court. Stanley *v.* Schwalby, 147 U. S. 508, 13 Sup. Ct. Rep. 418.

Whether a right given by act of Congress to "legal representatives" is for benefit of next of kin to the exclusion of creditors is a federal question. Briggs *v.* Walker, 171 U. S. 466, 19 Sup. Ct. Rep. 1. So is the effect of foreclosure proceedings in a Federal court. Pittsburg C. C. & St. L. Ry. Co. *v.* Long Island L. & T. Co., 172 U. S. 493, 19 Sup. Ct. Rep. 238. Where the decision of a State court may be supported upon grounds which do not involve a federal question, the United States Supreme Court will not review the case even though a federal question was also raised in the State court. Chappell Chemical & F. Co. *v.* Sulphur Mines Co., 172 U. S. 465, 19 Sup. Ct. Rep. 265; Allen *v.* Southern Pacific Ry. Co., 173 U. S. 479, 19 Sup. Ct. Rep. 518; Harrison *v.* Morton, 171 U. S. 38, 18 Sup. Ct. Rep. 742. Validity of title alleged to be derived through a congressional land grant when questioned raises a federal question. Northern Pac. Ry. Co. *v.* Colburn, 164 U. S. 383, 17 Sup. Ct. Rep. 98.]

to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority.[1]

But to authorize the removal under that act, it must appear by the record, either expressly or by clear and necessary intendment, that some one of the enumerated questions did arise in the State court, and was there passed upon. (*a*) It is not suffi-

[1] Acts 1789 and 1867; R. S. 1878, title 13, ch. 11.

"It is settled law, as established by well-considered decisions of this court, pronounced upon full argument, and after mature deliberation, notably in Cohens *v.* Virginia, 6 Wheat. 264; Osborn *v.* Bank of United States, 9 Wheat. 738; Mayor *v.* Cooper, 6 Wall. 247; Gold Water & Washing Co. *v.* Keyes, 96 U. S. 199; and Tennessee *v.* Davis, 100 U. S. 257:

"That while the eleventh amendment of the national Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State;

"That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the Constitution, or a law of the United States, whenever its correct decision depends upon a construction of either;

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted;

"That except in the cases of which this court is given by the Constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and lastly,—

"That it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it." *Harlan, J.*, in Railroad Co. *v.* Mississippi, 102 U. S. 135, 140. [Upon removal of causes to the Federal court, see note to 36 L. ed. U. S. 346, and another at page 528. The Federal Supreme Court may review the decision of a State court as to what property of a bankrupt passes to his assignee in bankruptcy; also as to when property arising under act of Congress begins. Williams *v.* Heard, 140 U. S. 529, 11 Sup. Ct. Rep. 885. For other cases upon power of review by the Supreme Court of the United States, see Metropolitan Nat'l Bk. *v.* Claggett, 141 U. S. 520, 12 Sup. Ct. Rep. 60; Etheridge *v.* Sperry, N. & G., 139 U. S. 266, 11 Sup. Ct. Rep. 565.]

(*a*) ["We have repeatedly decided that an appeal to the jurisdiction of the court must not be a mere afterthought, and that if any right, privilege, or immunity is

cient that it might have arisen or been applicable.[1] And if

[1] Owings *v.* Norwood's Lessee, 5 Cranch, 344; Martin *v.* Hunter's Lessee, 1 Wheat. 304; Inglee *v.* Coolidge, 2 Wheat. 363; Miller *v.* Nicholls, 4 Wheat. 311; Williams *v.* Norris, 12 Wheat. 117; Hickie *v.* Starke, 1 Pet. 94; Harris *v.* Dennie, 3 Pet. 292; Fisher's Lessee *v.* Cockerell, 5 Pet. 248; New Orleans *v.* De Armas, 9 Pet. 223, 234; Keene *v.* Clarke, 10 Pet. 291; Crowell *v.* Randell, 10 Pet. 368; McKinny *v.* Carroll, 12 Pet. 66; Holmes *v.* Jennison, 14 Pet. 540; Scott *v.* Jones, 5 How. 343; Smith *v.* Hunter, 7 How. 738; Williams *v.* Oliver, 12 How. 111; Calcote *v.* Stanton, 18 How. 243; Maxwell *v.* Newbold, 18 How. 511; Hoyt *v.* Shelden, 1 Black, 518; Farney *v.* Towle, 1 Black, 350; Day *v.* Gallup, 2 Wall. 97; Walker *v.* Villavaso, 6 Wall. 124; The Victory, 6 Wall. 382; Hamilton Co. *v.* Mass., 6 Wall. 632; Gibson *v.* Chouteau, 8 Wall. 314; Worthy *v.* Commissioners, 9 Wall. 611; Messenger *v.* Mason, 10 Wall. 507; Insurance Co. *v.* Treasurer, 11 Wall. 204; McManus *v.* O'Sullivan, 91 U. S. 578; Bolling *v.* Lersner, 91 U. S. 594; Adams Co. *v.* Burlington, &c. R. R. Co., 112 U. S. 123, 5 Sup. Ct. Rep. 77; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 5 Sup Ct. Rep. 681; Detroit Ry. Co. *v.* Guthard, 114 U. S. 133, 5 Sup. Ct. Rep. 811; Arrowsmith *v.* Harmoning, 118 U. S. 194, 6 Sup. Ct. Rep. 1023; Germania Ins. Co. 2 Sup. Ct. Rep. 940; and see Phila. Fire *v.* Wisconsin, 119 U. S. 473, 7 Sup. Ct. Rep. 360; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 7 Sup. Ct. Rep. 916; New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S. 18, 8 Sup. Ct. Rep. 741; [Scudder *v.* Coler, 175 U. S. 32, 20 Sup. Ct. Rep. 26; Roby *v.* Colehour, 146 U. S. 153, 13 Sup. Ct. Rep. 47; Brown *v.* Massachusetts, 144 U. S. 573, 12 Sup. Ct. Rep. 757; Jesler *v.* Bd. of Harbor Com'rs, 146 U. S. 646, 13 Sup. Ct. Rep. 190; United States *v.* Lynch, 137 U. S. 280, 11 Sup. Ct. Rep. 114.] It is not sufficient that the presiding judge of the State court certifies that a right claimed under the national authority was brought in question. Railroad Co. *v.* Rock, 4 Wall. 177; Parmelee *v.* Lawrence, 11 Wall. 36; Felix *v.* Schwarnweber, 125 U. S. 54, 8 Sup. Ct. Rep. 759; [Henkel *v.* Cincinnati, 177 U. S. 170, 20 Sup. Ct. Rep. 573.] If the record does not show a federal question raised or necessarily involved, the opinion of the court will not be examined to see if one was in fact decided. Otis *v.* Oregon S. S. Co., 116 U. S. 548, 6 Sup. Ct. Rep. 523. But where an opinion is part of the record by law, it may be examined. New Orleans Water Works *v.* Louisiana Sugar Co., 125 U. S. 18, 8 Sup. Ct. Rep. 741; Kreiger *v.* Shelby R. R. Co., 125 U. S. 39, 8 Sup. Ct. Rep. 752; Gross *v.* U. S. Mortgage Co., 108 U. S. 477,

asserted under the Constitution or laws of the United States, it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained." Per Mr. Justice *Brown* in Bolln *v.* Nebraska, 176 U. S. 83, 20 Sup. Ct. Rep. 287; Caldwell *v.* Texas, 137 U. S. 691, 11 Sup. Ct. Rep. 224; Eastern Building & L. Ass'n *v.* Welling, 181 U. S. 47, 21 Sup. Ct. Rep. 531; Yazoo & M. V. Ry. Co. *v.* Adams, 180 U. S. 1, 21 Sup. Ct. Rep. 240; Turner *v.* Richardson, 180 U. S. 87, 21 Sup. Ct. Rep. 295; Texas & P. Ry. Co. *v.* So. Pac. Co., 137 U. S. 48, 11 Sup. Ct. Rep. 10; Butler *v.* Gage, 138 U. S. 52, 11 Sup. Ct. Rep. 235. And it must be set up by him who would avail himself of it in the Federal Supreme Court. He cannot avail himself of the fact that somebody else raised the question in the State court, even though it were in the same suit. Sully *v.* American National Bank, 178 U. S. 289, 20 Sup. Ct. Rep. 935; Missouri *v.* Andriano, 138 U. S. 497, 11 Sup. Ct. Rep. 385. It is sufficient, however, if it be raised in the highest State court and there passed upon on its merits. Sully *v.* American National Bank, *supra*. It is sufficient if it be raised by some one under whom he claims. Ludeling *v.* Chaffe, 143 U. S. 301, 12 Sup. Ct. Rep. 439. The dispute must be real and substantial. *Re* Buchanan, 158 U. S. 31, 15 Sup. Ct. Rep. 723. And see in particular a note upon what is a federal question in 39 L. ed. U. S. 884. Also Powell *v.* Supervisors of Brunswick Co., 150 U. S. 433, 14 Sup. Ct. Rep. 166; Hanbiin *v.* Western Land Co., 147 U. S. 531, 13 Sup. Ct. Rep. 353. And see also upon "Necessity of Federal Question," note to last case in 37 Law ed. U. S. 267.]

the decision of the State court is in favor of the right, title, privilege, or exemption so claimed, the Judiciary Act does not authorize such removal.[1] Neither does it where the validity of the State law is drawn in question, and the decision of the State court is against its validity.[2]

But the same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State constitutions and laws, where nothing is involved of national authority, or of right under the Constitution, laws, or treaties of the United States;(*a*) and to accept

Ass. *v.* New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108. The record should show that the right was claimed in the trial court. Brooks *v.* Missouri, 124 U. S. 394, 8 Sup. Ct. Rep. 443. It is a federal question whether a State court has given effect to the unreversed decision of a United States Circuit Court acting within its jurisdiction. Crescent City, &c. Co. *v.* Butcher's Union, &c. Co., 120 U. S. 141, 7 Sup. Ct. Rep. 472. So, whether a prisoner has been twice in jeopardy; Bohanan *v.* Nebraska, 118 U. S. 231, 6 Sup. Ct. Rep. 1049; and whether one in a country with which we have an extradition treaty can be brought back for trial except under the treaty provisions. Ker *v.* Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225. That a State court has held valid a divorce in a foreign country raises no such question. Roth *v.* Ehman, 107 U. S. 319, 2 Sup. Ct. Rep. 312. [For other examples of cases held to involve no federal question, see Crystal Springs Land & W. Co. *v.* Los Angeles, 177 U. S. 169, 20 Sup. Ct. Rep. 573; De Lamar's Gold Mining Co. *v.* Nesbitt, 177 U. S. 523, 20 Sup. Ct. Rep. 715; McCain *v.* Des Moines, 174 U. S. 168, 19 Sup. Ct. Rep. 644; Remington Paper Co. *v.* Watson, 173 U. S. 443, 19 Sup. Ct. Rep. 456; Capital Nat'l Bk. *v.* First Nat'l Bk., 172 U. S. 425, 19 Sup. Ct. Rep. 202.]

[1] Gordon *v.* Caldcleugh, 3 Cranch, 268; McDonogh *v.* Millaudon, 3 How. 693; Fulton *v.* McAffee, 16 Pet. 149; Linton *v.* Stanton, 12 How. 423; Burke *v.* Gaines, 19 How. 388; Reddall *v.* Bryan, 24 How. 420; Roosevelt *v.* Meyer, 1 Wall. 512; Ryan *v.* Thomas, 4 Wall. 603; [Dower *v.* Richards, 151 U. S. 658, 14 Sup. Ct. Rep. 452.]

[2] Commonwealth Bank *v.* Griffith, 14 Pet. 56; Walker *v.* Taylor, 5 How. 64; [McNulty *v.* California, 149 U. S. 645, 13 Sup. Ct. Rep. 959.] We take no notice here of the statutes for the removal of causes from the State to the Federal courts for the purposes of original trial, as they are not important to any discussion we shall have occasion to enter upon in this work. See Rev. Stat. of U. S. 1878, title 13, ch. 7; Cooley, Constitutional Principles, 122–128. Judge Dillon has published a convenient manual on this subject.

(*a*) [But this does not apply to cases involving the question of impairment of obligation of contracts: McCullough *v.* Virginia, 172 U. S. 102, 19 Sup. Ct. Rep. 134, and many cases there cited: Shelby Co. *v.* Union & Planter's Bk., 161 U. S. 149, 16 Sup. Ct. Rep. 558; Folsom *v.* Township Ninety-six, 159 U. S. 611, 16 Sup. Ct. Rep. 174; Mobile & O. Ry. Co. *v.* Tennessee, 153 U. S. 486, 14 Sup. Ct. Rep. 968; Barnum *v.* Okolona, 148 U. S. 393, 13 Sup. Ct. Rep. 638; Knox Co. *v.* Ninth National Bank, 147 U. S. 91, 13 Sup. Ct. Rep. 267; McGahey *v.* Virginia, 135 U. S. 662, 10 Sup. Ct. Rep. 972.

It does not apply to cases involving the validity of alleged contracts. Turner *v.* Com'rs of Wilkes Co., 173 U. S. 461, 19 Sup. Ct. Rep. 464. And see also the dissenting opinion of *Peckham*, J., in McCullough *v.* Virginia, above. Also Bacon *v.*

the State decisions as correct, (*a*) and to follow them whenever

Texas, 163 U. S. 207, 16 Sup. Ct. Rep. 1023. Upon revision by Federal courts of the construction by State courts of State laws, see notes to 7 L. ed. U. S. 679, and 12 L. ed. U. S. 169.

In the interpretation of negotiable contracts the Supreme Court of the United States will follow the general principles of commercial law, and will not follow the particular construction of any State court. This is true, though such contracts be issued by municipalities of the State. Woodruff *v.* Mississippi, 162 U. S. 291, 16 Sup. Ct. Rep. 820. So with regard to the master's liability to servants for damage caused by negligence of fellow-servant. Baltimore & Ohio Ry. Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914; Gardner *v.* Michigan C. Ry. Co., 150 U. S. 349, 14 Sup. Ct. Rep. 140. And so as to all questions of *general* law. Clark *v.* Bever, 139 U. S. 96, 11 Sup. Ct. Rep. 468; Pleasant Tp. *v.* Ætna Life Ins. Co., 138 U. S. 67, 11 Sup. Ct. Rep. 215.]

(*a*) [The construction put upon its statutes by the courts of a State is usually binding upon the Federal courts. New York Life Ins Co. *v.* Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962; Clarke *v.* Clarke, 178 U. S. 186, 20 Sup. Ct. Rep. 873; Warburton *v.* White, 176 U. S. 484, 20 Sup. Ct. Rep. 404; Hartford F. Ins. Co. *v.* Chicago M. & St. P. Ry. Co., 175 U. S. 91, 20 Sup. Ct. Rep. 33; Sioux City Tr. & W. Co. *v.* Trust Co. of N. A., 173 U. S. 99, 19 Sup. Ct. Rep. 381; First Nat'l Bank *v.* Chehalis Co., 166 U. S. 440, 17 Sup. Ct. Rep. 629; Walker *v.* New Mexico & S. P. Ry. Co., 165 U. S. 593, 17 Sup. Ct. Rep. 421; Bamberger & Co. *v.* Schoolfield, 160 U. S. 149, 16 Sup. Ct. Rep. 225; First Nat'l Bk. *v.* Ayers, 160 U. S. 660, 16 Sup. Ct. Rep. 412; Bergeman *v.* Backer, 157 U. S. 655, 15 Sup. Ct. Rep. 727; Baltimore Tr. Co. *v.* Baltimore B. R. Co., 151 U. S. 137, 14 Sup. Ct. Rep. 294; *Ex parte* Lockwood, 154 U. S. 116, 14 Sup. Ct. Rep. 1082; Morley *v.* L. S. & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. Rep. 54; Hancock *v.* Louisville & N. Ry. Co., 145 U. S. 409, 12 Sup. Ct. Rep. 969; Kaukauna W. P. Co. *v.* Green Bay & M. Canal Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173; Duncan *v.* McCall, 139 U. S. 449, 11 Sup. Ct. Rep. 573; Pullman Pal. Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876; Cross *v.* Allen, 141 U. S. 528, 12 Sup. Ct. Rep. 67; Randolph's Executor *v.* Quidnick Co., 135 U. S. 457; 10 Sup. Ct. Rep. 655; Abraham *v.* Casey, 179 U. S. 210, 21 Sup. Ct. Rep. 88; Mason *v.* Missouri, 179 U. S. 328, 21 Sup. Ct. Rep. 125; Loeb *v.* Columbia Tp. Trustees, 179 U. S. 472, 21 Sup. Ct. Rep. 174.

Rules of real property settled by course of State decisions are followed by Federal courts. Lowndes *v.* Town of Huntington, 153 U. S. 1, 14 Sup. Ct. Rep. 758; Halstead *v.* Buster, 140 U. S. 273, 11 Sup. Ct. Rep. 782.

And so as to chattel mortgages. Etheridge *v.* Sperry W. & G., 139 U. S. 266, 11 Sup. Ct. Rep. 565. And assignments for benefit of creditors. South Branch L. Co. *v.* Ott, 142 U. S. 622, 12 Sup. Ct. Rep. 318.

State decisions upon what is correct practice in criminal cases are followed unless due process is denied. Graham *v.* Weeks, 138 U. S. 461, 11 Sup. Ct. Rep. 363. The latest settled adjudications are usually followed. Wade *v.* Travis Co., 174 U. S. 499, 19 Sup. Ct. Rep. 715; Backus *v.* Fort St. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. Rep. 445; Nobles *v.* Georgia, 168 U. S. 398, 18 Sup. Ct. Rep. 87; Barber *v.* Pittsburg Ft. W. & C. Ry. Co., 166 U. S. 83, 17 Sup. Ct. Rep. 488; Bauserman *v.* Blunt, 147 U. S. 647, 13 Sup. Ct. Rep. 466; Byers *v.* McAuley, 149 U. S. 608, 13 Sup. Ct. Rep. 406; Miller's Exrs. *v.* Swann, 150 U. S. 132, 14 Sup. Ct. Rep. 52; New York L. E. & W. Ry. Co. *v.* Estill, 147 U. S. 591, 13 Sup. Ct. Rep. 444; Wood *v.* Brady, 150 U. S. 13, 14 Sup. Ct Rep. 6; May *v.* Tenney, 148 U. S. 60, 13 Sup. Ct. Rep. 491; Stutsman Co. *v.* Wallace, 142 U. S. 293, 12 Sup. Ct. Rep. 227; Yazoo & M. V. Ry. Co. *v.* Adams, 181 U. S. 580, 21 Sup. Ct. Rep. 729.

So the construction put upon statutes by the courts of the State will usually be followed by the courts of other States. Kulp *v.* Fleming, 65 Ohio, 321, 62 N. E. 334, 87 Am. St. 611. See upon "rule of decision" in Federal courts, article in 60 Alb. L. Jour. 297.]

the same questions arise in the national courts.[1] With the power to revise the decisions of the State courts in the cases

[1] In Beauregard *v.* New Orleans, 18 How. 497, 502, Mr. Justice *Campbell* says: "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title of lands." In Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 492, 524, it was urged that the exclusive power of State courts to construe legislative acts did not extend to the paramount law, so as to enable them to give efficacy to an act which was contrary to the State constitution; but *Marshall*, Ch. J., said: "We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law." Again, in Elmendorf *v.* Tailor, 10 Wheat. 152, 159, the same eminent judge says: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which proposed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." In Green *v.* Neal's Lessee, 6 Pet. 291, 298, it is said by *McLean*, J.: "The decision of the highest judicial tribunal of a State should be considered as final by this court, not because the State tribunal in such a case has any power to bind this court, but because, in the language of the court in Shelby *v.* Guy, 11 Wheat. 361, a fixed and received construction by a State in its own courts makes a part of the statute law." And see Jackson *v.* Chew, 12 Wheat. 153, 162, per *Thompson*, J.; also the following cases: Sims *v.* Irvine, 3 Dall. 425; McKeen *v.* Delancy, 5 Cranch, 22; Polk's Lessee *v.* Wendal, 9 Cranch, 87; Preston *v.* Browder, 1 Wheat. 115; Mutual Assurance Co. *v.* Watts, 1 Wheat. 279; Shipp *v.* Miller, 2 Wheat. 316; Thatcher *v.* Powell, 6 Wheat. 119; Bell *v.* Morrison, 1 Pet. 351; Waring *v.* Jackson, 1 Pet. 570; De Wolf *v.* Rabaud, 1 Pet. 476; Fullerton *v.* Bank of United States, 1 Pet. 604; Gardner *v.* Collins, 2 Pet. 58; Beach *v.* Viles, 2 Pet. 675; Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99; United States *v.* Morrison, 4 Pet. 124; Henderson *v.* Griffin, 5 Pet. 151; Hindle *v.* Vattier, 5 Pet. 398; Ross *v.* McLung, 6 Pet. 283; Marlatt *v.* Silk, 11 Pet. 1; Bank of United States *v.* Daniel, 12 Pet. 32; Clarke *v.* Smith, 13 Pet. 195; Ross *v.* Duval, 13 Pet. 45; Wilcox *v.* Jackson, 13 Pet. 498; Harpending *v.* Reformed Church, 16 Pet. 455; Martin *v.* Waddell, 16 Pet. 307; Amis *v.* Smith, 16 Pet. 303; Porterfield *v.* Clark, 2 How. 76; Lane *v.* Vick, 3 How. 464; Foxcroft *v.* Mallett, 4 How. 353; Barry *v.* Mercein, 5 How. 103; Rowan *v.* Runnells, 5 How. 134; Van Rensselaer *v.* Kearney, 11 How. 297; Pease *v.* Peck, 18 How. 595; Fisher *v.* Haldeman, 20 How. 186; Parker *v.* Kane, 22 How. 1; Suydam *v.* Williamson, 24 How. 427; Sumner *v.* Hicks, 2 Black, 532; Chicago *v.* Robbins, 2 Black, 418; Miles *v.* Caldwell, 2 Wall. 35; Williams *v.* Kirkland, 13 Wall. 306; Walker *v.* Harbor Com'rs, 17 Wall. 648; Supervisors *v.* United States, 18 Wall. 71; Fairfield *v.* Gallatin, 100 U. S. 47; Wade *v.* Walnut, 105 U. S. 1; Post *v.* Supervisors, *id.* 667; Taylor *v.* Ypsilanti, *id.* 60; Equator Co. *v.* Hall, 106 U. S. 86, 1 Sup. Ct. Rep. 198; Bendey *v.* Townsend, 109 U. S. 665, 3 Sup. Ct. Rep. 482; Norton *v.* Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121; Stryker *v.* Goodnow, 123 U. S. 527, 8 Sup. Ct. Rep. 203; Williams *v.* Conger, 125 U. S. 397, 8 Sup. Ct. Rep. 933; Bucher

already pointed out, the due observance of this rule will prevent those collisions of judicial authority which would otherwise be

v. Cheshire R. R. Co., *id.* 555, 8 Sup. Ct. Rep. 974; German Sav. Bank *v.* Franklin Co., 128 U. S. 526, 9 Sup. Ct. Rep. 159; Springer *v.* Foster, 2 Story C. C. 383; Neal *v.* Green, 1 McLean, 18; Paine *v.* Wright, 6 McLean, 395; Boyle *v.* Arledge, Hemp. 620; Grifling *v.* Gibb, McAll. 212; Bayerque *v.* Cohen, McAll. 113; Wick *v.* The Samuel Strong, Newb. 187; N. F. Screw Co. *v.* Bliven, 3 Blatch. 240; Bronson *v.* Wallace, 4 Blatch. 465; Van Bokelen *v.* Brooklyn City R. R. Co., 5 Blatch. 379; United States *v.* Mann, 1 Gall. 3; Society, &c. *v.* Wheeler, 2 Gall. 105; Coates *v.* Muse, Brock. 529; Meade *v.* Beale, Taney, 339; Loring *v.* Marsh, 2 Cliff. 311; Parker *v.* Phetteplace, 2 Cliff. 70; King *v.* Wilson, 1 Dill. 555; [New York Life Ins. Co. *v.* Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962. See also note to 12 L. ed. U. S. 169, and to 5 L. R. A. 508. Upon when Federal courts do not follow State decisions, see note to 19 L. ed. U. S. 490. See also Missouri, K. & T. Ry. Co. *v.* McCann, 174 U. S. 580, 19 Sup. Ct. Rep. 755.] The decision of the State court, that a State statute has been enacted in accordance with the State constitution, is binding on the Federal courts. Railroad Co. *v.* Georgia, 98 U. S. 359; [Brown *v.* New Jersey, 175 U. S. 172, 20 Sup. Ct. Rep. 77; Tullis *v.* Lake Erie & W. Ry. Co., 175 U. S. 348, 20 Sup. Ct. Rep. 136; Missouri, K. & T. Ry. Co. *v.* McCann, 174 U. S. 580, 586, 19 Sup. Ct. Rep. 755; M. & M. Nat'l Bk. *v.* Pennsylvania, 167 U. S. 461, 17 Sup. Ct. Rep. 829.] In Green *v.* Neal's Lessee, 6 Pet. 291, an important question was presented as to the proper course to be pursued by the Supreme Court of the United States, under somewhat embarrassing circumstances. That court had been called upon to put a construction upon a State statute of limitations, and had done so. Afterwards the same question had been before the Supreme Court of the State, and in repeated cases had been decided otherwise. The question now was whether the Supreme Court would follow its own decision, or reverse that, in order to put itself in harmony with the State decisions. The subject is considered at length by *McLean, J.*, who justly concludes that "adherence by the Federal to the exposition of the local law, as given by the courts of the State, will greatly tend to preserve harmony in the exercise of the judicial power in the State and Federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority." The court, accordingly, reversed its rulings to make them conform to those of the State court. See also Suydam *v.* Williamson, 24 How. 427; Leffingwell *v.* Warren, 2 Black, 599; Blossburg, &c. R. R. Co. *v.* Tioga R. R. Co., 5 Blatch. 387; Smith *v.* Shriver, 3 Wall. Jr. 219. It is, of course, immaterial that the court may still be of opinion that the State court has erred, or that the decisions elsewhere are different. Bell *v.* Morrison, 1 Pet. 351. But where the Supreme Court had held that certain contracts for the price of slaves were not made void by the State constitution, and afterwards the State court held otherwise, the Supreme Court, regarding this decision wrong, declined to reverse their own ruling. Rowan *v.* Runnels, 5 How. 134. Compare this with Nesmith *v.* Sheldon, 7 How. 812, in which the court followed, without examination or question, the State decision that a State general banking law was in violation of the constitution of the State. The United States Circuit Court had held otherwise previous to the State decision. Falconer *v.* Campbell, 2 McLean, 195. Under like circumstances the State Supreme Court's ruling on a statute of limitations was followed, overruling the Federal circuit decision which followed that of a lower State court. Moores *v.* Nat. Bank, 104 U. S. 625. But the State court's construction of its constitution after the controversy arose, and in a suit between different parties as to the same subject-matter, is not binding on the Federal court. Carroll Co. *v.* Smith, 111 U. S. 556, 4 Sup. Ct. Rep. 539; Enfield *v* Jordan, 119 U. S. 680, 7 Sup. Ct. Rep. 358. So, where after a ruling in the United States Circuit Court the State Supreme Court for the first time decides against such ruling, its decision will not

inevitable, and which, besides being unseemly, would be dangerous to the peace, harmony, and stability of the Union.

Besides conferring specified powers upon the national government, the Constitution contains also certain restrictions upon the action of the States, a portion of them designed to prevent encroachments upon the national authority, (*a*) and another portion to protect individual rights against possible abuse of State power. Of the first class are the following: No State shall enter into any treaty, alliance, or confederation, grant letters of marque or reprisal, coin money, emit bills of credit,[1]

be followed of necessity in the Federal Supreme Court. Burgess *v.* Seligman, 107 U. S. 20, 2 Sup. Ct. Rep. 10. See Gibson *v.* Lyon, 115 U. S. 439, 6 Sup. Ct. Rep. 129.

This doctrine does not apply to questions not at all dependent upon local statutes or usages; as, for instance, to contracts and other instruments of a commercial and general nature, like bills of exchange: Swift *v.* Tyson, 16 Pet. 1; Oates *v.* National Bank, 100 U. S. 239; Railroad Co. *v.* National Bank, 102 U. S. 14; and insurance contracts. Robinson *v.* Commonwealth Ins. Co., 3 Sum. 220. And see Reimsdyke *v.* Kane, 1 Gall. 376; Austen *v.* Miller, 5 McLean, 153; Gloucester Ins. Co. *v.* Younger, 2 Curt. C. C. 322; Bragg *v.* Meyer, McAll. 408. Whether a lunatic's contract is void or voidable is a question of general jurisprudence. Edwards *v.* Davenport, 20 Fed. Rep. 756. And of course cases presenting questions of conflict with the Constitution of the United States cannot be within the doctrine. State Bank *v.* Knoop, 16 How. 369; Jefferson Branch Bank *v.* Skelley, 1 Black, 436. The Federal court must decide for itself whether there exists a contract within the constitutional protection. Louisville & N. R. R. Co. *v.* Palmes, 109 U. S. 244, 3 Sup. Ct. Rep. 193; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265. So in determining the validity of municipal ordinances. Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. And where a contract had been made under a settled construction of the State constitution by its highest court, the Supreme Court sustained it, notwithstanding the State court had since overruled its former decision. Gelpcke *v.* Dubuque, 1 Wall. 175. See Olcott *v.* Supervisors, 16 Wall. 67; Douglass *v.* Pike County, 101 U. S. 677.

[1] To constitute a bill of credit within the meaning of the Constitution, it must be issued by a State, involve the faith of the State, and be designed to circulate as money on the credit of the State, in the ordinary uses of business. Briscoe *v.* Bank of Kentucky, 11 Pet. 257; Woodruff *v.* Trapnall, 10 How. 190. Treasury warrants designed so to circulate are bills of credit. Braggs *v.* Tuffts, 49 Ark. 554, 6 S. W. 158. [But if they are to be retired, as soon as presented for payment at the State treasury, and paid, they are not bills of credit, even though the creditor to whom they are issued may demand at the time of receiving them that they be issued in denominations of one dollar each to the extent of the debt, the remainder being issued in denominations of not less than five dollars, and even though they may pass from hand to hand and are receivable from any person in payment of taxes. Houston & T. C. R. Co. *v.* Texas, 177 U. S. 66, 20 Sup. Ct. Rep. 545, rev. 41 S. W. 157.] The facts that a State owns the entire capital stock of a bank, elects the directors, makes its bills receivable for the public dues, and pledges its faith for their redemption, do not make the bills of such bank "bills of credit" in the constitutional sense. Darrington *v.* State Bank of Alabama, 13

(*a*) [Regulations of the U. S. Treasury Department which prohibit an internal revenue collector from producing records of his office or copies thereof in any State court are valid, and no State court has any authority to punish him for refusing to produce such records or copies before it. Boske *v.* Comingore, 177 U. S. 459, 20 Sup. Ct. Rep. 701.]

or make anything but gold and silver coin a tender in payment of debts. No State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact (*a*) with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Of the second class are the following: No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,[1] (*b*) or make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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,[2] nor base discriminations in suffrage on race, color, or previous condition of servitude.[3]

Other provisions have for their object to prevent discriminations by the several States against the citizens and public authority and proceedings of other States. Of this class are the provisions that the citizens of each State shall be en-

How. 12. See, further, Craig *v.* Missouri, 4 Pet. 410; Byrne *v.* Missouri, 8 Pet. 40; Curran *v.* Arkansas, 15 How. 304; Moreau *v.* Detchamendy, 41 Mo. 431; Bailey *v.* Milner, 35 Ga. 330; City National Bank *v.* Mahan, 21 La. Ann. 751.

[1] Const. of U. S. art. 1, § 10; Story on Const. c. 33, 34.

[2] Const. of U. S. 14th Amendment; Story on Const. (4th ed.) c. 47.

[3] Const. of U. S. 15th Amendment; Story on Const. (4th ed.) c. 48.

(*a*) [Agreement between two States to appoint commissioners to trace and mark their common boundary line is not prohibited. Virginia *v.* Tennessee, 148 U. S. 503, 13 Sup. Ct. Rep. 728. Upon judicial settlement of State boundaries, see Nebraska *v.* Iowa, 145 U. S. 519, 12 Sup. Ct. Rep. 976, and note to 36 L. ed. U. S. 798.]

(*b*) [Whether a State statute impairs the obligation of a contract is a federal question. Pierce *v.* Somerset Ry., 171 U. S. 641, 19 Sup. Ct. Rep. 64. But this provision of the Constitution does not extend to the case where a State court overrules its prior decisions, even though they have become rules of property and contracts have been entered into whose obligation is seriously impaired by such overruling. Bacon *v.* Texas, 163 U. S. 207, 16 Sup. Ct. Rep. 1023; and see also Turner *v.* Com'rs of Wilkes Co., 173 U. S. 461, 19 Sup. Ct. Rep. 464, and dissenting opinion of *Peckham*, J., in McCullough *v.* Virginia, 172 U. S. 102, 19 Sup. Ct. Rep. 134. That impairing remedy impairs the obligation of a contract, see note to 26 L. ed. U. S. 132. This provision does not cover the case of an alleged impairment of a contract by State action other than legislative. Hanford *v.* Davies, 163 U. S. 273, 16 Sup. Ct. Rep. 1051; Turner *v.* Com'rs of Wilkes Co., 173 U. S. 461, 19 Sup. Ct. Rep. 464; Central Land Co. *v.* Laidley, 159 U. S. 103, 16 Sup. Ct. Rep. 80; Wood *v.* Brady, 150 U. S. 18, 14 Sup. Ct. Rep. 6. See also Ford *v.* Delta & Pine Land Co., 164 U. S. 662, 17 Sup. Ct. Rep. 230.]

titled to all the privileges and immunities of citizens in the several States;[1] that fugitives from justice shall be delivered

[1] Const. of U. S. art. 4. "What are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the citizens of the other State,—may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities; and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.'" *Washington, J.,* in Corfield *v.* Coryell, 4 Wash. C. C. 380. The Supreme Court will not describe and define those privileges and immunities in a general classification; preferring to decide each case as it may come up. Conner *v.* Elliott, 18 How. 591; Ward *v.* Maryland, 12 Wall. 418; McCready *v.* Virginia, 94 U. S. 391. The question in this last case was whether the State of Virginia could prohibit citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, and the right be granted by the State to its own citizens exclusively. *Waite,* Ch. J., in answering the question in the affirmative, said: "The right thus granted is not a privilege or immunity of general, but of special citizenship. It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed; they, and they alone, owned the property to be sold or used; and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality." See also Paul *v.* Hazelton, 37 N. J. 106; [Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475.] For other discussions upon this subject, see Murray *v.* McCarty, 2 Munf. 393; Lemmon *v.* People, 26 Barb. 270, and 20 N. Y. 562; Campbell *v.* Morris, 3 Har. & M'H. 554; Amy *v.* Smith, 1 Lit. 326; Crandall *v.* State, 10 Conn. 340; Butler *v.* Farnsworth, 4 Wash. C. C. 101; Commonwealth *v.* Towles, 5 Leigh, 743; Haney *v.* Marshall, 9 Md. 194; Slaughter *v.* Commonwealth, 13 Gratt. 767; State *v.* Medbury, 3 R. I. 138; People *v.* Imlay, 20 Barb. 68; People *v.* Coleman, 4 Cal. 46; People *v.* Thurber, 13 Ill. 544; Phœnix Insurance Co. *v.* Commonwealth, 5 Bush, 68; Ducat *v.* Chicago, 48 Ill. 172; Fire Department *v.* Noble, 3 E. D. Smith, 441; Same *v.* Wright, 3 E. D. Smith, 453; Robinson *v.* Oceanic S. N. Co., 112 N. Y. 315, 19 N. E. 625; Bliss's Petition, 63 N. H. 135; State *v.* Lancaster, *id.* 267; People *v.* Phippin, 70 Mich. 6, 37 N. W. Rep. 88; State *v.* Gilman, 33 W. Va. 146, 10 S. E. Rep. 283; Fire Dep't *v.* Helfenstein, 16 Wis. 136; Sears *v.* Commis-

up,[1] and that full faith and credit shall be given in each State

sioners of Warren Co., 36 Ind. 267; Jeffersonville, &c. R. R. Co. *v.* Hendricks, 41 Ind. 48; Cincinnati Health Association *v.* Rosenthal, 55 Ill. 85; State *v.* Fosdick, 21 La. Ann. 434; Slaughter House Cases, 16 Wall. 36; Bradwell *v.* State, 16 Wall. 130; Bartmeyer *v.* Iowa, 18 Wall. 129; United States *v.* Cruikshank, 92 U. S. 542; Kimmish *v.* Ball, 129 U. S. 217, 9 Sup. Ct. Rep. 277; [Maxwell *v.* Dow, 176 U. S. 581, 558–593, 20 Sup. Ct. Rep. 448, 491. Upon privileges of citizens of States, see note to 1 L. R. A. 56; political rights of, note to 8 L. R. A. 337.

This clause does not give a citizen the right to enjoy within his own State the privileges which citizens of other States enjoy under the laws of those States. McKane *v.* Durston, 153 U. S. 684, 14 Sup. Ct. Rep. 913. Nor to carry with him, when he goes into other States, the privileges which he enjoys in his home State. Detroit *v.* Osborne, 135 U. S. 492, 10 Sup. Ct. Rep. 1012. Exemptions from taxation must be granted to non-residents upon same terms as to residents. Sprague *v.* Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840. Citizen of sister State may sue defendant resident of his home State in any State where he can get service upon him, even though cause of action arose in home State, provided it be transitory. Eingartner *v.* Illinois Steel Company, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503; Cofrode *v.* Gartner, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. Insurance laws cannot place greater restrictions upon citizens of other States than upon those of home State. State *v.* Board of Ins. Com'rs, 37 Fla. 564, 20 So. 772, 33 L. R. A. 288. Agents of non-resident insurers may be required to secure a certificate of authority from the insurance commissioner before insuring property within the State. People *v.* Gay, 107 Mich. 422, 65 N. W. 292, 30 L. R. A. 464. Citizens of other States cannot be denied right to become trustees by appointment through deeds, mortgages, &c. Roby *v.* Smith, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792. Dower interests may be restricted to widows of residents. Buffington *v.* Grosvenor, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282; Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222. Privilege of selling liquors may be restricted to male inhabitants of State. Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664. Discrimination in inheritance tax law between nephews and nieces resident within the State and those resident without is void. *Re* Mahoney's Estate, 133 Cal. 180, 65 Pac. 389.] The constitutional provision does not apply to corporations. Warren Manuf. Co. *v.* Ætna Ins. Co., 2 Paine, 501; Paul *v.* Virginia, 8 Wall. 168; Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181, 8 Sup. Ct. Rep. 737; Woodward *v.* Com., 7 S. W. Rep. 613 (Ky.); Phenix Ins. Co. *v.* Burdett, 112 Ind. 204, 13 N. E. 705; [Blake *v.* McClung, 176 U. S. 59, 20 Sup. Ct. Rep. 307; s. c. 172 U. S. 239, 19 Sup. Ct. Rep. 165; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281.] A discrimination between local freight on railroads and that which is extra-territorial is not personal, and therefore not forbidden by this clause of the Constitution. Shipper *v.* Pennsylvania R. R. Co., 47 Penn. St. 338. This clause does not forbid requiring security for costs from non-resident plaintiffs. Cummings *v.* Wingo, 30 S. C. 611, 10 S. E. Rep. 107. See, for taxes which are forbidden by it, *post*, 688, note. [A State cannot give priority to creditors residing within its boundaries over those of the same class residing without. Blake *v.* McClung, 176 U. S. 59, 20 Sup. Ct. Rep. 307; s. c. 172 U. S. 239, 19 Sup. Ct. Rep. 165; Sully *v.* American Nat'l Bk., 178 U. S. 289, 20 Sup. Ct. Rep. 935. A conveyance, which the courts of the State wherein it was made, hold void as against the citizens of that State, the Federal courts will hold void as against the citizens of other States. Smith M. P. Co. *v.* McGroarty, 136 U. S. 237, 10 Sup. Ct. Rep. 1017. The mere fact that a partnership was organized under the laws of another State is not sufficient to justify the imposition of conditions upon its doing business within the State not required of local partnerships. State *v.* Cadigan, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 666, 87 Am. St. 714. For an instructive discussion of the doctrine of the "Privileges and Immunities of Citizens in the Several States," see article by Wm. J. Meyers in 1 Mich. Law Rev. 286, 364.]

[1] *Extradition as between the States.* —

to the public acts, (*a*) records, and judicial proceedings of every

The return by one State of fugitives from justice which have fled to it from another State is only made a matter of rightful demand by the provisions of the Federal Constitution. In the absence of such provisions, it might be provided for by State law; but the Constitution makes that obligatory which otherwise would rest in the imperfect and uncertain requirements of interstate comity. The subject has received much attention from the courts when having occasion to consider the nature and extent of the constitutional obligation. It has also been the subject of many executive papers; and several controversies between the executives of New York and those of more southern States, are referred to in the recent Life of William H. Seward, by his son. [Upon extradition between States, see note to 36 L. ed. U. S. 934; upon extradition interstate and international, see note to 41 L. ed. U. S. 1064. See also Whitten *v.* Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep. 297, and note to 40 L. ed. U. S. 406. The sufficiency of the proceedings upon which a governor bases his issue of a warrant for the arrest of an alleged fugitive may be inquired into on *habeas corpus*. *Ex parte* Tod, 12 S. D. 386, 81 N. W. 637, 47 L. R. A. 566. A governor may revoke his warrant at any time before the alleged fugitive has been removed from the State. State *v.* Toole, 69 Minn. 104, 72 N. W. 53, 38 L. R. A. 224. An escaped prisoner is a fugitive. Drinkall *v.* Spiegel, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486.] The following are among the judicial decisions: The offence for which extradition may be ordered need not have been an offence either at the common law or at the time the Constitution was adopted; it is sufficient that it was so at the time the act was committed, and when demand is made. Matter of Clark, 9 Wend. 212; People *v.* Donohue, 84 N. Y. 438; Johnston *v.* Riley, 13 Ga. 97; Matter of Fetter, 23 N. J. 311; Matter of Voorhees, 32 N. J. 141; Morton *v.* Skinner, 48 Ind. 123; Matter of Hughes, Phill. (N. C.) 57; Kentucky *v.* Dennison, 24 How. 66; *Ex parte* Reggel, 114 U. S. 642, 5 Sup. Ct. Rep. 748; *In re* Hooper, 52 Wis. 699, 58 N. W. 741. The offence must have been actually committed within the State making the demand, and the accused must have fled therefrom. *Ex parte* Smith, 3 McLean, 121; Jones *v.* Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Hartman *v.* Aveline, 63 Ind. 344; Wilcox *v.* Nolze, 34 Ohio St. 520. To be a fugitive it is not necessary that one should have left the State after indictment found, or to avoid prosecution; but simply that, having committed a crime within it, he is when sought found in another State. Roberts *v.* Reilly, 116 U. S. 80, 6 Sup. Ct. Rep. 291; State *v.* Richter, 37 Minn. 436, 35 N. W. 9. [A person standing in one State and shooting across the boundary line and injuring one in another State is not a fugitive from justice in the first State. State *v.* Hall, 115 N. C. 811, 20 S. E. 729, 44 Am. St. 501.] The accused may be arrested to await demand. State *v.* Buzine, 4 Harr. 572; *Ex parte* Cubreth, 49 Cal. 436; *Ex parte* Rosenblat, 51 Cal. 285. See Tullis *v.* Fleming, 69 Ind. 15. But one cannot lawfully be arrested on a telegram from officers in another State and without warrant. Malcolmson *v.* Scott, 56 Mich. 459, 23 N. W. 166. Nor can he be surrendered before formal demand is made, and parties who seize and deliver him up without demand will be liable for doing so. Botts *v.* Williams, 17 B. Monr. 677. Still if he is returned without proper papers to the State from whence he fled, this will be no sufficient ground for his discharge from custody. Dow's Case, 18 Penn. St. 37. Even forceable and unlawful abduction of a citizen gives a State no right to demand his release. Mahon *v.* Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204; [Cook *v.* Hart,

(*a*) [A mistake in understanding the true meaning of the statute of a sister State as interpreted by the courts thereof, is not a refusal to give full faith and credit to such statute, and does not give jurisdiction to the Supreme Court of the United States on writ of error. Banholzer *v.* N. Y. Life Ins. Co., 178 U. S. 402, 20 Sup. Ct. Rep. 972; Glenn *v.* Garth, 147 U. S. 360, 13 Sup. Ct. Rep. 350. And such statute is a matter of fact and must be proved as such. Lloyd *v.* Matthews, 155 U. S. 222, 15 Sup. Ct. Rep. 70.]

other State.[1](a) Many cases have been decided under these

146 U. S. 183, 13 Sup. Ct. Rep. 40.] The question whether after such abduction in another country a State court will try a person, is not a federal question. Ker *v.* Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225. The charge must be made before a magistrate of the State where the offence was committed. Smith *v.* State, 21 Neb. 552, 32 N. W. 594. The demand is to be made by the executive of the State, by which is meant the governor: Commonwealth *v.* Hall, 9 Gray, 262; and it is the duty of the executive of the State to which the offender has fled to comply: Johnston *v.* Riley, 13 Ga. 97; *Ex parte* Swearingen, 13 S. C. 74; People *v.* Pinkerton, 77 N. Y. 245; Work *v.* Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; but if he refuses to do so, the courts have no power to compel him: Kentucky *v.* Dennison, 24 How. 66; Matter of Manchester, 5 Cal. 237. It is his duty to determine in some legal way whether the person is a fugitive from justice; the mere requisition is not enough; but his determination is *prima facie* sufficient. *Ex parte* Reggel, 114 U. S. 642, 5 Sup. Ct. Rep. 1148; Roberts *v.* Reilly, 116 U. S. 80, 6 Sup. Ct. Rep. 291. See *In re* Jackson, 2 Flipp. 183. There must be a showing of sufficient cause for the arrest before the requisition can issue; but after it is issued and complied with, it is competent for the courts of either State on *habeas corpus* to look into the papers, and if they show no sufficient legal cause, to order the prisoner's discharge. *Ex parte* Smith, 3 McLean, 121; Matter of Clark, 9 Wend. 212; Matter of Manchester, 5 Cal. 237; Matter of Heyward, 1 Sandf. 701; *Ex parte* White, 49 Cal. 434; State *v.* Hufford, 28 Iowa, 391; People *v.* Brady, 56 N. Y. 182; Kingsbury's Case, 106 Mass. 223; *Ex parte* McKean, 3 Hughes, 23; Jones *v.* Leonard, 50 Iowa, 106, 32 Am. Rep. 116; *Ex parte* Powell, 20 Fla. 806; State *v.* Richardson, 34 Minn. 115, 24 N. W. 354; *In re* Mohr, 73 Ala. 503. As to the showing required, see State *v.* Swope, 72 Mo. 399; *Ex parte* Sheldon, 34 Ohio St. 319; Ham *v.* State, 4 Tex. App. 645. [A novel question was raised in *In re* Maney, 20 Wash. 509, 55 Pac. 930, 72 Am. St. 130. A sheriff while conducting a prisoner from one part of Idaho to another part of the same State, passed through a portion of the State of Washington. His prisoner in this latter State invoked the aid of the writ of *habeas corpus* on the theory that he was unlawfully detained. Writ denied.] If one is brought under extradition proceedings into the State where the crime was committed, he will not be discharged by it for defects in proceedings, except on application of officers of the State from which he has been taken. *Ex parte* Barker, 87 Ala. 4, 6 So. 7. The Federal courts have no power to compel the State authorities to fulfil their duties under

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[1] Const. of U. S. art. 4. This covers territorial judgments. Suesenbach *v.* Wagner, 41 Minn. 108, 42 N. W. Rep. 925. This clause of the Constitution has been

(a) [Upon conclusiveness and effect of judgments as between Federal and State courts, see notes to 21 C. C. A. 478 and 5 L. R. A. 508. A Federal court has jurisdiction of a suit to set aside a judgment of a State court relating to title to land in that State, when such judgment was obtained by fraud or without jurisdiction. Howard *v.* De Cordova, 177 U. S. 609, 20 Sup. Ct. Rep. 517; Cooper *v.* Newell, 173 U. S. 555, 19 Sup. Ct. Rep. 506. See also Bryar *v.* Campbell, 177 U. S. 649, 20 Sup. Ct. Rep. 794. In a suit to quiet title to land outside the State, service of process outside the State upon a non-resident of the State gives no jurisdiction of him. Dull *v.* Blackman, 169 U. S. 243, 18 Sup. Ct. Rep. 333.

Upon the question of fraud as a defence to a judgment of another State, see note to 18 L. ed. U. S. 475. An order of a court of a sister State is subject to the statute of limitations of the State in which it is sought to be enforced. Great W. Tel. Co. *v.* Purdy, 162 U. S. 329, 16 Sup. Ct. Rep. 810, aff. 83 Iowa, 430, 50 N. W. 45. A Federal court may inquire into the jurisdiction of a State court of another State to render a decree sued upon in the Federal court. Hekking *v.* Pfaff, 91 Fed. 60, 43 L. R. A. 618.]

several provisions, the most important of which are collected in the marginal notes.

this clause of the Constitution. Kentucky *v.* Dennison, 24 How. 66. The executive may revoke his warrant, if satisfied it ought not to have issued. Work *v.* Corrington, 34 Ohio St. 64, 32 Am. Rep. 345. [When once within the custody of the demanding State, he may be tried for any crime there charged against him. Lascelles *v.* Georgia, 148 U. S. 537, 13 Sup. Ct. Rep. 687; State *v.* McNaspy, 58 Kan. 691, 817, 38 L. R. A. 756, 50 Pac. 895; *Re* Little, — Mich. —, 89 N. W. 38, 57 L. R. A. 295. (Feb. 1902.) And may be sued in civil suit. Reid *v.* Ham, 54 Minn. 305, 56 N. W. 35, 21 L. R. A. 232, 40 Am. St. 333. Actual presence in demanding State is necessary to constitute flight. Constructive presence, as by firing bullet into it from another State, is insufficient. State *v.* Hall, 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 289, and note, 44 Am. St. 501. For other cases on interstate extradition, see *Re* Sultan, 115 N. C. 57, 20 S. E. 375, 28 L. R. A. 294, 44 Am. St. 433; *Ex parte* Hart, 63 Fed. Rep. 249, 28 L. R. A. 801, and note.]

Extradition to foreign countries is purely a national power, to be exercised under treaties. Holmes *v.* Jennison, 14 Pet. 540; *Ex parte* Holmes, 12 Vt. 631; People *v.* Curtis, 50 N. Y. 321. [Upon interstate and international extradition, see note to 41 L. ed. U. S. 1046. See also Whitten *v.* Tomlinson, 160 U. S. 231, 16 Sup. Ct. Rep 297, and note to 40 L. ed. U. S. 406. In Neeley *v.* Henkle, 180 U. S. 109, 126, 21 Sup. Ct. Rep. 308, the question of the validity of an act providing for extradition to foreign countries or to countries occupied by the United States was before the court and the act sustained as applicable to Cuba before that island was turned over to the home government after the Spanish war.] In the absence of a treaty there is no obligation to deliver a fugitive: U. S. *v.* Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234; but by virtue of such a treaty an American criminal resident in a foreign country gets no right of asylum there so that he may not be removed therefrom by a State except under the provisions of the treaty. Ker *v.* Illinois, 119 U. S. 436, 7 Sup. Ct. Rep. 225. Foreign governments must make the application, not individuals. *In re* Ferrelle, 28 Fed. Rep. 878. That where a person is extradicted from another country or another State on one charge, he should be discharged if not held upon that, see Commonwealth *v.* Hawes, 13 Bush, 697; *In re* Cannon, 47 Mich. 481, 11 N. W. 280; State *v.* Vanderpool, 39 Ohio St. 272; Blandford *v.* State, 10 Tex. App. 627; State *v.* Hall, 40 Kan. 338, 19 Pac. 918; U. S. *v.* Rauscher, 119 U. S. 407, 7 Sup. Ct. Rep. 234. *Contra*, State *v.* Stewart, 60 Wis. 587, 19 N. W. 429. See also, Hackney *v.* Welsh, 107 Ind. 253, 8 N. E. 141; *In re* Miller, 23 Fed. Rep. 32; *Ex parte* Brown, 28 Fed. Rep. 653. [But when he is surrendered as a matter of comity and not under treaty stipulations, and the indictment is set aside as being defective, he is liable to arrest upon a subsequent complaint for same offence. *Re* Foss, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, and note.]

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the subject of a good deal of discussion in the courts. [See notes to 3 L. ed. U. S. 411, 12 L. R. A. 574, 7 L. R. A. 578, 4 L. R. A. 131, 1 L. R. A. 79. See also Reynolds *v.* Stockton, 140 U. S. 254, 11 Sup. Ct. Rep. 773; Cole *v.* Cunningham, 133 U. S. 107, 10 Sup. Ct. Rep. 269, aff. 142 Mass. 47, 6 N. E. 782. See note on this case, 4 Har. L. Rev. 93.] It is well settled that if the record of a judgment shows that it was rendered without service of process or appearance of the defendant, or if that fact can be shown without contradicting the recitals of the record, it will be treated as void in any other State, notwithstanding this constitutional provision. Kibbe *v.* Kibbe, Kirby, 119; Aldrich *v.* Kinney, 4 Conn. 380; Middlebrooks *v.* Ins. Co., 14 Conn. 301; Wood *v.* Watkinson, 17 Conn. 500; Bartlett *v.* Knight, 1 Mass. 401; Bissell *v.* Briggs, 9 Mass. 462; Hall *v.* Williams, 6 Pick. 232; Woodworth *v* Tremere, 6 Pick. 354; Gleason *v* Dodd, 4 Met. 333; Commonwealth *v.* Blood, 97 Mass. 538; Edson *v.* Edson, 108 Mass. 590; 11 Am. Rep. 393; Kilburn *v.* Woodworth, 5 Johns. 37; Robinson *v.* Ward's Execu-

The last provisions that we shall here notice are that the

tors, 8 Johns. 86; Fenton *v.* Garlick, 8 Johns. 194; Pawling *v.* Bird's Executors, 13 Johns. 192; Holbrook *v.* Murray, 5 Wend. 161; Bradshaw *v.* Heath, 13 Wend. 407; Noyes *v.* Butler, 6 Barb. 613; Hoffman *v.* Hoffman, 46 N. Y. 30; 7 Am. Rep. 299; Thurber *v.* Blackbourne, 1 N. H. 242; Whittier *v.* Wendell, 7 N. H. 257; Rangely *v.* Webster, 11 N. H. 299; Adams *v.* Adams, 51 N. H. 388; 12 Am. Rep. 134; Wilson *v.* Jackson, 10 Mo. 334. See McLaurine *v.* Monroe, 30 Mo. 462; Bimeler *v.* Dawson, 5 Ill. 536; Warren *v.* McCarthy, 25 Ill. 95; Curtiss *v.* Gibbs, 1 Pa. 406; Rogers *v.* Coleman, Hard. 416; Armstrong *v.* Harshaw, 1 Dev. 187; Norwood *v.* Cobb, 24 Texas, 551; Rape *v.* Heaton, 9 Wis. 328; McCauley *v.* Hargroves, 48 Ga. 50; 15 Am. Rep. 660; People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260; Hood *v.* State, 56 Ind. 263; Lincoln *v.* Tower, 2 McLean, 473; Westervelt *v.* Lewis, 2 McLean, 511; Railroad Co. *v.* Trimble, 10 Wall. 367; Board of Public Works *v.* Columbia College, 17 Wall. 521; St. Clair *v.* Cox, 106 U. S. 350, 1 Sup. Ct. Rep. 350; Van Fossen *v.* State, 37 Ohio St. 317; Cross *v.* Armstrong, 44 Ohio St. 613. See Drake *v.* Granger, 22 Fla. 348; [Reynolds *v.* Stockton, 140 U. S. 254, 11 Sup. Ct. Rep. 773; Guaranty Tr. & S. Dep. Co. *v.* Green Cove Spr. & M. R. Co., 139 U. S. 137, 11 Sup. Ct. Rep. 92; Grover & B. S. M. Co. *v.* Radcliffe, 137 U. S. 287, 11 Sup. Ct. Rep. 92; Simmons *v.* Saul, 138 U. S. 439, 11 Sup. Ct. Rep. 369; Wabash R. Co. *v.* Tourville, 179 U. S. 322, 21 Sup. Ct. Rep. 113, aff. 148 Mo. 614, 50 S. W. 300; Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. 189, 36 L. R. A. 549; Crumlish's Adm'r *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120. A judgment against a non-resident entered on a note under a power in the note, to confess judgment if valid in the State where rendered is entitled to full faith and credit in other States. Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502.] But whether it would be competent to show, in opposition to the recitals of the record, that a judgment of another State was rendered without jurisdiction having been obtained of the person of the defendant, the authorities are not agreed. Many cases hold not. Field *v.* Gibbs, 1 Pet. C. C. 155; Green *v.* Sarmiento, 1 Pet. C. C. 74; Lincoln *v.* Tower, 2 McLean, 473; Westervelt *v.* Lewis, 2 McLean, 511; Roberts *v.* Caldwell, 6 Dana, 512; Hensley *v.* Force, 7 Eng. 756; Pearce *v.* Olney, 20 Conn. 544; Hoxie *v.* Wright, 2 Vt. 263; Newcomb *v.* Peck, 17 Vt. 302; Willcox *v.* Kassick, 2 Mich. 165; Bimeler *v.* Dawson, 5 Ill. 536; Welch *v.* Sykes, 8 Ill. 197; Wetherell *v.* Stillman, 65 Pa. St. 105; Lance *v.* Dugan, 13 Atl. Rep. 942 (Pa.); Lockhart *v.* Locke, 42 Ark. 17; Caughran *v.* Gilman, 72 Iowa, 570, 34 N. W. 423. Other cases admit such evidence. Starbuck *v.* Murray, 5 Wend. 148, 21 Am. Dec. 172; Holbrook *v.* Murray, 5 Wend. 161; Shumway *v.* Stillman, 6 Wend. 447; Borden *v.* Fitch, 15 Johns. 121; Bartlet *v.* Knight, 1 Mass. 401, 2 Am. Dec. 36; Hall *v.* Williams, 6 Pick. 232; Aldrich *v.* Kinney, 4 Conn. 380; Bradshaw *v.* Heath, 13 Wend. 407; Hoffman *v.* Hoffman, 46 N. Y. 30; Gleason *v.* Dodd, 4 Met. 333; Kane *v.* Cook, 8 Cal. 449; Norwood *v.* Cobb, 24 Texas, 551; Russell *v.* Perry, 14 N. H. 152; Rape *v.* Heaton, 9 Wis. 328; Carleton *v.* Bickford, 13 Gray, 591; McKay *v.* Gordon, 34 N. J. 286; Thompson *v.* Whitman, 18 Wall. 457; Stewart *v.* Stewart, 27 W. Va. 167; Chunn *v.* Gray, 61 Texas, 112. In People *v.* Dawell, 25 Mich. 247, on an indictment for bigamy, in which the defendant relied on a foreign divorce from his first wife, it was held competent to show, in opposition to the recitals of the record, that the parties never resided in the foreign State, and that the proceedings were a fraud. To the same effect are Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 23; Pennywit *v.* Foote, 27 Ohio St. 600; People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274; O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110; Reed *v.* Reed, 52 Mich. 117, 17 N. W. 720; Smith *v.* Smith, 19 Neb. 706, 28 N. W. 296. ["Judgments recovered in one State in the Union, when proved in the courts of another, . . . (are not) re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Per Mr. Justice *Gray* in Hanley *v.* Donoghue, 116 U. S. 1, 6 Sup. Ct. Rep. 242; Buckner *v.* Finley, 2 Pet. 592; M'Elmoyle *v.* Cohen, 13 Pet. 312; D'Arcy *v.* Ketchum,

United States shall guarantee to every State a republican form

11 How. 165; Christmas *v.* Russell, 5 Wall. 290; and Thompson *v.* Whitman, 18 Wall. 457. See also Maxwell *v.* Stewart, 22 Wall. 77; Broderick's Will, 21 Wall. 503; Ellis *v.* Davis, 109 U. S. 485, 3 Sup. Ct. Rep. 327; and Simmons *v.* Saul, 138 U. S. 439, 11 Sup. Ct. Rep. 369.] And see further, as to divorce cases, *post*, p. 578 *et seq.* Mr. Freeman discusses this general subject in his treatise on Judgments, c. 26. The same defences may be made to a judgment, when sued in another State, which could have been made to it in the State where rendered: Hampton *v.* McConnel, 3 Wheat. 234; Mills *v.* Duryea, 7 Cranch, 481; Steele *v.* Smith, 7 W. & S. 447; Bank of the State *v.* Dalton, 9 How. 522; Scott *v.* Coleman, 5 Litt. 349, 15 Am. Dec. 71; but no others: Green *v.* Van Buskirk, 7 Wall. 139; Christmas *v.* Russell, 5 Wall. 290; Cheever *v.* Wilson, 9 Wall. 108; Wernwag *v.* Pawling, 5 Gill & J. 500, 25 Am. Dec. 317; Fletcher *v.* Ferrel, 9 Dana, 372, 35 Am. Dec. 143; People *v.* Dawell, 25 Mich. 247, 12 Am. Rep. 260; Dodge *v.* Coffin, 15 Kan. 277; [Hancock National Bank *v.* Farnum, 176 U. S. 640, 20 Sup. Ct. Rep. 506, rev. 20 R. I. 466, 40 Atl. 341; Thompson *v.* Taylor, 65 N. J. L. 107, 46 Atl. 567, 54 L. R. A. 585. Courts of one State will not enforce the judgments of a sister State, so a bill will not lie to enforce specific performance of a decree for alimony rendered in a court of a sister State. Bullock *v.* Bullock, 51 N. J. Eq. 444, 27 Atl. 435, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. 528.] A foreign decree not appropriate to any part of the issue raised by the record is not conclusive collaterally. Reynolds *v.* Stockton, 43 N. J. Eq. 211.

This provision of the Constitution of the United States does not require that disabilities imposed upon a person convicted of crime in one State should follow him and be enforced in other States. Sims *v.* Sims, 75 N. Y. 466, approving Commonwealth *v.* Green, 17 Mass. 515, and disapproving Chase *v.* Blodgett, 10 N. H. 22, and State *v.* Chandler, 3 Hawks, 393.

The courts of the United States cannot enforce the penal laws of a State, and where an action was brought in such court by a State upon a judgment recovered in its own courts, the Federal court looked back of the judgment to the original demand, and refused to enforce the judgment. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. Rep. 1370. [But in order that the law may be penal it must inflict the penalty as punishment for some offence against the State. It is not within the rule if the penalty is mere liquidated damages for a private wrong, still less if it is damages ascertained from the contract relations between the parties. Huntington *v.* Attrill, 146 U. S. 657, 13 Sup. Ct. Rep. 224, rev. 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. 344. See also upon "full faith and credit," note to this case in 36 L. ed. U. S. 1123.

Where a discontinuance of the suit is entered by consent of the parties, the entry reciting that it is upon a settlement of the suit, it may be shown in an action in another State upon the original cause that the settlement was by an executory agreement which has not been fulfilled. Jacobs *v.* Marks, 182 U. S. 583, 21 Sup. Ct. Rep. 865, aff. 183 Ill. 533, 56 N. E. 154. Execution cannot issue in one State upon a judgment rendered in another. The foreign judgment must first be reduced to a domestic judgment. Bennett *v.* Bennett, — N. J. App. —, 49 Atl. 501 (June 25, 1901).

The situs of a debt is with the debtor, so far at least as attachment and garnishment are concerned, and a judgment against a garnishee is not invalidated by the fact that his creditor, the principal defendant, resides outside the State and has been served only constructively by publication. If otherwise sufficient, the judgment must be given "full faith and credit" in every State. Chicago, R. I. & P. R. Co. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. Rep. 797, followed in King *v.* Cross, 175 U. S. 396, 20 Sup. Ct. Rep. 139, aff. 19 R. I. 220, 33 Atl. 147. The judgment of the court of one State that a certain will works an equitable conversion into personalty of realty situated in another State is not binding upon the courts of that other State. Clarke *v.* Clarke, 178 U. S. 186, 20 Sup. Ct. Rep. 873, aff. 70 Conn. 195, 483, 39 Atl. 155, 40 Atl. 111. Upon effect of probate of will in another State, see Martin *v.*

of government,[1] and that no State shall grant any title of

Stovell, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130, and note; upon equitable conversion of real property into personalty, see Cottman *v.* Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145, and note; also Bullard *v.* Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104, and note. An *ex parte* adjudication upon the domicil of decedent, made in grant of letters of administration, has no probative force outside the State. Overby *v.* Gordon, 177 U. S. 214, 20 Sup. Ct. Rep. 603. A guardian appointed in one State cannot exercise any authority in another except so far as permitted by the laws of that other. He cannot even sue in a Federal court held in that other. Morgan *v.* Potter, 157 U. S. 195, 15 Sup. Ct. Rep. 590. A voluntary assignment of his property made by an insolvent debtor for the payment of his debts and valid by the law of his residence covers his property in another State in which none of his creditors reside, provided the assignee takes possession before the levy of judicial process, even though the assignment contains provisions for the preferment of creditors which are prohibited by the law of the State where such property is situated. Burnett *v.* Kinney, 147 U. S. 476, 13 Sup. Ct. Rep. 403. But where the insolvency proceedings are involuntary and the assignee has not yet reduced the goods in the sister State to possession, the title does not pass to him. Reynolds *v.* Adden, 136 U. S. 348, 10 Sup. Ct. Rep. 843. A decree of a State court having jurisdiction of the parties that a conveyance of land outside the State was in fraud of the rights of the plaintiff, but not directing defendant to reconvey, is of no force outside the State in which the decree is rendered. But a decree that defendant is indebted to plaintiff and shall pay certain sums of money is binding upon the courts of other States. Carpenter *v.* Strange, 141 U. S. 87, 11 Sup. Ct. Rep. 960. An appointment of an administrator has no extra-territorial force, and a judgment in one State against the administrator of the estate of X. is a personal judgment, and therefore cannot be pleaded by the same plaintiff against the administrator of the estate of X. in another State, because the defendants are neither the same person, nor are they in privity, and the matter is not therefore *res judicata* with respect to the defendant in the second action. Johnson *v.* Powers, 137 U. S. 156, 11 Sup. Ct. Rep. 525. A judgment cannot receive credit if it is not responsive to the issue presented by the pleadings. Reynolds *v.* Stockton, 140 U. S. 254, 11 Sup. Ct. Rep. 773. And the jurisdiction of the court is always open to inquiry. Guaranty Tr. & S. Dep. Co. *v.* Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. Rep. 512; Streitwolf *v.* Streitwolf, 181 U. S. 179, 21 Sup. Ct. Rep. 553, aff. 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. 630; Bell *v.* Bell, 181 U. S. 175, 21 Sup. Ct. Rep. 551, aff. 157 N. Y. 719, 53 N. E. 1123. For validity of a consent decree, see Texas & P. Ry. Co. *v.* Southern P. Co., 137 U. S. 48, 11 Sup. Ct. Rep. 10. But where the plaintiff is duly domiciled in the State in which he sues for divorce, and such State is the duly established matrimonial domicil of the parties, if the defendant is without the State, reasonable constructive service of notice if authorized by the laws of the State will give the court such jurisdiction that its decree of divorce will be valid throughout the United States. Atherton *v.* Atherton, 181 U. S. 155, 21 Sup. Ct. Rep. 544, rev. 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. 650. A decree of divorce granting alimony, the decree having been rendered by a court having jurisdiction, must be given full faith and credit in a sister State so far as the divorce and the alimony due at the date of the decree are concerned, but is of no force outside the State in which it is granted so far as it relates to alimony subsequently to become due. Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. 332, affd. in 181 U. S. 183, 21 Sup. Ct. Rep. 555. See also in this connection, Laing *v.* Rigney, 160 U. S. 531, 16 Sup. Ct. Rep. 366; Arrington *v.* Arrington, 127 N. C. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. 791; Trowbridge *v.* Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am.

[1] Const. of U. S. art. 4, § 4.

nobility.[1] The purpose of these is to protect a Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations.[2]

So far as a particular consideration of the foregoing provisions falls within the plan of our present work, it will be more convenient to treat of them in another place, especially as all of them which have for their object the protection of person or property are usually repeated in the bills of rights contained in the State constitutions, and will require some notice at our hands as a part of State constitutional law.

Where powers are conferred upon the general government, the exercise of the same powers by the States is impliedly prohibited, wherever the intent of the grant to the national government would be defeated by such exercise. On this ground it is held that the States cannot tax the agencies or loans of the general government; since the power to tax, if possessed by the States in regard to these objects, might be so exercised as altogether to destroy such agencies, and impair or even destroy the national credit.[3] And where by the national Constitution jurisdiction is given to the national courts with a view to the more efficient and harmonious working of the system organized under it, it is competent for Congress in its wisdom to make that jurisdiction exclusive of the State courts.[4] On some other subjects State laws may be valid until the power of Congress is exercised, when they become superseded, either wholly, or so far as they are found inconsistent. The States may legislate on the subject of bankruptcy if there be no national bankrupt law.[5] State laws for organizing and disci-

St. 806. Judgment by confession entered by an attorney acting upon a warrant contained in a promissory note made in the State and conformably to its laws must be granted full faith and credit in sister State. Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. 304; Crim *v.* Crim, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. 521. Judgment *in rem* upon lands in another State is not binding in State where such lands are situated. Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403; Bullock *v.* Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. 528. Upon this provision, see also Van Matre *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665.]

[1] Const. of U. S. art. 1, § 10.

[2] Federalist, Nos. 43 and 44. It does not fall within our province to discuss these provisions. They have been much discussed in Congress within a few years, but in a party rather than a judicial, spirit. See Story on Const. (4th ed.) c. 41; Luther *v* Borden, 7 How. 1; Texas *v.* White, 7 Wall. 700; Cooley, Constitutional Principles, ch. xi.

[3] McCulloch *v.* Maryland, 4 Wheat. 316, 427; Weston *v.* Charleston, 2 Pet. 449. See cases collected, *post*, pp. 681–683.

[4] Martin *v* Hunter's Lessee, 1 Wheat. 304; The Moses Taylor *v.* Hammons, 4 Wall. 411; The Ad Hine *v.* Trevor, 4 Wall. 555. And see note to these cases in the Western Jurist, Vol. I, p. 241.

[5] Sturges *v.* Crowninshield, 4 Wheat. 122; McMillan *v.* McNeill, 4 Wheat. 209 And see *post*, pp. 416, 417.

plining the militia are valid, except as they may conflict with national legislation;[1] and the States may constitutionally provide for punishing the counterfeiting of coin[2] and the passing of counterfeit money,[3] since these acts are offences against the State, notwithstanding they may be offences against the nation also.

The tenth amendment to the Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. And it is to be observed of this instrument, that being framed for the establishment of a national government, it is a settled rule of construction that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the States are expressly mentioned.[4] As illustrations, the sixth and seventh amendments to the Constitution may be mentioned. These constitute a guaranty of the right of trial by jury; but, as they do not mention the States, they are not to be understood as restricting their powers; and the States may, if they choose, provide for the trial of all offences against the States, as well as for the trial of civil cases in the State courts, without the intervention of a jury, or by some different jury from that known to the common law.[5]

[1] Houston *v.* Moore, 5 Wheat. 1, 51.

[2] Harlan *v.* People, 1 Doug. (Mich.) 207.

[3] Fox *v.* Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560. And see Hendrick's Case, 5 Leigh, 707; Jett *v.* Commonwealth, 18 Grat. 933; State *v.* Rankin, 4 Cold. 145; Moore *v.* People, 14 How. 13.

[4] Barron *v.* Baltimore, 7 Pet. 243; Livingston's Lessee *v.* Moore, 7 Pet. 469; Fox *v.* Ohio, 5 How. 410; Smith *v.* Maryland, 18 How. 71; Kelly *v.* Pittsburgh, 104 U. S. 78; Presser *v.* Illinois, 116 U. S. 252, 6 Sup. Ct. Rep. 580; Spies *v.* Illinois, 123 U. S. 131, 8 Sup. Ct. Rep. 21; Buonaparte *v.* Camden & Amboy R. R. Co., Baldw. 220; James *v.* Commonwealth, 12 S. & R. 220; Barker *v.* People, 3 Cow. 686; Colt *v.* Eves, 12 Conn. 243; Jane *v.* Commonwealth, 3 Met. (Ky.) 18; Lincoln *v.* Smith, 27 Vt. 328; Matter of Smith, 10 Wend. 449; State *v.* Barnett, 3 Kan. 250; Reed *v.* Rice, 2 J. J. Marsh. 45, 19 Am. Dec. 122; North Mo. R. R. Co. *v.* Maguire, 49 Mo. 490; Lake Erie, &c. R. R. Co. *v.* Heath, 9 Ind. 558; Prescott *v.* State, 19 Ohio St. 184; State *v.* Shumpert, 1 S. C. 85; Commonwealth *v.* Hitchings, 5 Gray, 482; Bigelow *v.* Bigelow, 120 Mass. 320; Boyd *v.* Ellis, 11 Iowa, 97; Campbell *v.* State, 11 Ga. 353; State *v.* Carro, 26 La. Ann. 377; Purvear *v.* Commonwealth, 5 Wall. 475; Twitchell *v.* Commonwealth, 7 Wall. 321. [Second and fourth amendments do not operate on States. Miller *v.* Texas, 153 U. S. 535, 14 Sup. Ct. Rep. 874. Nor does fifth. Thorington *v.* City Council of Montgomery, 147 U. S. 490, 13 Sup. Ct. Rep. 394; Brown *v.* New Jersey, 175 U. S. 172, 174, 20 Sup. Ct. Rep. 77, 22 Sup. Ct. Rep. 120; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 245. Nor the eighth. O'Neil *v.* Vermont, 144 U. S. 323, 12 Sup. Ct. Rep. 693. Nor do the fifth and sixth. Davis *v.* Texas, 139 U. S. 651, 11 Sup. Ct. Rep. 675. See also McElvaine *v.* Brush, 142 U. S 255, 12 Sup. Ct. Rep. 156.]

[5] Twitchell *v.* Commonwealth, 7 Wall. 321; Justices *v.* Murray, 9 Wall. 274; Edwards *v.* Elliott, 21 Wall. 532; Walker *v.* Sauvinet, 92 U. S. 90; Munn *v.* Illinois, 94 U. S. 113; Huston *v.* Wads

With other rules for the construction of the national Constitution we shall have little occasion to deal. They have been the subject of elaborate treatises, judicial opinions, and legislative debates, which are familiar alike to the legal profession and to the public at large. So far as that instrument apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the Federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates, but an act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name. And although the courts of the United States administer the common law in many cases,[1] they can recognize as offences against the nation only those acts which are made criminal, and their punishment provided for, by acts of Congress.[2] It is

worth, 5 Col. 213. See Butler *v.* State, 97 Ind. 378; People *v.* Williams, 35 Hun, 516. A State may give a court of equity jurisdiction of a suit to establish an equitable interest in land. Church *v.* Kelsey, 121 U. S. 282, 7 Sup. Ct. Rep. 897. The seventh amendment has no application to demands against the government, or to counter-claims. McElrath *v.* United States, 102 U. S. 426. [A jury of eight may be provided for criminal cases not capital. Maxwell *v.* Dow, 176 U. S. 581, 20 Sup. Ct. Rep. 448, 494. See also State *v.* Bates, 14 Utah, 293, 47 Pac. 78, 43 L. R. A. 33, and note. The federal jury is the common-law jury of twelve men. It does not include statutory juries before justices of the peace, and facts examined before such statutory juries may be re-examined otherwise than according to the course of the common law. Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 Sup. Ct. Rep. 580. The fifth amendment does not apply to trials in the consular courts of the U. S. held in non-Christian countries. Ross *v.* McIntyre, 140 U. S. 453, 11 Sup. Ct. Rep. 897.]

[1] Townsend *v.* Todd, 91 U. S. 452; Elmwood *v.* Marcy, 92 U. S. 289; Railroad Co. *v.* Georgia, 98 U. S. 359.

[2] Demurrer to an indictment for a libel upon the President and Congress. By the court: "The only question which this case presents is whether the circuit courts can exercise a common-law jurisdiction in criminal cases. . . . The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States: whatever is not expressly given to former, the latter expressly reserve. The judicial power of the United States is a constitutional part of these concessions: that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that created them, and can be vested with none but what the power ceded to the general government will authorize it to confer. It is not necessary

otherwise in the States; for the State courts take notice of, and punish as crimes, those acts which were crimes at the common law, except in a few States where it is otherwise expressly provided by statute or Constitution.

to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation." United States *v.* Hudson, 7 Cranch, 32. See United States *v.* Coolidge, 1 Wheat. 415. "It is clear there can be no common law of the United States. The Federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption." Per *McLean*, J., Wheaton *v.* Peters, 8 Pet. 591. See also Kendall *v.* United States, 12 Pet. 524; Lorman *v.* Clarke, 2 McLean, 568; United States *v.* Lancaster, 2 McLean, 431; United States *v.* New Bedford Bridge, 1 Wood. & M. 403; United States *v.* Wilson, 3 Blatch. 435; United States *v.* Barney, 5 Blatch. 294. [Upon this ground it was held in Gatton *v.* Chicago, R. I. & P. R. Co., 95 Iowa, 112, 63 N. W. 589, 28 L. R. A. 556, that in the absence of congressional action, common carriers engaged in interstate commerce were not limited to reasonable charges. See also Forepaugh *v.* Delaware, L. & W. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, and note, 15 Am. St. 672. These cases however are overruled in W. U. Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 Sup. Ct. Rep. 561, aff. 58 Neb. 192, 78 N. W. 519, holding that in the absence of congressional action, interstate telegraph companies are subject to the common-law rule of reasonable charges, and no unreasonable discrimination between patrons.] As to the adoption of the common law by the States, see Van Ness *v.* Pacard, 2 Pet. 137, 144, per *Story*, J.; and *post*, p. 51, and cases cited in notes.

CHAPTER III.

THE FORMATION AND AMENDMENT OF STATE CONSTITUTIONS.

THE Constitution of the United States assumes the existence of thirteen distinct State governments, over whose people its authority was to be extended if ratified by conventions chosen for the purpose. Each of these States was then exercising the powers of government under some form of written constitution, and that instrument would remain unaffected by the adoption of the national Constitution, except in those particulars in which the two would come in conflict; and as to those, the latter would modify and control the former.[1] But besides this fundamental law, every State had also a body of laws, prescribing the rights, duties, and obligations of persons within its jurisdiction, and establishing those minute rules for the various relations of life which cannot be properly incorporated in a constitution, but must be left to the regulation of the ordinary law-making power.

By far the larger and more valuable portion of that body of laws consisted of the *common law of England*, which had been transplanted in the American wilderness, and which the colonists, now become an independent nation, had found a shelter of protection during all the long contest with the mother country, brought at last to so fortunate a conclusion.

The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of the domestic institutions, and the acquisition, control, and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences, and new modes of business. Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs, and as they took with them their nature, so also they would take with them these

[1] Livingston *v.* Van Ingen, 9 Johns. 507; State *v.* Cape Girardeau, &c. R. R. Co., 48 Mo. 468; Mayor, &c. of Mobile *v.* Dargan, 45 Ala. 310; Neal *v.* Delaware, 103 U. S. 370.

laws whenever they should transfer their domicile from one country to another.

To eulogize the common law is no part of our present purpose. Many of its features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition, and barbarism. The feudal system, which was essentially a system of violence, disorder, and rapine,[1] gave birth to many of the maxims of the common law; and some of these, long after that system has passed away, may still be traced in our law, especially in the rules which govern the acquisition, control, and enjoyment of real estate. The criminal code was also marked by cruel and absurd features, some of which have clung to it with wonderful tenacity, even after the most stupid could perceive their inconsistency with justice and civilization. But, on the whole, the system was the best foundation on which to erect an enduring structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought especially to protect the rights and privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority were not recognized in its principles. Awe surrounded and majesty clothed the king, but the humblest subject might shut the door of his cottage against him, and defend from intrusion that privacy which was as sacred as the kingly prerogatives.[2] The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people; and if the criminal code was harsh, it at least escaped the inquisitorial features which were apparent in criminal procedure of other civilized countries, and which have ever been fruitful of injustice, oppression, and terror.

For several hundred years, however, changes had from time to time been made in the common law by means of statutes. Originally the purpose of general statutes was mainly to declare and reaffirm such common-law principles as, by reason of usurpations and abuses, had come to be of doubtful force, and which, therefore, needed to be authoritatively announced, that king and sub-

[1] "A feudal kingdom was a confederacy of a numerous body, who lived in a state of war against each other, and of rapine towards all mankind; in which the king, according to his ability and vigor, was either a cipher or a tyrant, and a great portion of the people were reduced to personal slavery." Mackintosh, History of England, c. 3.

[2] See *post*, p. 425, 426.

ject alike might understand and observe them. Such was the purpose of the first great statute, promulgated at a time when the legislative power was exercised by the king alone, and which is still known as the Magna Charta of King John.[1] Such also was the purpose of the several confirmations of that charter, as well as of the Petition of Right,[2] and the Bill of Rights,[3] each of which became necessary by reason of usurpations. But further statutes also became needful because old customs and modes of business were unsuited to new conditions of things when property had become more valuable, wealth greater, commerce more extended, and when all these changes had brought with them new desires and necessities, and also new dangers against which society as well as the individual subject needed protection. For this reason the Statute of Wills[4] and the Statute of Frauds and Perjuries[5] became important; and the Habeas Corpus Act[6] was also found necessary, not so much to change the law,[7] as to secure existing principles of the common law against being habitually set aside and violated by those in power.

From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them.[8] They also

[1] It is justly observed by Sidney that "Magna Charta was not made to restrain the absolute authority, for no such thing was in being or pretended (the folly of such visions seeming to have been reserved to complete the misfortunes and ignominy of our age), but it was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should any way encroach upon them." Sidney on Government, c. 3, sec. 27.

[2] 1 Charles I. c. 1.

[3] 1 William and Mary, sess. 2, c. 2.

[4] 32 Henry VIII. c. 7, and 34 & 35 Henry VIII. c. 5.

[5] 29 Charles II. c. 3.

[6] 31 Charles II. c. 2.

[7] "I dare not advise to cast the laws into a new mould. The work which I propound tendeth to the pruning and grafting of the law, and not the plowing up and planting it again, for such a remove I should hold for a perilous innovation." Bacon's Works, Vol. II. p. 231, Phil. ed. 1852.

[8] "The common law of England is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition." *Story*, J., in Van Ness *v.* Pacard, 2 Pet. 137. "The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force; particularly ecclesiastical laws, those for payment of tithes, and others. Had it been understood that they were to carry these laws with them, they had better have stayed at home among their friends, unexposed to the risks and toils of a new settlement. They carried with them a right to such parts of laws of the land as they should judge advantageous or useful to them; a right to be free from those they thought hurtful, and a right to make such others

claimed the benefit of such statutes as from time to time had been enacted in modification of this body of rules.[1] And when the difficulties with the home government sprung up, it was a source of immense moral power to the colonists that they were able to show that the rights they claimed were conferred by the common law, and that the king and Parliament were seeking to deprive them of the common birthright of Englishmen. Did Parliament attempt to levy taxes in America, the people demanded the benefit of that maxim with which for many generations every intelligent subject had been familiar, that those must vote the tax

as they should think necessary, not infringing the general rights of Englishmen; and such new laws they were to form as agreeable as might be to the laws of England." Franklin, Works by Sparks, Vol. IV. p. 271. See also Chisholm *v.* Georgia, 2 Dall. 419; Patterson *v.* Winn, 5 Pet. 233; Wheaton *v.* Peters, 8 Pet. 591; Pollard *v.* Hagan, 3 How. 212; Commonwealth *v.* Leach, 1 Mass. 59; Commonwealth *v.* Knowlton, 2 Mass. 530; Commonwealth *v.* Hunt, 4 Met. 111; Pearce *v.* Atwood, 13 Mass. 324; Sackett *v.* Sackett, 8 Pick. 309; Marks *v.* Morris, 4 Hen. & M 463; Mayo *v.* Wilson, 1 N. H. 53; Houghton *v.* Page, 2 N. H. 42; State *v.* Rollins, 8 N. H. 550; State *v.* Buchanan, 5 H. & J. 356; Sibley *v.* Williams, 3 G. & J. 62; State *v.* Cummings, 33 Conn. 260; Martin *v.* Bigelow, 2 Aiken, 187; Lindsley *v.* Coats, 1 Ohio, 243; Bloom *v.* Richards, 2 Ohio St. 287; Lyle *v.* Richards, 9 S. & R. 322; State *v.* Campbell, T. U. P. Charlt. 166; Craft *v.* State Bank, 7 Ind. 219; Dawson *v.* Coffman, 28 Ind. 220; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633; Morgan *v.* King, 30 Barb. 9; Lansing *v.* Stone, 37 Barb. 15; Simpson *v.* State, 5 Yerg. 356; Crouch *v.* Hall, 15 Ill. 263; Brown *v.* Pratt, 3 Jones (N. C.) Eq. 202; Stout *v.* Keyes, 2 Doug. (Mich.) 184; Lorman *v.* Benson, 8 Mich. 18; Pierson *v.* State, 12 Cal. 149; Norris *v.* Harris, 15 Cal. 226; Powell *v.* Sims, 5 W. Va. 1; Colley *v.* Merrill, 6 Me. 55; State *v.* Cawood, 2 Stew. 360; Carter *v.* Balfour, 19 Ala. 814; Barlow *v.* Lambert, 28 Ala. 704; Goodwin *v.* Thompson, 2 Greene (Iowa), 329; Wagner *v.* Bissell, 3 Iowa, 396; Noonan *v.* State, 9 Miss. 562; Powell *v.* Brandon, 24 Miss. 343; Coburn *v.* Harvey, 18 Wis. 147; Reaume *v.* Chambers, 22 Mo. 36; Hamilton *v.* Kneeland, 1 Nev. 10; People *v.* Green, 1 Utah, 11; Thomas *v.* Railroad Co., 1 Utah, 232; Reno Smelting Works *v.* Stevenson, 21 Pac. Rep. 317 (Nev.). The courts of one State will presume the common law of a sister State to be the same as their own, in the absence of evidence to the contrary. Dunn *v.* Adams, 1 Ala. 527, s. c. 35 Am. Dec. 42: Abell *v.* Douglass, 4 Denio, 305; Kermott *v.* Ayer, 11 Mich. 181; Schurman *v.* Marley, 29 Ind. 458; Buckles *v.* Ellers, 72 Ind. 220; Tinkler *v.* Cox, 68 Ill. 119; Flagg *v.* Baldwin, 38 N. J. Eq. 219; Eureka Springs Ry. Co. *v.* Timmons, 11 S. W. Rep. 690 (Ark.). So of the law of a foreign country. Carpenter *v.* Grand Trunk Ry. Co., 72 Me. 388. So, that statutory modifications of the common law are the same. Shattuck *v.* Chandler, 20 Pac. Rep. 225 (Kan.); Buchanan *v.* Hubbard, 21 N. E. 538 (Ind.). But see Atchison, &c. R. R. Co. *v.* Betts, 15 Pac. Rep. 821 (Kan.).

[1] The acts of Parliament passed after the settlement of a colony were not in force therein, unless made so by express words, or by adoption. Commonwealth *v.* Lodge, 2 Grat. 579; Pemble *v.* Clifford, 2 McCord, 31. See Swift *v.* Tousey, 5 Ind. 196; Baker *v.* Mattocks, Quincy, 72; Fechneimer *v.* Washington, 77 Ind. 366; Ray *v.* Sweeney, 14 Bush, 1; Lavalle *v.* Strobel, 89 Ill. 370; Cathcart *v.* Robinson, 5 Pet. 264. Those amendatory of the common law, if suited to the condition of things in America, were generally adopted by tacit consent. For the differing views taken by English and American statesmen upon the general questions here discussed, see the observations by Governor Pownall, and the comments of Franklin thereon, 4 Works of Franklin, by Sparks, 271.

who are to pay it.[1] Did Parliament order offenders against the laws in America to be sent to England for trial, every American was roused to indignation, and protested against the trampling under foot of that time-honored principle, that trials for crime must be by a jury of the vicinage. Contending thus behind the bulwarks of the common law, Englishmen would appreciate and sympathize with their position, and Americans would feel doubly strong in a cause that not only was right, but the justice of which must be confirmed by an appeal to the consciousness of their enemies themselves.

The evidence of the common law consisted in part of the declaratory statutes we have mentioned,[2] in part of the commentaries of such men learned in the law as had been accepted as authority, but mainly in the decisions of the courts applying the law to actual controversies. While colonization continued, — that is to say, until the war of the Revolution actually commenced, — these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments.

The colonists also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted, *first*, of the com-

[1] "The blessing of Judah and Issachar will never meet; that the same people or nation should be both the lion's whelp and the ass between burdens; neither will it be that a people overlaid with taxes should ever become valiant and martial. It is true that taxes levied by consent of the State do abate men's courage less, as it hath been seen notably in the exercise of the Low Countries, and in some degree in the subsidies of England, for you must note that we speak now of the heart and not of the purse; so that although the same tribute or tax laid by consent or by imposing be all one to the purse, yet it works diversely upon the courage. So that you may conclude that no people overcharged with tribute is fit for empire." Lord Bacon on the True Greatness of Kingdoms.

[2] These statutes upon the points which are covered by them are the best evidence possible. They are the living charters of English liberty, to the present day; and as the forerunners of the American constitutions and the source from which have been derived many of the most important articles in their bills of rights, they are constantly appealed to when personal liberty or private rights are placed in apparent antagonism to the claims of government.

mon law of England, so far as they had tacitly adopted it as suited to their condition; *second*, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, *third*, of the colonial statutes.[1] The first and second constituted the American common law, and by this in great part are rights adjudged and wrongs redressed in the American States to this day.[2]

[1] The like condition of things is found to exist in the new States formed and admitted to the Union since the Constitution was adopted. Congress creates territorial governments of different grades, but generally with plenary legislative power either in the governor and judges, a territorial council, or a territorial legislature chosen by the people; and the authority of this body extends to all rightful subjects of legislation, subject, however, to the disapproval of Congress. Vincennes University *v.* Indiana, 14 How. 268; Miners' Bank *v.* Iowa, 12 How. 1. Thus the Territory of Oregon had power to grant a legislative divorce. Maynard *v.* Hill, 125 U. S. 190, 8 Sup. Ct. Rep. 723. A territorial legislature may empower a probate court to grant a divorce. Whitmore *v.* Harden, 3 Utah, 121, 1 Pac. 465. The legislation, of course, must not be in conflict with the law of Congress conferring the power to legislate, but a variance from it may be supposed approved by that body, if suffered to remain without disapproval for a series of years after being duly reported to it. Clinton *v.* Englebrect, 13 Wall. 434, 446. See Williams *v.* Bank of Michigan, 7 Wend. 539; Swan *v.* Williams, 2 Mich. 427; Stout *v.* Hyatt, 13 Kan. 232; Himman *v.* Warren, 6 Oreg. 408. As to the complete control of Congress over the Territories, see United States *v.* Reynolds, 98 U. S. 145; National Bank *v.* Yankton, 101 U. S. 129. It may exclude polygamists from the right to vote. [It may declare void the charter of a church granted by the legislature of the Territory. Church of Jesus Christ of Latter Day Saints *v.* United States, 136 U. S. 1, 10 Sup. Ct. Rep. 792;] Murphy *v.* Ramsey, 114 U. S. 15, 5 Sup. Ct. Rep. 747. In Treadway *v.* Schnauber, 1 Dak 236, it was decided that without express authority a territorial legislature could not vote aid to a railroad company.

[2] A few of the States, to get rid of confusion in the law, deemed it desirable to repeal the acts of Parliament, and to re-enact such portions of them as were regarded important here. See the Michigan repealing statute, copied from that of Virginia, in Code of 1820, p. 459. Others named a date or event, and provided by law that English statutes passed subsequently should not be of force within their limits. In some of the new States there were also other laws in force than those to which we have above alluded, as for example, the ordinance of 1787, in the Northwest Territory. There has been much discussion of the question whether that ordinance was superseded in each of the States formed out of that Territory by the adoption of a State constitution, and admission to the Union. In Hogg *v.* The Zanesville Canal Manufacturing Co., 5 Ohio, 410, it was held that the provision of the ordinance that the navigable waters of the Territory and the carrying-places between should be common highways, and forever free, was permanent in its obligation, and could not be altered without the consent both of the people of the State and of the United States, given through their representatives. "It is an article of compact; and until we assume the principle that the sovereign power of a State is not bound by compact, this clause must be considered obligatory." Justice *McLean* and Judge *Leavitt*, in Spooner *v.* McConnell, 1 McLean, 337, examine this subject at considerable length, and both arrive at the same conclusion with the Ohio court. The like opinion was subsequently expressed in Palmer *v.* Commissioners of Cuyahoga Co., 3 McLean, 226, and in Jolly *v.* Terre Haute Drawbridge Co., 6 McLean, 237. See also United States *v.* New Bedford Bridge, 1 Wood. & M. 401; Strader *v.* Graham, 10 How. 82; Doe *v.* Douglass, 8 Blackf. 12; Connecticut Mutual Life Ins. Co. *v.* Cross, 18 Wis. 109; Milwaukee Gaslight Co. *v.* Schooner Gamecock, 23 Wis. 144; Wisconsin River

Every colony had also its charter, emanating from the Crown, and constituting its colonial constitution. All but two of these were swept away by the whirlwind of revolution, and others substituted which had been framed by the people themselves, through the agency of conventions which they had chosen. The exceptions were those of Connecticut and Rhode Island, each of which States had continued its government under the colonial charter, finding it sufficient and satisfactory for the time being, and accepting it as the constitution for the State.[1]

Improvement Co. *v.* Lyons, 30 Wis. 61; Attorney-General *v.* Eau Claire, 37 Wis. 400; Keokuk *v.* Packet Co., 45 Iowa, 196. Compare Woodburn *v.* Kilbourn Manuf. Co., 1 Abb. U. S. 158; s. c. 1 Biss. 546. But in Escanaba Co. *v.* Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185, it was decided that limitations on legislative power imposed by the ordinance ceased to have effect within a State upon its admission to the Union, except as the State had voluntarily adopted them. See Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113; Higgins *v.* Farmers' Ins. Co., 60 Iowa, 50, 14 N. W. 118, and also the early cases of La Plaisance Bay Harbor Co. *v.* Monroe, Walk. Ch. 155, and Depew *v.* Trustees, 5 Ind. 8; and with reference to the enabling acts of Oregon, Louisiana, and California, in Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811; Hamilton *v.* Vicksburg, &c. R. R. Co., 119 U. S. 280, 7 Sup. Ct. Rep. 206; Cardwell *v.* American Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423; People *v.* Potrero, &c. R. R. Co., 67 Cal. 166, 7 Pac. 445. And the provision that the rivers shall be forever free refers not to physical obstructions, but to the imposition of duties for the use of the navigation, and any discrimination against citizens of other States. Escanaba Co. *v.* Chicago, *supra*; Huse *v.* Glover, 119 U. S. 543, and cases last cited. But a State may charge tolls for the use of improvements it has made in its navigable rivers. Huse *v.* Glover; Sands *v.* Manistee River Imp. Co., *supra*; Palmer *v.* Com'rs, 3 McLean, 226; Spooner *v.* McConnell, 1 McLean, 337. See also, *post*, 863, 864.

In some of the States formed out of the territory acquired by the United States from foreign powers, traces will be found of the laws existing before the change of government. Louisiana has a code peculiar to itself, based upon the civil law. Much of Mexican law, and especially as regards lands and land titles, is retained in the systems of Texas and California. In Michigan, when the acts of Parliament were repealed, it was also deemed important to repeal all laws derived from France, through the connection with the Canadian provinces, including the *Coutume de Paris*, or ancient French common law. In the mining States and Territories a peculiar species of common law, relating to mining rights and titles, has sprung up, having its origin among the miners, but recognized and enforced by the courts. Regarding the canon and ecclesiastical law, and their force in this country, see Crump *v.* Morgan, 3 Ired. Eq. 91; Le Barron *v.* Le Barron, 35 Vt. 365. That constitutions are supposed to be framed in reference to existing institutions, see Pope *v.* Phifer, 3 Heisk. 686. A change in a constitution cannot retroact upon legislation so as to enlarge its scope. Dewar *v.* People, 40 Mich. 401. See Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112.

[1] It is worthy of note that the first well-authenticated case in which a legislative act was held void for incompatibility with the constitution of the State, was decided under one of these charters. It was that of Trevett *v.* Weeden, decided in Rhode Island in 1786. See Arnold's History of Rhode Island, Vol. II. c. 24. Mr. Brinton Coxe, in his book on Judicial Power and Constitutional Legislation, makes much use of this case, and refers to others decided near the same time. Mr. Gouverneur Morris, in an address to the Pennsylvania Assembly in 1785, speaks of a law passed in New Jersey having been declared unconstitutional and void, and is supposed to have referred to the unreported case of Holmes *v.*

New States have since, from time to time, formed constitutions, either regularly in pursuance of enabling acts passed by Congress, or irregularly by the spontaneous action of the people, or under the direction of the legislative or executive authority of the Territory to which the State succeeded. Where irregularities existed, they must be regarded as having been cured by the subsequent admission of the State into the Union by Congress; and there were not wanting in the case of some States plausible reasons for insisting that such admission had become a matter of right, and that the necessity for an enabling act by Congress was dispensed with by the previous stipulations of the national government in acquiring the territory from which such States were formed.[1] Some of these constitutions pointed out the mode for their own modification; others were silent on that subject; but it has been assumed that in such cases the power to originate proceedings for that purpose rested with the legislature of the State, as the department most nearly representing its general sovereignty; and this is doubtless the correct view to take of this subject.[2]

The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority.[3] The people of the Union created a national constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law. But in

Willow, which Mr. Coxe thought must have been decided in 1786 or 1787, but which President Scott of Rutger's College, who has examined the original files and records, informs us was decided in 1780. The next reported case in which a like result was reached was Bayard *v.* Singleton, to be found in Martin, N. C. Rep. p. 48.

[1] This was the claim made on behalf of Michigan; it being insisted that the citizens, under the provisions of the ordinance of 1787, whenever the Territory acquired the requisite population, had an absolute right to form a constitution and be admitted to the Union under it. See Scott *v.* Detroit Young Men's Society's Lessee, 1 Doug. (Mich.) 119, and the contrary opinion in Myers *v.* Manhattan Bank, 20 Ohio, 283. The debates in the Senate of the United States on the admission of Michigan to the Union go fully into this question. See Benton's Abridgment of Congressional Debates, Vol. XIII. pp. 69–72. And as to the right of the people of a Territory to originate measures looking to an application for admission to the Union, see Opinions of Attorneys-General, Vol. II. p. 726.

[2] See Jameson on Constitutional Conventions, c. 8.

[3] *McLean*, J., in Spooner *v.* McConnell, 1 McLean, 347; *Waite*, Ch. J., in Minor *v.* Happersett, 21 Wall. 162, 172; Campbell's Case, 2 Bland Ch. 209, 20 Am. Dec. 360; Reynolds *v.* Baker, 6 Cold. 221; Potter's Dwarris on Stat. c. 1.

every State, although all persons are under the protection of the government, and obliged to conform their action to its laws, there are always some who are altogether excluded from participation in the government, and are compelled to submit to be ruled by an authority in the creation of which they have no choice. The political maxim, that government rests upon the consent of the governed, appears, therefore, to be practically subject to many exceptions; and when we say the sovereignty of the State is vested in the people, the question very naturally presents itself, What are we to understand by *The People* as used in this connection?

What *should be* the correct rule upon this subject, it does not fall within our province to consider. Upon this men will theorize; but the practical question precedes the formation of the Constitution and is addressed to the people themselves. As a practical fact the sovereignty is vested in those persons who are permitted by the constitution of the State to exercise the elective franchise.[1] Such persons may have been designated by description in the enabling act of Congress permitting the formation of the constitution, if any such there were, or the convention which framed the constitution may have determined the qualifications of electors without external dictation. In either case, however, it was essential to subsequent good order and contentment with the government, that those classes in general should be admitted to a voice in its administration, whose exclusion on the ground of want of capacity or of moral fitness could not reasonably and to the general satisfaction be defended.

Certain classes have been almost universally excluded, — the slave, because he is assumed to be wanting alike in the intelligence and the freedom of will essential to the proper exercise of the right; the woman, from mixed motives, but mainly, perhaps, because, in the natural relation of marriage, she was supposed to be under the influence of her husband, and, where the common law prevailed, actually was in a condition of dependence upon and subjection to him;[2] the infant, for reasons similar to those which exclude the slave; the idiot, the lunatic, and the felon, on obvious grounds; and sometimes other classes for whose exclusion it is difficult to assign reasons so generally satisfactory.

The theory in these cases we take to be that classes are excluded because they lack either the intelligence, the virtue, or the

[1] "The people, for political purposes, must be considered as synonymous with qualified voters." Blair *v.* Ridgely, 41 Mo. 63.

[2] Some reference is made to the reasons for the exclusion in the opinions in Bradwell *v.* State, 16 Wall. 130, and Minor *v.* Happersett, 21 Wall. 162.

liberty of action essential to the proper exercise of the elective franchise. But the rule by which the presence or absence of these qualifications is to be determined, it is not easy to establish on grounds the reason and propriety of which shall be accepted by all. It must be one that is definite and easy of application, and it must be made permanent, or an accidental majority may at any time change it, so as to usurp all power to themselves. But to be definite and easy of application, it must also be arbitrary. The infant of tender years is wanting in competency, but he is daily acquiring it, and a period is fixed at which he shall conclusively be presumed to possess what is requisite. The alien may know nothing of our political system and laws, and he is excluded until he has been domiciled in the country for a period judged to be sufficiently long to make him familiar with its institutions; races are sometimes excluded arbitrarily; and at times in some of the States the possession of a certain amount of property, or the capacity to read, seems to have been regarded as essential to satisfactory proof of sufficient freedom of action and intelligence.[1]

Whatever rule is once established must remain fixed until those who by means of it have the power of the State put into their hands see fit to invite others to participate with them in its exercise. Any attempt of the excluded classes to assert their right to a share in the government, otherwise than by operating upon the public opinion of those who possess the right of suffrage, would be regarded as an attempt at revolution, to be put down by the strong arm of the government of the State, assisted, if need be, by the military power of the Union.[2]

In regard to the formation and amendment of State constitutions, the following appear to be settled principles of American constitutional law: —

I. The people of the several Territories may form for themselves State constitutions whenever enabling acts for that purpose are passed by Congress, but only in the manner allowed by such enabling acts, and through the action of such persons as the en-

[1] State *v.* Woodruff, 2 Day, 504; Catlin *v.* Smith, 2 S. & R. 267; Opinions of Judges, 18 Pick. 575. See Mr. Bancroft's synopsis of the first constitutions of the original States, in his History of the American Revolution, c. 5. For some local elections it is quite common still to require property qualification or the payment of taxes in the voter; but statutes of this description are generally construed liberally. See Crawford *v.* Wilson, 4 Barb. 504. Many special statutes, referring to the people of a municipality the question of voting aid to internal improvements, have confined the right of voting on the question to taxpayers.

[2] The case of Rhode Island and the "Dorr Rebellion," so popularly known, will be fresh in the minds of all. For a discussion of some of the legal aspects of the case, see Luther *v.* Borden, 7 How. 1.

abling acts shall clothe with the elective franchise to that end. If the people of a Territory shall, of their own motion, without such enabling act, meet in convention, frame and adopt a constitution, and demand admission to the Union under it, such action does not entitle them, as matter of right, to be recognized as a State; but the power that can admit can also refuse, and the territorial status must be continued until Congress shall be satisfied to suffer the Territory to become a State. There are always in these cases questions of policy as well as of constitutional law to be determined by the Congress before admission becomes a matter of right, — whether the constitution formed is republican; whether suitable and proper State boundaries have been fixed upon; whether the population is sufficient; whether the proper qualifications for the exercise of the elective franchise have been agreed to; whether any inveterate evil exists in the Territory which is now subject to control, but which might be perpetuated under a State government, — these and the like questions, in which the whole country is interested, cannot be finally solved by the people of the Territory for themselves, but the final decision must rest with Congress, and the judgment must be favorable before admission can be claimed or expected.[1]

II. In the original States, and all others subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter at will the law which they have made. But the people, in the legal sense, must be understood to be those who, by the existing constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed.[2]

III. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be author-

[1] When a constitution has been adopted by the people of a Territory, preparatory to admission as a State, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and declares such changes and additions to be fundamental conditions of admission of the State, and the legislature accepts such changes and additions, and it is admitted, the changes become a part of the constitution, and binding as such, although not submitted to the people for approval. Brittle *v.* People, 2 Neb. 198; Secombe *v.* Kittelson, 29 Minn. 555, 12 N. W. 519.

[2] Luther *v.* Borden, 7 How. 1; Wells *v.* Bain, 75 Penn. St. 39.

ized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself.[1]

[1] Opinions of Judges, 6 Cush. 573. The first constitution of New York contained no provision for its own amendment, and Mr. Hammond, in his Political History of New York, Vol. I. c. 26, gives a very interesting account of the controversy before the legislature and in the council of revision as to the power of the legislature to call a convention for revision, and as to the mode of submitting its work to the people. In Collier *v.* Frierson, 24 Ala. 100, it appeared that the legislature had proposed eight different amendments to be submitted to the people at the same time; the people had approved them, and all the requisite proceedings to make them a part of the constitution had been had, except that in the subsequent legislature the resolution for their ratification had, by mistake, omitted to recite one of them. On the question whether this one had been adopted, we quote from the opinion of the court: "The constitution can be amended in but two ways: either by the people who originally framed it, or in the mode prescribed by the instrument itself. . . . We entertain no doubt that to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are those acts required or those requisitions enjoined, if the legislature or any department of the government can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the fundamental law." See also State *v.* McBride, 4 Mo. 303; State *v.* Tufly, 19 Nev. 391, 12 Pac. 835; *In re* Const. Convention, 14 R. I. 649; Koehler *v.* Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609. In the last case it is held that where a proposed amendment *must* be entered *at length* upon the journal, neither the enrolled resolution embodying it nor parol evidence can be received to contradict the journal; nor are the courts debarred from ascertaining the truth by the fact that a second general assembly passed the amendment as enrolled. But if the proposition is recorded in the Senate journal and amended in the House and the amendment is then recorded in the Senate, it is not a valid objection that the whole proposition is not recorded in one place in the Senate journal. *In re* Senate File, 25 Neb. 861, 41 N. W. Rep. 981. It is enough if the journal entry is by reference to the title. Thomason *v.* Ruggles, 69 Cal. 465, 11 Pac. 20. Where the constitution provided that amendments should be proposed by one general assembly, and approved and submitted to popular vote by a second, and seventeen amendments were thus approved together, and the second general assembly passed upon and submitted eight by one bill and nine by another, the submission was held sufficient and valid. Trustees of University *v.* McIver, 72 N. C. 76. Several propositions which in effect are but one amendment may be submitted to the people as one amendment. State *v.* Timme, 54 Wis. 318, 11 N. W. 785. A high license amendment and a prohibitory amendment may be submitted at one time. *In re* Senate File, *supra*. An amendment becomes effective when the votes are canvassed. The Governor need not make a proclamation. Sewall *v.* State, 15 Tex. App. 56; Wilson *v.* State, *id.* 150. [A proposed amendment which has duly passed the legislature does not in Pennsylvania require to be passed upon by the Governor before it can be submitted to the people. Com. *v.* Griest, 196 Pa. 396, 46 Atl. 505, 50 L. R. A. 568; State *v.* Dahl, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97.

IV. In accordance with universal practice, and from the very necessity of the case, amendments to an existing constitution, or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose. It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval. But no body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definitive action upon amendments or revisions; they must submit the result of their deliberations to the people — who alone are competent to exercise the powers of sovereignty in framing the fundamental law — for ratification or rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass; but the changes in the fundamental law of the State must be enacted by the people themselves.[1]

Whether or not a proposed amendment has been duly adopted is a question for the courts, and where the Governor has under statute appointed a commission to determine the result of the popular vote upon the proposed amendment, the proceedings of such commission may be reviewed by *certiorari*, notwithstanding the Governor's proclamation that the amendment has been duly adopted. State *v.* Wurts, 63 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251. In voting on a constitutional amendment voters exercise a legislative function and courts cannot enjoin the Secretary of State from publishing notice of the election even though the amendment, if adopted, may be invalid. People *v.* Mills, — Col. —, 70 Pac. 322 (June 30, 1902).]

[1] See, upon this subject, Jameson on the Constitutional Convention, §§ 415–418, and 479–520. This work is so complete and satisfactory in its treatment of the general subject as to leave little to be said by one who shall afterwards attempt to cover the same ground. Where a convention to frame amendments to the constitution is sitting under a legislative act from which all its authority is derived, the submission of its labors to a vote of the people in a manner different from that prescribed by the act is nugatory. Wells *v.* Bain, 75 Penn. St. 39. Such a convention has no inherent rights; it has delegated powers only, and must keep within them. Woods's Appeal, 75 Penn. St. 59. Compare Loomis *v.* Jackson, 6 W. Va. 613, 708. The Supreme Court of Missouri has expressed the opinion that it was competent for a convention to put a new constitution in force without submitting it to the people. State *v.* Neal, 42 Mo. 119. But this was *obiter*. [But if, after being accepted by the people, the convention modifies it and promulgates it as modified, and the constitution as promulgated is recognized as valid by the executive and legislative branches of the government the modifications must be deemed valid. Miller *v.* Johnson, 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524.] Where proposed amendments are required to be submitted to the people, and approved by a majority vote, it is a mooted question whether a majority of those voting thereon is sufficient, when it appears that they do not constitute a majority of all who voted at the same election. See State *v.* Swift, 69 Ind. 505; and cases cited, *post*, 892–894. [That pub-

V. The power of the people to amend or revise their constitutions is limited by the Constitution of the United States in the following particulars: —

1. It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.[1]

2. It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint persons of crime, or provide *ex post facto* for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures.[2]

VI. Subject to the foregoing principles and limitations, each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise; what protection shall be thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good.[3]

lication of proposed amendments with the statutes adopted at same session of legislature as that in which the amendments were proposed is a sufficient publication if made a sufficiently long time before election, see State *v.* Grey, 21 Nev. 378, 32 Pac. 190, 19 L. R. A. 134.]

[1] Const. of U. S. art. 4, § 4; Federalist, No. 43.

[2] Cummings *v.* Missouri, 4 Wall. 277; Jefferson Branch Bank *v.* Skelly, 1 Black, 436; State *v.* Keith, 63 N. C. 140; Jacoway *v.* Denton, 25 Ark. 525; Union Bank *v.* State, 9 Yerg. 490; Girdner *v.* Stephens, 1 Heisk. 280; Lawson *v.* Jeffries, 47 Miss. 686, 12 Am. Rep. 342 Penn *v.* Tollison, 26 Ark. 545; Dodge *v.* Woolsey, 18 How. 331; Pacific R. R. Co. *v.* Maguire, 20 Wall. 36; Railroad Co. *v.* McClure, 10 Wall. 511; White *v.* Hart, 13 Wall. 646; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 6 Sup. Ct. Rep. 329; [Bier *v.* McGehee, 148 U. S. 137, 13 Sup. Ct. Rep. 580.] The fact that the constitution containing the obnoxious provision was submitted to Congress, and the State admitted to full rights in the Union under it, cannot make such provision valid. Gunn *v.* Barry, 15 Wall. 610.

[3] Matter of the Reciprocity Bank, 22 N. Y. 9; McMullen *v.* Hodge, 5 Texas, 34; Penn *v.* Tollison, 26 Ark. 545; Matter of Oliver Lee & Co.'s Bank, 21 N. Y. 9. In the case last cited, *Denio*, J., says: "The [constitutional] convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people and to the Constitution of the Federal government,

And the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action, or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subjects it covers, the fundamental rule of action throughout the whole United States.[1]

How far the constitution of a State shall descend into the particulars of government, is a question of policy addressed to the

with all private and social rights, and with all the existing laws and institutions of the State. If the convention had so willed, and the people had concurred, all former charters and grants might have been annihilated. When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any and all existing institutions which might stand in their way."

[1] All the State constitutions now contain within themselves provisions for their amendment. Some require the question of calling a convention to revise the constitution to be submitted to the people at stated periods; others leave it to the legislature to call a convention, or to submit to the people the question of calling one; while the major part allow the legislature to mature specific amendments to be submitted to the people separately, and these become a part of the constitution if adopted by the requisite vote.

When the late rebellion had been put down by the military forces of the United States, and the State governments which constituted a part of the disloyal system had been displaced, serious questions were raised as to the proper steps to be taken in order to restore the States to their harmonious relations to the Union. These questions, and the controversy over them, constituted an important part of the history of our country during the administration of President Johnson; but as it is the hope and trust of our people that the occasion for discussing such questions will never arise again, we do not occupy space with them in this work. It suffices for the present to say, that Congress claimed, insisted upon, and enforced the right to prescribe the steps to be taken and the conditions to be observed in order to restore these States to their former positions in the Union, and the right also to determine when the prescribed conditions had been complied with, so as to entitle them to representation in Congress. There is some discussion of the general subject in Texas *v.* White, 7 Wall. 700. And see Gunn *v.* Barry, 15 Wall. 610.

When a constitution has been regarded by the people of a State as valid, and it has never been adjudged illegal by the courts, a Federal circuit court will not question its legal adoption. Smith *v.* Good, 34 Fed. Rep. 204.

It has been decided in some cases that a constitution is to have effect from the time of its adoption by the people, and not from the time of the admission of the State into the Union by Congress. Scott *v.* Young Men's Society's Lessee, 1 Doug. (Mich.) 119; Campbell *v.* Fields, 35 Texas, 751. The Texas reconstruction constitution became operative before the State was admitted to representation in Congress. Peak *v.* Swindle, 68 Texas, 242, 4 S. W. 478. An amendment to the Minnesota original constitution adopted before formal admission of the State is valid. Any irregularity is healed by the admission, and the subsequent recognition of the validity of the amendment by the State. Secombe *v.* Kittelson, 29 Minn. 555, 12 N. W. 519.

convention which forms it. Certain things are to be looked for in all these instruments; though even as to these there is great variety, not only of substance, but also in the minuteness of their provisions to meet particular cases.

I. We are to expect a general framework of government to be designed, under which the sovereignty of the people is to be exercised by representatives chosen for the purpose, in such manner as the instrument provides, and with such reservations as it makes.

II. Generally the qualifications for the right of suffrage will be declared, as well as the conditions under which it shall be exercised.

III. The usual checks and balances of republican government, in which consists its chief excellence, will be retained. The most important of these are the separate departments for the exercise of legislative, executive, and judicial power;(*a*) and these are to be kept as distinct and separate as possible, except in so far as the action of one is made to constitute a restraint upon the action of the others, to keep them within proper bounds, and to prevent hasty and improvident action. Upon legislative action there is, first, the check of the executive, who will generally be clothed with a qualified veto power, and who may refuse to execute laws deemed unconstitutional; and, second, the

(*a*) [Authority in one department of government to interfere with another will always be strictly construed. Where the constitution provides for sessions of the legislature to be held at the State capitol, "except in case of war, insurrection or pestilence, when it may by proclamation of the governor assemble for the time being elsewhere," it does not empower the governor to adjourn the Houses after they have convened, even though he declares a state of insurrection to exist; neither can he under his power to adjourn the legislature, in case of disagreement between the two Houses in regard to their adjournment, adjourn them to meet at a stated time at another place when there has been no disagreement between the two Houses. Taylor *v.* Beckham, — Ky. —, 49 L. R. A. 258, 56 S. W. 177. See this case in Supreme Court of the United States, where the writ of error after discussion was dismissed on the ground that no deprivation of rights secured by the fourteenth amendment, without due process, was shown, nor was there any case made of a violation of the guaranty of a republican form of government. Taylor *v.* Beckham, 178 U. S. 548, 20 Sup. Ct. Rep. 890. Dissenting opinion of *Harlan*, J., 20 Sup. Ct. Rep. 1009. Where the legislature is empowered to remove judges for cause, but is required to give notice and opportunity to appear, this imports that the cause shall be one personal to the judge, and he cannot be removed merely to cut down expenses. But if his court is one which the legislature is authorized to ordain and establish, the legislature may abolish the court, and the judge's office and salary will thereupon cease. McCulley *v.* State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567. That all the territory of one judicial district may be distributed among other districts or annexed to one district, and the judge thus deprived of office, see Aikman *v.* Edwards, 55 Kan. 751, 12 Pac. 366, 30 L. R. A. 149; but this cannot be done where the judge's term of office is fixed by the constitution. State *v.* Friedley, 135 Ind. 119, 34 N. E. 872, 21 L. R. A. 634. Court will not enjoin any attempted exercise of legislative power by legislature. State *v.* Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582.]

check of the judiciary, who may annul unconstitutional laws, and punish those concerned in enforcing them. Upon judicial action there is the legislative check, which consists in the power to prescribe rules for the courts, and perhaps to restrict their authority; and the executive check, of refusing aid in enforcing any judgments which are believed to be in excess of jurisdiction. Upon executive action the legislature has a power of restraint, corresponding to that which it exercises upon judicial action; and the judiciary may punish executive agents for any action in excess of executive authority. And the legislative department has an important restraint upon both the executive and the judiciary, in the power of impeachment for illegal or oppressive action, or for any failure to perform official duty. The executive, in refusing to execute a legislative enactment, will always do so with the peril of impeachment in view.

IV. Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument. And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.[1]

V. We shall also expect a declaration of rights for the protection of individuals and minorities. This declaration usually contains the following classes of provisions:—

1. Those declaratory of the general principles of republican government; such as, that all freemen, when they form a social compact, are equal, and no man, or set of men, is entitled to exclusive, separate public emoluments or privileges (*a*) from the

[1] Park Commissioners *v.* Common Council of Detroit, 28 Mich. 228; People *v.* Albertson, 55 N. Y. 50. [Under the constitution of Georgia it is held that municipalities cannot maintain the proposition of absolute local self-government and the State legislature may by direct enactment control the local police. Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230. It is held in White *v.* Barker, — Iowa, —, 89 N. W. 204, 57 L. R. A. 244 (Feb. 13, 1902), that the legislature could not take from the municipality the management of a municipal water supply system. That action to that effect was invalid for violation of the principle of municipal self-government. This case is valuable for its historical discussion of the principle.

The legislature cannot fix the salaries of firemen employed by municipalities, although there is no limitation on such action in the constitution, since this is a matter of purely local concern. Lexington *v.* Thompson, — Ky. —, 68 S. W. 477, 57 L. R. A. 775 (May 28, 1902). A legislature may create a school district and appoint its officers. Kies *v.* Lowery, — Mich. —, 92 N. W. 289 (Nov. 18, 1902). For a discussion of the "Right to Local Self-Government," see article by Mr. Amasa M. Eaton, 13 Harv. L. Rev. 441, 570, 638, 14 *id.* 20, 116.]

(*a*) [The provision that no corporation shall be granted any special or exclusive privilege or immunity is not violated by an act which allows trustees of an estate to charge the estate any reasonable sum which they may have paid "to a company," authorized by law so to do, for becoming surety upon their bonds. *Re* Clark, 195 Pa.

community but in consideration of public services; that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, happiness, security, and the protection of property; that for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper; that all elections shall be free and equal; that no power of suspending the laws shall be exercised except by the legislature or its authority; that standing armies are not to be maintained in time of peace; that representation shall be in proportion to population; that the people shall have the right freely to assemble to consult of the common good, to instruct their representatives, and petition for redress of grievances; and the like.

2. Those declaratory of the fundamental rights of the citizen: as that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, (*a*) and pursuing and obtaining safety and

520, 46 Atl. 127, 48 L. R. A. 587. But the privilege of taking oysters in public waters cannot be restricted to taxpayers. Gustafson *v.* State, 40 Tex. Cr. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615. But labor unions may be granted right to register their trade-marks and labels and have them protected from infringement. Schmalz *v.* Woolley, 57 N. J. Eq. 303, 41 Atl. 939, 43 L. R. A. 80, 73 Am. St. 637; Perkins *v.* Heert, 158 N. Y. 306, 53 N. E. 18, 43 L. R. A. 858, 70 Am. St. 483. Sale of ferry franchise to highest bidder is not a grant of special or exclusive privilege, even though the franchise be exclusive, all persons being free to bid. Patterson *v.* Wollman, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536; Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315. Law making an exception from civil service regulations in case of veteran soldiers, and compelling their appointment to vacancies upon their sworn statements of qualification, is void. Brown *v.* Russell, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. 357. Statute authorizing the levy of an arbitrary tax upon ordinary and lawful occupations is void. State *v.* Conlon, 65 Conn. 478, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. 227. Statute granting to trade-unions copyright in their trade-marks is valid. State *v.* Bishop, 128 Mo. 373, 31 S. W. 9, 29 L. R. A. 200, 49 Am. St. 569, and see note hereto in L. R. A. Statute specifying number of deputies to be allowed county officers in certain counties, but leaving it to discretion of county court in other counties is void. Weaver *v.* Davidson County, 101 Tenn. 315, 59 S. W. 1105.]

(*a*) [An act which makes it unlawful to hire any laborer to work more than eight hours per day in any mine or smelter is void. *Re* Morgan, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. 269. But a State may require that its contractors and builders shall employ their laborers only eight hours per day. *Re* Dalton, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380. The right to liberty does not give to insurance corporations the right to contract among themselves to maintain stipulated rates. State *v.* Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363. Right to engage in ticket brokerage cannot be restricted to persons designated by

happiness; that the right to property is before and higher than any constitutional sanction; that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed;[1] that every man may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that every man may bear arms for the defence of himself and of the State; that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, nor shall soldiers be quartered upon citizens in time of peace; and the like.

3. Those declaratory of the principles which ensure to the citizen an impartial trial, and protect him in his life, liberty, and property against the arbitrary action of those in authority: as that no bill of attainder or *ex post facto* law shall be passed; that the right to trial by jury shall be preserved; that excessive bail shall not be required, nor excessive punishments inflicted; that no person shall be subject to be twice put in jeopardy for the same offence, nor be compelled in any criminal case to be a witness against himself, (*a*) nor be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without compensation; and the like. (*b*)

[1] Hale *v.* Everett, 53 N. H. 9; Board of Education *v.* Minor, 23 Ohio St. 211.

transportation companies. People *v.* Warden, &c., 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. 763. But see, in this connection, cases cited in note 3, page 886, *post*. No man can be held to answer for the act of another over whom he has no control or authority, Durkin *v.* Kingston Coal Co., 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. 801, declaring invalid an act making the proprietor of a mine responsible for the acts and neglects of a licensed mine foreman whom he was by statute compelled to employ. Right of employer to discharge employees joining or refusing to withdraw from labor unions cannot be taken from him. State *v.* Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. 443, a statute fixing a license fee of $1,000 for persons engaged in hiring laborers in one State to be employed in another is invalid. State *v.* Moore, 113 N. C. 697, 18 S. E. 342.]

(*a*) [See latter part of note 1, page 442.]

(*b*) [The provision that courts of justice shall be open to every person and that right and justice shall be administered without denial, sale, or delay is violated by a statute which allows an attorney's fee to successful lien claimants but not to successful defendants. Davidson *v.* Jennings, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am St. 49. Such fees are allowed in Florida. Dell *v.* Marvin, 41 Fla. 221, 26 So. 188, 45 L. R. A. 201, 79 Am St. 171. Further proceedings in an action may be stayed until costs of an appeal are paid. Knee *v.* Baltimore City Pass. Ry. Co., 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363. A person is not deprived of property or particular services without compensation by a statute which compels him to appear before the court and testify in criminal cases, and deprives him of all right to fees therefor or makes such right contingent upon conviction of accused. State *v.* Henley, 98 Tenn. 665, 41 S. W. 352, 39 L. R. A. 126. And an expert witness can not claim higher fees than other witnesses, nor can he refuse to testify until such

Other clauses are sometimes added declaratory of the principles of morality and virtue; and it is also sometimes expressly declared — what indeed is implied without the declaration — that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void.

Many other things are commonly found in these charters of government;[1] but since, while they continue in force, they are to remain absolute and unchangeable rules of action and decision, it is obvious that they should not be made to embrace within their iron grasp those subjects in regard to which the policy or interest of the State or of its people may vary from time to time, and which are therefore more properly left to the control of the legislature, which can more easily and speedily make the required changes.

In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. "What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the frame-

[1] "This, then, is the office of a written [free] constitution: to delegate to various public functionaries such of the powers of government as the people do not intend to exercise for themselves; to classify these powers, according to their nature, and to commit them to separate agents; to provide for the choice of these agents by the people; to ascertain, limit, and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives." E. P. Hurlbut in Human Rights and their Political Guaranties.

fees are secured to him. Dixon *v.* People, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; upon right of State to require services of witnesses without compensation, see note to Dixon *v.* People, above, in L. R. A. Moderate court fees may be exacted of parties to legal proceedings. Northern Counties Invt. Trust *v.* Sears, 30 Or. 388, 41 Pac. 931, 35 L. R. A. 188. Repeal of statute giving right of action against county for injury resulting from defective bridge does not violate a provision that every man shall have remedy by due course of law for all injuries done him. Templeton *v.* Linn. Co., 22 Oreg. 313, 29 Pac. 795, 15 L. R. A. 730. Proceedings in a second action in ejectment may be stayed until costs in the first are paid. Shear *v.* Box, 92 Ala. 596, 8 So. 792, 11 L. R. A. 620, and note.]

work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it: it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition."[1]

[1] Hamilton *v.* St. Louis County Court, 15 Mo. 13, per *Bates, arguendo.* And see Matter of Oliver Lee & Co.'s Bank, 21 N. Y. 9; Lee *v.* State, 26 Ark. 265–6. "Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." 2 Webster's Works, 392. See also 1 Bl. Com. 124; 2 Story, Life and Letters, 278; Sidney on Government, c. 3, secs. 27 and 33. "If this charter of State government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts that have come to us from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction, which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone." People *v.* Hurlbut, 24 Mich. 44, 107.

CHAPTER IV.

OF THE CONSTRUCTION OF STATE CONSTITUTIONS.

THE deficiencies of human language are such that, if written instruments were always prepared carefully by persons skilled in the use of words, we should still expect to find their meaning often drawn in question, or at least to meet with difficulties in their practical application. But when draughtsmen are careless or incompetent, these difficulties are greatly increased; and they multiply rapidly when the instruments are to be applied, not only to the subjects directly within the contemplation of those who framed them, but also to a great variety of new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish. Moreover, the different points of view from which different individuals regard these instruments incline them to different views of the instruments themselves. All these circumstances tend to give to the subjects of interpretation and construction great prominence in the practical administration of the law, and to suggest questions which often are of no little difficulty.

Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction,

then resort must be had to construction; so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case.[1] In common use, however, the word *construction* is generally employed in the law in a sense embracing all that is properly covered by both when each is used in a sense strictly and technically correct; and we shall so employ it in the present chapter.

From the earliest periods in the history of written law, rules of construction, sometimes based upon sound reason, and seeking the real intent of the instrument, and at other times altogether arbitrary or fanciful, have been laid down by those who have assumed to instruct in the law, or who have been called upon to administer it, by the aid of which the meaning of the instrument was to be resolved. Some of these rules have been applied to particular classes of instruments only; others are more general in their application, and, so far as they are sound, may be made use of in any case where the meaning of a writing is in dispute. To such of these as seem important in constitutional law we shall refer, and illustrate them by references to reported cases, in which they have been applied.

A few preliminary words may not be out of place, upon the questions, who are to apply these rules; what person, body, or department is to enforce the construction; and how far a determination, when once made, is to be binding upon other persons, bodies, or departments.

We have already seen that we are to expect in every constitution an apportionment of the powers of government. We shall also find certain duties imposed upon the several departments, as well as upon specified officers in each, and we shall likewise discover that the constitution has sought to hedge about their action in various ways, with a view to the protection of individual rights, and the proper separation of duties. And wherever any one is called upon to perform any constitutional duty, or to do any act in respect to which it can be supposed that the constitution has spoken, it is obvious that a question of construction may at once arise, upon which some one must decide before the duty is performed or the act done. From the very nature of the case,

[1] Lieber, Legal and Political Hermeneutics. See Smith on Stat. and Const. Construction, 600. Bouvier defines the two terms succinctly as follows: "*Interpretation*, the discovery and representation of the true meaning of any signs used to convey ideas." "*Construction*, in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement." Law Dict.

this decision must commonly be made by the person, body, or department upon whom the duty is imposed, or from whom the act is required.

Let us suppose that the constitution requires of the legislature, that, in establishing municipal corporations, it shall restrict their powers of taxation; and a city charter is proposed which confines the right of taxation to the raising of money for certain specified purposes, but in regard to those purposes leaves it unlimited; or which allows to the municipality unlimited choice of purposes, but restricts the rate; or which permits persons to be taxed indefinitely, but limits the taxation of property: in either of these cases the question at once arises, whether the limitation in the charter is such a restriction as the constitution intends. Let us suppose, again, that a board of supervisors is, by the Constitution, authorized to borrow money upon the credit of the county for any county purpose, and that it is asked to issue bonds in order to purchase stock in some railway company which proposes to construct a road across the county; and the proposition is met with the query, Is this a county purpose, and can the issue of bonds be regarded as a borrowing of money, within the meaning of the people as expressed in the constitution? And once again: let us suppose that the governor is empowered to convene the legislature on extraordinary occasions, and he is requested to do so in order to provide for a class of private claims whose holders are urgent; can this with any propriety be deemed an extraordinary occasion?

In these and the like cases our constitutions have provided no tribunal for the specific duty of solving in advance the questions which arise. In a few of the States, indeed, the legislative department has been empowered by the constitution to call upon the courts for their opinion upon the constitutional validity of a proposed law, in order that, if it be adjudged without warrant, the legislature may abstain from enacting it.[1] But those pro-

[1] By the constitutions of Maine, New Hampshire, and Massachusetts, the judges of the Supreme Court are required, when called upon by the governor, council, or either house of the legislature, to give their opinions "upon important questions of law, and upon solemn occasions." In Rhode Island the governor or either house of the general assembly may call for the opinions of the judges of the Supreme Court upon any question of law. In Massachusetts the justices will not give an opinion on the proper construction of an existing act which the legislature may amend. Opinion of Justices, 148 Mass. 623, 21 N. E. Rep. 439. In Florida the governor may require an opinion on any question affecting his executive powers and duties. A duty with reference to a bill before it becomes a law, is not an executive duty, and as to it the judges cannot advise. Opinion of Justices, 23 Fla. 297, 6 So. 925. [So in South Dakota. *Re* Constitutional Provision, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575.] In Missouri, previous to the constitution

visions are not often to be met with, and judicial decisions, especially upon delicate and difficult questions of constitutional law, can seldom be entirely satisfactory when made, as they commonly will be under such calls, without the benefit of argument at the bar, and of that light upon the questions involved which might be afforded by counsel learned in the law, and interested in giving them a thorough investigation.

It follows, therefore, that every department of the government and every official of every department may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction.[1] Sometimes the case will be such that the decision when made must, from the nature of things, be conclusive and subject to no appeal or review, however erroneous it may be in the opinion of other departments or other officers; but in other cases the same question may be required to be passed upon again before the duty is completely performed.

of 1875, the judges were required to give their opinions "upon important questions of constitutional law, and upon solemn occasions;" and the Supreme Court held that while the governor determined for himself, whether the occasion was such as to authorize him to call on the judges for their opinion, they must decide for themselves whether the occasion was such as to warrant the governor in making the call. Opinions of Judges, 49 Mo. 216. By a constitutional amendment of 1885, the Colorado Supreme Court is required to give its opinion upon important questions upon solemn occasions to the governor or either house of the legislature. The intention, it is held, is not "to authorize an *ex parte* adjudication of individual or corporate rights," nor to exact "a wholesale exposition of all constitutional questions relating to a given subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subject." It appearing that the question was covered by pending litigation, the court refused to answer. *In re* Irrigation Resolution, 9 Col. 620, 21 Pac. 470. Nor should it give an opinion on provisions which do not affect a pending act. *In re* Irrigation Resolution, *supra*. Questions must affect purely public rights. *In re* Senate Resolution, No. 65, 12 Col. 466, 21 Pac. 478; [*Re* House Bill, No. 99, 26 Col. 140, 56 Pac. 181; *Re* Senate Bill, No. 27, 28 Col. 359, 65 Pac. 50.]

In Vermont, by statute the governor may require an opinion on questions connected with the discharge of his duties; and in Kentucky an opinion has been given without requirement of law on the power of the governor to fill a vacancy on the Supreme Bench. Opinion of Judges, 79 Ky. 621.

[1] "It is argued that the legislature cannot give a construction to the constitution relative to private rights secured by it. It is true that the legislature, in consequence of their construction of the constitution, cannot make laws repugnant to it. But every department of government, invested with certain constitutional powers, must, in the first instance, but not exclusively, be the judge of its powers, or it could not act." *Parsons*, Ch. J., in Kendall *v.* Inhabitants of Kingston, 5 Mass. 524, 533. The decision of a governor, having jurisdiction to decide in the first instance whether tax exemption is constitutional, must be obeyed by inferior executive officers. State *v.* Buchanan, 24 W. Va. 362. But a patent commissioner may not refuse to perform a ministerial act on the ground that the statute requiring it is unconstitutional. United States *v.* Marble, 3 Mackey, 32. Notwithstanding a void proviso as to an officer's salary, it is his duty to give the act effect. State *v.* Kelsey, 44 N. J. L. 1.

The first of these classes is where, by the constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the constitution has confided the decision, would be impertinent and intrusive. (*a*) Under every constitution, cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final.

We will suppose, again, that the constitution empowers the executive to convene the legislature on extraordinary occasions, and does not in terms authorize the intervention of any one else in determining what is and what is not such an occasion in the constitutional sense; it is obvious that the question is addressed exclusively to the executive judgment, and neither the legislative nor the judicial department can intervene to compel action, if the executive decide against it, or to enjoin action if, in his opinion, the proper occasion has arisen.[1] And again, if, by the

[1] Whiteman *v.* Railroad Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; *In re* State Census, 9 Col. 642, 21 Pac. Rep. 477; [Farrelly *v.* Cole, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.] In exercising his power to call out the militia in certain exigencies, the President is the exclusive and final judge when the exigency has arisen. Martin *v.* Mott, 12 Wheat. 19. In People *v.* Parker, 3 Neb. 409, 19 Am. Rep. 634, it appeared that an officer, assuming to act as governor in the absence of the governor from the State, had issued a proclamation convening the legislature in extraordinary session. The governor returned previous to the time named for the meeting, and issued a second proclamation, revoking the first. Held, that the power of convening the legislature being a discretionary power, it might be recalled before the meeting took place.

It is undoubted that, when a case is within the legislative discretion, the courts cannot interfere with its exercise. State *v.* Hitchcock, 1 Kan. 178; State *v.* Boone County Court, 50 Mo 317; Patterson *v.* Barlow, 60 Pa. St. 54; [Kimball *v.* Grantsville City, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628,] and see cases *post*, 181. The statement of legislative reasons in the preamble of an act will not affect its validity. Lothrop *v.* Steadman, 42 Conn. 583.

(*a*) [Where the constitution empowers the legislature to determine an election contest for offices of governor and lieutenant-governor, the decision of the legislature in any such contest is not subject to review in the courts. Taylor *v.* Beckham, — Ky. —, 49 L. R. A. 256, 56 S. W. 177. See this case in Supreme Court of the United States, 178 U. S. 548, 20 Sup. Ct. Rep. 890; Dissenting opinion of *Harlan*, J., 20 Sup. Ct. Rep. 1009. Courts have jurisdiction to review apportionment statutes for abuses of discretion, amounting to violations of the constitution. Carter *v.* Rice, 135 N. Y. 473, 31 N. E. 921; State *v.* Cunningham, 83 Wis. 90, 51 N. W. 724, 35 Am. St. 27; Giddings *v.* Secretary of State, 93 Mich. 1, 52 N. W. 914. In the last-mentioned case, the question was expressly determined to be a judicial one. But see Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. 220, in which case it was held that a bill, which raised the question of the validity of an apportionment act, filed by an elector for the enforcement of his right to the elective franchise, would not lie since the right involved was a purely political one.]

constitution, laws are to take effect at a specified time after their passage, unless the legislature for urgent reasons shall otherwise order, we must perceive at once that the legislature alone is competent to pass upon the urgency of the alleged reasons.[1] And to take a judicial instance: If a court is required to give an accused person a trial at the first term after indictment, unless good cause be shown for continuance, it is obvious that the question of good cause is one for the court alone to pass upon, and that its judgment when exercised is, and must be from the nature of the case, final. And when in these or any similar case the decision is once made, other departments or other officers, whatever may have been their own opinions, must assume the decision to be correct, and are not at liberty to raise any question concerning it, unless some duty is devolved upon them which presents the same question anew.

But there are cases in which the question of construction is equally addressed to two or more departments of the government, and it then becomes important to know whether the decision by one is binding upon the others, or whether each is to act upon its own judgment. Let us suppose once more that the governor, being empowered by the constitution to convene the legislature upon extraordinary occasions, has regarded a particular event as being such an occasion, and has issued his proclamation calling them together with a view to the enactment of some

[1] See *post*, p. 224. In Gillinwater *v.* Mississippi & Atlantic Railroad Co., 13 Ill. 1, it was urged that a certain restriction imposed upon railroad corporations by the general railroad law was a violation of the provision of the constitution which enjoins it upon the legislature "to encourage internal improvements by passing liberal general laws of incorporation for that purpose" The court say of this provision: "This is a constitutional command to the legislature, as obligatory on it as any other of the provisions of that instrument; but it is one which cannot be enforced by the courts of justice. It addresses itself to the legislature alone, and it is not for us to say whether it has obeyed the behest in its true spirit. Whether the provisions of this law are liberal, and tend to encourage internal improvements, is matter of opinion, about which men may differ; and as we have no authority to revise legislative action on the subject, it would not become us to express our views in relation to it. The law makes no provision for the construction of canals and turnpike roads, and yet they are as much internal improvements as railroads, and we might as well be asked to extend what we might consider the liberal provisions of this law to them, because they are embraced in the constitutional provision, as to ask us to disregard such provisions of it as we might regard as illiberal. The argument proceeds upon the idea that we should consider that as done which ought to be done; but that principle has no application here. Like laws upon other subjects within legislative jurisdiction, it is for the courts to say what the law is, not what it should be." It is clear that courts cannot interfere with matters of legislative discretion. Maloy *v.* Marietta, 11 Ohio St. 636. As to self-executing provisions in general, see *post*, p. 119. [The courts have authority to decide which if either of two contesting bodies is the State senate. Attorney-General *v.* Rogers, 56 N. J. L. 480, 29 Atl. 173, 23 L. R. A. 354.]

particular legislation which the event seems to call for, and which he specifies in his proclamation. Now, the legislature are to enact laws upon their own view of necessity and expediency; and they will refuse to pass the desired statute if they regard it as unwise or unimportant. But in so doing they indirectly review the governor's decision, especially if, in refusing to pass the law, they do so on the ground that the specific event was not one calling for action on their part. In such a case it is clear that, while the decision of the governor is final so far as to require the legislature to meet, it is not final in any sense that would bind the legislative department to accept and act upon it when they enter upon the performance of their duty in the making of laws.[1]

So also there are cases where, after the two houses of the legislature have passed upon the question, their decision is in a certain sense subject to review by the governor. If a bill is introduced the constitutionality of which is disputed, the passage of the bill by the two houses must be regarded as the expression of their judgment that, if approved, it will be a valid law. But if the constitution confers upon the governor a veto power, the same question of constitutional authority will be brought by the bill before him, since it is manifestly his duty to withhold approval from any bill which, in his opinion, the legislature ought not for any reason to pass. And what reason so forcible as that the constitution confers upon them no authority to enact it? In all these and the like cases, each department must act upon its own judgment, and cannot be required to do that which it regards as a violation of the constitution, on the ground solely that another department which, in the course of the discharge of its own duty, was called upon first to act, has reached the conclusion that it will not be violated by the proposed action.

But setting aside now those cases to which we have referred, where from the nature of things, and perhaps from explicit terms of the constitution, the judgment of the department or officer acting must be final, we shall find the general rule to be, that whenever action is taken which may become the subject of a suit or proceeding in court, any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and that as the courts must finally settle the particular controversy, so also will they finally determine the question of constitutional law.

For the constitution of the State is higher in authority than any law, direction, or order made by any body or any officer

[1] See Opinions of Judges, 49 Mo. 216.

assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. But no mode has yet been devised by which these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practicable only when public or private rights would be affected thereby. They then become the subject of legal controversy; and legal controversies must be settled by the courts.[1] The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative, and sometimes of executive acts. And as judicial tribunals have authority, not only to judge, but also to enforce their judgments, the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid through the enforcement of the paramount law in the controversy which has raised the question.[2]

[1] Governor *v.* Porter, 5 Humph. 165. The legislature cannot by statute define the words of the constitution for the courts. Westinghausen *v.* People, 44 Mich. 265; Powell *v.* State, 17 Tex. App. 345. Compare People *v.* Supervisors of La Salle, 100 Ill. 495. And see *post*, 136, note.

[2] "When laws conflict in actual cases, they [the courts] must decide which is the superior law, and which must yield; and as we have seen that, according to our principles, every officer remains answerable for what he officially does, a citizen, believing that the law he enforces is incompatible with the superior law, the constitution, simply sues the officer before the proper court as having unlawfully aggrieved him in the particular case. The court, bound to do justice to every one, is bound also to decide this case as a simple case of conflicting laws. The court does not decide directly upon the doings of the legislature. It simply decides for the case in hand, whether there actually are conflicting laws, and, if so, which is the higher law that demands obedience, when both may not be obeyed at the same time. As, however, this decision becomes the leading decision for all future cases of the same import, until, indeed, proper and legitimate authority should reverse it, the question of constitutionality is virtually decided, and it is decided in a natural, easy, legitimate and safe manner, according to the principle of the supremacy of the law and the dependence of justice. It is one of the most interesting and important evolutions of the government of law, and one of the greatest protections of the citizen. It may well be called a very jewel of Anglican liberty and one of the best fruits of our political civilization." Lieber, Civil Liberty and Self-Government.

"Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. Few laws can escape the searching analysis; for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case. But from the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral sanction. The persons to whose interest it is prejudicial learn that means exist for evading its authority; and similar suits are multiplied until it becomes powerless. One of two alternatives must then be resorted

The same conclusion is reached by stating in consecutive order a few familiar maxims of the law. The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law applicable to such facts. The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or order, must be inoperative and void. If, therefore, such other law, direction, or order seems to be applicable to the facts, but on comparison with the fundamental law the latter is found to be in conflict with it, the court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby in effect annul it.[1] The right and the power of the courts to do this are so plain, and the duty is so generally — we may almost say universally — conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject.[2]

to, — the people must alter the constitution, or the legislature must repeal the law." De Tocqueville, Democracy in America, c. 6.

[1] "It is idle to say that the authority of each branch of the government is defined and limited by the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that the constitution is thoughtlessly but habitually violated; and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses to attract their attention. From its very position it is apparent that the conservative power is lodged in the judiciary, which, in the exercise of its undoubted rights, is bound to meet any emergency; else causes would be decided, not only by the legislature, but sometimes without hearing or evidence." Per *Gibson*, Ch. J., in De Chastellux *v.* Fairchild, 15 Pa. St. 18.

"Nor will this conclusion, to use the language of one of our most eminent jurists and statesmen, by any means suppose a superiority of the judicial to the legislative power. It will only be supposing that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that declared by the people in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental. Neither would we, in doing this, be understood as impugning the honest intentions, or sacred regard to justice, which we most cheerfully accord to the legislature. But to be above error is to possess an entire attribute of the Deity; and to spurn its correction is to reduce to the same degraded level the most noble and the meanest of his works." Bates *v.* Kimball, 2 Chip. 77. See Bailey *v.* Gentry, 1 Mo. 164, 13 Am. Dec. 484.

"Without the limitations and restraints usually found in written constitutions, the government could have no elements of permanence and durability; and the distribution of its powers, and the vesting their exercise in separate departments, would be an idle ceremony." *Brown*, J., in People *v.* Draper, 15 N. Y. 532, 558.

[2] 1 Kent, 500–507; Marbury *v.* Madison, 1 Cranch, 137; see *post*, p. 227–229; Webster on the Independence of the Judiciary, Works, Vol. III. p. 29. In this speech, Mr. Webster has forcibly set forth the necessity of leaving with the courts the power to enforce constitutional restrictions. "It cannot be denied," says he, "that one great object of written constitutions is, to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that

Conclusiveness of Judicial Decisions.

But a question which has arisen and been passed upon in one case may arise again in another, or it may present itself under different circumstances for the decision of some other department or officer of the government. It therefore becomes of the highest importance to know whether a principle once authoritatively declared is to be regarded as conclusively settled for the guidance, not only of the court declaring it, but of all courts and all departments of the government; or whether, on the other hand, the decision settles the particular controversy only, so that a different decision may be possible, or, considering the diversity of human judgments, even probable, whenever in any new controversy other tribunals may be required to examine and decide upon the same question.

In some cases and for some purposes the conclusiveness of a judicial determination is, beyond question, final and absolute. A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies, and they are not allowed

effect. And it is equally true that there is no department on which it is more necessary to impose restraints than upon the legislature. The tendency of things is almost always to augment the power of that department in its relation to the judiciary. The judiciary is composed of few persons, and those not such as mix habitually in the pursuits and objects which most engage public men. They are not, or never should be, political men. They have often unpleasant duties to perform, and their conduct is often liable to be canvassed and censured where their reasons for it are not known or cannot be understood. The legislature holds the public purse. It fixes the compensation of all other departments; it applies as well as raises all revenue. It is a numerous body, and necessarily carries along with it a great force of public opinion. Its members are public men, in constant contact with one another and with their constituents. It would seem to be plain enough that, without constitutional provisions which should be fixed and certain, such a department, in case of excitement, would be able to encroach on the judiciary." . . . "The constitution being the supreme law, it follows, of course, that every act of the legislature contrary to that law must be void. But who shall decide this question? Shall the legislature itself decide it? If so, then the constitution ceases to be a legal, and becomes only a moral restraint upon the legislature. If they, and they only, are to judge whether their acts be conformable to the constitution, then the constitution is admonitory or advisory only, not legally binding, because if the construction of it rests wholly with them, their discretion, in particular cases, may be in favor of very erroneous and dangerous constructions. Hence the courts of law necessarily, when the case arises, must decide on the validity of particular acts." "Without this check, no certain limitations could exist on the exercise of legislative power." See also, as to the dangers of legislative encroachments, De Tocqueville, Democracy in America, c. 6; Story on Const. (4th ed.) § 532 and note. The legislature though possessing a larger share of power, no more represents the sovereignty of the people than either of the other departments; it derives its authority from the same high source. Bailey *v.* Philadelphia, &c. Railroad Co., 4 Harr. 389; Whittington *v.* Polk, 1 H. & J. 236; McCauley *v.* Brooks, 16 Cal. 11.

afterwards to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. The matter in dispute has become *res judicata*, a thing definitely settled by judicial decision; and the judgment of the court imports absolute verity. Whatever the question involved, — whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, — the rule of finality is the same. The controversy has been adjudged; and, once finally passed upon, it is never to be renewed.[1] It must

[1] Duchess of Kingston's Case, 11 State Trials, 261, 2 Smith, Lead. Cas. 421; Young *v.* Black, 7 Cranch, 565; Chapman *v.* Smith, 16 How. 114; Aurora City *v.* West, 7 Wall. 82; Tioga R. R. Co. *v.* Blossburg, &c. R. R. Co., 20 Wall. 137; The Rio Grande, 23 Wall. 458; Cofley *v.* United States, 116 U. S. 436; 6 Sup. Ct. Rep. 437; United States *v.* Parker, 120 U. S. 89, 7 Sup. Ct. Rep. 451; Wilson's Exec. *v.* Deen, 121 U. S. 525, 7 Sup. Ct. Rep. 1004; Skelding *v.* Whitney, 3 Wend. 154; Etheredge *v.* Osborn, 12 Wend. 399; Hayes *v.* Reese, 34 Barb. 151; Hyatt *v.* Bates, 35 Barb. 308; Harris *v.* Harris, 36 Barb. 88; Maddox *v.* Graham, 2 Met. (Ky.) 56; Porter *v.* Hill, 9 Mass. 34; Norton *v.* Doherty, 3 Gray, 372; Thurston *v.* Thurston, 99 Mass. 39; Way *v.* Lewis, 115 Mass. 26; Blackinton *v.* Blackinton, 113 Mass. 231; Witmer *v.* Schlatter, 15 S. & R. 150; Warner *v.* Scott, 39 Pa. St. 274; Verner *v.* Carson, 66 Pa. St. 440; Kerr *v.* Union Bank, 18 Md. 396; Whitehurst *v.* Rogers, 38 Md. 503; Wales *v.* Lyon, 2 Mich. 276; Prentiss *v.* Holbrook, 2 Mich. 372; Van Kleek *v.* Eggleston, 7 Mich. 511; Newberry *v.* Trowbridge, 13 Mich. 278; Barker *v.* Cleveland, 19 Mich. 230; Winslow *v.* Grindall, 2 Me. 64; Slade *v.* Slade, 58 Me. 157; Crandall *v.* James, 6 R. I. 144; Babcock *v.* Camp, 12 Ohio St. 11; Hawkins *v.* Jones, 19 Ohio St. 22; George *v.* Gillespie, 1 Greene (Iowa), 421; Taylor *v.* Chambers, 1 Iowa, 124; Wright *v.* Leclair, 3 Iowa, 221; Clark *v.* Sammons, 12 Iowa, 368; Whittaker *v.* Johnson Co., 12 Iowa, 595; Dwyer *v.* Goran, 29 Iowa, 126; Fairfield *v.* McNany, 37 Iowa, 75; Elmer *v.* Richards, 25 Ill. 280; Wells *v.* McClenning, 23 Ill. 409; Crow *v.* Bowlby, 68 Ill. 23; Peay *v.* Duncan, 20 Ark. 85; Perrine *v.* Serrell, 30 N. J. 454; Weber *v.* Morris, &c., 36 N. J. 213; Fischli *v.* Cowan, 1 Blackf. 350; Denny *v.* Reynolds, 24 Ind. 248; Bates *v.* Spooner, 45 Ind. 489; Davenport *v.* Barnett, 51 Ind. 329; Center Tp. *v.* Com'rs Marion Co., 110 Ind. 579, 10 N. E. 291; Warwick *v.* Underwood, 3 Head, 238; Jones *v.* Weathersbee, 4 Strob. 50; Hoover *v.* Mitchell, 25 Gratt. 387; Hungerford's Appeal, 41 Conn. 322; Union R. R. Co. *v.* Traube, 59 Mo. 355; Perry *v.* Lewis, 49 Miss. 443; Harris *v.* Colquit, 44 Ga. 663; McCauley *v.* Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Castellaw *v.* Guilmartin, 54 Ga. 299; Sloan *v.* Cooper, 54 Ga. 486; Doyle *v.* Hallam, 21 Minn. 515; Philpotts *v.* Blasdel, 10 Nev. 19; Case *v.* New Orleans, &c. R. R., 2 Woods, 236; Geary *v.* Simmons, 39 Cal. 224; Gee *v.* Williamson, 1 Port. (Ala.) 313, 27 Am. Dec. 628; Cannon *v.* Brame, 45 Ala. 262; Finney *v.* Boyd, 26 Wis. 366; Warner *v.* Trow, 36 Wis. 195; Schroers *v.* Fisk, 10 Col. 599, 16 Pac. 285. Ram on Legal Judgment, c. 14. A judgment, however, is conclusive as an estoppel, as to those facts only without the existence and proof of which it could not have been rendered; and if it might have been given on any one of several grounds, it is conclusive between the parties as to neither of them. Lea *v.* Lea, 99 Mass. 493. And see Dickinson *v.* Hayes, 31 Conn. 417; Church *v.* Chapin, 35 Vt. 223; Packet Co. *v.* Sickles, 5 Wall. 580; Spencer *v.* Dearth, 43 Vt. 98; Hill *v.* Morse, 61 Me. 541. A judicial sale by an administrator will pass title though the supposed intestate proves to be living. Roderigas *v.* Savings Institution, 63 N. Y. 460; s. c. 20 Am. Rep. 555; *contra*, Johnson *v.* Beazley, 65 Mo. 250; s. c. 27 Am. Rep. 285, and note. [Death of the alleged intestate is a jurisdictional fact, and in the absence of such fact any administration upon his estate is null. Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108; rev. 5 Wash. 309, 31 Pac. 873, 34 Am. St. 863. Many authorities are cited in 154 U. S. at page 43.]

frequently happen, therefore, that a question of constitutional law will be decided in a private litigation, and the parties to the controversy, and all others subsequently acquiring rights under them, in the subject-matter of the suit, will thereby become absolutely and forever precluded from renewing the question in respect to the matter then involved. The rule of conclusiveness to this extent is one of the most inflexible principles of the law; insomuch that even if it were subsequently held by the courts that the decision in the particular case was erroneous, such holding would not authorize the reopening of the old controversy in order that the final conclusion might be applied thereto.[1]

But if important principles of constitutional law can be thus disposed of in suits involving only private rights, and when private individuals and their counsel alone are heard, it becomes of interest to know how far, if at all, other individuals and the public at large are affected by the decision. And here it will be discovered that quite a different rule prevails, and that a judicial decision has no such force of absolute conclusiveness as to other parties as it is allowed to possess between the parties to the litigation in which the decision has been made, and those who have succeeded to their rights.

A party is concluded by a judgment against him from disputing its correctness, so far as the point directly involved in the case was concerned, whether the reasons upon which it was based were sound or not, and even if no reasons were given therefor. And if the parties themselves are concluded, so also should be all those who, since the decision, claim to have acquired interests in the subject-matter of the judgment from or under the parties, as personal representatives, heirs-at-law, donees, or purchasers, and who are therefore considered in the law as privies.[2] But if strangers who have no interest in that subject-

[1] McLean *v.* Hugarin, 13 Johns. 184; Morgan *v.* Plumb, 9 Wend. 287; Wilder *v.* Case, 16 Wend. 583; Baker *v.* Rand, 13 Barb. 152; Kelley *v.* Pike, 5 Cush. 484; Hart *v.* Jewett, 11 Iowa, 276; Colburn *v.* Woodworth, 31 Barb. 381; Newberry *v.* Trowbridge, 13 Mich. 278; Skeldin *v.* Whitney, 3 Wend. 154; Brockway *v.* Kinney, 2 Johns. 210; Platner *v.* Best, 11 Johns. 530; Phillips *v.* Berick, 16 Johns. 136; Page *v.* Fowler, 37 Cal. 100; Howison *v.* Weeden, 77 Va. 704. The rule laid down becomes the law of the case. Bibb *v.* Bibb, 79 Ala. 437; Weare *v.* Dearing, 60 N. H. 56; Pittsburgh, &c. Ry. Co. *v.* Hixon, 110 Ind. 225, 11 N. E. 285; Heinlein *v.* Martin, 59 Cal. 181; Frankland *v.* Cassaday, 62 Texas, 418; Adams Co. *v.* Burlington & M. R. R. Co., 55 Iowa, 94, 7 N. W. 471. But see Barton *v.* Thompson, 56 Iowa, 571, 9 N. W. 899.

[2] The question whether a judgment, by force of its recitals, shall operate as a technical estoppel, or whether it shall operate as a bar only after the proper parol evidence shall have been given to identify the subject of litigation, is one which our subject does not require us to discuss. The cases are examined fully and with discrimination in Robinson's Practice, Vol. VI., and are also discussed in Bigelow on Estoppel.

matter are to be in like manner concluded, because their controversies are supposed to involve the same question of law, we shall not only be forced into a series of endless inquiries, often resulting in little satisfaction, in order to ascertain whether the question is the same, but we shall also be met by the query, whether we are not concluding parties by decisions which others have obtained in fictitious controversies and by collusion, or have suffered to pass without sufficient consideration and discussion, and which might perhaps have been given otherwise had other parties had an opportunity of being heard.

We have already seen that the force of a judgment does not depend upon the reasons given therefor, or upon the circumstance that any were or were not given. If there were, they may have covered portions of the controversy only, or they may have had such reference to facts peculiar to that case, that in any other controversy, though somewhat similar in its facts, and apparently resembling it in its legal bearings, grave doubts might arise whether it ought to fall within the same general principle. If one judgment were absolutely to conclude the parties to any similar controversy, we ought at least to be able to look into the judicial mind, in order that we might ascertain of a surety that all those facts which should influence the questions of law were substantially the same in each, and we ought also to be able to see that the first litigation was conducted in entire good faith, and that every consideration was presented to the court which could properly have weight in the construction and application of the law. All these things, however, are manifestly impossible; and the law therefore wisely excludes judgments from being used to the prejudice of strangers to the controversy, and restricts their conclusiveness to the parties thereto and their privies.[1] Even parties and privies are bound only so far as regards the subject-matter then involved, and would be at liberty to raise the same questions anew in a distinct controversy affecting some distinct subject-matter.[2]

[1] Burrill *v.* West, 2 N. H. 190; Davis *v.* Wood, 1 Wheat. 6; Jackson *v.* Vedder, 3 Johns. 8; Case *v.* Reeve, 14 Johns. 79; Alexander *v.* Taylor, 4 Denio. 302; Van Bokkelin *v.* Ingersoll, 5 Wend. 315; Smith *v.* Ballantyne, 10 Paige, 101; Orphan House *v.* Lawrence, 11 Paige, 80; Thomas *v.* Hubbell, 15 N. Y. 405; Masten *v.* Olcott, 101 N. Y 152, 4 N. E. 274; Wood *v.* Stephen, 1 Serg. & R. 175; Peterson *v.* Lothrop, 34 Pa. St. 223; Twambly *v.* Henley, 4 Mass. 441; Este *v.* Strong, 2 Ohio, 402; Cowles *v.* Harts, 3 Conn. 516; Floyd *v.* Mintsey, 5 Rich. 361; Riggin's Ex'rs *v.* Brown, 12 Ga. 271; Persons *v.* Jones, 12 Ga. 371; Buckingham *v.* Ludlum, 37 N. J. Eq. 137; Scates *v.* King, 110 Ill. 456; Leslie *v.* Bonte, 130 Ill. 498, 22 N. E. Rep. 594; Tiffany *v.* Stewart, 60 Iowa, 207, 14 N. W. 241; Lord *v.* Wilcox, 99 Ind 431. Compare Benedict *v.* Smith, 48 Mich. 593, 12 N. W. 866; Howison *v.* Weeden, 77 Va. 704; Robinson's Practice, Vol. VII. 134 to 156; Bigelow on Estoppel, 46 *et seq.*

[2] Van Alstine *v.* Railroad Co., 34 Barb.

All judgments, however, are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable. Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind. Chancellor *Kent* says: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or

28; Taylor *v.* McCrackin, 2 Blackf. 260; Cook *v.* Vimont, 6 T. B. Monr. 284. If certain facts were not necessarily included in the issue, a party is not concluded by the judgment as to them. Davis *v.* Davis, 65 Miss. 498, 4 So. 554; Doonan *v.* Glynn, 28 W. Va. 715; Lorillard *v.* Clyde, 99 N. Y. 196, 1 N. E. 614; Belden *v.* State, 103 N. Y. 1, 8 N. E. 363; Umlauf *v.* Umlauf, 117 Ill. 580, 6 N. E. 455; Concha *v.* Concha, L. R. 11 App. Cas. 541. If the second action involves the same property and more, the judgment is conclusive only as to those issues which were actually tried and determined. Foye *v.* Patch, 132 Mass. 105. See Metcalf *v.* Gilmore, 63 N. H. 174. But if the facts were within the issue, the judgment is conclusive as to them, although the question raised in the second action was not actually litigated. Harmon *v.* Auditor, 123 Ill. 123, 13 N. E. 161; Fairchild *v.* Lynch, 99 N. Y. 359, 2 N. E. 20; Trayhern *v.* Colburn, 66 Md. 277, 7 Atl. 459; Kennedy *v.* McCarthy, 73 Ga. 346; Shenandoah V. R. R. Co. *v.* Griffith, 76 Va. 913; Cleveland *v.* Creviston, 93 Ind. 31; Chouteau *v.* Gibson, 76 Mo. 38. See, for a further discussion of this doctrine, its meaning and extent, Spencer *v.* Dearth, 43 Vt. 98, and the very full and exhaustive discussion in Robinson's Practice, Vol. VII.

exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded, and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law.[1]

[1] 1 Kent, 475. And see Cro. Jac. 527; Rex *v.* Cox, 2 Burr. 787; King *v.* Younger, 5 T. R. 450; Goodtitle *v.* Otway, 7 T. R. 416; Selby *v.* Bardons, 3 B. & Ad. 17; Fletcher *v.* Lord Somers, 3 Bing. 588; Hammond *v.* Anderson, 4 Bos. & P. 69; Lewis *v.* Thornton, 6 Munf. 94; Dugan *v.* Hollins, 13 Md. 149; Anderson *v.* Jackson, 16 Johns. 382; Goodell *v.* Jackson, 20 Johns. 693; Bates *v.* Relyea, 23 Wend. 336; Emerson *v.* Atwater, 7 Mich. 12; Nelson *v.* Allen, 1 Yerg. 360; Palmer *v.* Lawrence, 5 N. Y. 389; Kneeland *v.* Milwaukee, 15 Wis. 454; Boon *v.* Bowers, 30 Miss. 246; Frink *v.* Darst, 14 Ill. 304; Broom's Maxims, 109. Dr. Lieber thinks the doctrine of the precedent especially valuable in a free country. "Liberty and steady progression require the principle of the precedent in all spheres. It is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. It is the weapon by which interference is warded off. The principle of the precedent is eminently philosophical. The English Constitution would not have developed itself without it. What is called the English Constitution consists of the fundamentals of the British polity, laid down in custom, precedent, decisions, and statutes; and the common law in it is a far greater portion than the statute law. The English Constitution is chiefly a common-law constitution; and this reflex of a continuous society in a continuous law is more truly philosophical than the theoretic and systematic, but lifeless, constitutions of recent France." Civ. Lib. and Self-Gov. See also his chapter on precedents in the Hermeneutics. In Nelson *v.* Allen, 1 Yerg. 360, 376, where the constitutionality of the "Betterment Law" came under consideration, the court (*White*, J.) say: "Whatever might be my own opinion upon this question, not to assent to its settlement now, after two solemn decisions of this court, the last made upwards of fourteen years ago, and not only no opposing decision, but no attempt even by any case, during all this time, to call the point again in controversy, forming a complete acquiescence, would be, at the least, inconsistent, perhaps mischievous, and uncalled for by a correct discharge of official duty. Much respect has always been paid to the contemporaneous construction of statutes, and a forbidding caution hath always accompanied any approach towards unsettling it, dictated, no doubt, by easily foreseen consequences attending a sudden change of a rule of property, necessarily introductory at least of confusion, increased litigation, and the disturbance of the peace of society. The most able judges and the greatest names on the bench have held this view of the subject, and occasionally expressed themselves to that effect, either tacitly or openly, intimating that if they had held a part in the first construction they would have been of a different opinion; but the construction having been made, they give their assent thereto. Thus Lord *Ellenborough*, in 2 East, 302, remarks: 'I think

The doctrine of *stare decisis*, however, is only applicable, in its full force, within the territorial jurisdiction of the courts making the decisions, since there alone can such decisions be regarded as having established any rules. Rulings made under a similar legal system elsewhere may be cited and respected for their reasons, but are not necessarily to be accepted as guides, except in so far as those reasons commend themselves to the judicial mind.[1] Great Britain and the thirteen original States had each substantially the same system of common law originally, and a decision now by one of the higher courts of Great Britain as to what the common law is upon any point is certainly entitled to great respect in any of the States, though not necessarily to be accepted as binding authority any more than the decisions in any one of the other States upon the same point. It gives us the opinions of able judges as to what the law is, but its force as an authoritative declaration must be confined to the country for which the court sits and judges. But an English decision before the Revolution is in the direct line of authority; and where a particular statute or clause of the constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction has been given it in such last-mentioned State, it is but just to regard the construction as having been adopted, as well as the words; and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case.[2]

it is better to abide by that determination, than to introduce uncertainty into this branch of the law, it being often more important to have the rule settled, than to determine what it shall be. I am not, however, convinced by the reasoning in this case, and if the point were new I should think otherwise.' Lord *Mansfield*, in 1 Burr. 419, says: 'Where solemn determinations acquiesced under had settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed, as if they had originally formed a part of the text of the statute.' And Sir *James Mansfield*, in 4 B. & P. 69, says: 'I do not know how to distinguish this from the case before decided in the court. It is of greater consequence that the law should be as uniform as possible, than that the equitable claim of an individual should be attended to.'" And see People *v.* Cicotte, 16 Mich. 283.

How far a judgment rendered by a court concludes, notwithstanding it was one given under the law of necessity, in consequence of an equal division of the court, see Durant *v.* Essex Co., 7 Wall. 107; s. c. 101 U. S. 555; Hartman *v.* Greenhow, 102 U. S. 672; Morse *v.* Goold, 11 N. Y. 281; Lyon *v.* Circuit Judge, 37 Mich. 377; and the cases collected in Northern R. R. *v.* Concord R. R., 50 N. H. 176.

[1] Caldwell *v.* Gale, 11 Mich. 77; Koontz *v.* Nabo, 16 Md. 549; Nelson *v.* Goree, 34 Ala. 565; Jamison *v.* Burton. 43 Iowa, 282.

[2] Bond *v.* Appleton, 8 Mass. 472; Rutland *v.* Mendon, 1 Pick. 154; Commonwealth *v.* Hartnett, 3 Gray, 450; Turnpike Co. *v.* People, 9 Barb. 167; Campbell *v.* Quinlin, 4 Ill. 288; Little *v.* Smith, 5 Ill. 400; Rigg *v.* Wilton, 13 Ill. 15; Tyler *v.* Tyler, 19 Ill. 151; Fisher *v.* Deering, 60 Ill. 114; Langdon *v.* Applegate, 5 Ind. 327; Clark *v.* Jeffersonville, &c. R. R. Co., 44 Ind. 248; Fall *v.* Hazelrigg, 45 Ind. 576; Ingraham *v.* Regan, 23

It will of course sometimes happen that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such a case it may be better that the correction of the error be left to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences.[1]

Miss. 213; Adams *v.* Field, 21 Vt. 256; Drennan *v.* People, 10 Mich. 169; Daniels *v.* Clegg, 28 Mich. 32; Harrison *v.* Sager, 27 Mich. 476; Pangborn *v.* Westlake, 36 Iowa, 546; Attorney-General *v.* Brunst, 3 Wis. 787; Poertner *v.* Russell, 33 Wis. 193; Myrick *v.* Hasey, 27 Me. 9; People *v.* Coleman, 4 Cal. 46; Bemis *v.* Becker, 1 Kan. 226; Walker *v.* Cincinnati, 21 Ohio St. 14; Hess *v.* Pegg, 7 Nev. 23; Freeze *v.* Tripp, 79 Ill. 496; *In re* Tuller, 79 Ill. 99; *Ex parte* Mathews, 52 Ala. 51; Danville *v.* Pace, 25 Gratt. 1; Bradbury *v.* Davis, 5 Col. 265. But it does not necessarily follow that the prior decision construing the law must be inflexibly followed, since the circumstances in the State adopting it may be so different as to require a different construction. Little *v.* Smith, 5 Ill. 400; Lessee of Gray *v.* Askew, 3 Ohio, 436; Jamison *v.* Burton, 43 Iowa, 282. It has very properly been held that the legislature, by enacting, without material alteration, a statute which had been judicially expounded by the highest court of the State, must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old. Grace *v.* McElroy, 1 Allen, 563; Cronan *v.* Cotting, 104 Mass. 245; Low *v.* Blanchard, 116 Mass. 272. It is proper to accept and follow the decisions of courts of another State upon the construction and validity of their own statutes. Sidwell *v.* Evans, 1 Pen. & W. 383; s. c. 21 Am. Dec. 387; Bank of Illinois *v.* Sloo, 16 La. 539, 35 Am. Dec. 223, except when it conflicts with the constitution of the adopting State. Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611.

[1] "After an erroneous decision touching rights of property has been followed thirty or forty years, and even a much less time, the courts cannot retrace their steps without committing a new error nearly as great as the one at the first." *Bronson*, J., in Sparrow *v.* Kingman, 1 N. Y. 246, 260. See also Emerson *v.* Atwater, 7 Mich. 12; Rothschild *v.* Grix, 31 Mich. 150; Loeb *v.* Mathis, 37 Ind. 306; Pond *v.* Irwin, 113 Ind. 243, 15 N. E. Rep. 272; Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. Rep. 450; Adams Co. *v.* Burlington & M. R. R. Co., 55 Iowa, 94, 2 N. W. 1054; Davidson *v.* Briggs, 61 Iowa, 309, 7 N. W. 471; State *v.* Whitworth, 8 Lea, 594. Where an old constitution has been construed by the court, a new court after the adoption of a new constitution will follow the old construction without regard to its own views. Emery *v.* Reed, 65 Cal. 351, 4 Pac. 200.

"It is true that when a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, courts will hesitate long before they will attempt to overturn the result so long established. But when it is apparently indifferent which of two or more rules is adopted, the one which shall have been adopted by judicial sanction will be adhered to, though it may not, at the moment, appear to be the preferable rule. But when a question involving important public or private rights, extending through all coming time, has been passed upon on a single

Whenever the case is such that judicial decisions which have been made are to be accepted as law, and followed by the courts in future cases, it is equally to be expected that they will be followed by other departments of the government also. Indeed, in the great majority of cases, the officers of other departments have no option; for the courts possess the power to enforce their construction of the law as well as to declare it; and a failure to accept and follow it in one case would only create a necessity for new litigation with similar result. Nevertheless, there are exceptions to this rule which embrace all those cases where new action is asked of another department, which that department is at liberty to grant or refuse for any reasons which it may regard as sufficient. We cannot conceive that, because the courts have declared an expiring corporation to have been constitutionally created, the legislature would be bound to renew its charter, or the executive to sign an act for that purpose, if doubtful of the constitutional authority, even though no other adverse reasons existed.[1] In the enactment of laws the legislature must act upon its own reasons; mixed motives of power, justice, and policy influence its action; and it is always justifiable and laudable to lean against a violation of the constitution. Indeed, cases must sometimes occur when a court should refrain from declaring a statute unconstitutional, because not clearly satisfied that it is so, though, if the judges were to act as legislators upon the question of its enactment, they ought with the

occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule *stare decisis*, but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review." Per *Smith*, J., Pratt *v.* Brown, 3 Wis. 603, 609. And see Kneeland *v.* Milwaukee, 15 Wis. 454; Taylor *v.* French, 19 Vt. 49; Bellows *v.* Parsons, 13 N. H. 256; Hannel *v.* Smith, 15 Ohio, 134; Day *v.* Munson, 14 Ohio St. 488; Green Castle, &c. Co. *v.* State, 28 Ind. 382; Harrow *v.* Myers, 29 Ind. 469; Paul *v.* Davis, 100 Ind. 422; Burks *v.* Hinton, 77 Va. 1; Mead *v.* McGraw, 19 Ohio St. 55; Linn *v.* Minor, 4 Nev. 462; Willis *v.* Owen, 43 Texas, 41, 48; Ram on Legal Judgment, c. 14, § 3. "Common error" does not make law until sanctioned by a superior tribunal, and subsequently treated as law in business affairs. Ocean Beach Ass. *v.* Brinley, 34 N. J. Eq. 438.

[1] In the celebrated case of the application of the Bank of the United States for a new charter, President Jackson felt himself at liberty to act upon his own view of constitutional power, in opposition to that previously declared by the Supreme Court, and President Lincoln expressed similar views regarding the conclusiveness of the Dred Scott decision upon executive and legislative action. See Story on Const. (4th ed.) § 375, note. It is notorious that while the reconstruction of States was going on, after the late Civil War, Congress took especial pains in some cases to so shape its legislation that the Federal Supreme Court should have no opportunity to question and deny its validity.

same views to withhold their assent, from grave doubts upon that subject. The duty is different in the two cases, and presumptions may control in one which do not exist in the other.[1] But those cases where new legislation is sought stand by themselves, and are not precedents for those which involve only considerations concerning the constitutional validity of existing enactments. The general acceptance of judicial decisions as authoritative, by each and all, can alone prevent confusion, doubt, and uncertainty, and any other course is incompatible with a true government of law.

Construction to be Uniform.

A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instru-

[1] A constitution forbade the payment of any claim arising against the State under any agreement made without authority of law. It was held that this did not prevent the legislature from awarding pay for work done under an act which after its completion had been declared unconstitutional; that the word "law" did not necessarily mean a constitutional law. Miller *v.* Dunn, 72 Cal. 462, 14 Pac. 27.

ments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require.[1] The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.[2]

The Intent to Govern.

The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.* In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."[3] Possible

[1] People *v.* Morrell, 21 Wend. 563; Heirs of Ludlow *v.* Johnson, 3 Ohio, 553; Newell *v.* People, 7 N. Y. 9; Hyatt *v.* Taylor, 42 N. Y. 258; Slack *v.* Jacobs, 8 W. Va. 612, 650.

[2] *Campbell*, J., in People *v.* Blodgett, 13 Mich. 127, 138; Scott *v.* Sandford, 19 How. 393.

[3] United States *v.* Fisher, 2 Cranch, 358; Bosley *v.* Mattingley, 14 B. Monr. 89; Sturgis *v.* Crowninshield, 4 Wheat. 122; Schooner Paulina's Cargo *v.* United States, 7 Cranch, 52; Ogden *v.* Strong, 2 Paine, C. C. 584; United States *v.* Ragsdale, 1 Hemp. 497; Southwark Bank *v.* Commonwealth, 26 Penn. St. 446; Ingalls *v.* Cole, 47 Me. 530; McCluskey *v.* Cromwell, 11 N. Y. 593; Furman *v.* New York, 5 Sandf. 16; Newell *v.* People, 7 N. Y. 9; People *v.* N. Y. Central R. R. Co., 24 N. Y. 485; Bidwell *v.* Whittaker, 1 Mich. 469; Alexander *v.* Worthington, 5 Md. 471; Cantwell *v.* Owens, 14 Md. 215; Case *v.* Wildridge, 4 Ind. 51; Spencer *v.* State, 5 Ind. 41; Pitman *v.* Flint, 10 Pick. 504; 262; Pattison *v.* Yuba, 13 Cal. 175; Ezekiel *v.* Dixon, 3 Ga. 146; *In re* Murphy, 23 N. J. 180; Attorney-General *v.* Detroit & Erin P. R. Co., 2 Mich. 138; Smith *v.* Thursby, 28 Md. 244; State *v.* Blasdel, 4 Nev. 241; State *v.* Doron, 5 Nev. 399; Hyatt *v.* Taylor, 42 N. Y. 258; Johnson *v.* Hudson R. R. Co., 49 N. Y. 455; Beardstown *v.* Virginia, 76 Ill. 34; St. Louis, &c. R. R. Co. *v.* Clark, 53 Mo. 214; Mundt *v.* Sheboygan, &c. R. R. Co., 31 Wis. 41; Slack *v.* Jacob, 8 W. Va. 612; Hawbecker *v.* Hawbecker, 43 Md. 516; *Ex parte* Mayor of Florence, 78 Ala. 419. The remarks of Mr. Justice *Bronson* in People *v.* Purdy, 2 Hill, 35, are very forcible in showing the impolicy and danger of looking beyond the instrument itself to ascertain its meaning, when the terms employed are positive and free from all ambiguity. "It is said that the Constitution does not extend to *public* corpora-

or even probable meanings, when one is plainly declared in the

tions, and therefore a majority vote was sufficient. I do not so read the Constitution. The language of the clause is: 'The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to *every* bill creating, continuing, altering, or renewing *any* body politic or corporate.' These words are as broad in their signification as any which could have been selected for the occasion from our vocabulary, and there is not a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to *all* corporations, whether public or private, it may then, I think, be set down as an established fact that the English language is too poor for the framing of fundamental laws which shall limit the powers of the legislative branch of the government. No one has, I believe, pretended that the Constitution, looking at that alone, can be restricted to any particular class or description of corporations. But it is said that we may look beyond the instrument for the purpose of ascertaining the mischief against which the clause was directed, and thus restrict its operation. But who shall tell us what that mischief was? Although most men in public life are old enough to remember the time when the Constitution was framed and adopted, they are not agreed concerning the particular evils against which this clause was directed. Some suppose the clause was intended to guard against legislative corruption, and others that it was aimed at monopolies. Some are of opinion that it only extends to private without touching public corporations, while others suppose that it only restricts the power of the legislature when creating a single corporation, and not when they are made by the hundred. In this way a solemn instrument — for so I think the Constitution should be considered — is made to mean one thing by one man and something else by another, until, in the end, it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to mean more than one thing, unless we first lose sight of the instrument itself, and allow ourselves to roam at large in the boundless fields of speculation. For one, I dare not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value if their injunctions may be thus lightly overlooked; and the experiment of setting a boundary to power will prove a failure. We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language." See also same case, 4 Hill, 384, and State v. King, 44 Mo. 285. Another court has said: "This power of construction in courts is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the State. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice *Pemberton*, one of the judges of the despot Charles II., and not the worst even of those times, that he had entirely outdone the Parliament in making law. We think that system of jurisprudence best and safest which controls most by fixed rules, and leaves least to the discretion of the judge; a doctrine constituting one of the points of superiority in the common law over that system which has been administered in France, where authorities had no force, and the law of each case was what the judge of the case saw fit to make it. We admit that the exercise of an unlimited discretion may, in a particular instance, be attended with a salutary result; still history informs us that it has often been the case that the arbitrary discretion of a judge was the law of a tyrant, and warns us that it may be so again." *Perkins*, J., in Spencer v. State, 5 Ind. 41, 46. "Judge-made law," as the phrase is here employed, is that made by judicial decisions which construe away the meaning of statutes, or find meanings in them the legislature never held. The phrase is sometimes used as meaning, simply, the law that becomes established by precedent. The uses and necessity of judicial legislation are considered and explained at length by Mr. Austin, in his Province of Jurisprudence.

instrument itself, the courts are not at liberty to search for elsewhere.

"Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses.* To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning."[1]

The Whole Instrument to be examined.

Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction. Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a very proper rule of construction, that *the whole is to be examined with a view to arriving at the true intention of each part;* and this Sir Edward Coke regards as the most natural and genuine method of expounding a statute.[2] If any section of a law be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another.[3] And in making this comparison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is, that *effect is to be given, if possible,*

[1] Newell *v.* People, 7 N. Y. 9, 97, per *Johnson*, J.; Chesapeake, &c. Ry. Co. *v.* Miller, 19 W. Va. 409. And see Denn *v.* Reid, 10 Pet. 524; Greencastle Township *v.* Black, 5 Ind. 566; Bartlett *v.* Morris, 9 Port. 266; Leonard *v.* Wiseman, 31 Md. 201, per *Bartol*, Ch. J.; Way *v.* Way, 64 Ill. 406; McAdoo *v.* Benbow, 63 N. C. 461; Hawkins *v.* Carrol, 50 Miss. 735; Cearfoss *v.* State, 42 Md. 403; Douglas *v.* Freeholders, &c., 38 N. J. 214; Gold *v.* Fite, 2 Bax. 237; State *v.* Gammon, 73 Mo. 421; Broom's Maxims (5th Am. ed.), 551, marg.

[2] Co. Lit. 381 *a*.

[3] Stowell *v.* Lord Zouch, Plowd. 365; Chance *v.* Marion County, 64 Ill. 66; Dyer *v.* Bayne, 54 Md. 87; Broom's Maxims, 521.

to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.[1]

This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication.[2] It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.[3]

In interpreting clauses we must presume that *words have been employed in their natural and ordinary meaning.* As *Marshall*, Ch. J., says: The framers of the constitution, and the people who adopted it, "must be understood to have employed words in their natural sense, and to have intended what they have said."[4]

[1] Attorney-General *v.* Detroit & Erin Plank Road Co., 2 Mich. 138; People *v.* Burns, 5 Mich. 114; District Township *v.* Dubuque, 7 Iowa, 262; Manly *v.* State, 7 Md. 135; Parkinson *v.* State, 14 Md. 184; Belleville Railroad Co. *v.* Gregory, 15 Ill. 20; Ogden *v.* Strong, 2 Paine, C. C. 584; Ryegate *v.* Wardsboro, 30 Vt 746; Brooks *v.* Mobile School Commissioners, 31 Ala. 227; Den *v.* Dubois, 16 N. J. 285; Den *v.* Schenck, 8 N. J. 29; Bigelow *v.* W. Wisconsin R. R., 27 Wis. 478; Gas Company *v.* Wheeling, 8 W. Va. 320; Parker *v.* Savage, 6 Lea, 406; Crawfordsville, &c. Co. *v.* Fletcher, 104 Ind. 97, 2 N. E. 243. See Sams *v.* King, 18 Fla. 557. [That the title may be considered in order to throw light upon an otherwise obscure provision, see Knowlton *v.* Moore, 178 U. S. 41, 20 Sup. Ct. Rep. 747. See also People *v.* McElroy, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609, and note.]

[2] Wolcott *v.* Wigton, 7 Ind. 44; People *v.* Purdy, 2 Hill, 31, per *Bronson*, J.; Greencastle Township *v.* Black, 5 Ind. 557; Green *v.* Weller, 32 Miss. 650.

[3] People *v.* Wright, 6 Col. 92. It is a general rule in the construction of writings, that, a general intent appearing, it shall control the particular intent; but this rule must sometimes give way, and effect must be given to a particular intent plainly expressed in one part of a constitution, though apparently opposed to a general intent deduced from other parts. Warren *v.* Shuman, 5 Tex. 441. In Quick *v.* Whitewater Township, 7 Ind. 570, it was said that if two provisions of a written constitution are irreconcilably repugnant, that which is last in order of time and in local position is to be preferred. In Gulf, C. & S. F. Ry. Co. *v.* Rambolt, 67 Tex. 654, 4 S. W. 356, this rule was recognized as a last resort, but if the last provision is more comprehensive and specific, it was held that it should be given effect on that ground.

The rule applies to constitutions that a later amendment operates to repeal an earlier provision inconsistent with it. People *v.* Angle, 109 N. Y. 564, 17 N. E. 413.

[4] Gibbons *v.* Ogden, 9 Wheat. 1, 188. See Settle *v.* Van Evrea, 49 N. Y. 281; Jenkins *v.* Ewin, 8 Heisk. 456; Way *v.*

This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim.[1] Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.

But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these

Way, 64 Ill. 406; Stuart *v.* Hamilton, 66 Ill. 253; Hale *v.* Everett, 53 N. H. 9; State *v.* Brewster, 42 N. J. 125; Carpenter *v.* People, 8 Col. 116, 5 Pac. 828.

[1] State *v.* Mace, 5 Md. 337; Manly *v.* State, 7 Md. 135; Green *v.* Weller, 32 Miss. 650; Greencastle Township *v.* Black, 5 Ind. 566; People *v.* N. Y. Central Railroad Co., 34 Barb. 123, and 24 N. Y. 485; Story on Const. § 453. "The true sense in which words are used in a statute is to be ascertained generally by taking them in their ordinary and popular signification, or, if they be terms of art, in their technical signification. But it is also a cardinal rule of exposition, that the intention is to be deduced from the whole and every part of the statute, taken and compared together, from the words of the context, and such a construction adopted as will best effectuate the intention of the lawgiver. One part is referred to in order to help the construction of another, and the intent of the legislature is not to be collected from any particular expression, but from a general view of the whole act. Dwarris, 658, 698, 702, 703. And when it appears that the framers have used a word in a particular sense generally in the act, it will be presumed that it was intended to be used in the same sense throughout the act, unless an intention to give it a different signification plainly appears in the particular part of the act alleged to be an exception to the general meaning indicated. Dwarris, 704 *et seq.* When words are used to which the legislature has given a plain and definite import in the act, it would be dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it has expressed. It follows from these principles that the statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, the intention thus indicated shall prevail, without resorting to other means of aiding in the construction. And these familiar rules of construction apply with at least as much force to the construction of written constitutions as to statutes; the former being presumed to be framed with much greater care and consideration than the latter." Green *v.* Weller, 32 Miss. 650, 678. Words re-enacted after they have acquired a settled meaning will be understood in that meaning. Fulmer *v.* Commonwealth, 97 Penn. St. 503. The argument *ab inconvenienti* cannot be suffered to influence the courts by construction to prevent the evident intention. Chance *v.* Marion County, 64 Ill. 66.

provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the Constitution speaks of an *ex post facto* law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.[1]

The Common Law to be kept in View.

It is also a very reasonable rule that a State constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules. But only that for its definitions we are to draw from that great fountain, and that in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under

[1] See Jenkins *v.* Ewin, 8 Heisk. 476. Kent, of which the thirteen provinces were a part and parcel; for in their charters they were to hold of the manor of Greenwich in Kent, of which manor they were by charter to be parcel! The opinion, it is said, "raised a very loud laugh," but Sir James continued to support it, and concluded by declaring that he would give the motion a hearty negative. Thus would he have settled a great principle of constitutional right, for which a seven years' bloody war had been waged, by putting it in the form of a meaningless legal fiction. Hansard's Debates, Vol. XXII. p. 1184. Lord Mahon, following Lord Campbell, refers the origin of this wonderful argument to Mr. Hardinge, a Welsh judge, and nephew of Lord Camden; 7 Mahon's Hist. 139. He was said to have been a good lawyer, but must have read the history of his country to little purpose.

It is quite possible, however, in applying constitutional maxims, to overlook entirely the reason upon which they rest, and "considering merely the letter, go but skin deep into the meaning." On the great debate on the motion for withdrawing the confidence of Parliament from the ministers, after the surrender of Cornwallis, — a debate which called out the best abilities of Fox and Pitt as well as of the ministry, and necessarily led to the discussion of the primary principle in free government, that taxation and representation shall go together, — Sir James Mariott rose, and with great gravity proceeded to say, that if taxation and representation were to go hand in hand, then Britain had an undoubted right to tax America, because she was represented in the British Parliament. She was represented by the members for the county of

such limitations and restrictions as that instrument imposes.[1] It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly,[2] — a maxim which we fear is sometimes perverted to the overthrow of the legislative intent; but there can seldom be either propriety or safety in applying this maxim to constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive; and the real question is, what the people meant, and not how meaningless their words can be made by the application of arbitrary rules.[3]

As a general thing, it is to be supposed that the same word is used in the same sense wherever it occurs in a constitution.[4]

[1] State *v.* Noble, 118 Ind. 350, 21 N. E. Rep. 244.

[2] Broom's Maxims, 33; Sedg. on Stat. & Const. Law, 313. See Harrison *v.* Leach, 4 W. Va. 383.

[3] Under a clause of the constitution of Michigan which provided that "the real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled, by gift, grant, inheritance, or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried," it was held that a married woman could not sell her personal property without the consent of her husband, inasmuch as the power to do so was not expressly conferred, and the clause, being in derogation of the common law, was not to be extended by construction. Brown *v.* Fifield, 4 Mich. 322. The danger of applying arbitrary rules in the construction of constitutional principles might well, as it seems to us, be illustrated by this case. For while on the one hand it might be contended that, as a provision in derogation of the common law, the one quoted should receive a strict construction, on the other hand it might be insisted with perhaps equal reason that, as a remedial provision, in furtherance of natural right and justice, it should be liberally construed, to effect the beneficial purpose had in view. Thus arbitrary rules, of directly opposite tendency and force, would be contending for the mastery in the same case. The subsequent decisions under the same provision do not appear to have followed this lead. See White *v.* Zane, 10 Mich. 333; McKee *v.* Wilcox, 11 Mich. 358; Farr *v.* Sherman, 11 Mich. 33; Watson *v.* Thurber, 11 Mich. 457; Burdeno *v.* Amperse, 14 Mich. 91; Tong *v.* Marvin, 15 Mich. 60; Tillman *v.* Shackleton, 15 Mich. 447; Devries *v.* Conklin, 22 Mich. 255; Rankin *v.* West, 25 Mich. 195. The common law is certainly to be kept in view in the interpretation of such a clause, since otherwise we do not ascertain the evil designed to be remedied, and perhaps are not able fully to understand and explain the terms employed; but it is to be looked at with a view to the real intent, rather than for the purpose of arbitrarily restraining it. See Bishop, Law of Married Women, §§ 18-20 and cases cited; McGinnis *v.* State, 9 Humph. 43; State *v.* Lash, 16 N. J. 380, 32 Am. Dec. 397; Cadwallader *v.* Harris, 76 Ill. 370; Moyer *v.* Slate Co., 71 Pa. St. 293.

[4] Brien *v.* Williamson, 8 Miss. 14. If in one place in a statute the meaning of a

Here again, however, great caution must be observed in applying an arbitrary rule; for, as Mr. Justice *Story* has well observed: "It does not follow, either logically or grammatically, that because a word is found in one connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen and practical reasoners. And yet nothing has been more common than to subject the Constitution to this narrow and mischievous criticism.[1] Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the Constitution a word used in some sense which falls in with their favorite theory of interpreting it, have made that the standard by which to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes, lopping off its meaning when it seemed too large for their purposes, and extending it when it seemed too short. They have thus distorted it to the most unnatural shapes, and crippled where they have sought only to adjust its proportions according to their own opinions."[2] And he gives many instances where, in the national Constitution, it is very manifest the same word is employed in different meanings. So that, while the rule may be sound as one of presumption merely, its force is but slight, and it must readily give way to a different intent appearing in the instrument.

Where a constitution is revised or amended, (*a*) the new provisions come into operation at the same moment that those they take the place of cease to be of force; and if the new instrument re-enacts in the same words provisions which it supersedes, it is a reasonable presumption that the purpose was not to change

word or phrase is clear, it will generally be taken in the same sense throughout the act. Rhodes *v.* Weldy, 46 Ohio St. 234, 20 N. E. Rep. 461.

[1] See remarks of *Johnson*, J., in Ogden *v.* Saunders, 12 Wheat. 213, 290.

[2] Story on Const. § 454. And see Cherokee Nation *v.* Georgia, 5 Pet 1, 19.

(*a*) [Whether the attempt to amend has sufficiently complied with the constitutional requirements of formality in amending the constitution is a question for the courts, and that the legislature has declared the amendment adopted is immaterial. State *v.* Powell, 77 Miss. 513, 27 So. 927, 48 L. R. A. 652. That an amendment must be complete and not conditional and dependent, for its force, upon the subsequent acts and discretion of certain officers. see Livermore *v.* Waite, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312, in which an attempted amendment relating to the relocation of the State capitol was declared invalid. All preliminary steps prescribed for amendment of constitution must be taken in full compliance with requirements. State *v.* Tooker, 15 Mont. 8, 37 Pac. 840, 25 L. R. A. 500; State *v.* Brookhart, 113 Iowa, 250, 84 N. W. 1064.]

the law in those particulars, but to continue it in uninterrupted operation. This is the rule in the case of statutes,[1] and it sometimes becomes important, where rights had accrued before the revision or amendment took place. Its application to the case of an amended or revised constitution would seem to be unquestionable.

Operation to be Prospective.

We shall venture also to express the opinion that a *constitution should operate prospectively only*, unless the words employed show a clear intention that it should have a retrospective effect. This is the rule in regard to statutes, and it is "one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."[2] Retrospective legislation, except when designed to cure formal defects, or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it. And we are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to constitutions.[3]

[1] Laude *v.* Chicago, &c. R. R. Co., 33 Wis. 640; Gilkey *v.* Cook, 60 Wis. 133, 18 N. W. 639. Blackwood *v.* Van Vleit, 30 Mich. 118.

[2] Moon *v.* Durden, 2 Exch. 22. See Dash *v.* Van Kleek, 7 Johns. 477; Brown *v.* Wilcox, 22 Miss. 127; Price *v.* Mott, 52 Pa. St. 315; Broom's Maxims, 28; *post*, p. 529 and note.

[3] In Allbyer *v.* State, 10 Ohio St. 588, a question arose under the provision of the constitution that "all laws of a general nature shall have a uniform operation throughout the State." Another clause provided that all laws then in force, not inconsistent with the constitution, should continue in force until amended or repealed. Allbyer was convicted and sentenced to imprisonment under a crimes act previously in force applicable to Hamilton County only, and the question was, whether that act was not inconsistent with the provision above quoted, and therefore repealed by it. The court held that the provision quoted evidently had regard to future and not to past legislation, and therefore was not repealed. A similar decision was made in State *v.* Barbee, 8 Ind. 258; Evans *v.* Phillipi, 117 Pa. St. 226, 11 Atl. 630; Pecot *v.* Police Jury, 41 La. Ann. 706, 6 So. 677. So as to the effect of a provision allowing compensation for property injured, but not taken, in course of public improvements. Folkenson *v.* Easton, 116 Pa. St. 523, 8 Atl. 869. See also State *v.* Thompson, 2 Kan. 432; Slack *v.* Maysville, &c. R. R. Co., 13 B. Monr. 1; State *v.* Macon County Court, 41 Mo. 453; N. C. Coal Co. *v.* G. C. Coal & Iron Co., 37 Md. 557. In Matter of Oliver Lee & Co.'s Bank, 21 N. Y. 9, 12, *Denio*, J., says: "The rule laid down in Dash *v.* Van Kleek, 7 Johns. 477, and other cases of that class, by which the courts are admonished to avoid, if possible, such an interpretation as would give a statute a retrospective operation, has but a limited application, if any, to the construction of a constitution. When, therefore, we read in the provision under consideration, that the stockholders of every banking corporation shall be subject to a certain liability, we are to attribute to the language its natural meaning,

Implications.

The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its construction. In regard to the Constitution of the United States the rule has been laid down, that where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred.[1] The same rule has been applied to the State constitution, with an important modification, by the Supreme Court of Illinois. "That other powers than those expressly granted may be, and often are, conferred by implication, is too well settled to be doubted. Under every constitution the doctrine of implication must be resorted to, in order to carry out the general grants of power. A constitution cannot from its very nature enter into a minute specification of all the minor powers naturally and obviously included in it and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one. And it is further modified by another rule, that where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient."[2] The rule applies to the exercise of power by all departments and all officers, and will be touched upon incidentally hereafter.

Akin to this is the rule that "where the power is granted in general terms, the power is to be construed as coextensive with the terms, unless some clear restriction upon it is deducible [expressly or by implication] from the context."[3] This rule has been so frequently applied as a restraint upon legislative encroachment upon the grant of power to the judiciary, that we

without inquiring whether private interests may not be prejudiced by such a sweeping mandate." The remark was *obiter*, as it was found that enough appeared in the constitution to show clearly that it was intended to apply to existing, as well as to subsequently created, banking institutions.

[1] Story on Const. § 430. See also United States *v.* Fisher, 2 Cranch, 358; McCulloch *v.* Maryland, 4 Wheat. 316; Northwestern Fertilizing Co. *v.* Hyde Park, 70 Ill. 634.

[2] Field *v.* People, 3 Ill. 79, 83. See Letcher *v.* Oliver, 25 Ark. 289. In Nevada it has been held that a constitutional provision that the counties shall provide for their paupers will preclude a State asylum for the poor. State *v.* Hallock, 14 Nev. 202, 33 Am. Rep. 559.

[3] Story on Const. §§ 424–426. See Du Page County *v.* Jenks, 65 Ill. 275.

shall content ourselves in this place with a reference to the cases collected on this subject and given in another chapter.[1]

Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland, that where the constitution defines the qualifications of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly or by necessary implication conferred by the constitution itself.[2] Other cases recognizing the same principle are referred to in the note.[3]

[1] See *post*, pp. 124, 162.

[2] Thomas *v.* Owens, 4 Md. 189. And see Barker *v.* People, 3 Cow. 686; Matter of Dorsey, 7 Port. 293.

[3] The legislature cannot add to the constitutional qualifications of voters: Rison *v.* Farr, 24 Ark. 161; St. Joseph, &c. R. R. Co. *v.* Buchanan County Court, 39 Mo. 485; State *v.* Williams, 5 Wis. 308; State *v.* Baker, 38 Wis. 71; Monroe *v.* Collins, 17 Ohio St. 665; State *v.* Symonds, 57 Me. 148; State *v.* Staten, 6 Cold. 233; Davies *v.* McKeeby, 5 Nev. 369; McCafferty *v.* Guyer, 59 Pa. St. 109; Quinn *v.* State, 35 Ind. 485; Clayton *v.* Harris, 7 Nev. 61; Randolph *v.* Good, 3 W. Va. 551; [Morris *v.* Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326. Nor diminish them: Allison *v.* Blake, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 480, and note; except in the case of school officers and other officers not provided for in the Constitution. Plummer *v.* Yost, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110;] nor of an officer: Feibleman *v.* State, 98 Ind. 516; nor shorten the constitutional term of an office: Howard *v.* State, 10 Ind. 99; Cotten *v.* Ellis, 7 Jones, N. C. 545; State *v.* Askew, 48 Ark. 82, 2 S. W. 349; nor practically abolish the office by repealing provision for salary: Reid *v.* Smoulter, 128 Pa. 324, 5 L. R. A. 517, 18 Atl. Rep. 445; nor extend the constitutional term: People *v.* Bull, 46 N. Y. 57; Goodin *v.* Thoman, 10 Kan. 191; State *v.* Brewster, 44 Ohio St. 589, 6 N. E. 653; [Kahn *v.* Sutro, 114 Cal. 316, 46 Pac 87, 33 L. R. A. 620; see also Hill *v.* Slade, 41 Md. 640, 48 Atl. 64 (Nov. 15, 1900);] but see Jordan *v.* Bailey, 37 Minn. 174, 33 N. W. 778; nor add to the constitutional grounds for removing an officer: Lowe *v.* Commonwealth, 3 Met. (Ky.) 237; Brown *v.* Grever, 6 Bush, 1, as by enacting that intoxication while discharging his duties shall be deemed misfeasance in office, Com. *v.* Williams, 79 Ky. 42; but see McComas *v.* Krug, 81 Ind. 327; nor change the compensation prescribed by the constitution: King *v.* Hunter, 65 N. C. 603; see also, on these questions, *post*, p. 388, note; nor provide for the choice of officers a different mode from that prescribed by the constitution: People *v.* Raymond, 37 N. Y. 428; Devoy *v.* New York, 35 Barb. 264; 22 How. Pr. 226; People *v.* Blake, 49 Barb. 9; People *v.* Albertson, 55 N. Y. 50; Opinions of Justices, 117 Mass. 603; State *v.* Goldstucker, 46 Wis. 124; see *post*, p. 388, note. A legislative extension of an elective office is void as applied to incumbents. People *v.* McKinney, 52 N. Y. 374. [But where the constitution contains no prohibition, the legislature may prescribe the qualifications of voters at municipal elections. Hanna *v.* Young, 84 Md. 179, 35 Atl. 674, 34 L. R. A. 55. And of officers: State *v.* McCallister, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343. Where the constitution limits the term, appointee under statute providing for holding during good behavior cannot hold beyond constitutional term. Neumeyer *v.* Krakel, — Ky. —, 62 S. W. 518 (Apr. 25, 1901).]

It is not unconstitutional to allow the governor to supply temporary vacancies in offices which under the constitution are elective. Sprague *v.* Brown, 40 Wis.

The Light which the Purpose to be accomplished may afford in Construction.

The considerations thus far suggested are such as have no regard to extrinsic circumstances, but are those by the aid of which we seek to arrive at the meaning of the constitution from an examination of the words employed. It is possible, however, that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain. Then, and only then, are we warranted in seeking elsewhere for aid. We are not to import difficulties into a constitution, by a consideration of extrinsic facts, when none appear upon its face. If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of *the object to be accomplished or the mischief designed to be remedied or guarded against* by the clause in which the ambiguity is met with.[1] "When we once know the reason which alone determined the will of the lawmakers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. Great caution should always be observed in the application of this rule to particular given cases; that is, we ought always to be certain that we do know, and have actually ascertained, the true and only reason which induced the act. It is never allowable to indulge in vague and uncertain conjecture, or in supposed reasons and views of the framers of an act, where there are none known with any degree of certainty."[2] The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision,[3] and it is

612. [But such vacancy does not arise by mere failure to hold the election. Ijams *v.* Duvall, 85 Md. 252, 36 Atl. 819, 36 L. R. A. 127. Enumeration in constitution of certain modes in which vacancies arise does not prevent legislative certain of other modes. State *v.* Lansing, 46 Neb. 514, 64 N. W. 1101, 35 L. R. A. 124. Illness of governor which disables him to perform his duties is such vacancy as authorizes the officer designated by the constitution to assume the powers and discharge the duties of the governor until the disability is removed. Barnard *v.* Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613. Where the term fixed by statute is unconstitutional, the tenure is at the will of the appointing power. Lewis *v.* Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510.]

[1] Alexander *v.* Worthington, 5 Md. 471; District Township *v.* Dubuque, 7 Iowa, 262. See Smith *v.* People, 47 N. Y. 330; People *v.* Potter, 47 N. Y. 375; Ball *v.* Chadwick, 46 Ill. 28; Sawyer *v.* Insurance Co, 46 Vt. 697.

[2] Smith on Stat. and Const. Construction, 634. See also remarks of *Bronson*, J., in People *v.* Purdy, 2 Hill, 35–37.

[3] Baltimore *v.* State, 15 Md. 376;

especially important to look into it if the constitution is the successor to another, and in the particular in question essential changes have apparently been made.[1]

Proceedings of the Constitutional Convention.

When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument.[2] Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey.[3] For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was

Henry *v.* Tilson, 19 Vt. 447; Hamilton *v.* St. Louis County Court, 15 Mo. 3; People *v.* Gies, 25 Mich. 83; Servis *v.* Beatty, 32 Miss. 52; Bandel *v.* Isaac, 13 Md. 202; Story on Const. § 428.

[1] People *v.* Blodgett, 13 Mich. 127, 147.

[2] Per *Walworth*, Chancellor, Coutant *v.* People, 11 Wend. 511, 518, and Clark *v.* People, 26 Wend. 599, 602; per *Bronson*, J., People *v.* Purdy, 2 Hill, 31; People *v.* N. Y. Central Railroad Co., 24 N. Y. 485. See State *v.* Kennon, 7 Ohio St. 546; Wisconsin Cent. R. R. Co. *v.* Taylor Co., 52 Wis. 37, 8 N. W. 833; State *v.* Barnes, 24 Fla. 29, 3 So. 433.

[3] Taylor *v.* Taylor, 10 Minn. 107. And see Eakin *v.* Raub, 12 S. & R. 352; Aldridge *v.* Williams, 3 How. 1; State *v.* Doron, 5 Nev. 399.

the sense designed to be conveyed.[1] These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. The history of the calling of the convention, the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the proceedings of the convention.[2]

Contemporaneous and Practical Construction.

An important question which now suggests itself is this: How far the contemporaneous interpretation, or the subsequent practical construction of any particular provision of the constitution, is to have weight with the courts when the time arrives at which a judicial decision becomes necessary. Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always of necessity be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight.

[1] State *v.* Mace, 5 Md. 337; Manly *v.* State, 7 Md. 135; Hills *v.* Chicago, 60 Ill. 86; Beardstown *v.* Virginia, 76 Ill. 34.

[2] See People *v.* Harding, 53 Mich. 481, 19 N. W. 155.

The Supreme Court of the United States has had frequent occasion to consider this question. In Stuart *v.* Laird,[1] decided in 1803, that court sustained the authority of its members to sit as circuit judges on the ground of a practical construction, commencing with the organization of the government.

In Martin *v.* Hunter's Lessee,[2] Justice *Story*, after holding that the appellate power of the United States extends to cases pending in the State courts, and that the 25th section of the Judiciary Act, which authorized its exercise, was supported by the letter and spirit of the Constitution, proceeds to say: "Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the First Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have from time to time sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence by enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts." The same doctrine was subsequently supported by Chief Justice *Marshall* in a case involving the same point, and in which he says that "great weight has always been attached, and very rightly attached, to contemporaneous exposition."[3]

In Bank of United States *v.* Halstead[4] the question was made, whether the laws of the United States authorizing the courts of

[1] 1 Cranch, 299.

[2] 1 Wheat. 304, 351. See Story on Const. §§ 405–408.

[3] Cohens *v.* Virginia, 6 Wheat. 264, 418.

[4] 10 Wheat. 51, 63.

the Union so to alter the form of process of execution used in the Supreme Courts of the States in September, 1789, as to subject to execution lands and other property not thus subject by the State laws in force at that time, were constitutional; and Mr. Justice *Thompson*, in language similar to that of Chief Justice *Marshall* in the preceding case, says: "If any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction given to it ought to have great weight in determining both questions." And Mr. Justice *Johnson* assigns a reason for this in a subsequent case: "Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them."[1] Like views have been expressed by Chief Justice *Waite* in a recent decision.[2]

Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind.[3]

[1] Ogden *v.* Saunders, 12 Wheat. 290. See Pike *v.* Megoun, 44 Mo. 491; State *v.* Parkinson, 5 Nev. 15.

[2] Minor *v.* Happersett, 21 Wall. 162. To like effect is *Ex parte* Reynolds, 12 S. W. Rep. 570 (Ark.). And see Collins *v.* Henderson, 11 Bush, 74, 92.

[3] Union Insurance Co. *v.* Hoge, 21 How. 35, 66; Edward's Lessee *v.* Darby, 12 Wheat. 206; Hughes *v.* Hughes, 4 T. B. Monr. 42; Chambers *v.* Fisk, 22 Tex. 504; Britton *v.* Ferry, 14 Mich. 53; Bay City *v.* State Treasurer, 23 Mich. 499; Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256; Plummer *v.* Plummer, 37 Miss. 185; Burgess *v.* Pue, 2 Gill, 11; State *v.* Mayhew, 2 Gill, 487; Baltimore *v.* State, 15 Md. 376; Coutant *v.* People, 11 Wend. 511; People *v.* Dayton, 55 N. Y. 367; Farmers' and Mechanics' Bank *v.* Smith, 3 S. & R. 63; Norris *v.* Clymer, 2 Pa. St. 277; Moers *v.* City of Reading, 21 Pa. St. 188; Washington *v.* Page, 4 Cal. 388; Surgett *v.* Lapice, 8 How. 48; Bissell *v.* Penrose, 8 How. 317; Troup *v.* Haight, Hopk. 239; United States *v.* Gilmore, 8 Wall. 330; Brown *v.* United States, 113 U. S. 568, 5 Sup. Ct. Rep. 618; Hedgecock *v.* Davis, 64 N. C. 650; Lafayette, &c. R. R. Co. *v.* Geiger, 34 Ind. 185; Bunn *v.* People, 45 Ill. 397; Scanlan *v.* Childs, 33 Wis. 663; Faribault *v.* Misener, 20 Minn. 396; State *v.* Glenn, 18 Nev. 34, 1 Pac. 186; State *v.* Kelsey, 44 N. J. L. 1; [United States *v.* Ala. G. Southern R. Co., 142 U. S. 615, 12 Sup. Ct. Rep. 306; French *v.* State, 141 Ind. 618, 41 N. E. 2; 29 L. R. A. 113.] Where

Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. "Contemporary construction . . . can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."[1] While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of Stuart *v.* Laird,[2] above referred to, the practical construction was regarded as conclusive. To the objection that the judges of the Supreme Court had no right to sit as circuit judges, the court say: "It is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest, and ought not now to be disturbed." This is certainly very strong language; but language very similar in character was used by the Supreme Court of Massachusetts in one case where large and valuable estates depended upon a particular construction of a statute, and very great mischief

the constitution has been construed by the political departments of the government in its application to a political question, the courts will not only give great consideration to their action, but will generally follow the construction implicitly. People *v.* Supervisors of La Salle, 100 Ill. 495. The passage of an act by the first State legislature is a contemporary interpretation of a constitutional clause *in pari materia* of much weight. Cooper Mf'g Co. *v.* Ferguson, 113 U. S. 727, 5 Sup. Ct. Rep. 739; People *v.* Wright, 6 Col. 92. Where under color of authority long practical construction has sanctioned certain appointments by the legislature, it will control. Hovey *v.* State, 118 Ind. 502, 21 N. E. Rep. 899; Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. Rep 878. The executive construction of treaties is entitled to a similar respect. Castro *v.* De Uriarte, 16 Fed. Rep. 93. [Upon whether or not an executive officer may raise the question of constitutionality of an act which casts ministerial duties upon him, as a defence to a mandamus proceeding to compel performance of such duties, see State *v.* Heard, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 513, and cases collected in note thereto in L. R. A.]

[1] Story on Const. § 407. And see Evans *v.* Myers, 25 Pa. St. 116; Sadler *v.* Langham, 34 Ala. 311; Barnes *v.* First Parish in Falmouth, 6 Mass. 401; Union Pacific R. R. Co. *v.* United States, 10 Ct. of Cl. Rep. 518; s. c. in error, 91 U. S. 72. [See also St. Paul, M. & M. R. Co. *v.* Phelps, 137 U. S. 528, 11 Sup. Ct. Rep. 168; and Merritt *v.* Cameron, 137 U. S. 542, 11 Sup. Ct. Rep. 174.]

[2] 1 Cranch, 299.

would follow from changing it. The court said that, "although if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the argument *ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."[1] Language nearly as strong was also used by the Supreme Court of Maryland, where the point involved was the possession of a certain power by the legislature, which it had constantly exercised for nearly seventy years.[2]

It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no leng h of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution.[3] We think we allow to contemporary and practical construction its full legitimate force

[1] Rogers *v.* Goodwin, 2 Mass. 475. See also Fall *v.* Hazelrigg, 45 Ind. 576; Scanlan *v.* Childs, 33 Wis. 663.

[2] State *v.* Mayhew, 2 Gill, 487. In Essex Co. *v.* Pacific Mills, 14 Allen, 389, the Supreme Court of Massachusetts expressed the opinion that the constitutionality of the acts of Congress making treasury notes a legal tender ought not to be treated by a State court as open to discussion after the notes had practically constituted the currency of the country for five years. At a still later day, however, the judges of the Supreme Court of the United States held these acts void, though they afterwards receded from this position.

[3] See further, on this subject, the case of Sadler *v.* Langham, 34 Ala. 311, 334; People *v.* Allen, 42 N. Y. 378; Brown *v.* State, 5 Col. 525; Hahn *v.* United States, 14 Ct. of Cl. 305; Swift *v.* United States, 14 Ct. of Cl. 481. Practical acquiescence in a supposed unconstitutional law is entitled to much greater weight when the defect which is pointed out relates to mere forms of expression or enactment than when it concerns the substance of legislation; and if the objection is purely technical, long acquiescence will be conclusive against it. Continental Imp. Co. *v.* Phelps, 47 Mich. 299, 11 N. W. 167.

when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.[1]

[1] There are cases which clearly go further than any we have quoted, and which sustain legislative action which they hold to be usurpation, on the sole ground of long acquiescence. Thus in Brigham *v.* Miller, 17 Ohio, 446, the question was, Has the legislature power to grant divorces? The court say: "Our legislature have assumed and exercised this power for a period of more than forty years, although a clear and palpable assumption of power, and an encroachment upon the judicial department, in violation of the Constitution. To deny this long-exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted and children born, and it would bastardize all these, although born under the sanction of an apparent wedlock, authorized by an act of the legislature before they were born, and in consequence of which the relation was formed which gave them birth. On account of these children, and for them only, we hesitate. And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the legislature, is unwarranted and unconstitutional, an encroachment upon the duties of the judiciary, and a striking down of the dearest rights of individuals, without authority of law. We trust we have said enough to vindicate the Constitution, and feel confident that no department of State has any disposition to violate it, and that the evil will cease." So in Johnson *v.* Joliet & Chicago Railroad Co., 23 Ill. 202, 207, the question was whether railroad corporations could be created by special law, without a special declaration by way of preamble that the object to be accomplished could not be attained by general law. The court say: "It is now too late to make this objection, since, by the action of the general assembly under this clause, special acts have been so long the order of the day and the ruling passion with every legislature which has convened under the Constitution, until their acts of this description fill a huge and misshapen volume, and important and valuable rights are claimed under them. The clause has been wholly disregarded, and it would now produce far-spread ruin to declare such acts unconstitutional and void. It is now safer and more just to all parties to declare that it must be understood that, in the opinion of the general assembly at the time of passing the special act, its object could not be attained under the general law, and this without any recital by way of preamble, as in the act to incorporate the Central Railroad Company. That preamble was placed there by the writer of this opinion, and a strict compliance with this clause of the Constitution would have rendered it necessary in every subsequent act. But the legislature, in their wisdom, have thought differently, and have acted differently, until now our special legislation and its mischiefs are beyond recovery or remedy." These cases certainly presented very strong motives for declaring the law to be what it was not; but it would have been interesting and useful if either of these learned courts had enumerated the evils that must be placed in the opposite scale when the question is whether a constitutional rule shall be disregarded; not the least of which is, the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions, in the belief that, if the unconstitutional law can once be put in force, and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring. We agree with the Supreme Court of Indiana, that, in construing constitutions, courts have nothing to do with the argument *ab inconvenienti*, and should not "bend the Constitution to suit the law of the hour:" Greencastle Township *v.* Black, 5 Ind. 557, 565; and with *Benson*, Ch. J., in what he says in Oakley *v.* Aspinwall, 3 N. Y. 547, 568: "It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who made the instru-

Unjust Provisions.

We have elsewhere expressed the opinion that a statute cannot be declared void on the ground solely that it is repugnant to a supposed general intent or spirit which it is thought pervades or lies concealed in the Constitution, but wholly unexpressed, or because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the Constitution confers.[1] Still less will the injustice of a constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the people may, under the influence of temporary prejudice, or a mistaken view of public policy, incorporate provisions in their charter of government, infringing upon the proper rights of individual citizens or upon principles which ought ever to be regarded as sacred and fundamental in republican government; and it is also possible that obnoxious classes may be unjustly disfranchised. The remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail. Such provisions, when free from doubt, must receive the same construction as any other. We do not say, however, that if a clause

ment, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing as I do that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." See also Enoking v. Simmons, 28 Wis. 272. Whether there may not be circumstances under which the State can be held justly estopped from alleging the invalidity of its own action in apportioning the political divisions of the State, and imposing burdens on citizens, where such action has been acquiesced in for a considerable period, and rights have been acquired through bearing the burdens under it, see Rumsey v. People, 19 N. Y. 41; People v. Maynard, 15 Mich. 470; Kneeland v. Milwaukee, 15 Wis. 454.

[1] See *post*, p. 240, and cases referred to in notes.

should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments. When such a case arises, it will be time to consider it.[1]

Duty in Case of Doubt.

But when all the legitimate lights for ascertaining the meaning of the constitution have been made use of, it may still happen that the construction remains a matter of doubt. In such a case it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon the doubt alone to abstain from acting. Whoever derives power from the constitution to perform any public function is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions. A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it; and, if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force.

Directory and Mandatory Provisions.

The important question sometimes presents itself, whether we are authorized in any case, when the meaning of a clause of the Constitution is arrived at, to give it such practical construction as will leave it optional with the department or officer to which it is addressed to obey it or not as he shall see fit. In respect to statutes it has long been settled that particular provisions may be regarded as *directory* merely; by which is meant that they are to be considered as giving directions which *ought* to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them. The force of many of the decisions on

[1] McMullen *v.* Hodge, 5 Tex. 34. See Clarke *v.* Irwin, 5 Nev. 111; Walker *v.* Cincinnati, 21 Ohio St. 14; Bailey *v.* Commonwealth, 11 Bush, 688.

this subject will be readily assented to by all; while others are sometimes thought to go to the extent of nullifying the intent of the legislature in essential particulars. It is not our purpose to examine the several cases critically, or to attempt — what we deem impossible — to reconcile them all; but we shall content ourselves with quoting from a few, with a view, if practicable, to ascertaining some line of principle upon which they can be classified.

There are cases where, whether a statute was to be regarded as merely directory or not, was made to depend upon the employing or failing to employ negative words plainly importing that the act should be done in a particular manner or time, *and not otherwise.*[1] The use of such words is often conclusive of an intent to impose a limitation; but their absence is by no means equally conclusive that the statute was not designed to be mandatory.[2] Lord *Mansfield* would have the question whether mandatory or not depend upon whether that which was directed to be done was or was not of the essence of the thing required.[3] The Supreme Court of New York, in an opinion afterwards approved by the Court of Appeals, laid down the rule as one settled by authority, that "statutes directing the mode of proceeding by public officers are directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute."[4] This rule strikes us as very general, and as likely to include within its scope, in many cases, things which are of the very essence of the proceeding. The questions in that case were questions of irregularity under election laws, not in any way hindering the complete expression of the will of the electors; and the court was doubtless right in holding that the election was not to be avoided for a failure in the officers appointed for its conduct to comply in all respects with the directions of the statute there in question. The same court in another case say: "Statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than of substance."[5] The Supreme Court of Michigan, in a case involv-

[1] Slayton *v.* Hulings, 7 Ind. 144; King *v.* Inhabitants of St. Gregory, 2 Ad. & El. 99; King *v.* Inhabitants of Hipswell, 8 B. & C. 466.

[2] District Township *v.* Dubuque, 7 Iowa, 262, 284.

[3] Rex *v.* Locksdale, 1 Burr. 447.

[4] People *v.* Cook, 14 Barb. 290; s. c. 8 N. Y. 67.

[5] People *v.* Schermerhorn, 19 Barb. 540, 558. If a statute imposes a duty and gives the means of performing that duty, it must be held to be mandatory. Venzie *v.* China, 50 Me. 518. "It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are

ing the validity of proceedings on the sale of land for taxes, laid down the rule that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely."[1] A similar rule has been recognized in a case in Illinois. Commissioners had been appointed to ascertain and assess the damage and recompense due to the owners of land which might be taken, on the real estate of the persons benefited by a certain local improvement, in proportion as nearly as might be to the benefits resulting to each. By the statute, when the assessment was completed, the commissioners were to sign and return the same to the city council within forty days of their appointment. This provision was not complied with, but return was made afterwards, and the question was raised as to its validity when thus made. In the opinion of the court, this question was to be decided by ascertaining whether any advantage would be lost, or right destroyed, or benefit sacrificed, either to the public or to any individual, by holding the provision directory. After remarking that they had held an assessment under the general revenue law, returned after the time appointed by law, as void, because the person assessed would lose the benefit of an appeal from the assessment,[2] they say of the statute before the court: "There are no negative words used declaring that the functions of the commissioners shall cease after the expiration of the forty days, or that they shall not make their return after that time; nor have we been able to discover the least right, benefit, or advantage which the property owner could derive from having the return made within that time, and not after. No time is limited and made dependent on that time, within which the owner of the property may apply to

affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may, and often have been, construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within that category. 'A clause is directory,' says *Taunton*, J., 'when the provisions contain mere matter of discretion and no more; but not so when they are followed by words of positive prohibition.' Pearse *v.* Morrice, 2 Ad. & El. 96." Per *Sharswood*, J., in Bladen *v.* Philadelphia, 60 Pa. St. 464, 466. And see Pittsburg *v.* Coursin, 74 Pa. St. 400; Kennedy *v.* Sacramento, 19 Fed. Rep. 580. Under a statute providing that a court *may* appoint three commissioners to determine public rights, "may" is mandatory, and parties cannot agree that less than three shall act. Monmouth *v.* Leeds, 76 Me. 28.

[1] Clark *v.* Crane, 5 Mich. 150, 154. See also Young *v.* Joslin, 13 R. I. 675; Shawnee County *v.* Carter, 2 Kan. 115; [Marx *v.* Hanthorn, 148 U. S. 172, 13 Sup. Ct Rep. 508] In Life Association *v.* Board of Assessors, 49 Mo. 512, it is held that a constitutional provision that "all property subject to taxation ought to be taxed in proportion to its value" is a prohibition against its being taxed in any other mode, and the word *ought* is mandatory.

[2] Wheeler *v.* Chicago, 24 Ill. 105, 108.

have the assessment reviewed or corrected. The next section requires the clerk to give ten days' notice that the assessment has been returned, specifying the day when objections may be made to the assessment before the common council by parties interested, which hearing may be adjourned from day to day; and the common council is empowered in its discretion to confirm or annul the assessment altogether, or to refer it back to the same commissioners, or to others to be by them appointed. As the property owner has the same time and opportunity to prepare himself to object to the assessment and have it corrected, whether the return be made before or after the expiration of the forty days, the case differs from that of Marsh *v.* Chesnut,[1] at the very point on which that case turned. Nor is there any other portion of the chapter which we have discovered, bringing it within the principle of that case, which is the well-recognized rule in all the books." [2]

The rule is nowhere more clearly stated than by Chief Justice *Shaw*, in Torrey *v.* Milbury,[3] which was also a tax case. "In considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures that are intended for the security of the citizen, for ensuring equality of taxation, and to enable every one to know with reasonable certainty for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent; and if they are not observed, he is not legally taxed; and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by

[1] 14 Ill. 223.

[2] Wheeler *v.* Chicago, 24 Ill. 105, 108.

[3] 21 Pick. 64, 67. We commend in the same connection the views of *Lewis*, Ch. J., in Corbett *v.* Bradley, 7 Nev. 108: "When any requirement of a statute is held to be directory, and therefore not material to be followed, it is upon the assumption that the legislature itself so considered it, and did not make the right conferred dependent upon a compliance with the form prescribed for securing it. It is upon this principle that the courts often hold the time designated in a statute, where a thing is to be done, to be directory. No court certainly has the right to hold any requirement of a law unnecessary to be complied with, unless it be manifest the legislature did not intend to impose the consequence which would naturally follow from a non-compliance, or which would result from holding the requirement mandatory or indispensable. If it be clear that no penalty was intended to be imposed for a non-compliance, then, as a matter of course, it is but carrying out the will of the legislature to declare the statute in that respect to be simply directory. But if there be anything to indicate the contrary, a full compliance with it must be enforced." See also Hurford *v.* Omaha, 4 Neb. 336.

statutes designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, a compliance or non-compliance with which does in no respect affect the rights of taxpaying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them; but yet their observance is not a condition precedent to the validity of the tax."

We shall quote further only from a single other case upon this point. The Supreme Court of Wisconsin, in considering the validity of a statute not published within the time required by law, "understand the doctrine concerning directory statutes to be this: that where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that by allowing it to be so done it may work an injury or wrong, nothing in the act itself, or in other acts relating to the same subject-matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not to be done at all, there the courts assume that the intent was, that if not done within the time prescribed it might be done afterwards. But when any of these reasons intervene, then the limit is established."[1]

These cases perhaps sufficiently indicate the rules, so far as any of general application can be declared, which are to be made use of in determining whether the provisions of a statute are mandatory or directory. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute.[2] But this rule presupposes that no negative words are

[1] State *v.* Lean, 9 Wis. 279, 292. See further, for the views of this court on the subject here discussed, Wendel *v.* Durbin, 26 Wis. 390. The general doctrine of the cases above quoted is approved and followed in French *v.* Edwards, 13 Wall. 506. In Low *v.* Dunham, 61 Me. 566, a statute is said to be mandatory where public interests or rights are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised. And see Wiley *v.* Flournoy, 30 Ark. 609; State Auditor *v.* Jackson Co., 65 Ala. 142.

[2] The following, in addition to those cited, are some of the cases in this country in which statutes have been declared directory only: Odiorne *v.* Rand, 59 N. H. 504; Pond *v.* Negus, 3 Mass. 230; Williams *v.* School District, 21 Pick. 75; City of Lowell *v.* Hadley, 8 Met. 180; Holland *v.* Osgood, 8 Vt. 276; Corliss *v.* Corliss, 8 Vt. 373; People *v.* Allen, 6 Wend. 486; Marchant *v.* Langworthy,

employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed. Even as thus laid down and restricted, the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the legislature.[1]

But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or

6 Hill, 616; *Ex parte* Heath, 3 Hill, 42; People *v.* Honey, 12 Wend. 481; Jackson *v.* Young, 5 Cow. 269; Striker *v.* Kelley, 7 Hill. 9; People *v.* Peck, 11 Wend. 604; Matter of Mohawk & Hudson Railroad Co., 19 Wend. 135; People *v.* Runkel, 9 Johns. 147; Gale *v.* Mead, 2 Denio, 160; Doughty *v.* Hope, 3 Denio, 249; Elmendorf *v.* Mayor, &c. of New York, 25 Wend. 692; Thames Manufacturing Co. *v.* Lathrop, 7 Conn. 550; Colt *v.* Eves, 12 Conn. 243; People *v.* Doe, 1 Mich. 451; Parks *v.* Goodwin, 1 Doug. (Mich.) 56; Hickey *v.* Hinsdale, 8 Mich. 267; People *v.* Hartwell, 12 Mich. 508; State *v.* McGinley, 4 Ind. 7, Stayton *v* Hulings, 7 Ind. 144; New Orleans *v.* St. Romes, 9 La. Ann. 573; Edwards *v.* James, 13 Tex. 52; State *v.* Click, 2 Ala. 26; Savage *v.* Walshe, 26 Ala. 620; Sorchan *v.* Brooklyn, 62 N. Y. 339; People *v.* Tompkins, 64 N. Y. 53; Limestone Co. *v.* Rather, 48 Ala. 433; Webster *v.* French, 12 Ill. 302; McKune *v.* Weller, 11 Cal. 49; State *v.* Co. Commissioners of Baltimore, 29 Md. 516; Fry *v.* Booth, 19 Ohio St. 25; Whalin *v.* Macomb, 76 Ill. 49; Hurford *v.* Omaha, 4 Neb. 336; Lackawana Iron Co. *v.* Little Wolf, 38 Wis. 152; R. R. Co. *v.* Warren Co., 10 Bush, 711; Grant *v.* Spencer, 1 Mont. 136. The list might easily be largely increased.

[1] See upon this subject the remarks of Mr. Sedgwick in his work on Statutory and Constitutional Law, p. 375, and those of *Hubbard*, J., in Briggs *v.* Georgia, 15 Vt. 61. Also see Dryfus *v.* Dridges, 45 Miss. 247.

modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only;[1] and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.[2]

There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application. In delivering the opinion of the New York Court of Appeals in one case, Mr. Justice *Willard* had occasion to consider the constitutional provision, that on the final passage of a bill the question shall be taken by ayes and noes, which shall be duly entered upon the journals; and he expressed the opinion that it was only directory to the legislature.[3] The remark was *obiter dictum*, as the court had already decided that the provision had been fully complied with; and those familiar with the reasons which have induced the insertion of this clause in our constitutions will not readily concede that its sole design was to establish a mere rule of order for legislative proceedings which might be followed or not at discretion. Mr. Chief Justice *Thurman*, of Ohio, in a case not calling for a discussion of the subject, has considered a statute whose validity was assailed on the ground that it was not passed in the mode prescribed by the constitution. "By the term *mode*," he says, "I do not mean to

[1] See State *v.* Johnson, 26 Ark. 281. [Where the Constitution provides that the legislature shall apportion the State into legislative districts every ten years, and that such appointment shall be based upon the last preceding federal census, one exercise of this power of apportionment exhausts it, and the State cannot be reapportioned until after the next federal census. People *v.* Hutchinson, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770.]

[2] Wolcott *v.* Wigton, 7 Ind. 44; per *Bronson*, J., in People *v.* Purdy, 2 Hill, 31; Greencastle Township *v.* Black, 5 Ind. 566; Opinions of Judges, 18 Me. 458. See People *v.* Lawrence, 36 Barb. 177; State *v.* Johnson, 26 Ark. 281; State *v.* Glenn, 18 Nev. 34, 1 Pac. 186. "The essential nature and object of constitutional law being restrictive upon the powers of the several departments of government, it is difficult to comprehend how its provisions can be regarded as merely directory." *Nicholson*, Ch. J., in Cannon *v.* Mathes, 8 Heisk. 504, 517. Unless expressly permissive, constitutional provisions are mandatory. Varney *v.* Justice, 86 Ky. 596, 6 S. W. 457.

[3] People *v.* Supervisors of Chenango, 8 N. Y. 317.

include the *authority* in which the lawmaking power resides, or the number of votes a bill must receive to become a law. That the power to make law, is vested in the assembly alone, and that no act has any force that was not passed by the number of votes required by the constitution, are nearly, or quite, self-evident propositions. These essentials relate to the authority by which, rather than the mode in which, laws are to be made. Now to secure the careful exercise of this power, and for other good reasons, the constitution prescribes or recognizes certain things to be done in the enactment of laws, which things form a course or mode of legislative procedure. Thus we find, *inter alia*, the provision before quoted that every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule. This is an important provision without doubt, but, nevertheless, there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences. If it is in the power of every court (and if one has the power, every one has it) to inquire whether a bill that passed the assembly was 'fully' and 'distinctly' read three times in each house, and to hold it invalid if, upon any reading, a word was accidentally omitted, or the reading was indistinct, it would obviously be impossible to know what is the statute law of the State. Now the requisition that bills shall be fully and distinctly read is just as imperative as that requiring them to be read three times; and as both relate to the mode of procedure merely, it would be difficult to find any sufficient reason why a violation of one of them would be less fatal to an act than a violation of the other."[1]

A requirement that a law shall be read *distinctly*, whether mandatory or directory, is, from the very nature of the case, addressed to the judgment of the legislative body, whose decision as to what reading is sufficiently distinct to be a compliance cannot be subject to review. But in the absence of authority to the contrary, we should not have supposed that the requirement of three successive readings on different days stood upon the same footing.[2] To this extent a definite and certain rule is

[1] Miller *v.* State, 3 Ohio St. 475, 483. The provision for three readings on separate days does not apply to amendments made in the progress of the bill through the houses. People *v.* Wallace, 70 Ill. 680.

[2] See People *v.* Campbell, 8 Ill. 466; McCulloch *v.* State, 11 Ind. 424; Cannon *v.* Mathes, 8. Heisk. 504; Spangler *v.* Jacoby, 14 Ill. 297; People *v.* Starne, 35 Ill. 121; Ryan *v.* Lynch, 68 Ill. 160.

capable of being, and has been, laid down, which can be literally obeyed; and the legislative body cannot suppose or adjudge it to have been done if the fact is otherwise. The requirement has an important purpose, in making legislators proceed in their action with caution and deliberation; and there cannot often be difficulty in ascertaining from the legislative records themselves if the constitution has been violated in this particular. There is, therefore, no inherent difficulty in the question being reached and passed upon by the courts in the ordinary mode, if it is decided that the constitution intends legislation shall be reached through the three readings, and not otherwise.

The opinion above quoted was recognized as law by the Supreme Court of Ohio in a case soon after decided. In that case the court proceed to say: "The . . . provision . . . that no bill shall contain more than one subject, which shall be clearly expressed in its title, is also made a permanent rule in the introduction and passage of bills through the houses. The subject of the bill is required to be clearly expressed in the title for the purpose of advising members of its subject, when voting in cases in which the reading has been dispensed with by a two-thirds vote. The provision that a bill shall contain but one subject was to prevent combinations by which various and distinct matters of legislation should gain a support which they could not if presented separately. As a rule of proceeding in the General Assembly, it is manifestly an important one. But if it was intended to effect any practical object for the benefit of the people in the examination, construction, or operation of acts passed and published, we are unable to perceive it. The title of an act may indicate to the reader its subject, and under the rule each act would contain one subject. To suppose that for such a purpose the Constitutional Convention adopted the rule under consideration would impute to them a most minute provision for a very imperfect heading of the chapters of laws and their subdivision. This provision being intended to operate upon bills in their progress through the General Assembly, it must be held to be directory only. It relates to bills, and not to acts. · It would be most mischievous in practice to make the validity of every law depend upon the judgment of every judicial tribunal of the State, as to whether an act or a bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge. No practical benefit could arise from such inquiries. We are therefore of

the opinion that in general the only safeguard against the violation of these rules of the houses is their regard for, and their oath to support, the constitution of the State. We say, *in general*, the only safeguard; for whether a manifestly gross and fraudulent violation of these rules might authorize the court to pronounce a law unconstitutional, it is unnecessary to determine. It is to be presumed no such case will ever occur."[1]

If the prevailing doctrine of the courts were in accord with this decision, it might become important to consider whether the object of the clause in question, as here disclosed, was not of such a character as to make the provision mandatory even in a statute. But we shall not enter upon that subject here, as elsewhere we shall have occasion to refer to decisions made by the highest judicial tribunals in nearly all the States, recogniz-

[1] Pim *v.* Nicholson, 6 Ohio St. 176, 179. Those provisions which relate to the structure of a bill or the forms to be observed in its passage are generally directory, while those as to the number of members necessary to pass a bill and as to the effect and operation of a bill when passed, are usually mandatory. *Ex parte* Falk, 42 Ohio St. 638. But the authentication of an act must be by signature, and one which, though passed, is not signed nor enrolled is void. State *v.* Kiesewetter, 45 Ohio St. 254, 12 N. E. 807.

See also in line with Pim *v.* Nicholson, *supra*; Washington *v.* Page, 4 Cal. 388. In Hill *v.* Boyland, 40 Miss. 618, a provision requiring of all officers an oath to support the constitution was held not to invalidate the acts of officials who had neglected to take such an oath. And in McPherson *v.* Leonard, 29 Md. 377, the provision that the style of all laws shall be, "Be it enacted by the General Assembly of Maryland," was held directory. Similar rulings were made in Cape Girardeau *v.* Riley, 52 Mo. 424; St. Louis *v.* Foster, 52 Mo. 513; Swann *v.* Buck, 40 Miss. 268.

Directly the opposite has been held in Nevada. State *v.* Rogers, 10 Nev. 250. So a requirement that indictments shall conclude, "against the peace and dignity of the people of West Virginia," was held in Lemons *v.* People, 4 W. Va. 755, 1 Green Cr. R. 666, to be mandatory, and an indictment which complied with it, except in abbreviating the name of the State, was held bad.

A statute which is passed in obedience to a constitutional requirement must be held mandatory. State *v.* Pierce, 35 Wis. 93, 99.

A provision that the legislature shall provide for determining contested elections is mandatory upon that department, but if in its enactments it fails to carry out the provision, the courts cannot annul the acts on that ground. Schulherr *v.* Bordeaux, 64 Miss. 59, 8 So. 201. So if the legislature disregards a provision that before a special law is enacted there must be evidence of publication of notice of intention to introduce it. Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184.

If a constitution provides "that when any bill is presented for an act of incorporation, it shall be continued until another election of members of Assembly shall have taken place and public notice of the pendency thereof given, it does not necessarily follow that the organization under the charter is not as to all practical purposes valid. The provision is directory to the Assembly, and in the absence of any clause forbidding the enactment, does not affect the corporators unless the State itself intervenes. Whitney *v.* Wyman, 101 U. S. 392, 397. The State may waive conditions, and so long as the State raises no objection it is immaterial to other parties whether it is a corporation *de facto* or *de jure*. *Ibid.*" McClinch *v.* Sturgis, 72 Me. 288, 295.

ing similar provisions as mandatory, and to be enforced by the courts. And we concur fully in what was said by Mr. Justice *Emmot* in speaking of this very provision, that "it will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative."[1] And with what was said by Mr. Justice *Lumpkin*, as to the duty of the courts: "It has been suggested that the prohibition in the seventeenth section of the first article of the Constitution, 'Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof,' is directory only to the legislative and executive or law-making departments of the government. But we do not so understand it. On the contrary, we consider it as much a matter of judicial cognizance as any other provision in that instrument. If the courts would refuse to execute a law suspending the writ of *habeas corpus* when the public safety did not require it, a law violatory of the freedom of the press or trial by jury, neither would they enforce a statute which contained matter different from what was expressed in the title thereof."[2]

Self-executing Provisions.

But although none of the provisions of a constitution are to be looked upon as immaterial or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general.[3] The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force: the legislature ought to obey it; but the right intended to be given is only assured when the

[1] People *v.* Lawrence, 36 Barb. 177, 43 Ala. 224; Nougues *v.* Douglass, 7 Cal. 186; [Mulnix *v.* Mutual Ben. L. Ins. Co., 65; State *v.* McCann, 4 Lea, 1. 23 Col. 85, 46 Pac. 1114, 33 L. R. A. 827.]

[2] Protho *v.* Orr, 12 Ga. 36. See also Opinions of Judges, 1 Me. 458; Indiana Central Railroad Co. *v.* Potts, 7 Ind. 681; People *v.* Starne, 35 Ill. 121; State *v.* Miller, 45 Mo. 495; Weaver *v.* Lapsley,

[3] There are also many which merely contemplate the exercise of powers conferred, when the legislature in its discretion shall deem it wise; like the provision that "suits may be brought against the State in such courts as may be by law provided." *Ex parte* State, 52 Ala. 231.

legislation is voluntarily enacted.[1] Illustrations may be found in constitutional provisions requiring the legislature to provide by law uniform and just rules for the assessment and collection of taxes; these must lie dormant until the legislation is had;[2] they do not displace the law previously in force, though the purpose may be manifest to do away with it by the legislation required.[3] So, however plainly the constitution may recognize the right to appropriate private property for the general benefit, the appropriation cannot be made until the law has pointed out the cases, and given the means by which compensation may be assured.[4] A different illustration is afforded by the new amendments to the federal Constitution. The fifteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." To this extent it is self-executing, and of its own force it abolishes all distinctions in suffrage based on the particulars enumerated. But when it further provides that "Congress shall have power to enforce this article by appropriate legislation," it indicates the possibility that the rule may not be found sufficiently comprehensive or particular to protect fully this right to equal suffrage, and that legislation may be found necessary for that purpose.[5] Other provisions are completely self-executing,

[1] School Board *v.* Patten, 62 Mo. 444. See Schulherr *v.* Bordeaux, 64 Miss. 59, 8 So. 201; [State *v.* Spokane, 24 Wash. 53, 63 Pac. 1116.]

[2] Williams *v.* Detroit, 2 Mich. 560; People *v.* Lake Co., 33 Cal. 487; Bowie *v.* Lott, 24 La. Ann. 214; Mississippi Mills *v.* Cook, 56 Miss. 40; Coatesville Gas Co. *v.* Chester Co., 97 Pa. St. 476.

[3] *Moore*, J., in Supervisors of Doddridge *v.* Stout, 9 W. Va. 703, 705; Cahoon *v.* Commonwealth, 20 Gratt. 733; Lehigh Iron Co. *v.* Lower Macungie, 81 Pa. St. 482; Erie Co. *v.* Erie, 113 Pa. St. 360, 6 Atl. 136.

[4] Lamb *v.* Lane, 4 Ohio St. 167. See School Board *v.* Patten, 62 Mo. 444; Myers *v.* English, 9 Cal. 341; Gillinwater *v.* Mississippi, &c. R. R. Co., 13 Ill. 1; Cairo, &c. R. R. Co. *v.* Trout, 32 Ark. 17. A provision that all printing shall be done by the lowest bidder under regulations supplied by law is not self-executing. Brown *v.* Seay, 86 Ala. 122, 5 So. 216.

[5] United States *v.* Reese, 92 U. S. 214. Any constitutional provision is self-executing to this extent, that everything done in violation of it is void. Brien *v.* Williamson, 8 Miss. 14; [Russell *v.* Ayer, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246.] A provision that "the legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State," was held to be of itself a prohibition of lotteries. Bass *v.* Nashvile, Meigs, 421; Yerger *v.* Rains, 4 Humph. 259. In State *v.* Woodward, 89 Ind. 110, it was held that a like provision took away any pre-existing authority to carry them on, but that it needed legislation to make them criminal. All negative or prohibitive provisions in a constitution are self-executing. Law *v.* People, 87 Ill. 385. [Where the constitution requires that all public institutions shall be located at the seat of government, the courts have power to determine whether a proposed insane asylum is a public institution, and, if it is found so to be, to enjoin its location elsewhere. State *v.* Metschan, 32 Oreg. 372, 46 Pac. 791, 41 L. R. A. 692, 53 Pac. 1071. Prohibition of donations

and manifestly contemplate no legislation whatever to give them full force and operation.[1]

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced;[2] and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.[3] Rights in such a case may lie dormant until statutes shall provide for them, though in so far as any distinct provision is made which by itself is capable of enforcement, it is law, (*a*) and all supplementary legislation must be in harmony with it.

by municipalities to private corporations is self-executing. Washingtonian Home *v.* Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798.]

[1] See People *v.* Bradley, 60 Ill. 390; People *v.* McRoberts, 62 Ill. 38; Mitchell *v.* Illinois, &c. Coal Co., 68 Ill. 286; Beecher *v.* Baldy, 7 Mich. 488; People *v.* Rumsey, 64 Ill. 41; State *v.* Holladay, 64 Mo. 526; Miller *v.* Max, 55 Ala. 323; Hills *v.* Chicago, 60 Ill. 86; Kine *v.* Defenbaugh, 64 Ill. 291; People *v.* Hoge, 55 Cal 612; Rowan *v.* Runnels, 5 How. 134; Friedman *v.* Mathes, 8 Heisk. 488; Johnson *v.* Parkersburgh, 16 W. Va. 402, 37 Am. Rep. 779; De Turk *v.* Com., 129 Pa. St. 151, 18 Atl. Rep. 757.

[2] Friedman *v.* Mathes, 8 Heisk. 488; State *v.* Weston, 4 Neb. 216; People *v.* Hoge, 55 Cal. 612; Ewing *v.* Orville M. Co., 56 Cal. 649; Hills *v.* Chicago, 64 Ill. 86. A provision imposing a duty upon an officer is self-executing. State *v.* Babcock, 19 Neb. 230, 27 N. W. 98. So, one providing for jury trial in all of a certain class of cases. Woodward Iron Co. *v.* Cabaniss, 87 Ala. 328, 6 So. 300. So one providing that compensation shall be given for property "damaged" in the course of a public improvement. Householder *v.* Kansas City, 83 Mo. 488. [So one providing that "knowledge, by any employee injured, of the defective or unsafe character or conditions of any machinery, ways or appliances, shall be no defence to an action for injury caused thereby." Illinois C. R. Co. *v.* Ihlenberg, 75 Fed. Rep. 873, 34 L. R. A. 393. That justices of peace in cities above 5,000 shall be paid by salaries instead of fees. Anderson *v.* Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137. That civil service appointments "shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations which so far as practicable shall be competitive." People *v.* Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399. That no person shall hold a State and a federal office at the same time. De Turk *v.* Com., 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853, 15 Am. St. 705. Authorization of tax by an election. Logan *v.* Ouachita Parish, 105 La. 499, 29 So. 975.]

[3] Wall, *Ex parte*, 48 Cal. 279; Attorney-General *v.* Common Council of Detroit, 29 Mich. 108. For exemption provisions, not self-executing, see Green *v.* Aker, 11 Ind. 223; Speidel *v.* Schlosser, 13 W. Va. 686.

(*a*) [The Constitution of the State of Kansas of 1859, art. 12, § 2, provides as follows: "*Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder*; and such other means as shall be provided by law; . . ." The portion italicized is self-executing, and enters as a part of the contractual liability of every person who volun-

The provisions exempting homesteads from forced sale for the satisfaction of debts furnish many illustrations of self-executing provisions, and also of those which are not self-executing. Where, as in California, the constitution declares that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families," the dependence of the provision on subsequent legislative action is manifest. But where, as in some other States, the constitution defines the extent, in acres or amount, that shall be deemed to constitute a homestead, and expressly exempts from any forced sale what is thus defined, a rule is prescribed which is capable of enforcement. Perhaps even in such cases, legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it. The provision of a constitution which defines a homestead and exempts it from forced sale is self-executing, at least to this extent, that, though it may admit of supplementary legislation in particulars where in itself it is not as complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would defeat or limit the homestead which is thus defined and secured.

We have thus indicated some of the rules which we think are to be observed in the construction of constitutions. It will be perceived that we have not thought it important to quote and to

tarily becomes a stockholder in any corporation (except railroad, charitable, and religious corporations, expressly excepted in later part of above section) created under the laws of Kansas. Whitman *v.* National Bank of Oxford, 176 U. S. 559, 20 Sup. Ct. Rep. 477, aff. 76 Fed. Rep. 697, and 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404. But see Woodworth *v.* Bowles, 61 Kan. 569, 60 Pac. 331, in which it is said that the use of the future tense "shall be secured" indicates that the constitutional clause above given is not self-executing. The "double liability clause" of the Minnesota Constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him" is held to create *ex propris vigore* an individual liability on the part of each stockholder. Willis *v.* Mabon, 48 Minn. 140, *sub nom.* Willis *v.* St. Paul Sanitation Co., 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. 626. So too no supplementary legislation is needed to make effective the provision of the Nebraska Constitution declaring that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its "liabilities accruing while he remains such stockholder." Farmers' Loan and T. Co. *v.* Funk, 49 Neb. 353, 68 N. W. 520. In this connection, see note appended to 44 L. ed. U. S. 589, and another on self-executing constitutional provisions in 16 L. R. A. 281.]

dwell upon those arbitrary rules to which so much attention is sometimes given, and which savor rather of the closet than of practical life. Our observation would lead us to the conclusion that they are more often resorted to as aids in ingenious attempts to make the constitution seem to say what it does not, than with a view to make that instrument express its real intent. All external aids, and especially all arbitrary rules, applied to instruments of this popular character, are of very uncertain value; and we do not regard it as out of place to repeat here what we have had occasion already to say in the course of this chapter, that they are to be made use of with hesitation, and only with much circumspection.[1]

[1] See People *v.* Cowles, 13 N. Y. 350, per *Johnson*, J.; Temple *v.* Mead, 4 Vt. 535, 540, per *Williams*, J.; People *v.* Fancher, 50 N. Y. 291. "In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to indulge ingenious speculations which may lead us wide from the true sense and spirit of the instrument, nor, on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employ; that they had a beneficial end and purpose in view; and that, more especially in any apparent restriction upon the mode of exercising the right of suffrage, there was some existing or anticipated evil which it was their purpose to avoid. If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as a convenient exercise of the fundamental privilege or right, — that of election, — such sense must be attributed. We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of the rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies, so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce. *Qui hæret in litera hæret in cortice* is a familiar maxim of the law. 'The letter killeth, but the spirit maketh alive, is the more forcible expression of Scripture." *Parker*, Ch. J., in Henshaw *v.* Foster, 9 Pick. 312, 316. There are some very pertinent and forcible remarks by Mr. Justice *Miller* on this general subject in Woodson *v.* Murdock, 22 Wall. 351, 381.

CHAPTER V.

OF THE POWERS WHICH THE LEGISLATIVE DEPARTMENT MAY EXERCISE.

In considering the powers which may be exercised by the legislative department of one of the American States, it is natural that we should recur to those possessed by the Parliament of Great Britain, after which, in a measure, the American legislatures have been modelled, and from which we derive our legislative usages and customs, or parliamentary common law, as well as the precedents by which the exercise of legislative power in this country has been governed. It is natural, also, that we should incline to measure the power of the legislative department in America by the power of the like department in Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the government if it wills so to do; while on the other hand the legislatures of the American States are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative.

"The power and jurisdiction of Parliament, says Sir *Edward Coke*,[1] is so transcendent and absolute, that it cannot be confined, either for persons or causes, within any bounds. And of this high court it may truly be said: 'Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.' It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or

[1] 4 Inst. 36.

temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great Lord Treasurer, Burleigh, 'that England could never be ruined but by a Parliament;' and as Sir *Matthew Hale* observes: 'This being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should anyway fall upon it, the subjects of this kingdom are left without all manner of remedy.'"[1]

The strong language in which the complete jurisdiction of Parliament is here described is certainly inapplicable to any authority in the American States, unless it be to the people of the States when met in their primary capacity for the formation

[1] Bl. Com. 160; Austin on Jurisprudence, Lec. 6; Fischel on English Constitution, b. 7, ch. 7. The British legislature is above the constitution, and moulds and modifies it at discretion as public exigencies and the needs of the time may require. But in the American system such a thing as unlimited power is unknown. Loan Association *v.* Topeka, 20 Wall. 655, 663; Campbell's Case, 2 Bland Ch. 209, 20 Am. Dec. 360; [Missouri Pac. R. Co. *v.* Nebraska, Bd. of Transp., 164 U. S. 403, 17 Sup. Ct. Rep. 130.] Every American legislature is the creature of the constitution, and strictly subordinate to it. It may participate in making changes as the constitution itself may provide, but not otherwise, and constitutional principles which the British Parliament will deal with as shall seem needful are inflexible laws in America until the people, under the forms provided for constitutional amendments, see fit to change them. Such radical changes, for example, as recently have been made in the Irish land laws, and such forced modification in contracts, would be impossible in the United States without a change in both Federal and State constitutions.

of their fundamental law; and even then there rest upon them the restraints of the Constitution of the United States, which bind them as absolutely as they do the governments which they create. It becomes important, therefore, to ascertain in what respect the State legislatures resemble the Parliament in the powers they exercise, and how far we may extend the comparison without losing sight of the fundamental ideas and principles of the American system.

The first and most notable difference is that to which we have already alluded, and which springs from the different theory on which the British Constitution rests. So long as the Parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American legislatures in regard to their ultimate powers cannot be traced very far. The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people;[1] and the legislatures which they have created are only to discharge a trust of which they have been made a depositary, but which has been placed in their hands with well-defined restrictions.

Upon this difference it is to be observed, that while Parliament, to any extent it may choose, may exercise judicial authority, one of the most noticeable features in American constitutional law is the care which has been taken to separate legislative, executive, and judicial functions. It has evidently been the intention of the people in every State that the exercise of each should rest with a separate department. The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.

There are two fundamental rules by which we may measure the extent of the legislative authority in the States:—

1. In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion.

[1] *Ante*, p. 114.

2. But the apportionment to this department of legislative power does not sanction the exercise of executive or judicial functions, except in those cases, warranted by parliamentary usage, where they are incidental, necessary, or proper to the exercise of legislative authority, or where the constitution itself, in specified cases, may expressly permit it.[1] Executive power is so intimately connected with legislative, that it is not easy to draw a line of separation; but the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to.[2] While, therefore, the American legislatures may exercise the legislative powers which the Parliament of Great Britain wields, except as restrictions are imposed, they are at the same time excluded from other functions which may be, and sometimes habitually are, exercised by the Parliament.

"The people in framing the constitution," says *Denio*, Ch. J., "committed to the legislature the whole lawmaking power of the State, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchial or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame

[1] See *post*, pp. 134–162, 531, 532. [And even where the power is legislative, if the Constitution has limited its exercise to certain times, the attempt to exercise it at other times is necessarily void. Harmison *v.* Ballot Com'rs of Jefferson Co., 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; Denney *v.* State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726. A statute attempting to confer upon a State board authority to adjudge priorities of claimants to the use of public waters is held not to be unconstitutional as conferring judicial power in Farm Investment Co. *v.* Carpenter, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. 918.]

[2] See *post*, p. 129, note.

of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature."[1]

"It has never been questioned, so far as I know," says *Redfield*, Ch. J., "that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question."[2]

"I entertain no doubt," says *Comstock*, J., "that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the constitution, distributed to other departments of the government. It is only the 'legislative power' which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice *Marshall* said: 'How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.'[3] That very eminent judge

[1] People *v.* Draper, 15 N. Y. 532, 543.

[2] Thorpe *v.* Rutland & Burlington Railroad Co., 27 Vt. 140, 142. See also Adams *v.* Howe, 14 Mass. 340, 14 Am. Dec. 216; People *v.* Rucker, 5 Col. 455; People *v.* Osborne, 7 Col. 605, 4 Pac. 1074; Leggett *v.* Hunter, 19 N. Y. 445, Cochran *v.* Van Surlay, 20 Wend. 365; People *v.* Morrell, 21 Wend. 563; Sears *v.* Cottrell, 5 Mich. 251; Beauchamp *v.* State, 6 Blackf. 299; Mason *v.* Wait, 5 Ill. 127; People *v.* Supervisors of Orange, 27 Barb. 575; Taylor *v.* Porter, 4 Hill, 140, per *Bronson*, J.; State *v.* Reid, 1 Ala. 612, 35 Am. Dec. 44; Andrews *v.* State, 3 Heisk. 165; Knoxville, &c. R. R. Co. *v.* Hicks, 9 Bax. 442; Lewis's Appeal, 67 Pa. St. 153; Walker *v.* Cincinnati, 21 Ohio St. 14; People *v.* Wright, 70 Ill. 388. That the rule as to the extent of legislative power is substantially the same in Canada, see Valin *v.* Langlois, 3 Can. Sup. Ct. 1; Mayor, &c. *v.* The Queen, 3 Can. Sup. Ct. 505.

[3] Fletcher *v.* Peck, 6 Cranch, 87, 136.

felt the difficulty; but the danger was less apparent then than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied, as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government."[1]

Other judicial opinions in great number might be cited in support of the same general doctrine; but as there will be occasion to refer to them elsewhere when the circumstances under which a statute may be declared unconstitutional are considered, we refrain from further references in this place.[2] Nor shall we enter upon a discussion of the question suggested by Chief Justice *Marshall*, as above quoted;[3] since, however interesting it

[1] Wynehamer *v.* People, 13 N. Y. 378, 391.

[2] See *post*, p. 237, and cases cited in notes.

[3] The power to distribute the judicial power, except so far as that has been done by the Constitution, rests with the legislature: Commonwealth *v.* Hipple, 69 Pa. St. 9; State *v.* New Brunswick, 42 N. J. 51; State *v.* Brown, 71 Mo. 454; Jackson *v.* Nimmo, 3 Lea, 608; see Burke *v.* St. Paul, M. &c. Ry. Co., 35 Minn. 172, 28 N. W. 190; St. Paul *v.* Umstetter, 37 Minn. 15, 33 N. W. 115; but when the Constitution has conferred it upon certain specified courts, this must be understood to embrace the whole judicial power, and the legislature cannot vest any portion of it elsewhere. Greenough *v.* Greenough, 11 Pa. St. 489; State *v.* Maynard, 14 Ill. 420; Gibson *v.* Emerson, 7 Ark. 172; Chandler *v.* Nash, 5 Mich. 409; Succession of Tanner, 22 La. Ann. 90; Gough *v.* Dorsey, 27 Wis. 119; Van Slyke *v.* Ins. Co., 39 Wis. 390, 20 Am. Rep. 50; Alexander *v.* Bennett, 60 N. Y. 204; People *v.* Young, 72 Ill. 411; *In re* Cleveland, 51 N. J. L. 311, 17 Atl. 772; Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611; Shoultz *v.* McPheeters, 79 Ind. 373. [And when the Constitution gives the court appellate jurisdiction only, except in certain specified cases, the legislature cannot enlarge the original jurisdiction of the court. Klein *v.* Valerius, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609. Nor can the legislature redistribute the judicial power. Brown *v.* Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. 438; Watson *v.* Blackstone, 98 Va. 618, 38 S. E. 939. Cannot confer the power of the court upon a single judge thereof. State *v.* Woodson, 161 Mo. 444, 61 S. W. 252. Congress may provide that the determination by the treasury department of whether an alien is entitled to land shall be final. Nishimura Ekiu *v.* U. S., 142 U. S. 651, 12 Sup. Ct. Rep. 336.] The legislature cannot select persons to assist courts in the performance of their duties and act as a commission of appeal. State *v.* Noble, 118 Ind. 350, 21 N. E. 244; *In re* Courts of Appeals, 9 Col. 623, 21 Pac. 471. Courts established by the legislature cannot exercise jurisdiction to the exclusion of that conferred by the Constitution on other courts. Montross *v.* State, 61 Miss. 429. See State *v.* Butt, 25 Fla. 258, 5 So. 597. But a general provision in the Constitution for the distribution of the judicial power, not referring to courts-martial, would not be held to forbid such courts by implication. People

may be as an abstract question, it is made practically unimportant by the careful separation of powers and duties between the

v. Daniell, 50 N. Y. 274. Nor would it be held to embrace administrative functions of a *quasi* judicial nature, such as the assessment of property for taxation. State *v.* Commissioners of Ormsby County, 7 Nev. 392, and cases cited. See Auditor of State *v.* Atchison, &c. R. R. Co., 6 Kan. 500, 7 Am. Rep. 575. But a court may determine whether a proposed local improvement shall be undertaken. Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545. [A judge of a superior court cannot be required or empowered to pass upon and modify or approve a plan for the location of a street railway. Norwalk Street R. Co.'s Appeal, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794; nor a court to direct how a telegraph or telephone company may use the streets of a city. Zanesville *v.* Zanesville T. & Tel. Co., 63 Ohio, 442, 59 N. E. 109 (Oct. 16, 1900); New York & N. J. Tel. Co. *v.* Mayor of Bound Brook, 66 N. J. L. 168, 48 Atl. 1022. County board cannot determine which rooms in court house shall be occupied by certain judges. Dahnke *v.* People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197. Court during its session has full control over that portion of court house necessary to the convenient transaction of its business. Vigo County *v.* Stout, 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398, and note; and may order repairs to court house, although it cannot order the erection of additions thereto or the rebuilding thereof. White County *v.* Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.] It is not competent to confer upon the courts the power to tax: Monday *v.* Railway, 43 N. J. 338; nor to impose on them administrative duties. Houseman *v.* Kent Circ. Judge, 58 Mich. 364, 25 N. W. 369. But after thirty-five years of exercise of such power under a statute, it is too late to object. Locke *v.* Speed, 62 Mich. 408, 28 N. W. 917. [The legislature cannot create a "court of visitation" for the control of corporations and endow it with executive, legislative, and judicial powers. State *v.* Johnson, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. Nor can it constitute a board of State auditors, which is a purely executive board, a court of review to pass upon the rightfulness of a conviction of crime, and in case conviction be found wrongful to allow damages for the imprisonment consequent thereupon. Allen *v.* Board of State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117, 80 Am. St. 573.] The power to appoint election commissioners not having been expressly conferred on any department, the legislature may impose the duty of appointment on the county court. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 506, 8 N. E. 788. Such appointments are upheld in *In re* Citizens of Cincinnati, 2 Flipp. 228; Russell *v.* Cooley, 69 Ga. 215. But in Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341, a contrary doctrine is laid down. A chief justice cannot be empowered to determine which claimant of an office shall hold it pending a contest. Such power, if executive, cannot be given a judge; if judicial, belongs to a court. *In re* Cleveland, 51 N. J. L. 311, 17 Atl. 772. The legislature cannot require a court to give its opinions in writing: Vaughn *v.* Harp, 49 Ark. 160, 4 S. W. 751; nor to write syllabi to its decisions. *In re* Griffiths, 118 Ind. 83, 20 N. E. 513. [It is held in Illinois that the legislature cannot interfere with the power of the courts to regulate the licensing of attorneys. *Re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519. See also *Re* Leach, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701. The legislature cannot define what shall be considered a contempt of court. Bradley *v.* State, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691, 78 Am. St. 157; Hale *v.* State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, and note, 60 Am. St. 691. On the other hand, a court has no power to enjoin a legislative body. State *v.* Superior Court of Milwaukee Co., 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819. But see Roberts *v.* Louisville, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844, and note. Nor has a court power to determine whether or not a senator of the State legislature whose term has not yet expired, has disqualified himself from further acting as senator. Covington *v.* Buffett, 90 Md. 569, 45 Atl. 204, 47 L. R. A. 622. Not to establish rules and regulations for the extension of telephone lines. Michigan Tel. Co. *v.* St. Joseph,

several departments of the government which has been made by each of the State constitutions. Had no such separation been made, the disposal of executive and judicial duties must have devolved upon the department vested with the general authority to make laws;[1] but assuming them to be apportioned already, we are only at liberty to liken the power of the State legislature to that of the Parliament, when it confines its action to an exercise of legislative functions; and such authority as is in its nature either executive or judicial is beyond its constitutional powers, with the few exceptions to which we have already referred.

It will be important therefore to consider those cases where legislation has been questioned as encroaching upon judicial authority; and to this end it may be useful, at the outset, to endeavor to define legislative and judicial power respectively, that we may the better be enabled to point out the proper line of distinction when questions arise in their practical application to actual cases.

The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed. "The laws of a State," observes Mr. Justice *Story*, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws."[2] "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary

121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520. Upon distinction between legislative and judicial powers, see *Re* Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319. The legislature has no power to make a conclusive finding of facts, and thereupon direct a municipality to pay a specified claim. Board of Edn. *v.* State, 51 Ohio St. 531, 38 N. E. 614, 25 L. R. A. 770, 46 Am. St. 588.

Where the legislature is authorized to regulate the method of procedure in "Courts below the Supreme Court" it has no power over procedure in the Supreme Court. Herndon *v.* Imperial Fire Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547. The legislature can direct a court to appoint certain commissioners and confer upon the commissioners so to be appointed the power to apportion among several cities and towns the cost of a system of sewerage without prescribing any further direction for such apportionment than that it shall be just and equitable. *Re* Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. The legislature cannot validate warrants issued under an unconstitutional law. Felix *v.* Wallace Co. Com'rs, 62 Kan. 832, 62 Pac. 667, 84 Am. St. 424. Congress may provide that inspectors of customs may finally determine whether immigrants are entitled to land. Nishimura Ekiu *v.* United States, 142 U. S. 651, 12 Sup. Ct. Rep. 336.]

[1] Calder *v.* Bull, 2 Root, 350, and 3 Dall. 386; Ross *v.* Whitman, 6 Cal. 361; Smith *v.* Judge, 17 Cal. 547; per *Patterson*, J., in Cooper *v.* Telfair, 4 Dall. 19; Martin *v.* Hunter's Lessee, 1 Wheat. 304.

[2] Swift *v.* Tyson, 16 Pet. 18.

construes, the law."[1] And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions.[2] And in another case it is said: "The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."[3] "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."[4]

On the other hand, to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.[5] "No particular definition of judicial power," says

[1] Per *Marshall*, Ch. J., in Wayman *v.* Southard, 10 Wheat. 46; per *Gibson*, Ch. J., in Greenough *v.* Greenough, 11 Pa. St. 494. See Governor *v.* Porter, 7 Humph. 165; State *v.* Gleason, 12 Fla. 190; Hawkins *v.* Governor, 1 Ark. 570; Westinghausen *v.* People, 44 Mich. 265, 6 N. W. 641.

[2] Bates *v.* Kimball, 2 Chip. 77. A prospective determination by a court of the validity of school rules, compiled under legislative authority, is not an exercise of judicial power. *In re* School Law Manual, 63 N. H. 574, 4 Atl. 878. Power to supersede an ordinance upon petition of taxpayers as contrary to law cannot be conferred upon a court: Shephard *v.* Wheeling, 30 W. Va. 479, 4 S. E. 635; nor to fix the salary of a reporter in advance: Smith *v.* Strother, 68 Cal. 194, 8 Pac. 852; nor to make upon its own whim a party a competent witness who otherwise would not be. Tillman *v.* Cocke, 9 Bax. 429.

[3] Newland *v.* Marsh, 19 Ill. 383.

[4] Ervine's Appeal, 16 Pa. St. 256, 266. See also Greenough *v.* Greenough, 11 Pa. St. 489; Dechastellux *v.* Fairchild, 15 Pa. St. 18; Trustees, &c. *v.* Bailey, 10 Fla. 238.

[5] Cincinnati, &c. Railroad Co. *v.* Commissioners of Clinton Co., 1 Ohio St. 77. See also King *v.* Dedham Bank, 15 Mass. 447; Gordon *v.* Ingraham, 1 Grant's Cases, 152; People *v.* Supervisors of New York, 16 N. Y. 424; Beebe *v.* State, 6 Ind. 501; Greenough *v.* Greenough, 11 Pa. St. 489; Taylor *v.* Place, 4 R. I. 324. [It is also a part of the function of the judiciary to determine whether a proposed constitutional amendment has been in fact adopted under the forms prescribed for such case by the constitution, and the legislative declaration that it has been so adopted is null. State *v.* Powell, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652. But see Worman *v.* Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716, to effect that governor's proclamation of adoption is conclusive. It is also a proper function of a court to require proper authorities to prescribe rules and regulations for extension of telephone lines, and to pass upon the validity of such rules when properly brought in question. Mich. Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520.]

Woodbury, J., "is given in the constitution [of New Hampshire], and, considering the general nature of the instrument, none was to be expected. Critical statements of the meanings in which all important words were employed would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But 'powers judicial,' 'judiciary powers,' and 'judicatories' are all phrases used in the constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, — to compare the claims of parties with the law of the land before established, — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as 'a rule of civil conduct;'[1] because no rule

[1] 1 Bl. Com. 44. The distinction between legislative and judicial power lies between a rule and a sentence. Shrader, *Ex parte*, 33 Cal. 279. See Shumway *v.* Bennett, 29 Mich. 451; Supervisors of Election, 114 Mass 247. The legislature cannot empower election boards to decide whether one by duelling has forfeited his right to vote or hold office. Commonwealth *v.* Jones, 10 Bush, 725; Burkett *v.* McCurty, 10 Bush, 758. But a board may be empowered to recount votes and make a statement of results. If they have no power to investigate frauds, they do not exercise judicial power. Andrews *v.* Carney, 74 Mich. 278, 41 N. W. 923. Under a constitutional provision allowing the legislature to provide for removal of an election officer for such cause as it deems proper, the power to determine whether the cause exists need not be vested in the courts. People *v.* Stuart, 74 Mich. 411, 41 N. W. 1091. See Brown *v.* Duffus, 66 Iowa, 193, 23 N. W. 396. It is not an infringement of judicial power to enact that a jury shall assess the punishment in a murder case. State *v.* Hockett, 70 Iowa, 442, 30 N. W. 742; nor that persons sentenced to jail may be employed on roads by county commissioners, under regulations to be made by them. Holland *v.* State, 23 Fla. 123, 1 So. 521.

But it is an invasion of judicial power to provide that in case of doubt a statute shall be construed so as to save a lien given by it. Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513. Power to declare what acts shall be a misdemeanor cannot be conferred on commissioners of vine culture. *Ex parte* Cox, 63 Cal. 21. A county clerk cannot fix the amount of bail. Gregory *v.* State, 94 Ind. 384.

f conduct can with consistency operate upon what occurred before the rule itself was promulgated.

"It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State. Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they forbear to interfere with past transactions and vested rights." [1]

With these definitions and explanations, we shall now proceed to consider some of the cases in which the courts have attempted to draw the line of distinction between the proper functions of the legislative and judicial departments, in cases where it has been claimed that the legislature have exceeded their power by invading the domain of judicial authority.

Declaratory Statutes.

Legislation is either introductory of new rules, or it is declaratory of existing rules. "A declaratory statute is one which is passed in order to put an end to a doubt as to what is the com-

[Failure of a railroad commissioner to require a railway company to station a flagman at a given crossing cannot be made conclusive proof that the omission to station such flagman is not negligence. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679. An administrative board may be empowered to adjudicate upon priorities of water-rights and to make independent investigations in regard thereto and to declare its findings, provided parties interested in such adjudications are allowed by the statute a reasonable opportunity to appeal therefrom to the regular courts. Farm Investment Company *v.* Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747. A ministerial officer may be empowered to investigate land titles, and his findings may be made *prima facie* evidence. People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am St. 175; for other cases on Torrens Land Registration Acts, see People *v.* Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105, and State *v.* Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. 756; also Tyler *v.* Court of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

The courts have jurisdiction to pass upon the claims of rival bodies to be the State senate, and to determine which, if either, is the constitutional senate. Attorney-General *v.* Rogers, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354.]

[1] Merrill *v.* Sherburne, 1 N. H. 199, 203. See Jones *v.* Perry, 10 Yerg. 69; Taylor *v.* Porter, 4 Hill, 140; Ogden *v.* Blackledge, 2 Cranch, 272; Dash *v.* Van Kleek, 7 Johns. 477; Wilkinson *v.* Leland, 2 Pet. 627; Leland *v.* Wilkinson, 10 Pet. 294; State *v.* Hopper, 71 Mo. 425. [A statute creating a commission to review a tax assessment to be appointed by the circuit judge of the county is not invalid as vesting judicial power in the commission in the sense in which that term is used in the constitution of Wisconsin. The term as there used has reference alone to judicial power as exercised in the administration of the law in actions and proceedings in courts of law and equity. State *ex rel.* Ellis *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.]

mon law, or the meaning of another statute, and which declares what it is and ever has been."[1] Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was before it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts. Thus Mr. Fox's Libel Act declared that, by the law of England, juries were judges of the law in prosecutions for libel; it did not purport to introduce a new rule, but to declare a rule already and always in force. Yet previous to the passage of this act the courts had repeatedly held that the jury in these cases were only to pass upon the fact of publication and the truth of the innuendoes; and whether the publication was libellous or not was a question of law which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. So in the State of New York, after the courts had held that insurance companies were taxable to a certain extent under an existing statute, the legislature passed another act, declaring that such companies were only taxable at a certain other rate; and it was thereby declared that such was the intention and true construction of the original statute.[2] In these cases it will be perceived that the courts, in the due exercise of their authority as interpreters of the laws, have declared what the rule established by the common law or by statute is, and that the legislature has then interposed, put its own construction upon the existing law, and in effect declared the judicial interpretation to be unfounded and unwarrantable. The courts in these cases have clearly kept within the proper limits of their jurisdiction, and if they have erred, the error has been one of judgment only, and has not extended to usurpation of power. Was the legislature also within the limits of its authority when it passed the declaratory statute?

The decision of this question must depend perhaps upon the purpose which was in the mind of the legislature in passing the declaratory statute; whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is

[1] Bouv. Law Dict. "Statute;" Austin on Jurisprudence, Lect. 37.

[2] People v. Supervisors of New York, 16 N. Y. 424.

no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future.[1] But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.[2]

[1] Union Iron Co. *v.* Pierce, 4 Biss. 327.

[2] In several different cases the courts of Pennsylvania had decided that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the name was written by his express direction, was not the signature required by the statute, and the legislature, to use the language of Chief Justice *Gibson*, "declared, in order to overrule it, that every last will and testament heretofore made, or hereafter to be made, except such as may have been fully adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid. How this mandate to the courts to establish a particular interpretation of a particular statute can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, and to enact that white meant black, or that black meant white, would in the same degree be an exercise of arbitrary and unconstitutional power." Greenough *v.* Greenough, 11 Pa. St. 489, 494. The act in this case was held void so far as its operation was retrospective, but valid as to future cases. And see James *v.* Rowland, 42 Md. 462; Reiser *v.* Tell Association, 39 Pa. St. 137. The constitution of Georgia entitled the head of a family to enter a homestead, and the courts decided that a single person, having no others dependent upon him, could not be regarded the head of a family, though keeping house with servants. Afterwards, the legislature passed an act, declaring that any single person living habitually as housekeeper to himself should be regarded as the head of a family. Held void as an exercise of judicial power. Calhoun *v.* McLendon, 42 Ga. 405. The fact that the courts had previously given a construction to the law may show more clearly a purpose in the legislature to exercise judicial authority, but it would not be essential to that end. As is well said in Haley *v.* Philadelphia, 68 Pa. St. 45, 47: "It would be monstrous to maintain that where the words and intention of an act were so plain that no court had ever been appealed to for the purpose of declaring their meaning, it was therefore in the power of the legislature, by a retrospective law, to put a construction upon them contrary to the obvious letter and spirit. Reiser *v.* William Tell Fund Association, 39 Pa. St. 137, is an authority in point against such a doctrine. An expository act of assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the Constitution, which declares that no man can be deprived of his property unless 'by the judgment of his peers or the law of the land.'" See 8 Am. Rep. 155, 156. And on the force and effect of declaratory laws in general, see Salters *v.* Tobias, 3 Paige, 338; Postmaster-General *v.* Early, 12 Wheat. 136; Union Iron Co. *v.* Pierce, 4 Biss. 327; Planters' Bank *v.* Black, 19 Miss. 43; Gough *v.* Pratt, 9 Md. 526; McNichol *v.* U. S., &c. Agency, 74 Mo. 457; Titusville Iron Works *v.* Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917; Steb-

As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. "To declare what the law *is, or has been* is a judicial power; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial."[1] If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment.[2] But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted.

If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials,[3] ordering the discharge of offend-

bins *v.* Com'rs Pueblo Co., 2 McCrary, 196. The words "former jeopardy" had a settled meaning when the Constitution was adopted which by a declaratory statute the legislature cannot change. Powell *v.* State, 17 Tex. App. 345.

[1] Dash *v.* Van Kleek, 7 Johns. 477, 498, per *Thompson*, J.; Ogden *v.* Blackledge, 2 Cranch, 272; Lambertson *v.* Hogan, 2 Pa. St. 22; Seibert *v.* Linton, 5 W. Va. 57; Arnold *v.* Kelley, 5 W. Va. 446; McDaniel *v.* Correll, 19 Ill. 226. The legislature cannot dictate what instructions shall be given by the court to a jury, except by general law. State *v.* Hopper, 71 Mo. 425. A legislative act directing the levy and collection of a tax which has already been declared illegal by the judiciary, is void, as an attempted reversal of judicial action. Mayor, &c. *v.* Horn, 26 Md. 191; Butler *v.* Supervisors of Saginaw, 26 Mich. 22. See Forster *v.* Forster, 129 Mass. 559. This doctrine, however, would not prevent the correction of mere errors in taxation by legislation of a retrospective character. See *post*, p. 530.

[2] Governor *v.* Porter, 5 Humph. 165; People *v.* Supervisors, &c., 16 N. Y. 424; Reiser *v.* Tell Association, 39 Pa. St. 137; O'Conner *v.* Warner, 4 W. & S. 223; Lambertson *v.* Hogan, 2 Pa. St. 22. An act directing that a certain deposition which had previously been taken should be read in evidence on the trial of a certain cause, notwithstanding informalities, is void. Dupy *v.* Wickwire, 1 D. Chip. 237, 6 Am. Dec. 720.

[3] Lewis *v.* Webb, 3 Me. 326; Durham *v.* Lewiston, 4 Me. 140; Atkinson *v.* Dunlap, 50 Me. 111; Bates *v.* Kimball, 2 Chip. 77; Staniford *v.* Barry, 1 Aik. 314; Merrill *v.* Sherburne, 1 N. H. 199; Opinion of Judges in Matter of Dorr, 3 R. I. 299; Taylor *v.* Place, 4 R. I. 324; De Chastellux *v.* Fairchild, 15 Pa. St. 18; Young *v.* State Bank, 4 Ind. 301; Beebe *v.* State, 6 Ind. 501; Lanier *v.* Gallatas, 13 La. Ann.

ers,[1] or directing what particular steps shall be taken in the progress of a judicial inquiry.[2] And as a court must act as an

175; Mayor, &c. *v.* Horn, 26 Md. 194; Weaver *v.* Lapsley, 43 Ala. 224; Sanders *v.* Cabaniss, 43 Ala. 173; Moser *v.* White, 29 Mich. 59; Sydnor *v.* Palmer, 32 Wis. 406; People *v.* Frisbie, 26 Cal. 135; Lawson *v.* Jeffries, 47 Miss. 686, 12 Am. Rep. 342; Ratcliffe *v.* Anderson, 31 Gratt. 105, 31 Am. Rep. 716. And see *post*, pp. 557–561, and notes. It is not competent by legislation to authorize the court of final resort to reopen and rehear cases previously decided. Dorsey *v.* Dorsey, 37 Md. 64, 11 Am. Rep. 528. The legislature may control remedies, &c., but, when the matter has proceeded to judgment, it has passed beyond legislative control. Oliver *v.* McClure, 28 Ark. 555; Griffin's Executor *v.* Cunningham, 20 Gratt. 31; Teel *v.* Yancey, 23 Gratt. 690; Hooker *v.* Hooker, 18 Miss. 599. After an appeal bond was signed by the attorney, the court held bonds so signed bad. A statute validating all prior bonds so signed is void. Andrews *v.* Beane, 15 R. I. 451, 8 Atl. 540.

[1] In State *v.* Fleming, 7 Humph. 152, a legislative resolve that "no fine, forfeiture, or imprisonment should be imposed or recovered under the act of 1837 [then in force], and that all causes pending in any of the courts for such offence should be dismissed," was held void as an invasion of judicial authority. The legislature cannot declare a forfeiture of a right to act as curators of a college. State *v.* Adams, 44 Mo. 570. Nor can it authorize the governor or any other State officer to pass upon the validity of State grants and correct errors therein; this being judicial. Hilliard *v.* Connelly, 7 Ga. 172. Nor, where a corporate charter provides that it shall not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of its provisions," can there be a repeal before a judicial inquiry into the violation. Flint, &c. Plank Road Co. *v.* Woodhull, 25 Mich. 99. A legislative act cannot turn divorce *nisi* into absolute divorces, of its own force. Sparhawk *v.* Sparhawk, 116 Mass. 315. But to take away by statute a statutory right of appeal is not an exercise of judicial authority. *Ex parte* McCardle, 7 Wall. 506. And it has been held that a statute allowing an appeal in a particular case was valid. Prout *v.* Berry, 2 Gill, 147; State *v.* Northern Central R. R. Co., 18 Md. 193. A retroactive statute, giving the right of appeal in cases in which it had previously been lost by lapse of time, was sustained in Page *v.* Mathews's Adm'r, 40 Ala. 547. But in Carleton *v.* Goodwin's Ex'r, 41 Ala. 153, an act the effect of which would have been to revive discontinued appeals, was held void as an exercise of judicial authority. See cases cited in next note.

[1] Opinions of Judges on the Dorr Case, 3 R. I. 299; State *v.* Hopper, 71 Mo. 425. In the case of Picquet, Appellant, 5 Pick. 64, the judge of probate had ordered letters of administration to issue to an applicant therefor, on his giving bond in the penal sum of $50,000, with sureties within the Commonwealth, for the faithful performance of his duties. He was unable to give the bond, and applied to the legislature for relief. Thereupon a resolve was passed "empowering" the judge of probate to grant the letters of administration, provided the petitioner should give bond with his brother, a resident of Paris, France, as surety, and "that such bond should be in lieu of any and all bond or bonds by any law or statute in this Commonwealth now in force required," &c. The judge of probate refused to grant the letters on the terms specified in this resolve, and the Supreme Court, while holding that it was not compulsory upon him, also declared their opinion that, if it were so, it would be inoperative and void. In Bradford *v.* Brooks, 2 Aik. 284, it was decided that the legislature had no power to revive a commission for proving claims against an estate after it had once expired. See also Bagg's Appeal, 43 Pa. St. 512; Trustees *v.* Bailey, 10 Fla. 238. In Hill *v.* Sunderland, 3 Vt. 507, and Burch *v.* Newberry, 10 N. Y. 374, it was held that the legislature had no power to grant to parties a right to appeal after it was gone under the general law. In Burt *v.* Williams, 24 Ark. 91, it was held that the granting of continuances of pending cases was the exercise of judicial authority, and a legislative act assuming to do this was void. And where, by the general law,

organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members.[1]

Nor is it in the power of the legislature to bind individuals by a recital of facts in a statute, to be used as evidence against the parties interested. A recital of facts in the preamble of a statute may perhaps be evidence, where it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country;[2] but where the facts concern the rights of individuals, the legislature cannot adjudicate upon them. As private statutes are generally obtained on the application of some party interested, and are put in form to suit his wishes, perhaps their exclusion from being made evidence against any other party would result from other general principles; but it is clear that the recital could have no force, except as a judicial finding of facts; and that such finding is not within the legislative province.[3]

We come now to a class of cases in regard to which there has been serious contrariety of opinion; springing from the fact, perhaps, that the purpose sought to be accomplished by the statutes is generally effected by judicial proceedings, so that if the statutes are not a direct invasion of judicial authority, they

the courts have no authority to grant a divorce for a given cause, the legislature cannot confer the authority in a particular case. Simmonds *v.* Simmonds, 103 Mass. 572, 4 Am. Rep. 576. And see *post*, pp. 153, note, 559, and note.

[1] In Clapp *v.* Ely, 27 N. J. 622, it was held that a statute which provided that no judgment of the Supreme Court should be reversed by the Court of Errors and Appeals, unless a majority of those members of the court who were competent to sit on the hearing and decision should concur in the reversal, was unconstitutional. Its effect would be, if the court were not full, to make the opinion of the minority in favor of affirmance control that of the majority in favor of reversal, unless the latter were a majority of the whole court. Such a provision in the constitution might be proper and unexceptionable; but if the constitution has created a court of appeals, without any restriction of this character, the ruling of this case is that the legislature cannot impose it. The court was nearly equally divided, standing seven to six. But the decision of a majority of a court is binding as though unanimous. Feige *v.* Mich. Cent. R. R. Co., 62 Mich. 1, 28 N. W. 685. A statute authorizing an unofficial person to sit in the place of a judge who is disqualified was held void in Van Slyke *v.* Insurance Co., 39 Wis. 390, 20 Am. Rep. 50. That judicial power cannot be delegated, see Cohen *v.* Hoff, 3 Brev. 500. Therefore a commission of appeals created by statute cannot decide causes in place of the constitutional Supreme Court. State *v.* Noble, 118 Ind. 350, 21 N. E. 244.

[2] Rex *v.* Sutton, 4 M. & S. 532.

[3] Elmendorf *v.* Carmichael, 3 Litt. 475, 14 Am. Dec. 86; Parmelee *v.* Thompson, 7 Hill, 77; Lothrop *v.* Steadman, 42 Conn. 583, 592.

at least cover ground which the courts usually occupy under general laws conferring the jurisdiction upon them. We refer to

Statutes empowering Guardians and other Trustees to sell Lands.

Whenever it becomes necessary or proper to sell the estate of a decedent for the payment of debts, or of a lunatic or other incompetent person for the same purpose, or for future support, or of a minor to provide the means for his education and nurture, or for the most profitable investment of the proceeds, or of tenants in common to effectuate a partition between them, it will probably be found in every State that some court is vested with jurisdiction to make the necessary order, if the facts after a hearing of the parties in interest seem to render it important. The case is eminently one for judicial investigation. There are facts to be inquired into, in regard to which it is always possible that disputes may arise; the party in interest is often incompetent to act on his own behalf, and his interest is carefully to be inquired into and guarded; and as the proceeding will usually be *ex parte*, there is more than the ordinary opportunity for fraud upon the party interested, as well as upon the authority which grants permission. It is highly and peculiarly proper, therefore, that by general laws judicial inquiry should be provided for these cases, and that such laws should require notice to all proper parties, and afford an opportunity for the presentation of any facts which might bear upon the propriety of granting the applications.

But it will sometimes be found that the general laws provided for these cases are not applicable to some which arise; or, if applicable, that they do not accomplish fully all that in some cases seems desirable; and in these cases, and perhaps also in some others without similar excuse, it has not been unusual for legislative authority to intervene, and by special statute to grant the permission which, under the general law, would be granted by the courts. The power to pass such statutes has often been disputed, and it may be well to see upon what basis of authority, as well as of reason, it rests.

If in fact the inquiry which precedes the grant of authority is in its nature judicial, it would seem clear that such statutes must be ineffectual and void. But if judicial inquiry is not essential, and the legislature may confer the power of sale in such a case upon an *ex parte* presentation of evidence, or upon the representations of the parties without any proof whatever,

then we must consider the general laws to be passed, not because the cases fall necessarily within the province of judicial action, but because the courts can more conveniently consider, and more properly, safely, and inexpensively pass upon such cases, than the legislative body to which the power primarily belongs.[1]

The rule upon this subject which appears to be deducible from the authorities, is this: If the party standing in position of trustee applies for permission to convert by a sale the real property into personal, in order to effectuate the purposes of the trust, and to accomplish objects in the interest of the *cestui que trust* not otherwise attainable, there is nothing in the granting of permission which is in its nature judicial. To grant permission is merely to enlarge the sphere of the fiduciary authority, the better to accomplish the purpose for which the trusteeship exists; and while it would be entirely proper to make the questions which might arise assume a judicial form, by referring them to some proper court for consideration and decision, there is no usurpation of power if the legislature shall, by direct action, grant the permission.

In the case of Rice *v.* Parkman,[2] certain minors having become entitled to real estate by descent from their mother, the legislature passed a special statute empowering their father as guardian for them, and, after giving bond to the judge of probate, to sell and convey the lands, and put the proceeds at interest on good security for the benefit of the minor owners. A sale was made accordingly; but the children, after coming of age, brought suit against the party claiming under the sale, insisting that the special statute was void. There was in force at the time this special statute was passed, a general statute, under which license might have been granted by the courts; but it was held that this general law did not deprive the legislature of that full and complete control over such cases which it would have possessed had no such statute existed. "If," say the court, "the power by which the resolve authorizing the sale in this case was passed were of a judicial nature, it would be very clear that it could

[1] There are constitutional provisions in Kentucky, Virginia, Missouri, Oregon, Nevada, Indiana, Maryland, New Jersey, Arkansas, Florida, Illinois, Wisconsin, Texas, West Virginia, Michigan, and Colorado, forbidding special laws licensing the sale of the lands of minors and other persons under legal disability. Perhaps the general provision in some other constitutions, forbidding special laws in cases where a general law could be made applicable, might also be held to exclude such special authorization.

[2] 16 Mass. 326. See the criticism of this case in Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430. That case is out of harmony with the current of authority on the subject here considered. In California it has been held that where a minor has a guardian, it is not competent for the legislature to empower another to sell his lands. Lincoln *v.* Alexander, 52 Cal. 482, 28 Am. Rep. 639.

not have been exercised by the legislature without violating an express provision of the constitution. But it does not seem to us to be of this description of power; for it was not a case of controversy between party and party, nor is there any decree or judgment affecting the title to property. The only object of the authority granted by the legislature was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this State, since the adoption of the constitution, and by the legislatures of the province and of the colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects time out of mind. Indeed it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere of converting lands into money. For otherwise many minors might suffer, although having property; it not being in a condition to yield an income. This power must rest in the legislature in this Commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

"It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular application brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of law, for its due exercise, but still partaking in no degree of the characteristics of judicial power. It is doubtless included in the general authority granted by the people to the legislature by the constitution. For full power and authority is given from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions (so as the same be not repugnant or contrary to the constitution), as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects thereof. No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those

who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed.

"If this be not true, then the general laws under which so many estates of minors, persons *non compos mentis*, and others, have been sold and converted into money, are unauthorized by the constitution, and void. For the courts derive their authority from the legislature, and, it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government — that of providing for the welfare of the citizens — would be lost. But the argument which has most weight on the part of the defendants is, that the legislature has exercised its power over this subject in the only constitutional way, by establishing a general provision; and that, having done this, their authority has ceased, they having no right to interfere in particular cases. And if the question were one of expediency only, we should perhaps be convinced by the argument, that it would be better for all such applications to be made to the courts empowered to sustain them. But as a question of right, we think the argument fails. The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do; and especially when that constituent is the legislature, and is not prohibited by the constitution from exercising the authority. Indeed, the whole authority might be revoked, and the legislature resume the burden of the business to itself, if in its wisdom it should determine that the common welfare required it. It is not legislation which must be by general acts and rules, but the use of a parental or tutorial power, for purposes of kindness, without interfering with or prejudice to the rights of any but those who apply for specific relief. The title of strangers is not in any degree affected by such an interposition."[1]

[1] In Shumway v. Bennett, 29 Mich. 451, the distinction between judicial and administrative power is pointed out, and it is held that the question of incorporating territory as a village cannot be made a judicial question. A like decision is

A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly," says the Chancellor, "within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. But even that power cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself, as in the case of a provision out of the estate of an infant or lunatic for the support of an indigent parent or other near relative.[1]

made in State *v.* Simons, 32 Minn. 540, 21 N. W. 750, and by Chancellor *Cooper*, in *Ex parte* Burns, 1 Tenn. Ch. R. 83, though it is said in that case that the organization of corporations which are created by legislative authority may be referred to the courts. See, on the same subject, State *v.* Armstrong, 3 Sneed, 634; Galesburg *v.* Hawkinson, 75 Ill. 152. Compare Burlington *v.* Leebrick, 43 Iowa, 252, and Wahoo *v.* Dickinson, 23 Neb. 426, 36 N. W. 813, where it is held the question of extending, after hearing, the limits of a municipality may be decided by a court. That the courts cannot be clothed with legislative authority, see State *v.* Young, 29 Minn. 474, 9 N. W. 737. Compare *Ex parte* Mato, 19 Tex. App. 112. For the distinction between political and judicial power, see further, Dickey *v.* Reed, 78 Ill. 261; Commonwealth *v.* Jones, 10 Bush, 725. And see *post*, pp. 149, 150, and notes. In Hegarty's Appeal, 75 Pa. St. 503, the power of a legislature to authorize a trustee to sell the lands of parties who were *sui juris*, and might act on their own behalf, was denied, and the case was distinguished from Norris *v.* Clymer, 2 Pa. St. 277, and others which had followed it. The foreclosure of a mortgage on private property cannot be accomplished by legislative enactment. Ashuelot R. R. Co. *v.* Elliott, 58 N. H. 451.

Power to try city officers by impeachment may rest in a city council, the judgment extending only to removal and disqualification to hold any corporate office. State *v.* Judges, 35 La. Ann. 1075.

[1] Cochran *v.* Van Surlay, 20 Wend. 365, 373. See the same case in the Supreme Court, *sub nom.* Clarke *v.* Van Surlay, 15 Wend. 436. See also Suydam *v.* Williamson, 24 How. 427; Williamson *v.* Suydam, 6 Wall. 723; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Florentine *v.* Barton, 2 Wall. 210. In Hoyt *v.* Sprague, 103 U. S. 613, it was held competent, by special statute, to provide for the investment of the estate of minors in a manufacturing corporation, and that, after the investment was accordingly made, no account could be demanded on their behalf, except of the stock and its dividends. But the legislature cannot empower the guardian of infants to mortgage their lands to pay demands which are not obligations against them or their estate. Burke *v.* Mechanics' Savings Bank, 12 R. I. 513. In Brevoort *v.* Grace, 53 N. Y. 245, the power of the legislature to authorize the sale of lands of infants by special statute was held to extend to the future contingent interests of those not in being, but not to the interests of non-consenting adults, competent to act on their own behalf. In Opinions of the Judges, 4 N. H. 565, 572, the validity of such a special statute, under the constitution of New Hampshire, was denied. The judges say: "The objection to the exercise of such a power by the legislature is, that it is in its nature both legislative and judicial. It is the province of the legislature to prescribe the rule of law, but to apply it to particular cases is the business of the courts of law. And the thirty-eighth article in the Bill of Rights declares that

The same ruling has often been made in analogous cases. In Ohio, a special act of the legislature authorizing commissioners to make sale of lands held in fee tail, by devisees under a will, in order to cut off the entailment and effect a partition between them, — the statute being applied for by the mother of the devisees and the executor of the will, and on behalf of the devisees, — was held not obnoxious to constitutional objection, and to be sustainable on immemorial legislative usage, and on the same ground which would support general laws for the same purpose.[1] In a case in the Supreme Court of the United States,

'in the government of this State the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.' The exercise of such a power by the legislature can never be necessary. By the existing laws, judges of probate have very extensive jurisdiction to license the sale of the real estate of minors by their guardians. If the jurisdiction of the judges of probate be not sufficiently extensive to reach all proper cases, it may be a good reason why that jurisdiction should be extended, but can hardly be deemed a sufficient reason for the particular interposition of the legislature in an individual case. If there be a defect in the laws, they should be amended. Under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that an act of the legislature to authorize the sale of the land of a particular minor by his guardian cannot be easily reconciled with the spirit of the article in the Bill of Rights which we have just cited. It is true that the grant of such a license by the legislature to the guardian is intended as a privilege and a benefit to the ward. But by the law of the land no minor is capable of assenting to a sale of his real estate in such a manner as to bind himself. And no guardian is permitted by the same law to determine when the estate of his ward ought and when it ought not to be sold. In the contemplation of the law, the one has not sufficient discretion to judge of the propriety and expediency of a sale of his estate, and the other is not to be intrusted with the power of judging. Such being the general law of the land, it is presumed that the legislature would be unwilling to rest the justification of an act authorizing the sale of a minor's estate upon any assent which the guardian or the minor could give in the proceeding. The question then is, as it seems to us: Can a ward be deprived of his inheritance without his consent by an act of the legislature which is intended to apply to no other individual? The fifteenth article in the Bill of Rights declares that no subject shall be deprived of his property but by the judgment of his peers or the law of the land. Can an act of the legislature, intended to authorize one man to sell the land of another without his consent be 'the law of the land' within the meaning of the constitution? Can it be the law of the land in a free country? If the question proposed to us can be resolved into these questions, as it appears to us it may, we feel entirely confident that the representatives of the people of this State will agree with us in the opinion we feel ourselves bound to express on the question submitted to us, that the legislature cannot authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards." See also Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430; Lincoln *v.* Alexander, 52 Cal. 482, 28 Am. Rep. 639.

[1] Carroll *v.* Lessee of Olmsted, 16 Ohio, 251.

where an executrix who had proved a will in New Hampshire made sale of lands without authority in Rhode Island, for the purpose of satisfying debts against the estate, a subsequent act of the Rhode Island legislature, confirming the sale, was held not an encroachment upon the judicial power. The land, it was said, descended to the heirs subject to a lien for the payment of debts, and there is nothing in the nature of the act of authorizing a sale to satisfy the lien, which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate rather than by the legislature itself. It is remedial in its nature, to give effect to existing rights.[1] The case showed the actual existence of debts, and indeed a judicial license for the sale of lands to satisfy them had been granted in New Hampshire before the sale was made. The decision was afterwards followed in a carefully considered case in the same court.[2] In each of these cases it is assumed that the legislature does not by the special statute determine the existence or amount of the debts, and disputes concerning them would be determinable in the usual modes. Many other decisions have been made to the same effect.[3]

This species of legislation may perhaps be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal, on the application

[1] Wilkinson *v.* Leland, 2 Pet. 627, 660. Compare Brevoort *v.* Grace, 53 N. Y. 245.

[2] Watkins *v.* Holman's Lessee, 16 Pet. 25, 60. See also Florentine *v.* Barton, 2 Wall. 210; Doe *v.* Douglass, 8 Blackf. 10.

[3] Thurston *v.* Thurston, 6 R. I. 296, 302; Williamson *v.* Williamson, 11 Miss. 715; McComb *v.* Gilkey, 29 Miss. 146; Boon *v.* Bowers, 30 Miss. 246; Stewart *v.* Griffith, 33 Mo 13; Estep *v.* Hutchman, 14 S. & R. 435; Snowhill *v.* Snowhill, 17 N. J. Eq. 30; Dorsey *v.* Gilbert, 11 G. & J. 87; Norris *v.* Clymer, 2 Pa. St. 277; Sergeant *v.* Kuhn, 2 Pa. St. 393; Kerr *v.* Kitchen, 17 Pa. St. 433; Coleman *v.* Carr, 1 Miss. 258; Davison *v.* Johonnot, 7 Met. 388; Towle *v.* Forney, 14 N. Y. 423; Leggett *v.* Hunter, 19 N. Y. 445; Brevoort *v.* Grace, 53 N. Y. 245; Gannett *v.* Leonard, 47 Mo. 205; Kibby *v.* Chetwood's Adm'rs, 4 T. B. Monr. 91; Sheban's Heirs *v.* Barnett's Heirs, 6 T. B. Monr. 594; Davis *v.* State Bank, 7 Ind. 316; Richardson *v.* Monson, 23 Conn. 94; Ward *v.* New England, &c. Co., 1 Cliff. 565; Sohier *v.* Massachusetts, &c. Hospital, 3 Cush. 483; Lobrano *v.* Nelligan, 9 Wall. 295. *Contra*, Brenham *v.* Story, 39 Cal. 179. In Moore *v.* Maxwell, 18 Ark. 469, a special statute authorizing the administrator of one who held the mere naked legal title to convey to the owner of the equitable title was held valid. To the same effect is Reformed P. D. Church *v.* Mott, 7 Paige, 77, 32 Am. Dec. 613. A special act allowing the widow to sell lands of the deceased husband, subject to the approval of the probate judge, is valid. Bruce *v.* Bradshaw, 69 Ala. 360. In Stanley *v.* Colt, 5 Wall. 119, an act permitting the sale of real estate which had been devised to charitable uses was sustained, — no diversion of the gift being made. A more doubtful case is that of Linsley *v.* Hubbard, 44 Conn. 109, 26 Am. Rep. 431, in which it was held competent, on petition of tenant for life, to order a sale of lands for the benefit of all concerned, though against remonstrance of owners of the reversion.

of the person representing his interest, and under such circumstances that the consent of the owner, if capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other.[1]

But a different case is presented when the legislature assumes to authorize a person who does not occupy a fiduciary relation to the owner, to make sale of real estate, to satisfy demands which he asserts, but which are not judicially determined, or for any other purpose not connected with the convenience or necessity of the owner himself. An act of the legislature of Illinois undertook to empower a party who had applied for it to make sale of the lands pertaining to the estate of a deceased person, in order to raise a certain specified sum of money which the legislature assumed to be due to him and another person, for moneys by them advanced and liabilities incurred on behalf of the estate, and to apply the same to the extinguishment of their claims. Now it is evident that this act was in the nature of a judicial decree, passed on the application of parties adverse in interest to the estate, and in effect adjudging a certain amount to be due them, and ordering lands to be sold for its satisfaction. As was well said by the Supreme Court of Illinois, in adjudging the act void: "If this is not the exercise of a power of inquiry into, and a determination of, facts between debtor and creditor, and that, too, *ex parte* and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to, or hearing of, the parties whose estate is divested by the act. That the exercise of such power is in its nature clearly judicial, we think too apparent to need argument to illustrate its truth. It is so self-evident from the facts disclosed that it proves itself."[2]

[1] It would be equally competent for the legislature to authorize a person under legal disability — *e. g.* an infant — to convey his estate, as to authorize it to be conveyed by guardian. McComb *v.* Gilkey, 29 Miss. 146. [See in this connection, Louisville, N. O. & T. R. Co. *v.* Blythe, 69 Miss. 939, 11 So. 111, 16 L. R. A. 251, and note on constitutionality of private statutes to authorize disposal of property.]

[2] Lane *v.* Dorman, 4 Ill. 238, 242, 36 Am. Dec. 543. In Dubois *v.* McLean, 4 McLean, 486, Judge *Pope* assumes that the case of Lane *v.* Dorman decides that a special act, authorizing an executor to sell lands of the testator to pay debts against his estate, would be unconstitutional. We do not so understand that decision. On the contrary, another case in the same volume, Edwards *v.* Pope, p. 465, fully sustains the cases before decided, distinguishing them from Lane *v.* Dorman. But that indeed is also done in the principal case, where the court, after referring to similar cases in Kentucky,

A case in harmony with the one last referred to was decided by the Supreme Court of Michigan. Under the act of Congress "for the relief of citizens of towns upon the lands of the United States, under certain circumstances," approved May 23, 1844, and which provided that the trust under said act should be conducted "under such rules and regulations as may be prescribed by the legislative authority of the State," &c., the legislature passed an act authorizing the trustee to give deeds to a person named therein, and those claiming under him; thus undertaking to dispose of the whole trust to the person thus named and his grantees, and authorizing no one else to be considered or to receive any relief. This was very plainly an attempted adjudication upon the rights of the parties concerned; it did not establish regulations for the administration of the trust, but it adjudged the trust property to certain claimants exclusively, in disregard of any rights which might exist in others; and it was therefore declared to be void.[1] And it has also been held that, say: "These cases are clearly distinguished from the case at bar. The acts were for the benefit of all the creditors of the estates, without distinction; and in one case, in addition, for the purpose of perfecting titles contracted to be made by the intestate. The claims of the creditors of the intestate were to be established by judicial or other satisfactory legal proceedings, and, in truth, in the last case cited, the commissioners were nothing more than special administrators. The legislative department, in passing these acts, investigated nothing, nor did an act which could be deemed a judicial inquiry. It neither examined proof, nor determined the nature or extent of claims; it merely authorized the application of the real estate to the payment of debts generally, discriminating in favor of no one creditor, and giving no one a preference over another. Not so in the case before us; the amount is investigated and ascertained, and the sale is directed for the benefit of two persons exclusively. The proceeds are to be applied to the payment of such claims and none other, for liabilities said to be incurred, but not liquidated or satisfied; and those, too, created after the death of the intestate." See also Mason *v.* Wait, 5 Ill. 127, 134; Davenport *v.* Young, 16 Ill. 548; Rozier *v.* Fagan, 46 Ill. 404. The case of Estep *v.* Hutchman, 14 S. & R. 435, would seem to be more open to question on this point than any of the others before cited. It was the case of a special statute, authorizing the guardian of infant heirs to convey their lands in satisfaction of a contract made by their ancestor; and the statute was sustained. Compare this with Jones *v.* Perry, 10 Yerg. 59, where an act authorizing a guardian to sell lands to pay the ancestor's debts was held void.

[1] Cash, Appellant, 6 Mich. 193. The case of Powers *v.* Bergen, 6 N. Y. 358, is perhaps to be referred to another principle than that of encroachment upon judicial authority. That was a case where the legislature, by special act, had undertaken to authorize the sale of property, not for the purpose of satisfying liens upon it, or of meeting or in any way providing for the necessities or wants of the owners, but solely, after paying expenses, for the investment of the proceeds. It appears from that case that the executors under the will of the former owner held the lands in trust for a daughter of the testator during her natural life, with a vested remainder in fee in her two children. The special act assumed to empower them to sell and convey the complete fee, and apply the proceeds, *first*, to the payment of their commissions, costs, and expenses; *second*, to the discharge of assessments, liens, charges, and incumbrances on the land, of which, however, none were shown to exist; and

whether a corporation has been guilty of abuse of authority under its charter, so as justly to subject it to forfeiture,[1] and whether a widow is entitled to dower in a specified parcel of land,[2] are judicial questions which cannot be decided by the legislature. In these cases there are necessarily adverse parties; the questions that would arise are essentially judicial, and over them the courts possess jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without a due consideration of the proper boundaries which mark the separation of legislative

third, to invest the proceeds and pay over the income, after deducting taxes and charges, to the daughter during her life, and after her decease to convey, assign, or pay over the same to the persons who would be entitled under the will. The court regarded this as an unauthorized interference with private property upon no necessity, and altogether void, as depriving the owners of their property contrary to the "law of the land." At the same time the authority of those cases, where it has been held that the legislature, acting as the guardian and protector of those who are disabled to act for themselves by reason of infancy, lunacy, or other like cause, may constitutionally pass either general or private laws, under which an effectual disposition of their property might be made, was not questioned. The court cite, with apparent approval, the cases, among others, of Rice *v.* Parkman, 16 Mass. 326; Cochran *v.* Van Surlay, 20 Wend. 365; and Wilkinson *v.* Leland, 2 Pet. 627. The case of Ervine's Appeal, 16 Pa. St. 256, was similar, in the principles involved, to Powers *v.* Bergen, and was decided in the same way. See also Kneass's Appeal, 31 Pa. St. 87; Maxwell *v.* Goetschius, 40 N. J. 383, 29 Am. Rep. 242, and compare with Ker *v.* Kitchen, 17 Pa. St. 433; Martin's Appeal, 23 Pa. St. 433; Hegarty's Appeal, 75 Pa. St. 503; Tharp *v.* Fleming, 1 Houston, 580. There is no constitutional objection to a statute which transfers the mere legal title of a trustee to the beneficiary. Reformed P. D. Church *v.* Mott, 7 Paige, 77, 32 Am. Dec. 613.

[1] State *v.* Noyes, 47 Me. 189; Campbell *v.* Union Bank, 6 How. (Miss.) 661; Canal Co. *v.* Railroad Co., 4 G. & J. 1, 22; Regents of University *v.* Williams, 9 G. & J. 365. In Miners' Bank of Dubuque *v.* United States, 1 Morris, 482, a clause in a charter authorizing the legislature to repeal it for any abuse or misuser of corporate privileges was held to refer the question of abuse to the legislative judgment. In Erie & North East R. R. Co. *v.* Casey, 26 Pa. St. 287, on the other hand, it was held that the legislature could not conclude the corporation by its repealing act, but that the question of abuse of corporate authority would be one of fact to be passed upon, if denied, by a jury, so that the act would be valid or void as the jury should find. Compare Flint & Fentonville P. R. Co. *v.* Woodhull, 25 Mich. 99; 12 Am. Rep. 233, in which it was held that the reservation of a power to repeal a charter for violation of its provisions necessarily presented a judicial question, and the repeal must be preceded by a proper judicial finding. In Carey *v.* Giles, 9 Ga. 253, the appointment by the legislature of a receiver for an insolvent bank was sustained; and in Hindman *v.* Piper, 50 Mo. 292, a legislative appointment of a trustee was also sustained in a peculiar case. In Lothrop *v.* Steadman, 42 Conn. 583, the power of the legislature as an administrative measure to appoint a trustee to take charge of and manage the affairs of a corporation whose charter had been repealed, was affirmed. For a similar principle see Albertson *v.* Landon, 42 Conn. 209. And see *post*, p. 520. [And Congress has power to declare the forfeiture of a land grant for breach of condition subsequent. Atl. & Pac. R. Co. *v.* Mingus, 165 U. S. 413, 17 Sup. Ct. Rep. 348.]

[2] Edwards *v.* Pope, 4 Ill. 465.

from judicial duties.[1] As well might the legislature proceed to declare that one man is indebted to another in a sum specified, and establish by enactment a conclusive demand against him.[2]

We have elsewhere referred to a number of cases where statutes have been held unobjectionable which validated legal proceedings, notwithstanding irregularities apparent in them.[3] These statutes may as properly be made applicable to judicial as to ministerial proceedings; and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity

[1] The unjust and dangerous character of legislation of this description is well stated by the Supreme Court of Pennsylvania: "When, in the exercise of proper legislative powers, general laws are enacted which bear, or may bear, on the whole community, if they are unjust and against the spirit of the Constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation. But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and in the language of the Chief Justice in Greenough *v.* Greenough, in 11 Pa. St. 489, 'confesses itself too weak to stand against the antagonism of the legislature and the bar,' one independent co-ordinate branch of the government will become the subservient handmaid of another, and a quiet, insidious revolution be effected in the administration of the government, whilst its form on paper remains the same." Ervine's Appeal, 16 Pa. St. 256, 268.

[2] A statute is void which undertakes to make railroad companies liable for the expense of coroners' inquests, and of the burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, irrespective of any question of negligence. Ohio & M. R. R. Co. *v.* Lackey, 78 Ill. 55, 20 Am. Rep. 259. [But a railroad may be made absolutely liable for loss from fires caused by sparks from its locomotives, regardless of the question of negligence. Matthews *v.* St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and note. See this case affirmed in 165 U. S. 1, 17 Sup. Ct. Rep. 243.]

[3] See *post*, pp. 530-546.

to be heard before it; and, for the same reason, it would be incompetent for it, by retrospective legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable: *first*, as an exercise of judicial power, since, the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and *second*, because, in all judicial proceedings, notice to parties and an opportunity to defend are essential, — both of which they would be deprived of in such a case.[1] And for like reasons a statute validating proceedings had before an intruder into a judicial office, before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject-matter, would also be void.[2]

[1] In McDaniel *v.* Correll, 19 Ill. 226, it appeared that a statute had been passed to make valid certain legal proceedings by which an alleged will was adjudged void, and which were had against non-resident defendants, over whom the courts had obtained no jurisdiction. The court say: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding, than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree in this case the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants by the will are taken from them and given to others, according to our statute of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies which before belonged to the legatees have now ceased to be theirs, and this result has been brought about by the legislative act alone. The effect of the act upon them is precisely the same as if it had declared in direct terms that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs-at-law of the testator, according to our law of descents. This it will not be pretended that they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law." See, to the same effect, Richards *v.* Rote, 68 Pa. St. 248; Pryor *v.* Downey, 50 Cal. 388, 19 Am. Rep. 656; Lane *v.* Nelson, 79 Pa. St. 407; Shonk *v.* Brown, 61 Pa. St. 320; Spragg *v.* Shriver, 25 Pa. St. 282; Israel *v.* Arthur, 7 Col. 5.

[2] In Denny *v.* Mattoon, 2 Allen, 361, a judge in insolvency had made certain orders in a case pending in another jurisdiction, and which the courts subsequently declared to be void. The legislature then passed an act declaring that they "are hereby confirmed, and the same shall be taken and deemed good and valid in law, to all intents and purposes whatsoever." On the question of the validity of this act the court says: "The precise question is, whether it can be held to operate so as to confer a jurisdiction over parties and proceedings which it has been judicially determined did not exist, and give validity to acts and processes which have been adjudged void. The statement of this question seems to us to suggest the ob-

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There is another class of cases in which it would seem that action ought to be referred exclusively to the judicial tribunals,

vious and decisive objection to any construction of the statute which would lead to such a conclusion. It would be a direct exercise by the legislature of a power in its nature clearly judicial, from the use of which it is expressly prohibited by the thirtieth article of the Declaration of Rights. The line which marks and separates judicial from legislative duties and functions is often indistinct and uncertain, and it is sometimes difficult to decide within which of the two classes a particular subject falls. All statutes of a declaratory nature, which are designed to interpret or give a meaning to previous enactments, or to confirm the rights of parties either under their own contracts or growing out of the proceedings of courts or public bodies, which lack legal validity, involve in a certain sense the exercise of a judicial power. They operate upon subjects which might properly come within the cognizance of the courts and form the basis of judicial consideration and judgment. But they may, nevertheless, be supported as being within the legitimate sphere of legislative action, on the ground that they do not declare or determine, but only confirm rights; that they give effect to the acts of parties according to their intent; that they furnish new and more efficacious remedies, or create a more beneficial interest or tenure, or, by supplying defects and curing informalities in the proceedings of courts, or of public officers acting within the scope of their authority, they give effect to acts to which there was the express or implied assent of the parties interested. Statutes which are intended to accomplish such purposes do not necessarily invade the province, or directly interfere with the action of judicial tribunals. But if we adopt the broadest and most comprehensive view of the power of the legislature, we must place some limit beyond which the authority of the legislature cannot go without trenching on the clear and well-defined boundaries of judicial power." "Although it may be difficult, if not impossible, to lay down any general rule which may serve to determine, in all cases, whether the limits of constitutional restraint are overstepped by the exercise by one branch of the government of powers exclusively delegated to another, it certainly is practicable to apply to each case as it arises some test by which to ascertain whether this fundamental principle is violated. If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right to a review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action. Taylor *v.* Place, 4 R. I. 324, 337; Lewis *v.* Webb, 3 Me. 326; De Chastellux *v.* Fairchild, 15 Pa. St. 18. *A fortiori*, an act of the legislature cannot set aside or amend final judgments or decrees." The court further consider the general subject at length, and adjudge the particular enactment under consideration void, both as an

but in respect to which the prevailing doctrine seems to be that the legislature has complete control unless specially restrained by the State constitution. The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the Colonial and State legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases. Now it is clear that "the question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals, under the limitations to be prescribed by law;"[1] and so strong is the general conviction of this fact, that the people in framing their constitutions, in a majority of the States, have positively forbidden any such special laws.[2]

because, in declaring valid the void proceedings in insolvency against the debtor, under which assignees had been appointed, it took away from the debtor his property, "not by due process of law or the law of the land, but by an arbitrary exercise of legislative will." See, further, Griffin's Executor *v.* Cunningham, 20 Grat. 109; State *v.* Doherty, 60 Me. 504. In proceedings by tenants for life, the estate in remainder was ordered to be sold; there was at the time no authority for ordering such a sale. It was held to be void, and incapable of confirmation. Maxwell *v.* Goetschius, 40 N. J. 383, 29 Am. Rep. 242.

[1] 2 Kent, 106. See Levins *v.* Sleator, 2 Greene (Iowa), 607.

[2] The following are constitutional provisions: — *Alabama:* Divorces from the bonds of matrimony shall not be granted but in the cases by law provided for, and by suit in chancery; but decrees in chancery for divorce shall be final, unless appealed from in the manner prescribed by law, within three months from the date of the enrolment thereof. *Arkansas:* The General Assembly shall not have power to pass any bill of divorce, but may prescribe by law the manner in which such cases may be investigated in the courts of justice, and divorces granted. *California:* No divorce shall be granted by the legislature. The provision is the same or similar in *Iowa, Indiana, Maryland, Michigan, New Jersey, Texas,* and *Wisconsin. Florida:* Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law. *Georgia:* The Superior Court shall have exclusive jurisdiction in all cases of divorce, both total and partial. *Illinois:* The General Assembly shall not pass . . . special laws . . . for granting divorces. *Kansas:* And power to grant divorces is vested in the District Courts subject to regulations by law. *Kentucky:* The General Assembly shall have no power to grant divorces, . . . but by general laws shall confer such powers on the courts of justice. *Louisiana:* The General Assembly shall not pass any local or special law on the following specified objects: . . . Granting divorces. *Massachusetts:* All cause of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council, until the legislature shall by law make other provision. *Mississippi:* Divorces from the bonds of matrimony shall not be granted but in cases provided for by law, and by suit in chancery. *Missouri:* The General Assembly shall not pass any local or special law . . . granting divorces. In Colorado the provision is the same. *New Hampshire:* All causes of marriage, divorce, and alimony . . . shall be heard and tried by the Superior Court, until the legislature shall by law make other provision. *New York:* . . . nor shall any

Of the judicial decisions on the subject of legislative power over divorces there seem to be three classes of cases. The doctrine of the first class seems to be this: The granting of a divorce may be either a legislative or a judicial act, according as the legislature shall refer its consideration to the courts, or reserve it to itself. The legislature has the same full control over the *status* of husband and wife which it possesses over the other domestic relations, and may permit or prohibit it, according to its own views of what is for the interest of the parties or the good of the public. In dissolving the relation, it proceeds upon such reasons as to it seem sufficient; and if inquiry is made into the facts of the past, it is no more than is needful when any change of the law is contemplated, with a view to the establishment of more salutary rules for the future. The inquiry, therefore, is not judicial in its nature, and it is not essential that there be any particular finding of misconduct or unfitness in the parties. As in other cases of legislative action, the reasons or

divorce be granted otherwise than by due judicial proceedings. *North Carolina:* The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any particular case. *Ohio:* The General Assembly shall grant no divorce nor exercise any judicial power, not herein expressly conferred. *Pennsylvania:* The legislature shall not have power to enact laws annulling the contract of marriage in any case where by law the courts of this Commonwealth are, or hereafter may be, empowered to decree a divorce. *Tennessee:* The legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law; but such laws shall be general and uniform in their operation throughout the State. *Virginia:* The legislature shall confer on the courts the power to grant divorces, . . . but shall not by special legislation grant relief in such cases. *West Virginia:* The Circuit Courts shall have power, under such general regulations as may be prescribed by law, to grant divorces, . . . but relief shall not be granted by special legislation in such cases. Under the Constitution of Michigan, it was held that, as the legislature was prohibited from granting divorces, they could pass no special act authorizing the courts to divorce for a cause which was not a legal cause for divorce under the general laws. *Teft v.* Teft, 3 Mich. 67. *See* also Clark *v.* Clark, 10 N. H. 380; Simonds *v.* Simonds, 103 Mass. 572, 4 Am. Rep. 576. The case of White *v.* White, 105 Mass. 325, was peculiar. A woman procured a divorce from her husband, and by the law then in force he was prohibited from marrying again except upon leave procured from the court. He did marry again, however, and the legislature passed a special act to affirm this marriage. In pursuance of a requirement of the constitution, jurisdiction of all cases of marriage and divorce had previously been vested by law in the courts. Held, that this took from the legislature all power to act upon the subject in special cases, and the attempt to validate the marriage was consequently ineffectual. That the legislature possesses authority to validate marriages and to give legitimacy to the children of invalid marriages, where the constitution has not taken it away, see Andrews *v.* Page, 3 Heisk. 653; *post*, pp. 533, 534. [Constitutional prohibition of legislative divorces does not make invalid a statute providing that a sentence to life imprisonment shall operate as absolute divorce. State *v.* Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928; and see note hereto in L. R. A. upon effect of sentence upon marriage relation.]

the motives of the legislature cannot be inquired into; the relation which the law permitted before is now forbidden, and the parties are absolved from the obligations growing out of that relation which continued so long as the relation existed, but which necessarily cease with its termination. Marriage is not a contract, but a *status;* the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land, but, as in other cases within the scope of the legislative authority, the legislative will must be regarded as sufficient reason for the rule which it promulgates.[1]

[1] The leading case on this subject is Starr *v.* Pease, 8 Conn. 541. On the question whether a divorce is necessarily a judicial act, the court say: "A further objection is urged against this act; viz., that by the new constitution of 1818, there is an entire separation of the legislative and judicial departments, and that the legislature can now pass no act or resolution not clearly warranted by that constitution; that the constitution is a grant of power, and not a limitation of powers already possessed; and, in short, that there is no reserved power in the legislature since the adoption of this constitution. Precisely the opposite of this is true. From the settlement of the State there have been certain fundamental rules by which power has been exercised. These rules were embodied in an instrument called by some a constitution, by others a charter. All agree that it was the first constitution ever made in Connecticut, and made, too, by the people themselves. It gave very extensive powers to the legislature, and left too much (for it left everything almost) to their will. The constitution of 1818 proposed to, and in fact did, limit that will. It adopted certain general principles by a preamble called a Declaration of Rights; provided for the election and appointment of certain organs of the government, such as the legislative, executive, and judicial departments; and imposed upon them certain restraints. It found the State sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the Constitution of the United States, nor opposed to the sound maxims of legislation; and it left them in the same condition, except so far as limitations were provided. There is now and has been a law in force on the subject of divorces. The law was passed one hundred and thirty years ago. It provides for divorces *a vinculo matrimonii* in four cases; viz., adultery, fraudulent contract, wilful desertion, and seven years' absence unheard of. The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the Parliament of Great Britain and passed special acts of divorce *a vinculo matrimonii;* and at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the Constitution of the United States or by that of this State. In view of the appalling consequences of declaring the general law of the State or the repeated acts of our legislature unconstitutional and void, consequences easily conceived, but not easily expressed, — such as bastardizing the issue and subjecting the parties to punishment for adultery, — the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot

The second class of cases to which we have alluded hold that divorce is a judicial act in those cases upon which the general laws confer on the courts power to adjudicate; and that consequently in those cases the legislature cannot pass special laws, but its full control over the relation of marriage will leave it at liberty to grant divorces in other cases, for such causes as shall appear to its wisdom to justify them.[1]

A third class of cases deny altogether the authority of these special legislative enactments, and declare the act of divorce to be in its nature judicial, and not properly within the province of the legislative power.[2] The most of these decisions, however, lay more or less stress upon clauses in the constitutions other than those which in general terms separate the legislative and judicial functions, and some of them would perhaps have been differently decided but for those other clauses. But it is safe to say that the general sentiment in the legal profession is against the rightfulness of special legislative divorces; and it is believed that, if the question could originally have been considered by the courts, unembarrassed by any considerations of long acquiescence, and of the serious consequences which must result from affirming their unlawfulness, after so many had been granted and new relations formed, it is highly probable that these enactments would have been held to be usurpations of judicial author-

pronounce the act void." Per *Daggett*, J.; *Hosmer*, Ch. J., and *Bissell*, J., concurring. *Peters*, J., dissented. Upon the same subject see Crane *v.* Meginnis, 1 G. & J. 463; Wright *v.* Wright, 2 Md. 429; Gaines *v.* Gaines, 9 B. Monr. 295; Cabell *v.* Cabell, 1 Met. (Ky.) 319; Dickson *v.* Dickson, 1 Yerg. 110; Melizet's Appeal, 17 Pa. St. 449; Cronise *v.* Cronise, 54 Pa. St. 255; Adams *v.* Palmer, 51 Me. 480; Townsend *v.* Griffin, 4 Harr. 440; Noel *v.* Ewing, 9 Ind. 37, and the examination of the whole subject by Mr. Bishop, in his work on Marriage and Divorce. A territorial legislature having power covering all rightful subjects of legislation could grant a divorce. Maynard *v.* Hill, 125 U. S. 190, 8 Sup. Ct. Rep. 723.

[1] Levins *v.* Sleator, 2 Greene (Iowa), 604; Opinions of Judges, 16 Me. 479; Adams *v.* Palmer, 51 Me. 480. See also Townsend *v.* Griffin, 4 Harr. 440. In a well-reasoned case in Kentucky, it was held that a legislative divorce obtained on the application of one of the parties while suit for divorce was pending in a court of competent jurisdiction would not affect the rights to property of the other, growing out of the relation. Gaines *v.* Gaines, 9 B. Monr. 295. A statute permitting divorces for offences committed before its passage is not an *ex post facto* law in the constitutional sense. Jones *v.* Jones, 2 Overton, 2, 5 Am. Dec. 645.

[2] Brigham *v.* Miller, 17 Ohio, 445; Clark *v.* Clark, 10 N. H. 380; Ponder *v.* Graham, 4 Fla. 23; State *v.* Fry, 4 Mo. 120; Bryson *v.* Campbell, 12 Mo. 498; Bryson *v.* Bryson, 17 Mo. 590; Same *v.* Same, 44 Mo. 232. See also Jones *v.* Jones, 12 Pa. St. 350, 354. Under the Constitution of Massachusetts, the power of the legislature to grant divorces is denied. Sparhawk *v.* Sparhawk, 116 Mass. 315. See clause in constitution, *ante*, p. 153, note 2. Where a court is given appellate jurisdiction in *all* cases, it is not competent by statute to forbid its reversing a decree of divorce. Tierney *v.* Tierney, 1 Wash. Ter. 568. See Nichols *v.* Griffin, 1 Wash. Ter. 374.

ity, and we should have been spared the necessity for the special constitutional provisions which have since been introduced. Fortunately these provisions render the question now discussed of little practical importance; at the same time that they refer the decision upon applications for divorce to those tribunals which must proceed upon inquiry, and cannot condemn without a hearing.[1]

The force of a legislative divorce must in any case be confined to a dissolution of the relation; it can only be justified on the ground that it merely lays down a rule of conduct for the parties to observe towards each other for the future. It cannot inquire into the past, with a view to punish the parties for their offences against the marriage relation, except so far as the divorce itself can be regarded as a punishment. It cannot order the payment of alimony, for that would be a judgment;[2] it cannot adjudge upon conflicting claims to property between the parties, but it must leave all questions of this character to the courts. Those rights of property which depend upon the continued existence of the relation will be terminated by the dissolution, but only as in any other case rights in the future may be incidentally affected by a change in the law.[3]

Legislative Encroachments upon Executive Power.

If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the perform-

[1] If marriage is a matter of right, then it would seem that any particular marriage that parties might lawfully form they must have a lawful right to continue in, unless by misbehavior they subject themselves to a forfeiture of the right. And if the legislature can annul the relation in one case, without any finding that a breach of the marriage contract has been committed, then it would seem that they might annul it in every case, and even prohibit all parties from entering into the same relation in the future. The recognition of a full and complete control of the relation in the legislature, to be exercised at its will, leads inevitably to this conclusion; so that, under the "right-ful powers of legislation" which our constitutions confer upon the legislative department, a relation essential to organized civil society might be abrogated entirely. Single legislative divorces are but single steps towards this barbarism which the application of the same principle to every individual case, by a general law, would necessarily bring upon us. See what is said by the Supreme Court of Missouri in Bryson *v.* Bryson, 17 Mo. 590, 594.

[2] Crane *v.* Meginnis, 1 G. & J. 463; Potter's Dwarris on Statutes, 486; *post*, p. 584, note.

[3] Starr *v.* Pease, 8 Conn. 541.

ance of many duties which they may provide for by law they may refer either to the chief executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty.[1] What can be definitely said on this subject is this: That such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.[2] But other powers or duties the executive

[1] This is affirmed in the case of Bridges v. Shalleross, 6 W. Va. 562. The constitution of that State provides that the governor shall nominate, and by and with the advice and consent of the Senate appoint, all officers whose offices are established by the constitution or shall be created by law, and whose appointment or election is not otherwise provided for, and that no such officer shall be appointed or elected by the legislature. The court decided that this did not preclude the legislature from creating a board of public works of which the State officers should be *ex officio* the members. The legislature may regulate appointment to statutory offices: People v. Osborne, 7 Col. 605; may provide a board of civil service commissioners to prescribe qualifications of all officers not provided for by the constitution: Opinion of Justices, 138 Mass. 601. [For other cases upon merit system in civil service, see People v. Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809; *Re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Newcomb v. Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732; Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; Neumeyer v. Krakel, — Ky. —, 62 S. W. 518 (April 25, 1901); People v. Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. 552; People v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399.] May appoint a State board, if constitution does not expressly empower the governor to do so. People v. Freeman, 80 Cal. 233, 22 Pac. 173. See Hovey v. State, 119 Ind. 386, 21 N. E. 890; Biggs v. McBride, 17 Oreg. 640, 21 Pac. 878; State v. Covington, 29 Ohio St. 102. [Appointment of police officers cannot be intrusted to a bipartisan board, elected half by one party in city council and half by another. Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. But a provision that not more than two of the three members of a civil service commission shall be of the same political party is valid. Rogers v. Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.]

[2] Attorney-General v. Brown, 1 Wis. 513. "Whatever power or duty is expressly given to, or imposed upon, the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case where the subject is committed to the *discretion* of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise." Under the Constitution of Ohio, which forbids the exercise of any appointing power by the legislature, except as therein authorized, it was held that the legislature could not, by law, constitute certain designated persons a State board, with power to appoint commissioners of the State House, and directors of the penitentiary, and to remove such directors for cause. State v. Kennon, 7 Ohio St. 546. By the Indiana Constitution all officers whose appointment is not otherwise provided for, shall be chosen in such manner as shall be prescribed by law. The power to ordain the "manner" does not give the legislature power to appoint. State v. Denny, 118 Ind. 382, 21 N. E. 252, 274, 4 L. R. A. 79; Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. And see Davis v. State, 7 Md. 151; also cases referred

cannot exercise or assume except by legislative authority, and

to in preceding note. [O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327. The power of appointment to a particular office may be vested in the State geologist. State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79. The governor's power of appointment cannot be indirectly taken away; as by abolishing the office or offices and creating another and attaching to it the duties of the office or offices abolished. Johnson *v.* State, 59 N. J. L. 535, 37 Atl. 949, 38 L. R. A. 373, 39 Atl. 646.] As to what are public officers, see State *v.* Stanley, 66 N. C. 59, 8 Am. Rep. 488. An appointment to office was said, in Taylor *v.* Commonwealth, 3 J. J. Marsh. 401, to be intrinsically an executive act. In a certain sense this is doubtless so, but it would not follow that the legislature could exercise no appointing power, or could confer none on others than the chief executive of the State. Where the constitution contains no negative words to limit the legislative authority in this regard, the legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution, and the authority of the executive must be limited to taking care that the law is executed by such agencies. See Baltimore *v.* State, 15 Md. 376; [State *v.* Henderson, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751; Fox *v.* McDonald, 101 Ala. 51, 13 So. 416, 21 L. R. A. 529, 46 Am. St. 98; State *v.* George, 22 Oreg. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. 586. That power to appoint City Commissioners may be given to circuit judges. See Terre Haute *v.* Evansville and T. H. Ry. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; and see note 16 L. R. A. 737, on the constitutional power of courts or judges to appoint officers. With regard to requirements of merit in appointees and competitive examinations for the ascertainment thereof, see People *v.* Kipley, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; Chittenden *v.* Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809; *Re* Keymer, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; People *v.* Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399; Newcomb *v.* Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; Neumeyer *v.* Krakel, — Ky. —, 62 S. W. 518; People *v.* Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. 552. The mayor of a city may be empowered to appoint the principal executive officers thereof. Datz *v.* Cleveland, 52 N. J. L. 188, 19 Atl. 17, 7 L. R. A. 431. For other cases on appointing power, see State *v.* Boucher, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.]

Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected. State *v.* Doherty, 25 La. Ann. 119, 13 Am. Rep. 131; [State *v.* Johnson, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410; and see Trainor *v.* Wayne Co. Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95, and note on power of summary removal.] The courts cannot review his action if it is taken after a hearing: State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 228; but he must afford an opportunity for defence. Dullam *v.* Willson, 53 Mich. 392, 19 N. W. 112; [State *v.* Johnson, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410; State *v.* Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791; Biggs *v.* McBride, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115.] *Contra*, unless the right is expressly secured to the officer. Donahue *v.* Will Co., 100 Ill. 94, and cases cited. [For a case of removal for gross carelessness in declaring the result of a vote upon a constitutional amendment, see Attorney-General *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. 606. Provision for impeachment or removal does not prevent virtual removal by legislature through statute abolishing the office and creating another with same duties and powers. State *v.* Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79. Power of removal cannot be conferred on court. Gordon *v.* Moores, 61 Neb. 345, 85 N. W. 298.]

If the governor has power to appoint with the consent of Senate, and to remove, he may remove without such consent. Lane *v.* Com., 103 Pa. St. 481; Harman *v.* Harwood, 58 Md. 1. See, as to discretionary powers, *ante*, pp. 73–75, notes.

The executive, it has been decided, has power to pardon for contempt of court. State *v.* Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115; [Sharp *v.* State, 102 Tenn.

the power which in its discretion it confers it may also in its discretion withhold, or confide to other hands.[1] Whether in those cases where power is given by the constitution to the governor, the legislature have the same authority to make rules for the exercise of the power that they have to make rules to govern the proceedings in the courts, may perhaps be a question.[2] It

0, 49 S. W. 752, 43 L. R. A. 788, 73 Am. St. 851.] A general power to pardon may be exercised before as well as after conviction. Lapeyre *v.* United States, 17 Wall. 191; Dominick *v.* Bowdoin, 44 Ga. 357; Grubb *v.* Bullock, 44 Ga. 379; [Terr. *v.* Richardson, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440.] The President's power to pardon does not extend to the restoration of property which has been judicially forfeited. Knote *v.* United States, 10 Ct. of Cl. 397, and 95 U. S. 149; Osborn *v.* United States, 91 U. S. 474. The pardon may be granted by general proclamation. Carlisle *v.* United States, 16 Wall. 147; Lapeyre *v.* United States, 17 Wall. 191. The delivery of a pardon to the prison warden, makes it operative. *Ex parte* Powell, 73 Ala. 517. One receiving a full pardon from the President cannot afterwards be required by law to establish loyalty as a condition to the assertion of legal rights. Carlisle *v.* United States, 16 Wall. 147. Nor be prosecuted in a civil action for the same acts for which he is pardoned. United States *v.* McKee, 4 Dill. 128. Pardon removes all disabilities resulting from conviction, and may be granted after sentence executed. State *v.* Foley, 15 Nev. 64, 37 Am. Rep. 458; Edwards *v.* Com., 78 Va. 39; State *v.* Dodson, 16 S. C. 453; [State *v.* Martin, 59 Ohio, 212, 52 N. E. 188, 43 L. R. A. 94, 69 Am. St. 762.] But a mere executive order to discharge from custody is not such a pardon. State *v.* Kirschner, 23 Mo. App. 349. It does not release from the obligation to pay costs of the prosecution. *In re* Boyd, 31 Kan. 570, 9 Pac. 240; Smith *v.* State, 6 Lea, 637. [Upon invalidity of legislative pardon, see Singleton *v.* State, 38 Fla. 297, 21 So. 21, 34 L. R. A. 251, 56 Am. St. 177, and note thereto in L. R. A. Where board of pardons has only advisory power, the governor's pardoning power is in nowise infringed. Rich *v.* Chamberlain, 104 Mich. 436, 62 N. W. 584, 27 L. R. A. 573. Statute authorizing sentence of prisoner for an indefinite term not less than the minimum prescribed by law nor greater than the maximum with authority to the board of prison control to release on parol after expiration of minimum period and to recommit upon violation of parol is void as infringing upon governor's pardoning power. People *v.* Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note. Sentence may be suspended after conviction, and such suspension may be withdrawn at any time. It does not encroach upon governor's power to grant pardons and reprieves. People *v.* Monroe Co. Ct., 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.]

[1] "In deciding this question [as to the authority of the governor], recurrence must be had to the constitution. That furnishes the only rule by which the court can be governed. That is the charter of the governor's authority. All the powers delegated to him by or in accordance with that instrument, he is entitled to exercise, and no others. The constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the constitution." Field *v.* People, 3 Ill. 79, 80.

[2] Whether the legislature can constitutionally remit a fine, when the pardoning power is vested in the governor by the constitution, has been made a question; and the cases of Haley *v.* Clarke, 26 Ala. 439, and People *v.* Bircham, 12 Cal. 50, are opposed to each other upon the point. If the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they would have to release any other debtor to the State from his obligation. In Indiana the Supreme Court cannot be invested with power to

would seem that this must depend generally upon the nature of the power, and upon the question whether the constitution, in conferring it, has furnished a sufficient rule for its exercise. Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but where the governor is made commander-in-chief of the military forces of the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation upon the power of the legislature

grant reprieves. Butler *v.* State, 97 Ind. 373. The Secretary of the Treasury may remit penalties for breach of revenue laws. The Laura, 114 U. S. 411, 5 Sup. Ct. Rep. 881. In Michigan a judge cannot by suspending sentence indefinitely practically pardon a prisoner. People *v.* Brown, 54 Mich. 15, 19 N. W. 571. An act allowing a prisoner to go on parol, but in legal control of prison managers and subject to recall, is valid. State *v.* Peters, 43 Ohio St. 629, 4 N. E. 81. In Morgan *v.* Buffington, 21 Mo. 549, it was held that the State auditor was not obliged to accept as conclusive the certificate from the Speaker of the House as to the sum due a member of the House for attendance upon it, but that he might lawfully inquire whether the amount had been actually earned by attendance or not. The legislative rule, therefore, cannot go to the extent of compelling an executive officer to do something else than his duty, under any pretence of regulation. The power to pardon offenders is vested by the several State constitutions in the governor. It is not, however, a power which necessarily inheres in the executive. State *v.* Dunning, 9 Ind. 20. And several of the State constitutions have provided that it shall be exercised under such regulations as shall be prescribed by law. There are provisions more or less broad to this purport in those of Kansas, Florida, Alabama, Arkansas, Texas, Mississippi, Oregon, Indiana, Iowa, and Virginia. In State *v.* Dunning, 9 Ind. 20, an act of the legislature requiring the applicant for the remission of a fine or forfeiture to forward to the governor, with his application, the opinion of certain county officers as to the propriety of the remission, was sustained as an act within the power conferred by the constitution upon the legislature to prescribe regulations in these cases. And see Branham *v.* Lange, 16 Ind. 497. The power to reprieve is not included in the power to pardon. *Ex parte* Howard, 17 N. H. 545. *Contra*, *Ex parte* Fleming, 60 Miss. 910. It has been decided that to give parties who have been convicted and fined the benefit of the insolvent laws is not an exercise of the pardoning power. *Ex parte* Scott, 19 Ohio St. 581. And where the constitution provided that "In all criminal and penal cases, except those of treason and impeachment, [the governor] shall have power to grant pardons after conviction, and remit fines and forfeitures," &c., it was held that this did not preclude the legislature from passing an act of pardon and amnesty for parties liable to prosecution, but not yet convicted. State *v.* Nichols, 26 Ark. 74, 7 Am. Rep. 600. An act approved by the governor vacating a conviction operates as a pardon. People *v.* Stewart, 1 Idaho, 546. Pardons may be made conditional, and forfeited if the condition is not observed. State *v.* Smith, 1 Bailey, 283; Lee *v.* Murphy, 22 Gratt. 789; *Re* Ruhl, 5 Sawyer, 186; Kennedy's Case, 135 Mass. 48; *Ex parte* Marks, 64 Cal. 29, 28 Pac. 109. But a pardon obtained by fraud is held conclusive, though afterward declared null by the governor. Knapp *v.* Thomas, 39 Ohio St. 377. [A pardon does not relieve from forfeiture of bail bond. Dale *v.* Commonwealth, 101 Ky. 612, 42 S. W. 93, 38 L. R. A. 808.]

to prescribe rules for the executive department; that they must not be such as, under pretence of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. Those matters which the constitution specifically confides to him the legislature cannot directly or indirectly take from his control. And on the other hand the legislature cannot confer upon him judicial authority; such as the authority to set aside the registration of voters in a municipality;[1] or clothe him with any authority, not executive in its nature, which the legislature itself, under the constitution, is restricted from exercising.[2]

It may be proper to say here, that the executive, in the proper discharge of his duties under the constitution, is as independent of the courts as he is of the legislature.[3]

[1] State *v.* Staten, 6 Cold. 233.

[2] Smith *v.* Norment, 5 Yerg. 271.

[3] It has been a disputed question whether the writ of *mandamus* will lie to compel the performance of executive duties. In the following cases the power has either been expressly affirmed, or it has been exercised without being questioned. State *v.* Moffitt, 5 Ohio, 358; State *v.* Governor, 5 Ohio St. 529; Coltin *v.* Ellis, 7 Jones (N. C.), 545; Chamberlain *v.* Sibley, 4 Minn. 309; Magruder *v.* Governor, 25 Md. 173; Groome *v.* Gwinn, 43 Md. 572; Tennessee, &c. R. R. Co. *v.* Moore, 36 Ala. 371; Middleton *v.* Lowe, 30 Cal. 596; Harpending *v.* Haight, 39 Cal. 189, 2 Am. Rep. 433; Chumasero *v.* Potts, 2 Mont. 244; Martin *v.* Ingham, 38 Kan. 641, 17 Pac. 162. See Hatch *v.* Stoneman, 66 Cal. 632, 6 Pac. 734. In the following cases the power has been denied: Hawkins *v.* Governor, 1 Ark. 570; Low *v.* Towns, 8 Ga. 360; State *v.* Kirkwood, 14 Iowa, 162; Dennett, Petitioner, 32 Me. 510; People *v.* Bissell, 19 Ill. 229; People *v.* Yates, 40 Ill. 126; People *v.* Cullom, 100 Ill. 472; State *v.* Governor, 25 N. J. 331; Mauran *v.* Smith, 8 R. I. 192; State *v.* Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Same *v.* Same, 24 La. Ann. 351, 13 Am. Rep. 126; People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89; State *v.* Governor, 39 Mo. 388; Vicksburg & M. R. R. Co. *v.* Lowry, 61 Miss. 102; [Territorial Ins. Asylum *v.* Walfley, — Ariz —, 22 Pac. 383 (8 July, 1889), 8 L. R. A. 188; Bates *v.* Taylor, 3 Pick. (Tenn.) 319, 11 S. W. 266; People *v.* Morton, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. 547. This last was a case where it was attempted to compel action of governor as member of board of trustees *ex officio*. See also State *ex rel. v.* Nash, 66 Ohio, 612, 64 N. E. 558.] Nor can he be enjoined from acting. Smith *v.* Myers, 109 Ind. 1; Bates *v.* Taylor, 87 Tenn. 319. See Lacy *v.* Martin, 39 Kan. 703, 18 Pac. 957; Kilpatrick *v.* Smith, 77 Va. 347. In Hertranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667, it was decided that the governor was not subject to the subpœna of the grand jury. In Minnesota it seems that officers of the executive department are exempt from judicial process even in the case of ministerial duties. Rice *v.* Austin, 19 Minn. 103; County Treasurer *v.* Dike, 20 Minn. 363; Western R. R. Co. *v.* De Graff, 27 Minn. 1, 6 N. W. 341; State *v.* Whitcomb, 28 Minn. 50. [See also State *v.* Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. 705, and Frost *v.* Thomas, 26 Col. 222, 56 Pac. 899, 77 Am. St. 259. That court will not interfere with the exercise of discretion on the part of a railroad commission where such discretion is authorized by law, see Louisville & N. R. Co. *v.* Commonwealth, 104 Ky. 226, 46 S. W. 707, 47 S. W. 598, 48 S. W. 416, 43 L. R. A. 541, 549, 550. For effect of clause denying governor power to remove officers for partisan reasons, see People *v.* Martin, 19 Col. 565, 36 Pac. 543, 24 L. R. A. 201. In Maryland, the proclamation of the governor that a proposed amendment to the Constitution has been

Delegating Legislative Powers.

One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[1]

duly adopted is not subject to review by any other officer or department. Worman *v.* Hagan, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716.]

[1] "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every Commonwealth, in all forms of government:—

"*First.* They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.

"*Secondly.* These laws also ought to be designed for no other end ultimately but the good of the people.

"*Thirdly.* They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

"*Fourthly.* The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." Locke on Civil Government, § 142.

That legislative power cannot be delegated, see Thorne *v.* Cramer, 15 Barb. 112; Bradley *v.* Baxter, 15 Barb. 122; Barto *v.* Himrod, 8 N. Y. 483; People *v.* Stout, 23 Barb. 349; Rice *v.* Foster, 4 Harr. 479; Santo *v.* State, 2 Iowa, 165; Geebrick *v.* State, 5 Iowa, 491; State *v.* Beneke, 9 Iowa, 203; State *v.* Weir, 33 Iowa, 134, 11 Am. Rep. 115; People *v.* Collins, 3 Mich. 343; Railroad Company *v.* Commissioners of Clinton County, 1 Ohio St. 77; Parker *v.* Commonwealth, 6 Pa. St. 507; Commonwealth *v.* McWilliams, 11 Pa. St. 61; Maize *v.* State, 4 Ind. 342; Meshmeier *v.* State, 11 Ind. 482; State *v.* Parker, 26 Vt. 357; State *v.* Swisher, 17 Tex. 441; State *v.* Copeland, 3 R. I. 33; State *v.* Wilcox, 45 Mo. 458; Commonwealth *v.* Locke, 72 Pa. St. 491; *Ex parte* Wall, 48 Cal. 279; Willis *v.* Owen, 43 Tex. 41; Farnsworth Co. *v.* Lisbon, 62 Me. 451; Brewer Brick Co. *v.* Brewer, 62 Me. 62; State *v.* Hudson Co. Com'rs, 37 N. J. 12; Auditor *v.* Holland, 14 Bush, 147; State *v.* Simons, 32 Minn. 540, 21 N. W. 750. [Statutory delegation of power to incorporated medical societies to appoint medical examiners to examine and pass upon the fitness of applicants for license to practise medicine is not invalid. Scholle *v.* State, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411. Power of classification of towns and cities cannot be delegated. Jernigan *v.* Madisonville, 102 Ky. 313, 43 S. W. 443, 39 L. R. A. 214. Nor power of taxation except as constitution expressly authorizes. State *v.* Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285. But a court may be authorized to direct in what manner its writs shall be served and what notice shall be given. State *v.* Adams

But it is not always essential that a legislative act should be a completed statute which must in any event take effect as law,

Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225. Board of health cannot be authorized to make general rules concerning compulsory vaccination. State *v.* Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. 123. The legislature cannot delegate to an official the final authority to determine what shall be done to make factories and workshops sanitary. Schuezlein *v.* Cabaniss, 135 Cal. 466, 67 Pac. 755, 87 Am. St. 122; or the extent of a taking for waterworks. Stearns *v.* Barre, 73 Vt. 231, 50 Atl. 1086, 87 Am. St. 721. Statute imposing a penalty upon any carrier charging more than a reasonable rate without prescribing any means of determining what is such rate is void. Louisville & N. R. Co. *v.* Commonwealth, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. 457.]

[Court cannot be empowered to pass upon propriety of incorporation of lands into a village. *Re* Application of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638. Insurance commissioner cannot be empowered to determine the form of standard insurance contract for the State. Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; Anderson *v.* Manchester Fire As. Co., 59 Minn. 182, 63 N. W. 241, 28 L. R. A. 609; O'Neil *v.* American Fire Ins. Co., 166 Pa. 72, 30 Atl. 945, 26 L. R. A. 715, 45 Am. St. 650. A statute authorizing a particular officer to pass upon the question of character, to determine the granting of license is not a delegation of legislative power. Delegation of power to determine who are within the operation of the law is not a delegation of legislative power. State *v.* Thompson, 160 Mo. 333, 60 S. W. 1077, 83 Am. St. 468, 54 L. R. A. 950. So permitting city councils upon petition of specified portion of voters of respective cities to suspend certain penalties of a prohibitory liquor law is not a delegation of legislative powers, nor is it an infringement of the pardoning power of the executive. State *v.* Forkner, 94 Iowa, 1, 62 N. W. 772, 28 L. R. A. 206. Statute may require railroad to construct cattle-guards when demand therefor is made by owners of lands through which railroad runs. Birmingham M. R. Co. *v.* Parsons, 100 Ala. 662, 13 So. 602, 27 L. R. A. 263, 46 Am. St. 92. Elective franchise cannot be conferred upon women upon condition that the statute be approved at a subsequent election. *Re* Municipal Suffrage to Women, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113, and note hereto on power to make a statute contingent on popular approval. Law authorizing release from imprisonment for drunkenness upon entry of recognizance that convict will take the "Jag Cure," and final discharge upon exhibition of certificate of attendance and compliance with rules of the institution is void. Senate of Happy Home Club *v.* Alpena Co., 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144. Where the legislature is directed to regulate the salaries of county clerks in proportion to duties performed, and a statute fixes their salaries, the legislature cannot authorize county boards to allow the clerks deputies. Dougherty *v.* Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, and note on delegation of legislative powers. Municipality cannot be authorized to modify the jurisdiction of courts. Vesta Mills *v.* Charleston, 60 S. C. 1, 38 S. E. 226. Right of initiative and referendum cannot be conferred on people of a municipality in respect even of municipal affairs. Elliott *v.* Detroit, 121 Mich. 611, 84 N. W. 820.]

[For other cases denying right to delegate legislative power, see Bradshaw *v.* Lankford, 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582, 25 Am. St. 602; Owensboro & N. R. Co. *v.* Todd, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285; Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851, 85 Am. St. 357, where it is said, quoting from Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738: "A law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that in form and substance it is a law in all its details *in præsenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or

at the time it leaves the hands of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event.[1] Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option. A private act of incorporation cannot be forced upon the corporators; they may refuse the franchise if they so choose.[2] In these cases the legislative act is regarded as complete when it has passed through the constitutional formalities necessary to perfected legislation, notwithstanding its actually going into operation as law may depend upon its subsequent acceptance. We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. As municipal organizations are mere auxiliaries of the State government in the important business of

event." The legislature cannot delegate the power to fix penalties to a Board of Harbor Commissioners. Board of Harbor Commissioners *v.* Excelsior Redwood Co., 88 Cal. 491, 26 Pac. 375.]

[1] Brig Aurora *v.* United States, 7 Cranch, 382; Bull *v.* Read, 13 Gratt. 78; State *v.* Parker, 26 Vt. 357; Peck *v.* Weddell, 17 Ohio St. 271; State *v.* Kirkley, 29 Md. 85; Walton *v.* Greenwood, 60 Me. 356; Baltimore *v.* Clunet, 23 Md. 449. It is not a delegation of legislative power to make the repeal of a charter depend upon the failure of the corporation to make up a deficiency which is to be ascertained and determined by a tribunal provided by the repealing act. Lothrop *v.* Stedman, 42 Conn. 583. See Crease *v.* Babcock, 23 Pick. 334, 344. Nor to refer the question of extending municipal boundaries to a court where issues may be formed and disputed facts tried. Burlington *v.* Leebrick, 43 Iowa, 252; Wahoo *v.* Dickinson, 23 Neb. 426, 36 N. W. 813. [But a court cannot be authorized to create a municipal corporation upon petition of a majority of the inhabitants of the territory to be incorporated. Terr. *v.* Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 105.] It is competent to make an act take effect on condition that those applying for it shall erect a station at a place named. State *v.* New Haven, &c. Co., 43 Conn. 351. Railroad Commissioners may be empowered to fix rates. Georgia R. R., &c. Co. *v.* Smith, 70 Ga. 694. A commission may be empowered to select a site for a public building. People *v.* Dunn, 80 Cal. 211, 22 Pac. 140; Terr. *v.* Scott, 3 Dak. 357, 20 N. W. 401. An act taxing corporations of another State doing business within the State as its corporations are taxed in such other State is not an abandonment of legislative functions. The law is complete; its operation, contingent. Home Ins. Co. *v.* Swigert, 104 Ill. 653; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672. *Contra*, Clark *v.* Mobile, 67 Ala. 217.

[2] Angell and Ames on Corp. § 81.

municipal rule, the legislature may create them at will from its own views of propriety or necessity, and without consulting the parties interested; and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporators on that subject.[1]

Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive, unless, for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual.[2]

[1] City of Paterson *v.* Society, &c., 24 N. J. 385; Cheany *v.* Hooser, 9 B. Monr. 330; Berlin *v.* Gorham, 34 N. H. 266; State *v.* Holden, 19 Neb. 249, 27 N. W. 120; Attorney-General *v.* Weimer, 59 Mich. 580, 26 N. W. 773. The question of a levee tax may lawfully be referred to the voters of the district of territory over which it is proposed to spread the tax, regardless of municipal divisions. Alcorn *v.* Hamer, 38 Miss. 652. Power to grant an exclusive franchise in aid of navigation may be delegated to a village: Farnum *v.* Johnson, 62 Wis. 620, 22 N. W. 751; power to determine the penalty to be imposed for infraction of a State law may not: Montross *v.* State, 61 Miss. 429; nor power to increase its representation on a county board, when the constitution ordains that the legislature shall determine such representation. People *v.* Riordan, 73 Mich. 508, 41 N. W. 482. And see, in general, Angell and Ames on Corp. § 31 and note; also *post*, pp. 261–266.

[2] Bull *v.* Read, 13 Gratt. 78; Corning *v.* Greene, 23 Barb. 33; Morford *v.* Unger, 8 Iowa, 82; City of Paterson *v.* Society, &c., 24 N. J. 385; Gorham *v.* Springfield, 21 Me. 58; Commonwealth *v.* Judges of Quarter Sessions, 8 Pa. St. 391; Commonwealth *v.* Painter, 10 Pa. St. 214; Call *v.* Chadbourne, 46 Me. 206; State *v.* Scott, 17 Mo. 521; State *v.* Wilcox, 45 Mo. 458; Hobart *v.* Supervisors, &c., 17 Cal. 23; Bank of Chenango *v.* Brown, 26 N. Y. 467; Steward *v.* Jefferson, 3 Harr. 335; Burgess *v.* Pue, 2 Gill, 11; Lafayette, &c. R. R. Co. *v.* Geiger, 34 Ind. 185; Clarke *v.* Rogers, 81 Ky. 43. As the question need not be submitted at all, the legislature may submit it to the freeholders alone. People *v.* Butte, 4 Mont. 174, 1 Pac. 414. The right to refer to the people of several municipalities the question of their consolidation was disputed in Smith *v.* McCarthy, 56 Pa. St. 359, but sustained by the court. And see Smyth *v.* Titcomb, 31 Me. 272; Erlinger *v.* Boneau, 51 Ill. 94; Lammert *v.* Lidwell, 62 Mo. 188; State *v.* Wilcox, 45 Mo. 458; Brunswick *v.* Finney, 54 Ga. 317; Response to House Resolution, 55 Mo. 295; People *v.* Fleming, 10 Col. 553, 16 Pac. 298; Graham *v.* Greenville, 67 Tex. 62, 2 S. W. 742. [Such reference is now permitted in Minnesota. Hopkins *v.* Duluth, 81 Minn. 189, 83 N. W. 536. For a consideration of various questions arising in regard to such a reference, see State *v.* Denny, 4 Wash. 135, 29 Pac 991, 16 L. R. A. 214.]

For the like reasons the question whether a county or township shall be divided and a new one formed,[1] or two townships or school districts formerly one be reunited,[2] or a city charter be revised,[3] or a county seat located at a particular place, or after its location removed elsewhere,[4] or the municipality contract particular debts, or engage in a particular improvement,[5] is

[1] State *v.* Reynolds, 10 Ill. 1. See State *v.* McNiell, 24 Wis. 149. Response to House Resolution, 55 Mo. 205. For other cases on the same general subject, see People *v.* Nally, 49 Cal. 478; Pike County *v.* Barnes, 51 Miss. 305; Brunswick *v.* Finney, 54 Ga. 317. The question whether a general school law shall be accepted in a particular municipality may be referred to its voters. State *v.* Wilcox, 45 Mo. 458. The operation of an act creating a municipal court may be made dependent on the approval of the municipal voters. Rutter *v.* Sullivan, 25 W. Va. 427. A city may be empowered to decide by vote whether it will take control of the public schools in it. Werner *v.* Galveston, 72 Tex. 22, 7 S. W. 726.

[2] Commonwealth *v.* Judges, &c., 8 Pa. St. 391; Call *v.* Chadbourne, 46 Me. 206; People *v.* Nally, 49 Cal. 478; Erlinger *v.* Boneau, 51 Ill. 94.

[3] Brunswick *v.* Finney, 54 Ga. 317.

[4] Commonwealth *v.* Painter, 10 Pa. St. 214; Clarke *v.* Jack, 60 Ala. 271. See People *v.* Salomon, 51 Ill. 37; Slinger *v.* Henneman, 38 Wis. 504; Hall *v.* Marshall, 80 Ky. 552; *post*, pp. 172–174.

[5] There are many cases in which municipal subscriptions to works of internal improvement, under statutes empowering them to be made, have been sustained; among others, Goddin *v.* Crump, 8 Leigh, 120; Bridgeport *v.* Housatonic Railroad Co., 15 Conn. 475; Starin *v.* Genoa, 20 Barb. 442, and 23 N. Y. 439; Bank of Rome *v.* Village of Rome, 18 N. Y. 38; Prettyman *v.* Supervisors, &c., 19 Ill. 406; Robertson *v.* Rockford, 21 Ill. 451; Johnson *v.* Stack, 24 Ill. 75; Bushnell *v.* Beloit, 10 Wis. 195; Clark *v.* Janesville, 10 Wis. 136; Stein *v.* Mobile, 24 Ala. 591; Mayor of Wetumpka *v.* Winter, 29 Ala. 651; Pattison *v.* Yuba, 13 Cal. 175; Blanding *v.* Burr, 13 Cal. 343; Hobart *v.* Supervisors, &c., 17 Cal. 23; Taylor *v.* Newberne, 2 Jones Eq. 141; Caldwell *v.* Justices of Burke, 4 Jones Eq. 323; Louisville, &c. Railroad Co. *v.* Davidson, 1 Sneed, 637; Nichol *v.* Mayor of Nashville, 9 Humph. 252; Railroad Co. *v.* Commissioners of Clinton Co., 1 Ohio St. 77; Trustees of Paris *v.* Cherry, 8 Ohio St. 564; Cass *v.* Dillon, 2 Ohio St. 607; State *v.* Commissioners of Clinton Co., 6 Ohio St. 280; State *v.* Van Horne, 7 Ohio St. 327; State *v.* Trustees of Union, 8 Ohio St. 394; Trustees, &c. *v.* Shoemaker, 12 Ohio St. 624; State *v.* Commissioners of Hancock, 12 Ohio St. 596; Powers *v.* Dougherty Co., 23 Ga. 65; San Antonio *v.* Jones, 28 Tex. 19; Commonwealth *v.* McWilliams, 11 Pa. St. 61; Sharpless *v.* Mayor, &c., 21 Pa. St. 147; Moers *v.* Reading, 21 Pa. St. 188; Talbot *v.* Dent, 9 B. Monr. 526; Slack *v.* Railroad Co., 13 B. Monr. 1; City of St. Louis *v.* Alexander, 23 Mo. 483; City of Aurora *v.* West, 9 Ind. 74; Cotton *v.* Commissioners of Leon, 6 Fla. 610; Copes *v.* Charleston, 10 Rich. 491; Commissioners of Knox County *v.* Aspinwall, 21 How. 539, and 24 How. 326; Same *v.* Wallace, 21 How. 547; Zabriskie *v.* Railroad Co., 23 How. 381; Amey *v.* Mayor, &c., 24 How. 364; Gelpcke *v.* Dubuque, 1 Wall. 175; Thomson *v.* Lee County, 3 Wall. 327; Rogers *v.* Burlington, 3 Wall. 654; Gibbons *v.* Mobile & Great Northern Railroad Co., 36 Ala. 410; St. Joseph, &c., Railroad Co. *v.* Buchanan Co. Court, 39 Mo. 485; State *v.* Linn Co. Court, 44 Mo. 504; Stewart *v.* Supervisors of Polk Co., 30 Iowa, 9; John *v.* C. R. & F. W. R. R. Co., 35 Ind. 539; Leavenworth County *v.* Miller, 7 Kan. 479; Walker *v.* Cincinnati, 21 Ohio St. 14; *Ex parte* Selma, &c. R. R. Co., 45 Ala. 696; S. & V. R. R. Co. *v.* Stockton, 41 Cal. 149. In several of them the power to authorize the municipalities to decide upon such subscriptions has been contested as a delegation of legislative authority, but the courts — even those which hold the subscriptions void on other grounds — do not look upon these cases as being obnoxious to the constitutional principle referred to in the

always a question which may with propriety be referred to the voters of the municipality for decision.[1]

The question then arises, whether that which may be done in reference to any municipal organization within the State may not also be done in reference to the State at large. May not any law framed for the State at large be made conditional on an acceptance by the people at large, declared through the ballot-box? If it is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it not quite as clearly be within the power of the legislature to refer to the people at large, from whom all power is derived, the decision upon any proposed statute affecting the whole State? And can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned, and where perhaps there are questions of policy and propriety involved which no authority can decide so satisfactorily and so conclusively as the principal to whom they are referred?

If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the State, any more than there is to refer it to any other authority. The prevailing doctrine in the courts appears to be, that, except in those cases where, by the constitution, the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration. "The exercise of this power by the people in other cases is not expressly and in terms prohibited by the constitution, but it is forbidden by necessary

text. [In any event the power must be exercised strictly in accordance with the conditions attached to the legislative permission. Barnum *v.* Okolona, 148 U. S. 393, 13 Sup. Ct. Rep. 638.]

[1] Whatever powers the legislature may delegate to any public agency for exercise, it may itself resume and exercise. Dyer *v.* Tuscaloosa Bridge Co., 2 Port. 296, 27 Am. Dec. 655; Attorney-General *v.* Marr, 55 Mich. 445, 21 N. W. 883; Chicago & N. W. Ry. Co. *v.* Langlade Co., 56 Wis. 614, 14 N. W. 844; [Brand *v.* Multnomah Co., 38 Oreg. 79, 60 Pac. 390, 50 L. R. A. 389, 84 Am St. 772.] But this must be understood with the exception of those cases in which the constitution of the State requires local matters to be regulated by local authority. [County commissioners may be authorized to provide additional justices of the peace for any precinct above 20,000 inhabitants if "the needs of the precinct . . . require." Pueblo Co. Com'rs *v.* Smith, 22 Col. 534, 45 Pac. 357, 33 L. R. A. 465. Where local matters are required to be submitted to popular vote, if two or more propositions are submitted at one election, they must be so submitted that they may be voted on separately. Denver *v.* Hayes, 28 Col. 110, 63 Pac. 311.]

and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power, with the exception above stated. The people reserved no part of it to themselves [with that exception], and can therefore exercise it in no other case." It is therefore held that the legislature have no power to submit a proposed law to the people, nor have the people power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. The government of the State is democratic, but it is a representative democracy, and in passing general laws the people act only through their representatives in the legislature.[1]

Nor, it seems, can such legislation be sustained as legislation of a conditional character, whose force is to depend upon the happening of some future event, or upon some future change of circumstances. "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law; an event on which the expediency of the law in the opinion of the law-makers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them." But it was held that in the case of the submission of a proposed free-school law to the

[1] Per *Ruggles*, Ch. J., in Barto *v.* Himrod, 8 N. Y. 483. It is worthy of consideration, however, whether there is anything in the reference of a statute to the people for acceptance or rejection which is inconsistent with the representative system of government. To refer it to the people to frame and agree upon a statute for themselves would be equally impracticable and inconsistent with the representative system; but to take the opinion of the people upon a bill already framed by representatives and submitted to them, is not only practicable, but is in precise accordance with the mode in which the constitution of the State is adopted, and with the action which is taken in many other cases. The representative in these cases has fulfilled precisely those functions which the people as a democracy could not fulfil; and where the case has reached a stage when the body of the people can act without confusion, the representative has stepped aside to allow their opinion to be expressed. The legislature is not attempting in such a case to delegate its authority to a new agency, but the trustee, vested with a large discretionary authority, is taking the opinion of the principal upon the necessity, policy, or propriety of an act which is to govern the principal himself. See Smith *v.* Janesville, 26 Wis. 291; Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83; King *v.* Reed, 43 N. J 186.

people, no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the School Act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was to take effect was nothing else than the vote of the people on the identical question which the constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised.[1]

[1] Per *Ruggles*, Ch. J., in Barto *v.* Himrod, 8 N. Y. 483. And see State *v.* Hayes, 61 N. H. 264; Santo *v.* State, 2 Iowa, 165; State *v.* Bencke, 9 Iowa, 203; State *v.* Swisher, 17 Tex. 441; State *v.* Field, 17 Mo. 529; Bank of Chenango *v.* Brown, 26 N. Y. 467; People *v.* Stout, 23 Barb. 349; State *v.* Wilcox, 45 Mo. 458; *Ex parte* Wall, 48 Cal. 279, 313; Brown *v.* Fleischner, 4 Oreg. 132. The power to tax cannot be delegated except as by the Constitution is permitted. Where the Constitution provided that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, it was held not competent to delegate the power to a school board. Waterhouse *v.* Public Schools, 9 Bax. 308. But upon this point there is great force in what is said by *Redfield*, Ch. J., in State *v.* Parker, 26 Vt. 357: "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. And to us the contingency, upon which the present statute was to be suspended until another legislature should meet and have opportunity of reconsidering it, was not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute; for at the very threshold of inquiry into the expediency of such a law lies the other and more important inquiry, Are the people prepared for such a law? Can it be successfully enforced? These questions being answered in the affirmative, he must be a bold man who would even vote against the law; and something more must he be who would, after it had been passed with that assurance, be willing to embarrass its operation or rejoice at its defeat.

"After a full examination of the arguments by which it is attempted to be sustained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare that I am fully convinced — although at first, without much examination, somewhat inclined to the same opinion — that the opinion is the result of false analogies, and so founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice, — rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases; for . . . one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the people of these States, and in others by the lords of the treasury, or the

The same reasons which preclude the original enactment of a law from being referred to the people would render it equally incompetent to refer to their decision the question whether an existing law should be repealed. If the one is "a plain surrender to the people of the law-making power," so also is the other.[1] It would seem, however, that if a legislative act is, by its terms, to take effect in any contingency, it is not unconstitutional to make the *time* when it shall take effect depend upon

boards of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies. It is, in fact, the only possible mode of meeting them, unless Congress is kept constantly in session. The same is true of acts of Congress by which power is vested in the President to levy troops or draw money from the public treasury, upon the contingency of a declaration or an act of war committed by some foreign state, empire, kingdom, prince, or potentate. If these illustrations are not sufficient to show the fallacy of the argument, more would not avail." See also State *v.* Noyes, 10 Fost. 279; Bull *v.* Read, 13 Gratt. 78; Johnson *v.* Rich, 9 Barb. 680; State *v.* Reynolds, 10 Ill. 1; Robinson *v.* Bidwell, 22 Cal. 379. In the case of Smith *v.* Janesville, 26 Wis. 291, Chief Justice *Dixon* discusses this subject in the following language: "But it is said that the act is void, or at least so much of it as pertains to the taxation of shares in national banks, because it was submitted to a vote of the people, or provided that it should take effect only after approval by a majority of the electors voting on the subject at the next general election. This was no more than providing that the act should take effect on the happening of a certain future contingency, that contingency being a popular vote in its favor. No one doubts the general power of the legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not unfrequent. The law of Congress suspending the writ of *habeas corpus* during the late rebellion is one, and several others are referred to in the case *In re* Richard Oliver, 17 Wis. 681. It being conceded that the legislature possesses this general power, the only question here would seem to be, whether a vote of the people in favor of a law is to be excluded from the number of those future contingent events upon which it may be provided that it shall take effect. A similar question was before this court in a late case (State *ex rel.* Attorney-General *v.* O'Neill, Mayor, &c., 24 Wis. 149), and was very elaborately discussed. We came unanimously to the conclusion in that case that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this was one affecting the people of the whole State. There the law was submitted to the voters of that city, and here it was submitted to those of the State at large. What is the difference between the two cases? It is manifest, on principle, that there cannot be any. The whole reasoning of that case goes to show that this act must be valid, and so it has been held in the best-considered cases, as will be seen by reference to that opinion. We are constrained to hold, therefore, that this act is and was in all respects valid from the time it took effect, in November, 1866; and consequently that there was no want of authority for the levy and collection of the taxes in question." This decision, though opposed to many others, appears to us entirely sound and reasonable.

[1] Geebrick *v.* State, 5 Iowa, 491; Rice *v.* Foster, 4 Harr. 479; Parker *v.* Commonwealth, 6 Pa. St. 507 The case in 5 Iowa was followed in State *v.* Weir, 33 Iowa, 134, 11 Am. Rep. 115.

the event of a popular vote being for or against it, — the time of its going into operation being postponed to a later day in the latter contingency.[1] It would also seem that if the question of the acceptance or rejection of a municipal charter can be referred to the voters of the locality specially interested, it would be equally competent to refer to them the question whether a State law establishing a particular police regulation should be of force in such locality or not. Municipal charters refer most questions of local government, including police regulations, to the local authorities; on the supposition that they are better able to decide for themselves upon the needs, as well as the sentiments, of their constituents, than the legislature possibly can be, and are therefore more competent to judge what local regulations are important, and also how far the local sentiment will assist in their enforcement. The same reasons would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing them less extensive powers of local government than a municipal charter would confer; and the fact that the rule of law on that subject might be different in different localities, according as the people accepted or rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority.[2] It is not to be denied, however, that

[1] State *v.* Parker, 26 Vt. 357. The act under consideration in that case was, by its terms, to take effect on the second Tuesday of March after its passage, unless the people to whose votes it was submitted should declare against it, in which case it should take effect in the following December. The case was distinguished from Barto *v.* Himrod, 8 N. Y. 483, and the act sustained. At the same time the court express their dissent from the reasoning upon which the New York case rests. In People *v.* Collins, 3 Mich. 343, the court was equally divided in a case similar to that in Vermont, except that in the Michigan case the law which was passed and submitted to the people in 1853 was not to go into effect until 1870, if the vote of the people was against it.

[2] In New Hampshire an act was passed declaring bowling-alleys, situate within twenty-five rods of a dwelling-house, nuisances, but the statute was to be in force only in those towns in which it should be adopted in town meeting. In State *v.* Noyes, 10 Fost. 279, this act was held to be constitutional. "Assuming," say the court, "that the legislature has the right to confer the power of local regulation upon cities and towns, that is, the power to pass ordinances and by-laws, in such terms and with such provisions, in the classes of cases to which the power extends, as they may think proper, it seems to us hardly possible seriously to contend that the legislature may not confer the power to adopt within such municipality a law drawn up and framed by themselves. If they may pass a law authorizing towns to make ordinances to punish the keeping of billiard-rooms, bowling-alleys, and other places of gambling, they may surely pass laws to punish the same acts, subject to be adopted by the town before they can be of force in it." And it seems to us difficult to answer this reasoning, if it be confined to such laws as fall within the proper

there is considerable authority against the right of legislative delegation in these cases.

The legislature of Delaware, in 1847, passed an act to authorize the citizens of the several counties of the State to decide by ballot whether the license to retail intoxicating liquors should be permitted. By this act a general election was to be held; and if a majority of votes in any county should be cast against license, it should not thereafter be lawful for any person to retail intoxicating liquors within such county; but if the majority should be cast in favor of license, then licenses might be granted in the county so voting, in the manner and under the regulations in said act prescribed. The Court of Errors and Appeals of that State held this act void, as an attempted delegation of the trust to make laws, and upon the same reasons which support the cases before cited, where acts have been held void which referred to the people of the State for approval a law of general application.[1] A like decision was made near the same time by the Supreme Court of Pennsylvania,[2] followed afterwards by others in Iowa,[3] Indiana,[4] and California.[5] But the decision in Pennsylvania was afterwards overruled on full discussion and consideration,[6] and that in Indiana must, as we think, be deemed overruled also.[7] In other States a like delegation of authority to the local electors has generally been sustained. Such laws are known, in

province of local government, and which are therefore usually referred to the judgment of the municipal authorities or their constituency. A similar question arose in Smith *v.* Village of Adrian, 1 Mich. 495, but was not decided. In Bank of Chenango *v.* Brown, 26 N. Y. 467, it was held competent to authorize the electors of an incorporated village to determine for themselves what sections of the general act for the incorporation of villages should apply to their village. An act empowering a city, where the legal voters authorize it, to allow Sunday sales of refreshments, is valid. State *v.* Francis, 95 Mo. 44, 8 S. W. 1. The operation of a park act may be left to the vote of a city. State *v.* District Court, 33 Minn. 235, 22 N. W. 625. So, of a law vesting control of streets in aldermen instead of street commissioners. State *v.* Hoagland, 51 N. J. L. 62, 16 Atl. 166. So, of a law creating a new county. People *v.* McFadden, 81 Cal. 489, 22 Pac. 851. Whether an election to determine upon putting a law in operation shall be called, may be left to the discretion of officers. Johnson *v.* Martin, 75 Tex. 33, 12 S. W. 321. See, further, People *v.* Salomon, 51 Ill. 37; Burgess *v.* Pue, 2 Gill, 11; Hammond *v.* Haines, 25 Md. 541.

[1] Rice *v.* Foster, 4 Harr. 479.

[2] Parker *v.* Commonwealth, 6 Pa. St. 507. See Commonwealth *v.* McWilliams, 11 Pa. St. 61.

[3] Geebrick *v.* State, 5 Iowa. 491. See State *v.* Weir, 33 Iowa, 134, 11 Am. Rep. 115.

[4] Maize *v.* State, 4 Ind. 342; Meshmeier *v.* State, 11 Ind. 482. See also State *v.* Field, 17 Mo. 529; Lammert *v.* Lidwell, 62 Mo. 188; State *v.* Copeland, 3 R. I. 33.

[5] *Ex parte* Wall, 48 Cal. 279, 17 Am. Rep. 425.

[6] Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716.

[7] Groesch *v.* State, 42 Ind. 547. [A majority of voters in a ward or township may be allowed by formal remonstrance to prevent the issuance of license to a particular applicant for the sale of liquors therein. State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.]

common parlance, as Local Option Laws. They relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground, that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations, in respect to which it is proper that the local judgment should control.[1]

Irrepealable Laws.

Similar reasons to those which forbid the legislative department of the State from delegating its authority will also forbid its passing any irrepealable law. The constitution, in conferring the legislative authority, has prescribed to its exercise any limitations which the people saw fit to impose; and no other power than the people can superadd other limitations. To say that the legislature may pass irrepealable laws, is to say that it may alter the very constitution from which it derives its authority; since, in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors; and the process might be repeated, until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be to a greater or less degree rendered ineffectual.[2]

[1] Commonwealth *v.* Bennett, 108 Mass. 27; Commonwealth *v.* Dean, 110 Mass. 357; Commonwealth *v.* Fredericks, 119 Mass. 199; Bancroft *v.* Dumas, 21 Vt. 456; Slinger *v.* Henneman, 38 Wis. 504; Erlinger *v.* Boneau, 51 Ill. 94; Gunnarssohn *v.* Sterling, 92 Ill. 569; State *v.* Morris County, 36 N. J. 72, 13 Am. Rep. 422; State *v.* Circuit Court, 15 Atl. 274 (N. J.); State *v.* Wilcox, 42 Conn. 364, 19 Am. Rep. 536; Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83; State *v.* Cooke, 24 Minn. 247, 31 Am. Rep. 344; Cain *v.* Commissioners, 86 N. C. 8; Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6; Savage *v.* Com., 84 Va. 619, 5 S. E. 565; Caldwell *v.* Barrett, 73 Ga. 604; *Ex parte* Kennedy, 23 Tex. App. 77, 3 S. W. 114; Schulherr *v.* Bordeaux, 64 Miss. 59, 8 So. 201; State *v.* Pond, 93 Mo. 606, 6 S. W. 469; Terr. *v.* O'Connor, 5 Dak. 397, 41 N. W. 746; [Feek *v.* Bloomingdale, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.] Local option, as applied to the sale of liquors, has also been sustained in Canada. Mayor, &c. *v.* The Queen, 3 Can. Sup. Ct. 505. But the matter cannot be left to an election precinct. It must be submitted to a municipal corporation. Thornton *v.* Territory, 3 Wash. Ter. 482, 17 Pac. 896.

[2] "Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has the right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract. If in any line of legislation a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would

"Acts of Parliament," says Blackstone, "derogatory from the power of subsequent Parliaments, bind not; so the statute 11 Henry VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of Parliament or otherwise, is held to be good only as to common prosecution for high treason, but it will not restrain nor clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent Parliament. And upon the same principle, Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. 'When you repeal the law itself,' says he, 'you at the same time repeal the prohibitory clause which guards against such repeal.'"[1]

Although this reasoning does not in all its particulars apply to the American legislatures, the principle applicable in each case is the same. There is a modification of the principle, however, by an important provision of the Constitution of the United States, forbidding the States passing any laws impairing the obligation of contracts. Legislative acts are sometimes in substance contracts between the State and the party who is to derive some right under them, and they are not the less under the protection of the clause quoted because of having assumed this form. Charters of incorporation, except those of a municipal character, — and which, as we have already seen, create mere agencies of government, — are held to be contracts between the State and the corporators, and not subject to modification or change by the act of the State alone, except as may be authorized by the terms of the charters themselves.[2] And it now seems to be settled, by the decisions of the Supreme Court of the United States, that a State, by contract to that effect, based upon a consideration, may exempt the property of an individual or corporation from taxation for any specified period, or even

become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors; whether it would be wise to do so is a matter for legislative discretion." Bloomer *v.* Stolley, 5 McLean, 158. See this subject considered in Wall *v.* State, 23 Ind. 150, and State *v.* Oskins, 28 Ind. 364; Oleson *v.* Green Bay, &c. R. R. Co., 36 Wis. 383. In Kellogg *v.* Oshkosh, 14 Wis. 623, it was held that one legislature could not bind a future one to a particular mode of appeal.

[1] 1 Bl. Com. 90.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518; Planters' Bank *v.* Sharp, 6 How. 301.

permanently. And it is also settled by the same decisions, that where a charter, containing an exemption from taxes, or an agreement that the taxes shall be to a specified amount only, is accepted by the corporators, the exemption is presumed to be upon sufficient consideration, and consequently binding upon the State.[1]

Territorial Limitation to State Legislative Authority.

The legislative authority of every State must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State. It can have no authority upon the high seas beyond State lines, because there is the point of con-

[1] Gordon *v.* Appeal Tax Court, 3 How. 133; New Jersey *v.* Wilson, 7 Cranch, 164; Piqua Branch Bank *v.* Knoop, 16 How. 369; Ohio Life Ins. and Trust Co. *v.* Debolt, 16 How. 416, 432; Dodge *v.* Woolsey, 18 How. 331; Mechanics' and Traders' Bank *v.* Debolt, 18 How. 381; Jefferson Branch Bank *v.* Skelly, 1 Black, 436; Erie R. R. Co. *v.* Pennsylvania, 21 Wall. 492. See also Hunsaker *v.* Wright, 30 Ill. 146; Morgan *v.* Cree, 46 Vt. 773; Spooner *v.* McConnell, 1 McLean, 347; *post*, p. 395. The right of a State legislature to grant away the right of taxation, which is one of the essential attributes of sovereignty, has been strenuously denied. See Debolt *v.* Ohio Life Ins. and Trust Co., 1 Ohio St. 563; Mechanics' and Traders' Bank *v.* Debolt, 1 Ohio St. 591; Brewster *v.* Hough, 10 N. H. 138; Mott *v.* Pennsylvania Railroad Co., 30 Pa. St. 9. And see Thorpe *v.* Rutland and B. Railroad Co., 27 Vt. 140; *post*, p. 395 and note. In Brick Presbyterian Church *v.* Mayor, &c. of New York, 5 Cow. 538, it was held that a municipal corporation had no power, as a party, to make a contract which should control or embarrass its discharge of legislative duties. And see *post*, p. 295. In Coats *v.* Mayor, &c. of New York, 7 Cow. 585, it was decided that though a municipal corporation grant lands for cemetery purposes, and covenant for their quiet enjoyment, it will not thereby be estopped afterwards to forbid by by-law the use of the land for that purpose, when such use becomes or is likely to become a nuisance. In Stone *v.* Mississippi, 101 U. S. 814, 820, Chief Justice *Waite* says: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances." See also, on the same subject, Morgan *v.* Smith, 4 Minn. 104; Kincaid's Appeal, 66 Pa. St. 411; 5 Am. Rep. 377; Hamrick *v.* Rouse, 17 Ga. 56, where it was held that the legislature could not bind its successors not to remove a county seat. Bass *v.* Fontleroy, 11 Tex. 698; Shaw *v.* Macon, 21 Ga. 280; Regents of University *v.* Williams, 9 G. & J. 365; Mott *v.* Pennsylvania Railroad Co., 30 Pa. St. 9. In Bank of Republic *v.* Hamilton, 21 Ill. 53, it was held that, in construing a statute, it will not be intended that the legislature designed to abandon its right as to taxation. This subject is considered further, *post*, pp. 395–401.

tact with other nations, and all international questions belong to the national government.[1] It cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offences at all, must be offences against the sovereignty within whose limits they have been done.[2] But if the consequences of an unlawful act committed outside the State have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such State.[3]

[1] 1 Bish. Cr. Law, § 120.

[2] State *v.* Knight, 2 Hayw. 109; People *v.* Merrill, 2 Park. Cr. R. 590; Adams *v.* People, 1 N. Y. 173; Tyler *v.* People, 8 Mich. 320; Morrissey *v.* People, 11 Mich. 327; Bromley *v.* People, 7 Mich. 472; State *v.* Main, 16 Wis. 398; Watson's Case, 36 Miss. 593; *In re* Carr, 28 Kan. 1. See *In re* Rosdeitscher, 33 Fed. Rep. 657. [The territorial jurisdiction of a State bordering upon the high seas extends one marine league from shore and is subject over that space only to the federal power over navigation. State has full control of the fisheries therein. Manchester *v.* Massachusetts, 139 U. S. 240, 11 Sup. Ct. Rep. 559.] The Constitution of the United States empowers Congress to exercise exclusive jurisdiction over places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When the United States acquire lands without such consent, the State jurisdiction is as complete as if the lands were owned by private citizens. But the State, in giving consent, may reserve the right to serve State process within the territory: State *v.* Dimick, 12 N. H. 194; Commonwealth *v.* Clary, 8 Mass. 72; United States *v.* Cornell, 2 Mass. 60; Opinion of Judges, 1 Met. 580; or to tax railroads in it: Fort Leavenworth R. R. Co. *v.* Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995; and its railroad fencing statutes remain in force. Chicago, R. I., &c. Co. *v.* McGlinn, 114 U. S. 542, 5 Sup. Ct. Rep. 1005. Offences within the purchased territory can only be punished by the United States: United States *v.* Ames, 1 Wood. & M. 76; Mitchell *v.* Tibbetts, 17 Pick. 298; even though death ensues out of the territory: Kelly *v.* United States, 27 Fed. Rep. 616; State *v.* Kelly, 76 Me. 331; and residents within such territory are not citizens of the State. Commonwealth *v.* Clary, 8 Mass. 72; Sinks *v.* Reese, 19 Ohio St. 306. As to jurisdiction over military camps within a State, for military purposes, see United States *v.* Tierney, 1 Bond, 571; and as to crimes on Indian reservations, United States *v.* Kagama, 118 U. S. 375, 6 Sup. Ct. Rep. 1109; *Ex parte* Cross, 20 Neb. 417, 30 N. W. 428; Marion *v.* State, *id.* 233, 20 N. W. 911.

[3] Tyler *v.* People, 8 Mich. 320. Murder is committed in the District of Columbia if the fatal blow is struck there, though the death occurs elsewhere. United States *v.* Guiteau, 1 Mackey, 498. See Hatfield *v.* Com., 12 S. W. 309 (Ky.). That where a larceny is committed in one State and the property carried by the thief into another, this may be treated as a continuous larceny wherever the property is taken, see Commonwealth *v.* Cullins, 1 Mass. 116; Commonwealth *v.* Andrews, 2 Mass. 14, 3 Am. Dec. 17; Commonwealth *v.* Holder, 9 Gray, 7; Commonwealth *v.* White, 123 Mass. 430; State *v.* Ellis, 3 Conn. 185, 8 Am. Dec. 175; State *v.* Cummings, 33 Conn. 260; State *v.* Bartlett, 11 Vt. 650; State *v.* Bennett, 14 Iowa, 479; People *v.* Williams, 24 Mich. 156; State *v.* Main, 16 Wis. 398; Hamilton *v.* State, 11 Ohio, 435; State *v.* Seay, 3 Stew. 123, 20 Am. Dec. 66; State *v.* Johnson, 2 Oreg. 116; Myers *v.* People, 26 Ill. 173; Watson *v.* State, 36 Miss. 593; State *v.* Underwood, 49 Me. 181; Ferrell *v.* Commonwealth, 1 Duv. 153; Regina *v.* Hennessy, 35 Up. Can. R. 603. *Contra*, State *v.* Brown, 1 Hayw. 100, 1 Am. Dec. 548; People *v.* Gardner, 2 Johns. 477; Simmons *v.* Commonwealth, 5 Binn. 617; Simpson *v.* State, 4 Humph. 456; Beal *v.* State, 15 Ind. 378; State *v.* LeBlanch, 31

Upon the principle of comity, however, which is a part of the law of nations, recognized as such by every civilized people, effect is given in one State or country to the laws of another in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with and dependent upon such foreign laws; without which commercial and business intercourse between the people of different States and countries could scarcely exist.[1] In the making of contracts, the local law enters into and forms a part of the obligation; and if the contract is valid in the State where it is made, (*a*) any other State will give remedies for its enforcement, unless, according to the standard of such latter State, it is bad for immorality, or is opposed in its provisions to some accepted principle of public policy, or unless its enforcement would be prejudicial to the State or its people.[2] So, though a corporation created by or under the laws of one State has, in strictness, no extra-territorial life or authority, and cannot of right insist upon extending its operations within the limits of another, yet this

N. J. 82; and where the larceny took place in a foreign country: Stanley *v.* State, 24 Ohio St. 166, 15 Am. Rep. 604; Commonwealth *v.* Uprichard, 3 Gray, 434.

[1] Thompson *v.* Waters, 25 Mich. 214, 225; Bank of Augusta *v.* Earle, 13 Pet. 519.

[2] Runyon *v.* Coster's Lessee, 14 Pet. 122; Merrick *v.* Van Santvoord, 34 N. Y. 208; Saul *v.* His Creditors, 5 Mart. N. S. 569, 16 Am. Dec. 212; Greenwood *v.* Curtis, 6 Mass. 258, 4 Am. Dec. 145. In this last case, *Parsons*, Ch. J., says the rule that foreign contracts will be enforced in our own courts is subject to two exceptions. One is when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts; and the other is, when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable. The first he illustrates by a contract for an importation forbidden by the local law, and the second by an agreement for an incestuous marriage. Another illustration under the first head is, where enforcing the foreign contract would deprive a home creditor of a lien. Ingraham *v.* Geyer, 13 Mass. 146. Compare Oliver *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Arayo *v.* Currell, 1 La. 528, 20 Am. Dec. 286. If a sale of goods is valid where made though it would not be where the buyer lives and where it is sought to be enforced, it will be upheld in the latter State, unless the seller participates in the reselling there: Feineman *v.* Sachs, 33 Kan. 621; Parsons Oil Co. *v.* Boyett, 44 Ark. 230; not if the order was unlawfully solicited in the buyer's State. Jones *v.* Surprise, 64 N. H. 213. Gambling contracts as to stocks valid in New York will not be enforced in New Jersey. Flagg *v.* Baldwin, 38 N. J. Eq. 219. But a contract limiting a carrier's liability, valid in New York where made, will be enforced in Pennsylvania, though invalid if made there. Forepaugh *v.* Del. L. & W. R. R. Co., 128 Pa. St. 217, 18 Atl. 503.

(*a*) [The contract is made in the State in which the offer is accepted. Holder *v.* Aultman, Miller & Co., 169 U. S. 81, 18 Sup. Ct. Rep. 269, aff. 68, Fed. Rep. 467. Upon validity of contracts made by foreign corporations which have not complied with statutory conditions prescribed as precedent to their right to do business in the State, see Edison Gen. Electric Co. *v.* Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315 and note, 40 Am. St. 910.]

will be suffered without objection where no local policy forbids;(a) and the corporation may make contracts, and acquire,

(a) [A State may prescribe conditions upon which a foreign corporation may do business within its borders, and for breach of such conditions may exclude the corporation, except where it is doing business of a federal nature. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 20 Sup. Ct. Rep. 518, aff. 19 Tex. Civ. App. 1, 44 S. W. 936. Upon admission or exclusion of foreign corporations, see Cone Export and Commission Co. *v.* Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289 and note; exclusion of foreign corporation as regulation of interstate commerce, note to 24 L. R. A. 311; exclusion, regulation, and taxation of foreign corporations, note to 24 C. C. A. 13; regulation of business of a foreign corporation by State, Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601 and note; and that foreign corporations are amenable to local law, see Talbot *v.* Fidelity, &c. Co., 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584. A foreign life insurance company which enters a State and does business therein is bound to observe the laws of that State, and its contracts thus made will be interpreted according to the laws of that State even though the parties expressly stipulate that the contract shall be interpreted according to the laws of another State. N. Y. Life Ins. Co. *v.* Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962, aff. 148 Mo. 583, 50 S. W. 519, 71 Am. St. 628. A State has power to prescribe the conditions under which a foreign insurance corporation may do business within its borders, and to provide and enforce penalties for breach of those conditions. Noble *v.* Mitchell, 164 U. S. 367, 17 Sup Ct. Rep. 110. And the State may penalize any act done within its borders looking toward the formation of contract relations with a foreign corporation which it has forbidden to do business within its borders. Hooper *v.* California, 155 U. S. 648, 15 Sup. Ct. Rep. 207; but it cannot prevent the doing within its borders by its citizens of acts otherwise lawful which are reasonably necessary to the enjoyment of contracts which such citizens have made without its borders, even though they be made with foreign corporations which the State has forbidden to do business within its borders. Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427. And a requirement that before doing business within the State the foreign corporation shall surrender a right which it derives from the Constitution and laws of the United States is void. Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 Sup. Ct. Rep. 44. If State taxes its own corporations upon their entire capital, the foreign corporation doing business in the State cannot object to being taxed upon its entire capital, even though it uses only a very small fraction of its capital within the State. Horn Silver Mining Co. *v.* New York, 143 U. S. 305, 12 Sup. Ct. Rep. 403, aff. 105 N. Y. 76, 11 N. E. 155. A foreign corporation does business in a particular State not by right but by comity, and its license to do so may be revoked at pleasure. State *v.* Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. 449. A railroad corporation whose road lies entirely within one State, but is a link in a through route traversing several States, over which through route interstate commerce is carried on, is engaged in interstate commerce, and no State can exact of it a license before permitting it to open an office within the borders of the State, in which office it transacts only business relating to its interstate commerce. McCall *v.* California, 136 U. S. 104, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 Sup. Ct. Rep. 958. For note upon exclusion of foreign corporations as an interference with interstate commerce, see 24 L. R. A. 311. License for current year may be revoked for refusal to pay unpaid license fees for previous years. Travelers' Ins. Co. *v.* Fricke, 59 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557. The exclusion of a foreign corporation cannot operate to prevent the performance of contracts lawfully entered into before the order of exclusion was passed, nor impair the right to enforce the obligations arising through such performance. Bedford *v.* E. B'ld'g & Loan Ass'n, 181 U. S. 227, 21 Sup. Ct. Rep. 597. Upon right to sue in foreign State, see Cone E. & C. Co. *v.* Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289, and note therein on recognition or exclusion of foreign corporations. On power of a State to prevent foreign corporations operating within its borders from violating its

hold, and convey property as it would have a right to do in the State of its origin.[1] Real estate, however, it can only take, hold, and transmit in accordance with the rules prescribed by

[1] Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Jessup *v.* Carnegie, 80 N. Y. 441; Lumbard *v.* Aldrich, 8 N. H. 31; Lothrop *v.* Commercial Bank, 8 Dana, 114; National Trust Co. *v.* Murphy, 30 N. J. Eq. 408; Elston *v.* Piggott, 94 Ind. 14; People *v.* Howard, 50 Mich. 239; Christian Union *v.* Yount, 101 U. S. 352. Taking an order in one State for the delivery of goods in another is not such a doing of business as to require compliance with a statute for filing certificate, &c., before transacting of business by a foreign corporation. Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 Sup. Ct. Rep. 739. [Upon what is doing business within a State, and under what circumstances an agent doing business within the State may be served with process against the corporation, see Connecticut Life Ins. Co. *v.* Spratley, 172 U. S. 602, 19 Sup. Ct. Rep. 308, aff. 99 Tenn. 322, 42 S. W. 145. Where corporation is foreign and does no business in the State, nor has any agent or property therein, service of summons upon the president temporarily within the State is ineffective to give jurisdiction to a federal circuit court sitting therein, and appearance specially and solely for purpose of petitioning for removal of cause to another federal court does not waive the objection to itsufficiency of summons and service. Goldey *v.* Morning News, 156 U. S. 518, 15 Sup. Ct. Rep. 559. Foreign corporation doing business within a State thereby subjects itself to the local regulations concerning suits against non-residents. N. Y., L. E. & W. R. Co. *v.* Estill, 147 U. S. 591, 13 Sup. Ct. Rep. 444. And to local tax laws, Horn Silver Mining Co. *v.* New York, 143 U. S. 305, 12 Sup. Ct. Rep. 403. But after the corporation has completely withdrawn from the State and no longer does any business there, it is not subject to state process. Mutual R. F. Life Assn. *v.* Boyer, 62 Kan. 31, 61 Pac. 387, 50 L. R. A. 538. Discounting a note sent from another State is not doing business in the State from which the note is sent. Bamberger & Co. *v.* Schoolfield, 160 U. S. 149, 16 Sup. Ct. Rep. 225. Nor is filling an order for coal, order being sent from another State, a doing of business in that other State. Delaware & H. Canal Co. *v.* Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978, 45 L. R. A. 538. Being interested as silent partner in a limited partnership in the State is doing business within it. People *v.* Roberts, 152 N. Y. 59, 46 N. E. 161, 36 L. R. A. 756. But prosecuting a suit is not. St. Louis, A. & T. R. Co. *v.* Fire Assn. of Phila., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83. Nor is taking a single mortgage for past-due indebtedness for goods sold at its domicil. Florsheim, &c. Co. *v.* Leater, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. 162. Where the foreign corporation has no office or agency within the State, its sale of machinery to a resident and its subsequent coming into the State and erecting the machinery is only interstate commerce and not a doing business within the State which the State can control. Milan M. & M. Co. *v.* Gorton, 93 Tenn. 550, 27 S. W. 971, 26 L. R. A. 135.] But a State may by penalties enforce compliance with its laws by a foreign corporation. Moses *v.* State, 65 Miss. 56. Powers not allowed to such corporation in the State where created, it will not be suffered to exercise elsewhere. Starkweather *v.* Bible Society, 72 Ill. 50, 22 Am. Rep. 133; Kerr *v.* Dougherty, 79 N. Y. 327; Thompson *v.* Waters, 25 Mich. 214.

exemption laws by garnishment proceedings in other States, see Singer M'f'g Co. *v.* Fleming, 39 Neb. 679, 58 N. W. 226, 23 L. R. A. 210, 42 Am. St. 613. An action to exclude a foreign corporation from the State is a civil action, and the defendant corporation may be compelled to give evidence against itself. State *v.* Standard Oil Co., 61 Neb. 28, 84 N. W. 413. For other cases upon foreign corporations, see Southern B. & L. Ass'n *v.* Norman, 98 Ky. 294, 32 S. W. 952, 31 L. R. A. 41, 56 Am. St. 367, Kindel *v.* Beck & P. Lith. Co., 19 Col. 310, 35 Pac. 538, 24 L. R. A. 311; Gunn *v.* White S. M. Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. 223; State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. 152.]

the law of the State in which the estate is situate;[1] and the principle of comity is never so far extended as to give force and effect to the penal laws of one political society within the territory of another, even though both belong to one political system.[2] The question whether a statute giving a right of action for a death occurring within a State can be enforced in another State has given rise to much discussion. In several States it is held that the remedy is purely local, and that the action can only be brought in the State where the killing takes place. But in several the rule is that an action will lie in another State, if the statutes of the latter are substantially like those of the State where the death is caused.[3]

Other Limitations of Legislative Authority.

Besides the limitations of legislative authority to which we have referred, others exist which do not seem to call for special remark. Some of these are prescribed by constitutions,[4] but

[1] A rule which applies even to the government itself. United States *v.* Fox, 94 U. S. 315. See State *v.* Scott, 22 Neb. 628, 36 N. W. 121.

Only a State can raise the question whether a foreign corporation can rightfully acquire land for its business purposes. Barnes *v.* Suddard, 117 Ill. 237, 7 N. E. 477. Failure of such corporation to comply with statutory conditions precedent to doing business does not avoid a conveyance to it so that a private person can attack it collaterally. Fritts *v.* Palmer, 132 U. S. 382, 10 Sup. Ct. Rep. 93. Compare Koening *v.* Chicago, B. & Q. R. R. Co., 27 Neb. 609, 43 N. W. 423.

[2] Dickson *v.* Dickson, 1 Yerg. 110, 24 Am. Dec. 444; Scoville *v.* Canfield, 14 Johns. 338, 7 Am. Dec. 467; First National Bank *v.* Price, 33 Md. 487, 3 Am. Rep. 204; Lindsey *v.* Hill, 66 Me. 212, 22 Am. Rep. 564. The federal courts will not enforce at the suit of a State its penal laws against a foreign corporation. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265.

[3] See Taylor *v.* Penn. Co., 78 Ky. 348; Debevoise *v.* New York, L. E. & W. R. R. Co., 98 N. Y. 377; St. Louis, I. M. &c. Co. *v.* McCormick, 71 Tex. 660, 9 S. W. Rep. 540; Dennick *v.* Railroad Co., 103 U. S. 11, and cases collected in Cooley on Torts, pp. 311–313.

[4] The restrictions upon State legislative authority are much more extensive in some constitutions than in others. The Constitution of Missouri of 1865 had the following provision: "The General Assembly shall not pass special laws divorcing any named parties, or declaring any named person of age, or authorizing any named minor to sell, lease, or encumber his or her property, or providing for the sale of the real estate of any named minor or other person laboring under legal disability, by any executor, administrator, guardian, trustee, or other person, or establishing, locating, altering the course, or affecting the construction of roads, or the building or repairing of bridges, or establishing, altering, or vacating any street, avenue, or alley in any city or town, or extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or giving effect to informal or invalid wills or deeds, or legalizing, except as against the State, the unauthorized or invalid acts of any officer, or granting to any individual or company the right to lay down railroad tracks in the streets of any city or town, or exempting any property of any named person or corporation from taxation. The General Assembly shall pass no special law for any case for which provision can

others spring from the very nature of free government. The

be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable." Art. 4, § 27. We should suppose that so stringent a provision would, in some of these cases, lead to the passage of general laws of doubtful utility in order to remedy the hardships of particular cases; but the constitution adopted in 1875 is still more restrictive. Art. 4, § 53. As to when a general law can be made applicable, see Thomas *v.* Board of Commissioners, 5 Ind. 4; State *v.* Squires, 26 Iowa, 340; Johnson *v.* Railroad Co., 23 Ill. 202. In State *v.* Hitchcock, 1 Kan. 178, it was held that the constitutional provision, that "in all cases where a general law can be made applicable, no special law shall be enacted," left a discretion with the legislature to determine the cases in which special laws should be passed. See, to the same effect, Marks *v.* Trustees of Purdue University, 37 Ind. 155; State *v.* Tucker, 46 Ind. 355, overruling Thomas *v.* Board of Commissioners, *supra*; Johnson *v.* Com'rs Wells Co., 107 Ind. 15; State *v.* County Court of Boone, 50 Mo. 317, 11 Am. Rep. 415; State *v.* Robbins, 51 Mo. 82; Hall *v.* Bray, 51 Mo. 288; St. Louis *v.* Shields, 62 Mo. 247; Carpenter *v.* People, 8 Col. 116, 5 Pac. 825; Richman *v.* Supervisors, 77 Iowa, 513, 42 N. W. Rep. 422; Davis *v.* Gaines, 48 Ark. 370. Compare Hess *v.* Pegg, 7 Nev. 23; Darling *v.* Rogers, 7 Kan. 592; *Ex parte* Pritz, 9 Iowa, 30; [Bank of Commerce *v.* Wiltsie, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489; State *v.* Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566, and note; Richman *v.* Muscatine County, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. 308; People *v.* Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 342. But see Silberman *v.* Hay, 59 Ohio St. 582, 53 N. E. 258, 44 L. R. A. 264, holding that right of trial by jury is general, and that a law relating thereto and expressly made applicable to a single county is void. Gambling cannot be made a crime everywhere except "within the limits or enclosure of a regular racecourse." State *v.* Walsh, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231; see also State *v.* Elizabeth, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525.] Where the legislature is forbidden to pass special or local laws regulating county or township business, a special act allowing and ordering payment of a particular claim is void, even though the claim, being merely an equitable one, cannot be audited by any existing board. Williams *v.* Bidleman, 7 Nev. 68. See Darling *v.* Rogers, 7 Kan. 592; [Dean *v.* Spartanburg County, 59 S. C. 110, 37 S. E. 226; Uffert *v.* Vogt, 65 N. J. App. 377, 621, 47 Atl. 225, 48 Atl. 574; Black *v.* Gloucester City, — N. J. L. —, 48 Atl. 1112 (April 29, 1901). Special tax liens cannot be provided for certain towns only. Burnet *v.* Dean, 60 N. J. Eq. 9, 46 Atl. 532.] Such a provision does not prevent a special act to locate a county seat. State *v.* Sumter Co., 19 Fla. 518. [But one arbitrarily classifying counties is special. Edmunds *v.* Herbrandson, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725. So is one changing ward boundaries in a single city. State *v.* Newark, 53 N. J. L. 4, 20 Atl. 886, 10 L. R. A. 700.] A statute is not special because it is not universal in operation by reason of earlier special laws not affected by the constitutional provision. Evans *v.* Phillipi, 117 Pa. St. 226, 11 Atl. 630. [And a law which gives to any city having a special charter the option to adopt the provisions of a general act is not special. Adams *v.* Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441.] An act creating a criminal court for a particular county is not in conflict with the constitutional prohibition of special legislation. Eitel *v.* State, 33 Ind. 201. See Matter of Boyle, 9 Wis. 264. Nor one allowing recovery from railroad of $5,000 in case of death. Carroll *v.* Missouri P. Ry. Co., 88 Mo. 239. [But one providing for interchange of judges in a single county is. Ashbrook *v.* Schaub, 160 Mo. 87, 60 S. W. 1085.] A Sunday law making it a misdemeanor for a baker to engage in the business of baking on Sunday is a special law, and unconstitutional in California. *Ex parte* Westerfield, 55 Cal. 550, 36 Am. Rep. 47. Where special acts conferring corporate powers are prohibited, the State cannot specially authorize a school district to issue bonds to erect a school-house. School District *v.* Insurance Co., 103 U. S. 707. [See, for an-

latter must depend for their enforcement upon legislative wis-

other example, Grey *v.* Newark Plank-Road Co., 65 N. J. L. 51, 603, 46 Atl. 606, 48 Atl. 557.] The provision does not forbid legalizing bonds of a city void from want of power to issue them: Read *v.* Plattsmouth, 107 U. S. 568, 2 Sup. Ct. Rep. 208; nor in Tennessee does it cover municipal corporations: Stat *v.* Wilson, 12 Lea, 246; [Burnett *v.* Maloney, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541;] nor in Wisconsin a commission created under the police power to establish drains. State *v.* Stewart, 74 Wis. 620, 43 N. W. 947; [applies to counties in Nevada: Schweiss *v.* First Judicial Distr. Ct., 23 Nev. 226, 45 Pac. 289, 34 L. R. A. 602.] A constitutional provision that requires all laws of a general nature to have uniform operation throughout the State is complied with in a statute applicable to all cities of a certain class having less than one hundred thousand inhabitants, though in fact there be but one city in the State of that class. Welker *v.* Potter, 18 Ohio St. 85; Wheeler *v.* Philadelphia, 77 Pa. St. 338; Kilgore *v.* Magee, 85 Pa. St. 401. *Contra*, Divine *v.* Commissioners, 84 Ill. 590. And see Desmond *v.* Dunn, 55 Cal. 24; Earle *v.* Board of Education, 55 Cal. 489; Van Riper *v.* Parsons, 40 N. J. 123, 29 Am. Rep. 210; State *v.* Trenton, 42 N. J. 486; State *v.* Hammer, 42 N. J. 435; Worthley *v.* Steen, 43 N. J. L. 542; Bumsted *v.* Govern, 47 N. J. L. 368, 1 Atl. 835; Van Giesen *v.* Bloomfield, *id.* 442, 2 Atl. 249; Hightstown *v.* Glenn, *id.* 105; New Brunswick *v.* Fitzgerald, 48 N. J. L. 457, 8 Atl. 729; State *v.* Hoagland, 51 N. J. L. 62, 16 Atl. 166; McCarthy *v.* Com., 110 Pa. St. 243, 2 Atl. 423; App. of Scranton Sch. Dist., 113 Pa. St. 176, 6 Atl. 158; Wilkes-Barre *v.* Meyers, *id.* 395; Reading *v.* Savage, 124 Pa. St. 328, 16 Atl. 788; *Ex parte* Falk, 42 Ohio St. 638; State *v.* Pugh, 43 Ohio St. 98, 1 N. E. 439; State *v.* Hawkins, 44 Ohio St. 98, 5 N. E. 225; State *v.* Anderson, *id.* 247, 6 N. E. 571; Ewing *v.* Hoblitzelle, 85 Mo. 64; Kelly *v.* Meeks, 87 Mo. 396; State *v.* Co. Court, 89 Mo. 237, 1 S. W. 307; State *v.* Pond, 93 Mo. 606, 6 S. W. 469; State *v.* Donovan, 20 Nev. 75, 15 Pac. 783; Darrow *v.* People, 8 Col. 417, 8 Pac. 661; People *v.* Henshaw, 76 Cal. 436, 18 Pac. 413. And on the general subject, see further, Bourland *v.* Hildreth, 26 Cal. 161; Brooks *v.* Hyde, 37 Cal. 366; McAunich *v.* Mississippi, &c. R. R. Co., 20 Iowa, 338; Rice *v.* State, 3 Kan. 141; Jackson *v.* Shaw, 29 Cal. 267; Gentile *v.* State, 29 Ind. 409; State *v.* Parkinson, 5 Nev. 15; Ensworth *v.* Albin, 46 Mo. 450; People *v.* Wallace, 70 Ill. 680; State *v.* Camden Common Pleas, 41 N. J. 495; O'Kane *v.* Treat, 25 Ill. 557; Commonwealth *v.* Patton, 88 Pa. St. 258; Cox *v.* State, 8 Tex. App. 254; State *v.* Monahan, 69 Mo. 556; State *v.* Clark, 23 Minn. 422; Speight *v.* People, 87 Ill. 595; [Morris *v.* Stout, 110 Iowa, 659, 78 N. W. 843, 50 L. R. A. 97; *Re* Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132; West Chicago Park Com'rs *v.* McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; Lodi Twp. *v.* State, 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56; State *v.* Somers' Point, 52 N. J. L. 32, 18 Atl. 694, 6 L. R. A. 57; Terr. *v.* School Dist., 10 Okla. 556, 64 Pac. 241; State *v.* Thomas, 25 Mont. 226, 64 Pac. 503; Lougher *v.* Soto, 129 Cal. 610, 62 Pac. 184; Fox *v.* Mohawk & H. R. H. Society, 165 N. Y. 517, 59 N. E. 353. Where the legislation shows the legislative intent to be the substitution of isolation for classification, it is invalid. State *v.* Jones, 66 Ohio, 453, 64 N. E. 424; State *v.* Beacom, 66 Ohio, 491, 64 N. E. 427. See also upon the general question, Com. *v.* Moir, 199 Pa. 534, 49 Atl. 351, 85 Am. St. 801.]

[Insane persons having no dependents nor persons who could take from them under the law of succession may have their expenses while in the asylum charged upon their estates, while the expenses of other insane persons in the same asylum are paid out of the public funds. Bon Homme Co. *v.* Berndt, 13 S. D. 309, 83 N. W. 333, 50 L. R. A. 351. Where the Constitution provides that "corporations other than banking shall not be created by special act," the extension of an old special charter of such other corporation is equally prohibited. Bank of Commerce *v.* Wiltsie, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489. And where the grant of any special privileges, immunities, or franchises whatever is prohibited, certain named societies cannot be empowered to appoint designated State officers, *e.g.*

dom, discretion, and conscience.[1] The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretence of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been

members of a State board of inspectors of the business of licensed commission merchants. Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. 103. Nor can the number of deputies for certain county officers be prescribed for some counties and left to the discretion of the county court in others. Weaver *v.* Davidson County, 104 Tenn. 315, 59 S. W. 1105. Where classification of cities is permitted, it must be for city purposes only. *Re* Washington St., 132 Pa. 257, 19 Atl. 219, 7 L. R. A. 193 and note. Statute providing for cure of inebriates at public expense in counties having fifty thousand population or more is void for arbitrariness. Murray *v.* Ramsey County Com'rs, 81 Minn. 359, 84 N. W. 103, 51 L. R. A. 828. Bicycle tax levied in certain counties only is void, although proceeds form a special fund for construction of bicycle paths. Ellis *v.* Frazier, 38 Oreg. 462, 63 Pac. 642.] As to what differences should underlie a classification, see Cobb *v.* Bord, 40 Minn. 479, 42 N. W. 396. [All classification must be reasonable. An exemption of ex-soldiers and marines, honorably dismissed from the service of the United States, from a pedler's license tax is void. State *v.* Garbroski, 111 Iowa, 496, 82 N. W. 959, 82 Am. St. 521. If special legislation is prohibited, a classification such that one class has but one member and, because the classification is based upon a past fact, can never have more, is void. Campbell *v.* Indianapolis, 155 Ind. 186, 57 N. E. 920. And see Knopf *v.* People, 185 Ill. 20, 57 N. E. 22. An arbitrary exemption from a license tax of all dealers whose business is less than a thousand dollars a year, others having no equal exemption, is void as class legislation. Com. *v.* Clark, 195 Pa. 634, 46 Atl. 286, 86 Am. St. 694. See also Burnet *v.* Dean, — N. J. App. —, 49 Atl. 503 (June 17, 1901).] Where the legislature, for urgent reasons, may suspend the rules and allow a bill to be read twice on the same day, what constitutes a case of urgency is a question for the legislative discretion. Hull *v.* Miller, 4 Neb. 503. The legislature's power over its own proceedings cannot be controlled by a statute requiring notice in advance of the session, in case of petition affecting private interests. Opinion of Court, 63 N. H. 625. [Where the Constitution provides that no county seat shall be changed except by approval of two-thirds of voters voting thereon, the legislature may intensify the requirement, and require the approval of two-thirds of all the voters in the county. State *v.* White, 162 Mo. 533, 63 S. W. 104.]

[1] Walker *v.* Cincinnati, 21 Ohio St. 14, 41. [But see The Stratton Claimants *v.* The Morris Claimants, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.]

satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.[1]

[1] State *v.* McCann, 21 Ohio St. 198, 212; Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216; State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Mount *v.* Richey, 99 Ind. 29. See cases, *post*, pp. 236, 237. [But to be legislative it must possess the characteristic of generality. It must be a rule and not merely an arbitrary order. The classification must be real, and reasonable in its basis. See Dibrell *v.* Lanier, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70, in which a statute based upon a flagrantly arbitrary classification was declared void. The decision of the question of whether a tax is for a public purpose is for the courts when there is a manifest attempt on the part of the legislature to authorize a levy for a purpose not public. Dodge *v.* Mission Township, 46 C. C. A. 661, 107 Fed. 827.]

CHAPTER VI.

OF THE ENACTMENT OF LAWS.

When the supreme power of a country is wielded by a single man, or by a single body of men, any discussion, in the courts, of the rules which should be observed in the enactment of laws must generally be without practical value, and in fact impertinent; for, whenever the unfettered sovereign power of any country expresses its will in the promulgation of a rule of law, the expression must be conclusive, though proper and suitable forms may have been wholly omitted in declaring it. It is a necessary attribute of sovereignty that the expressed will of the sovereign is law; and while we may question and cross-question the words employed, to make certain of the real meaning, and may hesitate and doubt concerning it, yet, when the intent is made out, it must govern, and it is idle to talk of forms that should have surrounded the expression, but do not. But when the legislative power of a State is to be exercised by a department composed of two branches, or, as in most of the American States, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.[1] And if, when the constitution was adopted,

[1] A bill becomes a law only when it has gone through all the forms made necessary by the constitution to give it validity. Jones *v.* Hutchinson, 43 Ala. 721; State *v.* Platt, 2 S. C. 150, 16 Am. Rep. 647; People *v.* Commissioners of Highways, 54 N. Y. 276; Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28; Legg *v.* Annapolis, 42 Md. 203; Walnut *v.* Wade, 103 U. S. 683. [And where the constitution prescribes an interval of time to elapse after the adjournment of the legislature, the full period of time must intervene between the date of adjourn-

there were known and settled rules and usages, forming a part of the law of the country, in reference to which the constitution has evidently been framed, and these rules and usages required the observance of particular forms, the constitution itself must also be understood as requiring them, because in assuming their existence, and being framed with reference to them, it has in effect adopted them as a part of itself, as much as if they were expressly incorporated in its provisions. Where, for an instance, the legislative power is to be exercised by two houses, and by settled and well-understood parliamentary law these two houses are to hold separate sessions for their deliberations, and the determination of the one upon a proposed law is to be submitted to the separate determination of the other, the constitution, in providing for two houses, has evidently spoken in reference to this settled custom, incorporating it as a rule of constitutional interpretation; so that it would require no prohibitory clause to forbid the two houses from combining in one, and jointly enacting laws by the vote of a majority of all. All those rules which are of the essentials of law-making must be observed and followed; and it is only the customary rules of order and routine, such as in every deliberative body are always understood to be under its control, and subject to constant change at its will, that the constitution can be understood to have left as matters of discretion, to be established, modified, or abolished by the bodies for whose government in non-essential matters they exist.

Of the two Houses of the Legislature.[1]

In the enactment of laws the two houses of the legislature are of equal importance, dignity, and power, and the steps which

ment and that on which the law becomes effective. Halbert *v.* San Saba Springs L. & L. S. Ass'n, 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193. Upon what constitutes presentation of bill to governor after it has duly passed the legislature, and the interval of time within which he must sign it, see State *v.* Michel, 52 La. Ann. 936, 27 So. 565, 49 L. R. A. 218, 78 Am. St. 364. Where act is void for lack of uniformity of operation, the defect may be corrected by subsequent amendment making non-uniform portion uniform with rest of original act, and the whole will then be good. Walsh *v.* State, 142 Ind. 357, 41 N. E. 65, 33 L. R. A. 392. For other cases upon necessity of recognizing prescribed forms of enactment, see Swindell *v.* State, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50.] The power to declare whether an act has become a law is judicial. Wolfe *v.* McCaull, 76 Va. 876. [State *v.* Powell, 77 Miss. 543, 27 So. 927.]

[1] The wisdom of a division of the legislative department has been demonstrated by the leading writers on constitutional law, as well as by general experience. See De Lolme, Const. of England, b. 2, c. 3; Federalist, No. 22; 1 Kent, 208; Story on Const. §§ 545-570. The early experiments in Pennsylvania and Georgia, based on Franklin's views, for which see his Works, Vol. V. p. 165, were the only ones made by any of the original States with a single house. The first Constitution of Vermont also provided for a single legislative body.

result in laws may originate indifferently in either. This is the general rule; but as one body is more numerous than the other, and more directly represents the people, and in many of the States is renewed by more frequent elections, the power to originate all money bills, or bills for the raising of revenue, is left exclusively, by the constitutions of some of the States, with this body, in accordance with the custom in England, which does not permit bills of this character to originate with the House of Lords.[1] To these bills, however, the other house may propose alterations, and they require the assent of that house to their passage, the same as other bills. The time for the meeting of the legislature will be such time as is fixed by the constitution or by statute; but it may be called together by the executive in special session as the constitution may prescribe, and the two houses may also adjourn any general session to a time fixed by them for the holding of a special session, if any agreement to that effect can be arrived at; and if not, power is conferred by a majority of the constitutions upon the executive to prorogue and adjourn them. And if the executive in any case undertake to exercise this power to prorogue and adjourn, on the assumption that a disagreement exists between the two houses which warrants his interference, and his action is acquiesced in by those bodies, who thereupon cease to hold their regular sessions, the legislature must be held in law to have adjourned, and no inquiry can be entered upon as to the rightfulness of the governor's assumption that such a disagreement existed.[2]

[1] There are provisions in the Constitutions of Massachusetts, Delaware, Minnesota, Mississippi, New Hampshire, New Jersey, Pennsylvania, South Carolina, Vermont, Indiana, Oregon, Kentucky, Louisiana, Alabama, Arkansas, Georgia, Virginia, Maine, and Colorado, requiring revenue bills to originate in the more popular branch of the legislature, but allowing the Senate the power of amendment usual in other cases. A bill to license saloons is a police regulation, not a revenue law. State *v.* Wright, 14 Oreg. 365, 12 Pac. 708. Money cannot be appropriated by joint resolution in Indiana. May *v.* Rice, 91 Ind. 516. During the second session of the forty-first Congress, the House of Representatives by their vote denied the right of the Senate under the Constitution to originate a bill repealing a law imposing taxes; but the Senate did not assent to this conclusion. In England the Lords are not allowed to amend money bills, and by resolutions of 5th and 6th July, 1860, the Commons deny their right even to reject them. [Law directing payment of bounties by county treasurer, such payments to be credited to him by state treasurer, is void under constitutional provision that "no money shall be paid out of the treasury except upon appropriations made by law and on warrant drawn by the proper officer." Institution for Edu. Mute & Blind *v.* Henderson, 18 Col. 98, 31 Pac. 714, 18 L. R. A. 398.]

[2] This question became important, and was passed upon in People *v.* Hatch, 33 Ill. 9. The Senate had passed a resolution for an adjournment of the session *sine die* on a day named, which was amended by the House by fixing a different day. The

There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. It chooses its own officers, except where, by constitution or statute, other provision is made; it determines its own rules of proceeding; it decides upon the election and qualification of its own members.[1] These powers it is obviously proper should rest with

Senate refused to concur, and the House then passed a resolution expressing a desire to recede from its action in amending the resolution and requesting a return of the resolution by the Senate. While matters stood thus, the governor, assuming that such a disagreement existed as empowered him to interfere, sent in his proclamation, declaring the legislature adjourned to a day named, and which was at the very end of the official term of the members. The message created excitement; it does not seem to have been at once acquiesced in, and a protest against the governor's authority was entered upon the journal; but for eleven days in one house and twelve in the other no entries were made upon their journals, and it was unquestionable that practically they had acquiesced in the action of the governor, and adjourned. At the expiration of the twelve days, a portion of the members came together again, and it was claimed by them that the message of the governor was without authority, and the two houses must be considered as having been, in point of law, in session during the intervening period, and that consequently any bills which had before been passed by them and sent to the governor for his approval, and which he had not returned within ten days, Sundays excepted, had become laws under the constitution. The Supreme Court held that, as the two houses had practically acquiesced in the action of the governor, the session had come to an end, and that the members had no power to reconvene on their own motion, as had been attempted. The case is a very full and valuable one on several points pertaining to legislative proceedings and authority. As to the governor's discretion in calling an extra session and revoking the call, see *ante*, p. 160, note. [Governor's decision that disagreement exists declared conclusive in *Re* Legislative Adjournment, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716, and see note in L. R. A. upon power as to adjournment of legislature.]

[1] In People *v.* Mahaney, 13 Mich. 481, it was held that the correctness of a decision by one of the houses, that certain persons had been chosen members, could not be inquired into by the courts. In that case a law was assailed as void, on the ground that a portion of the members who voted for it, and without whose votes it would not have had the requisite majority, had been given their seats in the house in defiance of law, and to the exclusion of others who had a majority of legal votes. See the same principle in State *v.* Jarrett, 17 Md. 309. See also Lamb *v.* Lynd, 44 Pa. St. 336; Opinion of Justices, 56 N. H. 570. [The persons who are to constitute the *prima facie* house, and to organize and examine into the qualifications of the members, to determine contests, &c., are those who bring certificates of election from the proper officers. *Re* Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519, a case where two rival bodies each claimed to be the true house of representatives.] In Kansas a question having some resemblance was disposed of differently. The legislature gave seats to several persons as representatives of districts not entitled to representation at all. By the concurrent vote of four of these a certain bill was passed. Held, that it was illegally passed, and did not become a law. State *v.* Francis, 26 Kan. 724. The legislature cannot transfer its power to judge of the election of its members, to the courts. State *v.* Gilman, 20 Kan. 551, 27 Am. Rep. 189. See Dalton *v.* State, 43 Ohio St. 652. But courts may procure and present evidence to the legislature. *In re* McNeill, 111 Pa. St. 235, 2 Atl. 341. The legislative power to judge of the election of members is not possessed by municipal bodies: People *v.* Hall, 80 N. Y. 117; nor by boards of supervisors: Robinson *v.* Cheboygan Supervisors, 49 Mich. 321, 13 N. W. 622; except when conferred by

the body immediately interested, as essential to enable it to enter upon and proceed with its legislative functions without liability to interruption and confusion. In determining questions concerning contested seats, the house will exercise judicial power, but generally in accordance with a course of practice which has sprung from precedents in similar cases, and no other authority is at liberty to interfere.

Each house has also the power to punish members for disorderly behavior, and other contempts of its authority, as well as to expel a member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the constitution among those which the two houses may exercise, but it need not be specified in that instrument, since it would exist whether expressly conferred or not. It is "a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be affected with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language." And, "independently of parliamentary customs and usages, our legislative houses have the power to protect themselves by the punishment and expulsion of a member;" and the courts cannot inquire into the justice of the decision, or even so much as examine the proceedings to see whether or not the proper opportunity for defence was furnished.[1]

law. Mayor *v.* Morgan, 7 Mart. n. s. 1, 18 Am. Dec. 232; Peabody *v.* School Committee, 115 Mass. 383; Cooley *v.* Fitzgerald, 41 Mich. 2, 2 N. W. 179. See Commonwealth *v.* Leech, 44 Pa. St. 332; Doran *v.* De Long, 48 Mich. 552, 12 N. W. 848. To exclude the jurisdiction of the courts, the council's power must be unequivocal. State *v.* Kempf, 69 Wis. 470, 34 N. W. 226; State *v.* Gates, 35 Minn. 385, 28 N. W. 927. [The power of the court to call a new election to elect a member of a general assembly is not precluded by the power of the house to pass upon the election of its members, even though the calling the election is a passing upon the validity of a prior election. State *v.* South Kingstown, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65. While each house judges of the election and qualifications of its members, and while the duties of canvassing boards are purely ministerial, yet the court will not aid a mandamus to the board of canvassers to give the candidate a certificate of election, even though it is admitted that he received the plurality vote. People *v.* State Bd. of Canvassers, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646. But it will correct a fraud through which the candidate rightfully entitled is deprived of his certificate, as that makes him *prima facie* a member. Ellison *v.* Barnes, 23 Utah, 183, 63 Pac. 399. House, by a majority vote of all members elected, may retire its speaker and elect another. *Re* Speakership, 15 Col. 520, 25 Pac. 707, 11 L. R. A. 241.]

[1] Hiss *v.* Bartlett, 3 Gray, 468. And see Anderson *v.* Dunn, 6 Wheat. 204. ["The authority of the house is equally absolute in regard to the rule usually prescribed in the Constitution that any member may have his protest entered upon the journal. If the house neglect

Each house may also punish contempts of its authority by other persons, where they are committed in its presence, or where they tend directly to embarrass or obstruct its legislative proceedings; and it requires for the purpose no express provision of the constitution conferring the authority.[1] It is not very well settled what are the limits to this power; and in the leading case in this country the speaker's warrant for the arrest of the person adjudged guilty of contempt was sustained, though it did not show in what the alleged contempt consisted.[2] In the leading English case a libellous publication concerning the house was treated as a contempt;[3] and punishment has sometimes been inflicted for assaults upon members of the house, not committed in or near the place of sitting, and for the arrest of members in disregard of their constitutional privilege.[4]

But in America the authority of legislative bodies in this regard is much less extensive than in England, and we are in danger, perhaps, of being misled by English precedents. The Parliament, before its separation into two bodies, was a high court of judicature, possessed of the general power, incident to such a court, of punishing contempts, and after the separation the power remained with each body, because each was considered to be a court of judicature and exercised the functions of such a court. American legislative bodies have not been clothed with the judicial function, and they do not therefore possess the general power to punish for contempt; but, as incidental to their legislative authority, they have the power to punish as contempts those acts of members or others which tend to obstruct the performance of legislative duty, or to defeat, impede, or embarrass the exercise of legislative power.[5]

When imprisonment is imposed as a punishment, it must terminate with the final adjournment of the house, and if the prisoner be not then discharged by its order, he may be released on *habeas corpus*.[6]

to recognize this rule, no outside power can compel it. Turnbull *v.* Giddings, 95 Mich. 314, 54 N. W. 887, 19 L. R. A. 853.]

[1] Anderson *v.* Dunn, 6 Wheat. 201; Burdett *v.* Abbott, 14 East, 1; Burnham *v.* Morrissey, 14 Gray, 226; State *v.* Matthews, 37 N. H. 450. See *post*, p. 651, note.

[2] Anderson *v.* Dunn, 6 Wheat. 204; questioned and rejected as to some of its reasoning in Kilbourn *v.* Thompson, 103 U. S. 168. And see Gosset *v.* Howard, 10 Q. B. 451; Stewart *v.* Blaine, 1 McArthur, 453.

[3] Burdett *v.* Abbott, 14 East, 1.

[4] Mr. Potter discusses such a case in his edition of Dwarris on Statutes, c. 18, and Mr. Robinson deals with the case of an arrest for a criminal act, not committed in the presence of the house, in the preface to the sixth volume of his Practice. As to the general right of Parliament to punish for contempt, see Gosset *v.* Howard, 10 Q. B. 411.

[5] See the subject considered fully and learnedly in Kilbourn *v.* Thompson, 103 U. S. 168.

[6] Jefferson's Manual, § 18; Prichard's

By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the constitutions of some of the States this privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process,[1] and in others their estates are exempt from attachment for some prescribed period.[2] For any arrest contrary to the parliamentary law or to these provisions, the house of which the person arrested is a member may give summary relief by ordering his discharge, and if the order is not complied with, by punishing the persons concerned in the arrest as for a contempt of its authority. The remedy of the member, however, is not confined to this mode of relief. His privilege is not the privilege of the house merely, but of the people, and is conferred to enable him to discharge the trust confided to him by his constituents;[3] and if the house neglect to interfere, the court from which the process issued should set it aside on the facts being represented,[4] and any court or officer having authority to issue writs of *habeas corpus* may also inquire into the case, and release the party from the unlawful imprisonment.[5]

Case, 1 Lev. 165; 1 Sid. 245, T. Raym. 120.

[1] "Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest. They shall not be subject to any civil process during the session of the legislature, or for fifteen days next before the commencement and after the termination of each session." Const. of Mich. art. 4, § 7. A like exemption from civil process is found in the Constitutions of Kansas, Nebraska, Alabama, Arkansas, California, Missouri, Mississippi, Wisconsin, Indiana, Oregon, and Colorado. Exemption from arrest is not violated by the service of citations or declarations in civil cases. Gentry *v.* Griffith, 27 Tex. 461; Case *v.* Rorabacher, 15 Mich. 537. So, of a member of Congress during the session. Merrick *v.* Giddings, MacAr. & Mack. 55; [Worth *v.* Norton, 56 S. C. 56, 479, 33 S. E. 792, 35 S. E. 135, 45 L. R. A. 563; 76 Am. St. 524.] But in Miner *v.* Markham, 28 Fed. Rep. 387, a California member *en route* to Washington was held exempt from service of summons in Wisconsin.

[2] The Constitution of Rhode Island provides that "the person of every member of the General Assembly shall be exempt from arrest, and his estate from attachment, in any civil action, during the session of the General Assembly, and two days before the commencement and two days after the termination thereof, and all process served contrary hereto shall be void." Art. 4, § 5.

[3] Coffin *v.* Coffin, 4 Mass. 27, 3 Am. Dec. 180.

[4] Courts do not, however, *ex officio* notice the privileges of members; they must be brought to their attention by some proper motion. Prentis *v.* Commonwealth, 5 Rand. 697, 16 Am. Dec. 782, and note.

[5] On this subject, Cushing on Law and Practice of Parliamentary Assemblies, §§ 516–597, will be consulted with profit. It is not a trespass to arrest a person privileged from arrest, even though the officer may be aware of the fact. The arrest is only voidable; and in general the party will waive the privilege unless he applies for discharge by motion or on *habeas corpus*. Tarlton *v.* Fisher, Doug. 671; Fletcher *v.* Baxter, 2 Aik. 224; Fox *v.* Wood, 1 Rawle, 143; Sperry *v.* Willard,

Each house must also be allowed to proceed in its own way in the col' ·tion of such information as may seem important to a proper d. harge of its functions,[1] and whenever it is deemed desirable that witnesses should be examined, the power and authority to do so is very properly referred to a committee, with any such powers short of final legislative or judicial action as may seem necessary or expedient in the particular case. Such a committee has no authority to sit during a recess of the house which has appointed it, without its permission to that effect; but the house is at liberty to confer such authority if it see fit.[2] A refusal to appear or to testify before such committee, or to produce books or papers, would be a contempt of the house;[3] but the committee cannot punish for contempts; it can only report the conduct of the offending party to the house for its action. The power of the committee will terminate with the final dissolution of the house appointing it.

Each house keeps a journal of its proceedings, which is a public record, and of ·:· the courts are at liberty to take judicial notice.[4] If it would appear from these journals that

1 Wend. 32; Wilmarth *v.* Burt, 7 Met. 257; Aldrich *v.* Aldrich, 8 Met. 102; Chase *v.* Fish, 16 Me. 132. But where the privilege is given on public grounds, or for the benefit of others, discharge may be obtained on the motion of any party concerned, or made by the court *sua sponte*.

[1] See Tillinghast *v.* Carr, 4 McCord, 152.

[2] Branham *v.* Lange, 16 Ind. 497; Marshall *v.* Harwood, 7 Md. 466. See also parliamentary cases, 5 Grey, 374; 9 Grey, 350; 1 Chandler, 50.

[3] *In re* Falvey, 7 Wis. 630; Burnham *v.* Morrissey, 14 Gray, 226; People *v.* Keeler, 99 N. Y. 463. In the last case a statute expressly permitted the house to punish for such contempt. But the privilege of a witness to be exempt from a compulsory disclosure of his own criminal conduct is the same when examined by a legislative body or committee as when sworn in court. Emery's Case, 107 Mass. 172. In the Matter of Kilbourn (May, 1876), Chief Justice *Carter*, of the Supreme Court of the District of Columbia, discharged on *habeas corpus* a person committed by the House of Representatives for a contempt in refusing to testify; holding that as the refusal was an indictable offence by statute, a trial therefor must be in the courts, and not elsewhere. If this is correct, the necessities of legislation will require a repeal of the statute; for if, in political cases, the question of punishment for failure to give information must be left to a jury, few convictions are to be expected, and no wholesome fear of the consequences of a refusal. The legality of the same arrest was considered afterwards by the Federal Supreme Court, and was not sustained, the court holding that the house exceeded its authority in the attempted investigation. Kilbourn *v.* Thompson, 103 U. S. 168. On questions of conflict between the legislature and the courts in matters of contempt, the great case of Stockdale *v.* Hansard, 9 Ad. & El. 1; s. c. 3 Per. & Dav. 330, is of the highest interest. See May, Const. Hist. c. 7.

[4] Spangler *v.* Jacoby, 14 Ill. 297; Turley *v.* Logan Co., 17 Ill. 151; Jones *v.* Hutchinson, 43 Ala. 721; State *v.* Moffit, 5 Ohio, 358; Miller *v.* State, 3 Ohio St. 475; Fordyce *v.* Godman, 20 Ohio St. 1; People *v.* Supervisors of Chenango, 8 N. Y. 317; People *v.* Mahaney, 13 Mich. 481; Southwark Bank *v.* Commonwealth, 2 Pa. St. 446; M'Culloch *v.* State, 11 Ind. 430; Osburn *v.* Staley, 5 W. Va. 85, 13 Am. Rep. 640; State *v.* Platt, 2 S. C. n. s. 150, 16 Am. Rep. 647; Moody

any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and

v. State, 48 Ala. 115; Houston, &c. R. R. Co. v. Odum, 53 Tex. 343; Gardner v. The Collector, 6 Wall. 499; South Ottawa v. Perkins, 94 U. S. 260. The presumption always is, when the act, as signed and enrolled, does not show the contrary, that it has gone through all necessary formalities: State v. McConnell, 3 Lea, 341; Blessing v. Galveston, 42 Tex. 641; State v. Francis, 26 Kan. 724; and some cases hold that the enrolled statute is conclusive evidence of its due passage and validity. See Sherman v. Story, 30 Cal. 253; People v. Burt, 43 Cal. 560; Louisiana Lottery Co. v. Richoux, 23 La. Ann. 743, 8 Am. Rep. 602; Greer v. Weller, 32 Miss. 650; Swan v. Buck, 40 Miss. 268; *Ex parte* Wren, 63 Miss. 512; Pacific R. R. Co. v. Governor, 23 Mo. 353; State v. Swift, 10 Nev. 176; Pangborn v. Young, 32 N. J. 29; Evans v. Brown, 30 Ind. 514; Duncombe v. Prindle, 12 Iowa, 1; Terr. v. O'Connor, 5 Dak. 397, 41 N. W. 746; [*Re* Tipton, 28 Tex. App. 438, 13 S. W. 610, 8 L. R. A. 326, and note; Narregang v. Brown County, 14 S. D. 357, 85 N. W. 602; State v. Bacon, 14 S. D. 394, 85 N. W. 605; Yolo County v. Colgan, 132 Cal. 265, 64 Pac. 403.] Others hold that the *prima facie* case may be overthrown by the journals: Spangler v. Jacoby, 14 Ill. 297; Houston, &c. R. R. Co. v. Odum, 53 Tex. 343; Burr v. Ross, 19 Ark. 250; Smithee v. Campbell, 41 Ark. 471; Jones v. Hutchinson, 43 Ala. 721; Moog v. Randolph, 77 Ala. 597; Berry v. Baltimore, &c. R. R. Co., 41 Md. 446, 20 Am. Rep. 69; Green v. Weller, 32 Miss. 650; People v. McElroy, 72 Mich. 446, 40 N. W. 750; Brewer v. Mayor, &c., 86 Tenn. 732, 9 S. W. 166; [State v. Frank, 60 Neb. 327, 61 Neb. 679, 83 N. W. 74, 85 N. W. 956; Lambert v. Smith, 98 Va. 268, 38 S. E. 938; State v. Burlington & M. R. Co., 60 Neb. 741, 84 N. W. 254:] so, if an act is passed over a veto, differing from an ordinary enrolled act. State v. Denny, 118 Ind. 449, 12 N. E. 274. The journal entry, if in compliance with a constitutional requirement, is the best evidence of a resolution, and cannot be contradicted. Koehler v. Hill, 60 Iowa, 543, 15 N. W. 609. So, as to the entry of the number voting. Wise v. Bigger, 79 Va. 269. [And as to which bill was voted on. State v. Wendler, 94 Wis. 369, 68 N. W. 759.] The journal cannot be contradicted by parol to show that a mere title or skeleton was introduced as a bill. Attorney-General v. Rice, 64 Mich. 385, 31 N. W. 203. If a journal shows an act passed, it cannot be attacked on the ground that some members voting for it were improperly seated. State v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829. And see Opinions of Justices, 52 N. H. 622; Hensoldt v. Petersburg, 63 Ill. 157; Larrison v. Peoria, &c. R. R. Co., 77 Ill. 11; People v. Commissioners of Highways, 54 N. Y. 276; English v. Oliver, 28 Ark. 317; *In re* Wellman, 20 Vt. 653; Osburn v. Staley, 5 W. Va. 85; Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; State v. Platt, 2 S. C. 150, 16 Am. Rep. 647; Worthen v. Badget, 32 Ark. 496; Southwark Bank v. Commonwealth, 26 Pa. St. 446; Fordyce v. Godman, 20 Ohio St. 1; People v. Starne, 35 Ill. 121; Supervisors v. Keenan, 2 Minn. 321; People v. Mahaney, 13 Mich. 481; Berry v. Doane Point R. R. Co., 41 Md. 446. Compare Brodnax v. Groom, 64 N. C. 244; Annapolis v. Harwood, 32 Md. 471. It has been held that where the constitution requires previous notice of an application for a private act, the courts cannot go behind the act to inquire whether the notice was given. Brodnax v. Groom, 64 N. C. 244. See People v. Hurlbut, 24 Mich. 44; Day v. Stetson, 8 Me. 365; M'Clinch v. Sturgis, 72 Me. 288; Davis v. Gaines, 48 Ark. 370, 3 S. W. 184; [Speer v. Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 462. As to what papers constitute the journal and what changes may be made in them and when, see Montgomery B. B. Works v. Gaston, 126 Ala. 425, 28 So. 497, 51 L. R. A. 396, 85 Am. St. 42. As to use to be made of the journals in determining the true contents of a bill, see Milwaukee County v. Isenring, 109 Wis. 9, 85 N. W. 131.]

adjudge the statute void.[1] But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered.[2]

[1] See cases cited in preceding note; also Prescott *v.* Trustees, &c., 19 Ill. 324; Koehler *v.* Hill, 60 Iowa, 543, 549, 14 N. W. 738, 15 N. W. 609.

[2] Miller *v.* State, 3 Ohio St. 475; McCulloch *v.* State, 11 Ind. 424; Supervisors *v.* People, 25 Ill. 181; Hall *v.* Steele, 82 Ala. 562; Glidewell *v.* Martin, 11 S. W. 382; People *v.* Dunn, 22 Pac. 140; State *v.* Brown, 20 Fla. 407; Matter of Vanderberg, 28 Kan. 243; State *v.* Peterson, 38 Minn. 143, 36 N. W. 443; State *v.* Algood, 87 Tenn. 163, 10 S. W. 310; Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233. But where a statute can only be enacted by a certain majority, *e. g.* two-thirds, it must affirmatively appear by the printed statute or the act on file that such a vote was had. People *v.* Commissioners of Highways, 54 N. Y. 276. It seems that, in Illinois, if one claims that a supposed law was never passed, and relies upon the records to show it, he must prove them. Illinois Cent. R. R. Co. *v.* Wren, 43 Ill. 77; Grob *v.* Cushman, 45 Ill. 119; Bedard *v.* Hall, 44 Ill. 91. The court will not act upon the admission of parties that an act was not passed in the constitutional manner. Happel *v.* Brethauer, 70 Ill. 166; Attorney-General *v.* Rice, 64 Mich. 385, 31 N. W. 203.

The Constitution of Alabama, art. 4, § 27, requires the presiding officer of each house, in the presence of the house, to sign acts "after the titles have been publicly read immediately before signing, and the fact of signing shall be entered on the journal." This seems a very imperative requirement. But in Colorado a like provision is held directory, and the presumption in case of silence of journal is in favor of the act. *In re* Roberts, 5 Col. 525. [That requirement to enter yeas and nays is mandatory, see Com'rs of Stanly Co. *v.* Snuggs, 121 N. C. 304, 28 S. E. 539, 39 L. R. A. 439. That journals must affirmatively show full compliance with constitutional requirements, see Cohn *v.* Kingsley, — Idaho —, 49 Pac. 985, 38 L. R. A. 74, an instructive case; *contra*, Lafferty *v.* Huffman, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203; McKinnon *v.* Cotner, 30 Oreg. 588, 49 Pac. 956. For other cases holding constitutional requirements mandatory, see Union Bank *v.* Comr's of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Mullan *v.* State, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262. The court will not declare a statute void because of fraud in procuring its enrolment and the signatures of the proper officers thereto. Such fraud must be corrected by the legislature. Carr *v.* Coke, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. 801. Duly enrolled bill properly filed is conclusive. State *v.* Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340, and see note in L. R. A. giving cases *pro* and *con*; *contra*, Norman *v.* Kentucky Bd. of Managers, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556. Parol testimony is inadmissible to impeach legislative records. White *v.* Hinton, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. Upon conclusiveness of legislative records, see Detroit *v.* Rentz, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 56. And upon records of Secretary of State in regard to passage of bills and submission to governor, see Lankford *v.* Somerset Co., 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491. Matters of detail will be presumed properly performed where journal records the doing of the main act and is silent as to the subsidiary matters. Barber Asphalt Co. *v.* Hunt, 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. 530.]

The law also seeks to cast its protection around legislative sessions, and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service,[1] yet to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views, is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law.[2]

[1] See Wildey *v.* Collier, 7 Md. 273; Bryan *v.* Reynolds, 5 Wis. 200; Brown *v.* Brown, 34 Barb. 533; Russell *v.* Burton, 66 Barb. 539; [Houlton *v.* Nichol, 93 Wis. 393; 67 N. W. 715; 33 L. R. A. 166.]

[2] This whole subject was very fully considered in the case of Frost *v.* Inhabitants of Belmont, 6 Allen, 152, which was a bill filed to restrain the payment by the town of demands to the amount of nearly $9,000, which the town had voted to pay as expenses in obtaining their act of incorporation. By the court, *Chapman*, J.:

"It is to be regretted that any persons should have attempted to procure an act of legislation in this Commonwealth, by such means as some of these items indicate. By the regular course of legislation, organs are provided through which any parties may fairly and openly approach the legislature, and be heard with proofs and arguments respecting any legislative acts which they may be interested in, whether public or private. These organs are the various committees appointed to consider and report upon the matters to be acted upon by the whole body. When private interests are to be affected, notice is given of the hearings before these committees; and thus opportunity is given to adverse parties to meet face to face and obtain a fair and open hearing. And though these committees properly dispense with many of the rules which regulate hearings before judicial tribunals, yet common fairness requires that neither party shall be permitted to have secret consultations, and exercise secret influences that are kept from the knowledge of the other party. The business of 'lobby members' is not to go fairly and openly before the committees, and present statements, proofs, and arguments that the other side has an opportunity to meet and refute if they are wrong, but to go secretly to the members and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be, and to bring illegitimate influence to bear upon them. If the 'lobby member' is selected because of his political or personal influence, it aggravates the wrong. If his business is to unite various interests by means of projects that are called 'log-rolling,' it is still worse. The practice of procuring members of the legislature to act under the influence of what they have eaten and drank at houses of entertainment, tends to render those of them who yield to such influences wholly unfit to act in such cases. They are disqualified from acting fairly towards interested parties or towards the public. The tendency and object of these influences are to obtain by corruption what it is supposed cannot be obtained fairly.

"It is a well-established principle, that all contracts which are opposed to public policy, and to open, upright, and fair dealing, are illegal and void. The prin-

The Introduction and Passage of Bills. (*a*)

Any member may introduce a bill in the house to which he belongs, in accordance with its rules; and this he may do at any

ciple was fully discussed in Fuller *v.* Dame, 18 Pick. 472. In several other States it has been applied to cases quite analogous to the present case.

"In Pingrey *v.* Washburn, 1 Aik. 264, it was held in Vermont that an agreement, on the part of a corporation, to grant to individuals certain privileges in consideration that they would withdraw their opposition to the passage of a legislative act touching the interests of the corporation, is against sound policy, prejudicial to correct and just legislation, and void. In Gulick *v.* Ward, 5 Halst. 87, it was decided in New Jersey that a contract which contravenes an act of Congress, and tends to defraud the United States, is void. A. had agreed to give B. $100, on condition that B. would forbear to propose or offer himself to the Postmaster-General to carry the mail on a certain mail route, and it was held that the contract was against public policy and void. The general principle as to contracts contravening public policy was discussed in that case at much length. In Wood *v.* McCann, 6 Dana, 366, the defendant had employed the plaintiff to assist him in obtaining a legislative act in Kentucky, legalizing his divorce from a former wife, and his marriage with his present wife. The court say: 'A lawyer may be entitled to compensation for writing a petition, or even for making a public argument before the legislature or a committee thereof; but the law should not help him or any other person to a recompense for exercising any personal influence, in any way, in any act of legislation. It is certainly important to just and wise legislation, and therefore to the most essential interests of the public, that the legislature should be perfectly free from any extraneous influence which may either corrupt or deceive the members, or any of them.'

"In Clippinger *v.* Hepbaugh, 5 Watts and S. 315, it was decided in Pennsylvania that a contract to procure or endeavor to procure the passage of an act of the legislature by using personal influence with the members, or by any sinister means, was void, as being inconsistent with public policy and the integrity of our political institutions. And an agreement for a contingent fee to be paid on the passage of a legislative act was held to be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object.

"The subject has been twice adjudicated upon in New York. In Harris *v.* Roof, 10 Barb. 489, the Supreme Court held that one could not recover for services performed in going to see individual members of the house, to get them to aid in voting for a private claim, the services not being performed before the house as a body nor before its authorized committees. In Sedgwick *v.* Stanton, 4 Kernan, 289, the Court of Appeals held the same doctrine, and stated its proper limits. *Selden*, J., makes the following comments on the case of Harris *v.* Roof: 'Now, the court did not mean by this decision to hold that one who has a claim against the State may not employ competent persons to aid him in properly presenting such claim to the legislature, and in supporting it with the necessary proofs and arguments. Mr. Justice *Hand*, who delivered the opinion of the court, very justly distinguishes between services of the nature of those rendered in that case, and the procuring and preparing the necessary documents in support of a claim, or acting as counsel before the legislature or some committee appointed by that body. Persons may, no doubt, be employed to conduct an application to the legislature, as well as to conduct a suit at law; and may contract for and receive pay for their services in preparing documents, collecting evidence, making statements of facts, or preparing and making oral or written arguments, provided all these are used or designed to be used before the legislature or some committee thereof as a body; but they

(*a*) [Upon this subject, see note to 11 L. R. A. 491.]

time when the house is in session, unless the constitution, the law, or the rules of the house forbid. The constitution of

cannot, with propriety, be employed to exert their personal influence with individual members, or to labor in any form privately with such members out of the legislative halls. Whatever is laid before the legislature in writing, or spoken openly or publicly in its presence or that of a committee, if false in fact, may be disproved, or if wrong in argument may be refuted; but that which is whispered into the private ear of individual members is frequently beyond the reach of correction. The point of objection in this class of cases, then, is, the personal and private nature of the services to be rendered.'

"In Fuller *v.* Dame, cited above, *Shaw*, Ch. J., recognizes the well-established right to contract and pay for professional services when the promisee is to act as attorney and counsel, but remarks that 'the fact appearing that persons do so act prevents any injurious effects from such proceeding. Such counsel is considered as standing in the place of his principal, and his arguments and representations are weighed and considered accordingly.' He also admits the right of disinterested persons to volunteer advice; as when a person is about to make a will, one may represent to him the propriety and expediency of making a bequest to a particular person; and so may one volunteer advice to another to marry another person; but a promise to pay for such service is void

"Applying the principles stated in these cases to the bills which the town voted to pay, it is manifest that some of the money was expended for objects that are contrary to public policy, and of a most reprehensible character, and which could not, therefore, form a legal consideration for a contract."

See, further, a full discussion of the same subject, and reaching the same conclusion, by Mr. Justice *Grier*, in Marshall *v.* Baltimore & Ohio R. R. Co., 16 How. 314 [In Richardson *v.* Scott's Bluff Co., 59 Neb. 466, 81 N. W. 309, 80 Am. St. 682, A contract to render services in securing the passage of an appropriation for a specified compensation in case the bill should be passed, no compensation to be paid if bill not passed, is against public policy and void.] A sale of a town office, though by the town itself, cannot be the consideration for a contract. Meredith *v.* Ladd, 2 N. H. 517. See Carleton *v.* Whitcher, 5 N. H. 196; Eddy *v.* Capron, 4 R. I. 394. A town cannot incur expenses in opposing before a legislative committee a division of the territorial limits: Westbrook *v.* Deering, 63 Me. 231; or to pay the expenses of a committee to procure the annexation of the town to another. Minot *v.* West Roxbury, 112 Mass. 1, 17 Am. Rep. 52. That contracts for lobby services in procuring or preventing legislation are void, see Usher *v.* McBratney, 3 Dill. 385; Trist *v.* Child, 21 Wall. 441; McKee *v.* Cheney, 52 How. (N. Y.) 144; Weed *v.* Black, 2 MacArthur, 268; Sweeney *v.* McLeod, 15 Oreg. 330, 15 Pac. 275; Cary *v.* Western U. Tel. Co., 47 Hun, 610. Or for influence in procuring contracts. Tool Co. *v.* Norris, 2 Wall. 45. And any contract the purpose of which is to influence a public officer or body to favor persons in the performance of his public duty is void, on grounds of public policy. Ordineal *v.* Barry, 24 Miss. 9. The same general principle will be found applied in the following cases: Swayze *v.* Hull, 8 N. J. 54, 14 Am. Dec. 399; Wood *v.* McCann, 6 Dana, 366; Hatzfield *v.* Gulden, 7 Watts, 152; Gill *v.* Davis, 12 La. Ann. 219; Powers *v.* Skinner, 34 Vt. 274; Frankfort *v.* Winterport, 54 Me. 250; Rose *v.* Truax, 21 Barb. 361; Devlin *v.* Brady, 32 Barb. 518; Oscanyan *v.* Arms Company, 103 U. S. 261; Meguire *v.* Corwin, 3 MacArthur, 81. See further, *post*, 924, note. [Contract of employment in which employee is assured of only a nominal salary and a large addition thereto is made contingent upon the adoption by a city council of a certain ordinance is void. Crichfield *v.* Bermudez Asphalt Paving Co., 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347. But the fact that the manager of a corporation was a member of the legislature which authorized the letting of a certain contract will not prevent the corporation's bidding for it if the manager is not a stockholder, and his pay is in no way

Michigan provides that no new bill shall be introduced into either house of the legislature after the first fifty days of the session shall have expired;[1] and the Constitution of Maryland provides that no bill shall originate in either house within the last ten days of the session.[2] The purpose of these clauses is to prevent hasty and improvident legislation, and to compel, so far as any previous law can accomplish that result, the careful examination of proposed laws, or at least the affording of opportunity for that purpose; which will not always be done when bills may be introduced up to the very hour of adjournment, and, with the concurrence of the proper majority, put immediately upon their passage.[3]

For the same reason it is required by the constitutions of several of the States, that no bill shall have the force of law until on three several days it be read in each house, and free discussion allowed thereon; unless, in case of urgency, four-fifths or some other specified majority of the house shall deem it

affected by the success or failure of the bid. State *v.* Rickards, 10 Mont. 145, 40 Pac. 210, 28 L. R. A. 298, 50 Am. St. 476.

An agreement upon a pecuniary consideration to withdraw opposition to granting of a pardon and to give assistance by solicitation and personal influence in procuring the same is against public policy and void. Deering & Co. *v.* Cunningham, 63 Kan. 174, 65 Pac. 263, 54 L. R. A. 410.]

[1] Art. 4, § 28.

[2] Art. 3, § 20. In Arkansas there is a similar provision, limiting the time to three days. Art. 5, § 24.

[3] A practice has sprung up of evading these constitutional provisions by introducing a new bill after the time has expired when it may constitutionally be done, as an amendment to some pending bill, the whole of which, except the enacting clause, is struck out to make way for it. Thus, the member who thinks he may possibly have occasion for the introduction of a new bill after the constitutional period has expired, takes care to introduce sham bills in due season which he can use as stocks to graft upon, and which he uses irrespective of their character or contents. The sham bill is perhaps a bill to incorporate the city of Siam. One of the member's constituents applies to him for legislative permission to construct a dam across the Wild Cat River. Forthwith, by *amendment*, the bill entitled a bill to incorporate the city of Siam has all after the enacting clause stricken out, and it is made to provide, as its sole object, that John Doe may construct a dam across the Wild Cat. With this title and in this form it is passed; but the house then considerately amends the title to correspond with the purpose of the bill, and the law is passed, and the constitution at the same time saved! This trick is so transparent, and so clearly in violation of the constitution, and the evidence at the same time is so fully spread upon the record, that it is a matter of surprise to find it so often resorted to. A bill to create a township may be amended after fifty days so as to make the same territory a county. Pack *v.* Barton, 47 Mich. 520, 11 N. W. 367. For a bill to create a township from certain territory may be substituted one to incorporate a city in the same county. People *v.* McElroy, 72 Mich. 446, 40 N. W. 750. But a bill to create the County of L. out of the County of W. cannot be amended so as to make M. County out of N. County. *Re* Creation of New Counties, 9 Col. 624, 21 Pac. 472. See, also, Hall *v.* Steele, 82 Ala. 562, 2 So. 650. [If bill is amended in second house, it must be returned to first to be acted upon. It must finally pass both houses in same form. State *v.* Laiche, 105 La. 84, 29 So. 700.]

expedient to dispense with this rule. The journals which each house keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not, the passage in the manner provided by the constitution must be presumed, in accordance with the general rule which presumes the proper discharge of official duty.[1] In the reading of a bill, it seems to be sufficient to read the written document that is adopted by the two houses; even though something else becomes law in consequence of its passage, and by reason of being referred to in it.[2] Thus, a statute which incorporated a military company by reference to its constitution and by-laws, was held valid notwithstanding the constitution and by-laws, which would acquire the force of law by its passage, were not read in the two houses as a part of it.[3] But there cannot be many cases, we should suppose, to which this ruling would be applicable.

[1] Supervisors of Schuyler Co. *v.* People, 25 Ill. 181; Miller *v.* State, 3 Ohio St. 475. In People *v.* Starne, 35 Ill. 121, it is said the courts should not enforce a legislative act unless there is record evidence, from the journals of the two houses, that every material requirement of the constitution has been satisfied. And see Ryan *v.* Lynch, 68 Ill. 160. *Contra*, State *v.* McConnell, 3 Lea, 341; Blessing *v.* Galveston, 42 Tex. 641. The clause in the Constitution of Ohio is: "Every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule;" and in Miller *v.* State, 3 Ohio St. 475, and Pim *v.* Nicholson, 6 Ohio St. 176, this provision was held to be merely directory. The *distinctness* with which any bill must be read cannot possibly be defined by any law; and it must always, from the necessity of the case, rest with the house to determine finally whether in this particular the constitution has been complied with or not; but the rule respecting three several readings on different days is specific, and capable of being precisely complied with, and we do not see how, even under the rules applied to statutes, it can be regarded as directory merely, provided it has a purpose beyond the mere regular and orderly transaction of business. That it has such a purpose, that it is designed to prevent hasty and improvident legislation, and is therefore not a mere rule of order, but one of protection to the public interests and to the citizens at large, is very clear; and independent of the question whether definite constitutional principles can be dispensed with in any case on the ground of their being merely directory, we cannot see how this can be treated as anything but mandatory. See People *v.* Campbell, 8 Ill. 466; McCulloch *v.* State, 11 Ind. 424; Weill *v.* Kenfield, 54 Cal. 111; Chicot Co. *v.* Davies, 40 Ark. 200; [Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.] Reading twice by title and once at length is sufficient. People *v.* McElroy, 72 Mich. 446, 49 N. W. 750. One reading may be in committee of the whole. *Re* Reading of Bills, 9 Col. 641, 21 Pac. 477. [After bill is amended and passed as amended in the second house, it need not be read three times in first house before amendments are concurred in by that house. State *v.* Dillon, — Fla. —, 28 So. 781 (June 5, 1900).]

[2] Dew *v.* Cunningham, 28 Ala. 466. Congress may adopt a law by reference. District of Columbia *v.* Washington Gas Light Co., 3 Mackey, 343. See, further, Baird *v.* State, 52 Ark. 326, 12 S. W. 556; Beard *v.* Wilson, *id.* 567; Titusville Iron Works *v.* Keystone Oil Co., 122 Pa. St. 627, 15 Atl. 917.

[3] Bibb County Loan Association *v.* Richards, 21 Ga. 592. And see Pulford *v.* Fire Department, 31 Mich. 458. [Where the laws of the State have been codified, and certain new provisions introduced, the code may be enacted as a whole by a

It is also provided in the constitutions of some of the States that, on the final passage of every bill, the yeas and nays shall be entered on the journal. Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation; and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not. "The constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the journal is to record the proceedings of the house, and authenticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and cannot be dispensed with by the legislature."[1]

For the vote required in the passage of any particular law the reader is referred to the constitution of his State. A simple majority of a quorum is sufficient, unless the constitution establishes some other rule; and where, by the constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended.[2]

single statute, and when so done it is sufficient to read the enacting statute. The code need not be read at length. Central of Georgia R. Co. *v.* State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518.]

[1] Spangler *v.* Jacoby, 14 Ill. 297; Supervisors of Schuyler Co. *v.* People, 25 Ill. 183; Ryan *v.* Lynch, 68 Ill. 160; Steckert *v.* East Saginaw, 22 Mich. 104; People *v.* Commissioners of Highways, 54 N. Y. 276; Post *v.* Supervisors, 105 U. S. 667. For a peculiar case, see Division of Howard County, 15 Kan. 194. As to what is sufficient evidence in a journal of such vote. *In re* Roberts, 5 Col. 525. An act which is invalid because not passed by the requisite number of votes may be validated indirectly by subsequent legislative action recognizing it as valid. Attorney-General *v.* Joy, 55 Mich. 94, 20 N. W. 806. There have been cases, as we happen to know, in which several bills have been put on their passage together, the yeas and nays being once called for them all, though the journal is made to state falsely a separate vote on each. We need hardly say that this is a manifest violation of the constitution, which requires separate action in every case; and that, when resorted to, it is usually for the purpose of avoiding another provision of the constitution, which seeks to preclude "log-rolling legislation," by forbidding the incorporation of distinct measures in one and the same statute.

[2] Southworth *v.* Palmyra & Jacksonburg R. R. Co., 2 Mich. 287; State *v.* McBride, 4 Mo. 303; 29 Am. Dec. 636. By most of the constitutions either all the laws, or laws on some particular subjects, are required to be adopted by a majority vote, or some other proportion of "all the members elected," or of "the whole representation." These and similar phrases require all the members to be taken into account whether present or not. Where a majority of all the members *elected* is required in the passage of

The Title of a Statute.

The title of an act was formerly considered no part of it; and although it might be looked to as a guide to the intent of the law-makers when the body of the statute appeared to be in any respect ambiguous or doubtful,[1] yet it could not enlarge or restrain the provisions of the act itself,[2] and the latter might therefore be good when it and the title were in conflict. The reason for this was that anciently titles were not prefixed at all, and when afterwards they came to be introduced, they were usually prepared by the clerk of the house in which the bill first passed, and attracted but little attention from the members. They indicated the clerk's understanding of the contents or purpose of the bills, rather than that of the house; and they therefore were justly regarded as furnishing very little insight into the legislative intention. Titles to legislative acts, however, have recently, in some States, come to possess very great importance, by reason of constitutional provisions, which not only require that they shall correctly indicate the purpose of the law, but which absolutely make the title to control, and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title. These provisions are given in the note, and it will readily be perceived that they make a very great change in the law.[3]

a law, an ineligible person is not on that account to be excluded in the count. Satterlee *v.* San Francisco, 22 Cal. 314. [Where a proposition to incur bonded indebtedness is voted on at a general election, and to be approved must be voted for by "two-thirds of the voters . . . voting at an election to be held for that purpose," this means two-thirds of those voting on the particular proposition. Montgomery Co. Fiscal Ct. *v.* Trimble, 20 Ky., Law Rep. 827, 47 S. W. 773, 42 L. R. A. 738. But see State *v.* Foraker, 46 Ohio St. 677, 23 N. E. 491, 6 L. R. A. 422; *Re* Denny, 156 Ind. 104, 59 N. E. 359, 51 L. R. A. 722; State *v.* Clark, 59 Neb. 702, 82 N. W. 8. Where a specified time must elapse after the passage of a bill before the law becomes operative, the time runs from the time of adoption by the final house and not from that of approval by the governor. State *v.* Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243, and note. When a quorum is present, a majority of those voting on the proposition is sufficient to carry it. Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388; *contra*, a majority of those present necessary: Lawrence *v.* Ingersoll, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. 870, and note.]

[1] United States *v.* Palmer, 3 Wheat. 610; Burgett *v.* Burgett, 1 Ohio, 469; Mundt *v.* Sheboygan, &c. R. R. Co., 31 Wis. 451; Eastman *v.* McAlpin, 1 Ga. 157; Cohen *v.* Barrett, 5 Call, 195; Garrigas *v.* Board of Com'rs, 39 Ind. 66; Matter of Middletown, 82 N. Y. 196; Tripp *v.* Goff, 15 R. I. 299, 3 Atl. 591; Avernham *v.* Hulit, 45 N. J. L. 53. See Dwarris on Statutes, 502.

[2] Hadden *v.* The Collector, 5 Wall. 107. Compare United States *v.* Union Pacific R. R. Co., 91 U. S. 72.

[3] The Constitutions of Minnesota, Kansas, Maryland, Kentucky, Nebraska, and Ohio provide that "no law shall embrace

In considering these provisions it is important to regard, —

1. *The evils designed to be remedied.* The Constitution of New Jersey refers to these as "the improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other." In the language of the Supreme Court of Louisiana, speaking of the former practice: "The title of an act often afforded no clue to its contents. Important general principles were found placed in acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were sometimes included in the same

more than one subject, which shall be expressed in its title." Those of Michigan, New Jersey, and Louisiana are similar, substituting the word *object* for *subject*. The Constitutions of South Carolina, Alabama, Tennessee, Arkansas, and California contain similar provisions. The Constitution of New Jersey provides that, "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." The Constitution of Missouri contains the following provision: "No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section 44 of this article) shall contain more than one subject, which shall be clearly expressed in its title." The exception secondly referred to is to bills for free public-school purposes. The Constitutions of Indiana, Oregon, and Iowa provide that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." The Constitution of Nevada provides that "every law enacted by the legislature shall embrace but one subject, and matters properly connected therewith, which subject shall be briefly expressed in the title." The Constitutions of New York and Wisconsin provide that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The Constitution of Illinois is similar to that of Ohio, with the addition of the saving clause found in the Constitution of Indiana. The provision in the Constitution of Colorado is similar to that of Missouri. In Pennsylvania the provision is that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title." Const. of 1853. Whether the word *object* is to have any different construction from the word *subject*, as used in these provisions, is a question which may some time require discussion; but as it is evidently employed for precisely the same purpose, it would seem that it ought not to have. Compare Hingle *v.* State, 24 Ind. 28, and People *v.* Lawrence, 36 Barb. 177. The present Texas Constitution substitutes *subject* for *object*, which was in the earlier one, and it is held that the word is less restrictive, and that an act whose subject is the regulation of the liquor traffic is good though several distinct objects are covered, for instance, regulation of liquor shops, collection of revenue, &c. Fahey *v.* State, 27 Tex. App. 146, 11 S. W. 108.

In Michigan this provision does not apply to city ordinances. People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124. [The Michigan Constitution requires an enacting clause; when this is omitted from the bill as it comes from the first house, the clerk of the next cannot insert it, but the bill must be sent back for the first house, to correct it. People *v.* Dettenthaler, 118 Mich. 595, 77 N. W. 450, 44 L. R. A. 161. Any material change in title of an act after passing legislature and before presentation to the governor, renders the act void. Weis *v.* Ashley, 59 Neb. 494, 81 N. W. 318, 80 Am. St. 704.]

statute with matters entirely foreign to them, the result of which was that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation to this chaotic mass was the object of the constitutional provision under consideration."[1] The Supreme Court of Michigan say: "The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass upon it."[2] The Court of Appeals of New York declare the object of this provision to be "that neither the members of the legislature nor the people should be misled by the title."[3] The Supreme Court

[1] Walker *v.* Caldwell, 4 La. Ann. 298. See Fletcher *v.* Oliver, 25 Ark. 298; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737.

[2] People *v.* Mahaney, 13 Mich. 481. And see Board of Supervisors *v.* Heenan, 2 Mich. 336; Davis *v.* Bank of Fulton, 31 Ga. 69; St. Louis *v.* Tiefel, 42 Mo. 578; State *v.* Losatee, 9 Baxt. 584. The Constitution of Georgia provided that "no law or ordinance shall pass containing any matter different from what is expressed in the title thereof." In Mayor, &c. of Savannah *v.* State, 4 Ga. 38, *Lumpkin*, J., says: "I would observe that the traditionary history of this clause is that it was inserted in the Constitution of 1798 at the instance of General James Jackson, and that its necessity was suggested by the Yazoo act. That memorable measure of the 17th of January, 1795, as is well known, was smuggled through the legislature under the caption of an act 'for the payment of the late State troops,' and a declaration in its title of the right of the State to the unappropriated territory thereof 'for the protection and support of the frontier settlements.'" The Yazoo act made a large grant of lands to a company of speculators. It constituted a prominent subject of controversy in State politics for many years.

[3] Sun Mutual Insurance Co. *v.* Mayor, &c. of New York, 8 N. Y. 239.

of Iowa say: "The intent of this provision of the constitution was, to prevent the union, in the same act, of incongruous matters, and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another."[1] And similar expressions will be found in many other reported cases.[2] It may therefore be assumed as settled that the purpose of these provisions was: *first*, to prevent *hodge-podge* or "log-rolling" legislation; *second*, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, *third*, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.

2. *The particularity required in stating the object.* The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the

[1] State *v.* County Judge of Davis Co., 2 Iowa, 280. See State *v.* Silver, 9 Nev. 227.

[2] See Conner *v.* Mayor, &c. of New York, 5 N. Y. 293; Davis *v.* State, 7 Md. 151. The Supreme Court of Indiana also understand the provision in the Constitution of that State to be designed, among other things, to assist in the codification of the laws. Indiana Central Railroad Co. *v.* Potts, 7 Ind. 681; Hingle *v.* State, 24 Ind. 28. See People *v.* Institution, &c., 71 Ill. 229; State *v.* Ah Sam, 15 Nev. 27, 37 Am. Rep. 454; Harrison *v.* Supervisors, 51 Wis. 645, 8 N. W. 731; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737; Hope *v.* Mayor, &c., 72 Ga. 246; State *v.* Ranson, 73 Mo. 78; Bumsted *v.* Govern, 47 N. J. L. 368, 1 Atl. 135.

The form of the title during any stage of the legislation before it becomes a law is immaterial. Attorney-General *v.* Rice, 61 Mich 385, 31 N. W. 203; State *v.* Ill. Centr. R. R. Co., 33 Fed. Rep. 730.

These provisions do not apply to a revision of the statutes required by the constitution: State *v.* McDaniel, 19 S. C. 114; nor to an act antedating the constitution and appearing in a later compilation. Stewart *v.* Riopelle, 48 Mich. 177, 12 N. W. 36. [And see also Parks *v.* State, 110 Ga. 760, 36 S. E. 73, that defect in title is cured by later inclusion of the regulation in the code.] It is enough if the title of the chapter in an authorized compilation is referred to in an amendatory act. People *v.* Howard, 73 Mich. 10, 40 N. W. 789; State *v.* Berka, 20 Neb. 375, 30 N. W. 267; but see Feibleman *v.* State, 98 Ind. 516. If the title of an original act is good, whether that of an amendatory act is in itself sufficient is unimportant. State *v.* Ranson, 73 Mo. 78; State *v.* Algood, 87 Tenn. 163, 10 S. W. 310. An amendment of an amended act may be upheld if the intention is plain, though there is confusion in the numbering of sections. Fenton *v.* Yule, 27 Neb. 758, 43 N. W. 1140. Under an amendatory title nothing can be enacted but what amends the old law. Matter which might have come under the original title, but did not, cannot be introduced. State *v.* Smith, 35 Minn. 257, 28 N. W. 241. See Tingue *v.* Port Chester, 101 N. Y. 294. [See also State *v.* Walker, 105 La. 492; 29 So. 973; Armstrong *v.* Mayer, 60 Neb. 423, 83 N. W. 401.]

accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. It has accordingly been held that the title of "an act to establish a police government for the city of Detroit," was not objectionable for its generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxation for its support, and courts for the examination and trial of offenders, might constitutionally be included in the bill under this general title. Under any different ruling it was said, "the police government of a city could not be organized without a distinct act for each specific duty to be devolved upon it, and these could not be passed until a multitude of other statutes had taken the same duties from other officers before performing them. And these several statutes, fragmentary as they must necessarily be, would often fail of the intended object, from the inherent difficulty in expressing the legislative will when restricted to such narrow bounds."[1] The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection.[2] The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it.[3] One thing, how-

[1] People *v.* Mahaney, 13 Mich. 481, 495. See also Powell *v.* Jackson Com. Council, 51 Mich. 129, 16 N. W. 369; Morford *v.* Unger, 8 Iowa, 82; Whiting *v.* Mount Pleasant, 11 Iowa, 482; Bright *v.* McCulloch, 27 Ind. 223; Mayor, &c. of Annapolis *v.* State, 30 Md. 112; State *v.* Union, 33 N. J. 350; Humboldt County *v.* Churchill Co. Commissioners, 6 Nev. 30; State *v.* Silver, 9 Nev. 227; State *v.* Ranson, 73 Mo. 78.

[2] Indiana Central Railroad Co. *v.* Potts, 7 Ind. 681; People *v.* Briggs, 50 N. Y. 553; People *v.* Wands, 23 Mich. 385; Washington Co. *v.* Franklin R. R. Co., 34 Md. 159; Benz *v.* Weber, 81 Ill. 288; Johnson *v.* People, 83 Ill. 431; Fuller *v.* People, 92 Ill. 182; Donnersberger *v.* Prendergast, 128 Ill. 229, 21 N. E. 1; Kurtz *v.* People, 33 Mich. 279; People *v.* Haug, 68 Mich. 549, 37 N. W. 21; Montclair *v.* Ramsdell, 107 U. S. 147, 2 Sup. Ct. Rep. 391; Jonesboro *v.* Cairo, &c. R. R. Co., 110 U. S. 192, 4 Sup. Ct. Rep. 67; Ackley School Dist. *v.* Hall, 113 U. S. 135, 5 Sup. Ct. Rep. 371; Carter Co. *v.* Sinton, 120 U. S. 517, 7 Sup. Ct. Rep. 650; Daubman *v.* Smith, 47 N. J. L. 200; Clare *v.* People, 9 Col. 122, 10 Pac. 799; Ewing *v.* Hoblitzelle, 85 Mo. 64.

[1] Woodson *v.* Murdock, 22 Wall. 351. In State *v.* Bowers, 14 Ind. 195, an act came under consideration, the title to which was, "An act to amend the first section of an act entitled 'An act concerning licenses to vend foreign merchandise, to exhibit any caravan, menagerie, circus, rope and wire dancing puppet shows, and legerdemain,' approved June 15, 1852, and for the encouragement of agriculture, and concerning the licensing of stock and exchange brokers." It was held that the subject of the act was licenses, and that it was not unconstitutional as containing more than one subject. But it was held also that, as the licenses which it authorized and required were specified in the title, the act could embrace no others, and consequently a provision in the act requiring concerts

ever, is very plain; that the use of the words "other purposes," which has heretofore been so common in the title to acts, with a view to cover any and every thing, whether connected with the main purpose indicated by the title or not, can no longer be of any avail where these provisions exist. As was said by the Supreme Court of New York in a case where these words had been made use of in the title to a local bill: "The words 'for other purposes' must be laid out of consideration. They express nothing, and amount to nothing as a compliance with this constitutional requirement. Nothing which the act could not embrace without them can be brought in by their aid."[1]

to be licensed was void. In State *v.* County Judge of Davis County, 2 Iowa, 280, 284, the act in question was entitled "An act in relation to certain State roads therein named." It contained sixty-six sections, in which it established some forty-six roads, vacated some, and provided for the re-location of others. The court sustained the act. "The object of an act may be broader or narrower, more or less extensive; and the broader it is, the more particulars will it embrace. . . . There is undoubtedly great objection to uniting so many particulars in one act, but so long as they are of the same nature, and come legitimately under one general determination or object, we cannot say that the act is unconstitutional." Upon this subject see Indiana Central Railroad Co. *v.* Potts, 7 Ind. 681, where it is considered at length. Also Brewster *v.* Syracuse, 19 N. Y. 116; Hall *v.* Bunte, 20 Ind. 301; People *v.* McCallum, 1 Neb. 182; Mauch Chunk *v.* McGee, 81 Pa. St. 433. But a title and act covering four separate objects is bad. State *v.* Heywood, 38 La. Ann. 689. An act entitled "An act fixing the time and mode of electing State printer, defining his duties, fixing compensation, and repealing all laws coming in conflict with this act," was sustained in Walker *v.* Dunham, 17 Ind. 483. In State *v.* Young, 47 Ind. 450, the somewhat strict ruling was made, that provisions punishing intoxication could not be embraced in an act entitled "To regulate the sale of intoxicating liquors." In Kurtz *v.* People, 33 Mich. 279, the constitutional provision is said to be "a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled. But it is not designed to require the body of the bill to be a mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the objects indicated by the title." And see Morton *v.* The Controller, 4 S. C. 430. No provision in a statute having natural connection with the subject expressed in the title and not foreign to it. is to be deemed within the constitutional inhibition. Johnson *v.* Higgins, 3 Met. (Ky.) 566; McReynolds *v.* Smallhouse, 8 Bush, 477; Annapolis *v.* State, 30 Md. 112; Tuttle *v.* Strout, 7 Minn. 465; Gunter *v.* Dale Co., 44 Ala. 639; *Ex parte* Upshaw, 45 Ala. 234; State *v.* Price, 50 Ala. 568; Commonwealth *v.* Drewry, 15 Gratt. 1; People *v.* Hurlbut, 24 Mich. 44; State *v.* Union, 33 N. J. 350; State *v.* Silver, 9 Nev. 227; Burke *v.* Monroe Co., 77 Ill. 610; Blood *v.* Mercelliott, 53 Pa. St. 391; Commonwealth *v.* Green, 58 Pa. St. 226; Walker *v.* Dunham, 17 Ind. 483.

[1] Town of Fishkill *v.* Fishkill & Beekman Plank Road Co., 22 Barb. 634. See, to the same effect, Johnson *v.* Spicer, 107 N. Y. 185; Ryerson *v.* Utley, 16 Mich. 269; St. Louis *v.* Tiefel, 42 Mo. 578. In a title to punish keepers of games of faro, etc., "etc." does not mean "other purposes," but "and other games." Garvin *v.* State, 13 Lea, 162. An act entitled "An act to repeal certain acts therein named," is void. People *v.* Mellen, 32 Ill. 181. An act, having for its sole object to legalize certain proceedings of the Common Council of Janesville, but entitled merely "An act to legalize and authorize the assessment of street improvements and assessments," was held not to express the subject, because fail-

3. *What is embraced by the title.* The repeal of a statute on a given subject, it is held, is properly connected with the subject-matter of a new statute on the same subject; and therefore a repealing section in the new statute is valid, notwithstanding the title is silent on that subject.[1] So an act to incorporate a railroad company, it has been held, may authorize counties to subscribe to its stock, or otherwise aid the construction of the road.[2] So an act to incorporate the Firemen's Benevolent Association may lawfully include under this title provisions for levying a tax upon the income of foreign insurance companies at the place of its location, for the benefit of the corporation.[3] So an act to provide a homestead for widows and children was held valid, though what it provided for was the pecuniary means sufficient to purchase a homestead.[4] So an act "to regulate proceedings in the county court" was held to properly embrace a provision giving an appeal to the District Court, and regulating the proceedings therein on the appeal.[5] So an act entitled "An act for the more uniform doing of township business" may properly provide for the organization of townships.[6] So it is held that the changing of the boundaries of existing counties is a matter properly connected with the subject of forming new counties out of those existing.[7] So a provision for the organization and sitting of courts in new counties is properly connected with the subject of the formation of such counties, and may be included in "an act to authorize the formation of new counties,

ing to specify the locality. Durkee *v.* Janesville, 26 Wis. 697.

[1] Gabbert *v.* Railroad Co., 11 Ind. 365; Timm *v.* Harrison, 109 Ill. 593. The constitution under which this decision was made required the law to contain but one subject, *and matters properly connected therewith*; but the same decision was made under the New York Constitution, which omits the words here italicized; and it may well be doubted whether the legal effect of the provision is varied by the addition of those words. See Guilford *v.* Cornell, 18 Barb. 615; People *v.* Father Matthew Society, 41 Mich. 67, 1 N. W. 931.

[2] Supervisors, &c. *v.* People, 25 Ill. 181; Mahomet *v.* Quackenbush, 117 U. S. 508, 6 Sup. Ct. Rep. 858; Hope *v.* Mayor, &c., 72 Ga. 246; Connor *v.* Green Pond, &c. R. R. Co., 23 S. C. 427. So a provision for the costs on appeal from a justice is properly connected with the subject of an act entitled "of the election and qualification of justices of the peace, and defining their jurisdiction, powers, and duties in civil cases." Robinson *v.* Skipworth, 23 Ind. 311.

[3] Firemen's Association *v.* Lounsbury, 21 Ill. 511. Power to tax for school purposes may be given under an act "to regulate public instruction." Smith *v.* Bohler, 72 Ga. 546.

[4] Succession of Lanzetti, 9 La. Ann. 329.

[5] Murphey *v.* Menard, 11 Tex. 673. See State *v.* Ah Sam, 15 Nev. 27, 37 Am. 454.

[6] Clinton *v.* Draper, 14 Ind. 295. An act to consolidate the acts as to a city and to define the duty of the mayor will not allow conferring judicial power on him. Brown *v.* State, 79 Ga. 324, 4 S. E. 861.

[7] Haggard *v.* Hawkins, 14 Ind. 299. And see Duncombe *v.* Prindle, 12 Iowa, 1; State *v.* Hoagland, 51 N. J. L. 62, 16 Atl. 166.

and to change county boundaries."[1] Many other cases are referred to in the note, which will further illustrate the views of the courts upon this subject. There has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted.[2]

[1] Brandon *v.* State, 16 Ind. 197. In this case, and also in State *v.* Bowers, 14 Ind. 195, it was held that if the title to an original act is sufficient to embrace the matters covered by the provisions of an act amendatory thereof, it is unnecessary to inquire whether the title of an amendatory act would, of itself, be sufficient. And see Morford *v.* Unger, 8 Iowa, 82.

[2] Green *v.* Mayor, &c., R. M. Charlt. 368; Martin *v.* Broach, 6 Ga. 21; Protho *v.* Orr, 12 Ga. 36; Wheeler *v.* State, 23 Ga. 9; Hill *v.* Commissioners, 22 Ga. 203; Jones *v.* Columbus, 25 Ga. 610; Denham *v.* Holeman, 26 Ga. 182; Allen *v.* Tison, 50 Ga. 374; *Ex parte* Conner, 51 Ga. 571; Brieswick *v.* Mayor, &c. of Brunswick, 51 Ga. 639; Howell *v.* State, 71 Ga. 224; People *v.* McCann, 16 N. Y. 58; Williams *v.* People, 24 N. Y. 405; People *v.* Allen, 42 N. Y. 404; Huber *v.* People, 49 N. Y. 132; People *v.* Rochester, 50 N. Y. 525; Wenzler *v.* People, 58 N. Y. 516; People *v.* Dudley, 58 N. Y. 323; People *v.* Quigg, 59 N. Y. 83; Harris *v.* People, 59 N. Y. 599; *In re* Flatbush, 60 N. Y. 398; People *v.* Willsea, 60 N. Y. 507; Matter of Met. Gas Light Co., 85 N. Y. 526; People *v.* Whitlock, 92 N. Y. 191; Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Railroad Co. *v.* Whiteneck, 8 Ind. 217; Wilkins *v.* Miller, 9 Ind. 100; Foley *v.* State, 9 Ind. 363; Gillespie *v.* State, 9 Ind. 380; Mewherter *v.* Price, 11 Ind. 199; Reed *v.* State, 12 Ind. 641; Henry *v.* Henry, 13 Ind. 250; Igoe *v.* State, 14 Ind. 239; Sturgeon *v.* Hitchens, 22 Ind. 107; Lauer *v.* State, 22 Ind. 461; Central Plank Road Co. *v.* Hannaman, 22 Ind. 484; Garrigus *v.* Board of Commissioners, 39 Ind. 66; McCaslin *v.* State, 44 Ind. 151; Williams *v.* State, 48 Ind. 306; Jackson *v.* Reeves, 53 Ind. 231; Railroad Co. *v.* Gregory, 15 Ill. 20; Firemen's Association *v.* Lounsbury, 21 Ill. 511; Ottawa *v.* People, 48 Ill. 233; Prescott *v.* City of Chicago, 60 Ill. 121; People *v.* Brislin, 80 Ill. 423; McAunich *v.* Mississippi, &c. R. R. Co., 20 Iowa, 338; State *v.* Squires, 26 Iowa, 340; Chiles *v.* Drake, 2 Met. (Ky.) 146; Phillips *v.* Bridge Co., 2 Met. (Ky.) 219; Louisville, &c. Co. *v.* Ballard, 2 Met. (Ky.) 177; Phillips *v.* Covington, &c. Co., 2 Met. (Ky.) 219; Chiles *v.* Monroe, 4 Met. (Ky.) 72; Hind *v.* Rice, 10 Bush, 528; Cannon *v.* Hemphill, 7 Tex. 184; Battle *v.* Howard, 13 Tex. 345; Robinson *v.* State, 15 Tex. 311; Antonio *v.* Gould, 34 Tex. 49; *Ex parte* Hogg, 36 Tex. 14; State *v.* Shaulle, 41 Tex. 404; State *v.* McCracken, 42 Tex. 383; Laefon *v.* Dufoe, 9 La. Ann. 329; State *v.* Harrison, 11 La. Ann. 722; Bossier *v.* Steele, 13 La. Ann. 433; Williams *v.* Payson, 14 La. Ann. 7; Wisners *v.* Monroe, 25 La. Ann. 598; Whited *v.* Lewis, 25 La. Ann. 568; State *v.* Lafayette County Court, 41 Mo. 221; State *v.* Miller, 45 Mo. 495; State *v.* Gut, 13 Minn. 341; Stuart *v.* Kinsella, 14 Minn. 524; Mills *v.* Charleton, 29 Wis. 400; Evans *v.* Sharpe, 29 Wis. 564; Single *v.* Supervisors of Marathon, 38 Wis. 363; Harrison *v.* Supervisors, 51 Wis. 645, 8 N. W. 731; People *v.* McCallum, 1 Neb. 182; Smails *v.* White, 4 Neb. 353; Cutlip *v.* The Sheriff, 3 W. Va. 588; Shields *v.* Bennett, 8 W. Va. 74; Tuscaloosa Bridge Co. *v.* Olmstead, 41 Ala. 9; Weaver *v.* Lapsely, 43 Ala. 224; *Ex parte* Upshaw, 45 Ala. 234; Lockhart *v.* Troy, 48 Ala. 579; Walker *v.* State, 49 Ala. 329; Simpson *v.* Bailey, 3 Oreg. 515; Pope *v.* Phifer, 3 Heisk. 682; Cannon *v.* Mathes, 8 Heisk. 504; State *v.* Newark, 34 N. J. 264; Gifford *v.* R. R. Co., 10 N. J. Eq. 171; Keller *v.* State, 11 Md. 525; Parkinson *v.* State, 14 Md. 184; Ryerson *v.* Utley, 16 Mich. 269; People *v.* Denahy, 20 Mich. 349; People *v.* Hurlbut, 24 Mich. 44; Kurtz *v.* People, 33 Mich. 279; Hathaway *v.* New Baltimore, 48 Mich. 251, 12 N. W. 186; Attorney-General *v.* Joy, 55 Mich. 94, 20 N. W. 806; Dorsey's Appeal, 72 Pa. St. 192; Alle-

4. *The effect if the title embrace more than one object.* Perhaps in those States where this constitutional provision is limited in

gheny County Home's Case, 77 Pa. St. 77; Morton *v.* Comptroller-General, 4 S. C. 430; State *v.* Gurney, 4 S. C. 520; Norman *v.* Curry, 27 Ark. 440; Division of Howard County, 15 Kan. 194; Simpson *v.* Bailey, 3 Oreg. 515; *Ex parte* Wells, 21 Fla. 280; Read *v.* Plattsmouth, 107 U. S. 568, 2 Sup. Ct. Rep. 208; Otoe Co. *v.* Baldwin, 111 U. S. 1, 4 Sup. Ct. Rep. 265.

In Davis *v.* Woolnough, 9 Iowa, 104, an act entitled "An act for revising and consolidating the laws incorporating the city of Dubuque, and to establish a city court therein," was held to express by its title but one object, which was, the revising and consolidating the laws incorporating the city; and the city court, not being an unusual tribunal in such a municipality, might be provided for by the act, whether mentioned in the title or not. "An act to enable the supervisors of the city and county of New York to raise money by tax," provided for raising money to pay judgments then existing, and also any thereafter to be recovered; and it also contained the further provision, that whenever the comptroller of the city should have reason to believe that any judgment then of record or thereafter obtained had been obtained by collusion, or was founded in fraud, he should take the proper and necessary means to open and reverse the same, &c. This provision was held constitutional, as properly connected with the subject indicated by the title, and necessary to confine the payments of the tax to the objects for which the moneys were intended to be raised. Sharp *v.* Mayor, &c. of New York, 31 Barb. 572. In O'Leary *v.* Cook Co., 28 Ill. 534, it was held that a clause in an act incorporating a college, prohibiting the sale of ardent spirits within a distance of four miles, was so germaine to the primary object of the charter as to be properly included within it. By the first section of "an act for the relief of the creditors of the Lockport and Niagara Falls Railroad Company," it was made the duty of the president of the corporation, or one of the directors to be appointed by the president, to advertise and sell the real and personal estate, including the franchise of the company, at public auction, to the highest bidder. It was then declared that the sale should be absolute, and that it should vest in the purchaser or purchasers of the property, real or personal, of the company, all the franchise, rights, and privileges of the corporation, as fully and as absolutely as the same were then possessed by the company. The money arising from the sale, after paying costs, was to be applied, first, to the payment of a certain judgment, and then to other liens according to priority; and the surplus, if any, was to be divided ratably among the other creditors, and then, if there should be an overplus, it was to be divided ratably among the then stockholders. By the second section of the act, it was declared that the purchaser or purchasers should have the right to sell and distribute stock to the full amount which was authorized by the act of incorporation, and the several amendments thereto; and to appoint an election, choose directors, and organize a corporation anew, with the same powers as the existing company. There was then a proviso, that nothing in the act should impair or affect the subscriptions for new stock, or the obligations or liabilities of the company, which had been made or incurred in the extension of the road from Lockport to Rochester, &c. The whole act was held to be constitutional. Mosier *v.* Hilton, 15 Barb. 657. An act for the relief of the village of Clinton covers curative provisions relative to the action of commissioners for village water-supply. Board Water Commissioners *v.* Dwight, 101 N. Y. 9. An act to regulate foreclosure of real estate covers provisions for sales on execution as well as mortgage. Gillitt *v.* McCarthy, 34 Minn. 318, 25 N. W. 637. One to prohibit sale of liquor covers civil damage provisions. Darein *v.* Pontious, 34 Kan. 353, 8 Pac. 428. And see Mills *v.* Charleton, 29 Wis. 400,—a very liberal case; Erlinger *v.* Boneau, 51 Ill. 94; State *v.* Newark, 34 N. J. 236; Smith *v.* Commonwealth, 8 Bush, 108; State *v.* St. Louis Cathedral, 23 La. Ann. 730; Simpson *v.* Bailey, 3 Oreg. 515; Neiffing *v.* Pontiac, 56 Ill. 172. [A title, "An Act

its operation to private and local bills, it might be held that an act was not void for embracing two or more objects which were indicated by its title, provided one of them only was of a private and local nature. It has been held in New York that a local bill was not void because embracing general provisions also;[1] and if they may constitutionally be embraced in the act, it is presumed they may also be constitutionally embraced in the title. But if the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act valid as to the one and void as to the other.[2]

5. *The effect where the act is broader than the title.* But if the act is broader than the title, it may happen that one part of it can stand because indicated by the title, while as to the object not indicated by the title it must fail. Some of the State constitutions, it will be perceived, have declared that this shall be the rule; but the declaration was unnecessary; as the general rule, that so much of the act as is not in conflict with the constitution must be sustained, would have required the same declaration from the courts. If, by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional. The principal questions in each case will therefore be, whether the act is in truth broader than

to Facilitate the Carriage of Passengers and Property by Railroad Companies" is insufficient to cover a restriction upon the powers of eminent domain possessed by certain railroad companies. Thomas *v.* Wabash, St. L. & P. R. Co., 40 Fed. Rep. 126, 7 L. R. A. 145. And an amendment to "An Act for the Incorporation of Manufacturing Companies," which makes it include mercantile companies without changing the title, is void. Eaton *v.* Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102. Word "purchase" does not include expropriation by eminent domain. Enterprise *v.* Smith, 62 Kan. 815, 62 Pac. 324.]

[A title, "An Act to Revise the Code of Civil Procedure of the State of California" does not comply with the constitutional provision that "every act shall embrace but one subject, which subject shall be expressed in the title," where the act deals with a vast variety of subjects, many of which are totally distinct from each other, and some of which have no relation to civil procedure. Lewis Adm'x of Lewis *v.* Dunne, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. 257.]

[1] People *v.* McCann, 16 N. Y. 58. An act as to paving Eighth Avenue cannot provide for changing the grade of intersecting streets. *In re* Blodgett, 89 N. Y. 392.

[2] Antonio *v.* Gould, 34 Tex. 49; State *v.* McCracken, 42 Tex. 383. All the cases recognize this doctrine. [State *v.* Ferguson, 104 La. 249, 28 So. 917, 81 Am. St. 123, furnishes a recent instance. For a valuable discussion and collection of cases upon questions growing out of titles to enactments, see 79 Am. St. 456–486.]

the title; and if so, then whether the other objects in the act are so intimately connected with the one indicated by the title that the portion of the act relating to them cannot be rejected, and leave a complete and sensible enactment which is capable of being executed.[1]

As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so. Thus, "an act concerning promissory notes and bills of exchange" provided that all promissory notes, bills of exchange, *or other instruments in writing*, for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other

[1] People *v.* Briggs, 50 N. Y. 553. See Van Riper *v.* North Plainfield, 43 N. J. 349; Central, &c. R. R. Co. *v.* People, 5 Col 39; Foley *v.* State, 9 Ind. 363; Kulms *v.* Kramis, 20 Ind. 400; Grubbs *v.* State, 24 Ind. 295; State *v.* Young, 47 Ind. 150; Robinson *v.* Bank of Darien, 18 Ga. 65; Williams *v.* Payson, 14 La. Ann. 7; Weaver *v.* Lapsley, 43 Ala. 224; Walker *v.* State, 49 Ala. 329; Boyd *v.* State, 53 Ala. 601; *Ex parte* Moore, 62 Ala. 471; State *v.* Miller, 45 Mo 495; Wisners *v.* Monroe, 25 La. Ann. 598; Dorsey's Appeal, 72 Pa. St. 192; Allegheny County Home's Case, 77 Pa. St. 77; Tecumseh *v.* Phillips, 5 Neb. 305; State *v.* Lancaster Co., 17 Neb. 85, 22 N. W. 228; Matter of Van Antwerp, 56 N. Y. 261; People *v.* O'Brien, 38 N. Y. 193; Matter of Metropolitan Gas. Co., 85 N. Y. 526; Lockport *v.* Gaylord, 61 Ill. 276; Middleport *v.* Insurance Co., 82 Ill. 562; Welch *v.* Post, 99 Ill. 471; Donnersberger *v.* Prendergast, 128 Ill. 229, 21 N. E. 1; Davis *v.* State, 7 Md. 151; Stiefel *v.* Maryland Inst., 61 Md. 144; State *v.* Banker's, &c. Assn., 23 Kan. 499; Rader *v.* Union, 39 N. J. 509; Evernham *v.* Hulit, 45 N. J. L. 53; Miss., &c. Boom Co. *v.* Prince, 34 Minn. 79, 24 N. W. 344; State *v.* Palmes, 23 Fla. 620, 3 So. 171; Jones *v.* Thompson, 12 Bush, 394; [Equit. G. Trust Co. *v.* Donahoe, — Del. —, 49 Atl. 372 (May 16, 1901); Harris *v.* State, 110 Ga. 887, 36 S. E. 232; State *v.* McDonald, 25 Wash. 122, 64 Pac. 912; *Re* Werner, 129 Cal. 567, 62 Pac. 97; Howard *v.* Schneider, 10 Kan. App. 137, 62 Pac. 435; People *v.* Curry, 130 Cal. 82, 62 Pac. 516; State *v.* Cornell, 60 Neb. 276, 691, 83 N. W. 72.] In Tennessee it is held that if an act contains more than one subject, it is void. State *v.* McCann, 4 Lea, 1. "None of the provisions of a statute should be regarded as unconstitutional where they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title." Phillips *v.* Bridge Co., 2 Met. (Ky.) 219, approved, Smith *v.* Commonwealth, 8 Bush, 112. See *Ex parte* Upshaw, 45 Ala. 234; Stewart *v.* Father Matthew Society, 41 Mich. 67, 1 N. W. 931. [That title is broader than the act is no objection. State *v.* Burgdoerfer, 107 Mo. 1, 17 S. W. 616, 14 L. R. A. 846; Boyer *v.* Grand Rapids Fire Ins. Co., 124 Mich. 455, 83 N. W. 121, 83 Am. St. 338.]

stipulation therein mentioned, should be negotiable, and assignees of the same might sue thereon in their own names. It was held that this act was void, as to all the instruments mentioned therein except promissory notes and bills of exchange:[1] though it is obvious that it would have been easy to frame a title to the act which would have embraced them all, and which would have been unobjectionable. It has also been held that an act for the preservation of the Muskegon River Improvement could not lawfully provide for the levy and collection of tolls for the payment of the expense of *constructing* the improvement, as the operation of the act was carefully limited by its title to the future.[2] So also it has been held that "an act to limit the numbers of grand jurors, and to point out the mode of their selection, defining their jurisdiction, and repealing all laws inconsistent therewith," could not constitutionally contain provisions which should authorize a defendant in a criminal case, on a trial for any offence, to be found guilty of any lesser offence necessarily included therein.[3] These cases must suffice upon this point; though the cases before referred to will furnish many similar illustrations.

In all we have said upon this subject we have assumed the constitutional provision to be mandatory. Such has been the view of the courts almost without exception. In California, however, a different view has been taken, the court saying: "We regard this section of the constitution as merely directory;

[1] Mewherter *v.* Price, 11 Ind. 199. See also State *v.* Young, 47 Ind. 150; Jones *v.* Thompson, 12 Bush, 304; Rushing *v.* Sebree, 12 Bush, 198; State *v.* Kinsella, 14 Minn. 524; Grover *v.* Trustees Ocean Grove, 45 N. J. L. 399.

[2] Ryerson *v.* Utley, 16 Mich. 269. See further Weaver *v.* Lapsley, 43 Ala. 224; Tuscaloosa Bridge Co. *v.* Olmstead, 41 Ala. 9; Stuart *v.* Kinsella, 14 Minn. 524; Rogers *v.* Manuf. Imp. Co., 109 Pa. St. 109. In Cutlip *v.* Sheriff, 3 W. Va. 588, it was held that if an act embraces two objects, only one of which is specified in the title, the whole is void; but this is opposed to the authorities generally.

[3] Foley *v.* State, 9 Ind. 363; Gillespie *v.* State, 9 Ind. 380. See also Indiana Cent. Railroad Co. *v.* Potts, 7 Ind. 681; State *v.* Squires, 26 Iowa, 340; State *v.* Lafayette Co. Court, 41 Mo. 39; People *v.* Denahy, 20 Mich. 349.

Prohibitory enactments are not covered by a title to "regulate" liquor selling. Miller *v.* Jones, 80 Ala. 89; People *v.* Gadway, 61 Mich. 285, 28 N. W. 101; People *v.* Hauck, 70 Mich. 396, 38 N. W. 269; Cantril *v.* Sainer, 59 Iowa, 26, 12 N. W. 753. See State *v.* Circuit Court, 50 N. J. L. 585, 15 Atl. 272.

For further illustration of provisions held bad because not within the title, see Ragio *v.* State, 86 Tenn. 272, 6 S. W. 401; *In re* Paul, 94 N. Y. 497, 20 N. W. 549; Anderson *v.* Hill, 54 Mich. 477; Northwestern Mfg. Co. *v.* Wayne Cir. Judge, 58 Mich. 381, 25 N. W. 371; Sewickley *v.* Sholes, 118 Pa. St. 165, 12 Atl. 302; Jersey City *v.* Elmendorf, 47 N. J. L. 283; Savannah, F. & W. Ry. Co. *v.* Geiger, 22 Fla. 669. [Addition of words "and so forth" to title is worthless. *Ex parte* Lacy, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822. Provision for building a court house cannot be included in "an act to incorporate the town of Luverne." Thompson *v.* Luverne, 128 Ala. 567, 29 So. 326.]

and, if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must in effect obliterate almost every law from the statute-book, unhinge the business and destroy the labor of the last three years. The first legislature that met under the constitution seems to have considered this section as directory; and almost every act of that and the subsequent sessions would be obnoxious to this objection. The contemporaneous exposition of the first legislature, adopted or acquiesced in by every subsequent legislature, and tacitly assented to by the courts, taken in connection with the fact that rights have grown up under it, so that it has become a rule of property, must govern our decision."[1] Similar views have also been expressed in the State of Ohio.[2] These cases, and especially what is said by the California court, bring forcibly before our minds a fact, which cannot be kept out of view in considering this subject, and which has a very important bearing upon the precise point which these decisions cover. The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed. Upon this subject we need only refer here to what we have said concerning it in another place.[3]

Amendatory Statutes.

It has also been deemed important, in some of the States, to provide by their constitutions, that "no act shall ever be revised

[1] Washington *v.* Page, 4 Cal. 388. See Pierpont *v.* Crouch, 10 Cal. 315; Matter of Boston Mining, &c. Co., 51 Cal. 624; Weill *v.* Kenfield, 54 Cal. 111.

[2] Miller *v.* State, 3 Ohio St. 475; Pim *v.* Nicholson, 6 Ohio St. 177; State *v.* Covington, 29 Ohio St. 102.

[3] *Ante*, p. 105 *et seq.* See State *v.* Tufly, 19 Nev. 391.

or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length."[1] Upon this provision an important query arises. Does it mean that the act or section revised or amended shall be set forth and published at full length as it stood before, or does it mean only that it shall be set forth and published at full length as amended or revised? Upon this question perhaps a consideration of the purpose of the provision may throw some light. "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for the express purpose.

[1] This is the provision as it is found in the Constitutions of Indiana, Nevada, Oregon, Texas, and Virginia. In Kansas, New Jersey, Ohio, Michigan, Louisiana, Wisconsin, [Utah,] Missouri, and Maryland there are provisions of similar import. In Tennessee the provision is: "All acts which revive, repeal, or amend former laws, shall recite, in their caption or otherwise, the title or substance of the law repealed, revived, or amended." Art. 1, § 17. See State *v.* Gaines, 1 Lea, 731; McGhee *v.* State, 2 Lea, 622. The provision in Nebraska (Const. of 1875) is peculiar. "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." Art. 3, § 11. Under a like provision that any section amended is thereby repealed, it is held in Alabama that an amendment to an amended statute is valid. State *v.* Warford, 84 Ala. 15, 3 So. 911. So where the amendment impliedly repealed the original act, an amendment to the amended act was held valid, as the mistake in referring to a repealed statute should not defeat the intention of the legislature. Com. *v.* Kenneson, 143 Mass. 418, 9 N. E. 761. Under provisions forbidding enactments by reference a law complete in itself may provide for carrying out its purposes by reference to procedure established by other acts. Campbell *v.* Board, &c., 47 N. J. L. 347; De Camp *v.* Hibernia R. R. Co., *id.* 43. But the act must be complete in all essentials. Christie *v.* Bayonne, 48 N. J. L. 407, 5 Atl. 805; Donohugh *v.* Roberts, 15 Phila. 144.

In Texas it appears to be held that the legislature may repeal a definite portion of a section without the re-enactment of the section with such portion omitted. Chambers *v.* State, 25 Tex. 307. But *quære* of this. Any portion of a section amended which is not contained in the amendatory section as set forth and published is repealed. State *v.* Ingersoll, 17 Wis. 631. [But where the provisions of an act applying to a certain city are made to apply to another, this is not an amendment of the original act. Phœnix Fire Assurance Co. *v.* Montgomery Fire Dept., 117 Ala. 631, 23 So. 843, 42 L. R. A. 468.] Further on this subject see Blakemore *v.* Dolan, 50 Ind. 194; People *v.* Wright, 70 Ill. 388; Jones *v.* Davis, 6 Neb. 33; Sovereign *v.* State, 7 Neb. 409; Gordon *v.* People, 44 Mich. 485, 7 N. W. 69; State *v.* Gerger, 65 Mo. 306; Van Riper *v.* Parsons, 40 N. J. 123, 29 Am. Rep. 210; Fleishner *v.* Chadwick, 5 Oreg. 152; State *v.* Cain, 8 W. Va. 720; State *v.* Henderson, 32 La. Ann. 779; Colwell *v.* Chamberlin, 43 N. J. 387; [State *v.* Beddo, 22 Utah, 432, 63 Pac. 96.]

Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation."[1] If this is a correct view of the purpose of the provision, it does not seem to be at all important to its accomplishment that the old law should be republished, if the law as amended is given in full, with such reference to the old law as will show for what the new law is substituted. Nevertheless, it has been decided in Louisiana that the constitution requires the old law to be set forth and published;[2] and the courts of Indiana, assuming the provision in their own constitution to be taken from that of Louisiana after the decisions referred to had been made, at one time adopted and followed them as precedents.[3] It is believed, however, that the general understanding of the provision in question is different, and that it is fully complied with in letter and spirit, if the act or section revised or amended is set forth and published as revised or amended, and that anything more only tends to render the statute unnecessarily cumbrous.[4] It should be observed that statutes which amend others by implication are not within this provision; and it is not essential that they even refer to the acts or sections which by implication they amend.[5] But repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when

[1] People *v.* Mahaney, 13 Mich. 497. See Mok *v.* Detroit, &c. Association, 30 Mich. 511; Bush *v.* Indianapolis, 120 Ind. 476, 22 N. E. 422.

[2] Walker *v.* Caldwell, 4 La. Ann. 297; Heirs of Duverge *v.* Salter, 5 La. Ann. 94. *Contra*, Shields *v.* Bennett, 8 W. Va. 74.

[3] Langdon *v.* Applegate, 5 Ind. 327; Rogers *v.* State, 6 Ind. 31. These cases were overruled in Greencastle, &c. Co. *v.* State, 28 Ind. 382.

[4] See Tuscaloosa Bridge Co. *v.* Olmstead, 41 Ala. 9; People *v.* Pritchard, 21 Mich. 236; People *v.* McCallum, 1 Neb. 182; State *v.* Draper, 47 Mo. 29; Boonville *v.* Trigg, 46 Mo. 288; State *v.* Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. 127. A whole act need be set out only when all its sections are amended. State *v.* Thruston, 92 Mo. 325, 4 S. W. 930. Under such a constitutional provision where a statute simply repeals others it is not necessary to set them out. Falconer *v.* Robinson, 46 Ala. 340. Compare Bird *v.* Wasco County, 3 Oreg. 282. [In Lewis, Adm'x of Lewis, *v.* Dunne, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. 257, an act for the revision of the code of Civil Procedure of the State was held unconstitutional which did not provide for republication where the act amended over 400 sections, repealed nearly 100, and added many new ones. There is a valuable note to this case upon the power of the legislature to enact a code or compilation of laws or make extended amendments to a system of laws by a single statute. 55 L. R. A. 833.]

[5] Spencer *v.* State, 5 Ind. 41; Branham *v.* Lange, 16 Ind. 497; People *v.* Mahaney, 13 Mich. 481; Lehman *v.* McBride, 15 Ohio St. 573; Shields *v.* Bennett, 8 W. Va. 74; Baum *v.* Raphael, 57 Cal. 361, Home Ins. Co. *v.* Taxing District, 4 Lea, 644; Swartwout *v.* Railroad Co., 24 Mich. 389; Scales *v.* State, 47 Ark. 476, 1 S. W. 769; Denver Circle R. Co. *v.* Nestor, 10 Col. 403, 15 Pac. 714; State *v.* Cross, 38 Kan. 696, 17 Pac. 190; Evernham *v.* Hulit, 45 N. J. L. 53; Sheridan *v.* Salem, 14 Oreg. 328, 12 Pac. 925. Compare State *v.* Wright, *id.* 365, 12 Pac. 708.

it does not in terms purport to do so.[1] This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect.[2]

It was a parliamentary rule that a statute should not be repealed at the same session of its enactment, unless a clause permitting it was inserted in the statute itself;[3] but this rule did not apply to repeals by implication,[4] and it is possibly not recognized in this country at all, except where it is incorporated in the State constitution.[5]

[1] See cases cited in last note; also Towle *v.* Marrett, 3 Me. 22, 14 Am. Dec. 206; Naylor *v.* Field, 29 N. J. 287; State *v.* Berry, 12 Iowa, 58; Attorney-General *v.* Brown, 1 Wis. 513; Dodge *v.* Gridley, 10 Ohio, 173; Hirn *v.* State, 1 Ohio St. 20; Saul *v.* Creditors, 5 Mart. n. s. 569, 16 Am. Dec. 212; New Orleans *v.* Southern Bank, 15 La. Ann. 89; Blain *v.* Bailey, 25 Ind. 165; Water Works Co. *v.* Burkhart, 41 Ind. 364; Swann *v.* Buck, 40 Miss. 268; Davis *v.* State, 7 Md. 151; State *v.* The Treasurer, 41 Mo. 16; Somerset & Stoystown Road, 74 Pa. St. 61; Kilgore *v.* Commonwealth, 94 Pa. St. 495; McCool *v.* Smith, 1 Black, 459; State *v.* Cain, 8 W. Va. 720; Fleischner *v.* Chadwick, 5 Oreg. 152; Covington *v.* East St. Louis, 78 Ill. 548; East St. Louis *v.* Maxwell, 99 Ill. 439; *In re* Ryan, 45 Mich. 173, 7 N. W. 819; Connors *v.* Carp River Iron Co., 54 Mich. 168, 19 N. W. 938; Parker *v.* Hubbard, 64 Ala. 203; Iverson *v.* State, 52 Ala. 170; Gohen *v.* Texas Pacific R. R. Co., 2 Woods, 346; State *v.* Commissioners, 37 N. J. 240; Attorney-General *v.* Railroad Companies, 35 Wis. 425; Rounds *v.* Waymart, 81 Pa. St. 395; Greeley *v.* Jacksonville, 17 Fla. 174; State *v.* Smith, 44 Tex. 443; Henderson's Tobacco, 11 Wall. 652; Cape Girardeau Co. Ct. *v.* Hill, 118 U. S. 68, 6 Sup. Ct. Rep. 951. If the two are repugnant in part, the earlier is *pro tanto* repealed. Hearn *v.* Brogan, 64 Miss. 334; Jeffersonville, &c. R. R. Co. *v.* Dunlap, 112 Ind. 93, 13 N. E. 403. A law which merely re-enacts a former one does not repeal an intermediate act qualifying such former act. The new is qualified like the old. Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614. It is a familiar rule, however, that when a new statute is evidently intended to cover the whole subject to which it relates, it will by implication repeal all prior statutes on that subject. See United States *v.* Barr, 4 Sawyer, 254; United States *v.* Claflin, 97 U. S. 546; Red Rock *v.* Henry, 106 U. S. 596, 1 Sup. Ct. Rep. 434; Dowdell *v.* State, 58 Ind. 333; State *v.* Rogers, 10 Nev. 319; Tafoya *v.* Garcia, 1 New Mex. 480; Campbell's Case, 1 Dak. 17, 46 N. W. 504; Andrews *v.* People, 75 Ill. 605; Clay Co. *v.* Chickasaw Co., 64 Miss. 534, 1 So. 753; Lyddy *v.* Long Island City, 104 N. Y. 218; Stingle *v.* Nevel, 9 Oreg. 62; State *v.* Studt, 31 Kan. 245, 1 Pac. 635. But a local option law merely suspends, does not repeal a former liquor law, and after its adoption offences against the latter while in force may be prosecuted. Winterton *v.* State, 65 Miss. 238, 3 So. 735. A statute cannot be repealed by non-user. Homer *v.* Com., 106 Pa. St. 221; Pearson *v.* Int. Distill. Co., 72 Iowa, 348, 34 N. W. 1.

[2] Cass *v.* Dillon, 2 Ohio St. 607; Fosdick *v.* Perrysburg, 14 Ohio St. 472; People *v.* Quigg, 59 N. Y. 83; McKenna *v.* Edmundstone, 91 N. Y. 231; Clark *v.* Davenport, 14 Iowa, 494; Oleson *v.* Green Bay, &c. R. R. Co., 36 Wis. 383; Covington *v.* East St. Louis, 78 Ill. 548; Chesapeake, &c. Co. *v.* Hoard, 16 W. Va. 270; Rounds *v.* Waymart, 81 Pa. St. 395; *Ex parte* Schmidt, 24 S. C. 363; New Brunswick *v.* Williamson, 44 N. J. L. 165; McGruder *v.* State, 83 Ga. 616, 10 S. E. 281.

[3] Dwarris on Statutes, Vol. I. p. 269; Sedgw. on Stat. and Const. Law, 122; Smith on Stat. and Const. Construction, 908.

[4] *Ibid.* And see Spencer *v.* State, 5 Ind. 41.

[5] Spencer *v.* State, 5 Ind. 41; Attorney-General *v.* Brown, 1 Wis. 513; Smith

Signing of Bills.

When a bill has passed the two houses, it is engrossed for the signatures of the presiding officers. This is a constitutional requirement in most of the States, and therefore cannot be dispensed with;[1] though, in the absence of any such requirement, it would seem not to be essential.[2] And if, by the constitution of the State, the governor is a component part of the legislature, the bill is then presented to him for his approval. (*a*)

Approval of Laws.

The qualified veto power (*b*) of the governor is regulated by the constitutions of those States which allow it, and little need

on Stat. and Const. Construction, 908; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; Strauss *v.* Heiss, 48 Md. 292. The later of two acts passed at the same session controls when they are inconsistent. Thomas *v.* Collins, 58 Mich. 64, 24 N. W. 553; Watson *v.* Kent, 78 Ala. 602. But the fact of later publication when action is taken at the same time will not work a repeal. *In re* Hall, 38 Kan. 670, 17 Pac. 649. Where acts passed on different days are approved on the same day, the presumption is that the one passed last was signed last. State *v.* Davis, 70 Md. 237, 16 Atl. 529.

[1] Moody *v.* State, 48 Ala. 115, 17 Am. Rep. 28; State *v.* Mead, 71 Mo. 266; Burritt *v.* Com'rs, 120 Ill. 322, 11 N. E. 180; State *v.* Kiesewetter, 45 Ohio St. 251, 12 N. E. 807; Hunt *v.* State, 22 Tex. App. 396, 3 S. W. 233. Signature by presiding officers and assistant secretary is enough. State *v.* Glenn, 18 Nev. 34, 1 Pac. 186. But if the journal shows the passage of an act and the governor signs it, absence of signature of the president of the Senate will not invalidate it. Taylor *v.* Wilson, 17 Neb. 88, 22 N. W. 119. After an act has been passed over a veto, it need not be again certified. State *v.* Denny, 118 Ind. 449, 21 N. E. 274 The bill as signed must be the same as it passed the two houses. People *v.* Platt, 2 S. C. N. S. 150; Legg *v.* Annapolis, 42 Md. 203; Brady *v.* West 50 Miss. 68. But a clerical error that would not mislead is to be overlooked. People *v.* Supervisor of Onondaga, 16 Mich. 254. Compare Smith *v.* Hoyt, 14 Wis. 252, where the error was in publication. And so should accidental and immaterial changes in the transmission of the bill from one house to the other. Larrison *v.* Railroad Co., 77 Ill. 11; Walnut *v.* Wade, 103 U. S. 683. See Wenner *v.* Thornton, 98 Ill. 156. When a mistake in enrolment made an approval void, signatures and approval on a correct roll after the adjournment were held to make the act valid. Dow *v.* Beidelman, 49 Ark. 325, 5 S. W. 297. In Maryland the governor may refuse to consider any bill sent him not authenticated by the Great Seal. Hamilton *v.* State, 61 Md. 14. [In Nevada where the governor vetoes an act after the adjournment of the legislature, the next legislature may pass it over his veto. Upon such passage, the presiding officers of the two houses must thereupon sign it. State *v.* Howell, — Nev. —, 64 Pac. 466 (April 8, 1901).]

[2] Speer *v.* Plank Road Co., 22 Pa. St. 376.

(*a*) [Upon power to withdraw the bill from the governor before he has acted on it and before the expiration of the time given him in which to act upon it, see McKenzie *v.* Moore, 92 Ky. 216, 17 S. W. 483, 14 L. R. A. 251, and note. The bill presented must be that which passed the legislature. Any change after passage and before signature by the governor prevents the bill's becoming a law. State *v.* Wendler, 94 Wis. 369, 68 N. W. 759.]

(*b*) [Where the statute provides that the mayor "shall have a negative upon the action of the aldermen in laying out highways and in all other matters," such pro-

be said here beyond referring to the constitutional provisions for information concerning them. It has been held that if the governor, by statute, was entitled to one day, previous to the adjournment of the legislature, for the examination and approval of laws, this is to be understood as a full day of twenty-four hours, before the hour of the final adjournment.[1] It has also been held that, in the approval of laws, the governor is a component part of the legislature, and that unless the constitution allows further time for the purpose, he must exercise his power of approval before the two houses adjourn, or his act will be void.[2] But under a provision of the Constitution of Minnesota, that the governor may approve and sign "within three days of

[1] Hyde *v.* White, 24 Tex. 137. The five days allowed in New Hampshire for the governor to return bills which have not received his assent, include days on which the legislature is not in session, if it has not finally adjourned. Opinions of Judges, 45 N. H. 607. But the day of presenting the bill to the governor should be excluded. Opinions of Judges, 45 N. H. 607; Iron Mountain Co. *v.* Haight, 39 Cal. 540; *In re* Senate Resolution, 9 Col. 632, 21 Pac. 475. And if the last day falls on Sunday he may return the bill on Monday, *id.* As to the power of the governor, derived from long usage, to approve and sign bills after the adjournment of the legislature, see Solomon *v.* Cartersville, 41 Ga. 157.

Neither house can, without the consent of the other, recall a bill after its transmission to the governor. People *v.* Devlin, 33 N. Y. 269. In Colorado the legislature may request the return of a bill in the governor's hands, but he may respond or not as he likes. If he sends back the bill, it may be reconsidered and amended. *Re* Recalling Bills, 9 Col. 630, 21 Pac. 474. But in Virginia no such recall is authorized. Wolfe *v.* McCaull, 76 Va. 876.

The delivery of a bill passed by the two houses to the secretary of the commonwealth according to custom, is not a presentation to the governor for his approval, within the meaning of the constitutional clause which limits him to a certain number of days after the presentation of the bill to veto it. Opinions of the Justices, 99 Mass. 636.

[2] Fowler *v.* Peirce, 2 Cal. 165. The court also held in this case that, notwithstanding an act purported to have been approved before the actual adjournment, it was competent to show by parol evidence that the actual approval was not until the next day. In support of this ruling, People *v.* Purdy, 2 Hill, 31, was cited, where it was held that the court might go behind the statute-book and inquire whether an act to which a two-thirds vote was essential had constitutionally passed. That, however, would not be in direct contradiction of the record, but it would be inquiring into a fact concerning which the statute was silent, and other records supplied the needed information. In Indiana it is held that the courts cannot look beyond the enrolled act to ascertain whether there has been compliance with the requirement of the constitution that no bill shall be presented to the governor within two days next previous to the final adjournment. Bender *v.* State, 53 Ind. 254. [In Maryland a bill may be signed within six days after it is submitted, although the legislature may have adjourned. The bill may even be presented after the adjournment. Lankford *v.* Somerset Co., 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491. See upon this question, paper of E. D. Renick and cases cited in it, 32 Am. Law Rev. 208.]

vision applies only to the legislative action of the aldermen. It does not apply to their determination of a contest as to membership. Cate *v.* Martin, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613.]

the adjournment of the legislature any act passed during the last three days of the session," it has been held that Sundays were not to be included as a part of the prescribed time;[1] and under the Constitution of New York, which provided that, "if any bill shall not be returned by the governor within ten days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law,"[2] it was held that the governor might sign a bill after the adjournment, at any time within the ten days.[3] The governor's approval is not complete until the bill has passed beyond his control by the constitutional and customary mode of legislation; and at any time prior to that he may reconsider and retract any approval previously made.[4] His

[1] Stinson *v.* Smith, 8 Minn. 366. See also Corwin *v.* Comptroller, 6 Rich. 390. In South Carolina a bill sent to the governor on the last day of the first session may be signed by him on the first day of the next regular session, notwithstanding an adjourned session has intervened. Arnold *v.* McKellur, 9 S. C. 335. In Mississippi if a bill is presented within ten days of the adjournment, it may be approved at any time before the third day of the next session. State *v.* Coahoma Co., 64 Miss. 358, 11 So. 501. [The Constitution of Michigan contains a provision similar to that of Minnesota above quoted, except that it provides five days instead of three. Held, that such provision makes a signature good that is attached within the required ten days after passage of bill and not later than five days after adjournment. The question arose in regard to a bill passed less than ten days and more than five days before adjournment, and signed after adjournment, but within ten days after passage of bill. Detroit *v.* Chapin, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391; and upon right of executive to sign bills after adjournment of legislature, see note to this case in L. R. A. In Nevada, upon bills sent to him during last five days of session, governor may act within ten days after adjournment. State *v.* Howell, — Nev. —, 64 Pac. 466 (April 8, 1901).]

[2] See McNeil *v.* Commonwealth, 12 Bush, 727. In computing the ten days, the first day should be excluded. Beaudeau *v.* Cape Girardeau, 71 Mo. 392.

[3] People *v.* Bowen, 30 Barb. 24, and 21 N. Y. 517. See also State *v.* Fagan, 22 La. Ann. 545; Solomon *v.* Commissioners, 41 Ga. 157; Darling *v.* Boesch, 67 Iowa, 702, 25 N. W. 887; Seven Hickory *v.* Ellery, 103 U. S. 423. It seems that in Nebraska, in a similar provision, by "adjournment" is meant the final adjournment; and if the same session is adjourned for a time — in this case two months — the governor must act upon the bill within the specified number of days. Miller *v.* Hurford, 11 Neb. 377, 9 N. W. 477. Where on the tenth day the governor sent a bill with his objections to the house with which it originated, but the messenger, finding the house had adjourned for the day, returned it to the governor, who retained it, it was held that to prevent the bill becoming a law it should have been left with the proper officer of the house instead of being retained by the governor. Harpending *v.* Haight, 39 Cal. 189. In response to an unauthorized request, the governor returned a bill without objections. The constitution provided that a bill, if not returned in five days, became law without his signature. Held, that his return was not covered by the provision, and that the bill became a law notwithstanding. Wolfe *v.* McCaull, 76 Va. 876.

[4] People *v.* Hatch, 19 Ill. 283. An act apportioning the representatives was passed by the legislature and transmitted to the governor, who signed his approval thereon by mistake, supposing at the time that he was subscribing one of sev-

disapproval of a bill is communicated to the house in which it originated, with his reasons; and it is there reconsidered, and may be again passed over the veto by such vote as the constitution prescribes.[1]

eral other bills then lying before him, and claiming his official attention; his private secretary thereupon reported the bill to the legislature as approved, not by the special direction of the governor, nor with his knowledge or special assent, but merely in his usual routine of customary duty, the governor not being conscious that he had placed his signature to the bill until after information was brought to him of its having been reported approved; whereupon he sent a message to the speaker of the house to which it was reported, stating that it had been inadvertently signed and not approved, and on the same day completed a veto message of the bill, which was partially written at the time of signing his approval, and transmitted it to the house where the bill originated, having first erased his signature and approval. It was held that the bill had not become a law. It had never passed out of the governor's possession after it was received by him until after he had erased his signature and approval; and the court was of opinion that it did not pass from his control until it had become a law by the lapse of ten days under the constitution, or by his depositing it with his approval in the office of the secretary of state. It had long been the practice of the governor to report, formerly through the secretary of state, but recently through his private secretary, to the house where bills originated, his approval of them; but this was only a matter of formal courtesy, and not a proceeding necessary to the making or imparting vitality to the law. By it no act could become a law which without it would not be a law. Had the governor returned the bill itself to the house, with his message of approval, it would have passed beyond his control, and the approval could not have been retracted, unless the bill had been withdrawn by consent of the house; and the same result would have followed his filing the bill with the secretary of state with his approval subscribed.

The Constitution of Indiana provides (art. 5, § 14) that, "if any bill shall not be returned by the governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law without his signature, unless the general adjournment shall prevent its return; in which case it shall be a law unless the governor, within five days next after the adjournment, shall file such bill, with his objections thereto, in the office of the secretary of state," &c. Under this provision it was held that where the governor, on the day of the final adjournment of the legislature, and after the adjournment, filed a bill received that day, in the office of the secretary of state, without approval or objections thereto, it thereby became a law, and he could not file objections afterwards. Tarlton *v.* Peggs, 18 Ind. 24. See State *v.* Whisner, 35 Kan. 271, 10 Pac. 852. If in approving a bill the governor signs in the wrong place, he may sign again after adjournment. Nat. Land and Loan Co. *v.* Mead, 60 Vt. 257, 14 Atl. 689.

An act of the legislature takes effect when the governor signs it, unless the constitution contains some different provision. Hill *v.* State, 5 Lea, 725.

[1] A bill which, as approved and signed, differs in important particulars from the one signed, is no law. Jones *v.* Hutchinson, 43 Ala. 721.

If the governor sends back a bill which has been submitted to him, stating that he cannot act upon it because of some supposed informality in its passage, this is in effect an objection to the bill, and it can only become a law by further action of the legislature, even though the governor may have been mistaken as to the supposed informality. Birdsall *v.* Carrick, 3 Nev. 151. If an act passed over a veto is duly authenticated otherwise, the absence of the governor's signature will not vitiate it. Hovey *v.* State, 119 Ind. 395, 21 N. E. 21.

In practice the veto power, although very great and exceedingly important in this country, is obsolete in Great Britain, and no king now ventures to resort to it. As the Ministry must at all times be in accord with the House of Commons, —

Other Powers of the Governor.

The power of the governor as a branch of the legislative department is almost exclusively confined to the approval of bills. As executive, he communicates to the two houses information concerning the condition of the State, and may recommend measures to their consideration, but he cannot originate or introduce bills. He may convene the legislature in extra session whenever extraordinary occasion seems to have arisen; but their powers when convened are not confined to a consideration of the subjects to which their attention is called by his proclamation or his message, and they may legislate on any subject as at the regular sessions.[1] An exception to this statement exists in those States where, by the express terms of the constitution, it is provided that when convened in extra session the legislature shall consider no subject except that for which they were specially called together, or which may have been submitted to them by special message of the governor.[2]

When Acts are to take Effect.

The old rule was that statutes, unless otherwise ordered, took effect from the first day of the session on which they were passed;[3]

except where the responsibility is taken of dissolving the Parliament and appealing to the people, — it must follow that any bill which the two houses have passed must be approved by the monarch. The approval has become a matter of course, and the governing power in Great Britain is substantially in the House of Commons. 1 Bl. Com. 184–185, and notes. [After the bill has been vetoed it is dead unless repassed by the constitutional majorities, even though it received those majorities on its first passage. State *v.* Crounse, 36 Neb. 835, 55 N. W. 246, 20 L. R. A. 265.]

[1] The Constitution of Iowa, art. 4, § 11, provides that the governor "may, on extraordinary occasions, convene the General Assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened." It was held in Morford *v.* Unger, 8 Iowa, 82, that the General Assembly, when thus convened, were not confined in their legislation to the purposes specified in the message. "When lawfully convened, whether in virtue of the provision in the constitution or the governor's proclamation, it is the 'General Assembly' of the State, in which the full and exclusive legislative authority of the State is vested. Where its business at such session is not restricted by some constitutional provision, the General Assembly may enact any law at a special or extra session that it might at a regular session. Its powers, not being derived from the governor's proclamation, are not confined to the special purpose for which it may have been convened by him."

[2] Provisions to this effect will be found in the Constitutions of Illinois, Michigan, Missouri, and Nevada; perhaps in some others. As to what matters are held embraced in such call, see State *v.* Shores, 31 W. Va. 491, 7 S. E. 413; Baldwin *v.* State, 21 Tex. App. 591, 3 S. W. 109; [Wells *v.* Mo. Pac. R. Co., 110 Mo 280, 19 S. W. 530, 15 L. R. A. 647; Chicago, B. & Q. R. Co. *v.* Wolfe, 61 Neb. 502, 86 N. W. 441; People *v.* Curry, 130 Cal. 82, 62 Pac. 516.] Confirmation of appointment by the Senate may be made. The limitation is upon legislation. People *v.* Blanding, 63 Cal. 333.

[3] 1 Lev. 91; Latless *v.* Holmes, 4 T. R. 660; Smith *v.* Smith, Mart. (N. C.) 26;

but this rule was purely arbitrary, based upon no good reason, and frequently working very serious injustice. The present rule is that an act takes effect from the time when the formalities of enactment are actually complete under the constitution, unless it is otherwise ordered, or unless there is some constitutional or statutory rule on the subject which prescribes otherwise.[1] By the Constitution of Mississippi,[2] "no law of a general nature, unless otherwise provided, shall be enforced until sixty days after the passage thereof." By the Constitution of Illinois,[3] no act of the General Assembly shall take effect until the first day of July next after its passage, unless in case of emergency (which emergency shall be expressed in the preamble or body of the act) the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. By the Constitution of Michigan,[4] no public act shall take effect, or be in force, until the expiration of ninety days from the end of the session at which the same is passed, unless the legislature shall otherwise direct by a two-thirds vote of the members elected to each house. These and similar provisions are designed to secure, as far as possible, the public promulgation of the law before parties are bound to take notice of and act under it, and to obviate the injustice of a rule which should compel parties at their peril to know and obey a law of which, in the nature of things, they could not possibly have heard; they give to all parties the full constitutional period in which to become ac-

Hamlet *v.* Taylor, 5 Jones L. 36. This is changed by 33 Geo. III. c. 13, by which statutes since passed take effect from the day when they receive the royal assent, unless otherwise ordered therein.

[1] Matthews *v.* Zane, 7 Wheat. 164; Rathbone *v.* Bradford, 1 Ala. 312; Branch Bank of Mobile *v.* Murphy, 8 Ala. 119; Heard *v.* Heard, 8 Ga. 380; Goodsell *v.* Boynton, 2 Ill. 555; Dyer *v.* State, Meigs, 237; Parkinson *v.* State, 14 Md. 184; Freeman *v.* Gaither, 76 Ga. 741. An early Virginia case decides that "from and after the passing of this act" would exclude the day on which it was passed. King *v.* Moore, Jefferson, 9. Same ruling in Parkinson *v.* Brandenberg, 35 Minn. 294, 28 N. W. 919. On the other hand, it is held in some cases that a statute which takes effect from and after its passage, has relation to the first moment of that day. *In re* Welman, 20 Vt. 653; Mallory *v.* Hiles, 4 Met. (Ky.) 53; Wood *v.* Fort, 42 Ala. 641; Hill *v.* State, 5 Lea, 725. Others hold that it has effect from the moment of its approval by the governor. People *v.* Clark, 1 Cal. 406. See *In re* Wynne, Chase Dec. 227.

[2] Art. 7, § 6. See State *v.* Coahoma Co., 64 Miss. 358.

[3] Art. 3, § 23. The intention that an act shall take effect sooner must be expressed clearly and unequivocally; it is not to be gathered by intendment and inference. Wheeler *v.* Chubbuck, 16 Ill. 361. See Hendrickson *v.* Hendrickson, 7 Ind. 13.

Where an act is by its express terms to take effect after publication in a specified newspaper, every one is bound to take notice of this fact: and if before such publication negotiable paper is issued under it, the purchasers of such paper can acquire no rights thereby. McClure *v.* Oxford, 94 U. S. 429; following George *v.* Oxford, 10 Kan. 72.

[4] Art. 4, § 20.

quainted with the terms of the statutes which are passed, except when the legislature has otherwise directed; and no one is bound to govern his conduct by the new law until that period has elapsed.[1] And the fact that, by the terms of the statute, something is to be done under it before the expiration of the constitutional period for it to take effect, will not amount to a legislative direction that the act shall take effect at that time, if the act itself is silent as to the period when it shall go into operation.[2]

The Constitution of Indiana provides[3] that "no act shall take effect until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law." Unless the emergency is thus declared, it is plain that the act cannot take earlier effect.[4] But the courts will not inquire too nicely into the mode of publication. If the laws are distributed in bound volumes, in a manner and shape not substantially contrary to the statute on that subject, and by the proper authority, it will be held sufficient, notwithstanding a failure to comply with some of the directory provisions of the statute on the subject of publication.[5]

The Constitution of Wisconsin, on the other hand, provides[6] that "no general law shall be in force until published;" thus

[1] Price *v.* Hopkin, 13 Mich. 318. A provision that "subsequent to the passage of [illegible] act" the law should be as declared, does not come into force till after ninety days. Andrews *v.* St. Louis Tunnel Co., 16 Mo. App. 299. See, however, Smith *v.* Morrison, 22 Pick. 430; Stine *v.* Bennett, 13 Minn. 153. Compare State *v.* Bond, 4 Jones (N. C.), 9. Where a law has failed to take effect for want of publication, all parties are chargeable with notice of that fact. Clark *v.* Janesville, 10 Wis. 136.

[2] Supervisors of Iroquois Co. *v.* Keady, 34 Ill. 293. An act for the removal of a county seat provided for taking the vote of the electors of the county upon it on the 17th of March, 1863, at which time the legislature had not adjourned. It was not expressly declared in the act at what time it should take effect, and it was therefore held that it would not take effect until sixty days from the end of the session, and a vote of the electors taken on the 17th of March was void. See also Rice *v.* Ruddiman, 10 Mich. 125; Rogers *v.* Vass, 6 Iowa, 405. And it was also held in the case first named, and in Wheeler *v.* Chubbuck, 16 Ill. 361, that "the direction must be made in a clear, distinct, and unequivocal provision, and could not be helped out by any sort of intendment or implication," and that the act must all take effect at once, and not by piecemeal.

[3] Art. 4, § 28.

[4] Carpenter *v.* Montgomery, 7 Blackf. 415; Hendrickson *v.* Hendrickson, 7 Ind. 13; Mark *v.* State, 15 Ind. 98. The legislature must necessarily in these cases be judge of the existence of the emergency. Carpenter *v.* Montgomery, *supra*. The Constitution of Tennessee provides that "No law of a general nature shall take effect until forty days after its passage, unless the same, or the caption, shall state that the public welfare requires that it should take effect sooner." Art. 1, § 20.

[5] State *v.* Bailey, 16 Ind. 46. See further, as to this constitutional provision, Jones *v.* Cavins, 4 Ind. 305.

[6] Art. 7, § 21.

leaving the time when it should take effect to depend, not alone upon the legislative direction, but upon the further fact of publication. But what shall be the mode of publication seems to be left to the legislative determination. It has been held, however, that a general law was to be regarded as *published* although printed in the volume of private laws, instead of the volume of public laws, as the statute of the State would require.[1] But an unauthorized publication — as, for example, of an act for the incorporation of a city, in two local papers instead of the State paper — is no publication in the constitutional sense.[2] The Constitution of Louisiana provides that "No law passed by the General Assembly, except the general appropriation act, or act appropriating money for the expenses of the General Assembly, shall take effect until promulgated. A law shall be considered promulgated at the place where the State journal is published, the day after the publication of such law in the State journal, and in all other parts of the State twenty days after such publication." Under similar provisions in the Civil Code, before the adoption of this constitution, it was held that "the promulgation of laws is an executive function. The mode of promulgation may be prescribed by the legislature, and differs in different countries and at different times. . . . Promulgation is the extrinsic act which gives a law, perfect in itself, executory force. Unless the law prescribes that it shall be executory from its passage, or from a certain date, it is presumed to be executory only from its promulgation."[3] But it is competent for the legislature to provide in an act that it shall take effect from and after its passage; and the act will have operation accordingly, though not published in the official gazette.[4] In Pennsylvania, whose constitution then in force also failed to require publication of laws, the publication was nevertheless held to be necessary before the act could come into operation; but as the doings of the legislature were public, and the journals published regularly, it was held that every enactment must be

[1] Matter of Boyle, 9 Wis. 264. Under this provision it has been decided that a law establishing a municipal court in a city is a general law. Matter of Boyle, *supra*. See Eitel *v.* State, 33 Ind. 201. Also a statute for the removal of a county seat. State *v.* Lean, 9 Wis. 279. Also a statute incorporating a municipality, or authorizing it to issue bonds in aid of a railroad. Clark *v.* Janesville, 10 Wis. 136. And see Scott *v.* Clark, 1 Iowa, 70. An inaccuracy in the publication of a statute, which does not change its substance or legal effect, will not invalidate the publication. Smith *v.* Hoyt, 14 Wis. 252.

[2] Clark *v.* Janesville, 10 Wis. 136. See, further, Mills *v.* Jefferson, 20 Wis. 50.

[3] State *v.* Ellis, 17 La. Ann. 390, 392.

[4] State *v.* Judge, 14 La. Ann. 486; Thomas *v.* Scott, 23 La. Ann. 689. In Maryland a similar conclusion is reached. Parkinson *v.* State, 14 Md. 184.

deemed to be published in the sense necessary, and the neglect to publish one in the pamphlet edition of the laws would not destroy its validity.[1]

The Constitution of Iowa provides that "no law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the State."[2] Under this section it is not competent for the legislature to confer upon the governor the discretionary power which the constitution gives to that body, to fix an earlier day for the law to take effect.[3]

[1] Peterman *v.* Huling, 31 Pa. St. 432. A joint resolution of a general nature requires the same publication as any other law. State *v.* School Board Fund, 4 Kan. 261.

[2] Art. 3, § 26. See Hunt *v.* Murray, 17 Iowa, 313.

[3] Scott *v.* Clark, 1 Iowa, 70; Pilkey *v.* Gleason, 1 Iowa, 522.

CHAPTER VII.

OF THE CIRCUMSTANCES UNDER WHICH A LEGISLATIVE ENACTMENT MAY BE DECLARED UNCONSTITUTIONAL.

In the preceding chapters we have examined somewhat briefly the legislative power of the State, and the bounds which expressly or by implication are set to it, and also some of the conditions necessary to its proper and valid exercise. In so doing it has been made apparent that, under some circumstances, it may become the duty of the courts to declare that what the legislature has assumed to enact is void, either from want of constitutional power to enact it, or because the constitutional forms or conditions have not been observed. In the further examination of our subject, it will be important to consider what the circumstances are under which the courts will feel impelled to exercise this high prerogative, and what precautions should be observed before assuming to do so. (*a*)

It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it. The constitution apportions the powers of government, but it does not make any one of the three departments subordi-

(*a*) [For a very learned discussion of the origin and scope of the American doctrine of constitutional law treating of the power of the courts to declare statutes void because in conflict with the constitution, see a paper by the late Professor James B. Thayer read before the Congress on Jurisprudence and Law Reform, and published in the October, 1893, number of the "Harvard Law Review." 7 Harv. L. Rev. 129. Other views of this subject are presented by Mr. Richard C. McMurtrie in 33 Am Law Register, N. S. 506; by Governor Pennoyer in 29 Am. Law Review, 550 and 856, and by Mr. Allen in the same volume at page 847.]

nate to another, when exercising the trust committed to it.[1] The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the constitution as the paramount law, whenever a legislative enactment comes in conflict with it.[2] But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action; and in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction. "In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."[3]

Nevertheless, in declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation. It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident action, or error in judgment, than to intentional disregard of obligation. But the duty to do this in a proper case, though at one time doubted, and by some persons persistently denied, it is now generally agreed that the

[1] Bates *v.* Kimball, 2 Chip. 77; Bailey *v.* Philadelphia, &c. R. R. Co., 4 Harr. 389; Whittington *v.* Polk, 1 H. & J. 236; Hawkins *v.* Governor, 1 Ark. 570; People *v.* Governor, 29 Mich. 320, 18 Am. Rep. 89.

[2] Rice *v.* State, 7 Ind. 332; Bloodgood *v.* Mohawk & Hudson Railroad Co., 18 Wend. 9; [Mulnix *v.* Mutual Ben. L. Ins. Co., 23 Col. 71, 46 Pac. 123, 33 L. R. A. 827.]

[3] Lindsay *v.* Commissioners, &c., 2 Bay, 38, 61; People *v.* Rucker, 5 Col. 5.

courts cannot properly decline, and in its performance they seldom fail of proper support if they proceed with due caution and circumspection, and under a proper sense as well of their own responsibility, as of the respect due to the action and judgment of the law-makers.[1]

[1] There are at least two cases in American judicial history where judges have been impeached as criminals for refusing to enforce unconstitutional enactments. One of these — the case of Trevett *v.* Weedon, decided by the Superior Court of Rhode Island in 1786 — is particularly interesting as being the first well-authenticated case in which a legislative enactment was held to be void because of conflict with the State constitution. Mr. Arnold, in his history of Rhode Island, Vol. II. c. 24, gives an account of this case; and the printed brief in opposition to the law, and in defence of the impeached judges, is in possession of the present writer. The act in question was one which imposed a heavy penalty on any one who should refuse to receive on the same terms as specie the bills of a bank chartered by the State, or who should in any way discourage the circulation of such bills. The penalty was made collectible on summary conviction, without jury trial; and the act was held void on the ground that jury trial was expressly given by the colonial charter, which then constituted the constitution of the State. Although the judges were not removed on impeachment, the legislature refused to re-elect them when their terms expired at the end of the year, and supplanted them by more pliant tools, by whose assistance the paper money was forced into circulation, and public and private debts extinguished by means of it. Concerning the other case, we copy from the Western Law Monthly, "Sketch of Hon. Calvin Pease," Vol. V. p. 3, June, 1863: "The first session of the Supreme Court [of Ohio] under the constitution was held at Warren, Trumbull County, on the first Tuesday of June, 1803. The State was divided into three circuits. . . . The Third Circuit of the State was composed of the counties of Washington, Belmont, Jefferson, Columbiana, and Trumbull. At this session of the legislature, Mr. Pease was appointed President Judge of the Third Circuit in April, 1808, and though nearly twenty-seven years old, he was very youthful in his appearance. He held the office until March 4, 1810, when he sent his resignation to Governor Huntingdon. . . . During his term of service upon the bench many interesting questions were presented for decision, and among them the constitutionality of some portion of the act of 1805, defining the duties of justices of the peace; and he decided that so much of the fifth section as gave justices of the peace jurisdiction exceeding $20, and so much of the twenty-ninth section as prevented plaintiffs from recovering costs in actions commenced by original writs in the Court of Common Pleas, for sums between $20 and $50, were repugnant to the Constitution of the United States and of the State of Ohio, and therefore null and void. . . . The clamor and abuse to which this decision gave rise was not in the least mitigated or diminished by the circumstance that it was concurred in by a majority of the judges of the Supreme Court, Messrs. Huntingdon and Tod. . . . At the session of the legislature of 1807–8, steps were taken to impeach him and the judges of the Supreme Court who concurred with him; but the resolutions introduced into the House were not acted upon during the session. But the scheme was not abandoned. At an early day of the next session, and with almost indecent haste, a committee was appointed to inquire into the conduct of the offending judges, and with leave to exhibit articles of impeachment, or report otherwise, as the facts might justify. The committee without delay reported articles of impeachment against Messrs. Pease and Tod, but not against Huntingdon, who in the mean time had been elected governor of the State. . . . The articles of impeachment were preferred by the House of Representatives on the 23d day of December, 1808. He was summoned at once to appear before the senate as a high court of impeachment, and he promptly obeyed the summons. The

I. In view of the considerations which have been suggested, the rule which is adopted by some courts, that they will not decide a legislative act to be unconstitutional by a majority of a bare quorum of the judges only, — less than a majority of all, — but will instead postpone the argument until the bench is full, seems a very prudent and proper precaution to be observed before entering upon questions so delicate and so important. The benefit of the wisdom and deliberation of every judge ought to be had under circumstances so grave. Something more than private rights are involved; the fundamental law of the State is in question, as well as the correctness of legislative action; and considerations of courtesy, as well as the importance of the question involved, should lead the court to decline to act at all, where they cannot sustain the legislative action, until a full bench has been consulted, and its deliberate opinion is found to be against it. But this is a rule of propriety, not of constitutional obligation; and though generally adopted and observed, each court will regulate, in its own discretion, its practice in this particular.[1]

managers of the prosecution on the part of the House were Thomas Morris, afterwards senator in Congress from Ohio, Joseph Sharp, James Pritchard, Samuel Marrett, and Othniel Looker. . . . Several days were consumed in the investigation, but the trial resulted in the acquittal of the respondent." Sketch of Hon. George Tod, August number of same volume: "At the session of the legislature of 1808–9, he was impeached for concurring in decisions made by Judge Pease, in the counties of Trumbull and Jefferson, that certain provisions of the act of the legislature, passed in 1805, defining the duties of justices of the peace, were in conflict with the Constitution of the United States and of the State of Ohio, and therefore void. These decisions of the courts of Common Pleas and of the Supreme Court, it was insisted, were not only an assault upon the wisdom and dignity, but also upon the supremacy of the legislature, which passed the act in question. This could not be endured; and the popular fury against the judges rose to a very high pitch, and the senator from the county of Trumbull in the legislature at that time, Calvin Cone, Esq., took no pains to soothe the offended dignity of the members of that body, or their sympathizing constituents, but pressed a contrary line of conduct. The judges must be brought to justice, he insisted vehemently, and be punished, so that others might be terrified by the example, and deterred from committing similar offences in the future. The charges against Mr. Tod were substantially the same as those against Mr. Pease. Mr. Tod was first tried, and acquitted. The managers of the impeachment, as well as the result, were the same in both cases."

[1] Briscoe *v.* Commonwealth Bank of Kentucky, 8 Pet. 118. It has been intimated that inferior courts should not presume to pass upon constitutional questions, but ought in all cases to treat statutes as valid. Ortman *v.* Greenman, 4 Mich. 291. But no tribunal can exercise judicial power unless it is to decide according to its judgment; and it is difficult to discover any principle of justice which can require a magistrate to enter upon the execution of a statute when he believes it to be invalid, especially when he must thereby subject himself to prosecution, without any indemnity in the law if it proves to be invalid. Undoubtedly when the highest courts in the land hesitate to declare a law unconstitutional, and allow much weight to the legislative judgment, the inferior courts should be still

II. Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a coordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled."[1] In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable.[2]

more reluctant to exercise this power, and a becoming modesty would at least be expected of those judicial officers who have not been trained to the investigation of legal and constitutional questions. But in any case a judge or justice, being free from doubt in his own mind, and unfettered by any judicial decision properly binding upon him, must follow his own sense of duty upon constitutional as well as upon any other questions. See Miller *v.* State, 3 Ohio St. 475; Pim *v.* Nicholson, 6 Ohio St. 176; Mayberry *v.* Kelly, 1 Kan. 116. In the case last cited it is said: "It is claimed by counsel for the plaintiff in error, that the point raised by the instruction is, that inferior courts and ministerial officers have no right to judge of the constitutionality of a law passed by a legislature. But is this law? If so, a court created to interpret the law must disregard the constitution in forming its opinions. The constitution is law, — the fundamental law, — and must as much be taken into consideration by a justice of the peace as by any other tribunal. When two laws apparently conflict, it is the duty of all courts to construe them. If the conflict is irreconcilable, they must decide which is to prevail; and the constitution is not an exception to this rule of construction. If a law were passed in open, flagrant violation of the constitution, should a justice of the peace regard the law, and pay no attention to the constitutional provision? If that is his duty in a plain case, is it less so when the construction becomes more difficult?"

[1] Hoover *v.* Wood, 9 Ind. 286, 287; Ireland *v.* Turnpike Co., 19 Ohio St. 369; Smith *v.* Speed, 50 Ala. 276; Allor *v.* Auditors, 43 Mich. 76, 4 N. W. 492; Board of Education *v.* Mayor of Brunswick, 72 Ga. 353. See People *v.* Kenney, 96 N. Y. 294.

[2] *Ex parte* Randolph, 2 Brock. 447; Frees *v.* Ford, 6 N. Y. 176, 178; Cumberland, &c. R. R. Co. *v.* County Court, 10 Bush, 564; White *v.* Scott, 4 Barb. 56; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; [Kansas City *v.* Union P. Ry. Co., 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321, aff. *sub nom.* Clark *v.* Kansas City in 176 U. S. 114, 20 Sup. Ct. Rep. 284. The constitutional question may be first raised in the court of review. Monticello D. Co. *v.* Mayor of Baltimore, 90 Md. 416, 45 Atl. 210. For the contrary doctrine, see

III. Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.[1] On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remainder-men against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remainder-men themselves.[2] And a party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the constitution designed for the protection of private property.[3] The statute is assumed to be valid, until some one complains whose rights it invades. "*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose."[4]

IV. Nor can a court declare a statute unconstitutional and

Chimgay *v.* People, 78 Ill. 570; Hopper *v.* Chicago, &c. Ry. Co., 91 Iowa, 639, 60 N. W. 487; Delaney *v.* Brett, 71 N. Y. 78.]

[1] People *v.* Rensselaer, &c. R. R. Co., 15 Wend. 113, 30 Am. Dec. 33; Smith *v.* Inge, 80 Ala. 283; [Clark *v.* Kansas City, 176 U. S. 114, 20 Sup. Ct. Rep. 284; Albany County Supers. *v.* Stanley, 105 U. S. 305; Brown *v.* Ohio Valley R. Co., 79 Fed. Rep. 176; Pittsburg, C. C. & St. L. R. Co. *v.* Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. 301, and other cases cited in brief for plaintiff in error, in Tullis *v.* Lake Erie and Western R. Co., 49 L. ed. U. S. 192. Also Kansas City *v.* Clark, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321.]

[2] Sinclair *v.* Jackson, 8 Cow. 543. See also Smith *v.* McCarthy, 56 Pa. St. 359; Antoni *v.* Wright, 22 Gratt. 857; Marshall *v.* Donovon, 10 Bush, 681.

[3] Embury *v.* Conner, 3 N. Y. 511; Baker *v.* Braman, 6 Hill, 47; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 586; Haskell *v.* New Bedford, 108 Mass. 208.

[4] Wellington, Petitioner, 16 Pick. 87, 96. And see Hingham, &c. Turnpike Co. *v.* Norfolk Co., 6 Allen, 353; De Jarnette *v.* Haynes, 23 Miss. 600; Sinclair *v.* Jackson, 8 Cow. 543, 579; Heyward *v.* Mayor, &c. of New York, 8 Barb. 486; Matter of Albany St., 11 Wend. 149; Williamson *v.* Carlton, 51 Me. 449; State *v.* Rich, 20 Miss. 393; Jones *v.* Black, 48 Ala. 540; Com. *v.* Wright, 79 Ky. 22; Burnside *v.* Lincoln Co. Ct., 86 Ky. 423, 6 S. W. 276.

void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution. (*a*) It is true there are some reported cases, in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the constitution had imposed no restraint. Mr. Justice *Story*, in one case, in examining the extent of power granted by the charter of Rhode Island, which authorized the General Assembly to make laws in the most ample manner, "so as such laws, &c., be not contrary and repugnant unto, but as near as may be agreeable to, the laws of England, considering the nature and constitution of the place and people there," expresses himself thus: "What is the true extent of the power thus granted must be open to explanation as well by usage as by construction of the terms in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the

(*a*) [See State *v.* Harrington, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100; Com. *v.* Moir, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801. The motive which inspires the passage of a statute does not affect its validity, *id.*]

rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." "We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."[1] The question discussed by the learned judge in this case is perceived to have been, What is the scope of a grant of legislative power to be exercised in conformity with the laws of England? Whatever he says is pertinent to that question; and the considerations he suggests are by way of argument to show that the power to do certain unjust and oppressive acts was not covered by the grant of legislative power. It is not intimated that if they were within the grant, they would be impliedly prohibited because unjust and oppressive.

In another case, decided in the Supreme Court of New York, one of the judges, in considering the rights of the city of New York to certain corporate property, used this language: "The inhabitants of the city of New York have a vested right in the

[1] Wilkinson *v.* Leland, 2 Pet. 627, 657. See also what is said by the same judge in Terrett *v.* Taylor, 9 Cranch, 43. "It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against those principles." Ham *v.* McClaws, 1 Bay, 93. But the question in that case was one of construction; whether the court should give to a statute a construction which would make it operate against common right and common reason. In Bowman *v.* Middleton, 1 Bay, 282, the court held an act which divested a man of his freehold and passed it over to another, to be void "as against common right as well as against Magna Charta." In Regents of University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72, it was said that an act was void as opposed to fundamental principles of right and justice inherent in the nature and spirit of the social compact. But the court had already decided that the act was opposed, not only to the constitution of the State, but to that of the United States also. See Mayor, &c. of Baltimore *v.* State, 15 Md. 376. In Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354, a statute forbidding payments in store orders was held void as preventing persons *sui juris* from making their own contracts. A similar rule was laid down in State *v.* Fire Creek, &c. Co., 33 W. Va. 188, 10 S. E. 288, where mining companies were forbidden to sell to employees merchandise at a higher rate than they sold it to others.

City Hall, markets, water-works, ferries, and other public property, which cannot be taken from them any more than their individual dwellings or storehouses. Their rights, in this respect, rest *not merely upon the constitution*, but upon the great principles of eternal justice which lie at the foundation of all free governments."[1] The great principles of eternal justice which affected the particular case had been incorporated in the constitution; and it therefore became unnecessary to consider what would otherwise have been the rule; nor do we understand the court as intimating any opinion upon that subject. It was sufficient for the case, to find that the principles of right and justice had been recognized and protected by the constitution, and that the people had not assumed to confer upon the legislature a power to deprive the city of rights which did not come from the constitution, but from principles antecedent to and recognized by it.

So it is said by *Hosmer*, Ch. J., in a Connecticut case: "With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I cannot agree. Should there exist — what I know is not only an incredible supposition, but a most remote improbability — a case of direct infraction of vested rights, too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made without any cause to deprive a person of his property, or to subject him to imprisonment, who would not question its legality, and who would aid in carrying it into effect? On the other hand, I cannot harmonize with those who deny the power of the legislature to make laws, in any case, which, with entire justice, operate on antecedent legal rights. A retrospective law may be just and reasonable, and the right of the legislature to enact one of this description I am not speculatist enough to question.[2] The cases here supposed of unjust and tyrannical enactments would probably be held not to be within the power of any legislative body in the Union. One of them would be clearly a bill of attainder; the other, unless it was in the nature of remedial legislation, and susceptible of being defended on that theory, would be an exercise of judicial power, and therefore in excess of legislative authority, because not included in the apportionment of power made to that department. No question of implied prohibition would arise in either of these cases; but

[1] Benson *v.* Mayor, &c. of New York, 10 Barb. 223, 244.

[2] Goshen *v.* Stonington, 4 Conn. 209, 225.

if the grant of power had covered them, and there had been no express limitation, there would, as it seems to us, be very great probability of unpleasant and dangerous conflict of authority, if the courts were to deny validity to legislative action on subjects within their control, on the assumption that the legislature had disregarded justice or sound policy. The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference.[1]

The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights.[2] The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and

[1] "If the legislature should pass a law in plain and unequivocal language, within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government." Per *Rogers*, J., in Commonwealth *v.* McCloskey, 2 Rawle, 374. "All the courts can do with odious statutes is to chasten their hardness by construction. Such is the imperfection of the best human institutions, that, mould them as we may, a large discretion must at last be reposed somewhere. The best and in many cases the only security is in the wisdom and integrity of public servants and their identity with the people. Governments cannot be administered without committing powers in trust and confidence." Beebe *v.* State, 6 Ind. 501, 528, per *Stuart*, J. And see Johnston *v.* Commonwealth, 1 Bibb, 603; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; State *v.* Kruttschnitt, 4 Nev. 178; Walker *v.* Cincinnati, 21 Ohio St. 14; Hills *v.* Chicago, 60 Ill. 86; Ballentine *v.* Mayor, &c., 15 Lea, 633; State *v.* Traders' Bank, 41 La. Ann. 329, 6 So. 582.

[2] Bennett *v.* Bull, Baldw. 74; Walker *v.* Cincinnati, 21 Ohio St. 14. "If the act itself is within the scope of their authority, it must stand, and we are bound to make it stand, if it will upon any intendment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the constitution — a clear usurpation of power prohibited — will justify the judicial department in pronouncing an act of the

expediency with the law-making power.[1] Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them.[2]

V. If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative en-

legislative department unconstitutional and void." Pennsylvania R. R. Co. *v.* Riblet, 66 Pa. St. 164, 169. See Weber *v.* Reinhard, 73 Pa. St. 370; Chicago, &c. R. R. Co. *v.* Smith, 62 Ill. 268; People *v.* Albertson, 55 N. Y. 50, per *Allen*, J.; Martin *v.* Dix, 52 Miss. 52, 64, per *Chalmers*, J.; Bennett *v.* Boggs, Baldw. 60, 74; United States *v.* Brown, 1 Deady, 566; Commonwealth *v.* Moore, 25 Gratt. 951; Danville *v.* Pace, 25 Gratt. 1, 8; Reithmiller *v.* People, 44 Mich. 280, 6 N. W. 667; Munn *v.* Illinois, 94 U. S. 113; Eastman *v.* State, 109 Ind. 278, 10 N. E. 97.

[1] *Perkins*, J., in Madison & Indianapolis Railroad Co. *v.* Whiteneck, 8 Ind. 217; Bull *v.* Read, 13 Gratt. 78, per *Lee*, J. [A statute cannot be declared void because against public policy. Julien *v.* Model B. & L. I. Co., — Wis. —, 92 N. W. 561.] So in Canada it is held that an act within the scope of legislative power cannot be objected to as contrary to reason and justice. *Re* Goodhue, 19 Ch'y (Ont.), 366; Toronto, &c. R. Co. *v.* Crookshank, 4 Q. B. (Ont.) 318.

[2] Sill *v.* Village of Corning, 15 N. Y. 297; Varick *v.* Smith, 5 Paige, 136; Cochran *v.* Van Surlay, 20 Wend. 365; Morris *v.* People, 3 Denio, 381; Wynehamer *v.* People, 13 N. Y. 378; People *v.* Supervisors of Orange, 17 N. Y. 235; Dow *v.* Norris, 4 N. H. 16; Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 543; Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210; Holden *v.* James, 11 Mass. 396; Adams *v.* Howe, 14 Mass. 340; 7 Am. Dec. 216; Norwich *v.* County Commissioners, 13 Pick. 60; Dawson *v.* Shaver, 1 Blackf. 206; Beauchamp *v.* State, 6 Blackf. 299; Doe *v.* Douglass, 8 Blackf. 10; Maize *v.* State, 4 Ind. 342; Stocking *v.* State, 7 Ind. 327; Beebe *v.* State, 6 Ind. 501; Newland *v.* Marsh, 19 Ill. 376, 384; Chicago, &c. R. R. Co. *v.* Smith, 62 Ill. 268; Gutman *v.* Virginia Iron Co., 5 W. Va. 22; Osburn *v.* Staley, 5 W. Va. 85; Yancy *v.* Yancy, 5 Heisk. 353; Bliss *v.* Commonwealth, 2 Litt. 90; State *v.* Ashley, 1 Ark. 513; Campbell *v.* Union Bank, 7 Miss. 625; Tate's Ex'r *v.* Bell, 4 Yerg. 202, 26 Am. Dec. 221; Andrews *v.* State, 3 Heisk. 165, 8 Am. Rep. 8; Railroad *v.* Hicks, 9 Bax. 446; Whittington *v.* Polk, 1 Harr. & J. 236; Norris *v.* Abingdon Academy, 7 Gill & J. 7; Harrison *v.* State, 22 Md. 468; State *v.* Lyles, 1 McCord, 238; Myers *v.* English, 9 Cal. 341; *Ex parte* Newman, 9 Cal. 502; Hobart *v.* Supervisors, 17 Cal. 23; Crenshaw *v.* Slate River Co., 6 Rand. 245; Lewis *v.* Webb, 3 Me. 326; Durham *v.* Lewiston, 4 Me. 140; Lunt's Case, 6 Me. 412; Scott *v.* Smart's Ex'rs, 1 Mich. 295; Williams *v.* Detroit, 2 Mich. 560; Tyler *v.* People, 8 Mich. 320; Weimer *v.* Bunbury, 30 Mich. 201; Cotton *v.* Commissioners of Leon County, 6 Fla. 610; State *v.* Robinson, 1 Kan. 17; Santo *v.* State, 2 Iowa, 165; Morrison *v.* Springer, 15 Iowa, 304; Stoddart *v.* Smith, 5 Binn. 355; Moore *v.* Houston, 3 S. & R. 169; Braddee *v.* Brownfield, 2 W. & S. 271; Harvey *v.* Thomas, 10 Watts, 63; Commonwealth *v.* Maxwell, 27 Pa. St. 444; Lewis's Appeal, 67 Pa. St. 153; Butler's Appeal, 73 Pa. St. 448; Carey *v.* Giles, 9 Ga. 253; Macon & Western Railroad Co. *v.* Davis, 13 Ga. 68; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Boston *v.* Cummins, 16 Ga. 102; Van Horne *v.* Dorrance, 2 Dall. 309; Calder *v.* Bull, 3 Dall. 386; Cooper *v.* Telfair, 4 Dall. 14; Fletcher *v.* Peck, 6 Cranch, 87.

croachment by the constitution. The principles of republican government are not a set of inflexible rules, vital and active in the constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity; and it is only in those particulars in which experience has demonstrated any departure from the settled practice to work injustice or confusion, that we shall discover an incorporation of them in the constitution in such form as to make them definite rules of action under all circumstances. It is undoubtedly a maxim of republican government, as we understand it, that taxation and representation should be inseparable; but where the legislature interferes, as in many cases it may do, to compel taxation by a municipal corporation for local purposes, it is evident that this maxim is applied in the case in a much restricted and very imperfect sense only, since the representation of the locality taxed is but slight in the body imposing the tax, and the burden may be imposed, not only against the protest of the local representative, but against the general opposition of the municipality. The property of women is taxable, notwithstanding they are not allowed a voice in choosing representatives.[1] The maxim is not entirely lost sight of in such cases, but its application in the particular case, and the determination how far it can properly and justly be made to yield to considerations of policy and expediency, must rest exclusively with the law-making power, in the absence of any definite constitutional provisions so embodying the maxim as to make it a limitation upon legislative authority.[2] It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations; but this maxim is subject to such exceptions as the legislative power of the State shall see fit to make; and when made, it must be presumed that the public interest,

[1] Wheeler *v.* Wall, 6 Allen, 558; Smith *v.* Macon, 20 Ark. 17.

[2] "There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard, but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature. . . . This court can know nothing of public policy except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy there are concluded here." *Chase*, Ch. J., in License Tax Cases, 5 Wall. 462, 469. "All mere questions of expediency, and all questions respecting the just operation of the law within the limits prescribed by the constitution, were settled by the legislature when it was enacted." *Ladd*, J., in Perry *v.* Keene, 56 N. H. 514, 530. And see remarks of *Ryan*, Ch. J., in Attorney-General *v.* Chicago, &c. R. R. Co., 35 Wis. 425, 580.

convenience, and protection are subserved thereby.[1] The State may interfere to establish new regulations against the will of the local constituency; and if it shall think proper in any case to assume to itself those powers of local police which should be executed by the people immediately concerned, we must suppose it has been done because the local administration has proved imperfect and inefficient, and a regard to the general well-being has demanded the change. In these cases the maxims which have prevailed in the government address themselves to the wisdom of the legislature, and to adhere to them as far as possible is doubtless to keep in the path of wisdom; but they do not constitute restrictions so as to warrant the other departments in treating the exceptions which are made as unconstitutional.[2]

VI. Nor are the courts at liberty to declare an act void, because

[1] People *v.* Draper, 15 N. Y. 532. See *post*, pp. 261–266.

[2] In People *v.* Mahaney, 13 Mich. 481, 500, where the Metropolitan Police Act of Detroit was claimed to be unconstitutional on various grounds, the court say: "Besides the specific objections made to the act as opposed to the provisions of the constitution, the counsel for respondent attacks it on 'general principles,' and especially 'because violating fundamental principles of our system, — that governments exist by the consent of the governed, and that taxation and representation go together. The taxation under the act, it is said, is really in the hands of a police board, a body in the choice of which the people of Detroit have no voice. This argument is one which might be pressed upon the legislative department with great force, if it were true in point of fact. But as the people of Detroit are really represented throughout, the difficulty suggested can hardly be regarded as fundamental. They were represented in the legislature which passed the act, and had the same proportionate voice there with the other municipalities in the State, all of which receive from that body their powers of local government, and such only as its wisdom shall prescribe within the constitutional limit. They were represented in that body when the present police board were appointed by it, and the governor, who is hereafter to fill vacancies, will be chosen by the State at large, including their city. There is nothing in the maxim that taxation and representation go together which requires that the body paying the tax shall alone be consulted in its assessment; and if there were, we should find it violated at every turn in our system. The State legislature not only has a control in this respect over inferior municipalities, which it exercises by general laws, but it sometimes finds it necessary to interpose its power in special cases to prevent unjust or burdensome taxation, as well as to compel the performance of a clear duty. The constitution itself, by one of the clauses referred to, requires the legislature to exercise its control over the taxation of municipal corporations, by restricting it to what that body may regard as proper bounds. And municipal bodies are frequently compelled most unwillingly to levy taxes for the payment of claims, by the judgments or mandates of courts in which their representation is quite as remote as that of the people of Detroit in this police board. It cannot therefore be said that the maxims referred to have been entirely disregarded by the legislature in the passage of this act. But as counsel do not claim that, in so far as they have been departed from, the constitution has been violated, we cannot, with propriety, be asked to declare the act void on any such general objection." And see Wynehamer *v.* People, 13 N. Y. 378, per *Selden*, J.; Benson *v.* Mayor, &c. of Albany, 24 Barb. 248 *et seq.*; Baltimore *v.* State, 15 Md. 376; People *v.* Draper, 15 N. Y. 532; White *v.* Stamford, 37 Conn. 578.

in their opinion it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words. "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the *spirit* of the constitution which is not even mentioned in the instrument."[1] "It is difficult," says Mr. Senator Verplanck, "upon any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many *dicta* and some great authorities holding that acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a legislature in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language if it be susceptible of any other more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too undefined either for its own security or the protection of private rights. It is therefore a most gratifying circumstance to the

[1] People *v.* Fisher, 24 Wend. 215, 220; State *v.* Staten, 6 Cold. 238; Walker *v.* Cincinnati, 21 Ohio St. 14; State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; People *v.* Rucker, 5 Col. 455; Whallon *v.* Ingham Circ. Judge, 51 Mich. 503, 16 N. W. 876; Wooten *v.* State, 24 Fla. 335, 5 So. 39. [But see Middleton *v.* Middleton, 54 N. J. Eq. 692, 35 Atl. 1065, 55 Am. St. 602, 36 L. R. A. 221, holding that an act which restricts a decree for a divorce to a divorce *a mensa et thoro* when the plaintiff has conscientious scruples against divorce *a vinculo* is void. In Com. *v.* Moir, 199 Pa. 534, 49 Atl. 351, 85 Am. St. 801, 53 L. R. A. 837, the text upon the question of validity of statutes dependent upon conformity, or want of it, to the "spirit" of the constitution is quoted and approved. See also Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. 68. For the purpose of determining questions of constitutionality courts will not consider questions of the justice, advisability, or policy of the act. State *ex rel.* Smith *v.* McLellan, 138 Ind. 395, 37 N. E. 799. For a valuable discussion of the power of courts to declare a law unconstitutional because opposed to the "spirit" of the constitution, see Lexington *v.* Thompson, — Ky. —, 68 S. W. 477, 57 L. R. A. 775 (May 28, 1902).]

friends of regulated liberty, that in every change in their constitutional polity which has yet taken place here, whilst political power has been more widely diffused among the people, stronger and better-defined guards have been given to the rights of property." And after quoting certain express limitations, he proceeds: "Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose, and vague interpretation of a constitutional provision beyond its natural and obvious sense."[1]

The accepted theory upon this subject appears to be this: In every sovereign State there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States it resides in the people themselves as an organized body politic. But the people, by creating the Constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the Congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the national Constitution. For the exercise of the legislative power, subject to this limitation, they create, by their State constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American States possess the same power, except, *first*, as it may have been limited by the Constitution of the United States; and, *second*, as it may have been limited by the constitution of the State. A legislative act cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out.[2]

It is to be borne in mind, however, that there is a broad difference between the Constitution of the United States and the constitutions of the States as regards the powers which may be

[1] Cochran *v.* Van Surlay, 20 Wend. 365, 381, 383. See also People *v.* Gallagher, 4 Mich. 244; Benson *v.* Mayor, &c. of Albany, 24 Barb. 248; Grant *v.* Courter, 24 Barb. 232; Wynehamer *v.* People, 13 N. Y. 378, per *Comstock*, J.; 13 N. Y. 453, per *Selden*, J.; 13 N. Y. 477, per *Johnson*, J.

[2] People *v.* New York Central Railroad Co., 34 Barb. 123; Gentry *v.* Griffith, 27 Tex. 461; Danville *v.* Pace, 25 Gratt. 1, 18 Am. Rep. 633; Davis *v.* State, 3 Lea, 377. And see the cases cited, *ante*, p. 237, note 2.

exercised under them. The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited.[1] "The law-making power of the State," it is said in one case, "recognizes no restraints, and is bound by none, except such as are imposed by the constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication. The leading feature of the constitution is the separation and distribution of the powers of the government. It takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judicial authority."[2]

It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed.[3]

[1] Sill *v.* Village of Corning, 15 N. Y. 297; People *v.* Supervisors of Orange, 27 Barb. 575; People *v.* Gallagher, 4 Mich. 244; Sears *v.* Cottrell, 5 Mich. 250; People *v.* New York Central Railroad Co., 24 N. Y. 497, 504; People *v.* Toynbee, 2 Park. Cr. R. 490; State *v.* Gutierrez, 15 La. Ann. 190; Walpole *v.* Elliott, 18 Ind. 258; Smith *v.* Judge, 17 Cal. 547; Commonwealth *v.* Hartman, 17 Pa. St. 118; Kirby *v.* Shaw, 19 Pa. St. 258; Weister *v.* Hade, 52 Pa. St. 474; Danville *v.* Pace, 25 Gratt. 1, 9, 18 Am. Rep. 663.

[2] Sill *v.* Corning, 15 N. Y. 297, 303.

[3] A remarkable case of evasion to avoid the purpose of the constitution, and still keep within its terms, was considered in People *v.* Albertson, 55 N. Y. 50. In Taylor *v* Commissioners of Ross County, 23 Ohio St. 22, the Supreme Court of

Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done. If in one department was vested the whole power of the government, it might be essential for the people, in the instrument delegating this complete authority, to make careful and particular exception of all those cases which it was intended to exclude from its cognizance; for without such exception the government might do whatever the people themselves, when met in their sovereign capacity, would have power to do. But when only the legislative power is delegated to one department, and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional, because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise.[1] And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government.[2] It could not be necessary to forbid the judiciary to render judgment without suffering the party to make defence; because it is implied in judicial authority that there shall be a hearing before condemnation.[3] Taxation cannot be arbitrary, because its very definition includes apportionment, nor can it be for a purpose not public, because that would be a contradiction in terms.[4] The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government.[5]

Ohio found itself under the necessity of declaring that that which was forbidden by the constitution could no more be done indirectly than directly.

[1] *Ante*, pp. 120–157, and cases cited.

[2] *Post*, pp. 592–595, and cases cited.

[3] *Post*, pp. 502–506. On this subject in general, reference is made to those very complete recent works, Bigelow on Estoppel, and Freeman on Judgments.

[4] *Post*, ch. 14. And see Curtis *v.* Whipple, 24 Wis. 350; Tyson *v.* School Directors, 51 Pa. St. 9; Freeland *v.* Hastings, 10 Allen, 570; Opinions of Judges, 58 Me. 590; People *v.* Batchellor, 53 N. Y. 128; Lowell *v.* Boston, 111 Mass. 451. [*Re* Page, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68.]

[5] People *v.* Mayor, &c. of Chicago, 51 Ill. 17; People *v.* Hurlbut, 24 Mich. 44; State *v.* Denny, 118 Ind. 449, 21 N. E. 274. [But this does not invalidate an act arbitrarily imposing upon a county the duty of erecting and maintaining a high school. State *v.* Freeman, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67. Upon

The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat.[1] There is no difficulty in saying that any such act, which under pretence of exercising one power is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves. The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments. The Parliament of Great Britain, indeed, as possessing the sovereignty of the country, has the power to disregard fundamental principles, and pass arbitrary and unjust enactments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends, and by which the courts can test the validity of its declared will. The rules which confine the discretion of Parliament within the ancient

this right to local self-government, see State *ex rel.* Bulkley *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Newport *v.* Horton, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330; Rathbone *v.* Wirth, 150 N. Y. 459, 45 N. E. 15, 24, 34 L. R. A. 408, 419; O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831; Com. *ex rel.* Elkin *v.* Moir, 199 Pa. 531, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801; State *v.* Fox, — Ind. —, 63 N. E. 19, 55 L. R. A. 893 (Feb. 26, 1902); Americus *v.* Perry, 114 Ga. 871, 40 S. E. 1001, 57 L. R. A. 230; State *ex rel.* White *v.* Barker, — Iowa, —, 89 N. W. 204, 57 L. R. A. 244 (Feb. 13, 1902); Lexington *v.* Thompson, — Ky. —, 68 S. W. 477, 57 L. R. A. 775 (May 28, 1902).] See cases *post*, pp. 265, 334.

peal, 16 Pa. St. 256. "It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public uses without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plenitude of power of the legislative department." *Nelson*, J., in People *v.* Morris, 13 Wend. 325, 328. See Bank of Michigan *v.* Williams, 5 Wend. 478. [Property of a private eleemosynary corporation is none the less private because it is charged with the maintenance of a public charity. State *v.* Neff, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409.]

[1] Bowman *v.* Middleton, 1 Bay, 252; Wilkinson *v.* Leland, 2 Pet. 627; Terrett *v.* Taylor, 9 Cranch, 43; Ervine's Ap-

landmarks are rules for the construction of the powers of the American legislatures; and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is found upon examination not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power.

Nor, where fundamental rights are declared by the constitution, is it necessary at the same time to prohibit the legislature, in express terms, from taking them away. The declaration is itself a prohibition, and is inserted in the constitution for the express purpose of operating as a restriction upon legislative power.[1] Many things, indeed, which are contained in the bills of rights to be found in the American constitutions, are not, and from the very nature of the case cannot be, so certain and definite in character as to form rules for judicial decisions; and they are declared rather as guides to the legislative judgment than as marking an absolute limitation of power. The nature of the declaration will generally enable us to determine without difficulty whether it is the one thing or the other. If it is declared that all men are free, and no man can be slave to another, a definite and certain rule of action is laid down, which the courts can administer; but if it be said that "the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue," we should not be likely to commit the mistake of supposing that this declaration would authorize the courts to substitute their own view of justice for that which may have impelled the legislature to pass a particular law, or to inquire into the moderation, temperance, frugality, and virtue of its members, with a view to set aside their action, if it should appear to have been influenced by the opposite qualities. (*a*) It is plain that what in the one case is a rule, in the other is an admonition addressed to the judgment and the conscience of all persons in authority, as well as of the people themselves.

So the forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions

[1] Beebe *v.* State, 6 Ind. 501. This principle is very often acted upon when not expressly declared.

(*a*) [So a statute cannot authorize a board of health to annul a physician's license "for grossly unprofessional conduct of a character likely to deceive or defraud the public" without in some way defining what is "grossly unprofessional conduct." Mathews *v.* Murphy, 24 Ky. L. Rep. 760, 63 S. W. 785, 54 L. R. A. 415.]

which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual.[1]

Statutes Unconstitutional in Part.

It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the State.[2] A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional.[3] Where, therefore, a part of a statute

[1] See *ante*, pp. 186 *et seq.*

[2] Commonwealth *v.* Clapp, 5 Gray, 97. "A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the federal or State Constitution." *Woodworth*, J., in Commonwealth *v.* Maxwell, 27 Pa. St. 444, 456.

[3] Commonwealth *v.* Clapp, 5 Gray, 97. See to the same effect, Fisher *v.* McGirr, 1 Gray, 1; Warren *v.* Mayor, &c. of Charlestown, 2 Gray, 84; Wellington, Petitioner, 16 Pick. 87; Commonwealth *v.* Hitchings, 5 Gray, 482; Commonwealth *v.* Pomeroy, 5 Gray, 486; State *v.* Copeland, 3 R. I. 33; State *v.* Snow, 3 R. I. 64; Armstrong *v.* Jackson, 1 Blackf. 374; Clark *v.* Ellis, 2 Blackf. 8: McCulloch *v.* State, 11 Ind. 424; People *v.* Hill, 7 Cal. 97; Lathrop *v.* Mills, 19 Cal. 513: Rood *v.* McCargar, 49 Cal. 117; Supervisors of Knox Co. *v.* Davis, 63 Ill. 405; Myers *v.* People, 67 Ill. 503; Thomson *v.* Grand Gulf Railroad Co., 3 How. (Miss.) 240; Campbell *v.* Union Bank, 7 Miss. 625; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; South & N. Ala. R. R. Co. *v.* Morris, 65 Ala. 193; Santo *v.* State, 2 Iowa, 165; State *v.* Cox, 3 Eng. 436;

is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other.[1] The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance.[2] If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the

Mayor, &c. of Savannah *v.* State, 4 Ga. 26; Exchange Bank *v.* Hines, 3 Ohio St. 1; Robinson *v.* Bank of Darien, 18 Ga. 65; State *v.* Wheeler, 25 Conn 290; People *v.* Lawrence, 36 Barb. 177; Williams *v.* Payson, 14 La. Ann. 7; Ely *v.* Thompson, 3 A. K. Marsh. 70; Davis *v.* State, 7 Md. 151; State *v.* Commissioners of Baltimore, 29 Md. 521; Hagerstown *v.* Dechert, 32 Md. 369; Berry *v.* Baltimore, &c. R. R. Co., 41 Md. 446, 20 Am. Rep. 69; State *v.* Clarke, 54 Mo. 17; Lowndes Co. *v.* Hunter, 49 Ala. 507; Isom *v.* Mississippi, &c. R. R. Co., 36 Miss. 300; Bank of Hamilton *v.* Dudley's Lessee, 2 Pet. 492; Turner *v.* Com'rs, 27 Kan. 314; *In re* Groffs, 21 Neb. 647, 33 N. W. 426; State *v.* Tuttle, 53 Wis. 45, 9 N. W. 791; People *v.* Hall, 8 Col. 485, 9 Pac. 34. "To the extent of the collision and repugnancy, the law of the State must yield; and to that extent, and no further, it is rendered by such repugnancy inoperative and void." Commonwealth *v.* Kimball, 24 Pick. 359, 361, per *Shaw*, Ch. J.; Norris *v.* Boston, 4 Met. 282; Eckhart *v.* State, 5 W. Va. 515. Where the portions are separable, action under the statute will be presumed to have been taken without reference to the invalid provisions, and will be upheld so far as it is within the valid portions. Donnersberger *v.* Prendergast, 128 Ill. 229, 21 N. E. 1.

[1] Commonwealth *v.* Hitchings, 5 Gray, 482. See People *v.* Briggs, 50 N. Y. 553. [See also Field *v.* Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495; Presser *v.* Illinois, 116 U. S. 263, 6 Sup. Ct. Rep. 580; Penniman's Case, 103 U. S. 716; Keokuk N. L. Packet Co. *v.* Keokuk, 95 U. S. 80; Com. *v.* Clark, 195 Pa. 634, 46 Atl. 286, 57 L. R. A. 348, and other cases cited in brief for plaintiff in error in Tullis *v.* Lake Erie and Western R. Co., 44 L. ed. U. S. 192; Wheeler *v.* N. Y., N. H. & H. R. Co., 178 U. S. 321, 20 Sup. Ct. Rep. 649, aff. 70 Conn. 326, 39 Atl. 443.] Although a proviso is ineffectual because unconstitutional, it cannot be disregarded when the intention of the legislature is in question. Commonwealth *v.* Potts, 79 Pa. St. 164.

[2] Commonwealth *v.* Hitchings, 5 Gray, 482; Willard *v.* People, 5 Ill. 461; Eells *v.* People, 5 Ill. 498; Robinson *v.* Bidwell, 22 Cal. 379; State *v.* Easterbrook, 3 Nev 173; Hagerstown *v.* Dechert, 32 Md. 369; People *v.* Kenney, 96 N. Y. 294.

other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion.[1] And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.[2]

[1] Santo *v.* State, 2 Iowa, 165. But perhaps the doctrine of sustaining one part of a statute when the other is void was carried to an extreme in this case. A prohibitory liquor law had been passed which was not objectionable on constitutional grounds, except that the last section provided that "the question of prohibiting the sale and manufacture of intoxicating liquor" should be submitted to the electors of the State, and if it should appear "that a majority of the votes cast as aforesaid, upon said question of prohibition, shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, 1855." The court held this to be an attempt by the legislature to shift the exercise of legislative power from themselves to the people, and therefore void; but they also held that the remainder of the act was complete without this section, and must therefore be sustained on the rule above given. The reasoning of the court by which they are brought to this conclusion is ingenious; but one cannot avoid feeling, especially after reading the dissenting opinion of Chief Justice *Wright*, that by the decision the court gave effect to an act which the legislature did not design should take effect unless the result of the unconstitutional submission to the people was in its favor. See also Weir *v.* Cram, 37 Iowa, 649. For a similar ruling, see Maize *v.* State, 4 Ind. 342; overruled in Meshmeier *v.* State, 11 Ind. 482. And see State *v.* Dombaugh, 20 Ohio St. 167, where it was held competent to construe a part of an act held to be valid by another part adjudged unconstitutional, though the court considered it "quite probable" that if the legislature had supposed they were without power to adopt the void part of the act, they would have made an essentially different provision by the other. See also People *v.* Bull, 46 N. Y. 57, where part of an act was sustained which probably would not have been adopted by the legislature separately. It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void. [Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. 238; Redell *v.* Moores, 62 Neb. —, 88 N. W. 243, 55 L. R. A. 740.]

[2] Warren *v.* Mayor, &c. of Charlestown, 2 Gray, 84; State *v.* Commissioners of Perry County, 5 Ohio St. 497; State *v.* Pugh, 43 Ohio St. 98; Slauson *v.* Racine, 13 Wis. 398; Allen County Commissioners *v.* Silvers, 22 Ind. 491; State *v.* Denny, 118 Ind. 449, 21 N. E. 274;

It has accordingly been held, where a statute submitted to the voters of a county the question of the removal of their county seat, and one section imposed the forfeiture of certain vested rights in case the vote was against the removal, that this portion of the act being void, the whole must fall, inasmuch as the whole was submitted to the electors collectively, and the threatened forfeiture would naturally affect the result of the vote.[1]

And, where a statute annexed to the city of Racine certain lands previously in the township of Racine, but contained an express provision that the lands so annexed should be taxed at a different and less rate than other lands in the city; the latter provision being held unconstitutional, it was also held that the whole statute must fail, inasmuch as such provision was clearly intended as a compensation for the annexation.[2]

And where a statute, in order to obtain a jury of six persons, provided for the summoning of twelve jurors, from whom six were to be chosen and sworn, and under the constitution the jury must consist of twelve, it was held that the provision for reducing the number to six could not be rejected and the statute sustained, inasmuch as this would be giving to it a construction and effect different from that the legislature designed; and would deprive the parties of the means of obtaining impartial jurors which the statute had intended to give.[3]

On the other hand, — to illustrate how intimately the valid and invalid portions of a statute may be associated, — a section of the criminal code of Illinois provided that "if any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or servant, owing service or labor to any other persons, whether they reside in this State or in any other State, or Territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every person so offending shall be deemed guilty of a misdemeanor," &c., and it was held that, although the latter portion of the section was void within

Eckhart *v.* State, 5 W. Va. 515; Allen *v.* Louisiana, 103 U. S. 80; Tillman *v.* Cooke, 9 Bax. 429; Jones *v.* Jones, 104 N. Y. 234, 10 N. E. 269; Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513. Where a statute made the same provision for taxing telegraph messages sent to points within and to points without the State, and was void as to the latter, it was held wholly void. Western Union Tel. Co. *v.* State, 62 Tex. 630.

[1] State *v.* Commissioners of Perry County, 5 Ohio St. 497. And see Jones *v.* Robbins, 8 Gray, 329; Monroe *v.* Collins, 17 Ohio St. 666, 684; Taylor *v.* Commissioners of Ross County, 23 Ohio St. 22, 84.

[2] Slauson *v.* Racine, 13 Wis. 398, followed in State *v.* Dousman, 28 Wis. 541.

[3] Campau *v.* Detroit, 14 Mich. 266. See Commonwealth *v.* Potts, 79 Pa. St. 164.

the decision in Prigg *v.* Pennsylvania,[1] yet that the first portion, being a police regulation for the preservation of order in the State, and important to its well-being, and capable of being enforced without reference to the rest, was not affected by the invalidity of the rest.[2]

A legislative act may be entirely valid as to some classes of cases, and clearly void as to others.[3] A general law for the punishment of offences, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which therefore would have no legal force except such as the law itself would allow.[4] In any such case the unconstitutional law must operate as far as it can,[5] and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the constitution forbids. If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as others.

Waiving a Constitutional Objection.

There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it.[6] Where a constitutional provision is designed for the protec-

[1] 16 Pet. 539.

[2] Willard *v.* People, 5 Ill. 461; Eells *v.* People, 5 Ill. 498. See Hagerstown *v.* Dechert, 32 Md. 369.

[3] Moore *v.* New Orleans, 32 La. Ann. 726. A law forbidding the sale of liquors may be void as to imported liquors and valid as to all others. Tiernan *v.* Rinker, 102 U. S. 123; State *v.* Amery, 12 R. I. 64.

[4] Mundy *v.* Monroe, 1 Mich. 68; Cargill *v.* Power, 1 Mich. 369. In People *v.* Rochester, 50 N. Y. 525, certain commissioners were appointed to take for a city hall either lands belonging to the city or lands of individuals. The act made no provision for compensation. The commissioners elected to take lands belonging to the city. Held, that the act was not wholly void for the omission to provide compensation in case the lands of individuals had been selected.

[5] Baker *v.* Braman, 6 Hill, 47; Regents of University *v.* Williams, 9 Gill & J. 365, 31 Am. Dec. 72; *Re* Middletown, 82 N. Y. 196. The case of Sadler *v.* Langham, 34 Ala. 311, appears to be opposed to this principle, but it also appears to us to be based upon cases which are not applicable.

[6] One waives right to object to law

tion solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will. On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege, if he received the compensation awarded, or brought an action to recover it.[1] So if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the ground of unconstitutionality is removed.[2] And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and damages assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common-law trial by jury.[3] In these and the like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition.[4] Under the terms of the statutes which exempt property from forced sale on execution, to a specified amount or value, it is sometimes necessary that the debtor, or some one in his behalf, shall appear and make selection or otherwise participate in the setting off of that to which he

under which a grand jury is made up, by pleading in bar to the indictment. United States *v.* Gale, 109 U. S. 65, 3 Sup. Ct. Rep. 1. An officer who has acted and received money under an act cannot contest its constitutionality. People *v.* Bunker, 70 Cal. 212, 11 Pac. 703.

[1] Baker *v.* Braman, 6 Hill, 47. So, if one has started the machinery to set going a local improvement act. Dewhurst *v.* Allegheny, 95 Pa. St. 437. [One who invokes the provisions of a statute cannot attack its constitutionality. Moore *v.* Napier, — S. C. —, 42 S. E. 997.]

[2] Embury *v.* Conner, 3 N. Y. 511. And see Heyward *v.* Mayor, &c. of New York, 8 Barb. 486; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; Detmold *v.* Drake, 46 N. Y. 318. For a waiver in tax cases resting on a similar principle, see Motz *v.* Detroit, 18 Mich. 495; Ricketts *v.* Spraker, 77 Ind. 371.

[3] People *v.* Murray, 5 Hill, 468. See Lee *v.* Tillotson, 24 Wend. 337.

[4] Embury *v.* Conner, 3 N. Y. 511. And see Matter of Albany St., 11 Wend. 149; Chamberlain *v.* Lyell, 3 Mich. 448; Beecher *v.* Baldy, 7 Mich. 488; Mobile & Ohio Railroad Co. *v.* State, 29 Ala. 573; Detmold *v.* Drake, 46 N. Y. 318; Haskell *v.* New Bedford, 108 Mass. 208; Wanser *v.* Atkinson, 43 N. J. 571.

is entitled; and where this is the case, the exemption cannot be forced upon him if he declines or neglects to claim it.[1] In Pennsylvania and Alabama it has been decided that a party may, by executory agreement entered into at the time of contracting a debt, and as a part of the contract, waive his rights under the exemption laws and preclude himself from claiming them as against judgments obtained for such debt;[2] but in other States it is held, on what seems to be the better reason, that, as the exemption is granted on grounds of general policy, an executory agreement to waive it must be deemed contrary to the policy of the law, and for that reason void.[3] In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offences are not within the provinces of individual consent or agreement.[4]

Judicial Doubts on Constitutional Questions.

It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond

[1] See Barton *v.* Brown, 68 Cal. 11, 8 261. And see Hoisington *v.* Huff, 24 Kan. Pac. 517; Butler *v.* Shiver, 79 Ga. 172, 4 S. E. 115. In some States the officer must make the selection when the debtor fails to do so, and in some the debtor, if a married man, is precluded from waiving the privilege except with the consent of his wife, given in writing. See Denny *v.* White, 2 Cold. 283; Ross *v.* Lister, 14 Tex. 469; Vanderhurst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328; Gilman *v.* Williams, 7 Wis. 329. She need not assent as to exemption of stock in trade. Charpentier *v.* Bresnahan, 62 Mich. 360, 28 N. W. 916.

[2] Case *v.* Dunmore, 23 Pa. St. 93; Bowman *v.* Smiley, 31 Pa. St. 225; Shelly's Appeal, 36 Pa. St. 373; O'Nail *v.* Craig, 56 Pa. St. 161; Thomas's Appeal, 69 Pa. St. 120; Bibb *v.* Janney, 45 Ala. 329; Brown *v.* Leitch, 60 Ala. 313, 31 Am. Rep. 42; Neely *v.* Henry, 63 Ala. 379.

[3] Maxwell *v.* Reed, 7 Wis. 582; Kneetle *v.* Newcomb, 22 N. Y. 249; Recht *v.* Kelly, 82 Ill. 147, 25 Am. Rep. 301; Moxley *v.* Ragan, 10 Bush, 156, 19 Am. Rep. 61; Denny *v.* White, 2 Cold. 283; Branch *v.* Tomlinson, 77 N. C. 388; Carter's Adm'r *v.* Carter, 20 Fla. 558; Cleghorn *v.* Greeson, 77 Ga. 343. A woman cannot by ante-nuptial agreement release the special allowance made to her as widow by statute; it being against public policy. Phelps *v.* Phelps, 72 Ill. 545.

[4] See *post*, p. 458. And as to the waiver of the right to jury trial in civil cases, *post*, pp. 590, 591. [An unconstitutional law cannot be held valid as to particular parties on the ground of estoppel, and executed as a law. O'Brien *v.* Wheelock, 184 U. S. 450, 22 Sup. Ct. Rep. 354.]

reasonable doubt.[1] A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.[2]

"The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."[3] Mr. Justice *Washington* gives a reason for this rule, which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law, was involved in difficulty and doubt, he says: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be

[1] Wellington, Petitioner, 16 Pick. 87, per *Shaw*, Ch. J. Alexander *v.* People, 7 Col. 155, 2 Pac. 894; Crowley *v.* State, 11 Oreg. 512, 6 Pac. 70. A law will be upheld unless its unconstitutionality is so clear "as to leave no doubt on the subject." Kelly *v.* Meeks, 87 Mo. 396; Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 698. If an act may be valid or not according to the circumstances, a court would be bound to presume that such circumstances existed as would render it valid. Talbot *v.* Hudson, 16 Gray, 417.

[2] Cooper *v.* Telfair, 4 Dall. 14; Dow *v.* Norris, 4 N. H. 16; Flint River Steamboat Co. *v.* Foster, 5 Ga. 194; Carey *v.* Giles, 9 Ga. 253; Macon & Western Railroad Co. *v.* Davis, 13 Ga. 68; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Kendall *v.* Kingston, 5 Mass. 524; Foster *v.* Essex Bank, 16 Mass. 245; Norwich *v.* County Commissioners of Hampshire, 13 Pick. 60; Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210; Rich *v.* Flanders, 39 N. H. 304; Eason *v.* State, 11 Ark. 481; Hedley *v.* Commissioners of Franklin Co., 4 Blackf. 116; Stocking *v.* State, 7 Ind. 326; La Fayette *v.* Jenners, 10 Ind. 74; *Ex parte* McCollum, 1 Cow. 550; Coutant *v.* People, 11 Wend. 511; Clark *v.* People, 26 Wend. 559; Morris *v.* People, 3 Denio, 376; N. Y., &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473; Baltimore *v.* State, 15 Md. 373; Cotton *v.* Commissioners of Leon Co., 6 Fla. 610; Cheney *v.* Jones, 14 Fla. 587; Lane *v.* Dorman, 4 Ill. 238, 36 Am. Dec. 543; Newland *v.* Marsh, 19 Ill. 376; Farmers' and Mechanics' Bank *v.* Smith, 3 S. & R. 63; Weister *v.* Hade, 52 Pa. St. 474; Sears *v.* Cottrell, 5 Mich. 251; Tyler *v.* People, 8 Mich. 320; Allen County Commissioners *v.* Silvers, 22 Ind. 491; State *v.* Robinson, 1 Kan. 17; Eyre *v.* Jacob, 14 Gratt. 422; Gormley *v.* Taylor, 44 Ga. 76; State *v.* Cape Girardeau, &c. R. R. Co., 48 Mo. 468; Oleson *v.* Railroad Co., 36 Wis. 383; Newsom *v.* Cocke, 44 Miss. 352; Slack *v.* Jacob, 8 W. Va. 612; Commonwealth *v.* Moore, 25 Gratt. 951. [All doubts are to be resolved in favor of the validity of statutes. State *v.* Standard Oil Co., 61 Neb. 28, 84 N. W. 413, 87 Am. St. 449; Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; Farm Investment Co. *v.* Carpenter, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. 918.]

[3] Fletcher *v.* Peck, 6 Cranch, 87, 128, per *Marshall*, Ch. J.

a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt." [1]

The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment. For although it is plain, upon the authorities, that the courts should sustain legislative action when not clearly satisfied of its invalidity, it is equally plain in reason that the legislature should abstain from adopting such action if not fully assured of their authority to do so. Respect for the instrument under which they exercise their power should impel the legislature in every case to solve their doubts in its favor, and it is only because we are to presume they do so, that courts are warranted in giving weight in any case to their decision. If it were understood that legislators refrained from exercising their judgment, or that, in cases of doubt, they allowed themselves to lean in favor of the action they desired to accomplish, the foundation for the cases we have cited would be altogether taken away.[2]

As to what the doubt shall be upon which the court is to act, we conceive that it can make no difference whether it springs from an endeavor to arrive at the true interpretation of the constitution, or from a consideration of the law after the meaning of the constitution has been judicially determined. It has sometimes been supposed that it was the duty of the court, first, to interpret the constitution, placing upon it a construction that must remain

[1] Ogden *v.* Saunders, 12 Wheat. 213. See Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216; Kellogg *v.* State Treasurer, 44 Vt. 356, 359; Slack *v.* Jacob, 8 W. Va. 612.

[2] See upon this subject what is said in Osburn *v.* Staley, 5 W. Va. 85; Tate *v.* Bell, 4 Yerg. 202, 26 Am. Dec. 221.

unvarying, and then test the law in question by it; and that any other rule would lead to differing judicial decisions, if the legislature should put one interpretation upon the constitution at one time and a different one at another. But the decided cases do not sanction this rule,[1] and the difficulty suggested is rather imaginary than real, since it is but reasonable to expect that, where a construction has once been placed upon a constitutional provision, it will be followed afterwards, even though its original adoption may have sprung from deference to legislative action rather than from settled convictions in the judicial mind.[2]

The duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For as a conflict between the statute and the constitution is not to be implied, it would seem to follow, where the meaning of the constitution is clear, *that the court, if possible, must give the statute such a construction as will enable it to have effect.* This is only saying, in another form of words, that the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity. (*a*)

The rule upon this subject is thus stated by the Supreme Court of Illinois: "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature, in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to, and operating upon, future acts and transaction only, they are rules of property under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation; but as retroactive laws, they reach to and destroy *existing* rights, through force of the legislative will, without a hearing or judgment of law. So will acts of the legislature,

[1] Sun Mutual Insurance Co. *v.* New York, 5 Sandf. 10; Clark *v.* People, 26 Wend. 599; Baltimore *v.* State, 15 Md. 376.

[2] People *v.* Blodgett, 13 Mich 127.

(*a*) [The court will not go beyond the face of the law to seek for grounds, for holding it unconstitutional. Stevenson *v.* Colgan, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. 230, and note on extrinsic evidence to show unconstitutionality in 25 Am. St. 233.]

having elements of limitation, and capable of being so applied and administered, although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy; for as such they are valid, but as weapons destructive of vested rights they are void; and such force only will be given the acts as the legislature could impart to them."[1]

The Supreme Court of New Hampshire, a similar question being involved, recognizing their obligation "so to construe every act of the legislature as to make it consistent, if it be possible, with the provisions of the constitution," proceed to the examination of a statute by the same rule, "without stopping to inquire what construction might be warranted by the natural import of the language used."[2]

And it is said by *Harris*, J., delivering the opinion of the majority of the Court of Appeals of New York: "A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption."[3] And this after all is only the application of the familiar rule, that in the exposition of a statute it is the duty of the court to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound so to construe the statute, if practicable, as to give it force and validity, rather than to avoid it, or render it nugatory.[4]

The rule is not different when the question is whether any portion of a statute is void, than when the whole is assailed. The excess of power, if there is any, is the same in either case, and is not to be applied in any instance.

And on this ground it has been held that where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding

[1] Newland *v.* Marsh, 19 Ill. 376, 384. See also Bigelow *v.* West Wisconsin R. R. Co., 27 Wis. 478; Attorney-General *v.* Eau Claire, 37 Wis. 400; Coleman *v.* Yesler, 1 Wash. Ter. 591; Singer Mfg. Co *v.* McCollock, 24 Fed. Rep. 667.

[2] Dow *v.* Norris, 4 N. H. 16, 18. See Dubuque *v.* Illinois Cent. R. R. Co., 39 Iowa, 56.

[3] People *v.* Supervisors of Orange, 17 N. Y. 235, 241. See also Boisdere *v.* Citizens' Bank, 9 La. 506, 29 Am. Dec. 453. It is the duty of the court to adopt a construction of a statute which, without doing violence to the fair meaning of words brings it into harmony with the constitution. Grenada Co. Supervisors *v.* Brogden, 112 U. S. 261, 5 Sup. Ct. Rep. 125.

[4] Clarke *v.* Rochester, 24 Barb. 446. See Marshall *v.* Grimes, 41 Miss. 27; Morrell *v.* Fickle, 3 Lea, 79.

the invalidity of the rest.[1] But other cases hold that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect; and that if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed.[2] Great caution is necessary in some cases, or the rule which was designed to ascertain and effectuate the legislative intent will be pressed to the extreme of giving effect to part of a statute exclusively, when the legislative intent was that the part should not stand except as a component part of the whole. (*a*)

Inquiry into Legislative Motives.

From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised.[3] If evidence was required, it must be supposed that it was before the legislature when the act was passed;[4] and if any special find-

[1] Meshmeier *v.* State, 11 Ind. 482; Ely *v.* Thompson, 3 A. K. Marsh. 70. [Equit. G. & Trust Co. *v.* Donahoe, — Del. —, 49 Atl. 372 (May 16, 1901).]

[2] Shepardson *v.* Milwaukee & Beloit Railroad Co., 6 Wis. 605; State *v.* Judge of County Court, 11 Wis. 50; Tims *v.* State, 26 Ala. 165; Sullivan *v.* Adams, 3 Gray, 476; Devoy *v.* Mayor, &c. of New York, 35 Barb. 264; Campau *v.* Detroit, 14 Mich. 276; Childs *v.* Shower, 18 Iowa, 261; Harbeck *v.* New York, 10 Bosw. 366; People *v.* Fleming, 7 Col. 230, 3 Pac. 70; Portland *v.* Schmidt, 13 Oreg. 17, 6 Pac. 221.

[3] People *v.* Lawrence, 36 Barb. 177; People *v.* New York Central Railroad Co., 34 Barb. 123; Baltimore *v.* State, 15 Md. 376; Goddin *v.* Crump, 8 Leigh, 154.

[4] De Camp *v.* Eveland, 19 Barb. 81; Lusher *v.* Scites, 4 W. Va. 11.

(*a*) [The declaration of *Brewer*, J., in Chicago, &c. Ry. Co. *v.* Wellman, 143 U. S. 346, 345. 12 Sup. Ct. Rep. 400, aff. 83 Mich. 592, 47 N. W. 592, illustrates the hesitation of the courts to determine constitutional questions except the duty is clear. It was raised in this case on an agreed statement of facts. Said Justice *Brewer:* Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act is constitutional or not. But such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort and as a necessity in the determination of real, earnest, and vital controversies between individuals. It never was the thought that by means of a friendly suit a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.]

ing was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding.[1] And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.[2] The reasons are the

[1] Johnson *v.* Joliet & Chicago Railroad Co., 23 Ill. 202. The Constitution of Illinois provided that "corporations not possessing banking powers or privileges may be formed under general laws, but shall not be created by special acts, except for municipal purposes, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws." A special charter being passed without any legislative declaration that its object could not be attained under a general law, the Supreme Court sustained it, but placed their decision mainly on the ground that the clause had been wholly disregarded, "and it would now produce far-spread ruin to declare such acts unconstitutional and void." It is very clearly intimated in the opinion, that the legislative practice, and this decision sustaining it, did violence to the intent of the constitution. A provision in the Constitution of Indiana that "no act shall take effect until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency," adds the words, "which emergency shall be declared in the preamble, or in the body of the law;" thus clearly making the legislative declaration necessary. Carpenter *v.* Montgomery, 7 Blackf. 415; Mark *v.* State, 15 Ind. 98; Hendrickson *v.* Hendrickson, 7 Ind. 13.

[2] Sunbury & Erie Railroad Co. *v.* Cooper, 33 Pa. St. 278; *Ex parte* Newman, 9 Cal. 502; Baltimore *v.* State, 15 Md. 376; Johnson *v.* Higgins, 3 Met. (Ky.) 566. "The courts cannot impute to the legislature any other than public motives for their acts." People *v.* Draper, 15 N. Y. 532, 545, per *Denio*, Ch. J. "We are not made judges of the motives of the legislature, and the court will not usurp the inquisitorial office of inquiring into the *bona fides* of that body in discharging its duties." *Shankland*, J., in the same case, p. 555. "The powers of the three departments are not merely equal; they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislature were governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill or withhold his approval, and in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the legislature, and a usurpation of power subversive of the constitution." Wright *v.* Defrees, 8 Ind. 298, 302, per *Gookins*, J. "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the constitution." Per *Chase*, Ch. J., in *Ex parte* McCardle, 7 Wall. 500, 514. The same doctrine is restated by Mr. Justice *Hunt*, in Doyle *v.* Continental Ins. Co., 94 U. S. 535. Courts cannot inquire into legislative motives "except as they may be disclosed on the face of the acts or be inferable from their operation considered with reference to the condition of the country and existing legislation." Soon Hing *v.* Crowley, 113 U. S. 703, 5 Sup. St. Rep. 730. [See also Com. *ex rel.* Elkin *v.* Moir, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801.] The rule applies to the legislation of municipalities. Brown *v.* Cape Girardeau, 90 Mo. 377, 2 S. W. 302. And see McCulloch *v.* State, 11 Ind. 421; Bradshaw *v.* Omaha, 1 Neb. 16; Lyon *v.* Morris, 15 Ga. 480; People *v.* Flagg, 46 N. Y. 401; Slack *v.* Jacob, 8 W. Va. 612, 635; State *v.* Cardozo, 5 S. C. 297; Humboldt County *v.* Churchill

same here as those which preclude an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people.[1]

Consequences if a Statute is Void.

When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it. and no one can be punished for having refused obedience to it before the decision was made.[2] And what is true of an act void *in toto* is true

County Com'rs, 6 Nev. 30; Flint, &c. Plank Road Co. *v.* Woodhull, 25 Mich. 99; State *v.* Fagan, 22 La. Ann. 545; State *v.* Hays, 49 Mo. 604; Luehrman *v.* Taxing District, 2 Lea, 425; Kourtze *v.* Omaha, 5 Dill. 443. In Jones *v.* Jones, 12 Pa. St. 350, the general principle was recognized, and it was decided not to be competent to declare a legislative divorce void for fraud. It was nevertheless held competent to annul it, on the ground that it had been granted (as shown by parol evidence) for a cause which gave the legislature no jurisdiction. The legislature was regarded as being for the purpose a court of limited jurisdiction. In Attorney-General *v.* Supervisors of Lake Co., 33 Mich. 289, it is decided that when supervisors and people, having full authority over the subject, have acted upon the question of removal of a county seat, no question of motive can be gone into to invalidate their action. [That a resolution accepting an imperfect sewer was secured by fraud and corrupt influences is a valid defence to an action brought upon the resolution. Weston *v.* Syracuse, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. 472.]

[1] Attorney-General *v.* Brown, 1 Wis. 513; Wright *v.* Defrees, 8 Ind. 298.

[2] Strong *v.* Daniel, 5 Ind. 348; Sumner *v.* Beeler, 50 Ind. 341; Astrom *v.* Hammond, 3 McLean, 107; Woolsey *v.* Commercial Bank, 6 McLean, 142; Detroit *v.* Martin, 34 Mich. 170; Kelly *v.* Bemis, 4 Gray, 83; Hover *v.* Barkhoof, 44 N. Y. 113; Clark *v.* Miller, 54 N. Y. 528; Meagher *v.* Storey Co., 5 Nev. 244; *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. 298. In People *v.* Salomon, 54 Ill. 46, a ministerial officer was severely censured for presuming to disregard a law as unconstitutional. The court found the law to be valid, but they could not have found otherwise without justifying the officer. In Texas it has been held that an unconstitutional act has the force of law for the protection of officers acting under it. Sessums *v.* Botts, 34 Tex. 335. In Iowa, a magistrate who had issued a warrant, and the officer who had served it, for the destruction of liquors, under a city ordinance which the city had no power to adopt, were held to be protected, notwithstanding this want of power in the city. Henke *v.* McCord, 55 Iowa, 378, 7 N. W. 623. The warrant seems to have been considered "fair on its face;" but can process ever be fair on its face when it commands that which is illegal? If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is to be considered as having been in force for the whole period. Pierce *v.* Pierce, 46 Ind. 86. [A statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the constitution removing the constitutional objection, but must be re-enacted. Seneca Mining Co. *v.* Secretary of State, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770; Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309; but see *In re* Rahrer, 43 Fed. 556, 10 L. R. A. 444; and this case in the Supreme Court, Wilkerson *v.* Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep. 865; *In re* Spickler, 43 Fed. 653, 10 L. R. A. 446; *In re* Van Vliet, 43 Fed. 761, 10 L. R. A. 451. In State *v.* Godwin, 123 N. C.

also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.

697, 31 S. E. 221, 44 Am. St. 42, it is held that a person acting in reliance upon a statute before it has been judicially determined to be unconstitutional cannot be held to answer criminally for such conduct if the conduct would not have been criminal if the statute was valid.]

CHAPTER VIII.

THE SEVERAL GRADES OF MUNICIPAL GOVERNMENT.

In the examination of American constitutional law, we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate.

In contradistinction to those governments where power is concentrated in one man, or one or more bodies of men, whose supervision and active control extends to all the objects of government within the territorial limits of the State, the American system is one of complete *decentralization*, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority. It was under the control of this idea that a national constitution was formed, under which the States, while yielding to the national government complete and exclusive jurisdiction over external affairs, conferred upon it such powers only, in regard to matters of internal regulation, as seemed to be essential to national union, strength, and harmony, and without which the purpose in organizing the national authority might have been defeated. It is this, also, that impels the several States, as if by common arrangement, to subdivide their territory into counties, towns, road and school districts,[1] and to confer powers of local

[1] The general rules respecting schools are sufficiently alike in the several States to justify bringing together in this place the leading authorities concerning them. To what degree the legislature shall provide for the education of the people at the cost of the State or of its municipalities, is a question which, except as regulated by the constitution, addresses itself to the legislative judgment exclusively. Commonwealth *v.* Hartman, 17 Pa. St. 118. It has been sometimes contended that it was incompetent to go beyond making provision for general education in the common branches of learning; but this notion is exploded. High schools may be established: Stuart *v.* School District, 30 Mich. 69; Richards *v.* Raymond, 32 Ill. 612, 34 Am. Rep. 151; and so may normal schools and colleges: Powell *v.* Board of Education, 97 Ill. 375; Briggs *v.* Johnson Co., 4 Dill. 148; music may be taught: Bellmeyer *v.* School District, 44 Iowa, 564; State *v.* Webber, 108 Ind. 31, 8 N. E. 708. "Common schools," means schools open to all, rather than those of a definite grade: Roach *v.* Board, &c., 77 Mo. 484; and the State may confer upon the governing boards such authority as it shall deem wise, but subject to alteration at all times, and to be taken away at the discretion of the State. Rawson *v.* Spencer, 113 Mass. 40. Many of the State constitutions provide common-school funds, and some provide a fund for higher education with certain restrictions: whatever

legislation upon the people of each subdivision, and also to incorporate cities, boroughs, and villages wherever the circumstances

these are they must be observed. People *v.* Board of Education, 13 Barb. 400; People *v.* Allen, 42 N. Y. 404; Halbert *v.* Sparks, 9 Bush, 259; Collins *v.* Henderson, 11 Bush, 74; State *v.* Graham, 25 La. Ann. 440; State *v.* Board of Liquidation, 29 La. Ann. 77; Sun Mut. Ins. Co. *v.* Board of Liquidation, 31 La. Ann. 175; Littlewort *v.* Davis, 50 Miss. 403; Weir *v.* Day, 35 Ohio St. 143; Otken *v.* Lamkin, 56 Miss. 758. Although it is customary to leave the control of schools in the hands of the school authorities, it is held competent for the State to contract with a publisher to supply all the schools of the State with text-books of a uniform character and price. Curryer *v.* Merrill, 25 Minn. 1, 33 Am. Rep. 450; Bancroft *v.* Thayer, 5 Sawy. 502; People *v.* Board of Education, 55 Cal. 331. [Leeper *v.* State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 166; State *v.* Haworth, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240.] The governing school boards derive all their authority from the statute, and can exercise no powers except those expressly granted, and those which result by necessary implication from the grant. Peers *v.* Board of Education, 72 Ill. 508; Clark *v.* School Directors, 78 Ill. 474; Adams *v.* State, 82 Ill. 132; Stevenson *v.* School Directors, 87 Ill. 255; Manning *v.* Van Buren, 28 Iowa, 332; Monticello Bank *v.* Coffin's Grove, 51 Iowa, 350, 1 N. W. 592; State *v.* Board of Education, 35 Ohio St. 368; State *v.* Mayor, &c., 7 Neb. 267; Gehling *v.* School District, 10 Neb. 239, 4 N. W. 1023. The board, in exercising its authority, must act as such, in regular meetings convened for the purpose; it is not sufficient that the members severally give their assent to what is done. State *v.* Leonard, 3 Tenn. Ch. 117; State *v.* Tiedemann, 69 Mo. 515; Smith *v.* Township Board, 58 Mo. 297; Dennison School District *v.* Padden, 89 Pa. St. 395; Hazen *v.* Lerche, 47 Mich. 626, 11 N. W. 413. But see Crane *v.* School District, 61 Mich. 299, 28 N. W. 105; Russell *v.* State, 13 Neb. 68, 12 N. W. 829. Illegal or unauthorized action by the board cannot be ratified by it, and the fact that the district has the benefit of what is done will not amount to a ratification by the district. School District *v.* Fogelman, 76 Ill. 189; Johnson *v.* School District, 67 Mo. 319; Board of Education *v.* Thompson, 33 Ohio St. 321; Gibson *v.* School District, 36 Mich. 404; Wells *v.* People, 71 Ill. 532. The general control of a school building is in the board, which may maintain all proper suits for possession. Barber *v.* Trustees of Schools, 51 Ill. 396; Alderman *v.* School Directors, 91 Ill. 179. The board must not enter into contracts with its own members, as these would be void. Pickett *v.* School District, 25 Wis. 551; Hewitt *v.* Normal School District, 94 Ill. 528; Flint, &c. R. R. Co. *v.* Dewey, 14 Mich. 477. The board is entrusted with the authority to employ teachers, and to remove them under the rules prescribed by statute. Crawfordsville *v.* Hays, 42 Ind. 200; School District *v.* Colvin, 10 Kan. 283; Directors, &c. *v.* Burton, 26 Ohio St. 421; Jones *v.* Nebraska, 1 Neb. 176; Bays *v.* State, 6 Neb. 167; Parker *v.* School District, 5 Lea, 505. If a teacher is rightfully dismissed, he cannot recover for services performed thereafter, though he takes possession of the school-house and continues to teach. Pierce *v.* Beck, 61 Ga. 413. But if he is wrongfully dismissed, or if he leaves school because of the unjustifiable action of the board, he may recover for his whole time. Ewing *v.* School Directors, 2 Ill. App. 458; Scott *v.* School District, 46 Vt. 452. See McCutchen *v.* Windsor, 55 Mo. 149. Contracts for a stated time are subject to the observance of public holidays, and the teacher is entitled to these without deduction from his salary. School District *v.* Gage, 39 Mich. 484. The school board may make the contract for teaching extend beyond their own term of office: Wilson *v.* School District, 36 Conn. 280; Wait *v.* Ray, 67 N. Y. 36; provided they act in good faith and do not unreasonably forestall the action of their successors. Loomis *v.* Coleman, 61 Mo. 21; Stevenson *v.* School District, 87 Ill. 255; Hewitt *v.* School District, 94 Ill. 528; School Directors *v.* Hart, 4 Ill. App. 224. See Tappan *v.* School District, 44 Mich. 500, 7 N. W. 73; Athearn *v.* Independent District, 33 Iowa, 105. The board has

and needs of a dense population seem to require other regulations than those which are needful for the rural districts.

The system is one which almost seems a part of the very nature of the race to which we belong. A similar subdivision of the realm for the purposes of municipal government has existed in England from the earliest ages;[1] and in America, the first settlers, as if instinctively, adopted it in their frame of government, and no other has ever supplanted it, or even found advocates. In most of the colonies the central power created and provided for the organization of the towns;[2] in one at least the towns preceded and created the central authority;[3] but in all, the final

general authority to establish for the school such rules and regulations as it shall deem wise. Donahoe *v.* Richards, 38 Me. 376; Spiller *v.* Woburn, 12 Allen, 127; Board of Education *v.* Minor, 23 Ohio St. 211. The rules may be enforced by suspensions and expulsions if necessary. Hodgkins *v.* Rockport, 105 Mass. 475; Murphy *v.* Directors, 30 Iowa, 429; Burdick *v.* Babcock, 31 Iowa, 562; Board of Education *v.* Thompson, 33 Ohio St. 321; Rulison *v.* Post, 79 Ill. 567; Sewell *v.* Board of Education, 29 Ohio St. 89. But this power is subject to the general principle that the by-laws of all corporations must be reasonable; if a rule is unreasonable, and a pupil is punished for refusal to submit to it, an action will lie. Roe *v.* Deming, 21 Ohio St. 666. See Ward *v.* Flood, 48 Cal. 36; State *v.* Vanderbilt, 116 Ind. 11, 18 N. E. 266; Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605; State *v.* Board of Education, 63 Wis. 234, 23 N. W. 102; Holman *v.* School Trustees, 77 Mich. 605, 43 N. W. 996. The board and the teacher have no control of pupils after they have returned to their homes: Dritt *v.* Snodgrass, 66 Mo. 286; State *v.* Osborne, 24 Mo. App. 309; otherwise while they are on their way home before parental control is resumed. Deskins *v.* Gose, 85 Mo. 485; Hutton *v.* State, 23 Tex. App. 386, 5 S. W. 122. It is held in Wisconsin and Illinois that parents have a right to excuse their children from taking any particular study in a course, and that teachers cannot refuse to give instruction in other studies of the course to the pupils thus excused. Morrow *v.* Wood, 35 Wis. 59, 17 Am. Rep. 471; Rulison *v.* Post, 79 Ill. 567; Lake View School Trustees *v.* People, 87 Ill. 303. As to the power to discriminate between colored and other children in schools, see *post*, 556, note. As to devoting school funds and school buildings to religious purposes, see *post*, 663, note. That towns, &c., may hold in trust moneys given for education, see Piper *v.* Moulton, 72 Me. 155; Hatheway *v.* Sackett, 32 Mich. 97.

[1] Crabbe's History of English Law, c. 2; 1 Bl. Com. 114; Hallam's Middle Ages, c. 8, pt. 1; 2 Kent, 278; Vaughan's Revolutions in English History, b. 2, c. 8; Frothingham's Rise of the Republic, 14, 15. The early local institutions of England are presented with great fulness and erudition in the Constitutional History of Professor Stubbs.

[2] For an interesting history of the legislation in Connecticut on this subject, see Webster *v.* Harwinton, 32 Conn. 131. In New Hampshire, see Bow *v.* Allenstown, 34 N. H. 351. The learned note to Commonwealth *v.* Roxbury, 9 Gray, 503, will give similar information concerning the organization and authority of towns in the Massachusetts provinces. And see People *v.* Hurlbut, 24 Mich. 98, 9 Am. Rep. 103; Shumway *v.* Bennett, 29 Mich. 451. Mr. Elliott well says: "The prime strength of New England and of the whole republic was and is in the municipal governments and in the homes." And he adds, that among the earliest things decided in Massachusetts was, 'that trivial things should be ended in towns" (1635). Elliott's New England, Vol. I. p. 182.

[3] Rhode Island; see Arnold's History, c. 7. It is remarked by this author that, when the charter of Rhode Island was suspended to bring the colony under the

result was substantially the same, that towns, villages, boroughs, cities, and counties exercised the powers of local government, and the Colony or State the powers of a more general nature.[1]

The several State constitutions have been framed with this system in view, and the delegations of power which they make, and the express and implied restraints which they impose thereupon, can only be correctly understood and construed by keeping in view its present existence and anticipated continuance. There are few of the general rules of constitutional law that are not more or less affected by the fact that the powers of government, instead of being concentrated in one body of men, are carefully distributed, with a view to being exercised with intelligence, economy, and facility, and as far as possible by the persons most directly and immediately interested.

It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations,

dominion of Andros, "*the American system of town governments* which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the individual liberty of the citizen when that of the State or Colony was crushed." Arnold, Vol. I. p. 487.

[1] "The townships," says De Tocqueville, "are only subordinate to the State in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves, and among the inhabitants of New England I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests. The towns of New England buy and sell, prosecute or are indicted, augment or diminish their rates, without the slightest opposition on the part of the administrative authority of the State. They are bound, however, to comply with the demands of the community. If a State is in need of money, a town can neither give nor withhold the supplies. If a State projects a road, the township cannot refuse to let it cross its territory; if a police regulation is made by the State, it must be enforced by the town. A uniform system of instruction is organized all over the country, and every town is bound to establish the schools which the law ordains. . . . Strict as this obligation is, the government of the State imposes it in principle only, and in its performance the township assumes all its independent rights. Thus taxes are voted by the State, but they are assessed and collected by the township; the existence of a school is obligatory, but the township builds, pays, and superintends it. In France, the State collector receives the local imposts; in America, the town collector receives the taxes of the State. Thus the French government lends its agents to the commune; in America, the township is the agent of the government. This fact alone shows the extent of the differences which exist between the two nations." Democracy in America, c. 5. See Frothingham's Rise of the Republic, 14–28. [On the Right to Local Self-Government, see articles by Amasa M. Eaton in 13 Harv. L. Rev. 441, 570, 638, and 14 Harv. L. Rev. 20, 116.]

would always pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of State policy or dangers of local abuse to warrant the interposition.[1]

The people of the municipalities, however, do not define for themselves their own rights, privileges, and powers, nor is there any common law which draws a definite line of distinction between the powers which may be exercised by the State, and those which must be left to the local governments.[2] The municipalities must look to the State for such charters of government as the legislature shall see fit to provide; and they cannot prescribe for themselves the details, though they have a right to expect that those charters will be granted with a recognition of the general principles with which we are familiar. The charter, or the

[1] "It seems to be generally conceded that powers of local legislation may be granted to cities, towns, and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our constitution to take from the legislature a power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions." State *v.* Noyes, 30 N. H. 279, 292, per *Bell*, J. See also Tanner *v.* Trustees of Albion, 5 Hill, 121; Dalby *v.* Wolf, 14 Iowa, 228; State *v.* Simonds, 3 Mo. 414; McKee *v.* McKee, 8 B. Mour. 433; Smith *v.* Levinus, 8 N. Y. 472; People *v.* Draper, 15 N. Y. 532; Burgess *v.* Pue, 2 Gill, 11; New Orleans *v.* Turpin, 13 La. Ann. 56; Gilkeson *v.* The Frederick Justices, 13 Gratt. 577; Mayor, &c. of New York *v.* Ryan, 2 E. D. Smith, 368; St. Louis *v.* Russell, 9 Mo. 507; Bliss *v.* Kraus, 16 Ohio St. 55; Trigally *v.* Memphis, 6 Cold. 382; Durach's Appeal, 62 Pa. St. 491; State *v.* Wilcox, 45 Mo 458; Jones *v.* Richmond, 18 Gratt. 517; State *v.* O'Neill, 24 Wis. 149; Bradley *v.* M'Atee, 7 Bush, 667, 3 Am. Rep. 309; Burckholter *v.* M'Connellsville, 20 Ohio St. 308; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Mills *v.* Charleton, 29 Wis. 400; Commonwealth *v.* Coyningham, 65 Pa. St. 76; People *v.* Kelsey, 34 Cal. 470; Tugman *v.* Chicago, 78 Ill. 405; Manly *v.* Raleigh, 4 Jones Eq. 370; Stone *v.* Charlestown, 114 Mass. 214; Hayden *v.* Goodnow, 39 Conn. 164; Goldthwaite *v.* Montgomery, 50 Ala. 486; Stanfill *v.* Court of Co. Rev., 80 Ala. 287; Robinson *v.* Schenck, 102 Ind. 307, 1 N. E. 658; Cross *v.* Hopkins, 6 W. Va. 323. [Statute for government of cities of certain class may provide for appointment by governor temporarily of an executive officer for said city. Com. *v.* Moir, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801.] The propriety of establishing a municipality is not a judicial question. People *v.* Riverside, 70 Cal. 461, 11 Pac. 759. It is not an unlawful delegation of power to give a city the right to extend its bounds. Kelly *v.* Meeks, 87 Mo. 396. See cases, *post*, p. 334. [Nor to confer upon it the power to levy license taxes upon occupations, and under such power it may tax brokers, even though they deal in nothing but stocks, and trade only upon the stock exchange. Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611.

[2] As to the common law affecting these corporate existences, and the effect of usage, see 2 Kent, 278, 279.

general law under which they exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.[1]

The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion, and substitute those which are different.[2] The rights and franchises of such a corporation,

[1] Stetson *v.* Kempton, 13 Mass. 272; Willard *v.* Killingworth, 8 Conn. 247; Abendroth *v.* Greenwich, 29 Conn. 356; Baldwin *v.* North Branford, 32 Conn. 47; Webster *v.* Harwinton, 32 Conn. 131; Douglass *v.* Placerville, 18 Cal. 643; Lackland *v.* Northern Missouri Railroad Co., 31 Mo. 180; Mays *v.* Cincinnati, 1 Ohio St. 268; Frost *v.* Belmont, 6 Allen, 152; Hess *v.* Pegg, 7 Nev. 23; Ould *v.* Richmond, 23 Gratt. 464; Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 655; [Louisiana Constr. & Imp. Co. *v.* Illinois C. R. Co., 49 La. Ann. 527, 21 So. 891, 37 L. R. A. 661. Where legislature grants right to occupy streets of a city upon getting consent of city council, that body cannot attach conditions to its consent unless the conditions are restricted entirely to matters within the city limits. Galveston & W. R. Co. *v.* Galveston, 90 Tex. 393, 39 S. W. 920, 36 L. R. A. 33 and note. Interest cannot be required upon delayed payments of sewer assessments in the absence of statutory authority therefor. Sargent & Co. *v.* Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822. Nor can the city regulate the charges of gas companies for gas furnished private consumers in the absence of a reservation of such power in their charter. *Re* Pryor, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398, 49 Am. St. 280.]

[2] St. Louis *v.* Allen, 13 Mo. 400; Coles *v.* Madison Co., Breese, 115; Richland County *v.* Lawrence County, 12 Ill. 1; Trustees of Schools *v.* Tatman, 13 Ill. 27; Robertson *v.* Rockford, 21 Ill. 451; People *v.* Power, 25 Ill. 187; St. Louis *v.* Russell, 9 Mo. 507; State *v.* Cowan, 29 Mo. 330; McKim *v.* Odom, 3 Bland, 407; Granby *v.* Thurston, 23 Conn. 416; Harrison Justices *v.* Holland, 3 Gratt. 247; Brighton *v.* Wilkinson, 2 Allen, 27; Sloan *v.* State, 8 Blackf. 361; Mills *v.* Williams, 11 Ired. 558; Langworthy *v.* Dubuque, 16 Iowa, 271; Weeks *v.* Milwaukee, 10 Wis. 242; State *v.* Branin, 23 N. J. 484; Patterson *v.* Society, &c., 24 N. J. 385; Atchison *v.* Bartholow, 4 Kan. 124; City of St. Louis *v.* Cafferata, 24 Mo. 94; People *v.* Draper, 15 N. Y. 532; Hawkins *v.* Commonwealth, 76 Pa. St. 15; People *v.* Tweed, 63 N. Y. 202; Barnes *v.* District of Columbia, 91 U. S. 540; Laramie Co. *v.* Albany Co., 92 U. S. 307; Aspinwall *v.* Commissioners, &c., 22 How. 364; Howard *v.* McDiamid, 26 Ark. 100; Phila-

being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken

delphia *v.* Fox, 94 Pa. St. 169; Bradshaw *v.* Omaha, 1 Neb. 16; Kuhn *v.* Board of Education, 4 W. Va. 499; Sinton *v.* Ashbury, 41 Cal. 525; Hess *v.* Pegg, 7 Nev. 23; Hagerstown *v.* Schuer, 37 Md. 180; San Francisco *v.* Canavan, 42 Cal. 541; State *v.* Jennings, 27 Ark. 419; Division of Howard Co., 15 Kan. 194; Martin *v.* Dix, 52 Miss. 53; Goff *v.* Frederick, 44 Md. 67; Blessing *v.* Galveston, 42 Tex. 641; Wiley *v.* Bluffton, 111 Ind. 152, 12 N. E. 165; True *v.* Davis, 133 Ill. 522, 22 N. E. Rep. 410. [Legislature may create a municipality of the inhabitants residing near the mouth of a navigable river and compel them to maintain a ship channel therein, although a portion of the benefit thereof is enjoyed by the inhabitants of a much larger area. Cook *v.* Portland, 20 Oreg. 580, 27 Pac. 263, 13 L. R. A. 533. May combine several cities and towns into a sewage district and compel them to construct a system of sewerage. *Re* Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417.] The legislature may in its discretion recall to itself and exercise so much of such powers as it has conferred upon municipal corporations as is not secured to them by the constitution. People *v.* Pinkney, 32 N. Y. 377. The subject was considered at length in Meriwether *v.* Garrett, 102 U. S. 472, in which was considered the effect of the legislation which abolished the city government of Memphis; and in Amy *v.* Selma, 77 Ala. 103. The creditors of a county cannot prevent the legislature reducing its limits, notwithstanding their security may be diminished thereby. Wade *v.* Richmond, 18 Gratt. 583; Luerhman *v.* Taxing District, 2 Lea, 425. Compare Milner *v.* Pensacola, 2 Woods, 632; Galesburg *v.* Hawkinson, 75 Ill. 152; Rader *v.* Road District, 36 N. J. 273; Wallace *v.* Sharon Trustees, 84 N. C. 164. A charter may not be repealed to the injury of creditors already entitled to payment. Morris *v.* State, 62 Tex. 728. This power is not defeated or affected by the circumstance that the municipal corporation was by its charter made the trustee of a charity; and in such case, if the corporation is abolished, the Court of Chancery may be empowered and directed by the repealing act to appoint a new trustee to take charge of the property and execute the trust. Montpelier *v.* East Montpelier, 29 Vt. 12. And see Harrison *v.* Bridgeton, 16 Mass. 16; Montpelier Academy *v.* George, 14 La. Ann. 406; Reynolds *v.* Baldwin, 1 La. Ann. 162; Police Jury *v.* Shreveport, 5 La. Ann. 665; Philadelphia *v.* Fox, 64 Pa. St. 169; Weymouth & Braintree Fire Commissioners *v.* County Commissioners, 108 Mass. 142. As to extent of power to hold property in trust, see Hatheway *v.* Sackett, 32 Mich. 97. But neither the identity of a corporation, nor its right to take property by devise, is destroyed by a change in its name, or enlargement of its area, or an increase in the number of its corporators. Girard *v.* Philadelphia, 7 Wall. 1. Changing a borough into a city does not of itself abolish or affect the existing borough ordinances. Trustees of Erie Academy *v.* City of Erie, 31 Pa. St. 515. Nor will it affect the indebtedness of the corporation, which will continue to be its indebtedness under its new organization. Olney *v.* Harvey, 50 Ill. 453. [So when a city has had a *de facto* organization, and is afterward reorganized so as to become *de jure*, its old obligations continue. Shapleigh *v.* San Angelo, 167 U. S. 646, 17 Sup. Ct. Rep. 957; Ranken *v.* McCallum, — Tex. Civ. Ap. —, 60 S. W. 975 (Jan. 26, 1901). Upon municipal bonds and changes in statutory construction, see note to 18 L. ed. U. S. 350; also notes to 26 L. ed. U. S. 263, and 35 L. ed. U. S. 344.] Property brought within a city by the exercise of legislative discretion is liable for existing municipal indebtedness. Maddrey *v.* Cox, 73 Tex. 538, 11 S. W. 541. A general statute, containing a clause repealing all statutes contrary to its provisions, does not repeal a clause in a municipal charter on the same subject. State *v.* Branin, 23 N. J. 484. [Where the constitution prescribes that the charter of a certain city can be amended by its own citizens, the power of the legislature to amend is excluded. St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68

away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated.[1] Restraints on the legislative power of control must be found in the constitution of the State, or they must rest alone in the legislative discretion.[2] If the legislative

Am. St. 575. Legislature has power to divide counties and to modify their boundaries, but such modifications do not modify the boundaries of legislative districts. People *v.* Board of Supervisors, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74.]

[1] This principle was recognized by the several judges in Dartmouth College *v.* Woodward, 4 Wheat. 518, and in Meriwether *v.* Garrett, 102 U. S. 472. And see People *v.* Morris, 13 Wend. 325; St. Louis *v.* Russell, 9 Mo. 507; Montpelier *v.* East Montpelier, 29 Vt. 12; Trustees of Schools *v.* Tatman, 13 Ill. 27; Brighton *v.* Wilkinson, 2 Allen, 27; Reynolds *v.* Baldwin, 1 La. Ann. 162; Police Jury *v.* Shreveport, 5 La. Ann. 665; Mt. Carmel *v.* Wabash County, 50 Ill. 69; Lake View *v.* Rose Hill Cemetery, 70 Ill. 191; Zitske *v.* Goldberg, 38 Wis. 216; Weeks *v.* Gilmanton, 60 N. H. 500; Dillon, Mun. Corp. §§ 24, 30, 37; [Covington *v.* Kentucky, 173 U. S. 231, 19 Sup. Ct. Rep. 383; Essex Public Road Bd. *v.* Skinkle, 140 U. S. 334, 11 Sup. Ct. Rep. 790.]

[2] See *ante*, p. 66; *post*, pp. 334–342. "Where a corporation is the mere creature of legislative will, established for the general good and endowed by the State alone, the legislature may, at pleasure, modify the law by which it was created. For in that case there would be but one party affected, — the government itself, — and therefore not a contract within the meaning of the constitution. The trustees of such a corporation would be the mere mandatories of the State, having no personal interest involved, and could not complain of any law that might abridge or destroy their agency." Montpelier Academy *v.* George, 14 La. Ann. 406. In Trustees of Schools *v.* Tatman, 13 Ill. 27, 30, the court say: "Public corporations are but parts of the machinery employed in carrying on the affairs of the State; and they are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. The State may exercise a general superintendence and control over them and their rights and effects, so that their property is not diverted from the uses and objects for which it was given or purchased." And see State *v.* Miller, 65 Mo. 50. As to the effect of legislation abolishing a corporation upon its property and debts, see Mount Pleasant *v.* Beckwith, 100 U. S. 514; Meriwether *v.* Garrett, 102 U. S. 472; Rawson *v.* Spencer, 113 Mass. 40. Where a municipal corporation is dissolved and a new one for the same general purposes is created containing the same population and property in substance, to which the corporate property passes without consideration, the debts of the old fall upon the new municipality, and with them the power to tax for their payment. Mobile *v.* Watson, 116 U. S. 289, 6 Sup. Ct. Rep. 398; Amy *v.* Selma, 77 Ala. 103. Upon the division of towns and counties, &c. the legislature may apportion the debts as it sees fit. People *v.* Supervisors, 94 N. Y. 263; Clay Co. *v.* Chickasaw Co., 64 Miss. 534, 1 So. 753; Dare Co. *v.* Currituck Co., 95 N. C. 189; Morrow Co. *v.* Hendryx, 14 Oreg. 397, 12 Pac. 806. It is a lawful exercise of legislative authority upon such division, to confer a part of the corporate property of the old corporation upon the new, and to direct the old body to pay it over to the new. Harrison *v.* Bridgeton, 16 Mass. 16; Salem Turnpike *v.* Essex Co, 100 Mass. 282; Whitney *v.* Stow, 111 Mass. 368; Stone *v.* Charlestown, 114 Mass. 214; Sedgwick Co. *v.* Bunker, 14 Kan. 498; Portwood *v.* Montgomery, 52 Miss. 523; Bristol *v.* New Chester, 3 N. H. 524; Milwaukee Town *v.* Milwaukee City, 12 Wis. 93; Marshall Co. Court *v.* Calloway Co. Court, 3 Bush, 93. [Columbus *v.* Columbus, 82 Wis. 374; 52 N. W. 425, 16 L. R. A. 695, and note.] But it seems that an apportionment of property can only be made at the time of the division. Windham *v.* Portland, 4 Mass. 384; Hampshire *v.* Franklin, 16 Mass. 76. See Richland *v.* Lawrence, 12 Ill. 1; Bowdoinham *v.* Richmond, 6 Me. 112. In the latter case

action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs.[1] This is the

it was held that the apportionment of debts between an old town and one created from it was in the nature of a contract; and it was not in the power of the legislature afterwards to release the new township from payment of its share as thus determined. But the case of Layton *v.* New Orleans, 12 La. Ann. 515, is *contra*. See also Borough of Dunmore's Appeal, 52 Pa. St. 374, and School District *v.* Board of Education, 73 Mo. 627; [Johnson *v.* San Diego, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; Perry County *v.* Conway County, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665, and note;] which in principle seem to accord with the Louisiana case. In the absence of such legislation each part is entitled to the property falling within it, and to any equitable share of the moneys of the township. Towle *v.* Brown, 110 Ind. 65, 10 N. E. 626. [The old corporation retains all the property within its borders and remains subject to the then existing debts, in the absence of any legislative apportionment. McCully *v.* Tracy, 66 N. J. L. 489, 49 Atl. 436.] In Burns *v.* Clarion County, 62 Pa. St. 422, it was held the legislature had the power to open a settlement made by county auditors with the county treasurer, and to compel them to settle with him on principles of equity. See further, Cambridge *v.* Lexington, 17 Pick. 222; Attorney-General *v.* Cambridge, 16 Gray, 247; Clark *v.* Cambridge, &c. Bridge Proprietors, 104 Mass. 236. The legislature has power to lay out a road through several towns, and apportion the expense between them. Waterville *v.* Kennebeck County, 59 Me. 80; Commonwealth *v.* Newburyport, 103 Mass. 129. [And where a highway or bridge, although lying outside the territorial limits of a municipality, is especially beneficial to the people thereof, the legislature may compel that municipality to sustain part of the burden of providing and maintaining such highway, and may determine what portion of such expense shall be contributed by such municipality. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, aff. in Williams *v.* Eggleston, 170 U. S. 304, 18 Sup. Ct. Rep. 617. Upon the power of the legislature to impose burdens upon municipalities, see the cases collected in note to 48 L. R. A. 465.] And it may change the law and redistribute the burden afterwards, if from a change of circumstances or other reasons it is deemed just and proper to do so. Scituate *v.* Weymouth, 108 Mass. 128, and cases cited. A statute abolishing school districts is not void on grounds like the following: that it takes the property of the districts without compensation; that the taxes imposed will not be proportional and reasonable, or that contracts will be affected. Rawson *v.* Spencer, 113 Mass. 40. See Weymouth &c. Fire District *v.* County Commissioners, 108 Mass. 142. [The legislature may lay a penalty upon any county in which a lynching occurs, and may provide that such penalty shall be recovered by the person injured. Champaign Co. *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738.]

[1] "The correction of these abuses is as readily attained at the ballot-box as it would be by subjecting it to judicial revision. A citizen or a number of citizens may be subtracted from a county free from debt, having no taxation for county purposes, and added to an adjacent one, whose debts are heavy, and whose taxing powers are exercised to the utmost extent allowed by law, and this, too, without consulting their wishes. It is done every day. Perhaps a majority of the people thus annexed to an adjacent or thrown into a new county by the division of an old one may have petitioned the legislature for this change; but this is no relief to the outvoted minority, or the individual who deems himself oppressed and vexed by the change. Must we, then, to prevent such occasional hardships, deny the power entirely?

"It must be borne in mind that these corporations, whether established over cities, counties, or townships (where such incorporated subdivisions exist), are never

general rule; and the exceptions to it are not numerous, and will be indicated hereafter.

Powers of Public Corporations.

The powers of these corporations are either express or implied. The former are those which the legislative act under which they exist confers in express terms; the latter are such as are necessary in order to carry into effect those expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant.[1] Certain powers are also incidental to corporations, and will be possessed unless expressly or by implication prohibited. Of these an English writer has said: "A municipal corporation has at common law few powers beyond those of electing, governing, and removing its members, and regulating its franchises and property. The power of its governing officers can only extend to the administration of the by-laws and other ordinances by which the body is regulated."[2] But without being expressly empowered so to do, they may sue and be sued; may have a common seal; may purchase and hold lands and other property for corporate purposes (*a*), and convey the same; may make by-laws whenever necessary to accomplish the design of the incorporation, and enforce the same by penalties; and may enter into contracts to effectuate the corporate purposes.[3] Except as to these incidental powers, which need not be, though they usually are, mentioned in the charter, the charter itself,

intrusted and can never be intrusted with any legislative power inconsistent or conflicting with the general laws of the land, or derogatory to those rights, either of person or property, which the constitution and the general laws guarantee. They are strictly subordinate to the general laws, and merely created to carry out the purposes of those laws with more certainty and efficiency. They may be and sometimes are intrusted with powers which properly appertain to private corporations, and in such matters their power as mere municipal corporations ceases." City of St. Louis *v.* Allen, 13 Mo. 400.

[1] 2 Kent, 278, note; Halstead *v.* Mayor, &c. of New York, 3 N. Y. 430; Hodges *v.* Buffalo, 2 Denio, 110; New London *v.* Brainard, 22 Conn. 552; State *v.* Ferguson, 33 N. H. 424; McMillan *v.* Lee County, 3 Iowa, 311; La Fayette *v.* Cox, 5 Ind. 38; Clark *v.* Des Moines, 19 Iowa, 199; State *v.* Morristown, 33 N. J. 57; Beaty *v.* Knowler, 4 Pet. 152; Mills *v.* Gleason, 11 Wis. 470. In this last case, it was held that these corporations had implied power to borrow money for corporate purposes. And see also Ketchum *v.* Buffalo, 14 N. Y. 356.

[2] Willcock on Municipal Corporations, tit. 769.

[3] Angell & Ames on Corp. §§ 111, 239; 2 Kyd on Corp. 102; State *v.* Ferguson, 33 N. H. 424. See Dillon, Mun. Corp., for an examination, in the light of the authorities, of the several powers here mentioned.

(*a*) [Such property as is held by the corporation in its public capacity is not liable to be taken on execution. See Klein *v.* New Orleans, 99 U. S. 149, and other cases in note to 35 L. ed. U. S. 556.]

or the general law under which they exist, is the measure of the authority to be exercised. And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private incorporation.[1] The reasonable presumption is that the State

[1] Under a city charter which authorized the common council to appoint assessors for the purpose of awarding damages to those through whose property a street might be opened, and to assess such damages on the property benefited, it was decided that the council were not empowered to levy a tax to pay for the other expenses of opening the street. Reed *v.* Toledo, 18 Ohio, 161. So a power to enact by-laws and ordinances to abate and remove nuisances will not authorize the passing of an ordinance to *prevent* nuisances, or to impose penalties for the creation thereof. Rochester *v.* Collins, 12 Barb 559. A power to impose penalties for *obstructions* to streets would not authorize the like penalties for *encroachments* upon streets, where, under the general laws of the State, the offences are recognized as different and distinct. Grand Rapids *v.* Hughes, 15 Mich. 54. Authority to levy a tax on real and personal estate would not warrant an income tax, especially when such a tax is unusual in the State. Mayor of Savannah *v.* Hartridge, 8 Ga. 23. It will appear, therefore, that powers near akin to those expressly conferred, are not, for that reason, to be taken by implication. And see Commonwealth *v.* Erie & N. E. Railroad Co., 27 Pa. St. 339. This rule has often been applied where authority has been asserted on behalf of a municipal corporation to loan its credit to corporations formed to construct works of internal improvement. See La Fayette *v.* Cox, 5 Ind. 38; Cleburne *v.* Gulf, &c. Ry. Co., 66 Tex. 457, 1 S. W. 342. The ordinary powers of a city do not give it authority to grant a street railway franchise. Eichels *v.* Evansville Street Railway Co., 78 Ind. 261. Power to buy land for public purposes does not cover a purchase for an agricultural society. Eufaula *v.* McNab, 67 Ala. 588. Power to make health regulations does not permit the erection of a public slaughter-house. Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558. Power to contract for a water-supply does not authorize granting an exclusive privilege for twenty-five years. Brenham *v.* Brenham Water Co., 67 Tex. 542, 4 S. W. 143. Power to regulate wharves does not cover creating a harbor. Spengler *v.* Trowbridge, 62 Miss. 46. A power to pass ordinances to prohibit the sale or giving away of intoxicating liquors in certain special cases is an implied exclusion of the power to prohibit the sale or giving away in other cases. State *v.* Ferguson, 33 N. H. 424. In Dunham *v.* Rochester, 5 Cow. 462, 465, it is said: "For all the purposes of jurisdiction, corporations are like the inferior courts, and must show the power given them in every case. If this be wanting, their proceedings must be holden void whenever they come in question, even collaterally; for they are not judicial and subject to direct review on *certiorari*. 2 Kyd on Corp. 104–107." The prescribed method of exercising a power must be strictly followed. Des Moines *v.* Gilchrist, 67 Iowa, 210, 25 N. W. 136. The power "to enact ordinances necessary for government" does not authorize the grant of the franchise of a toll-bridge. Williams *v.* Davidson, 43 Tex. 1. Like power coupled with that to regulate streets and business does not allow regulation of telephone charges. St. Louis *v.* Bell Telephone Co., 96 Mo. 623, 10 S. W. 197. The power to create indebtedness does not by implication carry with it a power to tax for its payment. Jeffries *v.* Lawrence, 42 Iowa, 498. The approving vote of the citizens cannot give an authority the law has not conferred. McPherson *v.* Foster, 43 Iowa, 48. See Hackettstown *v.* Swackhamer, 37 N. J. 191. In Nashville *v.* Ray, 19 Wall. 468, four of the eight justices of the Supreme Court denied the power of municipal corporations to borrow money or issue securities unless expressly authorized. Says *Bradley*, J.: "Such a

has granted in clear and unmistakable terms all it has designed to grant at all.

It must follow that, if in any case a party assumes to deal with a corporation on the supposition that it possesses powers

power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local government to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others." See Waxahachie *v.* Brown, 67 Tex. 519, 4 S. W. 207. Compare Bank of Chillicothe *v.* Chillicothe, 7 Ohio, 354; Clark *v.* School District, 3 R. I. 199; State *v.* Common Council of Madison, 7 Wis. 688; Mills *v.* Gleason, 11 Wis. 470; Hamlin *v.* Meadville, 6 Neb. 227; State *v.* Babcock, 22 Neb. 614, 35 N. W. 941. [No implied power to exempt from taxation. Whiting *v.* West Point, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. 750, and note. Nor to establish separate schools for white and negro children. Knox *v.* Bd. of Education, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830. Nor to publish ordinances in foreign languages. Chicago *v.* McCoy, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413. Nor to borrow money. Allen *v.* La Fayette, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497, and note; Wells *v.* Salina, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759, and note. Bonds may be issued in payment for property lawfully purchased, although they could not be issued in order to borrow money. Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388.] But power to confine patients with infectious diseases covers renting a pest-house: Anderson *v.* O'Conner, 98 Ind. 168; and paying nurses: Labrie *v.* Manchester, 59 N. H. 120; Rae *v.* Flint, 51 Mich. 526, 16 N. W. 887. Such corporation has implied power to take as trustee for indigent inhabitants: Estate of Robinson, 63 Cal. 620; and to defend its marshal sued for false imprisonment. Cullen *v.* Carthage, 103 Ind. 196, 2 N. E. 571; Roper *v.* Laurinburg, 90 N. C. 427. See also Nashville *v.* Ray, 19 Wall. 468; Milhau *v.* Sharp, 17 Barb. 435, 28 Barb. 228, and 27 N. Y. 611; Douglass *v.* Placerville, 18 Cal. 643; Mount Pleasant *v.* Breeze, 11 Iowa, 399; Hooper *v.* Emery, 14 Me. 375; Mayor, &c. of Macon *v.* Macon & Western R. R. Co., 7 Ga. 221; Hopple *v.* Brown, 13 Ohio St. 311; Lackland *v.* Northern Missouri Railroad Co., 31 Mo. 180; Smith *v.* Morse, 2 Cal. 524; Bennett *v.* Borough of Birmingham, 31 Pa. St. 15; Earley's App., 103 Pa. St. 273; Tucker *v.* Virginia City, 4 Nev. 20; Leavenworth *v.* Norton, 1 Kan. 432; Kyle *v.* Malin, 8 Ind. 34; Johnson *v.* Philadelphia, 60 Pa. St. 445; Kniper *v.* Louisville, 7 Bush, 599; Johnston *v.* Louisville, 11 Bush, 527; Williams *v.* Davidson, 43 Tex. 1; Burritt *v.* New Haven, 42 Conn. 174; Logan *v.* Pyne, 43 Iowa, 524; Field *v.* Des Moines, 39 Iowa, 575; Vance *v.* Little Rock, 30 Ark. 435; English *v.* Chicot County, 26 Ark. 454; Pullen *v.* Raleigh, 68 N. C. 451; Chisholm *v.* Montgomery, 2 Woods, 584; Burmeister *v.* Howard, 1 Wash. Ter. 207; Bell *v.* Plattville, 71 Wis. 139, 36 N. W. 831; Murphy *v.* Jacksonville, 18 Fla. 318. [The expense of providing water for a city is not a "necessary expense" and therefore is within the constitutional limitation upon the debt-creating power of the municipality. Edgerton *v.* Goldsboro Water Co., 120 N. C. 93, 35 S. E. 243, 48 L. R. A. 444. But see Swanson *v.* Ottumwa, — Iowa, —, 91 N. W. 1048, and Grunewalds *v.* Cedar Rapids, — Iowa, —, 91 N. W. 1059. Where a state board of health is empowered to quarantine and inspect persons and disinfect baggage from countries where contagious disease is for good reasons suspected, it cannot extend its powers, and quarantine all immigrants and incoming baggage. Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, 47 Am. St. 525. See also Wilson *v.* Alabama G. S. R. Co., 77 Miss. 714, 28 So. 567, 78 Am. St. 543. Power to regulate ten-pin alleys does not authorize their exclusion from all places within fire limits. *Ex parte* Patterson, — Tex. Cr. —, 58 S. W. 1011, 51 L. R. A. 654.]

which it does not, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based upon its unauthorized action. Even where a party is induced to enter upon work for a corporation by the false representations of corporate officers in regard to the existence of facts on which by law the power of the corporation to enter upon the work depends, these false representations cannot have the effect to give a power which in the particular case was wanting, or to validate a contract otherwise void, and therefore can afford no ground of action against the corporation; but every party contracting with it must take notice of any want of authority which the public records would show.[1] This is the

[1] The common council of Williamsburg had power to open, regulate, grade, and pave streets, but only upon petition signed by one-third of the persons owning lands within the assessment limits. A party entered into a contract with the corporation for improving a street, upon the false representations of the council that such a petition had been presented. Held, that the provision of law being public, and all the proceedings leading to a determination by the council to make a particular improvement being matters of record, all persons were chargeable with notice of the law and such proceedings; and that, notwithstanding the false representations, no action would lie against the city for work done under the contract. Swift v. Williamsburg, 24 Barb. 427. "If the plaintiff can recover on the state of facts he has stated in his complaint, the restriction and limitations which the legislature sought to impose upon the powers of the common council will go for nothing. And yet these provisions are matters of substance, and were designed to be of some service to the constituents of the common council. They were intended to protect the owners of lands and the taxpayers of the city, as well against the frauds and impositions of the contractors who might be employed to make these local improvements, as against the illegal acts of the common council themselves in employing the contractors. But if the plaintiff can recover in this action, of what value or effect are all these safeguards? If the common council desire to make a local improvement, which the persons to be benefited thereby, and to be assessed therefor, are unwilling to have made, the consent of the owners may be wholly dispensed with, according to the plaintiff's theory. The common council have only to represent that the proper petition has been presented and the proper proceedings have been taken, to warrant the improvement. They then enter into the contract. The improvement is made. Those other safeguards for an assessment of the expenses and for reviewing the proceedings may or may not be taken. But when the work is completed and is to be paid for, it is found that the common council have no authority to lay any assessment or collect a dollar from the property benefited by the improvement. The contractor then brings his action, and recovers from the city the damages he has sustained by the failure of the city to pay him the contract price. The ground of his action is the falsity of the representations made to him. But the truth or falsity of such representations might have been ascertained by the party with the use of the most ordinary care and diligence. The existence of the proper petition, and the taking of the necessary initiatory steps to warrant the improvement, were doubtless referred to and recited in the contract made with the plaintiff. And he thus became again directly chargeable with notice of the contents of all these papers. It is obvious that the restrictions and limitations imposed by the law cannot thus be evaded. The consent of the parties interested in such improvements cannot be dispensed with; the responsibility, which

general rule, and the cases of unauthorized action which may bind the corporation are exceptional, and will be referred to further on.

Municipal corporations exercise the authority conferred upon them by law through votes of the corporators at public meetings, and through officers and agents duly elected or chosen. The corporators are the resident electors, who, under the general laws of the State, may vote at the ordinary elections, though sometimes, in special cases, the franchise has been conferred upon taxpayers exclusively. A meeting of corporators for any purpose of legal action must be regularly convened in such manner or at such time as may have been prescribed by law. If the corporators were to come together at any time without legal permission and assume to act for the corporation, their action would be of no legal force or validity whatever. The State permits them to wield a part of the governmental authority of the State, but only on the conditions which the law has prescribed, and one of these

the conditions precedent created by the statute impose, cannot be thrown off in this manner. For the effect of doing so is to shift entirely the burden of making these local improvements, to relieve those on whom the law sought to impose the expense, and to throw it on others who are not liable either in law or morals."

So, where the charter of Detroit provided that no public work should be contracted for or commenced until an assessment had been levied to defray the expense, and that no such work should be paid or contracted to be paid for, except out of the proceeds of the tax thus levied, it was held that the city corporation had no power to make itself responsible for the price of any public work, and that such work could only be paid for by funds actually in the hands of the city treasurer, provided for the specific purpose. Goodrich *v.* Detroit, 12 Mich. 279. But if the city receives the fund and misappropriates it, it will be liable. Lansing *v.* Van Gorder, 24 Mich. 456. And that even if a contract is *ultra vires* a city is liable for value of work done under it, provided it receives the benefit of it, see Schipper *v.* Aurora, 121 Ind. 154, 22 N. E. 878, and cases cited.

Parties dealing with the agents or officers of municipal corporations must, at their own peril, take notice of the limits of the powers both of the municipal corporation, and of those assuming to act on its behalf. State *v.* Kirkley, 29 Md. 85; Gould *v.* Sterling, 23 N. Y. 456; Clark *v.* Des Moines, 19 Iowa, 199; Veeder *v.* Lima, 19 Wis. 280; Bryan *v.* Page, 51 Tex. 532, 32 Am. Rep. 637; Tainter *v.* Worcester, 123 Mass. 311, 25 Am. Rep. 90; Barton *v.* Swepston, 44 Ark. 437; Thomas *v.* Richmond, 12 Wall. 349; East Oakland *v.* Skinner, 94 U. S. 255; Dillon, Mun. Corp. § 381. But a *bona fide* holder of municipal obligations has a right to rely upon the truth of their recitals, if they appear to be warranted by the legislation under which they are issued. Coloma *v.* Eaves, 92 U. S. 484; Walnut *v.* Wade, 103 U. S. 683; Pana *v.* Bowler, 107 U. S. 529, 2 Sup. Ct. Rep. 704; New Providence *v.* Halsey, 117 U. S. 336, 6 Sup. Ct. Rep. 764; Oregon *v.* Jennings, 119 U. S 74, 7 Sup Ct. Rep. 124; Aberdeen *v.* Sykes, 59 Miss. 236; and cases *post*, pp. 319–325. [Contract for erecting public buildings and providing that only union labor shall be employed thereon is void, as unduly restricting competition and thereby increasing the cost of the work. Adams *v.* Brennan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. 222. And see in this connection Atlanta *v.* Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; Fiske *v.* People, 188 Ill. 206, 58 N. E. 985; People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. 605.]

is that it shall be exercised in an orderly manner, at meetings assembled upon due notice and conducted according to legal forms, in order that there may be opportunity for reflection, consultation, and deliberation.[1] The notice may be either general, and given by the law itself, or it may be special, and given by some corporate officer or agent. Annual meetings are commonly provided for by general law, which names a time, and perhaps a place for the purpose. Of this general law every corporator must take notice, and the meetings held in pursuance of it are legal, even though a further notice by publication, which the statute directs, has been omitted.[2] But for special meetings the requirement of special notice is imperative, and it must be given as the statute requires.[3] Sometimes it is directed to be given by publication, sometimes by posted notice, and sometimes by personal notification. If the law requires the order or warrant for the meeting to specify its object, compliance is imperative, and the business which can be lawfully done at the meeting will be strictly limited to the object stated.[4]

Special charters for corporations usually provide for some governing body who shall be empowered to make laws for them within the sphere of the powers conferred, and perhaps to appoint some portion or all of the ministerial and administrative officers. In the case of towns, school districts, &c., the power to make laws is largely confided to the corporators assembled in annual meeting;[5] and in the case of counties, in some county board. The laws, whether designated orders, resolutions, or ordinances, are more often in law spoken of as by-laws, and they must be justified by the grant of power which the State has made. Whatever is *ultra vires* in the case of any delegated authority, is of course void.

Whatever is said above respecting notice for corporate meet-

[1] Chamberlain *v.* Dover, 13 Me. 466, 29 Am. Dec. 517; Evans *v.* Osgood, 18 Me. 213; School District *v.* Atherton, 12 Met. 105; Stone *v.* School District, 8 Cush. 592; Bethany *v.* Sperry, 10 Conn. 200; State *v.* Harrison, 67 Ind. 71; Pike County *v.* Rowland, 94 Pa. St. 238; State *v.* Pettineli, 10 Nev. 181; State *v.* Bonnell, 35 Ohio St. 10; Ross *v.* Crockett, 14 La. Ann. 811; Goulding *v.* Clark, 34 N. H. 148. See Stow *v.* Wise, 7 Conn. 214, 18 Am. Dec. 99; Brooklyn Trust Co. *v.* Hebron, 51 Conn. 22; Pierce *v.* New Orleans Building Co., 9 La. 397, 29 Am. Dec. 448; Atlantic De Laine Co. *v.* Mason, 5 R. I. 463.

[2] See People *v.* Cowles, 13 N. Y. 350; People *v.* Hartwell, 12 Mich. 508; People *v.* Brenham, 3 Cal. 477; State *v.* Orvis, 20 Wis. 235; Dishon *v.* Smith, 10 Iowa, 212; State *v.* Jones, 19 Ind. 356.

[3] Tuttle *v.* Cary, 7 Me. 426.

[4] Little *v.* Merrill, 10 Pick. 543; Bartlett *v.* Kinsley, 15 Conn. 327; Atwood *v.* Lincoln, 44 Vt. 332; Holt's Appeal, 5 R. I. 603; Reynolds *v.* New Salem, 6 Met. 340; Bowen *v.* King, 34 Vt. 156; Haines *v.* School District, 41 Me. 246; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 7 Sup. Ct. Rep. 865.

[5] See Williams *v.* Roberts, 88 Ill. 11.

ings is equally applicable to meetings of the official boards, with this exception: that as the board is composed of a definite number of persons, if these all convene and act they may thereby waive the want of notice. But the meeting of a mere majority without notice to the others would be without legal authority.[1]

Corporations by Prescription and Implication.

The origin of many of the corporate privileges asserted and enjoyed in England is veiled in obscurity, and it is more than probable that in some instances they had no better foundation than an uninterrupted user for a considerable period. In other cases the royal or baronial grant became lost in the lapse of time, and the evidence that it had ever existed might rest exclusively upon reputation, or upon the inference to be drawn from the exercise of corporate functions. In all these cases it seems to be the law that the corporate existence may be maintained on the ground of *prescription;* that is to say, the exercise of corporate rights for a time whereof the memory of man runneth not to the contrary is sufficient evidence that such rights were once granted by competent authority, and are therefore now exercised by right and not by usurpation.[2] And this presumption concludes the crown, notwithstanding the maxim that the crown shall lose no rights by lapse of time. If the right asserted is one of which a grant might be predicated, a jury is bound to presume a grant from that prescription.[3] In this particular the claim to a corporate franchise stands on the same ground as any claim of private right which requires a grant for its support, and is to be sustained under the same circumstances of continuous assertion and enjoyment.[4] And even the grant of a charter by the crown will not preclude the claim to corporate rights by prescription; for a new charter does not extinguish old privileges.[5]

A corporation may also be established upon presumptive evidence that a charter has been granted within the time of memory. Such evidence is addressed to a jury, and though not conclusive upon them, yet, if it reasonably satifies their minds, it will justify

[1] Gordon *v.* Preston, 1 Watts, 385, 26 Am. Dec. 75.

[2] Introduction to Willcock on Municipal Corporations; The King *v.* Mayor, &c. of Stratford upon Avon, 14 East, 348; Robie *v.* Sedgwick, 35 Barb. 319. See Londonderry *v.* Andover, 28 Vt. 416.

[3] Mayor of Hull *v.* Horner, Cowp. 104, per Lord *Mansfield*. Compare People *v.* Maynard, 15 Mich. 463; State *v.* Bunker, 59 Me. 366.

[4] 2 Kent, 277; Angell & Ames on Corp. § 70, 1 Kyd on Corp. 14.

[5] Hadduck's Case, T. Raym. 439; The King *v.* Mayor, &c. of Stratford upon Avon, 14 East, 348; Bow *v.* Allenstown, 34 N. H. 351. See Jameson *v.* People, 16 Ill. 257.

them in a verdict finding the corporate existence. "There is a great difference," says Lord *Mansfield*, "between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time which operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt: though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription. If it be time out of mind, a jury is bound to preclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence, showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury, to be credited or not, and to draw their inference one way or the other according to circumstances." [1] The same ruling has been had in several cases in the courts of this country, where corporate powers had been exercised, but no charter could be produced. In one of these cases, common reputation that a charter had once existed was allowed to be given to the jury; the court remarking upon the notorious fact that two great fires in the capital of the colony had destroyed many of the public records.[2] In other cases there was evidence of various acts which could only lawfully and properly be done by a corporation, covering a period of thirty, forty, or fifty years, and done with the knowledge of the State and without question.[3] The inference of corporate powers, however, is not one of law; but it is to be drawn as a fact by the jury.[4]

Wherever a corporation is found to exist by prescription, the same rule as to construction of powers, we apprehend, would apply as in other cases. The presumption as to the powers granted would be limited by the proof of the usage, and nothing could be taken by intendment which the usage did not warrant.

Corporations are also said sometimes to exist by implication. When that power in the State which can create corporations grants to individuals such property, rights, or franchises, or imposes upon them such burdens, as can only be properly held, enjoyed, continued, or borne, according to the terms of the grant, by a corporate entity, the intention to create such corporate entity is to be presumed, and corporate capacity is held to be conferred

[1] Mayor of Hull *v.* Horner, Cowp. 104, 108; citing, among other cases, Bedle *v.* Beard, 12 Co. 5.

[2] Dillingham *v.* Snow, 5 Mass. 547. And see Bow *v.* Allenstown, 34 N. H. 351; Bassett *v.* Porter, 4 Cush. 487.

[3] Stockbridge *v.* West Stockbridge, 12 Mass. 400; New Boston *v.* Dunbarton, 12 N. H. 409, and 15 N. H. 201; Bow *v.* Allenstown, 34 N. H. 351; Trott *v.* Warren, 11 Me. 227.

[4] New Boston *v.* Dunbarton, 15 N. H. 201; Bow *v.* Allenstown, 34 N. H. 351; Mayor of Hull *v.* Horner, 14 East, 102.

so far as is necessary to effectuate the purpose of the grant or burden. On this subject it will be sufficient for our purpose to refer to authorities named in the note.[1] In these cases the rule of strict construction of corporate powers applies with unusual force.

Municipal By-Laws. (*a*)

The power of municipal corporations to make by-laws is limited in various ways.

1. It is controlled by the Constitution of the United States and of the State. The restrictions imposed by those instruments, which directly limit the legislative power of the State, rest equally upon all the instruments of government created by the State. If a State cannot pass an *ex post facto* law, or law impairing the obligation of contracts, neither can any agency do so which acts under the State with delegated authority.[2] By-laws, therefore, which in their operation would be *ex post facto*, or violate contracts, are not within the power of municipal corporations; and whatever the people by the State constitution have prohibited the State government from doing, it cannot do indirectly through the local governments.

2. Municipal by-laws must also be in harmony with the general

[1] Dyer, 400, cited by Lord *Kenyon*, in Russell *v.* Men of Devon, 2 T. R. 667, and in 2 Kent, 276; Viner's Abr. tit. "Corporation;" Conservators of River Tone *v.* Ash, 10 B. & C. 349, 10 B. & C. 383, citing case of Sutton Hospital, 10 Co. 28; per *Kent*, Chancellor, in Denton *v.* Jackson, 2 Johns. Ch. 320; Coburn *v.* Ellenwood, 4 N. H. 99; Atkinson *v.* Bemis, 11 N. H. 44; North Hempstead *v.* Hempstead, 2 Wend. 109; Thomas *v.* Dakin, 22 Wend. 9; per *Shaw*, Ch. J., in Stebbins *v.* Jennings, 10 Pick. 172; Mahony *v.* Bank of the State, 4 Ark. 620. Only where a contract made in good faith cannot otherwise be enforced, will the doctrine of implication be upheld. Blair *v.* West Point, 2 McCrary, 459, and cases cited.

[2] Angell & Ames on Corporations, § 322; Stuyvesant *v.* Mayor, &c. of New York, 7 Cow. 588; Brooklyn Central Railroad Co. *v.* Brooklyn City Railroad Co., 32 Barb. 358; Illinois Conference Female College *v.* Cooper, 25 Ill. 148. The last was a case where a by-law of an educational corporation was held void, as violating the obligation of a contract previously entered into by the corporation in a certificate of scholarship which it had issued. See also Davenport, &c. Co. *v.* Davenport, 13 Iowa, 229; Saving Society *v.* Philadelphia, 31 Pa. St. 175; Haywood *v.* Savannah, 12 Ga. 404. If an ordinance and its acceptance make a contract, it cannot be impaired by subsequent ordinances. People *v.* Chicago W. D. Ry. Co., 118 Ill. 113, 7 N. E. 116; Kansas City *v.* Corrigan, 86 Mo. 67. [A city cannot set apart a certain street as a boulevard and require that only residences be erected upon the lands abutting thereon. St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. 575, 42 L. R. A. 686. An ordinance forbidding any person "knowingly to associate with persons having the reputation of being thieves is invalid." *Ex parte* Smith, 135 Mo. 223, 36 S. W. 628, 58 Am. St. 576, 33 L. R. A. 606. So an ordinance forbidding the carrying on of one's regular occupation on Christmas Day is void. Watson *v.* Town of Thom, — Ga. —, 42 S. E. 747.]

(*a*) [Upon municipal ordinances and by-laws, see note to 41 L. ed. U. S. 519.]

laws of the State, and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-law must give way.[1] The charter, however, may expressly or by necessary implication exclude the general laws of the State on any particular subject, and allow the corporation to pass local laws at discretion, which may differ from the rule in force elsewhere.[2] But in these cases the control of the State is not excluded if the legislature afterward see fit to exercise it; nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the State law on the same subject, but the State law and the by-law may both stand together if not inconsistent.[3] Indeed, an act may be a penal offence under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other.[4]

[1] Wood *v.* Brooklyn, 14 Barb. 425; Mayor, &c. of New York *v.* Nichols, 4 Hill, 209; Petersburg *v.* Metzker, 21 Ill. 205; Southport *v.* Ogden, 23 Conn. 128; Andrews *v.* Insurance Co., 37 Me. 256; Canton *v.* Nist, 9 Ohio St. 439; Carr *v.* St. Louis, 9 Mo. 191; Commonwealth *v.* Erie & Northeast Railroad Co., 27 Pa. St. 339; Burlington *v.* Kellar, 18 Iowa, 59; Conwell *v.* O'Brien, 11 Ind. 419; March *v.* Commonwealth, 12 B. Monr. 25. See Baldwin *v.* Green, 10 Mo. 410; Cowen *v.* West Troy, 43 Barb. 48; State *v.* Georgia Medical Society, 38 Ga. 608; Pesterfield *v.* Vickers, 3 Cold. 205; Mays *v.* Cincinnati, 1 Ohio St. 268; Wirth *v.* Wilmington, 68 N. C. 24; Flood *v.* State, 19 Tex. App. 584; Bohmy *v.* State, 21 Tex. App. 597, 2 S. W. 886; [Shreveport *v.* Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193; Katzenberger *v.* Lawn, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185, 25 Am. St. 681. Ordinance cannot authorize keeping within city limits a greater quantity of explosives than statute allows. Cameron *v.* Kenyon-Connell Comm'l Co., 22 Mont. 312, 56 Pac. 358, 44 L. R. A. 508. Ordinance granting exclusive privilege for thirty years to construct and maintain waterworks to supply town with water is void as creating a monopoly. Thrift *v.* Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427. Ordinance cannot *penalize* the employment of a laborer by a contractor for more than eight hours a day upon city works. *Re* Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. 226.] Under the Kansas Constitution no city can by imposing a liquor license tax encourage a forbidden business without incurring a liability to be ousted of its corporate powers. State *v.* Topeka, 30 Kan. 653, 2 Pac. 587, 31 Kan. 452, 2 Pac. 593.

[2] State *v.* Clark, 1 Dutch. 54; State *v.* Dwyer, 21 Minn. 512; Covington *v.* East St. Louis, 78 Ill. 548; Coulterville *v.* Gillen, 72 Ill. 599; McPherson *v.* Cheoanse, 114 Ill. 46, 28 N. E. 454; St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571. Peculiar and exceptional regulations may even be made applicable to particular portions of a city only, and yet not be invalid. Goddard, Petitioner, 16 Pick. 504; Commonwealth *v.* Patch, 97 Mass. 221, per *Hoar*, J.; St. Louis *v.* Weber, 44 Mo. 547.

[3] City of St. Louis *v.* Bentz, 11 Mo. 61; City of St. Louis *v.* Cafferata, 24 Mo. 94; Rogers *v.* Jones, 1 Wend. 261; Levy *v.* State, 6 Ind. 281; Mayor, &c. of Mobile *v.* Allaire, 14 Ala. 400; Elk Point *v.* Vaugn, 1 Dak. 113; People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124.

[4] Such is the clear weight of authority, though the decisions are not uniform. We quote from Rogers *v.* Jones, 1 Wend. 261: "But it is said that the by-law of a town or corporation is void, if the legislature have regulated the subject by law. If the legislature have passed a law regulating as to certain things in a city, I

3. Municipal by-laws must also be reasonable. Whenever they appear not be so, the court must, as a matter of law, declare

apprehend the corporation are not thereby restricted from making further regulations. Cases of this kind have occurred and never been questioned on that ground; it is only to notice a case or two out of many. The legislature have imposed a penalty of one dollar for servile labor on Sunday; the corporation of New York have passed a by-law imposing the penalty of five dollars for the same offence. As to storing gunpowder in New York, the legislature and corporation have each imposed the same penalty. Suits to recover the penalty have been sustained under the corporation law. It is believed that the ground has never been taken that there was a conflict with the State law. One of these cases is reported in 12 Johns. 122. The question was open for discussion, but not noticed." In Mayor, &c. of Mobile *v.* Allaire, 14 Ala. 400, the validity of a municipal by-law, imposing a fine of fifty dollars for an assault and battery committed within the city, was brought in question. *Collier*, Ch. J., says (p. 403): "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offence against the criminal justice of the country, but to provide a mere *police regulation*, for the enforcement of good order and quiet within the limits of the corporation. So far as an offence has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the State tribunal has interfered and exercised its power in bringing the defendant before it to answer for the assault and battery; for whether he has there been punished or acquitted is alike unimportant. The offence against the corporation and the State we have seen are distinguishable and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis; the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view, the maintenance of the peace and dignity of the State." See also Mayor, &c. of Mobile *v.* Rouse, 8 Ala. 515; Intendant, &c. of Greensboro' *v.* Mullins, 13 Ala. 341; Mayor, &c. of New York *v.* Hyatt, 3 E. D. Smith, 156; People *v.* Stevens, 13 Wend. 341; Blatchley *v.* Moser, 15 Wend. 215; Amboy *v.* Sleeper, 31 Ill. 499; State *v.* Crummey, 17 Minn. 72; State *v.* Oleson, 26 Minn. 507, 5 N. W. 959; Greenwood *v.* State, 6 Bax. 567, 32 Am. Rep. 539; Brownville *v.* Cook, 4 Neb. 101; Levy *v.* State, 6 Ind. 281; Ambrose *v.* State, 6 Ind. 351; Lawrenceburg *v.* Wuest, 16 Ind. 337; St. Louis *v.* Bentz, 11 Mo. 61; St. Louis *v.* Cafferata, 24 Mo. 94; State *v.* Gordon, 60 Mo. 383; St. Louis *v.* Schoenbusch, 95 Mo. 618, 8 S. W. 791; Shafer *v.* Mumma, 17 Md. 331; Brownville *v.* Cook, 4 Neb. 101; State *v.* Ludwig, 21 Minn. 202; Bloomfield *v.* Trimble, 54 Iowa, 399, 37 Am. Rep. 212; Chicago Packing, &c. Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545; Hankins *v.* People, 106 Ill. 628; Fennell *v.* Bay City, 36 Mich. 186; McRea *v.* Americus, 59 Ga. 168; Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295; Hughes *v.* People, 8 Col. 536, 9 Pac. 50. [Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725; Thiesen *v.* McDavid, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; Ogden *v.* City of Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506. So, too, the same act may be a crime against a State and against the United States, punishable by each. People *v.* Welch, 141 N. Y. 266, 36 N. E. 328, 24 L. R. A. 117, 38 Am. St. 793.] Under a statute forbidding cities to punish acts punishable by State law, a city may punish selling liquor without a city license, as this is not an offence against the State law. Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802. On the other hand, it was held in State *v.* Cowan, 29 Mo. 330. that where a municipal corporation was authorized to take cognizance of and punish an act as an offence against its ordinances which was also an offence against the general laws of the State, and this power was exercised and the party punished, he could not afterwards be proceeded against under the State law. "The constitution," say the court, "forbids that a person shall be twice punished for the same offence. To hold that

them void.[1] To render them reasonable, they should tend in

a party can be prosecuted for an act under the State laws, after he has been punished for the same act by the municipal corporation within whose limits the act was done, would be to overthrow the power of the General Assembly to create corporations to aid in the management of the affairs of the State. For a power in the State to punish, after a punishment had been inflicted by the corporate authorities, could only find a support in the assumption that all the proceedings on the part of the corporation were null and void. The circumstance that the municipal authorities have not exclusive jurisdiction over the acts which constitute offences within their limits does not affect the question. It is enough that their jurisdiction is not excluded. If it exists, — although it may be concurrent, — if it is exercised, it is valid and binding so long as it is a constitutional principle that no man may be punished twice for the same offence." A similar ruling is laid down in People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, and the case seems to be supported by State *v.* Welch, 36 Conn. 216. The case of Slaughter *v.* People, cited below, goes still farther. Those which hold that the party may be punished under both the State and the municipal law are within the principle of Fox *v.* State, 5 How. 410; Moore *v.* People, 14 How. 13. And see Phillips *v.* People, 55 Ill. 429; State *v.* Rankin, 4 Cold. 145; *Ex parte* Siebold, 100 U. S. 371. A city cannot punish by ordinance what is already an offence by statute. State *v.* Keith, 94 N. C. 933; *In re* Sic, 73 Cal. 142, 14 Pac. 405; Menken *v.* Atlanta, 78 Ga. 668, 2 S. E. 559; [especially where the Constitution prescribes that all prosecutions shall be conducted in the name and by the authority of the State. *Ex parte* Fagg, 38 Tex. Cr. 573, 44 S. W. 294, 40 L. R. A. 212;] unless expressly empowered: *Ex parte* Bourgeois, 60 Miss. 663. See Loeb *v.* Attica, 82 Ind. 175. In Jefferson City *v.* Courtmire, 9 Mo. 692, it was held that authority to a municipal corporation to "regulate the police of the city" gave it no power to pass an ordinance for the punishment of indictable offences. To the same effect is State *v.* Savannah, 1 T. U. P. Charl. 235, 4 Am. Dec. 708; Slaughter *v.* People, 2 Doug. (Mich.) 334; Jenkins *v.* Thomasville, 35 Ga. 145; Vason *v.* Augusta, 38 Ga. 542; Reich *v.* State, 53 Ga. 73; Washington *v.* Hammond, 76 N. C. 33; New Orleans *v.* Miller, 7 La. Ann. 651. [And see also State *v.* McNally, 48 La. Ann. 1450, 21 So. 27, 36 L. R. A. 533.]

Where an act is expressly or by implication permitted by the State law, it cannot be forbidden by the corporation. Thus, the statutes of New York established certain regulations for the putting up and marking of pressed hay, and provided that such hay might be sold without deduction for tare, and by the weight as marked, or any other standard weight that should be agreed upon. It was held that the city of New York had no power to prohibit under a penalty the sale of such hay without inspection; this being obviously inconsistent with the statute which gave a right to sell if its regulations were complied with. Mayor, &c. of New York *v.* Nichols, 4 Hill, 209.

The penal enactments of a corporation, like those of the State, must be several (De Ben *v.* Gerard, 4 La. Ann. 30), and will be strictly construed. St. Louis *v.* Goebel, 32 Mo. 295. An ordinance punishing as a crime a failure to build a sidewalk is void. Port Huron *v.* Jenkinson, 77 Mich. 414, 43 N. W. 23. Compare James *v.* Pine Bluff, 40 Ark. 199, 4 S. W. 760.

[1] 2 Kyd on Corporations, 107; Davies *v.* Morgan, 1 Cromp. & J. 587; Chamberlain of London *v.* Compton, 7 D & R. 597; Clark *v.* Le Cren, 9 B. & C. 52; Gosling *v.* Veley, 12 Q. B. 328; Dunham *v.* Rochester, 5 Cow. 462; Mayor, &c. of Memphis *v.* Winfield, 8 Humph. 707; Hayden *v.* Noyes, 5 Conn. 391; Waters *v.* Leech, 3 Ark. 110; White *v.* Mayor, 2 Swan, 364; *Ex parte* Burnett, 30 Ala. 461; Craig *v.* Burnett, 32 Ala. 728; Austin *v.* Murray, 16 Pick. 121; Goddard, Petitioner, 16 Pick. 504; Commonwealth *v.* Worcester, 3 Pick. 461; Commissioners *v.* Gas Co., 12 Pa. St. 318; State *v.* Jersey City, 29 N. J. 170; Gallatin *v.* Bradford, 1 Bibb, 209; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525; State *v.* Freeman, 38 N. H. 426; Pedrick *v.* Bailey, 12 Gray, 161; St. Louis *v.* Weber, 44 Mo. 550; Peoria *v.* Calhoun, 29 Ill. 317; St. Paul *v.* Traeger, 25 Minn. 248,

some degree to the accomplishment of the objects for which the corporation was created and its powers conferred. A by-law, that persons chosen annually as stewards of the Society of Scriveners should furnish a dinner on election day to the freemen of the society,— the freemen not being the electors nor required to attend, and the office of steward being for no other purpose but that of giving the dinner, — was held not connected with the business of the corporation, and not tending to promote its objects, and therefore unreasonable and void.[1] And where a statute permitted a municipal corporation to license the sale of intoxicating drinks and to charge a license fee therefor, a by-law requiring the payment of a license fee of one thousand dollars was held void as not advancing the purpose of the law, but as being in its nature prohibitory.[2] And if a corporation has power to prohibit the carrying on of dangerous occupations within its limits, a by-law which should permit one person to carry on such an occupation and prohibit another, who had an equal right, from pursuing the same business; or which should allow the business to be carried on in existing buildings, but prohibit the erection of others for it, would

83 Am. Rep. 462. But where the question of the reasonableness of a by-law depends upon evidence, and it relates to a subject within the jurisdiction of the corporation, the court will presume it to be reasonable until the contrary is shown. Commonwealth *v.* Patch, 97 Mass. 221. And see St. Louis *v.* Weber, 44 Mo. 547; Clason *v.* Milwaukee, 30 Wis. 316; St. Louis *v.* Knox, 6 Mo. App. 247. An ordinance expressly authorized by the legislature cannot be held unreasonable. A Coal Float *v.* Jeffersonville, 112 Ind. 15, 13 N. E. 115. To be reasonable, by-laws should be equal in their operation. Tugman *v.* Chicago, 78 Ill. 405; Barling *v.* West, 29 Wis. 307. An ordinance as to obstructing streets with cars, unreasonable in its operation only in one locality, will be enforced elsewhere. Pennsylvania R. R. Co. *v.* Jersey City, 47 N. J. L. 286. [Ordinance penalizing the sale or gift of street railway transfer tickets contrary to regulations of company issuing them is not unreasonable. *Ex parte* Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55. To be invalid because unreasonable its unreasonable character must be so clearly apparent as to indicate a mere arbitrary exercise of the power vested in the council. State *v.* Barge, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428; Wygant *v.* McLauchlan, 39 Oreg. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. 673; State *v.* Robart, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947. In *Ex parte* Bahen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618, an ordinance prohibiting burials on lots not purchased before its enactment for such purpose is void upon the theory that it is unreasonable in that the right to restrain burials rests upon the theory that all burials are injurious to the public. See Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357.]

[1] Society of Scriveners *v.* Brooking, 3 Q. B. 95. See, on this general subject, Dillon, Mun. Corp. §§ 251–264.

[2] *Ex parte* Burnett, 30 Ala. 461; Craig *v.* Burnett, 32 Ala. 728. A by-law declaring the keeping on hand of intoxicating liquors a nuisance was held unreasonable and void in Sullivan *v.* Oneida, 61 Ill. 242. That which is not a nuisance in fact cannot be made such by municipal ordinance. Chicago, &c. R. R. Co. *v.* Joliet, 79 Ill. 25; State *v.* Mott, 61 Md. 297; *post*, p. 883, note 1. [Authority to levy a license tax does not authorize the levy of one so heavy as to be prohibitory, where the business upon which it is levied is useful and legitimate. Morton *v.* Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485.]

be unreasonable.[1] And a right to license an employment does not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power; but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation; and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it.[2]

[1] Mayor, &c. of Hudson *v.* Thorne, 7 Paige, 261. A power to prevent and regulate the carrying on of manufactures dangerous in causing or promoting fires does not authorize an ordinance prohibiting the erection of wooden buildings within the city, or to limit the size of buildings which individuals shall be permitted to erect on their own premises. *Ibid.* See also Newton *v.* Belger, 143 Mass. 598, 10 N. E. 464. An ordinance for the destruction of property as a nuisance without a judicial hearing is void. Darst *v.* People, 51 Ill. 286. See cases p. 883, n. 1, *post.* An ordinance for the arrest and imprisonment without warrant of a person refusing to assist in extinguishing a fire is void. Judson *v.* Reardon, 16 Minn. 431. [One which forbids the establishment and maintenance of livery stables within a specified part of the town, and then expressly exempts from its operation the stables already established, is void. Crowley *v.* West, 52 La. Ann. 526, 27 So. 53, 47 L. R. A. 652, 78 Am. St. 355.]

[2] State *v.* Roberts, 11 Gill & J. 506; Mays *v.* Cincinnati, 1 Ohio St. 268; Cincinnati *v.* Bryson, 15 Ohio, 625; Freeholders *v.* Barber, 6 N. J. Eq. 64; Kip *v.* Paterson, 26 N. J. 298; State *v.* Hoboken, 41 N. J. 71; Bennett *v.* Borough of Birmingham, 31 Pa. St. 15; Commonwealth *v.* Stodder, 2 Cush. 562; Chilvers *v.* People, 11 Mich. 43; Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137; Johnson *v.* Philadelphia, 60 Pa. St. 445; State *v.* Herod, 29 Iowa, 123; Burlington *v.* Bumgardner, 42 Iowa, 673; Mayor, &c. of New York *v.* Second Avenue R. R. Co., 32 N. Y. 261; Home Ins. Co. *v.* Augusta, 50 Ga. 530; Cairo *v.* Bross, 101 Ill. 475; Muhlenbrinck *v.* Commissioners, 42 N. J. 364; 36 Am. Rep. 518; Mestayer *v.* Corrigé, 38 La. Ann. 708; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828, Vansant *v.* Harlem Stage Co., 59 Md. 330. Nevertheless, the courts will not inquire very closely into the expense of a license with a view to adjudge it a tax, where it does not appear to be unreasonable in amount in view of its purpose as a regulation. Ash *v.* People, 11 Mich. 347; Van Baalen *v.* People, 40 Mich. 458; People *v.* Russell, 49 Mich. 617, 14 N. W. 568; Wolf *v.* Lansing, 53 Mich. 367, 19 N. W. 38; Johnson *v.* Philadelphia, 60 Pa. St. 445; Burlington *v.* Putnam Ins. Co., 31 Iowa, 102; Boston *v.* Schaffer, 9 Pick. 415; Welch *v.* Hotchkiss, 39 Conn. 140; State *v.* Hoboken, 41 N. J. 71; Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361; Jackson *v.* Newman, 59 Miss. 385; *Ex parte* Gregory, 20 Tex. App. 210; Fayetteville *v.* Carter, 52 Ark. 301, 12 S. W. 573. [Littlefield *v.* State, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. 697. Liquor license fee of $2000 in a city of 4000 inhabitants sustained in *Ex parte* Sikes, 102 Ala. 173, 15 So. 522, 24 L. R. A. 774.] In Illinois the imposition of license fees for revenue has been sustained. U. S. Dist. Co. *v.* Chicago, 112 Ill. 19, and cases cited; and under the California Constitution of 1879 licenses may be imposed for regulation or revenue, or both. *In re* Guerrero, 69 Cal. 88, 10 Pac. 261. A higher license imposed on a non-resident than on a resident for purposes of revenue is void. Morgan *v.* Orange, 50 N. J. L. 389, 13 Atl. 240. And in some cases it has been held that license fees might be imposed under the police power with a

A by-law, to be reasonable, should be certain.[1] If it affixes a penalty for its violation, it would seem that such penalty should be a fixed and certain sum, and not left to the discretion of the officer or court which is to impose it on conviction;[2] though a by-law imposing a penalty *not exceeding* a certain sum has been held not to be void for uncertainty.[3]

So a by-law, to be reasonable, should be in harmony with the general principles of the common law.[4] If it is in general re-

view to operate as a restriction upon the business or thing licensed. Carter *v.* Dow, 16 Wis. 299; Tenney *v.* Lenz, 16 Wis. 566. See State *v.* Cassidy, 22 Minn. 312; Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; St. Johnsbury *v.* Thompson, 59 Vt. 200, 9 Atl. 571; Russellville *v.* White, 41 Ark. 485. But in such cases, where the right to impose such license fees can be fairly deduced from the charter, it would perhaps be safer and less liable to lead to confusion and difficulty to refer the corporate authority to the taxing power, rather than exclusively to the power of regulation. See Dunham *v.* Trustees of Rochester, 5 Cow. 462, upon the extent of the police power. Fees which are imposed under the inspection laws of the State are akin to license fees, and if exacted not for revenue, but to meet the expenses of regulation, are to be referred to the police power. Cincinnati Gas Light Co. *v.* State, 18 Ohio St. 237. A city cannot exact a license fee from a national bank. Carthage *v.* National Bank, 71 Mo. 508, 36 Am. Rep. 494. On this subject in general, see *post*, 709; Dillon, Mun. Corp. §§ 291–308. [Ordinance requiring payment of license fee of $150 per annum by all persons buying claims, held void as to one who bought a few city warrants for purposes of investment only. Bitzer *v.* Thompson, 20 Ky. L. 1318, 49 S. W. 199, 44 L. R. A. 141.]

[1] Ordinance requiring use of device, which shall prevent escape of sparks as effectually as by any means in use for the purpose, is bad. Atkinson *v.* Goodrich Transp. Co., 60 Wis 141, 18 N. W. 764. Under power to prohibit driving at a rate of speed deemed inconsistent with public safety, the city may not prohibit driving at a speed which shall be found to be immoderate under the circumstances. Com. *v.* Roy, 140 Mass. 432, 4 N. E. 814. What shall be a violation of an ordinance cannot be left to implication. Helena *v.* Gray, 7 Mont. 486, 17 Pac. 561. A license fee may not be left to be fixed for each case, or to be determined by the mayor. Bills *v.* Goshen, 117 Ind. 221, 20 N. E. 115; State Center *v.* Barenstein, 66 Iowa, 249, 23 N. W. 652. [Ordinance requiring that any awning over a sidewalk must be "upon a suitable frame" is void for uncertainty. State *v.* Clarke, 69 Conn. 371, 37 Atl. 975, 39 L. R. A. 670, 61 Am. St. 45. So, one requiring a street railway company to provide "in some reasonable manner for the sprinkling of the streets through which their cars run." State *v.* New Orleans City & R. R. Co., 49 La. Ann. 1571, 22 So. 889, 39 L. R. A. 618. Law prescribing different maximum loads for "narrow-tired" and "broad-tired" wagons using specified gravel roads is void for uncertainty in not defining "broad-tired" and "narrow-tired." Cook *v.* State, 26 Ind. Ap. 278, 59 N. E. 489. Statute authorizing revocation of physician's license "for grossly unprofessional conduct of a character likely to deceive or defraud the public" is void for uncertainty. Matthews *v.* Murphy, — Ky. —, 63 S.W. 785 (June 22, 1901).]

[2] Melick *v.* Washington, 47 N. J. L. 254; State *v.* Crenshaw, 94 N. C. 877.

[3] Mayor, &c. of Huntsville *v.* Phelps, 27 Ala. 65, overruling Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137. And see Piper *v.* Chappell, 14 M. & W. 624.

[4] The following are cases in which municipal ordinances have been passed upon and their reasonableness determined: *Markets:* Prohibiting sales outside of. Reasonable — Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 418; Bowling Green *v.* Carson, 10 Bush, 64; Le Claire *v.* Davenport, 13 Iowa, 210; Winnsboro *v.* Smart, 11 Rich. L. 551; St. Louis *v.* Weber, 14 Mo. 547.

straint of trade, — like the by-law that no person shall exercise

Unreasonable — Caldwell *v.* Alton, 33 Ill. 416; Bloomington *v.* Wahl, 46 Ill. 489; Bethune *v.* Hayes, 28 Ga. 560. Compare Hughes *v.* Recorder's Court, 75 Mich. 574, 42 N. W. 984, with People *v.* Kier, 78 Mich. 98, 43 N. W. 1039. See Gossigi *v.* New Orleans, — La. Ann. —, 4 So. 15; *Ex parte* Byrd, 84 Ala. 17. Requiring permission to occupy stands. Reasonable — Nightingale, Petitioner, 11 Pick. 167. Imposing tax on stands. Reasonable — Cincinnati *v.* Buckingham, 10 Ohio, 257. Unreasonable — Kip *v.* Paterson, 26 N. J. 298. *Licensing hucksters:* Reasonable — Cherokee *v.* Fox, 34 Kan. 16, 7 Pac. 625. Unreasonable — Dunham *v.* Rochester, 5 Cow. 462; St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462; Muhlenbrinck *v.* Commissioners, 42 N. J. 364, 36 Am. Rep. 518; Frommer *v.* Richmond, 31 Gratt. 646; Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576. Prohibiting wagons standing in market. Unreasonable — Commonwealth *v.* Brooks, 109 Mass. 355; Commonwealth *v.* Wilkins, 121 Mass. 356. *Auctions:* Prohibiting sales at, on streets. Reasonable — White *v.* Kent, 11 Ohio St. 550. After sunset. Unreasonable — Hayes *v.* Appleton, 24 Wis. 542. Imposing heavy license on. Reasonable — Decorah *v.* Dunstan, 38 Iowa, 96; Wiggins *v.* Chicago, 68 Ill. 372; Fretwell *v.* Troy, 18 Kan. 271. Making it penal to sell without a license. Goshen *v.* Kern, 63 Ind. 468. *Saloons and Restaurants:* Closing for the night. Reasonable — Staats *v.* Washington, 45 N. J. L. 318; Platteville *v.* Bell, 43 Wis. 488; Smith *v.* Knoxville, 3 Head, 245; State *v.* Welch, 36 Conn. 215; State *v.* Freeman, 38 N. H. 426; Maxwell *v.* Jonesboro, 11 Heisk. 257; Baldwin *v.* Chicago, 68 Ill. 418. Unreasonable — Ward *v.* Greenville, 8 Baxt. 228, 35 Am. Rep 700. Closing on certain days. Unreasonable — Grills *v.* Jonesboro, 8 Baxt. 247. On Sunday. Reasonable — Gabel *v.* Houston, 29 Tex. 335; State *v.* Ludwig, 21 Minn. 202; Hudson *v.* Geary, 4 R. I. 485. Forbidding sale of liquor at restaurants. Reasonable — State *v.* Clark, 28 N. H. 176. Forbidding female waiters in saloons. Reasonable — Bergman *v.* Cleveland, 39 Ohio St. 651. [Requiring unobstructed view into all parts of interior from street, from sunset to sunrise, and prohibiting the letting in or out of any person during the hours when the saloon is lawfully required to be closed, is unreasonable; requiring the saloon to be closed from 10 P. M. to 4 A. M. is reasonable. Bennett *v.* Pulaski, — Tenn. Ch. Ap. —, 52 S. W. 913, 47 L. R. A. 278.] *Hackney Carriages:* Reasonable — to regulate fares. Commonwealth *v.* Gage, 114 Mass. 328. To put under direction of police. Commonwealth *v.* Matthews, 122 Mass. 60; St. Paul *v.* Smith, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296; Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644. To exclude from certain streets. Commonwealth *v.* Stodder, 2 Cush. 562. To require a license. Brooklyn *v.* Breslin, 57 N. Y. 591; City Council *v.* Pepper, 1 Rich. L. 364; Frankfort, &c. R. Co. *v.* Philadelphia, 58 Pa. St. 119; St. Louis *v.* Green, 70 Mo. 562. Unreasonable — To grant one person exclusive right to run omnibuses in the city. Logan *v.* Pyne, 43 Iowa, 524, 22 Am. Rep. 261. *Railroads:* Regulating speed of. Reasonable — Pennsylvania Company *v.* James, 81½ Pa. St. 194; Whitson *v.* Franklin, 34 Ind. 392. Unreasonable — Outside of inhabited portion of city. Meyers *v.* Chicago, R. I. & P. Co., 57 Iowa, 555, 10 N. W. 896. But see Knobloch *v.* Chicago, &c. Ry. Co., 31 Minn. 402, 18 N. W. 106. Requiring flagman at crossing which is not dangerous. Unreasonable — Toledo, &c. R. R. Co. *v.* Jacksonville, 67 Ill. 37, 16 Am. Rep. 611. Prohibiting removal of snow by street railway companies without consent of street superintendent. Reasonable — Union Railway Company *v.* Cambridge, 11 Allen, 287. Obstructing streets with cars. Reasonable — Penna. R. R. Co. *v.* Jersey City, 47 N. J. L. 286. *Burials:* Prohibiting in town. Unreasonable — Austin *v.* Murray, 16 Pick. 121. Prohibiting within certain certain limits. Reasonable — Coates *v.* New York, 7 Cowen, 585. Subjecting private cemeteries to control of city sexton. Unreasonable — Bogert *v.* Indianapolis, 13 Ind. 134. Requiring city sexton to expend $500 on the cemetery and to bury paupers free. Unreasonable — Beroujohn *v.* Mobile, 27 Ala. 58. See p. 881, n. 1, *post*. *Fire Limits:* Establishing. Reasonable — King *v.* Davenport,

the art of painter in the city of London, not being free of the com-

98 Ill. 305, 38 Am. Rep. 89; Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; Respublica *v.* Duquet, 2 Yeates, 493; Wadleigh *v.* Gilman, 12 Me. 403, 28 Am. Dec. 188; Brady *v.* Northwestern Ins. Co., 11 Mich. 425; Salem *v.* Maynes, 123 Mass. 372; Troy *v.* Winters, 4 Thomp. & C. (N. Y.) 256; McKibbin *v.* Fort Smith, 35 Ark. 352. Requiring a building license fee. Reasonable — Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383. Forbidding frame buildings in small towns. Unreasonable — Kneedler *v.* Norristown, 100 Pa. St. 368. *Houses of Ill Fame:* Reasonable — Prohibiting keeping of. State *v.* Williams, 11 S. C. 288; Childress *v.* Mayor, 3 Sneed, 356; State *v.* Mack, 41 La. Ann. 1079, 6 So. 808. Imposing penalty on owner of. McAlister *v.* Clark, 33 Conn. 91. Licensing. State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 171. Arresting and fining lewd women. Shafer *v.* Mumma, 17 Md. 331; Braddy *v.* Milledgeville, 74 Ga. 516. Unreasonable — Demolishing. Welch *v.* Stowell, 2 Doug. (Mich.) 332. Forbidding prostitute occupying any room in city. Milliken *v.* City Council, 54 Tex. 388, 38 Am. Rep. 629. [Forbidding all persons except nearest male relative to associate with prostitutes in any public place. Hechinger *v.* Maysville, 22 Ky. L. R. 486, 57 S. W. 619, 49 L. R. A. 114. But prostitutes may be forbidden to be upon the public streets between the hours of 7 P. M. and 4 A. M. without reasonable necessity for so being. Dunn *v.* Commonwealth, 105 Ky. 834, 49 S. W. 813, 43 L. R. A. 701.] *Slaughter Houses:* Prohibiting in certain parts of city. Reasonable — Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564; Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; Milwaukee *v.* Gross, 21 Wis. 241. See Wreford *v.* People, 14 Mich. 41. *Laundries:* Forbidding, except in brick or stone buildings, upheld. Matter of Yick Wo, 68 Cal. 294, 9 Pac. 139; rev. Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. Limited to a certain part of a city. *In re* Hang Kie, 69 Cal. 149, 10 Pac. 327; and to certain hours *Ex parte* Moynier, 65 Cal. 33, 2 Pac. 728. [Ordinance prohibiting within certain district, and declaring such as are within the district nuisances, is unconstitutional. *In re* Hong Wah, 82 Fed. Rep. 623.]

The following are cases in which municipal ordinances have been declared reasonable — Prohibiting keeping of swine in a city. Commonwealth *v.* Patch, 97 Mass. 221; State *v.* Holcomb, 63 Iowa, 107, 20 N. W. 33. Prohibiting swine running at large. Waco *v.* Powell, 32 Tex. 258; Crosby *v.* Warren, 1 Rich. 385; Whitfield *v.* Longest, 6 Ired. L. 268; Roberts *v.* Ogle, 30 Ill. 459; Gosselink *v.* Campbell, 4 Iowa, 296. Prohibiting cattle running at large. Commonwealth *v.* Bean, 14 Gray, 52. Impounding such and selling after such notice. Cartersville *v.* Lanham, 67 Ga. 753; but only the expense of impounding can be retained, not a fine upon the owner. Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435. Granting exclusive rights to remove carcasses of animals, dirt, or offal from city. Vandine, Petitioner, 6 Pick. 187, 17 Am. Dec. 351; *contra*, River Rendering Co. *v.* Behr, 77 Mo. 91. Requiring consent of mayor to maintain an awning. Pedrick *v.* Bailey, 12 Gray, 161. Requiring sidewalk to be cleared of snow. Goddard, petitioner, 16 Pick. 504, 28 Am. Dec. 259; Kirby *v.* Boylston Market Ass'n, 14 Gray, 249; *contra*, Gridley *v.* Bloomington, 88 Ill. 555; [State *v.* Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438; Chicago *v.* O'Brien, 111 Ill. 532, 53 Am. Rep. 640.] Requiring hoist-way to be closed after business hours. New York *v.* Williams, 15 N. Y. 502. Requiring a drawbridge to be closed after a vehicle had been kept waiting ten minutes. Chicago *v.* McGinn, 51 Ill. 266. Prohibiting laying of gas mains in winter. Northern Liberties *v.* Gas Co., 12 Pa. St. 318. Requiring hay or coal to be weighed by city weighers. Stokes *v.* New York, 14 Wend. 87; Yates *v.* Milwaukee, 12 Wis. 673; O'Maley *v.* Freeport, 96 Pa. St. 24. Regulating price and weight of bread. Mayor *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; Page *v.* Fazackerly, 36 Barb. 392; Guillotte *v.* New Orleans, 12 La. Ann. 432. Prohibiting peddling without a license. Huntington *v.* Cheesbro, 57 Ind. 74. Prohibiting sale of adulterated milk. Polinsky *v.* People, 73 N. Y. 65. Prohibiting sale of milk without license.

pany of painters, — it will be void on this ground.[1] To take an

Chica[illegible] Bartree, 100 Ill. 57; People *v.* Mulholla[illegible], 19 Hun, 548, 82 N. Y. 324, 37 Am. Rep. 568. Punishing vagrants. St. Louis *v.* Bentz, 11 Mo. 61. Imposing license tax on peddlers. *Ex parte* Ah Foy, 57 Cal. 92. Prohibiting keeping more than five tons of straw in one block at one time unless in a fire-proof enclosure. Clark *v.* South Bend, 85 Ind. 276. Prohibiting erection of livery stable on a block without consent of the owners of half the block. State *v.* Beattie, 16 Mo. App. 131. Requiring street railway company to report quarterly the number of passengers carried. St. Louis *v.* St. Louis R. R. Co., 89 Mo. 44, 1 S. W. 305. Prohibiting boys from getting on or off locomotives. Bearden *v.* Madison, 73 Ga. 184. Prohibiting stopping a vehicle in the street more than twenty minutes. Com. *v.* Fenton, 139 Mass[illegible], 29 N. E. 653. Forbidding preach[illegible] on Boston Common without permission. Com. *v.* Davis, 140 Mass. 485, 4 N. E. 577. Prohibiting cornet playing in street without license. Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224. [Requiring license for collecting, storing, and dealing in rags in thickly settled portions of city. Commonwealth *v.* Hubley, 172 Mass. 58, 51 N. E. 448, 42 L. R. A. 403, 70 Am. St. 242. Requiring a railroad to light the tracks operated by it within the city limits, and to use the same kind of lights and to light for the same period of the night as in the public streets. Cincinnati, H. & D. R. Co. *v.* Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; upon compelling railroad to light its tracks in city, see note to this case in L. R. A. Prohibiting dogs from running at large in streets and alleys and providing for the summary destruction of all dogs so caught running at large, unless they are ransomed within twenty-four hours, notice to owners of collared dogs being provided for. Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649. Punishing cruelty to animals in public places. State *v.* Karstendiek, 49 La. Ann. 1621, 22 So. 845, 39 L. R. A. 620; see upon municipal power as to nuisances affecting public morals, decency, peace, and good order, note to this case in L. R. A.; upon nuisances relating to trade or business, note in L. R. A. to *Ex parte* Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. 93, which holds that the establishment of steam shoddy machines and of steam carpet-beating machines within one hundred feet of churches, &c., may be prohibited. Public scavengers may be required to take out licenses and to secure permit from board of health before removing contents of any privy vault. State *v.* McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675. Prohibiting keeping of any swine within city limits. Darlington *v.* Ward, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326. Making lower water-rates to those who use large quantities. Silkman *v.* Bd. of Water Com'rs, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827. Requiring garbage-

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[1] Clark *v.* Le Cren, 9 B. & C. 52; Chamberlain of London *v.* Compton, 7 D. & R. 597. Compare Hayden *v.* Noyes, 5 Conn. 391; Willard *v.* Killingworth, 8 Conn. 247. But a by-law is not void, as in restraint of trade, which requires loaves of bread baked for sale to be of specified weight and properly stamped, or which requires bakers to be licensed. Mayor, &c. of Mobile *v* Yuille, 3 Ala. 137. See Buffalo *v.* Webster, 10 Wend. 99. A by-law forbidding the maintenance of slaughter-houses within a city is not void as in restraint of trade. Cronin *v.* People, 82 N. Y. 318, 37 Am. Rep. 564; *Ex parte* Heilbron, 65 Cal. 609, 4 Pac. 648. Meat sellers in one part of a city may not be allowed to sell from shops only, while in another they may sell from wagons also. St. Louis *v.* Spiegel, 90 Mo. 587, 2 S. W. 839. Without special legislative authority a merchant who has paid his license tax cannot be obliged to keep a sales-book open to inspection. Long *v.* Taxing District, 7 Lea, 134. An ordinance is bad which forbids importing and dealing in cast-off garments, but does not apply to such goods not imported. Greensboro *v.* Ehrenreich, 80 Ala. 579. [Upon powers of cities to regulate markets, see State *v.* Sarradat, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584, and note, and further upon validity of statutes and ordinances upon the ground of reasonableness or unreasonableness. See, *ante*, p. 284, n. 4.]

illustration from a private corporation: It has been held that a

collectors to take out licenses. State *v.* Orr, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 239. Requiring milk-venders to take out licenses and have their herds subjected to the "tuberculin test." State *v.* Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399. Requiring that only police officers may prosecute for violation of a specified ordinance. State *v.* Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33. Where a sewer-assessment has been successfully contested, the city may require that the amount of the assessment be paid as a condition precedent to permitting the contestant to connect with the sewer. Herrmann *v.* State, 54 Ohio St. 506, 43 N. E. 990, 32 L. R. A. 734. Requiring license fee of $25 per annum from junk-dealers, $50 per annum from pawnbrokers, bonds of $2,000 and $5,000 respectively, indorsements of twelve freeholders upon each application for license, and prohibiting purchases from boys and from drunkards and intoxicated persons, reserving power to revoke license at any time. Grand Rapids *v.* Brandy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. 472; and upon power to control such dealers, see note hereto in L. R. A.; see also Rosenbaum *v.* Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123. Requiring itinerant traders to pay a license fee of $50 per quarter, traders having a fixed place of business being exempt. *Re* Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. Prohibiting use of salt upon street-railway tracks, except at street corner curves. State *v.* Elizabeth, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170. Requiring roofed passageway over sidewalks where buildings are being constructed above first story. Smith *v.* Milwaukee B. & T. Exchange, 91 Wis. 360, 64 N. W. 1011, 30 L. R. A. 504, 51 Am. St. 912. Requiring boarding-house keepers, &c., to furnish street commissioner with list of boarders liable to poll-tax, and to pay a fine for failure so to do. Topeka *v.* Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593. Forbidding any unmarried minor to enter bar-room unless as agent or servant. State *v.* Austin, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. 817. Contracting for a supply of gas and water for a reasonable period, although such period extends beyond the official life of any member of the city council. Vincennes *v.* Citizens' Gas L. & C. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *contra*, Shelden *v.* Fox, 48 Kan. 356, 29 Pac. 769, 16 L. R. A. 257, and note. Requiring both driver and conductor on every street car in use on streets. South Covington & C. St. R. Co. *v.* Berry, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, and note, 40 Am. St. 161. Regulating weight of loaves of bread offered for sale and punishing sale of short weight loaves. People *v.* Wagner, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, and note, 24 Am. St. 141. Prohibiting suspension of electric wires over or upon roofs of buildings. El. Impr. Co. *v.* San Francisco, 45 Fed. Rep. 593, 13 L. R. A. 131, and note on police power. Levying license fee of $5 per month upon venders of fresh meats outside the public markets. Atkins *v.* Phillips, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158. Prohibiting keeping or storing of large quantities of inflammable or explosive oils within city limits. Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, and note, 28 Am. St. 180. Requiring petition of two-thirds of landowners of a block before permitting a saloon to be opened in it, if none has ever been in the block before. Martens *v.* People, 186 Ill. 314, 57 N. E. 871.]

The following have been held unreasonable, — Prohibiting putting up of steam-engine in city. Baltimore *v.* Redecke, 49 Md. 217, 33 Am. Rep. 239. Prohibiting one person carrying on a certain business and allowing another to carry on the same business. Hudson *v.* Thorne, 7 Paige, 261; Tugman *v.* Chicago, 78 Ill. 405. Prohibiting laying of gas-pipes across the streets. Northern Liberties *v.* Gas Co., 12 Pa. St. 318. Levying tax for building a sidewalk in uninhabited portion of the city. Corrigan *v.* Gage, 68 Mo. 541. Prohibiting use of Babcock's fire extinguishers and imprisoning those who used them. Teutonia Ins. Co. *v.* O'Connor, 27 La. Ann. 371. Requiring every person entering his drain in a sewer to pay his share of the expense of making such sewer. Boston *v.* Shaw, 1 Metc. 130. Refusing to supply water to certain premises. Dayton *v.* Quigley, 29 N. J. Eq. 77. Arresting free negroes found on street after 10 P. M. Mayor *v.* Winfield,

by-law of a bank, that all payments made or received by the bank

8 Humph. 707. Requiring druggist to furnish the names of parties to whom he sells liquors. Clinton *v.* Phillips, 58 Ill. 102, 11 Am. Rep. 52. Discriminating between dealers within and without the city. Nashville *v.* Althorp, 5 Cold. 554; *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642. Discriminating between railroads as to speed allowable under like circumstances. Lake View *v.* Tate, 130 Ill. 247, 22 N. E. Rep. 791. Prohibiting distribution of all handbills on the street. People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275. Forbidding all street parades with music except by permission. Matter of Frazee, 63 Mich. 396, 30 N. W. 72; Anderson *v.* Wellington, 40 Kan. 173, 19 Pac. 719; [*contra*, *Re* Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529. Requiring a license for the doing of any scavenger work whatever. State *v.* Hill, 126 N. C. 1139, 36 S. E. 326, 50 L. R. A. 473. Prohibiting a saloon keeper, his clerks, agents, and employees, from entering the saloon at any time during Sunday without written permission from mayor. Newbern *v.* McCann, 105 Tenn. 159, 58 S. W. 114, 50 L. R. A. 476. Prohibiting any woman from going into a place where liquor is sold or standing within fifty feet of such place. Gastineau *v.* Com., 22 Ky. L. R. 157, 56 S. W. 705, 49 L. R. A. 111; for constitutionality of discriminations against women in police regulations, see note to this case in L. R. A. Prohibiting the use of colored nettings and similar materials to cover fruits exposed for sale in baskets. Frost *v.* Chicago, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. 301. Levying a wheel tax upon all vehicles used upon the streets. Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. 224. Discriminating against department stores. Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, and see note to this case in L. R. A. upon discriminations against department stores. Requiring that city shall furnish materials and construct sewer connections up to within three feet of building to be connected. Slaughter *v.* O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442. Prohibiting suspending any sign whatever above a sidewalk. State *v.* Higgs, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446. Prohibiting the receipt, from a carrier, of intoxicating liquors purchased beyond the city limits, until a license tax has been paid upon such liquors. Henderson *v.* Heyward, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. 384. Prohibiting the sale of clothing on Sunday, but permitting that of most other kinds of goods. Denver *v.* Bach, 26 Col. 530, 58 Pac. 1089, 43 L. R. A. 848. Requiring heavily loaded vehicles to keep to specified portion of street when that portion is unfit for use. State *v.* Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750. Imposing unreasonable and discriminatory license fees upon draymen, hackmen, &c. State *v.* Finch, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437. Requiring a license for business of contracting for public work. Figg *v.* Thompson, 20 Ky. L. 1322, 49 S. W. 202, 44 L. R. A. 135. Requiring punishment to be by imprisonment alone, instead of permitting payment of fine. Calhoun *v.* Little, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. 254. Prohibiting hackmen and draymen from stopping their vehicles on certain streets, except for purpose of receiving or delivering persons or goods. *Ex parte* Battis, 40 Tex. Cr. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. 708. Prohibiting traffic in heavily loaded wagons on certain street except upon permission of village trustees, held arbitrary and unreasonable. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. 155. Prohibiting drummers, cabmen, hackmen, &c., from entering a passenger station to solicit custom. Cosgrove *v.* Augusta, 103 Ga. 835, 31 S. E. 445, 42 L. R. A. 711, 68 Am. St. 143. Prohibiting minors from being upon streets after 9 P. M. unless attended by guardians, or in search of physician. *Ex parte* McCarver, 39 Tex. Cr. 448, 46 S. W. 936, 42 L. R. A. 587, 73 Am. St. 946. Prohibiting during summer months sale of fresh pork, or sausage made thereof. Helena *v.* Dwyer, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. 206. Declaring, without regard to time or place, the emission of dense black or thick gray smoke a nuisance. St. Louis *v.* Heitzeberg P. & P. Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am.

must be examined at the time, and mistakes corrected before the dealer leaves, was unreasonable and invalid, and that a recovery

St. 516; upon municipal control over smoke as nuisance, see note to this case in L. R. A. Requiring street contractors to use asphaltum controlled by a monoply. Fishburn *v.* Chicago, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. 236. Placing harassing and arbitrary restrictions on dealers in second-hand goods. State *v.* Itzcovitch, 49 La. Ann. 366, 21 So. 544, 37 L. R. A. 673, 62 Am. St. 648. See also Morton *v.* Macon, 111 Ga. 162, 36 S. E. 627. Prohibiting traffic in second-hand clothing, &c. State *v.* Taft, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. 768. Prohibiting a railroad company from fencing its grounds inside the city limits. Grossman *v.* Oakland, 30 Oreg. 478, 41 Pac. 5, 36 L. R. A. 593, 60 Am. St. 832. Prohibiting driving faster than six miles per hour when applied to fire engine. State *v.* Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305. Ordinance is not unreasonable when expressly authorized by legislature. Beiling *v.* Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272. Unreasonable to restrict owner of dead animal to a particular spot outside of city in which to deposit same. Schoen Brothers *v.* Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804. Levying license fee of $10 per day on itinerant merchants. Carrollton *v.* Bazette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522. Requiring the laying of a cement sidewalk where, less than six months before, a duly authorized sidewalk of plank had been constructed and was yet sound and in good condition. Hawes *v.* Chicago, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225. Prohibiting erection of any building or addition to building within city limits, except by permission of building inspector. Sioux Falls *v.* Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621. Prohibiting use of screens, blinds, &c., to obstruct view from street into saloons. Champer *v.* Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, and note, 46 Am. St. 390. General welfare clause does not warrant an ordinance requiring inspection of steam boilers, &c. State *v.* Robertson, 45 La. Ann. 954, 13 So. 164, 20 L. R. A. 691, 40 Am. St. 272. Requiring distance of billboard from street line to be five feet greater than height of board. Crawford *v.* Topeka, 51 Kan. 756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. 323. Requiring permission from a city officer for street parades, but exempting from such requirement funerals, fire companies, State militia, and political parties having a State organization. *Re* Garrabad, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, and note on ordinances relating to street parades. See also that ordinances vesting arbitrary powers are void. Richmond *v.* Dudley, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. 180; but see Olympia *v.* Mann, 1 Wash. 389, 25 Pac. 330, 337, 12 L. R. A. 150, and note; Child *v.* Bemus, 71 R. I. 230, 21 Atl. 539, 12 L. R. A. 57. Requiring license fee of $25 per day from auctioneers of imported goods. *Re* Sipe, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184. Requiring license fee of non-resident peddlers. Sayre *v.* Phillips, 148 Pa. 482, 24 Atl. 76, 16 L. R. A. 49, and note, 33 Am. St. 842. Prohibiting absolutely the making repairs to the amount of $300 or more upon any wooden building within specified limits. Mt. Vernon F. Nat. Bank *v.* Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481. and note. On fire limits, see Olympia *v.* Mann, 1 Wash. 389, 25 Pac. 330, 337, 12 L. R. A. 150, and note. Prohibiting importation or sale of second-hand clothing unless owner first proves that it did not come from an infected region. Kosciusko *v.* Slomberg, 68 Miss. 469, 9 So. 297, 12 L. R. A. 528, 24 Am. St. 281. Permitting fine of $1,000 for visiting a disorderly house. *Re* Ah You, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am. St. 280. Penalizing a mere private trespass. Bregguglia *v.* Lord, 53 N. J. L. 168, 20 Atl. 1082, 11 L. R. A. 407. Levying license tax upon agents of non-resident insurance companies, but not upon those of local companies. Simrall *v.* Covington, 90 Ky. 444, 14 S. W. 369, 9 L. R. A. 556, 29 Am. St. 398. Penalizing breach of contract with city. Newport *v.* Newport & C. Bridge Co., 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484. Making arbitrary distinctions. Lake View *v.* Tate, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268. Requiring letting of public printing only to members of Allied Printing Trades

might be had against the bank for an over-payment discovered afterwards, notwithstanding the by-law.[1] So a by-law of a town, which, under pretence of regulating the fishery of clams and oysters within its limits, prohibits all persons except the inhabitants of the town from taking shell-fish in a navigable river, is void as in contravention of common right.[2] And for like reasons a by-law is void which abridges the rights and privileges conferred by the general laws of the State, unless express authority therefor can be pointed out in the corporate charter.[3] And

Council. Atlanta *v.* Stein, 111 Ga. 780, 36 S. E. 932, 51 L. R. A. 335. Fixing liquor license fee $300 higher for any place on main street than for any other place in town. Harrodsburg *v.* Renfro, 22 Ky. L. R. 806, 58 S. W. 795, 51 L. R. A. 807. Requiring six inch tires for loaded wagons weighing more than a ton and driven upon parkways. State *v.* Rohart, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947. Prohibiting getting off trains or boats at any point within the State at time of yellow fever outbreak, as applied to passengers from a non-infected district, (board of health rule). Wilson *v.* Alabama G. S. Ry. Co., 77 Miss. 714, 28 So. 567, 78 Am. St. 543. Prohibiting interment of dead bodies within city limits without regard to sparseness of population. Wygant *v.* McLauchlan, 39 Oreg. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. 673. Restricting employment upon public works to members of labor unions. Fiske *v.* People, 188 Ill. 206, 58 N. E. 985. For other ordinances held void for unreasonableness, see Grand Rapids *v.* Newton, 111 Mich. 48, 69 N. W. 84, 66 Am. St. 387, 35 L. R. A. 226; Ottumwa *v.* Zekind, 95 Iowa, 622, 64 N. W. 646, 58 Am. St. 447, 29 L. R. A. 734; Des Moines C. Ry. Co. *v.* Des Moines, 90 Iowa, 770, 58 N. W. 906, 26 L. R. A. 767; *Ex parte* Sing Lee, 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; Avis *v.* Vineland, 55 N. J. L. 285, 26 Atl. 149, 23 L. R. A. 685; State *v.* Tenant, 110 N. C. 609, 14 S. E. 387, 28 Am. St. 715, 15 L. R. A. 423; *Ex parte* Vance, — Tex. Cr. App. —, 62 S. W. 568 (April 17, 1901); Mills *v.* Missouri K. T. R. Co., 94 Tex. 242, 59 S. W. 874; *Ex parte* Patterson, — Tex. Cr. App. —, 58 S. W. 1011 (Oct. 24, 1900).]

[1] Mechanics' and Farmers' Bank *v.* Smith, 19 Johns. 115; Gallatin *v.* Bradford, 1 Bibb, 209. Although these are cases of private corporations, they are cited here because the rules governing the authority to make by-laws are the same with both classes of corporations.

[2] Hayden *v.* Noyes, 5 Conn. 391. As it had been previously held that every person has a common-law right to fish in a navigable river or arm of the sea, until by some legal mode of appropriation this common right was extinguished (Peck *v.* Lockwood, 5 Day, 22), the by-law in effect deprived every citizen, except residents of the township, of rights which were *vested*, so far as from the nature of the case a right could be vested. See also Marietta *v.* Fearing, 4 Ohio, 427. That a right to *regulate* does not include a right to *prohibit*, see also *Ex parte* Burnett, 30 Ala. 461; Austin *v.* Murray, 16 Pick. 121; Portland *v.* Schmidt, 13 Oreg. 17; Bronson *v.* Oberlin, 41 Ohio St. 476. And see Milhau *v.* Sharp, 17 Barb. 435, 28 Barb. 228, and 27 N. Y. 611, and cases *supra*, p. 213. ["The State's power to regulate the taking of game extends to the public lands of the United States within the State's borders, such lands not being included in an Indian reservation. Ward *v.* Race Horse, 163 U. S. 504, 16 Sup. Ct. Rep. 1076.]

[3] Dunham *v.* Trustees of Rochester, 5 Cow. 462; Mayor, &c. of New York *v.* Nichols, 4 Hill, 209; St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462. See Strauss *v.* Pontiac, 40 Ill. 301; Mayor of Athens *v.* Georgia R. R. Co., 72 Ga. 800. An ordinance granting the exclusive privilege to take every animal which dies in a city without regard to its being a nuisance is void. River Rendering Co. *v.* Behr, 77 Mo. 91. Hacks cannot be permitted to stand permanently in a street so as to cut off access to adjoining premises. Branahan *v.* Hotel Co., 39 Ohio St

a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretence of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages.[1]

333. Unless by express authority, a wooden building put up contrary to an ordinance cannot be forfeited. Kneedler *v.* Norristown, 100 Pa. St. 368. [Ordinance prohibiting barbers from working on Sunday, but not other shopkeepers, is void. Tacoma *v.* Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68.]

[1] By a by-law of the town of Charlestown, all persons were prohibited, without license from the selectmen, from burying any dead body brought into town on any part of their own premises or elsewhere within the town. By the court, *Wilde, J.*; "A by-law, to be valid, must be reasonable; it must be *legi fidei rationi consona*. Now if this regulation or prohibition had been limited to the populous part of the town, and were made in good faith for the purpose of preserving the health of the inhabitants, which may be in some degree exposed to danger by the allowance of interments in the midst of a dense population, it would have been a very reasonable regulation. But it cannot be pretended that this by-law was made for the preservation of the health of the inhabitants. Its restraints extend many miles into the country, to the utmost limits of the town. Now such an unnecessary restraint upon the right of interring the dead we think essentially unreasonable. If Charlestown may lawfully make such a by-law as this, all the towns adjoining Boston may impose similar restraints, and consequently all those who die in Boston must of necessity be interred within the precincts of the city. That this would be prejudicial to the health of the inhabitants, especially in the hot season of the year, and when epidemic diseases prevail, seems to be a well-established opinion. Interments, therefore, in cities and large populous towns, ought to be discountenanced, and no obstacles should be permitted to the establishment of cemeteries at suitable places in the vicinity. The by-law in question is therefore an unreasonable restraint upon many of the citizens of Boston, who are desirous of burying their dead without the city, and for that reason is void." Austin *v.* Murray, 16 Pick. 121, 125. So in Wreford *v.* People, 14 Mich. 41, the common council of Detroit, under a power granted by statute to compel the owners and occupants of slaughter-houses to cleanse and abate them whenever necessary for the health of the inhabitants, assumed to pass an ordinance altogether prohibiting the slaughtering of animals within certain limits in the city; and it was held void. See further, State *v.* Jersey City, 29 N. J. 170. [And upon power of municipal corporations to define, prevent, and abate nuisances, see note 36 L. R. A. 593. See also Orlando *v.* Pragg, 31 Fla. 111, 12 So. 368, 19 L. R. A. 196, and note, 34 Am. St. 17.] Power to control the erection of dwellings with reference to health does not allow regulation of the thickness of outer walls. Hubbard *v.* Paterson, 45 N. J. L. 310. Upon the whole subject of municipal by-laws, see Angell & Ames on Corp. c. 10; Grant on Corp. 76 *et seq.* See also Redfield on Railways (3d ed.), Vol. I. p. 88; Dillon, Mun. Corp. c. 12. The subject of the reasonableness of by-laws was considered at some length in People *v.* Medical Society of Erie, 24 Barb. 570, and Same *v.* Same, 32 N. Y. 187. See note to Ward *v.* Greencastle, 35 Am. Rep. 702. Municipal by-laws may impose penalties on parties guilty of a violation thereof, but they cannot impose forfeiture of property or rights, without express legislative authority. State *v.* Ferguson, 33 N. H. 424; Phillips *v.* Allen, 41 Pa. St. 481. Nor can municipal corporations, by their by-laws, take into their own hands the punishment of offences against the general laws of the State. See Charlton *v.* Barber, 54 Iowa, 360, 6 N. W. 528, 37 Am. Rep. 209; Kirk *v.* Nowill, 1 T. R. 118; White *v.* Tallman, 26 N. J. 67; Hart *v.* Albany, 9 Wend. 571; Peoria *v.* Calhoun, 29 Ill. 317; St. Paul *v.* Coulter, 12

Delegation of Municipal Powers.

Another and very important limitation which rests upon municipal powers is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority.[1] So strictly is this rule applied, that when a city charter authorized the common council of the city to make by-laws and ordinances ordering and directing any of the streets to be pitched, levelled, paved, flagged, &c., or for the altering or repairing the same, "within such time and in such manner as they may prescribe under the superintendence and direction of the city superintendent," and the common council passed an ordinance directing a certain street to be pitched, levelled, and flagged, "in such manner as the city superintendent, under the direction of the committee on roads of the common council, shall direct and require," the ordinance was held void, because it left to the city superintendent and the committee of the common council the decision which, under the law, must be made by the council itself. The trust was an important and delicate one, as the expenses of the improvement were, by the statute, to be paid by the owners of the property in front of which it was made. It was in effect a power of taxation; and taxatior is the exercise of sovereign

both a city and a town organization, it has been held competent for both to require those who carry on a noisome trade to take out a license. Chicago Packing, &c. Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

[1] A council may by ordinance adopt a code compiled by a city attorney. Garrett *v.* Janes, 65 Md. 260, 3 Atl. 507; Western & A. R. R. Co. *v.* Young, 83 Ga. 512, 10 S. E. 197. [Person desiring to move a building through the streets may be required to obtain permission of mayor. Wilson *v.* Eureka City, 173 U. S. 32, 19 Sup. Ct. Rep. 317, aff. 15 Utah, 53, 48 Pac. 41, 150, 62 Am. St. 904. And it is not a delegation of legislative power to require that "no person shall, in or upon any of the public grounds, make any public address, . . . except in accordance with a permit from the mayor," but merely a casting of an administrative function upon the mayor. Davis *v.* Massachusetts, 167 U. S. 43, 17 Sup. Ct. Rep. 731, aff. 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. 389. Making grant of privilege depend upon consent of majority of lot owners in the block in which the privilege is to be exercised is not a delegation of power. Chicago *v.* Stratton, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. 325; *contra*, St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, and note on delegation of municipal power. Power to prescribe width and other features of sidewalks cannot be delegated. McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653. Nor can that to fix street-grade. Zabel *v.* Louisville B. O. Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668. Nor that to regulate liquor-selling. State *v.* Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352.]

authority; and nothing short of the most positive and explicit language could justify the court in holding that the legislature intended to confer such a power, or permit it to be conferred, on a city officer or committee. The statute in question not only contained no such language, but, on the contrary, clearly expressed the intention of confining the exercise of this power to the common council, the members of which were elected by and responsible to those whose property they were thus allowed to tax.[1]

This restriction, it will be perceived, is the same which rests upon the legislative power of the State, and it springs from the same reasons. The people in the one case in creating the legislative department, and the legislature in the other in conferring the corporate powers, have selected the depositary of the power which they have designed should be exercised, and in confiding it to such depositary have impliedly prohibited its being exercised by any other agency. A trust created for any public purpose cannot be assignable at the will of the trustee.[2]

[1] Thompson *v.* Schermerhorn, 6 N. Y. 92. See also Smith *v.* Morse, 2 Cal. 524; Oakland *v.* Carpentier, 13 Cal. 540; Whyte *v.* Nashville, 2 Swan, 364; East St. Louis *v.* Wehrung, 50 Ill. 28; Ruggles *v.* Collier, 43 Mo. 353; State *v.* Jersey City, 25 N. J. 309; Hydes *v.* Joyes, 4 Bush, 464; Lyon *v.* Jerome, 26 Wend. 485; State *v.* Paterson, 34 N. J. 168; State *v.* Fiske, 9 R. I. 94; Kinmundy *v.* Mahan, 72 Ill. 462; Davis *v.* Reed, 65 N. Y. 566; Supervisors of Jackson *v.* Brush, 77 Ill. 59; Thomson *v.* Booneville, 61 Mo. 282; *In re* Quong Woo, 13 Fed. Rep. 229; Cornell *v.* State, 6 Lea, 624; Benjamin *v.* Webster, 100 Ind. 15; Minneapolis Gaslight Co. *v.* Minneapolis, 36 Minn. 159, 30 N. W. 450; Dillon, Mun. Corp. § 60. Compare *In re* Guerrero, 69 Cal. 88, 10 Pac. 261.

[2] The charter of Washington gave the corporation authority "to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided that the amount raised in each year shall not exceed ten thousand dollars. And provided also that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved by him." *Marshall*, Ch. J., speaking of this authority, says: "There is great weight in the argument that it is a trust, and an important trust, confided to the corporation itself, for the purpose of effecting important improvements in the city, and ought, therefore, to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose that Congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used, and would take as many precautions against its abuse as was compatible with its beneficial exercise. Accordingly, we find a limitation upon the amount to be raised, and on the object for which the lottery may be authorized. It is to be for any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; and is subjected to the judgment of the President of the United States. The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation under its control. While it remains where Congress has placed it, the character of the corporation affords some security against its abuse,—some security that no other mischief will result from it than is inseparable from the thing itself. But if the management, control, and responsibility may be transferred to any adventurer who will purchase, all the

Irrepealable Legislation.

Equally incumbent upon the State legislature and these municipal bodies is the restriction that they shall adopt no irrepealable legislation. No legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public interests require.[1] Such a body has no power, even by contract, to control and embarrass its legislative powers and duties. On this ground it has been held, that a grant of land by a municipal corporation, for the purposes of a cemetery, with a covenant for quiet enjoyment by the grantee, could not preclude the corporation, in the exercise of its police powers, from prohibiting any further use of the land for cemetery purposes, when the advance of population threatened to make such use a public nuisance.[2] So when "a lot is granted as a place of deposit for gunpowder, or other purpose innocent in itself at the time; it is devoted to that purpose till in the progress of population, it becomes dangerous to the property, the safety, or the lives of hundreds; it cannot be that the mere form of the grant, because the parties choose to make it particular instead of general and absolute, should prevent the use to which it is limited being regarded and treated as a nuisance, when it becomes so in fact. In this way the legislative powers essential to the comfort and preservation of populous communities might be frittered away into perfect insignificance. To allow rights thus to be parcelled out and secured beyond control would fix a principle by which our cities and villages might be broken up. Nuisances might and undoubtedly would be multiplied to an intolerable extent."[3]

And on the same ground it is held that a municipal corporation, having power to establish, make, grade, and improve streets,

security for fairness which is furnished by character and responsibility is lost." Clark *v.* Washington, 12 Wheat. 40, 54.

[1] East Hartford *v.* Hartford Bridge Co., 10 How. 511; Dillon, Mun. Corp. § 61.

[2] Brick Presbyterian Church *v.* City of New York, 5 Cow. 538; New York *v.* Second Avenue R. R. Co., 32 N. Y. 261. Compare Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377. Permission to build out over and under a sidewalk is a mere revocable license. Winter *v.* City Council, 83 Ala. 589, 3 So. 235. [So with awnings. Augusta *v.* Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340, and note, on right to maintain awnings in streets.] But after telephone poles have been erected by a company in certain streets designated by the city, it cannot revoke the designation at its mere will. Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123.

[3] Coats *v.* Mayor, &c. of New York, 7 Cow. 585; Davenport *v.* Richmond, 81 Va. 636. See also Davis *v.* Mayor, &c. of New York, 14 N. Y. 506; Attorney-General *v.* Mayor, &c. of New York, 3 Duer, 119; State *v.* Graves, 19 Md. 351; Goszler *v.* Georgetown, 6 Wheat. 593; Louisville City R. R. Co. *v.* Louisville, 8 Bush, 415.

does not, by once establishing the grade, preclude itself from changing it as the public needs or interest may seem to require, notwithstanding the incidental injury which must result to those individuals who have erected buildings with reference to the first grade.[1] So a corporation having power under the charter to establish and regulate streets cannot under this authority, without

[1] Callendar *v.* Marsh, 1 Pick. 417; [illegible]gs *v.* Foote, 4 Allen, 195; Graves *v.* Otis, 2 Hill, 466; Green *v.* Reading, 9 Watts, 382, 36 Am. Dec. 127; O'Connor *v.* Pittsburg, 18 Pa. St. 187; Reading *v.* Keppleman, 61 Pa. St. 233; Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Fellows *v.* New Haven, 44 Conn. 240, 26 Am. Rep. 447; La Fayette *v.* Bush, 19 Ind. 326; La Fayette *v.* Fowler, 34 Ind. 140; Creal *v.* Keokuk, 4 Greene (Iowa), 47; Hendershott *v.* Ottumwa, 46 Iowa, 658; Murphy *v.* Chicago, 29 Ill. 279; Quincy *v.* Jones, 76 Ill. 231; Rounds *v.* Mumford, 2 R. I. 154; Rome *v.* Omberg, 28 Ga. 46; Roll *v.* Augusta, 34 Ga. 326; Macon *v.* Hill, 58 Ga. 595; Reynolds *v.* Shreveport, 13 La. Ann. 426; White *v.* Yazoo City, 27 Miss. 357; Humes *v.* Mayor, &c., 1 Humph. 403; St. Louis *v.* Gurno, 12 Mo. 414; Taylor *v.* St. Louis, 14 Mo. 20; Schattner *v.* Kansas City, 35 Mo. 162; Keasy *v.* Louisville, 4 Dana, 154, 29 Am. Dec. 395; Blount *v.* Janesville, 31 Wis. 648; Nevins *v.* Peoria, 41 Ill. 502; Shawneetown *v.* Mason, 82 Ill. 337; Weymann *v.* Jefferson, 61 Mo. 55. Compare Louisville *v.* Rolling Mill Co., 3 Bush, 416; Denver *v.* Vernia, 8 Col. 399, 8 Pac. 656. No legal damage is done by establishing a grade where none had existed. Gardiner *v.* Johnston, 16 R. I. 94, 12 Atl. 888. A city having power to grade and level streets is not liable for consequent damages to persons whose lands are not taken. Radcliffe's Ex'rs *v.* Brooklyn, 4 N. Y. 195; Smith *v.* Washington, 20 How. 135; Snyder *v.* Rockport, 6 Ind. 237; Pontiac *v.* Carter, 32 Mich. 164; Cole *v.* Muscatine, 14 Iowa, 296; Russell *v.* Burlington, 30 Iowa, 262; Burlington *v.* Gilbert, 31 Iowa, 356; Roberts *v.* Chicago, 26 Ill. 249; Delphi *v.* Evans, 36 Ind. 90; Simmons *v.* Camden, 26 Ark. 276; 7 Am. Rep. 620; Dorman *v.* Jacksonville, 13 Fla. 538, 7 Am. Rep. 253; Dore *v.* Milwaukee, 42 Wis. 108; Lee *v.* Minneapolis, 22 Minn. 13; Lynch *v.* New York, 76 N. Y. 60; Cheever *v.* Shedd, 13 Blatch. 258. The law would seem to be otherwise declared in Ohio. See Rhodes *v.* Cincinnati, 10 Ohio, 160; McCombs *v.* Akron, 15 Ohio, 474; s. c. 18 Ohio, 229; Crawford *v.* Delaware, 7 Ohio St. 459; Akron *v.* Chamberlain Co., 31 Ohio St. 328; 32 Am. Rep. 367; Cohen *v.* Cleveland, 43 Ohio St. 190. See also Nashville *v.* Nichol, 59 Tenn. 338. It is also otherwise in Illinois under its present Constitution. Elgin *v.* Eaton, 83 Ill. 535; Rigney *v.* Chicago, 102 Ill. 64. Under like constitutional provisions a like rule has been laid down. Reardon *v.* San Francisco, 66 Cal. 492, 6 Pac. 317; Moore *v.* Atlanta, 70 Ga. 611; Harmon *v.* Omaha, 17 Neb. 548, 23 N. W. 503; Werth *v.* Springfield, 78 Mo. 107. But in Alabama not every change in grade gives ground for recovery. Montgomery *v.* Townsend, 80 Ala. 489. By statute in Indiana a change of grade causing special injury and damage warrants a recovery. Lafayette *v.* Nagle, 113 Ind. 425, 15 N. E. 1. The Iowa statute is similar. Phillips *v.* Council Bluffs, 63 Iowa, 576, 19 N. W. 672. [Millard *v.* Webster City, 113 Iowa, 220, 84 N. W. 1044; Richardson *v.* Webster City, 111 Iowa, 427, 82 N. W. 920.] Compare Alexander *v.* Milwaukee, 16 Wis. 247. [City liable in Kansas. Leavenworth *v.* Duffy, 63 Kan. 884, 62 Pac. 433.] Courts will not undertake to control municipal discretion in the matter of improving streets. Dunham *v.* Hyde Park, 75 Ill. 371; Brush *v.* Carbondale, 78 Ill. 74. The owner of a lot on a city street acquires no prescriptive right to collateral support for his buildings which can render the city liable for injuries caused by grading the street. Mitchell *v.* Rome, 33 Ga. 19, 15 Am. Rep. 663; Quincy *v.* Jones, 76 Ill. 231, 20 Am. Rep. 243. *Contra*, Nichols *v.* Duluth, 40 Minn. 389, 42 N. W. 81. But the failure to use due care and prudence in grading may render the city liable. Bloomington *v.* Brokaw, 77 Ill. 194.

explicit legislative consent, permit individuals to lay down a railway in one of its streets, and confer privileges exclusive in their character and designed to be perpetual in duration. (*a*) In a case

(*a*) [Nor can it contract away the power of the State to oust the corporation grantee from its privileges. State *v.* East Fifth St. Ry. Co., 140 Mo. 639, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. 742. Ordinance giving right to lay double tracks may be repealed. Lake Roland El. R. Co. *v.* Baltimore, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126. For other cases denying power to make exclusive grants, see Detroit Citizens' S. R. Co. *v.* Detroit, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 64 Am. St. 350; Vincennes *v.* Citizens' Gas L. & C. Co., 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383, and note; Syracuse W. Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546. Even where a company has a right, under a contract, to place electric wires beneath the surface of the streets, the right is subject to such reasonable regulations as the city deems best to make for the public safety and convenience. Missouri *v.* Murphy, 170 U. S. 78, 18 Sup. Ct. Rep. 505, aff. 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798. Upon power of city to allow subway under street for wires, State *v.* Murphy, 134 Mo. 548, 35 S. W. 1132, 56 Am. St. 515, 34 L. R. A. 369, and note; also note to State *v.* Murphy, 31 L. R. A. 798. Duty to keep streets safe: West. U. Tel. Co. *v.* State, 82 Md. 293, 33 Atl. 763, 51 Am. St. 464, 31 L. R. A. 572, and note. An ordinance authorizing a railroad company to build bridges of a certain pattern over its roadway, and providing that the beginning to erect such bridges should be deemed an acceptance of the terms of the ordinance, and a supersession of all contracts existing prior thereto, did not give rise to a contract, but was a mere license, revocable at any time. Wabash R. Co. *v.* Defiance, 167 U. S. 88, 17 Sup. Ct. Rep. 748, aff. 52 Ohio St. 262, 40 N. E. 89. Upon liability for cost of changing grade at railroad crossing, see Kelly *v.* Minneapolis, 57 Minn. 294, 59 N. W. 304, 26 L. R. A. 92, and note, 47 Am. St. 605. Upon right to regulate the placing and use of telegraph, telephone, and other electric wires in and above streets, see St. Louis *v.* Western U. Tel. Co., 148 U. S. 92, 13 Sup. Ct. Rep. 485. City cannot authorize the erection in its streets of what amounts to a private nuisance. Chicago G. W. R. Co. *v.* First M. E. Church, 42 C. C. A. 178, 102 Fed. Rep. 85, 50 L. R. A. 488; Baltimore & P. R. Co. *v.* Fifth Bapt. Church, 108 U. S. 317, 2 Sup. Ct. Rep. 719. City cannot levy a wheel tax upon all vehicles used on streets, where the property has already been assessed for taxation under the general property tax. Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. 224. See also Davis *v.* Petrinovich, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615. Where a city is bound to maintain sidewalks upon its streets in a safe condition, the obligation extends to boulevards also, even though they are primarily under the control of park and boulevard commissioners. Burridge *v.* Detroit, 117 Mich. 557, 76 N. W. 84, 42 L. R. A. 684, 72 Am. St. 582. A street may be set apart for use exclusively as a pleasure driveway, and heavily loaded vehicles excluded from it. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. 155. Upon municipal power over nuisances affecting highways and waters, see Hagerstown *v.* Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649, and note; over nuisances in highways caused by street railroads and other electrical companies, note to 39 L. R. A. 609. City cannot arbitrarily tear up and remove a track which has been laid under permission granted by valid ordinance. Some notice and opportunity to be heard must first be given. Cape May *v.* Cape M., Del. Bay & S. P. R. Co., 60 N. J. L. 224, 37 Atl. 892, 39 L. R. A. 609. Upon regulation of speed of vehicles in streets, see note 36 L. R. A. 395. Reasonable license fees may be exacted for use of streets by vehicles, and fact that vehicles are owned outside city and only occasionally used within it is immaterial. Tomlinson *v.* Indianapolis, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413, and note; Mason *v.* Cumberland, 92 Md. 451, 48 Atl. 136. Fenders may be required on street cars. State *v.* Cape May, 59 N. J. L. 396, 36 Atl. 696, 36 L. R. A. 653. And speed of street cars may be regulated. *Ibid.*, 59 N. J. L. 393, 36 Atl. 679, 36 L. R. A. 656.

where this was attempted, it has been said by the court: "The corporation has the exclusive right to control and regulate the use of the streets of the city. In this respect it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit, so long as it is within the objects and trusts for which the power is conferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the State. But the resolution in question is not such an act. Though it relates to a street, and very materially affects the mode in which that street is to be used, yet in its essential features it is a contract. Privileges exclusive in their nature and designed to be perpetual in their duration are conferred. Instead of regulating the use of the street, the use itself to the extent specified in the resolution is granted to the associates. For what has been deemed an adequate consideration, the corporation has assumed to surrender a portion of their municipal authority, and has in legal effect agreed with the defendants that, so far as they

Cars may be required to stop before crossing streets. *Ibid.*, 59 N. J. L. 404, 36 Atl. 678, 36 L. R. A. 657. Railroad cannot under general power to regulate streets be compelled to erect gates and keep watchman at crossing. Pittsburgh, C. C. & St. L. R. Co. *v.* Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684. City cannot divest itself of power to regulate use of streets. State *v.* Murphy, 134 Mo. 548, 35 S. W. 1142, 34 L. R. A. 369, 56 Am. St. 515; and that the municipality holds streets, parks, and the like in trust for the public, see St. Paul *v.* Chicago, M. & St. P. R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184. See also Columbus Gas Light and Coke Co. *v.* Columbus, 50 Ohio, 65, 33 N. E. 292, 40 Am. St. 648, 19 L. R. A. 510. On power to regulate use of streets by electric companies, see State *v.* Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798, and note in L. R. A. Rights of owners of abutting property to access and to light and air cannot be materially impeded. Block *v.* Salt Lake R. T. Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610; Lockwood *v.* Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547; Schopp *v.* St. Louis, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; Moose *v.* Carson, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, and note, 17 Am. St. 681; Gargan *v.* Louisville, N. A. & C. R. Co., 89 Ky. 212, 12 S. W. 259, 6 L. R. A. 340. Residents may be required to keep the sidewalks in front of their premises free from snow and ice. Carthage *v.* Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, and note, 19 Am. St. 490. Contractor cannot be granted right to place boxes upon streets and use them for posting bills, even though they are made and maintained without cost to city, and according to specifications of board of public improvements, and designed specially for the reception of litter and refuse that would otherwise be cast into the streets. State *v.* St. Louis, 161 Mo. 371, 61 S. W. 658. For other cases upon regulation of streets, see Argentine *v.* Atchison T. & S. F. Ry. Co, 55 Kan. 730, 41 Pac. 946, 30 L. R. A. 255; Mt. Carmel *v.* Shaw, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580; Indianapolis *v.* Consumers' Gas Co., 140 Ind. 107, 39 N. E. 433, 49 Am. St. 183, 27 L. R. A. 514; Tate *v.* Greensboro, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; Savage *v.* Salem, 23 Oreg. 381, 31 Pac. 832, 37 Am. St. 688, 24 L. R. A. 787; New Haven *v.* New Haven & D. Ry. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; People *v.* Ft. Wayne & E. Ry. Co., 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. 898, 15 L. R. A. 553, and note (shade trees); American R. Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. 764, 13 L. R. A. 454; State *v.* Trenton, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; note to 8 L. R. A. 828.]

may have occasion to use the street for the purpose of constructing and operating their railroad, the right to regulate and control the use of that street shall not be exercised. . . . It cannot be that powers vested in the corporation as an important public trust can thus be frittered away, or parcelled out to individuals or joint-stock associations, and secured to them beyond control." [1]

So, it has been held that the city of Philadelphia exercised a portion of the public right of eminent domain in respect to the streets within its limits, subject only to the higher control of the State and the use of the people; and therefore a written license granted by the city, though upon a valuable consideration, authorizing the holder to connect his property with the city railway by a turnout and track, was not such a contract as would prevent the city from abandoning or removing the railway whenever, in the opinion of the city authorities, such action would tend to the benefit of its police.[2]

[1] Milhau *v.* Sharp, 17 Barb. 435; s. c. 28 Barb. 228, and 27 N. Y. 611; Birmingham, &c. St. Ry. Co. *v.* Birmingham St. Ry. Co., 79 Ala. 465; Nash *v.* Lowry, 37 Minn. 261; Jackson, &c. R. Co. *v.* Interstate, &c. Co., 24 Fed. Rep. 306. See also Davis *v.* Mayor, &c. of New York, 14 N. Y. 506; State *v.* Mayor, &c., 3 Duer, 119; State *v.* Graves, 19 Md. 351; [Detroit Citizens' Street R. Co. *v.* Detroit Ry., 171 U. S. 48, 18 Sup. Ct. Rep. 732. Upon municipal power to impose conditions in granting right to street railway to occupy streets, &c., see Galveston & W. R. Co. *v.* Galveston, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33, and note; rights of street railways to use streets, People *v.* Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174, and note; and Adams *v.* Chicago, B. & N. R. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, and note, 12 Am. St. 644; upon general relations between street railways and municipalities, note to 43 L. ed. U. S. 67. Right to lay tracks is subject to regulation by subsequent ordinance. Baltimore *v.* Baltimore Tr. & G. Co., 166 U. S. 673, 17 Sup. Ct. Rep. 696. See also Clarksburg El. L. Co. *v.* Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; Cleveland *v.* Augusta, 102 Ga. 233, 29 S. E. 581, 43 L. R. A. 638. City cannot authorize the permanent occupation of a portion of the street for a private purpose, as by an awning. Resolution authorizing such is revocable at any time, although the licensee may have spent a large sum in the erection of the awning. Hibbard, S., B. & Co. *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621.] Compare Chicago, &c. R. R. Co. *v.* People, 73 Ill. 541. Nor can an exclusive privilege be granted to a gas company to use the streets. Gas Co. *v.* Parkersburg, 30 W. Va. 435, 4 S. E. 650; Cincinnati Gaslight Co. *v.* Avondale, 43 Ohio St. 257, 1 N. E. 527; Citizens' Gas, &c. Co. *v.* Elwood, 114 Ind. 332, 16 N. E. 624. [A grant of an "exclusive privilege of laying pipes for carrying gas in said city," &c., does not prevent a city's erecting its own gasworks, particularly where the legislature in incorporating the gas company reserved the power to amend, alter, or repeal its charter, and later authorized the city to construct its own gasworks. Hamilton Gaslight & C. Co. *v.* Hamilton, 146 U. S. 258, 13 Sup. Ct. Rep. 90.] The consent of the legislature in any such case would relieve it of all difficulty, except so far as questions might arise concerning the right of individuals to compensation, as to which, see *post*, ch. 15. In Milhau *v.* Sharp, *supra*, it was also held that a corporation, with authority "from time to time to regulate the rates of fare to be charged for the carriage of persons," could not by resolution divest itself thereof as to the carriages employed on a street railway.

[2] Branson *v.* Philadelphia, 47 Pa. St. 329. Compare Louisville City R. R. Co. *v.* Louisville, 8 Bush, 415. [And see

While thus held within the limitations which govern the legislative authority of the State, these corporations are also entitled to the protections and immunities which attend State action, and which exempt it from liability to those who may incidentally suffer damage in consequence. (*a*) As no State does or can undertake to protect its people against incidental injuries resulting from its adopting or failing to adopt any proposed legislative action, so no similar injury resulting from municipal legislative action or non-action can be made the basis of a legal claim against a municipal corporation. The justice or propriety of its opening or discontinuing a street, of its paving or refusing to pave a thoroughfare or alley, of its erecting a desired public building, of its adopting one plan for a public building or work rather than another, or of the exercise of any other discretionary authority committed to it as a part of the governmental machinery of the State, is not suffered to be brought in question in an action at law, and submitted to the determination of court and jury.[1] If, therefore, a city tem-

Stevens *v.* Muskegon, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.]

[1] In Griffin *v.* New York, 9 N. Y. 456, 459, in which it was held that an action would not lie against a city for injury occasioned by a failure to keep its streets free from obstructions, the following remarks are made: "The functions of a common council as applied to this subject are those of a local legislature within certain limits, and are not of a character to render the city responsible for the manner in which the authority is exercised, or in which the ordinances are executed, any more than the State would be liable for the want of adequate administrative laws, or from any imperfections in the manner of carrying them out." "A doctrine that should hold the city pecuniarily liable in such a case would oblige its treasury to make good to every citizen any loss which he might sustain for the want of adequate laws upon every subject of municipal jurisdiction, and on account of every failure in the perfect and infallible execution of those laws. There is no authority for such a doctrine, and we are satisfied it does not exist." [See also Evansville *v.* Senhenn, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. 218.] Where a city under proper authority has vacated part of a street, an abutter on another part of it has no ground of complaint. Whitsett *v.* Union D. & R. Co., 10 Col. 243, 15 Pac. 339. A court cannot control the discretion of a city in opening and working streets. Bauman *v.* Detroit, 58 Mich. 444, 25 N. W. 391. So, where a city was sued for an injury sustained in the destruction of property by a mob, in consequence of the failure of officers to give adequate protection, the court, in holding that the action will not lie, say: "It is not the policy of the government to indemnify individuals for losses sustained either from the want of proper laws, or from the inadequate enforcement of

(*a*) [A municipal corporation is not liable in an action for false imprisonment where imprisonment was under a judgment for violation of an ordinance, even though the judgment was erroneous or even void. Bartlett *v.* Columbus, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795. Nor for the destruction of property in time of flood in order to prevent still greater loss. Aitken *v.* Wells River, 70 Vt. 308, 40 Atl. 829, 41 L. R. A. 566, 67 Am. St. 672. Nor for injury resulting from the negligence of the employer of a public institution maintained by the county as a governmental agency (reform school). McAndrews *v.* Hamilton County, 105 Tenn. 399, 58 S. W. 483.]

porarily suspends useful legislation;[1] or orders and constructs

laws." Western College *v.* Cleveland, 12 Ohio St. 375, 377. [But liability for such losses may be cast by statute on municipalities. Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. 321.] A city is not liable for the destruction of a house by fire set by sparks from an engine which was by its ordinances a nuisance subject to abatement. "In the exercise of such powers a city is not bound to act unless it chooses to act." Davis *v.* Montgomery, 51 Ala. 139, 23 Am. Rep. 545. Nor for failure to enforce a fire limits ordinance whereby adjoining property is burned. Hines *v.* Charlotte, 72 Mich. 278, 40 N. W. 333. Nor for failure to prohibit manufacture of fireworks. McDade *v.* Chester, 117 Pa. St. 414, 12 Atl. 421. Nor is it liable for neglect to construct a proper system of drainage, in consequence of which plaintiff's store was overflowed in an extraordinary rain. Carr *v.* Northern Liberties, 35 Pa. St. 324; Flagg *v.* Worcester, 13 Gray, 601.

A city is not liable for the failure to provide a proper water supply for the extinguishment of fires: Grant *v.* Erie, 69 Pa. St. 420, 8 Am. Rep. 272; Tainter *v.* Worcester, 123 Mass. 311, 25 Am. Rep. 90; Wright *v.* Augusta, 78 Ga. 241, Black *v.* Columbia, 19 S. C. 412; Vanhorn *v.* Des Moines, 63 Iowa, 447, 19 N. W. 293; Mendel *v.* Wheeling, 28 W. Va. 233; [Butterworth *v.* Henrietta, — Tex. Civ. Ap. —, 61 S. W. 975, (Mar. 23, 1901);] nor for the inefficiency of its firemen: Wheeler *v.* Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Patch *v.* Covington, 17 B. Mon. 722; Greenwood *v.* Louisville, 13 Bush, 226, 26 Am. Rep. 203; Hafford *v.* New Bedford, 16 Gray, 297; Fisher *v.* Boston, 104 Mass. 87, 6 Am. Rep. 196; Jewett *v.* New Haven, 38 Conn. 368; Torbush *v.* Norwich, 38 Conn. 225, 9 Am. Rep. 395; Howard *v.* San Francisco, 51 Cal. 52; Heller *v.* Sedalia, 53 Mo. 159, 14 Am. Rep. 444; McKenna *v.* St. Louis, 6 Mo. App. 320; Robinson *v.* Evansville, 87 Ind. 334; nor for not preventing "coasting" in its streets, to the injury of individuals: Shepherd *v.* Chelsea, 4 Allen, 113; Pierce *v.* New Bedford, 129 Mass. 534; Ray *v.* Manchester, 46 N. H. 59; Altvater *v.* Baltimore, 31 Md. 462; Hutchinson *v.* Concord, 41 Vt. 271; Calwell *v.* Boone, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; Schultz *v.* Milwaukee, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779; Burford *v.* Grand Rapids, 53 Mich. 98, 18 N. W. 571; Weller *v.* Burlington, 60 Vt. 28, 12 Atl. 215; Lafayette *v.* Timberlake, 88 Ind. 330; [Wilmington *v.* Van De Grift, 1 Marvel (Del.), 5, 29 Atl. 1047, 25 L. R. A. 538, 65 Am. St. 256;] but see Taylor *v.* Cumberland, 64 Md. 68, 20 Atl. 1027; nor for fitting a path for "coasting" in public grounds, where a collision occurs with a person passing it: Steele *v.* Boston, 128 Mass. 583; [nor for not preventing the running at large of dogs when hydrophobia is epidemic: Smith *v.* Selinsgrove, 199 Pa. 615, 49 Atl. 213;] nor for failure to light the streets sufficiently: Freeport *v.* Isbell, 83 Ill. 440, 25 Am. Rep. 407; Miller *v.* St. Paul, 38 Minn. 134, 36 N. W. 271; see Randall *v.* Railroad Co., 106 Mass. 276, 8 Am. Rep. 327; nor for granting to a railroad a right of way along one of its streets: Davenport *v.* Stevenson, 34 Iowa, 225; Frith *v.* Dubuque, 45 Iowa, 406; Stevenson *v.* Lexington, 69 Mo. 157; nor for failure to compel such railroad to maintain safety gates: Kistner *v.* Indianapolis, 100 Ind. 210; nor for failure to enact proper ordinances for keeping its sidewalks in repair, or to enforce them if enacted: Cole *v.* Medina, 27 Barb. 218; [*contra*, McDevitt *v.* St. Paul, 56 Minn. 14, 68 N. W. 178, 33 L. R. A. 601; nor for failure to prohibit bicycle riding upon sidewalks: Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294;] nor for failure to build footwalks adjoining a bridge: Lehigh Co. *v.* Hoffort, 116 Pa. St. 119, 9 Atl. 177; nor for allowing a shooting-gallery to be maintained: Hubbell *v.* Viroqua, 67 Wis. 343, 30 N. W. 847; nor for permitting cannon firing: Wheeler *v.*

[1] Such as an ordinance forbidding fireworks within a city: Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451; or forbidding cattle running at large: Rivers *v.* Augusta, 65 Ga. 376, 38 Am. Rep. 787. A city is not liable for a loss by fire which might have been prevented if the city had not been cut off the water from one of its hydrants. Tainter *v.* Worcester, 123 Mass. 311.

public works, from which incidental injury results to individuals;[1] or adopts unsuitable or insufficient plans for public bridges, buildings, sewers, or other public works;[2] or in any other manner,

Plymouth, 116 Ind. 158, 18 N. E. 532; Lincoln *v.* Boston, 148 Mass. 578, 20 N. E. 329; Robinson *v.* Greenville, 42 Ohio St. 625; [O'Rourk *v.* Sioux Falls, 4 S. D. 47, 54 N.W. 1044, 19 L. R. A. 789; 46 Am. St. 760;] nor the discharge of fireworks: Ball *v.* Woodbine, 61 Iowa, 83, 15 N. W. 846; [Bartlett *v.* Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. 817; Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; Love *v.* Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192; Fifield *v.* Phœnix, — Ariz. —, 36 Pac. 916, 24 L. R. A. 430;] nor for damage done on adjoining property by its failure to remove a dangerous wall: Kiley *v.* Kansas City, 87 Mo. 103; Anderson *v.* East, 117 Ind. 126, 19 N. E. 726; Cain *v.* Syracuse, 95 N. Y. 83; otherwise for injury therefrom to a person on the street. Duffy *v.* Dubuque, 63 Iowa, 171, 18 N. W. 900. [But the city as owner of vacant lots is subject to same duties in regard thereto as a private owner. Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. 114. And where the city permits cattle to roam the streets to such an extent that they amount to a nuisance, it may be liable for an injury to a person on the street, caused by a cow running at large. Cochrane *v.* Frostburg, 81 Md. 54, 31 Atl. 703, 27 L. R. A. 728, 48 Am. St. 479, and see note in L. R. A. But city is not responsible for defective condition of a bathing beach, the duty to maintain which is thrust upon it by law. McGraw *v.* Dist. of Columbia, 3 App. D. C. 405, 25 L. R. A. 691. Where it lawfully acts as private contractor in furnishing water to steam-heating plant, it is liable for breach. Watson *v.* Needham, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287.]

[1] Brewster *v.* Davenport, 51 Iowa, 427, 1 N. W. 737; Wehn *v.* Commissioners, 5 Neb. 494, 25 Am. Rep. 497 (case of a jail, complained of as offensive in the neighborhood); Carroll *v.* St. Louis, 4 Mo. App. 191; Saxton *v.* St. Joseph, 60 Mo. 153; Wicks *v.* De Witt, 54 Iowa, 130, 6 N. W. 176; White *v.* Yazoo City, 27 Miss. 357; Vincennes *v.* Richards, 23 Ind. 381; Highway Com'rs *v.* Ely, 54 Mich. 173, 19 N. W. 940; Fort Worth *v.* Crawford, 64 Tex. 202. There can be no recovery for an injury caused by blasting in the course of a public work, in the absence of negligence in the city's agent. Blumb *v.* Kansas City, 84 Mo. 112; Murphy *v.* Lowell, 128 Mass. 396. *Contra*, Joliet *v.* Harwood, 86 Ill. 110. [Nor, except by force of statute, even in case of negligence. Howard *v.* Worcester, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160. Determination of city council that poles for electric light wires shall be erected in street cannot be questioned. Palmer *v.* Larchmont El. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.]

[2] Mills *v.* Brooklyn, 32 N. Y. 489; Carr *v.* Northern Liberties, 35 Pa. St. 324; Fair *v.* Philadelphia, 88 Pa. St. 309; Collins *v.* Philadelphia, 93 Pa. St. 272; Lynch *v.* New York, 76 N. Y. 60; Larkin *v.* Saginaw, 11 Mich. 88; Detroit *v.* Beckman, 34 Mich. 125; Lansing *v.* Toolan, 37 Mich. 152; Davis *v.* Jackson, 61 Mich. 530, 28 N. W. 526; Foster *v.* St. Louis, 4 Mo. App. 564; Denver *v.* Capelli, 4 Col. 25, 34 Am. Rep. 62; Allen *v.* Chippewa Falls, 52 Wis. 430, 9 N. W. 284; McClure *v.* Redwing, 28 Minn. 186, 9 N. W. 767; French *v.* Boston, 129 Mass. 592, 37 Am. Rep. 393; Johnston *v.* Dist. Columbia, 118 U. S. 19, 6 Sup. Ct. Rep. p. 923; [Hughes *v.* Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636.] A city is not liable if in rebuilding a walk an abutter follows the original plan. Urquhart *v.* Ogdensburg, 91 N. Y. 67. But if he deviates from it, the fact that the city suffers the walk to remain does not constitute an adoption of it. *Ibid.* 97 N. Y. 238. In Kansas a city may be liable if the plan is manifestly unsafe. Gould *v.* Topeka, 32 Kan. 485, 4 Pac. 822. In Indiana it is liable for negligence in plan, but not for mere errors of judgment. Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126, and note; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139; Terre Haute *v.* Hudnut, 112 Ind. 542, 13 N. E. 686. In Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332, a child attending one of the public schools in the third story of a school building fell over the railing to the staircase, and

through the exercise or failure to exercise its political authority, causes incidental injury to individuals, an action will not lie for such injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by the retroactive effect of punitive verdicts upon special complaints. The probable consequence is well stated in a case in which action was brought against a city for neglect to construct a proper system of drainage. "Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow; or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and than a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted."[1] The alternative is — and the only course consistent with principle — to leave the municipal corporation to judge finally in the exercise of such political power

brought suit for the consequent injury, alleging that the railing was made dangerously low. The court held no such action maintainable, and asserted the "general doctrine that a private action cannot be maintained against a town or other *quasi* corporation for a neglect of corporate duty, unless such action is given by statute;" citing White *v.* Phillipston, 10 Met. 108; Sawyer *v.* Northfield, 7 Cush. 490; Reed *v.* Belfast, 20 Me. 246; Eastman *v.* Meredith, 36 N. H. 284; Hyde *v.* Jamaica, 27 Vt. 443; Chidsey *v.* Canton, 17 Conn. 475; Taylor *v.* Peckham, 8 R. I. 349, 5 Am. Rep. 578; Bartlett *v.* Crozier, 17 Johns. 439; Freeholders *v.* Sussex, 18 N. J. 108; Warbiglee *v.* Los Angeles, 45 Cal. 36; Highway Commissioners *v.* Martin, 4 Mich. 557, and a great number of other cases. It is also said in the same case that, in Massachusetts, the same doctrine is applied to incorporated cities. See further Hyde *v.* Jamaica, 27 Vt. 443; State *v.* Burlington, 36 Vt. 521; Chidsey *v.* Canton, 17 Conn. 475; Taylor *v.* Peckham, 8 R. I. 349, 5 Am. Rep. 578. If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city, but he can recover so far as it is attributable to the improper construction or unreasonable use of the sewers, or the negligence or other fault of the city in the care and management of them. Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592, citing Emery *v.* Lowell, 104 Mass. 13; Child *v.* Boston, 4 Allen, 41. [See also Atlanta *v.* Warnock, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, and note, 44 Am. St. 17; Bulger *v.* Eden, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205, and note.] But a city may not empty a sewer into a mill pond without acquiring the right in some lawful way. Vale Mills *v.* Nashua, 63 N. H. 136. [And that a city may be liable for establishing a pest-house near the residence of a person, see Clayton *v.* Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474.]

[1] Carr *v.* Northern Liberties, 35 Pa. St. 324, 329. See Detroit *v.* Beckman, 34 Mich. 125.

as has been confided to it.[1] And as the State is not responsible for the acts or neglects of public officers in respect to the duties imposed upon them for the public benefit, so one of these corporations is not liable to private suits for either the non-performance or the negligent performance of the public duties which it is re-

[1] Louisville *v.* Hyatt, 2 B. Mon. 177, 36 Am. Dec. 594. Cities are under a political obligation to open such streets and build such market-houses as the convenience of the community requires; but they cannot be compelled to perform these duties, or be held responsible for non-performance. Joliet *v.* Verley, 35 Ill. 58. See, further, Little Rock *v.* Willis, 27 Ark. 572; Duke *v.* Rome, 20 Ga. 635; Tate *v.* Railroad Co., 64 Mo. 149; Bennett *v.* New Orleans, 14 La. Ann. 120; Commissioners *v.* Duckett, 20 Md. 468; Randall *v.* Eastern R. Corp., 106 Mass. 276; Hughes *v.* Baltimore, Taney, 243; Weightman *v.* Washington, 1 Black, 39. A city is not liable to an abutter for allowing a street to be used for market purposes. Henkel *v.* Detroit, 49 Mich. 249, 13 N. W. 611. But this doctrine does not deprive an individual of remedy when by reason of the negligent construction of a public work his property is injured, or when the necessary result of its construction is to flood or otherwise injure his property in a manner that would render a private individual liable. See Van Pelt *v.* Davenport, 40 Iowa, 308, 20 Am. Rep. 622, and note, p. 626; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Mayo *v.* Springfield, 136 Mass 10; Weyman *v.* Jefferson, 61 Mo. 55; Broadwell *v.* Kansas City, 75 Mo. 213; Union *v.* Durkes, 38 N. J. 21; Hewison *v.* New Haven, 37 Conn. 475, 9 Am. Rep. 342; Hines *v.* Lockport, 50 N. Y. 236; Hardy *v.* Brooklyn, 90 N. Y. 435; Weightman *v.* Washington, 1 Black, 39; Simmer *v.* St. Paul, 23 Minn. 408; Ross *v.* Clinton, 46 Iowa, 666; Inman *v.* Tripp, 11 R. I. 520; Damour *v.* Lyons City, 44 Iowa, 276; Thurston *v.* St. Joseph, 51 Mo. 510, 11 Am. Rep. 463; Little Rock *v.* Willis, 27 Ark. 572; Princeton *v.* Gieske, 93 Ind. 102; Denver *v.* Rhodes, 9 Col. 554, 13 Pac. 729; Keating *v.* Cincinnati, 38 Ohio St. 141; Mayor, &c. Savannah *v.* Spears, 66 Ga. 304. [Miles *v.* Worcester, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841, 26 Am. St. 264.] A city is liable for negligence in repairing a sewer. Fort Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743; Kranz *v.* Mayor, &c. of Baltimore, 64 Md. 491, 2 Atl. 908; Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. 703. And a State may be, if it has assumed to make one. Ballou *v.* State, 111 N. Y. 496, 18 N. E. 627. If a city cuts a sewer in such a manner as to cause the collection of a large quantity of water which otherwise would not have flowed there, and to cast it upon the premises of an individual to his injury, this is a trespass for which the city is liable. Ashley *v.* Port Huron, 35 Mich. 296, citing many cases. See also Bloomington *v.* Brokaw, 77 Ill. 194; Elgin *v.* Kimball, 90 Ill. 356; Dixon *v.* Baker, 65 Ill. 518, 16 Am. Rep. 591; Rowe *v.* Portsmouth, 56 N. H. 291, 22 Am. Rep. 464; Burton *v.* Chattanooga, 7 Lea, 739; Rhodes *v.* Cleveland, 10 Ohio, 159, 36 Am. Dec. 82; West Orange *v.* Field, 37 N. J. Eq. 600; Crawfordsville *v.* Bond, 96 Ind. 236; Lehn *v.* San Francisco, 66 Cal. 76, 4 Pac. 965; Rychlicki *v.* St. Louis, 98 Mo. 497, 11 S. W. 1001; Blakely *v.* Devine, 36 Minn. 53, 25 N. W. 342; Seifert *v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321. [Albany *v.* Sikes, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653.] As to the liability for increasing the flow of surface water on land by grading streets, compare Bronson *v.* Wallingford, 54 Conn. 513, 9 Atl. 393; Stewart *v.* Clinton, 79 Mo. 603; Kehrer *v.* Richmond, 81 Va. 745; Meth. Ep. Ch. *v.* Wyandotte, 31 Kan. 721, 3 Pac. 527; Morris *v.* Council Bluffs, 67 Iowa, 343, 25 N. W. 274; Kennison *v.* Beverly, 146 Mass. 467, 16 N. E. 278; Heth *v.* Fond du Lac, 63 Wis. 228, 23 N. W. 495; [Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. 859;] where it was denied, with Peters *v.* Fergus Falls, 35 Minn. 549, 29 N. W. 586; Gray *v.* Knoxville, 85 Tenn. 99, 1 S. W. 622; Gilluly *v.* Madison, 63 Wis. 518, 24 N. W. 137; Addy *v.* Janesville, 70 Wis. 401, 35 N. W. 931, where it was sustained.

quired to assume, and does assume, for the general public, and from which the corporation itself receives neither profit nor special privilege.[1] And the same presumption that legislative action has

[1] Eastman *v.* Meredith, 36 N. H. 284; Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332. [Markey *v.* Queens County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; Moran *v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. 543; Snider *v.* St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.] Nor does it change the rule that the duty is not specially imposed, but is assumed under a general law. Wixon *v.* Newport, 13 R. I. 454. A city is not liable for the negligent management of its hospitals: Richmond *v.* Long, 17 Gratt. 375; Benton *v.* Trustees, &c., 140 Mass. 13, 1 N. E. 836; [or for the administration of impure vaccine virus under an ordinance compelling vaccination: Wyatt *v.* Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. 41; or for an injury arising from defective machinery in an asylum which the State compelled it to maintain: Hughes *v.* County of Monroe, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33. See also Freel *v.* School City of Crawfordsville, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 361, and note thereto in L. R. A. But it is liable for injury to the health of a prisoner whom it confines in a damp, cold, filthy prison. Shields *v.* Durham, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293, and note.] A county is not liable for personal injuries sustained by reason of the imperfect construction of its court-house. Kincaid *v.* Hardin, 53 Iowa, 430, 50 N. W. 589, 36 Am. Rep. 236; Hollenbeck *v.* Winnebago Co., 95 Ill. 148, 35 Am. Rep. 151. See further, Little *v.* Madison, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793; Dawson *v.* Aurelius, 49 Mich. 479, 13 N. W. 824. And compare *post*, 353–362, and notes. A city is not liable for the torts of its police officers: Cook *v.* Macon, 54 Ga. 463; M'Elroy *v.* Albany, 65 Ga. 387, 38 Am. Rep. 791; Grumbine *v.* Washington, 2 McArthur, 578, 29 Am. Rep. 626; Harman *v.* Lynchburg, 33 Gratt. 37; Buttrick *v.* Lowell, 1 Allen, 172; Elliott *v.* Philadelphia, 75 Pa. St. 347; Norristown *v.* Fitzpatrick, 94 Pa. St. 121; Calwell *v.* Boone, 51 Iowa, 687, 2 N. W. 614; Attaway *v* Cartersville, 68 Ga. 740; Worley *v.* Columbia, 88 Mo. 106; or for their negligence: Pollock's Adm'r *v.* Louisville, 13 Bush, 221, 26 Am. Rep. 260, and note; Little *v.* Madison, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793; Jolly *v.* Hawesville, 89 Ky. 279, 12 S. W. Rep. 313; but see *contra*, Carrington *v.* St. Louis, 89 Mo. 208, 1 S. W. 240; or for the negligence of its firemen: Burrill *v.* Augusta, 78 Me. 118, 3 Atl. 177; Welsh *v.* Rutland, 56 Vt. 228; Wilcox *v.* Chicago, 107 Ill. 334; Grube *v.* St. Paul, 34 Minn. 402, 26 N. W. 228; [Gillespie *v.* Lincoln, 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349; Dodge *v.* Granger, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781, and note, 33 Am. St. 901; or bridge-tender: Corning *v.* Saginaw, 110 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; or for insufficiency of municipal water-works: Springfield F. & M. Ins. Co. *v.* Keeseville, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. 667; nor for negligence in not maintaining proper poles in fire-signal system: Pettingell *v.* Chelsea, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426;] or for the torts of other officers: Hunt *v.* Boonville, 65 Mo. 620, 27 Am. Rep. 299; Wallace *v.* Menasha, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804; Trustees *v.* Schroeder, 58 Ill. 353; Cumberland *v.* Willison, 50 Md. 138; Cooney *v.* Hartland, 95 Ill. 516; Corsicana *v.* White, 57 Tex. 382; [Gray *v.* Griffin, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131;] or for their errors or neglects: Wallace *v.* Menasha, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804; Collins *v.* Philadelphia, 93 Pa. St. 272; Hart *v.* Bridgeport, 13 Blatch. 289; McCarthy *v.* Boston, 135 Mass. 197; Tindley *v.* Salem, 137 Mass. 171; Summers *v.* Com'rs Daviess Co., 103 Ind. 262, 2 N. E. 725; Abbett *v.* Com'rs Johnson Co., 114 Ind. 61, 16 N. E. 127; Wakefield *v.* Newport, 60 N. H. 374; Condict *v.* Jersey City, 46 N. J. L. 157; Donnelly *v.* Tripp, 12 R. I. 97; [Bd. of Com'rs Jasper Co. *v.* Allman, 142 Ind. 573, 42 N. E. 206, 30 L. R. A. 58; A'Hern *v.* Iowa St. Agr'l Society, 91 Iowa, 97, 58 N. W. 1092, 24 L. R. A. 655; Williamson *v.* Louisville Ind. School, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, and note, 44

been devised and adopted on adequate information and under the influence of correct motives, will be applied to the discretionary action of municipal bodies, and of the State legislature, and will preclude, in the one case as in the other, all collateral attack.[1]

Among the implied powers of such an organization appears to be that of defending and indemnifying its officers where they have incurred liability in the *bona fide* discharge of their duty. It has been decided in a case where irregularities had occurred in the assessment of a tax, in consequence of which the tax was void, and the assessors had refunded to the persons taxed the moneys which had been collected and paid into the town, county, and State

Am. St. 243; Whitfield *v.* Paris, 84 Tex. 431, 19 S. W. 566, 15 L. R. A. 783, and note, 31 Am. St. 69; Brown *v.* Guyandotte, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; Culver *v.* Streator, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270;] but see Sprague *v.* Tripp, 13 R. I. 38; or for illegal action of officers under an illegal ordinance. Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1; [Hoggard *v.* Monroe, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477.] But it is liable if in obedience to orders an officer acts under such ordinance. Durkee *v.* Kenosha, 59 Wis. 123, 17 N. W. 677. [Schussler *v.* Hennepin Co. Com'rs, 67 Minn. 412, 70 N. W. 6, 64 Am. St. 424, 39 L. R. A. 75.] And it may be liable if the negligent person is to be regarded as its servants, and not as a public officer. Mulcairns *v.* Janesville, 67 Wis. 24, 29 N. W. 565; Waldron *v.* Haverhill, 143 Mass. 582, 10 N. E. 481; Perkins *v.* Lawrence, 136 Mass. 305; Semple *v.* Vicksburg, 62 Miss. 63. In the management of the private property held by the corporation for its own profit or advantage, it is held to the same responsibility with private citizens. Moulton *v.* Scarborough, 71 Me. 267, 36 Am. Rep. 308, and cases cited; Rowland *v.* Kalamazoo Supts., 49 Mich. 553, 14 N. W. 494. [But not where the acquisition and holding of such property is *ultra vires*. Duncan *v.* Lynchburg, — Va. —, 34 S. E. 964, 48 L. R. A. 331. Liable for negligent management of city waterworks. Esberg-Gunst Cigar Co. *v.* Portland, 34 Oreg. 282, 54 Pac. 664, 43 L. R. A. 435, 75 Am. St. 651; Augusta *v.* Mackey, 113 Ga. 64, 38 S. E. 339, and of market buildings which it may erect, but is not compelled to: Barron *v.* Detroit, 94 Mich. 601, 54 N. W. 273, 19 L. R. A. 452, and note, 34 Am. St. 366.] So if the city lets a public building for hire, it is liable for negligence in managing it. Worden *v.* New Bedford, 131 Mass. 23. See also Toledo *v.* Cone, 41 Ohio St. 149, [and note to 39 L. R. A. 33, upon liabilities of counties in actions for torts and negligence. The same doctrine of immunity from private suit applies to public officers who are compelled to serve without compensation where their duties are quasi-judicial. Daniels *v.* Hathaway, 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377. Mayor duly acting as court is not liable for maliciously issuing an erroneous order. Scott *v.* Fishblate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696. Statute made municipality liable for injuries done by "riotous or tumultuous assemblages of people." Held, not necessary that there should be any common intent, in those composing such assemblage, to injure in order that municipality be liable. Madisonville *v.* Bishop, — Ky. —, 67 S. W. 269, 57 L. R. A. 130. See also Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; Scanlon *v.* Wedger, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395.]

[1] Millhau *v.* Sharp, 15 Barb. 193; New York, &c. R. R. Co. *v.* New York, 1 Hilton, 562; Buell *v.* Ball, 20 Iowa, 282; Freeport *v.* Marks, 59 Pa St. 253. Compare State *v.* Cincinnati Gas Co., 18 Ohio St. 262. See cases *ante*, pp. 257–260. [But in Weston *v.* Syracuse, 155 N. Y. 271, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. 472, it was held that a resolution accepting an imperfect sewer was void because secured by fraud and corruption.]

treasuries, that the town had authority to vote to raise a sum of money in order to refund to the assessors what had been so paid by them, and that such vote was a legal promise to pay, on which the assessors might maintain action against the town. "The general purpose of this vote," it was said, "was just and wise. The inhabitants, finding that three of their townsmen, who had been elected by themselves to an office, which they could not, without incurring a penalty, refuse to accept, had innocently and inadvertently committed an error which, in strictness of law, annulled their proceedings, and exposed them to a loss perhaps to the whole extent of their property, if all the inhabitants individually should avail themselves of their strict legal rights, — finding also that the treasury of the town had been supplied by the very money which these unfortunate individuals were obliged to refund from their own estates, and that, so far as the town tax went, the very persons who had rigorously exacted it from the assessors, or who were about to do it, had themselves shared in due proportion the benefits and use of the money which had been paid into the treasury, in the shape of schools, highways, and various other objects which the necessities of a municipal institution call for, — concluded to reassess the tax, and to provide for its assessment in a manner which would have produced perfect justice to every individual of the corporation, and would have protected the assessors from the effects of their inadvertence in the assessment which was found to be invalid. The inhabitants of the town had a perfect right to make this reassessment, if they had a right to raise the money originally. The necessary supplies to the treasury of a town cannot be intercepted, because of an inequality in the mode of apportioning the sum upon the individuals. Debts must be incurred, duties must be performed, by every town; the safety of each individual depends upon the execution of the corporate duties and trusts. There is and must be an inherent power in every town to bring the money necessary for the purposes of its creation into the treasury; and if its course is obstructed by the ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means; and whether this be done by resorting to their original power of voting to raise money a second time for the same purposes, or by directing to reassess the sum before raised by vote, is immaterial; perhaps the latter mode is best, at least it is equally good."[1]

[1] Per *Parker*, Ch. J., in Nelson *v.* Milford, 7 Pick. 18, 23. See also Baker *v.* Windham, 13 Me. 74; Fuller *v.* Groton, 11 Gray, 340; Board of Commissioners *v.* Lucas, 93 U. S. 108; State *v.* Hammonton, 38 N. J. 430, 20 Am. Rep. 404; Miles *v.* Albany, 59 Vt. 79, 7 Atl. 601. The duty, however, must have been

It has also been held competent for a town to appropriate money to indemnify the school committee for expenses incurred in defending an action for an alleged libel contained in a report made by them in good faith, and in which action judgment had been rendered in their favor.[1] And although it should appear that the officer had exceeded his legal right and authority, yet, if he has acted in good faith in an attempt to perform his duty, the town has the right to adopt his act and to bind itself to indemnify him.[2] And perhaps the legislature may even have power to com-

one authorized by law, and the matter one in which the corporation had an interest. Gregory *v.* Bridgeport, 41 Conn. 76, 19 Am. Rep. 485. In Bristol *v.* Johnson, 34 Mich. 123, it appeared that a township treasurer had been robbed of town moneys, but had accounted to the township therefor. An act of the legislature was then obtained for refunding this sum to him by tax. Held, not justified by the constitution of the State, which forbids the allowance of demands against the public by the legislature. See People *v.* Supervisor of Onondaga, 16 Mich. 254. [No indemnity can be given an officer for a loss arising through his negligence. Thorndike *v.* Camden, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463. Where local improvements within the power of the legislature to authorize are made under an act later adjudged unconstitutional, and the assessment made thereunder fails, the legislature may authorize a reassessment of the cost of the improvement. Chester *v.* Black, 132 Pa. 568, 19 Atl. 276, 6 L. R. A. 802, and note.]

A municipal corporation, it is said, may offer rewards for the detection of offenders within its limits; but its promise to reward an officer for that which without such reward, it was his duty to do, is void. Dillon, Mun. Corp. § 91, and cases cited. And see note, p. 310. *post.*

[1] Fuller *v.* Groton, 11 Gray, 340. See also Hadsell *v.* Inhabitants of Hancock, 3 Gray, 526; Pike *v.* Middleton, 12 N. H. 278.

[2] A surveyor of highways cut a drain for the purpose of raising a legal question as to the bounds of the highway, and the town appointed a committee to defend an action brought against the surveyor therefor, and voted to defray the expenses incurred by the committee. By the court: "It is the duty of a town to repair all highways within its bounds, at the expense of the inhabitants, so that the same may be safe and convenient for travellers; and we think it has the power, as incident to this duty, to indemnify the surveyor, or other agent, against any charge or liability he may incur in the *bona fide* discharge of this duty, although it may turn out on investigation that he mistook his legal rights and authority. The act by which the surveyor incurred a liability was the digging a ditch, as a drain for the security of the highway; and if it was done for the purpose of raising a legal question as to the bounds of the highway, as the defendants offered to prove at the trial, the town had, nevertheless, a right to adopt the act, for they were interested in the subject, being bound to keep the highway in repair. They had, therefore, a right to determine whether they would defend the surveyor or not; and having determined the question, and appointed the plaintiffs a committee to carry on the defence, they cannot now be allowed to deny their liability, after the committee have paid the charges incurred under the authority of the town. The town had a right to act on the subject-matter which was within their jurisdiction; and their votes are binding and create a legal obligation, although they were under no previous obligation to indemnify the surveyor. That towns have an authority to defend and indemnify their agents who may incur a liability by an inadvertent error, or in the performance of their duties imposed on them by law, is fully maintained by the case of Nelson *v.* Milford, 7 Pick. 18." Bancroft *v.* Lynnfield, 18 Pick. 566, 568. And see Briggs *v.* Whipple, 6 Vt. 95; Sherman *v.* Carr, 8 R. I. 431. A collector may be indemnified for public money stolen from him. Fields *v.* Highland Co.

pel the town, in such a case, to reimburse its officers the expenses incurred by them in the honest but mistaken discharge of what they believed to be their duty, notwithstanding the town, by vote, has refused to do so.[1]

Construction of Municipal Powers.

The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the State in local government.[2] The State can create them for no other purpose, and it can confer powers of government to no other end, without at once coming in conflict with the constitutional maxim, that legislative power cannot be delegated, or with other maxims designed to confine all the agencies of government to the exercise of their proper functions. And wherever the municipality shall attempt to exercise powers not within the proper province of local self-government, whether the right to do so be claimed under express legislative grant, or by implication from the charter, the act must be considered as altogether *ultra vires*, and therefore void.

Commissioners, 36 Ohio St. 476. Compare Bristol *v.* Johnson, 34 Mich. 123.

[1] Guilford *v.* Supervisors of Chenango, 13 N. Y. 143. See this case commented upon by *Lyon*, J., in State *v.* Tappan, 29 Wis. 664, 680. On the page last mentioned it is said: "We have seen no case, except in the courts of New York, which holds that such moral obligation gives the legislature power to compel payment." The case in New York is referred to as authority in New Orleans *v.* Clark, 95 U. S. 644. Where officers make themselves liable to penalties for refusal to perform duty, the corporation has no authority to indemnify them. Halstead *v.* Mayor, &c. of New York, 3 N. Y. 430; Merrill *v.* Plainfield, 45 N. H. 126. See Frost *v.* Belmont, 6 Allen, 152; People *v.* Lawrence, 6 Hill, 244; Vincent *v.* Nantucket, 12 Cush. 103.

[2] A somewhat peculiar question was involved in the case of Jones *v.* Richmond, 18 Gratt. 517. In anticipation of the evacuation of the city of Richmond by the Confederate authorities, and under the apprehension that scenes of disorder might follow which would be aggravated by the opportunity to obtain intoxicating liquors, the common council ordered the seizure and destruction of all such liquors within the city, and pledged the faith of the city to the payment of the value. The Court of Appeals of Virginia afterwards decided that the city might be held liable on the pledge in an action of assumpsit. *Rives*, J., says: "By its charter the council is specially empowered to 'pass all by-laws, rules, and regulations which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of said city, or of the people or property therein.' It is hard to conceive of larger terms for the grant of sovereign legislative powers to the specified end than those thus employed in the charter; and they must be taken by necessary and unavoidable intendment to comprise the powers of eminent domain within these limits of prescribed jurisdiction. There were two modes open to the council: first, to direct the destruction of these stores, leaving the question of the city's liability therefor to be afterwards litigated and determined; or secondly, assuming their liability, to contract for the values destroyed under their orders. Had they pursued the first mode, the corporation would have been liable in an action of trespass for the damages; but they thought proper to adopt the latter mode, make it a matter of

A reference to a few of the adjudged cases will perhaps best illustrate this principle. The common council of the city of Buffalo undertook to provide an entertainment and ball for its citizens and certain expected guests on the 4th of July, and for that purpose entered into contract with a hotel-keeper to provide the entertainment at his house, at the expense of the city. The entertainment was furnished and in part paid for, and suit was brought to recover the balance due. The city had authority under its charter to raise and expend moneys for various specified purposes, and also "to defray the contingent and other expenses of the city." But providing an entertainment for its citizens is no part of municipal self-government, and it has never been considered, where the common law has prevailed, that the power to do so pertained to the government in any of its departments. The contract was therefore held void, as not within the province of the city government.[1]

contract, and approach their citizens, not as trespassers, but with the amicable proffer of a formal receipt and the plighted faith of the city for the payment. In this they seem to me to be well justified." Judge Dillon doubts the soundness of this decision. Dillon, Mun. Corp. § 371, note. The case seems to us analogous in principle to that of the destruction of buildings to stop the progress of a fire. In each case private property is destroyed to anticipate and prevent an impending public calamity. [Jones *v.* Richmond is overruled in Wallace *v.* Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554.] See *post*, pp. 757, 867, 868. [Village may offer reward for arrest and conviction of incendiaries. People *v.* Holly, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677, 75 Am. St. 435.]

[1] Hodges *v.* Buffalo, 2 Denio, 110. See also the case of New London *v.* Brainard, 22 Conn. 552, which follows and approves this case. The cases differ in this only: that in the first, suit was brought to enforce the illegal contract, while in the second the city was enjoined from paying over moneys which it had appropriated for the purposes of the celebration. The cases of Tash *v.* Adams, 10 Cush. 252; Hood *v.* Lynn, 1 Allen, 103, and Austin *v.* Coggeshall, 12 R. I. 329, 34 Am. Rep. 648, are to the same effect. A town, it has been held, cannot lawfully be assessed to pay a reward offered by a vote of the town for the apprehension and conviction of a person supposed to have committed murder therein. Gale *v.* South Berwick, 51 Me. 174. See also Hawk *v.* Marion County, 48 Iowa, 472; Hanger *v.* Des Moines, 52 Iowa, 193, 2 N. W. 1105; 35 Am. Rep. 266; Board of Commissioners *v.* Bradford, 72 Ind. 455, 37 Am. Rep. 174; Patton *v.* Stephens, 14 Bush. 324. *Contra*, Borough of York *v.* Forscht, 23 Pa. St. 391; and see, People *v.* Holly, *supra*. As to the power of a municipality to bind itself by the offer of a reward, see, further, Crawshaw *v.* Roxbury, 7 Gray, 374; Lee *v.* Flemingsburgh, 7 Dana, 28; Loveland *v.* Detroit, 41 Mich. 367, 1 N. W. 952; Janvrin *v.* Exeter, 48 N. H. 83; Murphy *v.* Jacksonville, 18 Fla. 318. An officer cannot claim an offered reward for merely doing his duty. Pool *v.* Boston, 5 Cush. 219. See Stamp *v.* Cass County, 47 Mich. 330, 11 N. W. 183. Nor, under its general authority to raise money for "necessary town charges," is a town authorized to raise and expend moneys to send lobbyists to the legislature. Frankfort *v.* Winterport, 54 Me. 250; Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413. Nor, under like authority, to furnish a uniform for a volunteer military company. Claflin *v.* Hopkinton, 4 Gray, 502. Under power to raise money for celebration of holidays and "other public purposes," it may raise it for public concerts. Hubbard *v.* Taunton, 140 Mass. 467, 5 N. E. 157. Where a municipal corporation enters into a contract

The supervisors of the city of New York refused to perform a duty imposed upon them by law, and were prosecuted severally and judgment recovered, for the penalty which the law imposed for such refusal. The board of supervisors then assumed, on behalf of the city and county, the payment of these judgments, together with the costs of defending the suits, and caused drafts to be drawn upon the treasurer of the city for these amounts. It was held that these drafts upon the public treasury to indemnify officers for disregard of duty were altogether unwarranted and void, and that it made no difference that the officers had acted conscientiously in refusing to perform their duty, and in the honest belief that the law imposing the duty was unconstitutional. The city had no interest in the suits against the supervisors, and appropriating the public funds to satisfy the judgments and costs was not within either the express or implied powers conferred upon the board.[1] It was in fact appropriating the public money for private purposes, and a tax levied therefor must consequently be invalid, on general principles controlling the right of taxation, which will be considered in another place. In an Iowa case it is said: "No instance occurs to us in which it would be competent for [a municipal corporation] to loan its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises;"[2] and where it cannot loan its credit to private undertakings, it is equally without power to appropriate the moneys in its treasury for such purposes, or by the conduct of its officers to subject itself to implied obligations.[3]

ultra vires, no implied contract arises to shen, 11 Pick. 396; Merrill *v.* Plainfield, 45 N. H. 126.

[2] Clark *v.* Des Moines, 19 Iowa, 199, 224; Carter *v.* Dubuque, 35 Iowa, 416. See Tyson *v.* School Directors, 51 Pa. St. 9; Freeland *v.* Hastings, 10 Allen, 570; Thompson *v.* Pittston, 59 Me. 545; Kelly *v.* Marshall, 69 Pa. St. 319; Allen *v.* Jay, 60 Me. 124, Am. Law Reg., Aug., 1873 with note by Judge Redfield, 11 Am. Rep. 185.

[3] "In determining whether the subject-matter is within the legitimate authority of the town, one of the tests is to ascertain whether the expenses were incurred in relation to a subject specially placed by law in other hands. . . . It is a decisive test against the validity of all grants of money by towns for objects liable to that objection, but it does not settle questions arising upon expenditures for objects not specially provided for. In compensate the contractor for anything he may have done under it, notwithstanding the corporation may have reaped a benefit therefrom. McSpedon *v.* New York, 7 Bosw. 601; McDonald *v.* Mayor, 68 N. Y. 23; Zottman *v.* San Francisco, 20 Cal. 96; Niles Water Works *v.* Mayor, 59 Mich. 311, 26 N. W. 625. Compare East St. Louis *v.* East St. L., &c. Co., 19 Ill. App. 44; Montgomery *v.* Montgomery Water Works, 79 Ala. 233. [County cannot lease rooms of court-house to be used for private purposes. State *v.* Hart, 144 Ind 107. 43 N. E. 7, 33 L. R. A. 118; upon lease of public buildings for private purposes, see note to this case in L. R. A.]

[1] Halstead *v.* Mayor, &c. of New York, 3 N. Y. 430. See a similar case in People *v.* Lawrence, 6 Hill, 244. See also Carroll *v.* St. Louis, 12 Mo. 444; Vincent *v.* Nantucket, 12 Cush. 103; Parsons *v.* Go-

The powers conferred upon the municipal governments must also be construed as confined in their exercise to the territorial limits embraced within the municipality; (*a*) and the fact that these powers are conferred in general terms will not warrant their exercise except within those limits. A general power "to purchase, hold, and convey estate, real and personal, for the public use" of the corporation, will not authorize a purchase outside the corporate limits for that purpose.[1] Without some special provision they cannot, as of course, possess any control or rights over lands lying outside;[2] and the taxes they levy of their own authority and the moneys they expend, must be for local purposes only.[3]

But the question is a very different one how far the legislature of the State may authorize the corporation to extend its action to objects outside the city limits, and to engage in enterprises of a public nature which may be expected to benefit the citizens of the municipality in common with the people of the State at large, and also in some special and peculiar manner, but which nevertheless are not under the control of the corporation, and are so far aside from the ordinary purposes of local governments that assistance by the municipality in such enterprises would not be warranted under any general grant of power for municipal

such cases the question still will recur, whether the expenditure was within the jurisdiction of the town. It may be safely assumed that, if the subject of the expenditure be in furtherance of some duty enjoined by statute, or in exoneration of the citizens of the town from a liability to a common burden, a contract made in reference to it will be valid and binding upon the town." Allen *v.* Taunton, 19 Pick. 485, 487. See Tucker *v.* Virginia City, 4 Nev. 20. It is no objection to the validity of an act which authorizes an expenditure for a town-hall that rooms to be rented for stores are contained in it. White *v.* Stamford, 37 Conn. 578.

[1] Riley *v.* Rochester, 9 N. Y. 64. It is competent for a municipal corporation to purchase land outside to supply itself with water. Newman *v.* Ashe, 9 Bax. 380. Or to provide drainage. Coldwater *v.* Tucker, 36 Mich. 474, 24 Am. Rep. 601. See Rochester *v.* Rush, 80 N. Y. 302; Houghton *v.* Huron Copper M. Co., 57 Mich. 547, 24 N. W. 820.

[2] Per *Kent*, Chancellor, Denton *v.* Jackson, 2 Johns. Ch. 320. And see Bullock *v.* Curry, 2 Met. (Ky.) 171; Weaver *v.* Cherry, 8 Ohio, N. S. 564; North Hempstead *v.* Hempstead, Hopk. 288; Concord *v.* Boscawen, 17 N. H. 465; Coldwater *v.* Tucker, 36 Mich. 474. A city may be authorized to take land outside for a park. Matter of Application of Mayor, 99 N. Y. 569. [But neither the legislature of the home state nor that of a sister state can authorize the city to construct and control a highway in the sister state. Becker *v.* La Crosse, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 820, 67 Am. St. 874.]

[3] In Parsons *v.* Goshen, 11 Pick. 396, the action of a town appropriating money in aid of the construction of a county road was held void and no protection to the officers who had expended it. See also Concord *v.* Boscawen, 17 N. H. 465. A town cannot lay a tax for the benefit of a cemetery which it does not control. Luques *v.* Dresden, 77 Me. 186.

(*a*) [State *v.* Eason, 114 N. C. 787, 19 S. E. 88, 41 Am. St. 811, 23 L. R. A. 520, and note upon boundary of municipality upon navigable stream.]

government. For a few years past the sessions of the legislative bodies of the several States have been prolific in legislation which has resulted in flooding the country with municipal securities issued in aid of works of public improvement, to be owned, controlled, and operated by private parties, or by corporations created for the purpose; the works themselves being designed for the convenience of the people of the State at large, but being nevertheless supposed to be specially beneficial to certain localities because running near or through them, and therefore justifying, it is supposed, the imposition of a special burden by taxation upon such localities to aid in their construction.[1] We have elsewhere[2] referred to cases in which it has been held that the legislature may constitutionally authorize cities, townships, and counties to subscribe to the stock of railroad companies, or to loan them their credit, and to tax their citizens to pay these subscriptions, or the bonds or other securities issued as loans, where a peculiar benefit to the municipality was anticipated from the improvement. The rulings in these cases, if sound, must rest upon the same right which allows such municipalities to impose burdens upon their citizens to construct local streets or roads, and they can only be defended on the ground that "the object to be accomplished is so obviously connected with the [municipality] and its interests as to conduce obviously and in a special manner to their prosperity and advancement."[3] But

[1] In Merrick *v.* Inhabitants of Amherst, 12 Allen, 500, it was held competent for the legislature to authorize a town to raise money by taxation for a State agricultural college, to be located therein. The case, however, we think, stands on different reasons from those where aid has been voted by municipalities to public improvements. See it explained in Jenkins *v.* Andover, 103 Mass. 94. And see similar cases referred to, *post*, p. 332, note.

[2] *Ante*, pp. 166–168.

[3] Talbot *v.* Dent, 9 B. Monr. 526. See Hasbrouck *v.* Milwaukee, 13 Wis. 37. It seems not inappropriate to remark in this place that the three authors who have treated so ably of municipal constitutional law (Mr. Sedgwick, Stat. & Const. Law, 464), of railway law (Judge Redfield), and of municipal corporations (Judge Dillon), have all united in condemning this legislation as unsound and unwarranted by the principles of constitutional law. See the views of the two writers last named in note to the case of People *v.* Township Board of Salem, 9 Am. Law Reg. 487. And Judge Dillon well remarks in his Treatise on Municipal Corporations (§ 104) that, "regarded in the light of its effects, there is little hesitation in affirming that this invention to aid private enterprises has proved itself baneful in the last degree."

If we trace the beginning of this legislation, we shall find it originating at a time when there had been little occasion to consider with care the limitations to the functions of municipal government, because as yet those functions had been employed with general caution and prudence, and no disposition had been manifested to stretch their powers to make them embrace matters not usually recognized as properly and legitimately falling within them, or to make use of the municipal machinery to further private ends. Nor did the earliest decisions attract much attention, for they referred to matters somewhat local, and the spirit of

there are authorities which dispute their soundness, and it cannot be denied that this specie of legislation has been exceedingly

speculation was not as yet rife. When the construction of railways and canals was first entered upon by an expenditure of public funds to any considerable extent, the States themselves took them in charge, and for a time appropriated large sums and incurred immense debts in enterprises, some of which were of high importance and others of little value, the cost and management of which threatened them at length with financial disaster, bankruptcy, and possible repudiation. No long experience was required to demonstrate that railways and canals could not be profitably, prudently, or safely managed by the shifting administrations of State government; and many of the States not only made provision for disposing of their interest in works of public improvement, but, in view of a bitter experience of the evils already developed in undertaking to construct and control them, they amended their constitutions so as to prohibit the State, when again the fever of speculation should prevail, from engaging anew in such undertakings.

All experience shows, however, that men are abundant who do not scruple to evade a constitutional provision which they find opposed to their desires, if they can possibly assign a plausible reason for doing so; and in the case of the provisions before referred to, it was not long before persons began to question their phraseology very closely, not that they might arrive at the actual purpose, — which indeed was obvious enough, — but to discover whether that purpose might not be defeated without a violation of the express terms. The purpose clearly was to remand all such undertakings to private enterprise, and to protect the citizens of the State from being taxed to aid them; but while the State was forbidden to engage in such works, it was unfortunately not expressly declared that the several members of the State, in their corporate capacity, were also forbidden to do so. The conclusion sought and reached was that the agencies of the State were at liberty to do what was forbidden to the State itself, and the burden of debt which the State might not directly impose upon its citizens, it might indirectly place upon their shoulders by the aid of municipal action.

The legislation adopted under this construction some of the courts felt compelled to sustain, upon the accepted principle of constitutional law that no legislative authority is forbidden to the legislature unless forbidden in terms; and the voting of municipal aid to railroads became almost a matter of course wherever a plausible scheme could be presented by interested parties to invite it. In some localities, it is true, vigorous protest was made; but as the handling of a large amount of public money was usually expected to make the fortune of the projectors, whether the enterprise proved successful or not, means either fair or unfair were generally found to overcome all opposition. Towns sometimes voted large sums to railroads on the ground of local benefit where the actual and inevitable result was local injury, and the projectors of one scheme succeeded in obtaining and negotiating the bonds of one municipality to the amount of a quarter of a million dollars, which are now being enforced, though the work they were to aid was never seriously begun. A very large percentage of all the aid voted was paid to "work up the aid," sacrificed in discounts to purchasers of bonds, expended in worthless undertakings, or otherwise lost to the taxpayers; and the cases might almost be said to be exceptional in which municipalities, when afterwards they were called upon to meet their obligations, could do so with a feeling of having received the expected consideration. Some State and territorial governors did noble work in endeavoring to stay this reckless legislative and municipal action, and some of the States at length rendered such action impossible by constitutional provisions so plain and positive that the most ingenious mind was unable to misunderstand or pervert them.

When the United States entered upon a scheme of internal improvement, the Cumberland road was the first important project for which its revenues were demanded. The promises of this enterprise were of continental magnificence and

mischievous in its results, that it has created a great burden of public debt, for which in a large number of cases the anticipated

importance, but they ended, after heavy national expenditures, in a road no more national than a thousand others which the road-masters in the several States have constructed with the local taxes; and it was finally abandoned to the States as a common highway. When next a great national scheme was broached, the aid of the general government was demanded by way of subsidies to private corporations, who presented schemes of works of great public convenience and utility, which were to open up the new Territories to improvement and settlement sooner than the business of the country would be likely to induce unaided private capital to do it, and which consequently appealed to the imagination rather than to facts to demonstrate their importance, and afforded abundant opportunity for sharp operators to call to their assistance the national sentiment, then peculiarly strong and active by reason of the attempt recently made to overthrow the government, in favor of projects whose national importance in many cases the imagination alone could discover. The general result was the giving away of immense bodies of land, and in some cases the granting of pecuniary aid, with a recklessness and often with an appearance of corruption that at length startled the people, and aroused a public spirit before which the active spirits in Congress who had promoted these grants, and sometimes even demanded them in the name of the poor settler in the wilderness who was unable to get his crops to market, were compelled to give way. The scandalous frauds connected with the Pacific Railway, which disgraced the nation in the face of the world, and the great and disastrous financial panic of 1873, were legitimate results of such subsidies; but the pioneer in the wilderness had long before discovered that land grants were not always sought or taken with a view to an immediate appropriation to the roads for the construction of which they were nominally made, but that the result in many cases was that large tracts were thereby kept out of the market and from taxation, which otherwise would have been purchased and occupied by settlers who would have lessened his taxes by contributing their share to the public burdens. The grants, therefore, in such cases, instead of being at once devoted to improvements for the benefit of settlers, were in fact kept in a state of nature by the speculators who had secured them, until the improvements of settlers in their vicinity could make the grantees wealthy by the increase in value which such improvements gave to the land near them. In saying this the admission is freely made that in many cases the grants were promptly and honestly appropriated in accordance with their nominal purpose; but the general verdict now is that the system was necessarily corruptive and tended to invite fraud, and that some persons of influence managed to accumulate great wealth by grants indirectly secured to themselves under the unfounded pretence of a desire to aid and encourage the pioneers in the wilderness.

Some States also have recently in their corporate capacity again engaged in issuing bonds to subsidize private corporations, with the natural result of serious State scandals, State insolvency, public discontent, and in some cases, it would seem, almost inevitable repudiation. Their governments, amid the disorders of the times, have fallen into the hands of strangers and novices, and the hobby of public improvement has been ridden furiously under the spur of individual greed.

It has often been well remarked that the abuse of a power furnishes no argument against its existence; but a system so open to abuses may well challenge attention to its foundations. And when those foundations are examined, it is not easy to find for them any sound support in the municipal constitutional law of this country. The same reasons which justify subsidies to the business of common carriers by railway will support taxation in aid of any private business whatsoever.

It is sometimes loosely said that railway companies are public corporations, but the law does not so regard them. It is the settled doctrine of the law that,

benefit was never received, and that, as is likely to be the case where municipal governments take part in projects foreign to

like banks, mining companies, and manufacturing companies, they are mere private corporations, supposed to be organized for the benefit of the individual corporators, and subject to no other public supervision or control than any other private association for business purposes to which corporate powers have been granted. Darmouth College *v.* Woodward, 4 Wheat. 518; Bonaparte *v.* Camden & Amboy R. R. Co., Baldw. 216; Eustis *v.* Parker, 1 N. H. 273; Ohio, &c. R. R. Co. *v.* Ridge, 5 Blackf. 78; Cox *v.* Louisville, &c. R R. Co., 48 Ind. 178, 189; Roanoke, &c. R. R. Co. *v.* Davis, 2 Dev. & Bat. 451; Dearborn *v.* Boston, C. & M. R. R. Co., 4 Fost. 179; Trustees, &c. *v.* Auburn, &c. R. R. Co., 3 Hill, 567; Tinsman *v.* Belvidere, &c. R. R. Co., 26 N. J. 148; Thorpe *v.* Rutland, &c. R. R. Co., 27 Vt. 140; Alabama R. R. Co. *v.* Kidd, 29 Ala. 221; Turnpike Co. *v.* Wallace, 8 Watts, 316; Seymour *v.* Turnpike Co., 10 Ohio, 477; Ten Eyck *v.* D. & R. Canal, 3 Harr. 200; Atlantic, &c. Telegraph Co. *v.* Chicago, &c. R. R. Co., 6 Biss. 158; A. & A. on Corp. §§ 30–36; Redf. on Railw. c. 3, § 1; Pierce on Railroads, 19, 20. Taxation to subsidize them cannot therefore be justified on the ground of any public character they possess, any more than to subsidize banks or mining companies. [This doctrine seems not now to be generally recognized. See Folsom *v.* Township Ninety-Six, 159 U. S. 611, 16 Sup. Ct. Rep. 174, and cases therein cited. That railroad corporations are quasi-public, see Central Transp. Co. *v.* Pullman's P. C. Co., 139 U. S. 24, 11 Supt. Ct. Rep. 478; State *v.* Minnesota T. R. Co., 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656.] It is truly said that it has long been the settled doctrine that the right of eminent domain may be employed in their behalf, and it has sometimes been insisted with much earnestness that wherever the State may aid an enterprise under the right of eminent domain, it may assist it by taxation also. But the right of taxation and the right of eminent domain are by no means coextensive, and do not rest wholly upon like reasons. The former compels the citizen to contribute his proportion of the public burden; the latter compels him to part with nothing for which he is not to receive pecuniary compensation. The tax in the one case is an exaction, the appropriation in the other is only a forced sale. To take money for private purposes under pretence of taxation is, as has been often said, but robbery and plunder; to appropriate under the right of eminent domain for a private corporation robs no one, because the corporation pays for what is taken, and in some cases, important to the welfare and prosperity of the community, and where a public convenience is to be provided, — as in the case of a grist mill, — it has long been held competent to exercise the one power, while the other was conceded to be inadmissible. Few persons would attempt to justify a tax in aid of a millowner, on the ground that laws appropriating lands for his benefit, but at his expense, have been supported.

The truth is, the right to tax in favor of private corporations of any description must rest upon the broad ground that the power of the legislature, subject only to the express restrictions of the constitution, is supreme, and that, in the language of some of the cases, "if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive." (*Post*, p. 698.) But nothing is better settled on authority than that this strong language, though entirely true when it refers to the making provision for those things which it falls within the province of government to provide for its citizens, or to the payment for services performed for the State, or the satisfaction of legal, equitable, or moral obligations resting upon it, is wholly inadmissible when the purpose is to impose a burden upon one man for the benefit of another. Many such cases might be suggested in which there would not only be a "possibility," but even a strong probability, that a small burden imposed upon the public to set an individual up in business, or to build him a house, or otherwise make him comforta-

the purposes of their creation, it has furnished unusual facilities for fraud and public plunder, and led almost inevitably, at last,

ble, would be promotive of the public welfare; but in law the purpose of any such burden is deemed private, and the incidental benefit to the public is not recognized as an admissible basis of taxation.

In Allen *v.* Inhabitants of Jay, 60 Me. 124, 11 Am. Rep. 185, it became necessary to reaffirm a doctrine, often declared by the courts, that however great was the power to tax, it was exceeded, and the legislature was attempting the exercise of a power not legislative in its character, when it undertook to impose a burden on the public for a private purpose. And it was also held that the raising of money by tax in order to loan the same to private parties to enable them to erect mills and manufactories in such town, was raising it for a private purpose, and therefore illegal. *Appleton*, Ch. J., most truly remarks in that case, that "all security of private rights, all protection of private property, is at an end, when one is compelled to raise money to loan at the will of others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority." And yet how plain it is that the benefit of the local public might possibly have been promoted by the proposed erections. See, to the same effect, Loan Association *v.* Topeka, 20 Wall. 655, where the whole subject is carefully considered and presented with clearness and force, in an opinion by Mr. Justice *Miller;* also Commercial Bank *v.* Iola, 2 Dill. C. C. 355; 9 Kan. 689; Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Parkersburg *v.* Brown, 106 U. S. 487, 1 Sup. Ct. Rep. 442; Cole *v.* La Grange, 113 U. S. 1, 5 Sup. Ct. Rep. 416, and cases cited; Mather *v.* Ottawa, 114 Ill. 659, 3 N. E. 216.

These cases are not singular: they are representative cases; and they are cited only because they are among the most recent expressions of judicial opinion on the subject. With them may be placed Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39, in which the Supreme Court of Massachusetts, after the great fire of 1872 in Boston, denied the power of the Commonwealth to permit taxation in order to loan the moneys out to the persons who had suffered by the fire. Like decisions are found in State *v.* Osawkee, 14 Kan. 418, and Feldman *v.* City Council, 23 S. C. 57. These decisions of eminent tribunals indicate a limit to legislative power in the matter of taxation, and hold, what has been decided very many times before, that it is not necessary the constitution should forbid expressly the taxing for private purposes, since it is implied in the very idea of taxation that the purpose must be public, and a taking for any other purpose is unlawful confiscation. Cooley on Taxation, 67 *et seq.*

One difference there undoubtedly is between the case of a railroad corporation and a manufacturing corporation; that there are precedents in favor of taxing for the one and not for the other. But if the precedents are a departure from sound principle, then, as in every other case where principle is departed from, evils were to have been expected. A catalogue of these would include the squandering of the public domain; the enrichment of schemers whose policy it has been, first, to obtain all they can by fair promises, and then avoid as far and as long as possible the fulfilment of the promises; the corruption of legislation; the loss of State credit; great public debts recklessly contracted for moneys often recklessly expended; public discontent because the enterprises fostered from the public treasury and on the pretence of public benefit are not believed to be managed in the public interest; and, finally, great financial panic, collapse, and disaster. At such a cost has the strong expression of dissent which all the while has accompanied these precedents been disregarded and set aside. [Where legislature is prohibited from making a gift to any private person or corporation, it cannot release a debt due to State from such person or corporation: Matter of Stanford, 126 Cal. 112, 54 Pac. 250, 58 Pac. 462, 45 L. R. A. 788, an appropriation for "relief" of a street contractor is void. Coulin *v.* San Francisco, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. 17; so one for benefit of suf-

to discontent; sometimes even to disorder and violence. In some of the recent revisions of State constitutions, the legislature has been expressly prohibited from permitting the municipal...es to levy taxes or incur debts in aid of works of public improvement, or to become stockholders in private corporations.[1]

Assuming that any such subscriptions or securities may be authorized, the first requisite to their validity would seem, then, to be a special legislative authority to make or issue them; an authority which does not reside in the general words in which the powers of local self-government are usually conferred,[2] and

ferers from flood: Patty *v.* Golgan, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744; and one for relief of employee of State injured through negligence of his superior officer: Bourn *v.* Hart, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. 203.]

[1] The following States have such provisions in their constitutions: Colorado, Connecticut, Illinois, Mississippi, Missouri, and New Hampshire. Many of the State constitutions expressly forbid State aid to private corporations of any sort, and it is probable that their provisions are broad enough in some cases to prohibit aid by the municipalities also. [Upon what is an indebtedness within constitutional and statutory restrictions upon indebtedness of municipal corporations, see Beard *v.* Hopkinsville, 95 Ky. 239, 24 S. W. 872, 44 Am. St. 222, 23 L. R. A. 402, and note; South Bend *v.* Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795; La Porte *v.* Gamewell F. A. T. Co., 146 Ind. 466, 45 N. E. 588, 58 Am. St. 359, 35 L. R. A. 686; Brashear *v.* Madison, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; Lamar W. & E. L. Co. *v.* Lamar, 128 Mo. 188, 31 S. W. 756, 32 L. R. A. 157; McBean *v.* Fresno, 112 Cal. 159, 44 Pac. 358, 53 Am. St. 191, 31 L. R. A. 794; Kelley *v.* Minneapolis, 63 Minn. 125, 65 N. W. 115; Hodges *v.* Crowley, 186 Ill. 305, 57 N. E. 889.

Where the constitution denies to municipalities the power to incur debts for any except necessary expenses unless specially authorized by the legislature and by popular vote, a debt for the purchase of an electric lighting plant for public purposes is within the restriction. Mayo *v.* Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163. The prohibition mentioned in the text above does not extend to construction of public improvements which shall be the property of the municipality. Sun P. & P. Assn. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788. But it prevents a city from becoming part owner. Ampt *v.* Cincinnati, 56 Ohio, 47, 46 N. E. 69, 35 L. R. A. 737, and note. Prohibition of aid to any corporation applies only to private corporations. Does not prevent gift to United States. Lancey *v.* King Co., 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

Where the constitution forbids the loan of the public credit for private benefit a statute authorizing the issue of bonds to pay for a local improvement, the cost thereof to be recovered by the levy of annual instalments upon the property benefited, is void. Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

Upon the general subject of municipal bonds, when they may be issued, for what purposes, etc., see notes to 37 L. ed. U. S. 145 and 34 L. ed. U. S. 344.]

[2] Bullock *v.* Curry, 2 Met. (Ky.) 171. A general power to borrow money or incur indebtedness to aid in the construction of "any road or bridge" must be understood to have reference only to the roads or bridges within the municipality. Stokes *v.* Scott County, 10 Iowa, 166; State *v.* Wapello County, 13 Iowa, 388; Lafayette *v.* Cox, 5 Ind. 38. Power to submit to village voters raising money for extraordinary purposes does not cover the submission of railroad aid. Perrin *v.* New London, 67 Wis. 416, 30 N. W. 623. There are decisions in the Supreme Court of the United States which appear to be to the contrary. The city charter of Muscatine conferred in detail the usual powers, and then authorized the city "to borrow money for any object in its discretion," after a vote of the city in favor

one also which must be carefully followed by the municipality in all essential particulars, or the subscription or security will be void.[1] And while mere irregularities (*a*) of action, not going to the essentials of the power, would not prevent parties who had acted in reliance upon the securities enforcing them, yet as

of the loan. In Meyer *v.* Muscatine, 1 Wall. 384, the court seem to have construed this clause as authorizing a loan for *any object whatever;* though such phrases are understood usually to be confined in their scope to the specific objects before enumerated; or at least to those embraced within the ordinary functions of municipal governments. See Lafayette *v.* Cox, 5 Ind. 38. The case in 1 Wallace was followed in Rogers *v.* Burlington, 3 Wall. 654, four justices dissenting. See also Mitchell *v.* Burlington, 4 Wall. 270. See also cases cited, *ante*, p. 312, notes. A municipal corporation having power to borrow money, it is held, may make its obligations payable wherever it shall agree. Meyer *v.* Muscatine, 1 Wall. 384; Lynde *v.* County, 16 Wall. 6. But some cases hold that such obligations can only be made payable at the corporation treasury, unless there is express legislative authority to make them payable elsewhere. People *v.* Tazewell County, 22 Ill. 147; Pekin *v.* Reynolds, 31 Ill. 529. If the power to issue bonds is given, power to tax to meet them is impliedly given, unless a clear intent to the contrary is shown. Quincy *v.* Jackson, 113 U. S. 332, 5 Sup. Ct. Rep. 644; [Scotland Co. Court *v.* United States, 140 U. S. 41, 11 Sup. Ct. Rep. 697. But power to borrow money on the credit of the city does not of itself include power to issue negotiable bonds therefor. Brenham *v.* German American Bank, 144 U. S. 173, 549, 12 Sup. Ct. Rep. 559, 975; Merrill *v.* Monticello, 138 U. S. 673, 11 Sup. Ct. Rep. 441.]

[1] See Harding *v.* Rockford, &c. R R. Co., 65 Ill. 90; Dunnovan *v.* Green, 57 Ill. 63; Springfield, &c. R. R. Co. *v.* Cold Spring, 72 Ill. 603; People *v.* County Board of Cass., 77 Ill. 438; Cairo, &c. R. R. Co. *v.* Sparta, 77 Ill. 505; George *v.* Oxford, 16 Kan. 72; Hamlin *v.* Meadville, 6 Neb. 227; McClure *v.* Oxford, 94 U. S. 429; Bates Co. *v.* Winters, 97 U. S. 83; Buchanan *v.* Litchfield, 102 U. S. 278; Bissell *v.* Spring Valley, 110 U. S. 162, 3 Sup. Ct. Rep. 555. [Bonds cannot run a longer time than the legislature has given permission for. Barnum *v* Okolona, 148 U. S. 393, 13 Sup. Ct. Rep. 638. Strict compliance with all conditions necessary. Lytle *v.* Lansing, 147 U. S. 59, 13 Sup. Ct. Rep. 254; Stewart *v.* Lansing, 104 U. S. 505; People *v.* Van Valkenburg, 63 Barb. 105. But power to issue interest-bearing bonds carries with it power to issue negotiable coupons for the interest. Board of Ed. *v.* De Kay, 148 U. S. 591, 13 Sup. Ct. Rep. 706. Where the statute requires that the bonds shall recite the purposes for which they are issued, it is not sufficient to recite that they are issued by virtue of a specified ordinance in which is contained a statement of the purpose for which the bonds are to be issued. Bonds containing no further or more specific recital of purpose are void in the hands of every holder. Barnett *v.* Denison, 145 U. S. 135, 12 Sup. Ct. Rep. 819. Where question submitted to popular vote was on bonds bearing interest payable annually, making interest payable semiannually invalidates the bonds. Skinner *v.* Santa Rosa, 107 Cal. 469, 40 Pac. 742, 29 L. R. A. 512. Where statute prescribes that they shall be payable "in gold coin or lawful money of the United States," making them payable in gold coin invalidates them. *Ibid*, and see note hereto in L. R. A. Place of payment of coupons cannot be varied. Middleton *v.* St. Augustine, 42 Fla. 287, 29 So. 421.]

(*a*) [Like error in copying a single word in the title of a statute, or a misrecital of the name of the obligor corporation. Board of Ed. *v.* De Kay, 148 U. S. 591, 13 Sup. Ct. Rep. 706. And any improper or fraudulent action taken by the municipality in regard to the proceeds of the bonds after their issue cannot invalidate them. Cairo *v.* Zane, 149 U. S. 122, 13 Sup. Ct. Rep. 803.]

the doings of these corporations are matters of public record, and they have no general power to issue negotiable securities,[1] any one who becomes holder of such securities, even though they be negotiable in form, will take them with constructive notice of any want of power in the corporation to issue them, and cannot enforce them when their issue was unauthorized.[2]

[1] Thomson *v.* Lee County, 3 Wall. 327; Police Jury *v.* Britton, 15 Wall. 566; Wells *v.* Supervisors, 102 U. S. 625; Claiborne Co. *v.* Brooks, 111 U. S. 400, 4 Sup. Ct. Rep. 489; Carter Co. *v.* Sinton, 120 U. S. 517, 7 Sup. Ct. Rep. 650; Starin *v.* Genoa, 23 N. Y. 439; People *v.* Supervisors, 11 Cal. 170; Dively *v.* Cedar Falls, 21 Iowa, 565; Smith *v.* Cheshire, 13 Gray, 318; People *v.* Gray, 23 Cal. 125. See Thomas *v.* Richmond, 12 Wall. 349; Katzenberger *v.* Aberdeen, 121 U. S. 172, 7 Sup. Ct. Rep. 947; Emery *v.* Mariaville, 56 Me. 315; Sherrard *v.* Lafayette Co., 3 Dill. 236. The power to tax in aid of railroads does not necessarily give power to issue negotiable bonds. Concord *v.* Robinson, 121 U. S. 165, 7 Sup. Ct. Rep. 937; Kelly *v.* Milan, 127 U. S. 139, 8 Sup. Ct. Rep. 1101. Compare Savannah *v.* Kelly, 108 U. S. 184, 2 Sup. Ct. Rep. 468; Richmond *v.* McGirr, 78 Ind. 192.

[2] There is considerable confusion in the cases on this subject. If the corporation has no authority to issue negotiable paper, or if the officers who assume to do so have no power under the charter for that purpose, there can be no doubt that the defence of want of power may be made by the corporation in any suit brought on the securities. Smith *v.* Cheshire, 13 Gray, 318; Gould *v.* Sterling, 23 N. Y. 456; Andover *v.* Grafton, 7 N. H. 298; Clark *v.* Des Moines, 19 Iowa, 199; M'Pherson *v.* Foster, 43 Iowa, 48; Bissell *v.* Kankakee, 64 Ill. 249; Big Grove *v.* Wells, 65 Ill. 263; Wade *v.* La Moille, 112 Ill. 79; Elmwood *v.* Marcy, 92 U. S. 289; Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; St. Joseph *v.* Rogers, 16 Wall. 644; Pendleton Co. *v.* Amy, 13 Wall. 297; Marsh *v.* Fulton Co., 10 Wall. 676; East Oakland *v.* Skinner, 94 U. S. 255; South Ottawa *v.* Perkins, 94 U. S. 260; McClure *v.* Oxford, 94 U. S. 429. [Where unauthorized bonds were issued for railway stock the purchaser of bonds from the railway company for practically full value was, after failure in an attempt to enforce the bonds against the town issuing them, subrogated to the town's right to the stock. Illinois G. T. R. Co. *v.* Wade, 140 U. S. 65, 11 Sup. Ct. Rep. 709.] And in any case, if the holder has received the securities with notice of any valid defence, he takes them subject thereto. [Lytle *v.* Lansing, 147 U. S. 59, 13 Sup. Ct. Rep. 254; Stewart *v.* Lansing, 104 U. S. 505.] If the issue is without authority, the doctrine of protection to a purchaser in good faith has no application. Merchants' Bank *v.* Bergen Co., 115 U. S. 384, 6 Sup. Ct. Rep. 88. But where the corporation has power to issue negotiable paper in some cases, and its officers have assumed to do so in cases not within the charter, whether a *bona fide* holder would be chargeable with notice of the want of authority in the particular case, or on the other hand, would be entitled to rely on the securities themselves as sufficient evidence that they were properly issued when nothing appeared on their face to apprise him of the contrary, is a question still open to some dispute. [Where the amount of indebtedness is limited by the State constitution, and the indebtedness has not yet reached that limit, an issue of bonds which carries it beyond that limit is void *in toto*. No question of estoppel by recitals can be considered in such case, and the holder of the bonds cannot remit the excess above the constitutional limit and recover upon the remainder. Hedges *v.* Dixon County, 150 U. S. 182, 14 Sup. Ct. Rep. 71. See also Sutliff *v.* Bd. of Co. Com., 147 U. S. 230, 13 Sup. Ct. Rep. 318; Nesbit *v.* Ind. Dist. of Riverside, 144 U. S. 610, 12 Sup. Ct. Rep. 746. But where the debt arises under a continuing contract of lease and the annual instalments, together with all other running expenses, are within the current revenues of the city, such debt does not pass the prescribed limit, no matter how great

In some of the cases involving the validity of the subscriptions made or bonds issued by municipal corporations in aid of internal

the aggregate during the life of the contract. South Bend *v.* Reynolds, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795. For other cases upon limitation of indebtedness, see Kiehle *v.* South Bend, 44 U. S. App. 687, 36 L. R. A. 228; Rauch *v.* Chapman, 16 Wash. 568, 48 Pac. 253, 36 L. R. A. 407, 58 Am. St. 52; Grand Island & N. W. R. Co. *v.* Baker, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. 926; Saleno *v.* Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. 653; Brooke *v.* Philadelphia, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781; Beard *v.* Hopkinsville, 95 Ky. 239, 24 S. W. 872, 44 Am. St. 222, 23 L. R. A. 402, and note; Crowder *v.* Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Quill *v.* Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681.]

In Stoney *v.* American Life Insurance Co., 11 Paige, 635, it was held that a negotiable security of a corporation which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company, and in violation of the laws of the State where it was actually issued. In Gelpcke *v.* Dubuque, 1 Wall. 175, 203, the law is stated as follows: "When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper." See also Commissioners of Daviess Co. *v.* Aspinwall, 21 How. 364; Bissell *v.* Jeffersonville, 24 How. 287; Lexington *v.* Butler, 14 Wall. 282; Moran *v.* Commissioners of Miami Co., 2 Black, 722; De Voss *v.* Richmond, 18 Gratt. 338; San Antonio *v.* Lane, 32 Tex. 405; State *v.* Commissioners, 37 Ohio St. 526. In Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 125, 129, it is said: "A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is, upon its face, in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, — such as the purpose or object for which it was issued, — to hold that the person taking the paper must inquire as to such extraneous fact, of the existence of which he is in no way apprised, would obviously conflict with the whole policy of the law in regard to negotiable paper." In Madison & Indianapolis Railroad Co. *v.* The Norwich Savings Society, 24 Ind. 457, this doctrine is approved; and a distinction made, in the earlier case of Smead *v.* Indianapolis, &c. Railroad Co., 11 Ind. 104, between paper executed *ultra vires* and that executed within the power of the corporation, but, by an abuse of the power in that particular instance, was repudiated. In St. Joseph *v.* Rogers, 16 Wall. 644, it was decided that where power is conferred to issue bonds, but only in a particular manner, or subject to certain regulations, conditions, or qualifications, and the bonds are actually issued with recitals showing compliance with the law, the proof that any of the recitals are incorrect will not constitute a defence to a suit on the bonds, "if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled." And see Moran *v.* Commissioners of Miami Co., 2 Black, 722; Pendleton Co. *v.* Amy, 13 Wall. 297; Chute *v.* Winegar, 15 Wall. 355; Colona *v.* Eaves, 92 U. S. 484; Venice *v.* Murdoch, 92 U. S. 494; Marcy *v.* Oswego, 92 U. S. 637; Humboldt *v.* Long, 92 U. S. 642; Douglas Co. *v.* Bolles, 94 U. S. 104; Johnson Co. *v.* January, 94 U. S. 202; Scotland Co. *v.* Thomas, 94 U. S. 682; Wilson *v.* Salamanca, 99 U. S. 499; Menasha *v.* Hazard, 102 U. S. 81; Lincoln *v.* Iron Co., 103 U. S. 412; Bonham *v.* Needles, 103 U. S. 648; [Cairo *v.* Zane, 149 U. S. 122, 13 Sup. Ct. Rep. 803.] That neither irregularities in issuing bonds nor fraud in obtaining them will

improvements, there has been occasion to consider clauses in the State constitutions designed to limit the power of the legislature

be a defence in the hands of *bona fide* holders, see foregoing cases, and also Maxey *v.* Williamson Co., 72 Ill. 207; Nicolay *v.* St. Clair, 3 Dillon, 163; East Lincoln *v.* Davenport, 94 U. S. 801; Copper *v.* Mayor, &c., 44 N. J. L. 634; Aberdeen *v.* Sykes, 59 Miss. 236; Lynchburg *v.* Slaughter, 75 Va. 57. [But when one in whose hands the bonds are invalid puts them in course of trade so that they get into the hands of a *bona fide* holder and are enforced against the obligor, he is liable to such obligor for the tort. Winona & St. P. R. Co. *v.* Plainview, 143 U. S. 371, 12 Sup. Ct. Rep. 530.] See, further, that there may be an estoppel by the recitals in favor of a *bona fide* holder: Ottawa *v.* Nat. Bank, 105 U. S. 342; Pana *v.* Bowler, 107 U. S. 529, 2 Sup. Ct. Rep. 704; Sherman Co. *v.* Simons, 109 U. S. 735, 3 Sup. Ct. Rep. 502; New Providence *v.* Halsey, 117 U. S. 336, 6 Sup. Ct. Rep. 764; Oregon *v.* Jennings, 119 U. S. 74, 7 Sup. Ct. Rep. 124; State *v.* Montgomery, 74 Ala. 226; Shurtleff *v.* Wiscasset, 74 Me. 130; [Gunnison Co. Com'rs *v.* Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. Rep. 390; Harper Co. Com'rs *v.* Rose, 140 U. S. 71, 11 Sup. Ct. Rep. 710; Chaffee Co. Com'rs *v.* Potter, 142 U. S. 355, 12 Sup. Ct. Rep. 216; Huron *v.* 2d Ward Sav. Bk., 57 U. S. App. 593, 86 Fed. Rep. 272, 30 C. C. A. 38, 49 L. R. A. 534; Flagg *v.* School District No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; Hutchinson & S. R. Co. *v.* Fox, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401. Where a municipality is authorized by statute to issue bonds for refunding "binding, subsisting, legal obligations of such" municipality, and in accordance therewith it issues a series of bonds, each of which refers to the statute and recites that "this bond is issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county which remain outstanding and unpaid," &c., without describing such outstanding obligations more particularly, and the said bonds comply with all statutory requirements of form, execution, registration, &c., they are valid in the hands of a *bona fide* holder for value before maturity, even though some of the purported obligations retired by their issue were in fact invalid. Graves *v.* Saline Co., 161 U. S. 359, 16 Sup. Ct. Rep. 526. See, to like effect, Evansville *v.* Dennett, 161 U. S. 434, 16 Sup. Ct. Rep. 613; Andes *v.* Ely, 158 U. S. 312, 15 Sup. Ct. Rep. 954. But where the recitals in the bonds neither expressly nor by necessary implication import a compliance with conditions precedent, it is open to the municipality to show that the conditions had not been performed when the bonds were issued, and have never since been performed. Citizens' Sav. & Loan Assn. *v.* Perry County, 156 U. S. 692, 15 Sup. Ct. Rep. 547. Upon power to issue municipal bonds, &c., see note to 39 L. ed. U. S. 585. See an interesting case upon municipal bonds in Knox County *v.* Ninth Nat. Bk., 147 U. S. 91, 13 Sup. Ct. Rep. 267, where it became necessary to determine under which of two legislative authorizations the bonds were actually issued.] Such estoppel only applies to matters of procedure which the corporate officers had authority to determine and certify. It cannot supply the lack of statutory authority: Northern Bank *v.* Porter Township, 110 U. S. 608, 4 Sup. Ct. Rep. 254; Dixon Co. *v.* Field, 111 U. S. 83, 4 Sup. Ct. Rep. 315; School District *v.* Stone, 106 U. S. 183, 1 Sup. Ct. Rep. 84; Parkersburg *v.* Brown, 106 U. S. 487, 1 Sup. Ct. Rep. 442; Hayes *v.* Holly Springs, 114 U. S. 120, 5 Sup. Ct. Rep. 785; [Hedges *v.* Dixon County, 150 U. S. 182, 14 Sup. Ct. Rep. 71; Sutliff *v.* Bd. of Co. Com., 147 U. S. 230, 13 Sup. Ct. Rep. 318; Cass County *v.* Wilbarger County, — Tex. Civ. Ap. —, 60 S. W. 988 (Jan. 12, 1901);] nor avoid the effect of actual knowledge of invalidity. Ottawa *v.* Carey, 108 U. S. 110, 2 Sup. Ct. Rep. 361. [Nor can receipt of proceeds of issue of invalid bonds estop the city from pleading lack of authority to issue the same. Merrill *v.* Monticello, 138 U. S. 673, 11 Sup. Ct. Rep. 441. Where unauthorized issue was made in aid of railway company, and bonds were sold by such company and proceeds used in erection of railway structures within the limits of the town, an action for "money had and received" will not lie

to incur indebtedness on behalf of the State, and which clauses, it has been urged, were equally imperative in restraining indebt-

against the town to recover the money paid for the bonds. Travellers' Ins. Co. *v.* Johnson City, 99 Fed. Rep. 663, 49 L. R. A. 123.] A holder cannot recover if the bonds show on their face their issue under a void act: Cole *v.* La Grange, 113 U. S. 1, 5 Sup. Ct. Rep. 416; or show non-compliance with an enabling act: Gilson *v.* Dayton, 123 U. S. 59, 8 Sup. Ct. Rep. 66; [Barnum *v.* Okolona, 148 U. S. 393, 13 Sup. Ct. Rep. 638;] or if, when they contain no recitals, their invalidity could be learned from the records. Merchants' Bank *v.* Bergen Co., 115 U. S. 384, 6 Sup. Ct. Rep. 88; Daviess Co. *v.* Dickinson, 117 U. S. 657, 6 Sup. Ct. Rep. 897; [Sutliff *v.* Bd. of Co. Com., 147 U. S. 230, 13 Sup. Ct. Rep. 318; Doon Township *v.* Cummins, 142 U. S. 366, 12 Sup. Ct. Rep. 220; Nat. Life Ins. Co. *v.* Mead, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. 876.] In Halstead *v.* Mayor, &c. of New York, 5 Barb. 218, action was brought upon warrants drawn by the corporation of New York upon its treasurer, not in the course of its proper and legitimate business. It was held that the corporation under its charter had no general power to issue negotiable paper, though, not being prohibited by law, it might do so for any debt contracted in the course of its proper legitimate business. But it was also held that any negotiable securities not issued by the defendants in their proper and legitimate business, were void in the hands of the plaintiff, although received by him without actual notice of their consideration. This decision was affirmed in 3 N. Y. 430. In Gould *v.* Town of Stirling, 23 N. Y. 456, it was held that where a town had issued negotiable bonds, which could only be issued when the written assent of two-thirds of the resident persons taxed in the town had been obtained and filed in the county clerk's office, the bonds issued without such assent were invalid, and that the purchaser of them could not rely upon the recital in the bonds that such assent had been obtained, but must ascertain for himself at his peril. Say the court: "One who takes a negotiable promissory note or bill of exchange, purporting to be made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts of which the agent may naturally be supposed to be in an especial manner cognizant, the *bona fide* holder is protected; because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere fact of executing the note or bill amounts of itself, in such a case, to a representation by the agent to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence of the power itself. In that respect the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognizance of facts which the other cannot [must?] be presumed to have known." And the case is distinguished from that of the Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 16 N. Y. 125, where the extrinsic fact affecting the authority related to the state of accounts between the bank and one of its customers, which could only be known to the teller and other officers of the bank. See also Brady *v.* Mayor, &c. of New York, 2 Bosw. 173; Hopple *v.* Brown Township, 13 Ohio St. 311; Veeder *v.* Lima, 19 Wis. 280. The subject is reviewed in Clark *v.* Des Moines, 19 Iowa, 199. The action was brought upon city warrants, negotiable in form, and of which the plaintiff claimed to be *bona fide* assignee, without notice of any defects. The city offered to show that the warrants were issued without any authority from the city council and without any vote of the council authorizing the same. It was held that the evidence should have been admitted, and that it would constitute a complete defence. See further, Head *v.* Providence, &c. Co., 2 Cranch, 127; Royal British Bank *v.* Turquand, 6 El. & Bl. 327; Knox County *v.* Aspinwall, 21 How. 539; Bissell *v.* Jeffersonville, 24 How. 287; Sanborn *v.* Deerfield, 2 N. H. 251; Alleghany City *v.* McClurkan, 14 Pa. St. 81; Morris Canal & Banking Co. *v.* Fisher, 9 N. J. Eq. 667; Clapp *v.*

edness on behalf of the several political divisions of the State. The Constitution of Kentucky prohibited any act of the legislature authorizing any debt to be contracted on behalf of the Commonwealth, except for certain specified purposes, unless provision should be made in such act for an annual tax sufficient to pay such debt within thirty years; and the act was not to have effect unless approved by the people. It was contended that this provision was not to apply to the Commonwealth as a mere ideal abstraction, unconnected with her citizens and her soil, but to the Commonwealth as composed of her people, and their territorial

Cedar Co., 5 Iowa, 15; Commissioners, &c. *v.* Cox, 6 Ind. 403; Madison & Indianapolis R. R. Co. *v.* Norwich Savings Society, 24 Ind. 457; Bird *v.* Daggett, 97 Mass. 494. It is of course impossible to reconcile these cases. In Cagwin *v.* Hancock, 84 N. Y. 532, 5 Am. & Eng. R. R. Cas. 150, on a review of the New York authorities it is declared to be the law of that State that there can never be a *bona fide* holder of town bonds, within the meaning of the law applicable to negotiable paper, as such bonds are always issued under special statutory authority, and are only valid when the statute is complied with. To the same effect are Craig *v.* Andes, 93 N. Y. 405, and Lyons *v.* Chamberlain, 89 N. Y. 578. See Fish *v.* Kenosha, 26 Wis. 23. That the powers of the agents of municipal corporations are matters of record, and the corporation not liable for an unauthorized act, see further Baltimore *v.* Eschbach, 18 Md. 276; Johnson *v.* Common Council, 16 Ind. 227. That bonds voted to one railroad company and issued to another are void, see Big Grove *v.* Wells, 65 Ill. 263. Those who deal with a corporation must take notice of the restrictions in its charter, or in the general law, regarding the making of contracts. Brady *v.* Mayor, &c. of New York, 2 Bosw. 173, 20 N. Y. 312; Swift *v.* Williamsburg, 24 Barb. 427; Zabriskie *v.* Cleveland, &c. R. R. Co., 23 How. 381; Hull *v.* Marshall County, 12 Iowa, 142; Clark *v.* Des Moines, 19 Iowa, 199; McPherson *v.* Foster, 43 Iowa, 48; Marsh *v.* Supervisors of Fulton Co., 10 Wall. 676. If they are not valid, no subsequent ratification by the corporation can make them so. Leavenworth *v.* Rankin, 2 Kan. 357. If bonds are voted upon a condition, and issued before the condition is complied with, this, as to *bona fide* holders, is a waiver of the condition. Chiniquy *v.* People, 78 Ill. 570. Compare Supervisors of Jackson *v.* Brush, 77 Ill. 59.

In some States, after paper has been put afloat under laws which the courts of the State have sustained, it is very justly held that the validity and obligation of such paper will not be suffered to be impaired by subsequent action of the courts overruling the former conclusions. See Gelpcke *v.* Dubuque, 1 Wall. 175; Steines *v.* Franklin County, 48 Mo. 167; Osage, &c. R. R. Co. *v.* Morgan County, 53 Mo. 156; Smith *v.* Clark Co., 54 Mo. 58; State *v.* Sutterfield, 54 Mo. 391; Columbia Co. *v.* King, 13 Fla. 421; Same *v.* Davidson, 13 Fla. 482; [McCullough *v.* Com. of Va., 172 U. S. 102, 19 Sup. Ct. Rep. 134; Wilkes County *v.* Coler, 180 U. S. 506, 21 Sup. Ct. Rep. 458. Bonds issued by a *de facto* municipal corporation are valid and, after it has been dissolved for the defect in its organization, they may be enforced against the municipalities into which the territory of the *de facto* corporation has been distributed. Gatzow *v.* Buening, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. 17, 49 L. R. A. 483. Bonds issued for purpose of refunding an existing indebtedness cannot be considered as increasing the indebtedness of the municipality. Nat. Life Ins. Co. *v.* Mead, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. 876; *contra*, Doon Twp. *v.* Cummins, 142 U. S. 366, 12 Sup. Ct. Rep. 220, in case issue is not in exchange for outstanding evidence of indebtedness. Irregularities in the conduct of the election held to secure a popular authorization of a proposed bond issue are a sufficient ground for enjoining the issue. Murphy *v.* San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444.]

organizations of towns, cities, and counties, which make up the State, and that it embraced in principle every legislative act which authorized a debt to be contracted by any of the local organizations of which the Commonwealth was composed. The courts of that State held otherwise. "The clause in question," they say, "applies in terms to a debt contracted on behalf of the Commonwealth as a distinct corporate body; and the distinction between a debt on behalf of the Commonwealth, and a debt or debts on behalf of one county, or of any number of counties, is too broad and palpable to admit of the supposition that the latter class of debts was intended to be embraced by terms specifically designating the former only."[1] The same view has been taken by the courts of Iowa, Wisconsin, Illinois, and Kansas, of the provisions in the constitutions of those States restricting the power of the legislature to contract debts on behalf of the State in aid of internal improvements;[2] but the decisions of the first-named State have since been doubted,[3] and those in Illinois, it would seem, overruled.[4] In Michigan it has been held that they were inapplicable to a constitution adopted with a clear purpose to preclude taxation for such enterprises.[5]

[1] Slack *v.* Railroad Co., 13 B. Monr. 1.

[2] Dubuque County *v.* Railroad Co., 4 Greene (Iowa), 1; Clapp *v.* Cedar County, 5 Iowa, 15; Clark *v.* Janesville, 10 Wis. 136; Bushnell *v.* Beloit, 10 Wis. 195; Prettyman *v.* Supervisors, 19 Ill. 406; Robertson *v.* Rockford, 21 Ill. 451; Johnson *v.* Stark County, 24 Ill. 75; Perkins *v.* Lewis, 24 Ill. 208; Butler *v.* Dunham, 27 Ill. 474; Leavenworth Co. *v.* Miller, 7 Kan. 479.

[3] State *v.* Wapello County, 13 Iowa, 388. And see People *v.* Supervisor, &c., 16 Mich. 254.

[4] In People *v.* Mayor, &c. of Chicago, 51 Ill. 17, 35, it is held expressly that the provision of the State constitution prohibiting the State from creating a debt exceeding fifty thousand dollars without the consent of the people manifested at a general election, would preclude the State from creating a like debt against a municipal corporation, except upon the like conditions. And it was pertinently said: "The protection of the whole implies necessarily the protection of all its organized parts, and the whole cannot be secure while all or any of its parts are exposed to danger. What is the real value of this provision of the constitution if the legislature, inhibited from incurring a debt beyond fifty thousand dollars on behalf of the State, may force a debt tenfold or one hundred-fold greater — for there is no limit to the power — upon all the cities of the State? We can perceive none." We do not see how this can be reconciled with the earlier Illinois cases, and it is so manifestly right, it is hoped the learned court will never make the attempt.

[5] The following extract from the opinion in Bay City *v.* State Treasurer, 23 Mich. 499, 504, is upon this point: "Our State had once before had a bitter experience of the evils of the government connecting itself with works of internal improvement. In a time of inflation and imagined prosperity, the State had contracted a large debt for the construction of a system of railroads, and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt they had not received what they bargained for, and they did not recognize their legal or moral obligation to pay for it. The good name and fame of the State suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people, that

Another class of legislation, which has recently demanded the attention of the courts, has been little less troublesome, from the new, varied, and peculiar questions involved, than that in relation

works of internal improvement should be private enterprises; that it was not within the proper province of government to connect itself with their construction or management, and that an imperative State policy demanded that no more burdens should be imposed upon the people by State authority, for any such purpose. Under this conviction they incorporated in the constitution of 1850, under the significant title of 'Finance and Taxation,' several provisions expressly prohibiting the State from being a party to, or interested in, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it; and also from subscribing to, or being interested in, the stock of any company, association, or corporation, or loaning its credit in aid of any person, association, or corporation. Art. XIV. §§ 9, 8, and 7.

"All these provisions were incorporated by the people in the constitution, as precautions against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvements in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that if the temptation should return, the means of inflicting the like injury upon the credit, reputation, and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the constitution accomplished this purpose perfectly, and none of its provisions had more influence in recommending that instrument to the hearty good-will of the people.

"In process of time, however, a majority in the legislature were found willing, against the solemn warning of the executive, to resort again to the power of taxation in aid of internal improvement. It was discovered that though 'the State' was expressly inhibited from giving such aid in any form, except in the disposition of grants made to it, the subdivisions of which the State was composed were not under the like ban. Decisions in other States were found which were supposed to sanction the doctrine that, under such circumstances, the State might do indirectly through its subdivisions what directly it was forbidden to do. Thus a way was opened by which the whole purpose of the constitutional provisions quoted might be defeated. The State could not aid a private corporation with its credit, but it might require each of its townships, cities, and villages to do so. The State could not load down its people with taxes for the construction of a public improvement, but it might compel the municipal authorities, which were its mere creatures, and which held their whole authority and their whole life at its will, to enforce such taxes, one by one, until the whole people were bent to the burden.

"Now, whatever might be the just and proper construction of similar provisions in the constitutions of States whose history has not been the same with our own, the majority of this court thought when the previous case was before us, and they still think, that these provisions in our constitution do preclude the State from loaning the public credit to private corporations, and from imposing taxation upon its citizens or any portion thereof in aid of the construction of railroads. So the people supposed when the constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within

to municipal subscriptions in aid of internal improvements. As the power to declare war and to conduct warlike operations rests in the national government, and that government is vested with unlimited control of all the resources of the country for those purposes, the duty of national defence, and, consequently, the duty to defend all the citizens as well as all the property of all the municipal organizations in the several States, rests upon the national authorities. This much is conceded, though in a qualfied degree, also, and subordinate to the national government, a like duty rests doubtless upon the State governments, which may employ the means and services of their citizens for the purpose. But it is no part of the duty of a township, city, or county, as such, to raise men or money for warlike operations, nor have they any authority, without express legislative sanction, to impose upon their people any burden by way of taxation for any such purpose.[1] Nevertheless, when a war arises which taxes all the energies of the nation, which makes it necessary to put into the field a large proportion of all the able-bodied men of the country, and which renders imperative a resort to all available means for filling the ranks of the army, recruiting the navy, and replenishing the national treasury, the question becomes a momentous one, whether the local organizations — those which are managed most immediately by the people themselves — may not be made important auxiliaries to the national and State governments in accomplishing the great object in which all alike are interested so vitally; and if they are capable of rendering important assistance, whether there is any constitutional principle which would be violated by making use of these organizations in a case where failure on the part of the central authority would precipitate general dismay and ruin. Indeed, as the general government, with a view to convenience, economy, and promptness of action,

their power. In these cases we thought we could arrive at it from the public history of the times."

The State cannot provide indirectly for payment for work of internal improvement by authorizing a township to raise money for it by taxation. Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549. [And see Oren *v.* Pingree, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407, where an act attempting to authorize the creation of a public board for the purpose of acquiring and operating the street railways of Detroit was held void. Where the State cannot engage in the erection of works of internal improvement, a statute providing for the erection of a State grain elevator and warehouse is void. Rippe *v.* Becker, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857.]

[1] Stetson *v.* Kempton, 13 Mass. 272; Gove *v.* Epping, 41 N. H. 539, Crowell *v.* Hopkinton, 45 N. H. 9; Baldwin *v.* North Branford, 32 Conn. 47; Webster *v.* Harwinton, 32 Conn. 131. See also Claflin *v.* Hopkinton, 4 Gray, 502; Cover *v.* Baytown, 12 Minn. 124; Fiske *v.* Hazzard, 7 R. I. 438; Alley *v.* Edgecomb, 53 Me. 446; People *v.* Supervisors of Columbia, 43 N. Y. 130; Walschlager *v.* Liberty, 23 Wis. 362; Burrill *v.* Boston, 2 Cliff. 590.

will be very likely to adopt, for any purposes of conscription, the existing municipal divisions of the States, and its demand for men to recruit its armies will assume a form seeming to impose on the people whose municipal organization embraces the territory covered by the demand, the duty of meeting it, the question we have stated may appear to be one rather of form than of substance, inasmuch as it would be difficult to assign reasons why a duty resting upon the citizens of a municipality may not be considered as resting upon the corporation itself of which they are the constituents, and if so, why it may not be assumed by the municipality itself, and then be discharged in like manner as any other municipal burden, if the legislature shall grant permission for that purpose.

One difficulty that suggests itself in adopting any such doctrine is, that, by the existing law of the land, able-bodied men between certain specified ages are alone liable to be summoned to the performance of military duty; and if the obligation is assumed by the municipal organizations of the State, and discharged by the payment of money or the procurement of substitutes, the taxation required for this purpose can be claimed, with some show of reason, to be taxation of the whole community for the particular benefit of that class upon whom by the statutes the obligation rests. When the public funds are used for the purpose, it will be insisted that they are appropriated to discharge the liabilities of private individuals. Those who are already past the legal age of service, and who have stood their chance of being called into the field, or perhaps have actually rendered the required service, will be able to urge with considerable force that the State can no longer honorably and justly require them to contribute to the public defence, but ought to insist that those within the legal ages should perform their legal duty; and if any upon whom that duty rests shall actually have enrolled themselves in the army with a view to discharge it, such persons may claim, with even greater reason, that every consideration of equality and justice demands that the property they leave behind them shall not be taxed to relieve others from a duty equally imperative.

Much may be said on both sides of this subject, but the judicial decisions are clear, that the people of any municipal corporation or political division of a State have such a general interest in relieving that portion of their fellow-citizens who are liable to the performance of military duty, as will support taxation or render valid indebtedness contracted for the purpose of supplying their places, or of filling any call of the national authorities for

men, with volunteers who shall be willing to enter the ranks for such pecuniary inducements as may be offered them. The duty of national defence, it is held, rests upon every person under the protection of the government who is able to contribute to it, and not solely upon those who are within the legal ages. The statute which has prescribed those ages has for its basis the presumption that those between the limits fixed are best able to discharge the burden of military service to the public benefit, but others are not absolved from being summoned to the duty, if at any time the public exigency should seem to demand it. Exemption from military duty is a privilege rather than a right, and, like other statutory privileges, may be recalled at any time when reasons of public policy or necessity seem to demand the recall.[1] Moreover, there is no valid reason, in the nature of things, why those who are incapable of performing military service, by reason of age, physical infirmity, or other cause, should not contribute, in proportion to their ability, to the public defence by such means as are within their power; and it may well happen that taxation, for the purpose of recruiting the armies of the nation, will distribute the burden more equally and justly among all the citizens than any other mode which could be devised. Whether it will be just and proper to allow it in any instance must rest with the legislature to determine; but it is unquestionably competent, with legislative permission, for towns, cities, and counties to raise money by loans or by taxation to pay bounty moneys to those who shall volunteer to fill any call made upon such towns, cities, or counties to supply men for the national armies.[2]

[1] See *post*, p. 546, and cases cited in note.

[2] "The power to create a public debt, and liquidate it by taxation, is too clear for dispute. The question is, therefore, narrowed to a single point: Is the purpose in this instance a public one? Does it concern the common welfare and interest of the municipality? Let us see. Civil war was raging, and Congress provided in the second section of the act of 24th February, 1864, that the quota of troops of each ward of a city, town, township, precinct, &c., should be as nearly as possible in proportion to the number of men resident therein liable to render military service. Section three provided that all volunteers who may enlist after a draft shall be ordered, shall be deducted from the number ordered to be drafted in such ward, town, &c. Volunteers are therefore by law to be accepted in relief of the municipality from a compulsory service to be determined by lot or chance. Does this relief involve the public welfare or interest? The answer rises spontaneously in the breast of every one in a community liable to the military burden. It is given, not by the voice of him alone who owes the service, but swells into a chorus from his whole family, relatives, and friends. Military service is the highest duty and burden the citizen is called to obey or to bear. It involves life, limb, and health, and is therefore a greater 'burden' than the taxation of property. The loss or the injury is not confined to the individual himself, but extends to all the relations he sustains. It embraces those bound to him in the ties of consanguinity, friendship, and interest; to the community which must

Relief of the community from an impending or possible draft is not, however, the sole consideration which will support taxation by the municipal corporations of the State to raise money for the purpose of paying bounties to soldiers. Gratitude to those who have entered the military service, whether as volunteers or drafted men, or as substitutes for others who were drafted or were liable to be, is a consideration which the State may well recognize, and it may compensate the service either by the payment of bounty moneys directly to such persons, or by provision for the support of those dependent upon them while they shall be absent from their homes. Whether we regard such persons as public benefactors, who, having taken upon themselves the most severe and dangerous duty a citizen is ever called upon to perform, have thereby entitled themselves to public reward as an incentive to fidelity and courage, or as persons who, having engaged in the public service for a compensation inadequate to the toil, privation, and danger incurred, are deserving of the bounty as a further recognition on the part of the community of the worth of their services, there seems in either case to be no sufficient reason to question the right of the legislature to authorize the municipal divisions of the State to raise moneys in any of the usual modes, for the purpose of paying bounties to them or their families, in recognition of such services.[1] And if a municipal corporation

furnish support to his family, if he cannot, and which loses in him a member whose labor, industry, and property contribute to its wealth and its resources; who assists to bear its burdens, and whose knowledge, skill, and public spirit contribute to the general good. Clearly the loss of that part of the population upon whom the greatest number depend, and who contribute most to the public welfare by their industry, skill, and property, and good conduct, is a common loss, and therefore a general injury. These are alike subject to the draft. The blind and relentless lot respects no age, condition, or rank in life. It is, therefore, clearly the interest of the community that those should serve who are willing, whose loss will sever the fewest ties and produce the least injury.

"The bounty is not a private transaction in which the individual alone is benefited. It benefits the public by inducing and enabling those to go who feel they can best be spared. It is not voluntary in those who pay it. The community is subject to the draft, and it is paid to relieve it from a burden of war. It is not a mere gift or reward, but a consideration for services. It is therefore not a confiscation of one man's property for another's use, but it is a contribution from the public treasury for a general good. In short, it is simply taxation to relieve the municipality from the stern demands of war, and avert a public injury in the loss of those who contribute most to the public welfare." Speer *v.* School Directors of Blairsville, 50 Pa. St. 150, 159. See also Waldo *v.* Portland, 33 Conn. 363; Bartholomew *v.* Harwinton, 33 Conn. 408; Fowler *v.* Danvers, 8 Allen, 80; Lowell *v.* Oliver, 8 Allen, 247; Washington County *v.* Berwick, 56 Pa. St. 466; Trustees of Cass *v.* Dillon, 16 Ohio St. 38; State *v.* Wilkesville, 20 Ohio St. 288. Also Opinions of Justices, 52 Me. 505, in which the view is expressed that towns cannot, under the power to raise money for "necessary town charges," raise and pay commutation moneys to relieve persons drafted into the military service of the United States.

[1] The act under which the Pennsyl-

shall have voted moneys for such purpose without legislative authority, it is competent for the legislature afterwards to legalize their action if it shall so choose.[1]

The cases to which we have referred in the notes assume that, if the purpose is one for which the State might properly levy a tax upon its citizens at large, the legislature would also have power to apportion and impose the duty, or confer the power of assuming it, upon the towns and other municipal or political divisions. And the rule laid down is one which opens a broad field to legislative discretion, allowing as it does the raising and appropriation of moneys, whenever, in the somewhat extravagant words of one of the cases, there is "the least possibility that it will be promotive in any degree of the public welfare."[2] The same rule, substantially, has been recognized by the Court of Appeals of New York. "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good. It can,

vania case, cited in the preceding note, saw decided, authorized the borough to contract a debt for the payment of three hundred dollars to each non-commissioned officer and private who might thereafter volunteer and enter the service of the United States, and be credited upon the quota of the borough under an impending draft. The whole purpose, therefore, was to relieve the community from the threatened conscription. But in the case of Brodhead *v.* Milwaukee, 19 Wis. 624, 652, it was held constitutional, not only to provide for the future by such municipal taxation, but also to raise moneys to pay bounties to volunteers previously enlisted, and even to those who should thereafter procure substitutes for themselves, and have them credited on the municipal quota.

[1] Booth *v.* Town of Woodbury, 32 Conn. 118; Bartholomew *v.* Harwinton, 33 Conn. 408; Crowell *v.* Hopkinton, 45 N. H. 9; Shackford *v.* Newington, 46 N. H. 415; Lowell *v.* Oliver, 8 Allen, 247; Aul *v.* Gleim, 52 Pa. St. 432; Weister *v.* Hade, 52 Pa. St. 474; Coffman *v.* Keightley, 24 Ind. 509; Board of Commissioners *v.* Bearss, 25 Ind. 110; Comer *v.* Fulsom, 13 Minn. 219; State *v.* Demorest, 32 N. J. 528; Taylor *v.* Thompson, 42 Ill. 9; Barbour *v.* Camden, 51 Me. 608; Hart *v.* Holden, 55 Me. 572; Burnham *v.* Chelsea, 43 Vt. 69; Butler *v.* Pultney, 43 Vt. 481. In State *v.* Jackson 33 N. J. 450, a statute authorizing a town to raise money by tax to relieve its inhabitants from the burden of a draft under a law of Congress, was held void as tending to defeat the purpose of such law. The decision was made by a bare majority of a bench of eleven judges. Compare O'Hara *v.* Carpenter, 23 Mich. 410, in which a contract of insurance against a military draft was held void on grounds of public policy.

[2] Booth *v.* Woodbury, 32 Conn. 118, 128, per *Butler, J.* "To make a tax law unconstitutional on this ground, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied." Sharpless *v.* Mayor, &c., 21 Pa. St. 147, 174, following Cheaney *v.* Hooser, 9 B. Monr. 330.

moreover, under the power to levy taxes, apportion the public burdens among all the taxpaying citizens of the State, or among those of a particular section or political division."[1] And where citizens have voluntarily advanced moneys for the purpose of paying bounties to recruits who fill the quota of a municipal corporation, on an understanding, based upon informal corporate action, that the moneys should be refunded when a law should be passed permitting it, a subsequent act of the legislature authorizing taxation for this purpose is valid.[2]

However broad are the terms employed in describing the legislative power over taxation in these cases, it is believed that no one of them has gone so far as to sanction taxation or the appropriation of the public revenue in order to refund to individuals moneys which they may have paid to relieve themselves from an impending draft, or may have voluntarily contributed to any public purpose, from motives purely personal to themselves, without any reason to rely upon the credit of the State, or of any municipal corporation, for reimbursement, and where the circumstances are not such as fairly to challenge the public gratitude. Taxation in such a case, where no obligation, honorary or otherwise, rests upon the public, would be nothing else than a naked case of appropriating the property of the taxpayer for private purposes, and that, too, without reference to anticipated public benefits.[3]

[1] Guilford *v.* Supervisors of Chenango, 13 N. Y. 143, 149. See New Orleans *v.* Clark, 95 U. S. 644.

[2] Weister *v.* Hade, 52 Pa. St. 474. And see People *v.* Sullivan, 43 Ill. 412; Johnson *v.* Campbell, 49 Ill. 316. Compare Susquehanna Depot *v.* Barry, 61 Pa. St. 317.

[3] Tyson *v.* School Directors, &c., 51 Pa. St. 9. A meeting of persons liable to draft under the law of the United States was called, and an association formed, called the Halifax Bounty Association, which levied an assessment of thirty dollars on each person liable to military duty in the township, and solicited contributions from others. Afterwards, an act was passed by the legislature, with a preamble reciting that certain citizens of Halifax township, associated as the Halifax Bounty Association, for freeing the said township from the late drafts, advanced moneys, which were expended in paying bounties to volunteers to fill the quota of the township. The act then authorized and required the school directors to borrow such sums of money as would fully reimburse the said Halifax Bounty Association for moneys advanced to free said township from the draft, and then further authorized the school directors to levy and collect a tax to repay the sums borrowed. The court say: "We are bound to regard the statute as an authority to reimburse what was intended by the Association as advances made to the township with the intent or understanding to be reimbursed or returned to those contributing. This was the light in which the learned judge below regarded the terms used; and unless this appears in support of the present levy by the school directors, they are acting without authority. But the learned judge, if I properly comprehend his meaning, did not give sufficient importance to these terms, and hence, I apprehend, he fell into error. He does not seem to have considered it material whether the Association paid its money voluntarily in aid of its own mem-

But it has been held by the Supreme Court of Massachusetts that towns might be authorized by the legislature to raise moneys by taxation for the purpose of refunding sums contributed by individuals to a common fund, in order to fill the quota of such towns under a call of the President, notwithstanding such moneys might have been contributed without promise or expectation of reimbursement. The court were of opinion that such contributions might well be considered as advancements to a public object, and, being such, the legislature might properly recognize the obligation and permit the towns to provide for its discharge.[1]

On a preceding page we have spoken in strong terms of the complete control which is possessed by the legislative authority

bers, or expressly to aid the township in saving its people from a draft, with the understanding that it was advanced in the character of a loan if the legislature chose to direct its repayment, and the school directors chose to act upon the authority conferred. This we cannot agree to. Such an enactment would not be legislation at all. It would be in the nature of judicial action, it is true; but, wanting the justice of notice to parties to be affected by the hearing, trial, and all that gives sanction and force to regular judicial proceedings, it would much more resemble an imperial rescript than constitutional legislation: first, in declaring an obligation where none was created or previously existed; and next, in decreeing payment by directing the money or property of the people to be sequestered to make the payment. The legislature can exercise no such despotic functions; and as it is not apparent in the act that they attempted to do so, we are not to presume they did. They evidently intended the *advancements* to be reimbursed to be only such as were made on the faith that they were to be returned." See also Crowell *v.* Hopkinton, 45 N. H. 9; Miller *v.* Grandy, 13 Mich. 540; Pease *v.* Chicago, 21 Ill. 500; Ferguson *v.* Landram, 5 Bush, 230; Esty *v.* Westminster, 97 Mass. 324; Cole *v.* Bedford, 97 Mass. 326; Usher *v.* Colchester, 33 Conn. 567; Perkins *v.* Milford, 59 Me. 315; Thompson *v.* Pittston, 59 Me. 315; Kelly *v.* Marshall, 69 Pa. St. 319. The legislature cannot ratify the action of a town in agreeing to repay those who paid money to avoid the draft. Bowles *v.* Landaff, 59 N. H. 164. In Freeland *v.* Hastings, 10 Allen, 570, it was held that the legislature could not empower towns to raise money by taxation for the purpose of refunding what had been paid by individuals for substitutes in military service. In Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413, it was held that an act passed in 1882 was void, which permitted taxation to pay bounties to those who re-enlisted in 1864, as being for a private purpose. In Cass *v.* Dillon, 16 Ohio St. 38, it was held that taxes to refund bounties previously and voluntarily paid might be authorized. See also State *v.* Harris, 17 Ohio St. 608. The Supreme Court of Wisconsin, in the well-reasoned case of State *v.* Tappan, 29 Wis. 664, deny the power of the State to *compel* a municipal corporation to pay bounties where it has not voted to do so. [Act authorizing county to raise by taxation money to pay to men drafted and serving in Union armies in Civil War, or to their heirs, specified sums of money is void, as authorizing a devotion of public moneys to private purposes. Bush *v.* Bd. of Supervisors of Orange Co., 159 N. Y. 212, 53 N. E. 1121, 45 L. R. A. 556, 70 Am. St. 538.]

[1] Freeland *v.* Hastings, 10 Allen, 570, 585. And see Hilbish *v.* Catherman, 64 Pa. St. 154, and compare Tyson *v.* School Directors, 51 Pa. St. 9. [The question of the right to pension school teachers was before the court in Hibbard *v.* State, 65 Ohio, 574, 64 N. E. 109, and the right denied as involving the taking of private property without due process of law and because the particular act was not uniform in its operation.]

of the State over the municipal corporations. There are nevertheless some limits to its power in this regard, as there are in various other directions limits to the legislative power of the State. Some of these are expressly defined; others spring from the usages, customs, and maxims of our people; they are a part of its history, a part of the system of local self-government, in view of the continuance and perpetuity of which all our constitutions are framed, and of the right to which the people can never be deprived except through express renunciation on their part. One undoubted right of the people is to choose, directly or indirectly, under the forms and restrictions prescribed by the legislature for reasons of general State policy, the officers of local administration, and the board that is to make the local laws. This is a right which of late has sometimes been encroached upon under various plausible pretences, but almost always with the result which reasonable men should have anticipated from the experiment of a body at a distance attempting to govern a local community of whose affairs or needs they could know but little, except as they should derive information from sources likely to have interested reasons for misleading.[1] An-

[1] On this subject reference is made to what is said by *Campbell*, Ch. J., in People *v.* Hurlbut, 24 Mich. 44, 87, *et seq.*; also p. 97. See s. c. 9 Am. Rep. 103. Much has been said concerning the necessity of legislative interference in some cases where bad men were coming into power through universal suffrage in cities, but the recent experience of the country shows that this has oftener been said to pave the way for bad men to obtain office or grants of unusual powers from the legislature than with any purpose to effect local reforms. And the great municipal scandals and frauds that have prevailed, like those which were so notorious in New York City, have been made possible and then nursed and fostered by illegitimate interference at the seat of State government. Some officers, usually of local appointment, are undoubtedly to be regarded as State officers whose choice may be confided to a State authority without any invasion of local rights; such as militia officers, officers of police, and those who have charge of the execution of the criminal laws; but those who are to administer the corporate funds and have the control of the corporate property, those who make the local laws and those who execute them, cannot rightfully be chosen by the central authority. Dillon, Mun. Corp. § 33. See People *v.* Com. Council of Detroit, 28 Mich. 228. The legislature cannot appoint a board to have charge of the public works, streets, and fire department of a city. State *v.* Denny, 118 Ind. 382, 21 N. E. 252, 274, 4 L. R. A. 79; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. Nor may a city board control the police of neighboring townships which are not represented on it. Metr. Police Board *v.* Wayne County Auditors, 68 Mich. 576, 36 N. W. 743. But the State may provide for the appointment of police officials in a city. Com. *v.* Plaisted, 148 Mass. 374, 19 N. E. 224, 12 Am. St. 566, 2 L. R. A. 142; State *v.* Seavey, 22 Neb. 454, 35 N. W. 228; [Newport *v.* Horton, 22 R. I. 106, 47 Atl. 312, 50 L. R. A. 320. Not so in Wisconsin. O'Connor *v.* Fond du Lac, 109 Wis. 253, 85 N. W. 327.] See State *v.* Hunter, 38 Kan. 578, 17 Pac. 177. And it may empower a board of water commissioners, created by itself, to bond a city. David *v.* Portland Water Com., 14 Oreg. 98, 12 Pac. 174. In Ohio it is held no infraction of the right of local self-government to allow the governor to appoint a board of public affairs for cities. State *v.* Smith, 44 Ohio St. 348, 7 N. E. 447, 12

other is the right of the local community to determine what pecuniary burdens it shall take upon its shoulders.(*a*) But here from the very nature of the case there must be some limitations. The municipalities do not exist wholly for the benefit of their corporators, but as a part of the machinery of State government, and they cannot be permitted to decline a performance of their duties or a discharge of their obligations as such. (*b*) They cannot abolish local government; they cannot refuse to provide the conveniences for its administration; they cannot decline to raise the necessary taxes for the purpose; they cannot repudiate pecuniary obligations that justly rest upon them as a local government. Over these matters the legislature of the State must have control, or confusion would inevitably be introduced into the whole system. But beyond this it is not often legitimate for the State to go except in moulding and shaping the local powers, and perhaps permitting the local authorities to do certain things for the benefit of their citizens which under the general grants of power would be inadmissible.[1]

On this general subject we shall venture to lay down the following propositions as the result of the authorities:—

1. That the legislature has undoubted power to compel the municipal bodies to perform their functions as local governments under their charters, and to recognize, meet, and discharge the duties and obligations properly resting upon them as such, whether they be legal, or merely equitable or moral; and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient.[2]

N. E. 829. In Com. *v.* Plaisted, *supra*, the court say, "We cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution." [And the right of local self-government is not involved where a public duty is laid upon a municipality, the proper discharge of which will benefit the State at large or an indefinite portion of it. The municipality may be compelled to submit to a tax levied upon it by the legislature for the support of a local board of health, created by the legislature. Davock *v.* Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.]

[1] This subject is discussed with some fulness in Cooley on Taxation, ch. xxi.

[2] In support of this, we refer to the very strong case of Guilford *v.* Super-

(*a*) [Where the Constitution prohibits the levy by the legislature of any tax upon a municipality for municipal purposes, the municipality cannot be required to purchase, when it shall determine to own a water plant, only from a private water company to which it has granted a franchise. Helena Cons. Water Co. *v.* Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.]

(*b*) [A county may be compelled to establish and maintain a high school. State *v.* Freeman, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67. And a city, a park. Knowlton *v.* Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.]

2. That in some cases, in view of the twofold character of such bodies, as being on the one hand agencies of State govern-

visors of Chenango, 18 Barb. 615, s. c. 13 N. Y. 143, where a town was compelled by the legislative authority of the State to reimburse its officers the expenses incurred by them in the honest but mistaken endeavor to discharge what they believed to be their duty; approved in New Orleans *v.* Clark, 95 U. S. 644; also to Sinton *v.* Ashbury, 41 Cal. 525, 530, in which it is said by *Crocket*, J., that "It is established by an overwhelming weight of authority, and I believe is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation *for municipal purposes*, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it" (citing Blanding *v.* Burr, 13 Cal. 343; Beals *v.* Amador Co., 35 Cal. 624; People *v.* Supervisors of San Francisco, 11 Cal. 206; Sharp *v.* Contra Costa Co., 34 Cal. 284; People *v.* McCreery, 34 Cal. 432; People *v.* Alameda, 26 Cal. 641, and holding that a city might be compelled to pay the claim of persons who had acted as commissioners in the extension of certain of its streets); also to Borough of Dunmore's Appeal, 52 Pa. St. 374, in which the legislature assumed the right of apportioning the indebtedness of a town among the boroughs carved out of it; supported by Layton *v.* New Orleans, 12 La. Ann. 515; People *v.* Alameda, 26 Cal. 641; and Burns *v.* Clarion County, 62 Pa. St. 422; also to People *v.* Flagg, 46 N. Y. 401, in which the legislative power to direct the construction of a public road, and to compel the creation of a town debt for the purpose, was fully sustained; to People *v.* Power, 25 Ill. 187; Waterville *v.* County Commissioners, 59 Me. 80; and to numerous other cases cited, *ante*, p. 268, note, and which we will not occupy space by repeating here. The legislature may validate an unauthorized issue of bonds, thereby taking away an inequitable defence against a holder of them in good faith, and enabling him to enforce them. Read *v.* Plattsmouth, 107 U. S. 568, 2 Sup. Ct. Rep. 208. So far as an act creates a liability which did not exist, it is void; so far as it provides a means for enforcing a pre-existing liability, it is valid. Supervisors of Sadsbury *v.* Dennis, 96 Pa. St. 400. The legislature cannot impose taxation to pay what a county does not owe: Board of Supervisors *v.* Cowan, 60 Miss. 876; nor to bestow a gratuity; otherwise if there is an equitable obligation to pay. Fuller *v.* Morrison Co., 36 Minn. 309, 30 N. W. 824. See State *v.* Foley, 30 Minn. 350, 15 N. W. 375; Caldwell Co. *v.* Harbert, 68 Tex. 321, 4 S. W. 607. [Where the Constitution provides that no county shall give any money or property in aid of any individual, association, or corporation, the legislature cannot authorize the retrial of a demand against a county where judgment upon the first trial was for the county. *Re* Greene, 166 N. Y. 485, 60 N. E. 183.] In Creighton *v.* San Francisco, 42 Cal. 446, it is said that the power of the legislature to appropriate the money of municipal corporations in payment of equitable claims to individuals, not enforceable in the courts, depends on the legislative conscience, and the judiciary will not interfere unless in exceptional cases. [But the Constitution of California now prohibits such action on the part of the legislature. Conlin *v.* San Francisco Bd. of Supervisors, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. 17. See also other cases to same effect, note 3, p. 315, and latter part of note on p. 318, *ante*.] Unquestionably the legislature may decide what taxes shall be levied for proper purposes of local government. Youngblood *v.* Sexton, 32 Mich. 406. [And a territorial legislature may compel the payment of debts incurred for public purposes by the inhabitants of a town before the organization of territorial and municipal governments. Guthrie National Bank *v.* Guthrie, 173 U. S. 528, 19 Sup. Ct. Rep. 513; Guthrie *v.* Oklahoma, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. See also State *v.* Springer, — N. J. —, 48 Atl.

ment, and on the other, corporations endowed with capacities and permitted to hold property and enjoy peculiar privileges for the benefit of their corporators exclusively, the legislature may permit the incurring of expense, the contracting of obligations, and the levy of taxes which are unusual, and which would not be admissible under the powers usually conferred. Instances of the kind may be mentioned in the offer of military bounties, and the payment of a disproportionate share of a State burden in consideration of peculiar local benefits which are to spring from it.[1]

3. But it is believed the legislature has no power, against the will of a municipal corporation, to compel it to contract debts for local purposes in which the State has no concern, or to assume obligations not within the ordinary functions of municipal government. Such matters are to be disposed of in view of the

605 (March 4, 1901). That penalties recoverable at suit of party injured may be laid upon counties in which lynchings occur, see Bd. of Com'rs of Champaign Co. *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738. Legislature may compel a city to acquire or construct and to pay for bridges and ferries within their limits or contiguous to them, but it cannot compel a county to pay the debts of a city within it. Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.]

[1] The subject of military bounties has been sufficiently referred to already. As to the right to permit a municipal corporation to burden itself with a local tax for a State object, we refer to Merrick *v.* Amherst, 12 Allen, 500; Marks *v.* Trustees of Purdue University, 37 Ind. 155; Hasbrouck *v.* Milwaukee, 13 Wis. 37. The first was a case in which, in consideration of the local benefits expected from the location of the State agricultural college in a certain town, the town was permitted to levy a large local tax in addition to its proportion of the State burden, for the erection of the necessary buildings. The second case was of a similar nature. The third was the case of permission to levy a city tax to improve the city harbor, — a work usually done by the general government. There are cases which go further than these, and hold that the legislature may *compel* a municipal corporation to do what it may thus permit. Thus, in Kirby *v.* Shaw, 19 Pa. St. 258, it appeared that by an act of April 3, 1848, the commissioners of Bradford County were required to add $500 annually, until 1857, to the usual county rates and levies of the borough of Towanda in said county, for the purpose of defraying the expenses of the court-house and jail, then in process of erection in that borough. The act was held constitutional on the principle of assessment of benefits. In Gordon *v.* Cornes, 47 N. Y. 608, a law was sustained which "authorized and required" the village of Brockport to levy a tax for the erection of a State normal school building at that place. It is to be said of this case, however, that there was to be in the building a grammar-school free to all the children of proper acquirements in the village; so that the village was to receive a peculiar and direct benefit from it, besides those which would be merely incidental to the location of the normal school in the place. But for this circumstance it would be distinctly in conflict with State *v.* Haben, 22 Wis. 660, where it was held incompetent for the legislature to appropriate the school moneys of a city to the purchase of a site for a State normal school; and also with other cases cited in the next note. It must be conceded, however, that there are other cases which support it. And see, as supporting the last case, Livingston County *v.* Weider, 64 Ill. 427; Burr *v.* Carbondale, 76 Ill. 455; Livingston County *v.* Darlington, 101 U. S. 407.

interests of the corporators exclusively, and they have the same right to determine them for themselves which the associates in private corporations have to determine for themselves the questions which arise for their corporate action. The State in such cases may remove restrictions and permit action, but it cannot compel it.[1]

[1] A city cannot be compelled to erect buildings for a county; but it may be permitted to do it if it so elects. Callam *v.* Saginaw, 50 Mich. 7, 14 N. W. 677. There are undoubtedly some cases which go to the extent of holding that municipal corporations and organizations are so completely under the legislative control, that whatever the legislature may *permit* them to do, it may *compel* them to do, whether the corporators are willing or not. A leading case is Thomas *v.* Leland, 24 Wend. 65. In that case it appeared that certain citizens of Utica had given their bond to the people of the State of New York, conditioned for the payment into the canal fund of the sum of $38,615, the estimated difference between the cost of connecting the Chenango Canal with the Erie at Utica, instead of at Whitesborough, as the canal commissioners had contemplated; and it was held within the constitutional powers of the legislature to require this sum to be assessed upon the taxable property of the city of Utica, supposed to be benefited by the canal connection. The court treat the case as "the ordinary one of local taxation to make or improve a public highway," and dismiss it with few words. If it could be considered as merely a case of the apportionment between a number of municipalities of the expense of a public highway running through them, it would have the support of Waterville *v.* County Commissioners, 59 Me. 80; Commonwealth *v.* Newburyport, 103 Mass. 129; and also what is said in Bay City *v.* State Treasurer, 23 Mich. 499, where it is admitted that over the matter of the construction of such a highway, as well as the apportionment of expense, the State authority must necessarily be complete. It has been considered in subsequent New York cases as a case of apportionment merely. See People *v.* Brooklyn, 4 N. Y. 419; Howell *v.* Buffalo, 37 N. Y. 267. The cases of Kirby *v.* Shaw, 19 Pa. St. 258, and Gordon *v.* Cornes, 47 N. Y. 608, referred to in the preceding note, it will be perceived, were also treated as cases merely of apportionment. How that can be called a case of apportionment, however, which singles out a particular town, and taxes it for benefits to be expected from a highway running across the State, without doing the same by any other town in the State, it is not easy to perceive. In Commissioners of Revenue *v.* The State, 45 Ala. 399, it appeared that the legislature had created a local board consisting of the president of the county commissioners of revenue of Mobile County, the mayor of Mobile, the president of the Bank of Mobile, the president of the Mobile Chamber of Commerce, and one citizen of Mobile, appointed by the governor, as a board for the improvement of the river, harbor, and bay of Mobile, and required the commissioners of revenue of Mobile County to issue to them for that purpose county bonds to the amount of $1,000,000, and to levy a tax to pay them. Here was an appointment by the State of local officers to make at the expense of the locality an improvement which it has been customary for the general government to take in charge as one of national concern; but the Supreme Court of the State sustained the act, going farther, as we think, in doing so, than has been gone in any other case. In Hasbrouck *v.* Milwaukee, 13 Wis. 37, approved and defended in an able opinion in Mills *v.* Charleton, 29 Wis. 400, the power of the legislature to compel the city of Milwaukee to issue bonds or levy a tax for the improvement of its harbor was distinctly denied, though it was conceded that permission might be given, which the city could lawfully act upon. Compare also Knapp *v.* Grant, 27 Wis. 147; State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Atkins *v.* Randolph, 31 Vt. 226. In People *v.* Batchellor, 53 N. Y. 128, the Court of Appeals, through an able and lucid opinion by *Grover*, J., denied the validity of a mandatory statute compelling a town to take stock in a rail-

4. And there is much good reason for assenting also to what several respectable authorities have held, that where a demand

road corporation, and to issue its bonds in exchange therefor. The authority to permit the town to do this was not discussed, but, taking that as admitted, it is declared that municipal corporations, in the making or refusing to make arrangements of the nature of that attempted to be forced upon the town in question, were entitled to the same freedom of action precisely which individual citizens might claim. This opinion reviews the prior decisions in the same State, and finds nothing conflicting with the views expressed. In People *v.* Mayor, &c. of Chicago, 51 Ill. 17, 2 Am. Rep. 278, it was denied, in an opinion of great force and ability, delivered by Chief Justice *Breese*, that the State could empower a board of park commissioners of State appointment to contract a debt for the city of Chicago, for the purposes of a public park for that city, and without the consent of its citizens. The learned judge says (p. 31): "While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have in their franchises no vested rights, and whose powers and privileges the creating power may alter, modify, or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the State, over which and their rights and effects the State may exercise a general superintendence and control (Richland County *v.* Lawrence County, 12 Ill. 8; Trustees of Schools *v.* Tatman, 13 Ill. 30), we are not of the opinion that that power, such as it is, can be so used as to compel any one of our many cities to issue its bonds against its will, to erect a park, or for any other improvement to force it to create a debt of millions; in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it, and the structures which adorn them. What would be the universal judgment, should the legislature, *sua sponte*, project magnificent and costly structures within one of our cities, — triumphal arches, splendid columns, and perpetual fountains, — and require in the act creating them that every owner of property within the city limits should give his individual obligation for his proportion of the cost, and impose such costs as a lien upon his property forever? What would be the public judgment of such an act, and wherein would it differ from the act under consideration?" And again: "Here, then, is a case where taxes may be assessed, not by any corporate authority of the city, but by commissioners, to whom is intrusted the erection, embellishment, and control of this park, and this without consent of the property owners.

"We do not think it is within the constitutional competency of the legislature to delegate this power to these commissioners. If the principle be admitted that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed; in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the pleasure and will of the legislature. Can it be that the General Assembly of the State, just and honest as its members may be, is the depository of the rights of property of the citizen? Would there be any sufficient security for property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of any such legislation."

This case should be read in connection with the following in the same State, and all in the same direction. People *v.* Common Council of Chicago, 51 Ill. 58; Lovingston *v.* Wider, 53 Ill. 302; People *v.* Canty, 55 Ill. 33; Wider *v.* East St. Louis, 55 Ill. 133; Gage *v.* Graham, 57 Ill. 144; East St. Louis *v.* Witts, 59 Ill. 155; Marshall *v.* Silliman, 61 Ill. 218;

is asserted against a municipality, though of a nature that the legislature would have a right to require it to incur and discharge, yet if its legal and equitable obligation is disputed, the corporation has the right to have the dispute settled by the courts, and cannot be bound by a legislative allowance of the claim.[1]

Cairo, &c. R. R. Co. *v.* Sparta, 77 Ill. 505; Barnes *v.* Lacon, 84 Ill. 461. See also People *v.* Common Council of Detroit, 28 Mich. 228. That the legislature may compel a municipality to levy a tax for a local road, see Wilcox *v.* Deer Lodge Co., 2 Mont. 574. [And where a highway or bridge is beneficial to several municipalities, the legislature may compel them to contribute to the expense of providing and maintaining it, even though no portion of it lies within the boundaries of some of the contributories; and the legislature may apportion the expense. State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, aff. in Williams *v.* Eggleston, 170 U. S. 304, 18 Sup. Ct. Rep. 617. Upon power of legislature to impose burdens of this character on municipalities, see cases collected in note to 48 L. R. A. 465. That city may be compelled to purchase and maintain a park, see Knowlton *v.* Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.]

The case of People *v.* Batchellor, 53 N. Y. 128, seems to us clearly inconsistent with Thomas *v.* Leland, *supra*. But, on the other hand, the case of Duanesburgh *v.* Jenkins, 57 N. Y. 177, goes to the full extent of holding that a subscription of a town to a railroad, made on condition of subsequent assent of the town thereto, may be relieved of the condition by the legislature and enforced against the town, though the original subscription was by a commission which the town did not choose. It is a little difficult, therefore, to determine what the law of New York now is on this subject, especially as in New York, &c. R. R. Co *v.* Van Horn, 57 N. Y. 473, the power of the legislature to make valid an ineffectual individual contract is denied. But leaving out of view the New York cases, and a few others which were decided on the ground of an apportionment of local benefits, we think the case in Alabama will stand substantially alone. Before that decision the Supreme Court of Illinois were able to say, in a case calling for a careful and thorough examination of the authorities, that counsel had "failed to find a case wherein it had been held that the legislature can compel a city against its will to incur a debt by the issue of its bonds for a local improvement." People *v.* Mayor, &c., 51 Ill. 17, 31. See also cases pp. 699–702, *infra*. [And see Cook Farm Co. *v.* Detroit, 124 Mich. 426, 83 N. W. 130, that citizens must be permitted to pass upon the proposition to allow a board the power of local taxation, decided on authority of Park Commissioners *v.* Detroit, 28 Mich. 228.]

[1] It was held in People *v.* Hawes, 37 Barb. 440, that the legislature had no right to direct a municipal corporation to satisfy a claim made against it for damages for breach of contract, out of the funds or property of such corporation. In citing the cases of Guilford *v.* Supervisors of Chenango, 13 N. Y. 143, and People *v.* Supervisors of New York, 11 Abb. 14, a distinction is drawn by which the cases are supposed to be reconciled with the one then under decision. "Those cases and many others," say the court, p. 455, "related not to the right or power of the legislature to compel an individual or corporation to pay a debt or claim, but to the power of the legislature to raise money by tax, and apply such money, when so raised, to the payment thereof. We could not, under the decisions of the courts on this point, made in these and other cases, now hold that the legislature had not authority to impose a tax to pay any claim, or to pay it out of the State treasury; and for this purpose to impose a tax upon the property of the whole State, or any portion of the State. This was fully settled in People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; but neither that case nor the case in 13 N. Y. 143, in any manner gave a warrant for the opinion that the legislature had a right to direct a municipal corporation to pay a claim for damages for breach of a contract out of the funds or property of such corporation, without a submission of such

Having concisely stated these general views, we add merely, that those cases which hold that the State may raise bounty moneys by taxation, to be paid to persons in the military service, we think stand by themselves, and are supported by different principles from any which can fairly be summoned to the aid of some of the other cases which we have cited. The burden of the public defence unquestionably rests upon the whole community; and the legislature may properly provide for its apportionment and discharge in such manner as its wisdom may prescribe. But those cases which hold it competent for the legislature to give its consent to a municipal corporation engaging in works of public improvement outside its territorial limits, and becoming a stockholder in a private corporation, must be conceded on all hands to have gone to the very limit of constitutional power in this direction; and to hold that the legislature may go even further, and, under its power to control the taxation of the political divisions and organizations of the State, may *compel* them, without the consent of their citizens, to raise money for such or any other unusual purposes, or to contract debts therefor, seems to us to be introducing new principles into our system of local self-

claim to a judicial tribunal." If by this is meant that the legislature has power to compel a corporation to tax its citizens for the payment of a demand, but has not the authority to make it a charge against the corporation in any other mode, the distinction seems to be one of form rather than of substance. It is no protection to the rights of property of a municipal corporation to hold that the legislature can-not determine upon a claim against it, if at the same time the corporation may be compelled by statute to assume and discharge the obligation through the levy of a tax for its satisfaction. But if it is only meant to declare that the legislature cannot adjudicate upon disputed claims, there can be no good reason to find fault with the decision. It is one thing to determine that the nature of a claim is such as to make it proper to satisfy it by taxation, and another to adjudge how much is justly due upon it. The one is the exercise of legislative power, the other of judicial. See Sanborn *v.* Rice, 9 Minn. 273; Commonwealth *v.* Pittsburgh, 34 Pa. St. 496; Plimpton *v.* Somerset, 33 Vt. 283; Gage *v.* Graham, 57 Ill. 144. But the power to decide upon the breach of a contract by a corporation, and the extent of the damages which have resulted, is less objectionable and less likely to lead to oppression, than the power to impose through taxation a claim upon a corporation which it never was concerned in creating, against which it protests, and which is unconnected with the ordinary functions and purposes of municipal government. In Borough of Dunmore's Appeal, 52 Pa. St. 374, a decision was made which seems to conflict with that in People *v.* Hawes, *supra*, and with the subsequent case of Baldwin *v.* Mayor, &c. of New York, 42 Barb. 549. The Pennsylvania court decided that the constitutional guaranty of the right to jury trial had no application to municipal corporations, and a commission might be created by the legislature to adjust the demands between them. See also *In re* Pennsylvania Hall, 5 Pa. St. 204; Layton *v.* New Orleans, 12 La. Ann. 515. In People *v.* Power, 25 Ill. 187, it was held competent for the legislature to apportion the taxes collected in a county between a city therein and the remainder of the county, and that the county revenues "must necessarily be within the control of the legislature for political purposes." And see Portwood *v.* Montgomery Co., 52 Miss. 523.

government, and to be sanctioning a centralization of power not within the contemplation of the makers of the American constitutions. We think, where any such forced taxation is resisted by the municipal organization, it will be very difficult to defend it as a proper exercise of legislative authority in a government where power is distributed on the principles which prevail here.

Legislative Control of Corporate Property.

The legislative power of the State controls and disposes of the property of the State. How far it may also control and dispose of the property of those agencies of government which it has created and endowed with corporate powers, is a question which happily there has been very little occasion to discuss in the courts. Being created as an agency of government, it is evident that the municipality cannot in itself have that complete and absolute control and power of disposition of its property which is possessed by natural persons and private corporations in respect to their several possessions. For it can hold and own property only for corporate purposes,(*a*) and its powers are liable at any time to be so modified by legislation as to render the property no longer available. Moreover, the charter rights may be altogether taken away; and in that case the legislature has deprived the corporation of its property by depriving it of corporate capacity to hold it. And in many ways, while the corporation holds and enjoys property, the legislature must possess power to interfere with its control, at least incidentally; for the mere fact that the corporation possesses property cannot deprive the State of its complete authority to mould and change the corporate organization, and enlarge or diminish the powers which it possessed before. But whether the State can directly intervene and take away the corporate property, or convert it to other uses than those for which it was procured, or whether, on repealing a charter of incorporation, it can take to itself the corporate property, and dispose of it at its discretion, are different questions from any raised by the indirect and incidental interference referred to.

In the leading case, in which it was decided by the Supreme Court of the United States that a private charter of incorporation, granted by a State, was a contract between the State and the corporators, not subject to modification or repeal, except in pur-

(*a*) [Such property is held subject to a trust in behalf of the public, and the municipality is incapable of alienating it unless expressly authorized thereto. See Huron Waterworks Co. *v.* Huron, 8 S. D. 169, 65 N. W. 816, 30 L. R. A. 848.]

suance of a right expressly reserved, but that the charter of a municipal corporation was not such a contract, it was at the same time declared, as the opinion of the judges, that the legislature could not deprive such municipal corporations of their vested rights in property. "It may be admitted," says one of the judges, "that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses, as many municipal corporations are, does the legislature, under our forms of limited government, possess the authority to seize upon those funds and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our government, the public faith is pledged the other way, and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation."[1] "The government has no power to revoke a grant, even of its own funds, when given to a private person or corporation for special uses. It cannot recall its own endowments, granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration through the means of equitable tribunals, in cases where there would otherwise be a failure of justice."[2]

"In respect to public corporations," says another judge, "which exist only for public purposes, such as towns, cities, &c., the legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was purchased."[3] These views had been acted upon by the same court in preceding cases.[4] They draw a distinction between the politi-

[1] *Story*, J., in Dartmouth College *v.* Woodward, 4 Wheat. 518, 694, 695.

[2] *Story*, J., in Dartmouth College *v.* Woodward, 4 Wheat. 698.

[3] *Washington*, J., in Dartmouth College *v.* Woodward, 4 Wheat. 663.

[4] Terrett *v.* Taylor, 9 Cranch, 43; Town of Pawlet *v.* Clark, 9 Cranch, 292. See also State *v.* Haben, 22 Wis. 660, referred to, *ante*, p. 337, note; Aberdeen *v.* Saunderson, 16 Miss. 663. In People *v.* Common Council of Detroit, 28 Mich.

cal rights and privileges conferred on corporations and which are not vested rights in any sense implying constitutional permanency, and such rights in property as the corporation acquires, and which in the view of these decisions are protected by the same reasons which shield similar rights in individuals.[1]

When the municipal divisions of the territory of the State are changed in their boundaries, two or more consolidated in one, or one subdivided, it is conceded that the legislature possesses the power to make such disposition of the corporate property as natural equity would require in view of the altered condition of things. The fact that a portion of the citizens, before entitled to the benefits springing from the use of specific property for public purposes, will now be deprived of that benefit, cannot affect the validity of the legislative act, which is supposed in some other way to compensate them for the incidental loss.[2] And in many other cases the legislature properly exercises a similar power of control in respect to the corporate property, and may direct its partition and appropriation, in order to accommodate most justly and effectually, in view of new circumstances, the purposes for which it was acquired.

The rule upon the subject we take to be this: when corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes under their charter shall not be taken from them and appropriated to other uses.[3]

228, this subject was largely considered, and the court denied the right of the State to compel a municipal corporation to contract a debt for a mere local object; for example, a city park. Compare People *v.* Board of Supervisors, 50 Cal. 561. In Texas it is held that municipal corporations have a constitutional right to protection in their property as against State legislation. Milam Co. *v.* Bateman, 54 Tex. 153.

[1] "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right, *as against the government*, in any individual or body of men. It is repugnant to the genius of our institutions, and the spirit and meaning of the Constitution; for by that fundamental law, all political rights not there defined and taken out of the exercise of legislative discretion, were intended to be left subject to its regulation. If corporations can set up a vested right as against the government to the exercise of this species of power, because it has been conferred upon them by the bounty of the legislature, so may any and every officer under the government do the same." *Nelson, J.*, in People *v.* Morris, 13 Wend. 325, 331. And see Bristol *v.* New Chester, 3 N. H. 524; Benson *v.* Mayor, &c. of New York, 10 Barb. 223. It is competent for the legislature to transfer the control of the streets of a city to park commissioners for boulevard or park purposes. People *v.* Walsh, 96 Ill. 232; 36 Am. Rep. 135. See Matter of Woolsey, 95 N. Y. 135.

[2] Bristol *v.* New Chester, 3 N. H. 524. And see *ante*, pp. 267–269, notes; *post*, p. 347, note 1.

[3] If land is dedicated as a public square, and accepted as such, a law devoting it to other uses is void, because violating the obligation of contracts. Warren *v.* Lyons City, 22 Iowa, 351. As there was no attempt in that case to appropriate the land to such other uses

If the State grants property to the corporation, the grant is an executed contract, which cannot be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away. Nevertheless if the corporate powers should be repealed, the corporate ownership would necessarily cease, and even when not repealed, a modification of those powers, or a change in corporate bounds, might seriously affect, if not altogether divest, the rights of individual corporators, so far as they can be said to have any rights in public property. And in other ways, incidentally as well as by direct intervention, the State may exercise authority and control over the disposition and use of corporate property, according to the legislative view of what is proper for the public interest and just to the corporators, subject, however, to this restriction, that the purpose for which the property as originally acquired shall be kept in view, so far as the circumstances will admit, in any disposition that may be made of it.[1]

under the right of eminent domain, the question of the power to do so was not considered.

[1] This principle is asserted and sustained in Mount Pleasant *v.* Beckwith, 100 U. S. 514, in an elaborate opinion by Mr. Justice *Clifford*. Also in Meriwether *v.* Garrett, 102 U. S. 472. And see North Yarmouth *v.* Skillings, 45 Me. 133. "That the State may make a contract with, or a grant to, a public municipal corporation, which it could not subsequently impair or resume, is not denied; but in such case the corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage; and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges were conferred. Public or municipal corporations, however, which exist only for public purposes, and possess no powers except such as are bestowed upon them for public political purposes, are subject at all times to the control of the legislature, which may alter, modify, or abolish them at pleasure." *Trumbull*, J., in Richland County *v.* Lawrence County, 12 Ill. 18. "Public corporations are but parts of the machinery employed in carrying on the affairs of the State; and they are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. The State may exercise a general superintendence and control over them and their right and effects, so that their property is not diverted from the uses and objects for which it was given or purchased." Trustees of Schools *v.* Tatman, 13 Ill. 27, 30, per *Treat*, Ch. J. And see Harrison *v.* Bridgeton, 16 Mass. 16; Rawson *v.* Spencer, 113 Mass. 40; Montpelier *v.* East Montpelier, 27 Vt. 704; Same *v.* Same, 29 Vt. 12; Benson *v.* Mayor, &c. of New York, 10 Barb. 223. See also City of Louisville *v.* University, 15 B. Monr. 642; Weymouth & Braintree Fire District *v.* County Commissioners, 108 Mass. 142; Morgan *v.* Beloit, 7 Wall. 613. In State *v.* St. Louis County Court, 34 Mo. 546, the following remarks are made by the court, in considering the cause shown by the county in answer to an application to compel it to meet a requisition for the police board of St. Louis: "As to the second cause shown in the return, it is understood to mean, not that there is in fact no money in the treasury to pay this requisition, but that as a matter of law all the money which is in the treasury was collected for specific purposes from which it cannot be diverted. The specific purposes for which the money

This restriction is not the less applicable where corporate powers are abolished than it is in other cases; and whatever

was collected were those heretofore directed by the legislature; and this act, being a later expression of the will of the legislature, controls the subject, and so far as it conflicts with previous acts repeals them. The county is not a private corporation, but an agency of the State government; and though as a public corporation it holds property, such holding is subject to a large extent to the will of the legislature. Whilst the legislature cannot take away from a county its property, it has full power to direct the mode in which the property shall be used for the benefit of the county." For like views, see Palmer *v.* Fitts, 51 Ala. 489, 492. Compare People *v.* Mahaney, 13 Mich. 481; Richland Co. *v.* Richland Center, 59 Wis. 591, 18 N. W. 497. It will be observed that the strong expression of legislative power is generally to be found in cases where the thing actually done was clearly and unquestionably competent. In Payne *v.* Treadwell, 16 Cal. 220, 233, this language is used: "The agents, of the corporation can sell or dispose of the property of the corporation only in the way and according to the order of the legislature; and therefore the legislature may by law operating immediately upon the subject dispose of this property, or give effect to any previous disposition or attempted disposition. The property itself is a trust, and the legislature is the prime and controlling power, managing and directing the use, disposition, and direction of it." Quoted and approved in San Francisco *v.* Canavan, 42 Cal. 541, 558. These strong and general expressions should be compared with what is said in Grogan *v.* San Francisco, 18 Cal. 590, in which the right of municipal corporations to constitutional protection in their property is asserted fully. The same right is asserted in People *v.* Batchellor, 53 N. Y. 128; People *v.* Mayor, &c. of Chicago, 51 Ill. 17; People *v.* Tappan, 29 Wis. 664; People *v.* Hurlbut, 24 Mich. 44; and very many others. See Dillon, Mun. Corp. §§ 39 *et seq.*, and cases referred to in notes. And see Hewison *v.* New Haven, 37 Conn. 475; New Orleans, &c. R. R. Co. *v.* New Orleans, 26 La. Ann. 517, as to the distinction between the public or governmental character of municipal corporations, and their private character as respects the ownership and management of their own property. One of the strongest illustrations of the power of legislation over municipal corporations is to be found in the statutes which have been passed in some States to compel these corporations to make compensation for losses occasioned by mobs and riots. The old English law made the hundred responsible for robberies, and this was extended by the Riot Act of 1 Geo. I. to cover damages sustained at the hands of persons unlawfully, riotously, and tumultuously assembled. See Radcliffe *v.* Eden, Cowp. 485; Wilmot *v.* Horton, Doug. 701, note; Hyde *v.* Cogan, Doug. 699, an action growing out of the riot in which Lord Mansfield's house was sacked and his library destroyed. Similar statutes it has been deemed necessary to enact in some of the States, and they have received elaborate judicial examination and been sustained as important and beneficial police regulations, based upon the theory that, with proper vigilance on the part of the local authorities, the disorder and injury might and ought to have been prevented. Donoghue *v.* Philadelphia, 2 Pa. St, 230; Commissioners of Kensington *v.* Philadelphia, 13 Pa. St. 76; Allegheny County *v.* Gibson, 90 Pa. St. 397, 35 Am. Rep. 670; Darlington *v.* New York, 31 N. Y. 164; Ely *v.* Niagara Co., 36 N. Y. 297; Folsom *v.* New Orleans, 28 La. Ann. 936; Street *v.* New Orleans, 32 La. Ann. 577; Underhill *v.* Manchester, 45 N. H. 214; Chadbourne *v.* New Castle, 48 N. H. 196; [Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. 321. Municipal corporations may be made liable for lynchings that occur within their boundaries. Brown *v.* Orangeburg Co., 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734; see, in this connection, Champaign Co. *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738. Upon liability for destruction by mobs, see note to 24 L. R. A. 592.] There is no such liability in the absence of statute. Western College *v.* Cleveland, 12 Ohio St. 375. [Nor for loss of life at hands of rioters,

might be the nature of the public property which the corporation had acquired, and whatever the purpose of the acquisition, the legislature, when by taking away the corporate authority it became vested with the control of the property, would be under obligation to dispose of it in such manner as to give the original corporators the benefit thereof by putting it to the use designed, if still practicable, or to some kindred or equally beneficial use having reference to the altered condition of things. The obligation is one which, from the very nature of the case, must rest for its enforcement in great measure upon the legislative good faith and sense of justice; and it could only be in those cases where there had been a clear disregard of the rights of the original corporators, in the use attempted to be made of the property, that relief could be had through judicial action.

No such restriction, however, can rest upon the legislature in regard to the rights and privileges which the State grants to municipal corporations in the nature of franchises, and which are granted only as aids or conveniences to the municipality in effecting the purposes of its incorporation. These, like the corporate powers, must be understood to be granted during pleasure.[1]

Towns and Counties.

Thus far we have been considering general rules, applicable to all classes of municipal organizations possessed of corporate powers, and by which these powers may be measured, or the duties which they impose defined. In regard to some of these organizations, however, there are other and peculiar rules which require separate mention. Some of them are so feebly endowed with corporate life, and so much hampered, controlled, and

in absence of statute. New Orleans *v.* Abagnatto, 62 Fed. Rep. 240, 26 L. R. A. 329; Gianfortone *v.* New Orleans, 61 Fed. Rep. 64, 24 L. R. A. 502.]

[1] East Hartford *v.* Hartford Bridge Co., 10 How. 511. On this subject see ch. ix., *post*. The case of Trustees of Aberdeen Academy *v.* Mayor, &c. of Aberdeen, 13 S. & M. 645, appears to be *contra*. By the charter of the town of Aberdeen in 1837, the legislature granted to it the sole power to grant licenses to sell vinous and spirituous liquors within the corporate limits thereof, and to appropriate the money arising therefrom to city purposes. In 1848 an act was passed giving these moneys to the Aberdeen Female Academy. The act was held void, on the ground that the original grant was of a franchise which constituted property, and it could not be transferred to another, though it might be repealed. The case cites Bailey *v.* Mayor, &c., 3 Hill, 531, and St. Louis *v.* Russell, 9 Mo. 507, which seem to have little relevancy; also 4 Wheat. 663, 698, 699, and 2 Kent, 305, note, for the general rule protecting municipal corporations in their vested rights to property. The case of Benson *v.* Mayor, &c. of New York, 10 Barb. 223, also holds the grant of a ferry franchise to a municipal corporation to be irrevocable, but the authorities generally will not sustain this view. See *post*, p. 399, and note.

directed in the exercise of the functions which are conferred upon them, that they are sometimes spoken of as nondescript in character, and as occupying a position somewhere between that of a corporation and a mere voluntary association of citizens. Counties, townships, school districts, and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the State,[1] which apportion the territory of the State into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the State; and, in order that they may be able to perform these duties, vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; the legislature assumes this division of the State to be essential in republican government, and the duties are imposed as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty.[2] Usually their functions are wholly of a public nature, and there is no room to imply any contract between them and the State, in their organization as corporate bodies, except that which springs from the ordinary rules of good faith, and which requires that the property they shall acquire, by local taxation or otherwise, for the purposes of their organization, shall not be seized by the State, and appropriated in other ways. They are, therefore, sometimes called *quasi* corporations,[3] to distinguish them from the corporations in general, which possess more completely the functions of an artificial entity. Chief Justice *Parker*, of Massachusetts, in speaking of school districts, has said, "That they are not bodies, politic and corporate, with the general powers of corporations, must be admitted: and the reasoning advanced to show their defect of power is conclusive.

[1] A constitutional provision that the legislature shall pass no special act conferring corporate powers, applies to public as well as private corporations. State *v.* Cincinnati, 20 Ohio St. 18; Clegg *v.* School District, 8 Nev. 178; School District *v.* Insurance Co., 103 U. S. 707.

[2] Granger *v.* Pulaski County, 26 Ark. 37; Scales *v.* Chattahoochee County, 41 Ga. 225; Palmer *v.* Fitts, 51 Ala. 489.

[3] Riddle *v.* Proprietors, &c., 7 Mass. 169, 187; School District *v.* Wood, 13 Mass. 192; Adams *v.* Wiscasset Bank, 1 Me. 361; Denton *v.* Jackson, 2 Johns. Ch. 320; Todd *v.* Birdsall, 1 Cow. 260, 13 Am. Dec. 522; Beardsley *v.* Smith, 16 Conn. 367; Eastman *v.* Meredith, 36 N. H. 284; Hopple *v.* Brown, 13 Ohio St. 311; Commissioners of Hamilton Co. *v.* Mighels, 7 Ohio St. 109; Ray County *v.* Bentley, 49 Mo. 236. In Nebraska counties are not municipal corporations, Sherman Co. *v.* Simons, 109 U. S. 735, 3 Sup. Ct. Rep. 502. It is not competent to organize a town of parcels of territory which are not contiguous. Chicago, &c. Railway Co. *v.* Oconto, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840. See Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561.

The same may be said of towns and other municipal societies; which, although recognized by various statutes, and by immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suit at law, yet are deficient in many of the powers incident to the general character of corporations. They may be considered, under our institutions, as *quasi* corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage, but restrained from the general use of authority which belongs to these metaphysical persons by the common law. The same may be said of all the numerous corporations which have been from time to time created by various acts of the legislature; all of them enjoying the power which is expressly bestowed upon them, and perhaps, in all instances where the act is silent, possessing, by necessary implication, the authority which is requisite to execute the purposes of their creation." "It will not do to apply the strict principles of law respecting corporations in all cases to these aggregate bodies which are created by statute in this Commonwealth. By the several statutes which have been passed respecting school districts, it is manifest that the legislature has supposed that a division of towns, for the purpose of maintaining schools, will promote the important object of general education; and this valuable object of legislative care seems to require, in construing their acts, that a liberal view should be had to the end to be effected."[1] Following out this view, the courts of the New England States have held, that when judgments are recovered against towns, parishes, and school districts, any of the property of private owners within the municipal division is liable to be taken for their discharge. The reasons for this doctrine, and the custom upon which it is founded, are thus stated by the Supreme Court of Connecticut:—

"We know that the relation in which the members of municipal corporations in this State have been supposed to stand, in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them, for some purposes, as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts. Heretofore this has not been doubted as to the inhabitants of towns, located ecclesiastical societies, and school districts.

[1] School District *v.* Wood, 13 Mass. 192, 197.

"From a recurrence to the history of the law on this subject, we are persuaded that the principle and usage here recognized and followed, in regard to the liability of the inhabitants of towns and other communities, were very early adopted by our ancestors. And whether they were considered as a part of the common law of England, or originated here, as necessary to our state of society, it is not very material to inquire. We think, however, that the principle is not of domestic origin, but to some extent was operative and applied in the mother country, especially in cases where a statute fixed a liability upon a municipality which had no corporate funds. The same reasons and necessity for the application of such a principle and practice existed in both countries. Such corporations are of a public and political character; they exercise a portion of the governing power of the State. Statutes impose upon them important public duties. In the performance of these, they must contract debts and liabilities, which can only be discharged by a resort to individuals, either by taxation or execution. Taxation, in most cases, can only be the result of the voluntary action of the corporation, dependent upon the contingent will of a majority of the corporators, and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it. Such reasons as these probably operated with our ancestors in adopting the more efficient and certain remedy by execution, which has been resorted to in the present case, and which they had seen to some extent in operation in the country whose laws were their inheritance.

"The plaintiff would apply to these municipal or *quasi* corporations the close principles applicable to private corporations. But inasmuch as they are not, strictly speaking, corporations, but only municipal bodies, without pecuniary funds, it will not do to apply to them literally, and in all cases, the law of corporations.[1]

"The individual liability of the members of *quasi* corporations, though not expressly adjudged, was very distinctly recognized in the case of Russell *v.* The Men of Devon.[2] It was alluded to as a known principle in the case of the Attorney-General *v.* The City of Exeter,[3] applicable as well to cities as to hundreds and parishes. That the rated inhabitants of an English parish are considered as the real parties to suits against the parish is now supposed to be well settled; and so it was decided in the cases of The King *v.* The Inhabitants of Woburn,[4] and The King *v.* The

[1] School District *v.* Wood, 13 Mass. 192.

[2] 2 Term Rep. 660.

[3] 2 Russ. 45.

[4] 10 East, 395.

Inhabitants of Hardwick.[1] And, in support of this principle, reference was made to the form of the proceedings; as that they are entitled 'against the inhabitants,' &c.

"In the State of Massachusetts, from whose early institutions we have borrowed many valuable specimens, the individual responsibility of the inhabitants of towns for town debts has long been established. Distinguished counsel in the case of the Merchants' Bank *v.* Cook,[2] referring to municipal bodies, say: 'For a century past the practical construction of the bar has been that, in an action by or against a corporation, a member of the corporation is a party to the suit.' In several other cases in that State the same principle is repeated. In the case of Riddle *v.* The Proprietors of the Locks and Canals on Merrimack River,[3] *Parsons*, Ch. J., in an allusion to this private responsibility of corporators, remarks: 'And the sound reason is, that having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment obtained against the corporation.' So in Brewer *v.* Inhabitants of New Gloucester,[4] the court say: 'As the law provides that, when judgments is recovered against the inhabitants of a town, execution may be levied upon the property of any inhabitant, each inhabitant must be considered as a party.' In the case before referred to of the Merchants' Bank *v.* Cook, *Parker*, Ch. J., expresses the opinion of the court upon this point thus: 'Towns, parishes, precincts, &c., are but a collection of individuals, with certain corporate powers for political and civil purposes, without any corporate funds from which a judgment can be satisfied; but each member of the community is liable, in his person and estate, to the execution which may issue against the body; each individual, therefore, may be well thought to be a party to a suit brought against them by their collective name. In regard to banks, turnpike, and other corporations, the case is different.' The counsel concerned in the case of Mower *v.* Leicester,[5] without contradiction, speak of this practice of subjecting individuals as one of daily occurrence. The law on this subject was very much considered in the case of Chase *v.* The Merrimack Bank,[6] and was applied and enforced against the members of a territorial parish. 'The question is,' say the court, 'whether, on an execution against a town or parish, the body or estate of any inhabitant may be lawfully taken to satisfy it. This question seems to have been settled in the affirmative by a series of

[1] 11 East, 577.
[2] 4 Pick. 405.
[3] 7 Mass. 187.
[4] 14 Mass. 216.
[5] 9 Mass. 247.
[6] 19 Pick. 564.

decisions, and ought no longer to be considered as an open question.' The State of Maine, when separated from Massachusetts, retained most of its laws and usages, as they had been recognized in the parent State; and, among others, the one in question. In Adams *v.* Wiscasset Bank,[1] *Mellen*, Ch. J., says: 'It is well known that all judgments against *quasi* corporations may be satisfied out of the property of any individual inhabitant.'

"The courts of this State, from a time beyond the memory of any living lawyer, have sanctioned and carried out this usage, as one of common-law obligation; and it has been applied, not to towns only, but also, by legal analogy, to territorial ecclesiastical societies and school districts. The forms of our process against these communities have always corresponded with this view of the law. The writs have issued against the *inhabitants* of towns, societies, and districts *as parties*. As early in the history of our jurisprudence as 1705, a statute was enacted authorizing communities, such as towns, societies, &c., to prosecute and defend suits, and for this purpose to appear, either by *themselves*, agents, or attorneys. If the inhabitants were not then considered as parties individually, and liable to the consequences of judgments against such communities as parties, there would have been a glaring impropriety in permitting them to appear and defend by themselves; but, if parties, such a right was necessary and indispensable. Of course this privilege has been and may be exercised.[2]

"Our statute providing for the collection of taxes enacts that the treasurer of the State shall direct his warrant to the collectors of the State tax in the several towns. If neither this nor the further proceedings against the collectors and the selectmen authorized by the statute shall enforce the collection of the tax, the law directs that then the treasurer shall issue his execution against the inhabitants of such town. Such an execution may be levied upon the estate of the inhabitants; and this provision of the law was not considered as introducing a new principle, or enforcing a novel remedy, but as being only in conformity with the well-known usage in other cases. The levy of an execution under this statute produced the case of Beers *v.* Botsford.[3] There the execution, which had been issued against the town of Newtown by the treasurer of the State, had been levied upon the property of the plaintiff, an inhabitant of that town, and he had thus been compelled to pay the balance of a State tax due from the town. He sued the town of Newtown for the recovery of the

[1] 1 Greenl. 361. [2] 1 Swift's System, 227. [3] 3 Day, 159.

money so paid by him. The most distinguished professional gentlemen in the State were engaged as counsel in that case; and it did not occur, either to them or to the court, that the plaintiff's property had been taken without right: on the contrary, the case proceeded throughout on the conceded principle of our common law, that the levy was properly made upon the estate of the plaintiff. And without this the plaintiff could not have recovered of the town, but must have resorted to his action against the officer for his illegal and void levy. In Fuller *v.* Hampton,[1] *Peters*, J., remarked that, if costs are recovered against a town, the writ of execution to collect them must have been issued against the property of the inhabitants of the town; and this is the invariable practice. The case of Atwater *v.* Woodrich[2] also grew out of this ancient usage. The ecclesiastical society of Bethany had been taxed by the town of Woodrich for its moneys at interest, and the warrant for the collection of the tax had been levied upon the property of the plaintiff, and the tax had thus been collected of him, who was an inhabitant of the located society of Bethany. *Brainerd*, J., who drew up the opinion of the court, referring to this proceeding, said: 'This practice with regard to towns, has prevailed in New England, so far as I have been able to investigate the subject, from an early period, — from its first settlement, — a practice brought by our forefathers from England, which had there obtained in corporations similar to the towns incorporated in New England.' It will here be seen that the principle is considered as applicable to territorial societies as to towns, because the object to be obtained was the same in both, — 'that the town or society should be brought to a sense of duty, and make provision for payment and indemnity;' a very good reason, and very applicable to the case we are considering.

"The law on this subject was more distinctly brought out and considered by this court in the late case of McCloud *v.* Selby,[3] in which this well-known practice, as it had been applied to towns and ecclesiastical societies, was extended and sanctioned as to school districts; 'else it would be breaking in upon the analogies of the law.' 'They are communities for different purposes, but essentially of the same character.' And no doubt can remain, since the decision of this case, but that the real principle of all the cases on this subject, has been, and is, that the inhabitants of *quasi* corporations are parties individually, as well as in their corporate capacities, to all actions in which the corporation is a

[1] 5 Conn. 417. [2] 6 Conn. 223. [3] 10 Conn. 390–395.

party. And to the same effect is the language of the elementary writers." [1]

So far as this rule rests upon the reason that these organizations have no common fund, and that no other mode exists by which demands against them can be enforced, it cannot be considered applicable in those States where express provision is made by law for compulsory taxation to satisfy any judgment recovered against the corporate body, — the duty of levying the tax being imposed upon some officer, who may be compelled by *mandamus* to perform it. Nor has any usage, so far as we are aware, grown up in any of the newer States, like that which had so early an origin in New England. More just, convenient, and inexpensive modes of enforcing such demands have been established by statute, and the rules concerning them are conformed more closely to those which are established for other corporations.

On the other hand, it is settled that these corporations are not liable to a private action, at the suit of a party injured by a neglect of their officers to perform a corporate duty, unless such action is given by statute.(*a*) This doctrine has been frequently applied where suits have been brought against towns, or the highway officers of towns, to recover for damages sustained in consequence of defects in the public ways. The common law gives no such action, and it is therefore not sustainable at all, unless given by statute.[2] A distinction is made between those corporations which are created as exceptions, and receive special grants of power for the peculiar convenience and benefit of the corporators, on the one hand, and the incorporated inhabitants of a district, who are by statute invested with particular powers,

[1] Beardsley *v.* Smith, 16 Conn. 375, citing 2 Kent, 221; Angell & Ames on Corp. 374; 1 Swift's Dig. 72, 794; 5 Dane's Abr. 158. And see Dillon, Mun. Corp. c. 1. It was held competent in the above case to extend the same principle to incorporated cities; and an act of the legislature permitting the enforcement of city debts in the same mode was sustained. For a more recent case in Massachusetts than these cited, see Gaskill *v.* Dudley, 6 Met. 546. A statute allowing judgments against a town to be collected from the goods of individuals is due process of law under the fourteenth amendment. Eames *v.* Savage, 77 Me. 212.

[2] This rule, however, has no application to the case of neglect to perform those obligations which are incurred by the political subdivisions of the State when special duties are imposed on them by law. Hannon *v.* St. Louis Co. Court, 62 Mo. 313. But such liability is strictly construed. Where a county is chargeable with highway repairs, it is not liable for injury to one on the highway caused by the fall of a dead tree which had stood near the road. Watkins *v.* County Court, 30 W. Va. 657, 5 S. E. 654.

(*a*) [On right of action given to injured party to sue for damages where sheriff fails to prevent lynching, see Champaign Co. *v.* Church, 62 Ohio St. 318, 57 N. E. 50 48 L. R. A. 738.]

without their consent, on the other. In the latter case, the State may impose corporate duties, and compel their performance, under penalties; but the corporators, who are made such whether they will or no, cannot be considered in the light of persons who have voluntarily, and for a consideration, assumed obligations, so as to owe a duty to every person interested in the performance.[1]

The reason which exempts these public bodies from liability to private actions, based upon neglect to perform public obligations, does not apply to villages, boroughs, and cities, which accept special charters from the State. The grant of the corporate franchise, in these cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers what to them is a valuable privilege. This privilege is a consideration for the duties which the charter imposes. Larger powers of self-government are given than are confided to towns or counties; larger privileges in the acquisition and

[1] Mower *v.* Leicester, 9 Mass. 247; Bartlett *v.* Crozier, 17 Johns. 439; Farnum *v.* Concord, 2 N. H. 392; Adams *v.* Wiscasset Bank, 1 Me. 361; Baxter *v.* Winooski Turnpike, 22 Vt. 114; Beardsley *v.* Smith, 16 Conn. 368; Chidsey *v.* Canton, 17 Conn. 475; Young *v.* Commissioners, &c., 2 N. & McC. 537; Commissioners of Highways *v.* Martin, 4 Mich. 557; Morey *v.* Newfane, 8 Barb. 645; Lorillard *v.* Monroe, 11 N. Y. 392; Galen *v.* Clyde and Rose Plank Road Co., 27 Barb. 543; Reardon *v.* St. Louis, 36 Mo. 555; Sherbourne *v.* Yuba Co., 21 Cal. 113; State *v.* County of Hudson, 30 N. J. 137; Hedges *v.* Madison Co., 6 Ill. 567; Granger *v.* Pulaski Co., 26 Ark. 37; Weightman *v.* Washington, 1 Black, 39; Ball *v.* Winchester, 32 N. H. 435; Eastman *v.* Meredith, 36 N. H. 284; Waltham *v.* Kemper, 55 Ill. 346; Sutton *v.* Board, 41 Miss. 236; Cooley *v.* Freeholders, 27 N. J. 415; Bigelow *v.* Randolph, 14 Gray, 541; Symonds *v.* Clay Co., 71 Ill. 355; People *v.* Young, 72 Ill. 411; Frazer *v.* Lewiston, 76 Me. 531; Altnow *v.* Sibley, 30 Minn. 186, 14 N. W. 877; Yeager *v.* Tippecanoe, 81 Ind. 46; Abbett *v.* Com'rs Johnson Co., 114 Ind. 61, 16 N. E. 127. These cases follow the leading English case of Russell *v.* Men of Devon, 2 T. R. 667. A county is not liable for obstructing a river: White Star Co. *v.* Gordon Co., 81 Ga. 47, 7 S. E. Rep. 231; nor for failure of its treasurer to pay to city money belonging to the latter. Marquette Co. *v.* Ishpeming Treas., 49 Mich. 244, 13 N. W. 609. In the very carefully considered case of Eastman *v.* Meredith, 36 N. H. 284, it was decided, on the principle above stated, that if a building erected by a town for a town-house is so imperfectly constructed that the flooring gives way at the annual town-meeting, and an inhabitant and legal voter, in attendance on the meeting, receives thereby a bodily injury, he cannot maintain an action against the town to recover damages for this injury. The case is carefully distinguished from those where corporations have been held liable for the negligent use of their own property by means of which others are injured. The familiar maxim that one shall so use his own as not to injure that which belongs to another is of general application. A similar ruling was made after careful consideration in a case where a child was injured by the unsafe condition of a school building which a city was obliged to maintain. The duty being one to the public imposed by law, there is no liability in the absence of statute. Hill *v.* Boston, 122 Mass. 344. So if the duty is assumed under a general law but not expressly imposed. Wixon *v.* Newport, 13 R. I. 454. See Wild *v.* Paterson, 47 N. J. L. 406, 1 Atl. 490, and cases *supra*, p. 305.

control of corporate property; and special authority is conferred to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. The grant by the State to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise, on the part of the corporation, to perform the corporate duties, and as imposing the duty of performance, not for the benefit of the State merely, but for the benefit of every individual interested in its performance.[1] In this respect these corporations

[1] *Selden*, J., in Weet *v.* Brockport, 16 N. Y. 161, note. See also Mayor of Lyme *v.* Turner, Cowp. 86; Henley *v.* Lyme Regis, 5 Bing. 91; s. c. in error, 3 B. & Adol. 77, and 1 Bing. N. C. 222; Mayor, &c. of New York *v.* Furze, 3 Hill, 612; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Hutson *v.* Mayor, &c. of New York, 9 N Y. 163; Conrad *v.* Ithaca, 16 N. Y. 158; Mills *v.* Brooklyn, 32 N. Y. 489; Barton *v.* Syracuse, 36 N. Y. 54; Lee *v.* Sandy Hill, 40 N. Y. 442; Clark *v.* Washington, 12 Wheat. 40; Riddle *v.* Proprietors of Locks, &c., 7 Mass. 169; Bigelow *v.* Inhabitants of Randolph, 14 Gray, 541; Mears *v.* Commissioners of Wilmington, 9 Ired. 73; Browning *v.* Springfield, 17 Ill. 143; Bloomington *v.* Bay, 42 Ill. 503; Springfield *v.* LeClaire, 49 Ill. 476; Peru *v.* French, 55 Ill. 317; Pittsburg *v.* Grier, 22 Pa. St. 54; Jones *v.* New Haven, 34 Conn. 1; Stackhouse *v.* Lafayette, 26 Ind. 17; Brinkmeyer *v.* Evansville, 29 Ind. 187; Sawyer *v.* Corse, 17 Gratt. 230; Richmond *v.* Long, 17 Gratt. 375; Noble *v.* Richmond, 31 Gratt. 271, 31 Am. Rep. 726; Blake *v.* St. Louis, 40 Mo. 569; Scott *v.* Mayor, &c. of Manchester, 37 Eng. L. & Eq. 495; Smoot *v.* Wetumpka, 24 Ala. 112; Albrittin *v.* Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Detroit *v.* Corey, 9 Mich. 165; Rusch *v.* Davenport, 6 Iowa, 443; Commissioners *v.* Duckett, 20 Md. 468; Covington *v.* Bryant, 7 Bush, 248; Weightman *v.* Washington, 1 Black, 39; Chicago *v.* Robbins, 2 Black, 418; Nebraska *v.* Campbell, 2 Black, 590; Galveston *v.* Posnainsky, 62 Tex. 118; Hutchinson *v.* Olympia, 2 Wash. 314; Kellogg *v.* Janesville, 34 Minn. 132, and see Kent *v.* Worthing Local Board, L. R. 10 Q. B. D. 118. The same rule applies to cities existing under a general law. Boulder *v.* Niles, 9 Col. 415, 12 Pac. 632. A city is liable for a defect in a sidewalk maintained by it though in fact outside the highway line: Mansfield *v.* Moore, 124 Ill. 133, 16 N. E. 246; for negligence of an abutter who for his own purposes renders a sidewalk unsafe, if it has notice. Philadelphia *v.* Smith, — Pa. —, 16 Atl. Rep. 493. See Dooley *v.* Sullivan, 112 Ind. 451, 14 N. E. 566. [That legislature may exempt municipal corporations from such liability, see Wilmington *v.* Ewing, 2 Penn., Del. 66, 43 Atl. 305, 45 L. R. A. 79.] In the case of Detroit *v.* Blackeby, 21 Mich. 84, this whole subject is considered at length; and the court (one judge dissenting) deny the soundness of the principle stated in the text, and hold that municipal corporations existing under special charters are not liable to individuals for injuries caused by neglect to perform corporate duties, unless expressly made so by statute. This case is referred to and dissented from in Waltham *v.* Kemper, 55 Ill. 347, and approved in Navasota *v.* Pearce, 46 Tex. 525; Young *v.* Charleston, 20 S. C. 116, and Arkadelphia *v.* Windham, 49 Ark. 139, 4 S. W. 450. The rule in California is similar. Chope *v.* Eureka, 78 Cal. 588, 21 Pac. 364. Where a street is roped off by order of a court, a city is not liable for an injury caused thereby. Belvin *v.* Richmond, 85 Va. 574, 8 S. E. Rep. 378. In Murtaugh *v.* St. Louis, 44 Mo. 479, 480, *Currier*, J., says: "The general result of the adjudications seems to be this: When the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or

are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise, on condition of the performance of certain public duties, are held by the acceptance to contract for the performance of those duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which, in some cases, by reason of restrictions upon the power of taxation, they might not possess. But, assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village, vested with control of its streets, for any neglect to keep them in repair, or for any improper construction, has been determined in many cases.[1] And a similar liability would exist in other cases where the same reasons would be applicable.

But if the ground of the action is the omission by the corporation to repair a defect, it would seem that notice of the defect

parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for the private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions." Citing Bailey *v.* New York, 3 Hill, 531; Martin *v.* Brooklyn, 1 Hill, 550; Richmond *v.* Long's Adm'r, 17 Gratt. 375; Sherbourne *v.* Yuba Co., 21 Cal. 113; Dargan *v.* Mobile, 31 Ala. 469; Stewart *v.* New Orleans, 9 La. Ann. 461; Prother *v.* Lexington, 13 B. Monr. 559. And as to exemption from liability in exercising or failing to exercise legislative authority, see *ante*, pp. 301–303, and notes. As to who are to be regarded as municipal officers, see Maxmilian *v.* New York, 62 N. Y. 160, 20 Am. Rep. 468, and cases there cited. [Upon remedy over by municipality against wrongdoer after payment of damages for injury done by him or through his negligence, see Washington Gas Light Co. *v.* District of Columbia, 161 U. S. 316, 16 Sup. Ct. Rep. 564, and note to s. c. in 40 L. ed. U. S. 712.]

[1] Weet *v.* Brockport, 16 N. Y. 161, note; Hickok *v.* Plattsburg, 16 N. Y. 161; Nelson *v.* Canisteo, 100 N. Y. 89; Morey *v.* Newfane, 8 Barb. 645; Browning *v.* Springfield, 17 Ill. 143; Hyatt *v.* Rondout, 44 Barb. 385; Lloyd *v.* Mayor, &c. of New York, 5 N. Y. 369; Rusch *v.* Davenport, 6 Iowa, 443. And see Dillon, Mun. Corp. c. 18, and the cases cited in the preceding note. [See also Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, and note.] The cases of Weet *v.* Brockport, and Hickok *v.* Plattsburg, were criticised by Mr. Justice *Marvin*, in the case of Peck *v.* Batavia, 32 Barb. 634, where, as well as in Cole *v.* Medina, 27 Barb. 218, he held that a village merely *authorized* to make and repair sidewalks, but not in terms absolutely and imperatively required to do so, had a discretion conferred upon it in respect to such walks, and was not responsible for a refusal to enact ordinances or by-laws in relation thereto; nor, if it enacted such ordinances or by-laws, was it liable for damages arising from a neglect to enforce them. The doctrine that a power thus conferred is discretionary does not seem consistent with the ruling in some of the other cases cited, and is criticised in Hyatt *v.* Rondout, 44 Barb. 385. But see *ante*, pp. 301–303, and notes. Calling public meetings for political or philanthropic purposes is no part of the business of a municipal corporation, and it is not liable to one who, in lawfully passing by where the meeting is held, is injured by the discharge of a cannon fired by persons concerned in the meeting. Boyland *v.* Mayor, &c. of New York, 1 Sandf. 27. The noise of a cannon fired outside a highway is not a defect in the way for which a city is liable. Lincoln *v.* Boston, 148 Mass. 517, 20 N. E. 329.

should be brought home to the corporation, or to officers charged with some duty respecting the streets, or that facts should appear sufficient to show that, by proper vigilance, it must have been known.[1] On the other hand, if the injury has happened in consequence of defective construction, notice is not essential, as the facts must be supposed to have been known from the first.[2]

In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporators, — such as the power to construct works to supply a city with water, or gas-works, or sewers, and the like, — the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner in which the work is constructed, or guarded, even though, under its charter, the agents for the construction are not chosen or controlled by the corporation, and even where the work is required by law to be let to the lowest responsible bidder.

In Bailey *v.* Mayor, &c., of New York,[3] an action was brought against the city by one who had been injured in his property by the careless construction of the Croton dam for the purpose of supplying the city with water. The work was constructed under the control of water commissioners, in whose appointment the city had no voice; and upon this ground, among others, and also on the ground that the city officers were acting in a public capacity, and, like other public agents, not responsible for the misconduct of those necessarily appointed by them, it was insisted the city could not be held liable. *Nelson*, Ch. J., examining the position that, "admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the State in prosecuting the work in question, and therefore are not responsible for the conduct of those necessarily employed by them for that purpose," says: "We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of

[1] Hart *v.* Brooklyn, 36 Barb. 226; Dewey *v.* City of Detroit, 15 Mich. 307; Garrison *v.* New York, 5 Bosw. 497; McGinity *v.* Mayor, &c. of New York, 5 Duer, 674; Decatur *v.* Fisher, 53 Ill. 407; Chicago *v.* McCarthy, 75 Ill. 602; Requa *v.* Rochester, 45 N. Y. 129; Hume *v.* New York, 47 N. Y. 639; Springfield *v.* Doyle, 76 Ill. 202; Rosenburg *v.* Des Moines, 41 Iowa, 415; Vandersliste *v.* Philadelphia, 103 Pa. St. 102; Dotton *v.* Albion, 50 Mich. 129, 50 N. W. 46; Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350. Notice of defect is notice of the facts, whether the authorities consider them as constituting a defect or not. Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166. [When excavation is made by city employees acting under proper authority, city must be deemed to have notice. Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. 817.]

[2] Alexander *v.* Mt. Sterling, 71 Ill. 366; Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166.

[3] 3 Hill, 531; s. c. in error, 2 Denio, 433.

diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of *respondeat superior* does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. But this view cannot be maintained on the facts before us. The powers conferred by the several acts of the legislature, authorizing the execution of this great work, are not, strictly and legally speaking, conferred for the benefit of the public; the grant is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment, under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much so as the lands and houses belonging to it situate within its corporate limits.

"The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body, — such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant.

"As the powers in question have been conferred upon one of these public corporations, thus blending, in a measure, those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each.

"But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quo hoc* is to be regarded as a private company. It stands on the same footing as would

any individual or body of persons upon whom the like special franchises had been conferred.[1]

"Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies, could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers, in the eye of the law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company, and be subject to the responsibilities attaching to that class of institutions. The distinction is well stated by the Master of the Rolls in Moodalay *v.* East India Co.,[2] in answer to an objection made by counsel. There the plaintiff had taken a lease from the company, granting him permission to supply the inhabitants of Madras with tobacco for ten years. Before the expiration of that period, the company dispossessed him, and granted the privilege to another. The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was, that the removal of the plaintiff was incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The Master of the Rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. 'They have rights,' he observed, 'as a sovereign power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable.' It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same

[1] Citing Dartmouth College *v.* Woodward, 4 Wheat. 668, 672; Philips *v.* Bury, 1 Ld. Raym. 8, 2 T. R. 352; Allen *v.* McKeen, 1 Sumn. 297; People *v.* Morris, 13 Wend. 331–338, 2 Kent's Com. 275 (4th ed.); United States Bank *v.* Planters' Bank, 9 Wheat. 907; Clark *v.* Corp. of Washington, 12 Wheat. 40; Moodalay *v.* East India Co., 1 Brown's Ch. R. 469. See, in addition to the cases cited by the court, Touchard *v.* Touchard, 5 Cal. 306; Gas Co. *v.* San Francisco, 9 Cal. 453; Richmond *v.* Long, 17 Gratt. 375; Atkins *v.* Randolph, 31 Vt. 226; Small *v.* Danville, 51 Me. 359; Oliver *v.* Worcester, 102 Mass. 489, 3 Am. Rep. 485; Philadelphia *v.* Fox, 64 Pa. St. 169; Detroit *v.* Corey, 9 Mich. 165; People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Western College *v.* Cleveland, 12 Ohio, N. S. 375; Hewinson *v.* New Haven, 37 Conn. 475, 9 Am. Rep. 342; People *v.* Batchellor, 53 N. Y. 128; Welsh *v.* St. Louis, 73 Mo. 71.

[2] 1 Brown's Ch. R. 469.

light as individual owners and occupiers, and dealt with accordingly. As such, they are bound to repair bridges, highways, and churches; are liable to poor rates; and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject."[1]

In Storrs *v.* City of Utica,[2] it was held that a city, owing to the public the duty of keeping its streets in a safe condition for travel, was liable to persons receiving injury from the neglect to keep proper lights and guards at night around an excavation which had been made for the construction of a sewer, notwithstanding it had contracted for all proper precautions with the persons executing the work. And in the City of Detroit *v.* Corey[3] the corporation was held liable in a similar case, notwithstanding the work was required by the charter to be let to the lowest bidder. *Manning*, J., in speaking to the point whether the contractors were to be considered as the agents of the city, so that the maxim *respondeat superior* should apply, says: "It is to be observed that the power under which they acted, and which made that lawful which would otherwise have been unlawful, was not a power given to the city for governmental purposes, or a public municipal duty imposed on the city, as to keep its streets in repair, or the like, but a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city; they belong to the city. The corporation and its corporators, the citizens, are alone interested in them; the outside public or people of the State at large have no interest in them, as they have in the streets of the city, which are public highways.

"The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding — for such are the requirements of the law in the execution of the power —

[1] 2 Inst. 703; Thursfield *v.* Jones, Sir T. Jones, 187; Rex *v.* Gardner, Cowp. 79; Mayor of Lynn *v.* Turner, Cowp. 87; Henley *v.* Mayor of Lyme Regis, 5 Bing. 91; s. c. in House of Lords, 1 Bing. N. C. 222. See also Lloyd *v.* Mayor, &c. of New York, 5 N. Y. 369; Commissioners *v.* Duckett, 20 Md. 468. "The corporation of the City of New York possesses two kinds of powers, — one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty; the other private, and, to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual." *Ibid.*, per *Foot*, J. See upon this point also Western Fund Saving Society *v.* Philadelphia, 31 Pa. St. 175; Louisville *v.* Commonwealth, 1 Duvall, 295; People *v.* Common Council of Detroit, 28 Mich. 228; *ante*, pp. 335–337, and notes.

[2] 17 N. Y. 104.

[3] 9 Mich. 165. Compare Mills *v.* Brooklyn, 32 N. Y. 489; Jones *v.* New Haven, 34 Conn. 1.

that it shall be so executed as not unnecessarily to interfere with the rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he cannot accept the power divested of them, or rid himself of their performance by executing them through a third person as his agent. He may stipulate with the contractor for their performance, as was done by the city in the present case, but he cannot thereby relieve himself of his personal liability, or compel an injured party to look to his agent, instead of himself, for damages." And in answer to the objection that the contract was let to the lowest bidder, as the law required, it is shown that the provision of law to that effect was introduced for the benefit of the city, to protect it against frauds, and that it should not, therefore, relieve it from any liability.[1]

[1] See also Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463; Grant *v.* City of Brooklyn, 41 Barb. 381; City of Buffalo *v.* Holloway, 14 Barb. 101, and 7 N. Y. 493; Lloyd *v.* Mayor, &c. of New York, 5 N. Y. 369; Delmonico *v.* Mayor, &c. of New York, 1 Sandf. 222; Barton *v.* Syracuse, 37 Barb. 292; Storrs *v.* Utica, 17 N. Y. 104; Springfield *v.* LeClaire, 49 Ill. 476; Blake *v.* St. Louis, 40 Mo. 569; Baltimore *v.* Pendleton, 15 Md. 12; St. Paul *v.* Seitz, 3 Minn. 297; Denver *v.* Rhodes, 9 Col. 554, 13 Pac. 729; Wilson *v.* Wheeling, 19 W. Va. 323; Birmingham *v.* McCary, 84 Ala. 469, 4 So. 630; Logansport *v.* Dick, 70 Ind. 65; Brasso *v.* Buffalo, 90 N. Y. 679; Turner *v.* Newburgh, 109 N. Y. 301, 16 N. E. 344; Circleville *v.* Neuding, 41 Ohio St. 465; Jacksonville *v.* Drew, 19 Fla. 106; Joslyn *v.* Detroit, 74 Mich. 458, 42 N. W. 50; McCoull *v.* Manchester, 85 Va. 579, 8 S. E. 379; also numerous cases collected and classified in Dillon on Municipal Corporations. But this doctrine seems not to obtain in Pennsylvania: School Dist. *v.* Fuess, 98 Pa. St. 600; Susquehanna Depot *v.* Simmons, 112 Pa. St. 384, 5 Atl. 434. If the injury arises from something not collateral to the work, the city is not liable, as where horses are frightened by the noise of blasting in an adjoining street: Herrington *v.* Lansingburgh, 110 N. Y. 145, 17 N. E. 728; or a person is injured by the blasting. Blumb *v.* Kansas City, 84 Mo. 112; Murphy *v.* Lowell, 128 Mass. 396. Compare Joliet *v.* Harwood, 86 Ill. 110. A municipal corporation is not liable for neglect to devise and construct a proper system of drainage. Carr *v.* Northern Liberties, 35 Pa. St. 324. See *ante*, pp. 300, 301, and notes. Cities are not liable for the illegal conduct of officials in the discharge of duty. Dillon, §§ 774–778, and cases cited; Grumbine *v.* Washington, 2 McArthur, 578.

The following are some of the more recent cases in which the liability of municipal corporations for neglect of public duties has been considered: —

For nuisance in highway, sewer, &c.: Todd *v.* Troy, 61 N. Y. 506; Masterton *v.* Mt. Vernon, 58 N. Y. 391; Merrifield *v.* Worcester, 110 Mass. 216, 14 Am. Rep. 592; Woodward *v.* Worcester, 121 Mass. 245; Chicago *v.* Brophy, 79 Ill. 277; Chicago *v.* O'Brennan, 65 Ill. 160; Wilkins *v.* Rutland, 61 Vt. 336, 17 Atl. Rep. 735; Kibele *v.* Philadelphia, 105 Pa. St. 41; Duffy *v.* Dubuque, 63 Iowa, 171, 18 N. W. 900: Kunz *v.* Troy, 104 N. Y. 344, 10 N. E. 442; Langan *v.* Atchison, 35 Kan. 318, 11 Pac. 38. See Stock *v.* Boston, 149 Mass. 410, 21 N. E. 871; Ray *v.* St. Paul, 40 Minn. 458, 42 N. W. 297. For invasion of private right or property: Sheldon *v.* Kalamazoo, 24 Mich. 383; Babcock *v.* Buffalo, 56 N. Y. 268; Lee *v.* Sandy Hill, 40 N. Y. 442; Phinizy *v.* Augusta, 47 Ga. 260; Helena *v.* Thompson, 29 Ark. 569; Kobs *v.* Minneapolis, 22 Minn. 159. For negligent construction

We have not deemed it important, in considering the subject embraced within this chapter, to discuss the various questions which might be suggested in regard to the validity of the proceedings by which it is assumed in any case that a municipal corporation has become constituted. These questions are generally questions between the corporators and the State, with which private individuals are supposed to have no concern. In proceedings where the question whether a corporaton exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the State as such. Such a question should be raised by the State itself, by *quo warranto* or other direct proceeding.[1] And the rule, we apprehend, would be no

of sewers: Nims *v.* Troy, 59 N. Y. 500; Van Pelt *v.* Davenport, 42 Iowa, 308; Rowe *v.* Portsmouth, 56 N. H. 291; Ashley *v.* Port Huron, 35 Mich. 296, 20 Am. Rep. 628, note; Noonan *v.* Albany, 79 N. Y. 470, 35 Am. Rep. 540; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Post *v.* Boston, 141 Mass. 189, 4 N. E. 815. For negligence in construction and improvement of streets: Pekin *v.* Winkel, 77 Ill. 56; Bloomington *v.* Brokaw, 77 Ill. 194; Pekin *v.* Brereton, 67 Ill. 477; Chicago *v.* Langlass, 66 Ill. 361; Mead *v.* Derby, 40 Conn. 205; Milledgeville *v.* Cooley, 55 Ga. 17; Prentiss *v.* Boston, 112 Mass. 43; Saltmarsh *v.* Bow, 56 N. H. 428; Sewall *v.* St. Paul, 20 Minn. 511; Kentworthy *v.* Ironton, 41 Wis. 647; Hoyt *v.* Hudson, 41 Wis. 105; Talbot *v.* Taunton, 140 Mass. 552, 5 N. E. 616; Gray *v.* Danbury, 54 Conn. 574, 10 Atl. 198. For defective sidewalk: Springfield *v.* Doyle, 76 Ill. 202; Champaign *v.* Pattison, 50 Ill. 62; Townsend *v.* Des Moines, 42 Iowa, 657; Rice *v.* Des Moines, 40 Iowa, 638; McAuley *v.* Boston, 113 Mass. 503; Harriman *v.* Boston, 114 Mass. 241; Morse *v.* Boston, 109 Mass. 446; Hanscom *v.* Boston, 141 Mass. 242, 5 N. E. 249; McLaughlin *v.* Corry, 77 Pa. St. 109; Boucher *v.* New Haven, 40 Conn. 456; Congdon *v.* Norwich, 37 Conn. 414; Stewart *v.* Ripon, 38 Wis. 584; Chapman *v.* Macon, 55 Ga. 566; Moore *v.* Minneapolis, 19 Minn. 300; Furnell *v.* St. Paul, 20 Minn. 117; Omaha *v.* Olmstead, 5 Neb. 446; Higert *v.* Greencastle, 43 Ind. 574; Providence *v.* Clapp, 17 How. 161; Smith *v.* Leavenworth, 15 Kan. 81; Atchison *v.* King, 9 Kan. 550; Gillison *v.* Charleston, 16 W. Va. 282, 37 Am. Rep. 763; Cromarty *v.* Boston, 127 Mass. 329, 34 Am. Rep. 381; Sherwood *v.* Dist. Columbia, 3 Mackey, 276; Saulsbury *v.* Ithaca, 94 N. Y. 27; Pomfrey *v.* Saratoga, 104 N. Y. 459, 11 N. E. 43; Cloughessey *v.* Waterbury, 51 Conn. 405. For injury by limb falling from tree overhanging street: Jones *v.* New Haven, 34 Conn. 1. See Gubasko *v.* New York, 1 N. Y. Supp. 215. For injury by fall of an awning over sidewalk: Bohen *v.* Waseca, 32 Minn. 176, 19 N. W. 730; Larson *v.* Grand Forks, 3 Dak. 307, 19 N. W. 414. For failure to keep street in repair: Gorham *v.* Cooperstown, 59 N. Y. 660; Hines *v.* Lockport, 50 N. Y. 236; Bell *v.* West Point, 51 Miss. 262; Chicago *v.* McGiven, 78 Ill. 347; Alton *v.* Hope, 68 Ill. 167; Centralia *v.* Scott, 59 Ill. 129; Winbigler *v.* Los Angeles, 45 Cal. 36; Market *v.* St. Louis, 56 Mo. 189; Willey *v.* Belfast, 61 Me. 569; Bill *v.* Norwich, 39 Conn. 222; Lindholm *v.* St. Paul, 19 Minn. 245; Shartle *v.* Minneapolis, 17 Minn. 308; O'Leary *v.* Mankato, 21 Minn. 65; Griffin *v.* Williamstown, 6 W. Va. 312. For failure to keep sewers in repair: Munn *v.* Pittsburg, 40 Pa. St. 364; Jersey City *v.* Kiernan, 50 N. J. L. 246, 13 Atl. 170.

[1] State *v.* Carr, 5 N. H. 367; President, &c. of Mendota *v.* Thompson, 20 Ill. 197; Hamilton *v.* President, &c. of Carthage, 24 Ill. 22. These were prosecutions by municipal corporations for recovery of penalties imposed by by-laws, and where the plea of *nul tiel* corporation was interposed and overruled. See also Kayer *v.* Bremen, 16 Mo. 88; Kettering *v.* Jacksonville, 50 Ill. 39; Bird *v.* Per-

different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the State; and private parties could not enter upon any question of regularity. And the State itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition.[1]

kins, 33 Mich. 28; Worley *v.* Harris, 82 Ind. 493.

[1] In People *v.* Maynard, 15 Mich. 463, 470, where the invalidity of an act organizing a county, passed several years before, was suggested on constitutional grounds, *Campbell, J.*, says: "If this question had been raised immediately, we are not prepared to say that it would have been altogether free from difficulty. But inasmuch as the arrangement there indicated had been acted upon for ten years before the recent legislation, and had been recognized as valid by all parties interested, it cannot now be disturbed. Even in private associations the acts of parties interested may often estop them from relying on legal objections, which might have availed them if not waived. But in public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can no longer be open to question. See Rumsey *v.* People, 19 N. Y. 41; and Lanning *v.* Carpenter, 20 N. Y. 474, where the effect of the invalidity of an original county organization is very well considered in its public and private bearings. There have been direct legislative recognitions of the new division on several occasions. The exercise of jurisdiction being notorious and open in all such cases, the State as well as county and town taxes being all levied under it, there is no principle which could justify any court, at this late day, in going back to inquire into the regularity of the law of 1857." A similar doctrine has been applied in support of the official character of persons who, without authority of law, have been named for municipal officers by State legislation, and whose action in such offices has been acquiesced in by the citizens or authorities of the municipality. See People *v.* Salomon, 54 Ill. 51; People *v.* Lothrop, 24 Mich. 235. Compare Kimball *v.* Alcorn, 45 Miss. 151. But such acquiescence could not make them local officers and representatives of the people for new and enlarged powers subsequently attempted to be given by the legislature. People *v.* Common Council of Detroit, 28 Mich. 228. Nor in respect to powers not purely local. People *v.* Springwells, 25 Mich. 153. And see People *v.* Albertson, 55 N. Y. 50.

CHAPTER IX.

PROTECTION TO PERSON AND PROPERTY UNDER THE CONSTITUTION OF THE UNITED STATES.

As the government of the United States was to be one of enumerated powers, it was not deemed important by the framers of the Constitution that a bill of rights should be incorporated among its provisions. If, among the powers conferred, there was none which would authorize or empower the government to deprive the citizen of any of those fundamental rights which it is the object and the duty of government to protect and defend, and to insure which is the sole purpose of bills of rights, it was thought to be at least unimportant to insert negative clauses in that instrument, inhibiting the government from assuming any such powers, since the mere failure to confer them would leave all such powers beyond the sphere of its constitutional authority. And, as Mr. Hamilton argued, it might seem even dangerous to do so. "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights." [1]

It was also thought that bills of rights, however important under a monarchical government, were of no moment in a constitution of government framed by the people for themselves, and under which public affairs were to be managed by means of agen-

[1] Federalist, No. 84.

cies selected by the popular choice, and subject to frequent change by popular action. "It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right, assented to by Charles the First, in the beginning of his reign. Such also was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament, called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations. 'WE, THE PEOPLE OF THE UNITED STATES, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." [1]

Reasoning like this was specious, but it was not satisfactory to many of the leading statesmen of that day, who believed that "the purposes of society do not require a surrender of all our rights to our ordinary governors; that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove." [2] And these governing powers will be no less disposed to be aggressive when chosen by majorities than when selected by the accident of birth, or at the will of privileged classes. Indeed if, during the long struggle for constitutional liberty in England, covering the whole of the seventeenth century, importance was justly attached to a distinct declaration and enumeration of individual rights on the part of the government,

[1] Federalist, No. 84, by Hamilton.

[2] Jefferson's Works, Vol. III. p. 201.

when it was still in the power of the governing authorities to infringe upon or to abrogate them at any time, and when, consequently, the declaration could possess only a moral force, a similar declaration would appear to be of even more value in the Constitution of the United States, where it would constitute authoritative law, and be subject to no modification or repeal, except by the people themselves whose rights it was designed to protect, nor even by them except in the manner by the Constitution provided.[1]

The want of a bill of rights was, therefore, made the ground of a decided, earnest, and formidable opposition to the confirmation of the national Constitution by the people; and its adoption was

[1] Mr. Jefferson sums up the objections to a bill of rights in the Constitution of the United States, and answers them as follows: "1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer: A constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration, as far as it goes; and if it goes to all material points, nothing more is wanting. In the draft of a constitution which I had once a thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed; but the deficiencies would have been supplied by others in the course of discussion. But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal Constitution. This instrument forms us into one State, as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power, within the field submitted to them. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer: Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can. 3. The limited powers of the federal government, and jealousy of the subordinate governments, afford a security, which exists in no other instance. Answer: The first member of this seems resolvable into the first objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also; as by the same text they may try the opposition of the subordinate governments. 4. Experience proves the inefficacy of a bill of rights. True. But though it is not absolutely efficacious, under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate, and reparable. The inconveniences of the want of a declaration are permanent, afflictive, and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period." Letter to Madison, March 15, 1789, Jefferson's Works, Vol. III. p. 4. See also same volume, pp. 13 and 101; Vol. II. pp. 329, 358.

only secured in some of the leading States in connection with the recommendation of amendments which should cover the ground.[1]

The clauses inserted in the original instrument, for the protection of person and property, had reference mainly to the action of the State governments, and were made limitations upon their power. The exceptions embraced a few cases only, in respect to which the experience of both English and American history had forcibly demonstrated the tendency of power to abuse, not when wielded by a prince only, but also when administered by the agencies of the people themselves.

Bills of attainder were prohibited to be passed, either by the Congress[2] or by the legislatures of the several States.[3] Attainder, in a strict sense, means an extinction of civil and political rights and capacities; and at the common law it followed, as of course, on conviction and sentence to death for treason; and, in greater or less degree, on conviction and sentence for the different classes of felony.

A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime. For some time before the American Revolution, however, no one had attempted to defend it as a legitimate exercise of power; and if it would be unjustifiable anywhere, there were many reasons why it would be specially obnoxious under a free government, and why consequently its prohibition, under the existing circumstances of our country, would be a matter of more than ordinary importance. Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited, — the very class of cases most likely to be prosecuted by this mode. And although it would be conceded that, if such bills were allowable, they should properly be presented only for offences against the general laws

[1] For the various recommendations by Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island, see 1 Elliott's Debates, 322–334.

[2] Constitution of United States, art. 1, § 9.

[3] Constitution of United States, art. 1, § 10.

of the land, and be proceeded with on the same full opportunity for investigation and defence which is afforded in the courts of the common law, yet it was remembered that in practice they were often resorted to because an obnoxious person was not subject to punishment under the general law,[1] or because, in proceeding against him by this mode, some rule of the common law requiring a particular species or degree of evidence might be evaded, and a conviction secured on proofs that a jury would not be suffered to accept as overcoming the legal presumption of innocence. Whether the accused should necessarily be served with process; what degree or species of evidence should be required; whether the rules of law should be followed, either in determining what constituted a crime, or in dealing with the accused after conviction, — were all questions which would necessarily address themselves to the legislative discretion and sense of justice; and the very qualities which are essential in a court to protect individuals on trial before them against popular clamor, or the hate of those in power, were precisely those which were likely to prove weak or wanting in the legislative body at such a time.[2] And what could be more obnoxious in a free government than the exercise of such a power by a popular body, controlled by a mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?

Nor were legislative punishments of this severe character the only ones known to parliamentary history; there were others of a milder form, which were only less obnoxious in that the consequences were less terrible. Those legislative convictions which

[1] Cases of this description were most numerous during the reign of Henry VIII., and among the victims was Cromwell, who is said to have first advised that monarch to resort to this objectionable proceeding. Even the dead were attainted, as in the case of Richard III., and later, of the heroes of the Commonwealth. The most atrocious instance in history, however, only relieved by its weakness and futility, was the great act of attainder passed in 1688 by the Parliament of James II., assembled in Dublin, by which between two and three thousand persons were attainted, their property confiscated, and themselves sentenced to death if they failed to appear at a time named. And, to render the whole proceeding as horrible in barbarity as possible, the list of the proscribed was carefully kept secret until after the time fixed for their appearance! Macaulay's History of England, c. 12.

[2] This was equally true, whether the attainder was at the command of the king, as in the case of Cardinal Pole's mother, or at the instigation of the populace, as in the case of Wentworth, Earl of Strafford. The last infliction of capital punishment in England under a bill of attainder was upon Sir John Fenwick, in the reign of William and Mary. It is worthy of note that in the preceding reign Sir John had been prominent in the attainder of the unhappy Monmouth. Macaulay's History of England, c. 5.

imposed punishments less than that of death were called bills of pains and penalties, as distinguished from bills of attainder; but the constitutional provisions we have referred to were undoubtedly aimed at any and every species of legislative punishment for criminal or supposed criminal offences; and the term "bill of attainder" is used in a generic sense, which would include bills of pains and penalties also.[1]

The thoughtful reader will not fail to discover, in the acts of the American States during the Revolutionary period, sufficient reason for this constitutional provision, even if the still more monitory history of the English attainders had not been so freshly remembered. Some of these acts provided for the forfeiture of the estates, within the Commonwealth, of those British subjects who had withdrawn from the jurisdiction because not satisfied that grievances existed sufficiently serious to justify the last resort of an oppressed people, or because of other reasons not satisfactory to the existing authorities; and the only investigation provided for was an inquiry into the desertion. Others mentioned particular persons by name, adjudged them guilty of adhering to the enemies of the State, and proceeded to inflict punishment upon them, so far as the presence of property within the Commonwealth would enable the government to do so.[2] These were the resorts of a time of extreme peril; and if possible to justify them in a period of revolution, when everything was staked on success, and when the public safety would not permit too much weight to

[1] Fletcher *v.* Peck, 6 Cranch, 87; Story on Constitution, § 1344; Cummings *v.* Missouri, 4 Wall. 277; *Ex parte* Garland, 4 Wall. 333; Drehman *v.* Stifle, 8 Wall. 595, 601. "I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned [which was that they declared certain persons attainted and their blood corrupted, so that it had lost all heritable property], which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government: 1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial. 2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. 3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry." Per *Miller*, J., in *Ex parte* Garland, 4 Wall. 333, 388.

[2] See Belknap's History of New Hampshire, c. 26; 2 Ramsay's History of South Carolina, 351; 8 Rhode Island Colonial Records, 609; 2 Arnold's History of Rhode Island, 360, 449; Thompson *v.* Carr, 5 N. H. 510; Sleght *v.* Kane, 2 Johns. Cas. 236; Story on Const. (4th ed.) § 1344, note. On the general subject of bills of attainder, one would do well to consult, in addition to the cases in 4 Wallace, those of Blair *v.* Ridgeley, 41 Mo. 63 (where it was very elaborately examined by able counsel); State *v.* Staten, 6 Cold. 233; Randolph *v.* Good, 3 W. Va. 551; *Ex parte* Law, decided by Judge Erskine, in the United States District Court of Georgia, May Term, 1866; State *v.* Adams, 44 Mo. 570; Beirne *v.* Brown, 4 W. Va. 72; Peerce *v.* Carskadon, 4 W. Va. 234.

scruples concerning the private rights of those who were not aiding the popular cause, the power to repeat such acts under any conceivable circumstances in which the country could be placed again was felt to be too dangerous to be left in the legislative hands. So far as proceedings had been completed under those acts, before the treaty of 1783, by the actual transfer of property, they remained valid and effectual afterwards; but so far as they were then incomplete, they were put an end to by that treaty.[1]

The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere. Nevertheless, cases have recently arisen, growing out of the attempt to break up and destroy the government of the United States, in which the Supreme Court of the United States has adjudged certain action of Congress to be in violation of this provision and consequently void.[2] The action

[1] Jackson *v.* Munson, 3 Caines, 137.

[2] On the 2d of July, 1862, Congress, by "an act to prescribe an oath of office, and for other purposes," enacted that "hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, take and subscribe the following oath or affirmation: I, A B, do solemnly swear or affirm that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear or affirm that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God." On the 24th of January, 1865, Congress passed a supplementary act as follows: "No person after the date of this act shall be admitted to the bar of the Supreme Court of the United States, or at any time after the 4th of March next shall be admitted to the bar of any Circuit or District Court of the United States, or of the Court of Claims, as an attorney or counsellor of such court, or shall be allowed to appear and to be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath" aforesaid. False swearing, under each of the acts, was made perjury. See 12 Statutes at Large, 502; 13 Statutes at Large, 424. In *Ex parte* Garland, 4 Wall. 333, a majority of the court held the second of these acts void, as partaking of the nature of a bill of pains and penalties, and also as being an *ex post facto* law. The act was looked upon as inflicting a punishment for past conduct; the exaction of the oath being the mode provided for ascertaining the parties upon whom the act was intended to operate. See Drehman *v.* Stifle, 8 Wall. 595. The conclusion declared by the Supreme Court of the United States in *Ex parte* Garland had been previously reached by Judge *Trigg*, of the United States Circuit Court, in Matter of Baxter; by Judge *Busteed*, of the District Court of Alabama, in Matter of Shorter *et al.*; and by Judge *Erskine*, of the Dis-

referred to was designed to exclude from practice in the United States courts all persons who had taken up arms against the government during the recent rebellion, or who had voluntarily given aid and encouragement to its enemies; and the mode adopted to effect the exclusion was to require of all persons, before they should be admitted to the bar or allowed to practise, an oath negativing any such disloyal action. This decision was not at first universally accepted as sound; and the Supreme Courts of West Virginia and of the District of Columbia declined to follow it, insisting that permission to practise in the courts is not a right, but a privilege, and that the withholding it for any reason of State policy or personal unfitness could not be regarded as the infliction of criminal punishment.[1]

The Supreme Court of the United States has also, upon the same reasoning, held a clause in the Constitution of Missouri, which, among other things, excluded all priests and clergymen from practising or teaching unless they should first take a similar oath of loyalty, to be void, overruling in so doing a decision of the Supreme Court of that State.[2]

Ex post facto laws are also, by the same provisions of the national Constitution already cited,[3] forbidden to be passed, either by the States or by Congress.

trict Court of Georgia, in *Ex parte* Law. An elector cannot be excluded from the right to vote on the ground of being a deserter who has never been tried and convicted as such. Huber *v.* Reily, 53 Pa. St. 112; McCafferty *v.* Guyer, 59 Pa. St. 109, State *v.* Symonds, 57 Me. 148. See *ante*, p. 93, note.

[1] See the cases *Ex parte* Magruder, American Law Register, Vol. VI. n. s. p. 202; and *Ex parte* Hunter, American Law Register, Vol. VI. n. s. 410; 2 W. Va. 122; *Ex parte* Quarrier, 4 W. Va. 210. See also Cohen *v.* Wright, 22 Cal. 293.

[2] Cummings *v.* Missouri, 4 Wall. 277. See also the case of State *v.* Adams, 44 Mo. 570, in which it was held that a legislative act declaring that the board of curators of St. Charles College had forfeited their office, was of the nature of a bill of attainder and void. The Missouri oath of loyalty was a very stringent one, and applied to electors, State, county, city and town officers, officers in any corporation, public or private, professors and teachers in educational institutions, attorneys and counsellors, bishops, priests, deacons, ministers, elders, or other clergymen of any denomination. The Supreme Court of Missouri had held this provision valid in the following cases: State *v.* Garesche, 36 Mo. 256, case of an attorney; State *v.* Cummings, 36 Mo. 263, case of a minister, reversed as above stated; State *v.* Bernoudy, 36 Mo. 279, case of the recorder of St. Louis; State *v.* McAdoo, 36 Mo. 452, where it is held that a certificate of election issued to one who failed to take the oath as required by the constitution was void. In Beirne *v.* Brown, 4 W. Va. 72, and Peerce *v.* Carskadon, 4 W. Va. 234, an act excluding persons from the privilege of sustaining suits in the courts of the State, or from proceedings for a rehearing, except upon their taking an oath that they had never been engaged in hostile measures against the government, was sustained. And see State *v.* Neal, 42 Mo 119. *Contra*, Kyle *v.* Jenkins, 6 W. Va. 371; Lynch *v.* Hoffman, 7 W. Va. 553. The case of Peerce *v.* Carskadon was reversed in 16 Wall. 234, being held covered by the case of Cummings *v.* Missouri.

[3] Constitution of United States, art. 1, §§ 9 and 10.

At an early day it was settled by authoritative decision, in opposition to what might seem the more natural and obvious meaning of the term *ex post facto*, that in their scope and purpose these provisions were confined to laws respecting criminal punishments, and had no relation whatever to retrospective legislation of any other description. And it has, therefore, been repeatedly held, that retrospective laws, when not of a criminal nature, do not come in conflict with the national Constitution, unless obnoxious to its provisions on other grounds than their retrospective character.

"The prohibition in the letter," says *Chase*, J., in the leading case,[1] "is not to pass any law concerning or after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several States shall not pass laws after a fact done by a subject or citizen, which shall have relation to such fact, and punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar

[1] Calder *v.* Bull, 3 Dall. 386, 390.

laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective and is generally unjust, and may be oppressive; and there is a good general rule, that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto*, within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions *ex post facto* laws are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors."[1]

[1] See also Fletcher *v.* Peck, 6 Cranch, 87; Ogden *v.* Saunders, 12 Wheat. 213; Satterlee *v.* Mathewson, 2 Pet. 380; Watson *v.* Mercer, 8 Pet. 88; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Carpenter *v.* Pennsylvania, 17 How. 456; Cummings *v.* Missouri, 4 Wall. 277; *Ex parte* Garland, 4 Wall. 333; Baugher *v.* Nelson, 9 Gill, 299; Woart *v.* Winnick, 3 N. H. 473; Locke *v.* Dane, 9 Mass. 360; Dash *v.* Van Kleek, 7 Johns. 477; Evans *v.* Montgomery, 4 W. & S. 218; Tucker *v.* Harris, 13 Ga. 1; Perry's Case, 3 Gratt. 632; Municipality No. 1 *v.* Wheeler, 10 La. Ann. 745; New Orleans *v.* Poutz, 14 La. Ann. 853; Huber *v.* Reily, 53 Pa. St. 115; Wilson *v.* Ohio, &c. R. R. Co., 64 Ill. 542. That an act providing for the punishment of an offence in respect to which prosecution is already barred is *ex post facto*, see Moore *v.* State, 43 N. J. 203. Before a right to an acquittal has been "absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition." Com. *v.* Duffy, 96 Pa. St. 506. [A constitutional provision that crimes less than capital shall be tried by a jury of eight is *ex post facto* with regard to crimes committed before its enactment. Thompson *v.* Utah, 170 U. S. 343, 18 Sup. Ct. Rep. 620. But a mere change in the constitution of the trial court which leaves unchanged all the substantial protections which the law in force at the time of commission of the alleged offence threw about the accused is not *ex post facto*. Duncan *v.* Missouri, 152 U. S. 377, 14 Sup. Ct. Rep. 570. "An *ex post facto* law does not involve, in *any* of its definitions, a change of the place of

Assuming this construction of the constitutional provision to be correct, — and it has been accepted and followed as correct by the courts ever since, — it would seem that little need be said relative to the first, second, and fourth classes of *ex post facto* laws, as enumerated in the opinion quoted.[1] It is not essential, however, in order to render a law invalid on these grounds, that it should expressly assume the action to which it relates to be criminal, or provide for its punishment on that ground. If it shall subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility,[2] or if it deprives a party of any valuable right — like the right to follow a lawful

trial of an alleged offence after its commission." Gut *v.* Minnesota, 9 Wall. 35, quoted and affirmed in Cook *v.* United States, 138 U. S. 157, 11 Sup. Ct. Rep. 268. Nor of the time when sentence shall be executed. Holden *v.* Minnesota, 137 U. S. 483, 11 Sup. Ct. Rep. 143. Privilege existing at time of commission of offence (*e. g.* privilege of earning a shortening of sentence by good behavior) cannot be taken away by subsequent statute. Murphy *v.* Commonwealth, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. 266. Second offences may be made punishable with greater severity, even though first offence was committed before law was passed. *Re* Miller, 110 Mich. 676, 68 N. W. 990, 34 L. R. A. 398, 64 Am. St. 376, and see note thereto in L. R. A. upon enhanced penalty for second and subsequent offences; see also Commonwealth *v.* Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; McDonald *v.* Massachusetts, 180 U. S. 311, 21 Sup. Ct. Rep. 389, aff. 173 Mass. 322, 53 N. E. 874. Right to secure change of magistrate or place of preliminary examination upon affidavit of accused that he believes magistrate is prejudiced against him may be withdrawn. People *v.* McDonald, 5 Wyo. 526, 42 Pac. 15, 29 L. R. A. 834. Statute allowing punitive damages where none had been theretofore allowed is *ex post facto* with regard to past acts. French *v.* Deane, 19 Col. 504, 36 Pac. 609, 24 L. R. A. 387. Statute *diminishing* the minimum period of imprisonment is not *ex post facto*. People *v.* Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. 572. Law shortening time between sentence and execution is *ex post facto* with regard to past crimes. *Re* Tyson, 13 Col. 482, 22 Pac. 810, 6 L. R. A. 472. But providing that State may appeal from an order granting a new trial is not. Mallett *v.* North Carolina, 181 U. S. 589, 21 Sup. Ct. Rep. 730, aff. 125 N. C. 718, 34 S. E. 651. A statute providing that persons convicted of murder and awaiting execution shall be confined in the State's prison and executed within its walls is invalid as applied to one convicted prior to its enactment. People *v.* McNulty, 93 Cal. 427, 29 Pac. 61. A statute changing the punishment for murder from death to imprisonment for life is not *ex post facto*. McGuire *v.* State, 76 Miss. 504, 25 So. 495. See, in this connection, Storti *v.* Com., 180 Mass. 57, 61 N. E. 759, 52 L. R. A. 620.]

[1] See Kring *v.* Missouri, 107 U. S. 221, 2 Sup. Ct. Rep. 443. A constitutional amendment changed the judicial rule that conviction of one grade of murder bars a subsequent conviction of a higher grade. Before it took effect a crime had been committed. After it on a plea of guilty the prisoner was convicted of murder in the second degree, but the conviction was reversed, and on new trial he was convicted in the first degree. A bare majority of the court held the act *ex post facto* as to him, as altering the rules of evidence and the punishment. The minority considered the change one in procedure, and as the evidence in question, viz., his conviction in the second degree, of the effect of which he was deprived, came into existence after the amendment, held the act good.

[2] Falconer *v.* Campbell, 2 McLean, 195; Wilson *v.* Ohio, &c. R. R. Co., 64 Ill. 542.

calling — for acts which were innocent, or at least not punishable by law when committed,[1] the law will be *ex post facto* in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal.[2] But how far a law may change the punishment for a criminal offence, and make the change applicable to past offences, is certainly a question of great difficulty, which has been increased by the decisions made concerning it. As the constitutional provision is enacted for the protection and security of accused parties against arbitrary and oppressive legislative action, it is evident that any change in the law which goes in mitigation of the punishment is not liable to this objection.[3] But what does go in mitigation of the punishment? If the law makes a fine less in amount, or imprisonment shorter in point of duration, or relieves it from some oppressive incident, or if it dispenses with some severable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion that the law was favorable to the accused, and therefore not *ex post facto*. But who shall say, when the nature of the punishment is altogether changed, and a fine is substituted for the pillory, or imprisonment for whipping, or imprisonment at hard labor for life for the death penalty, that the punishment is diminished, or at least not increased by the change made? What test of severity does the law or reason furnish in these cases? and must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment? or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case,

Cummings *v.* Missouri, 4 Wall. 277; *Ex parte* Garland, 4 Wall. 333. But a divorce is not a punishment, and it may therefore be authorized for causes happening previous to the passage of the divorce act. Jones *v.* Jones, 2 Overt. 2, 5 Am. Dec. 645; Carson *v.* Carson, 40 Miss. 349. An act providing for destruction of liquor as a means of abating an existing liquor nuisance does not authorize a criminal proceeding, and is not *ex post facto*. McLane *v.* Bonn, 70 Iowa, 752, 30 N. W. 478. See Drake *v.* Jordan, 73 Iowa, 707, 36 N. W. 653. [A statute providing that one who has been convicted of crime is ineligible as a medical practitioner is not invalid as to a case where the conviction was prior to the enactment of the statute. People *v.* Hawker, 152 N. Y. 234, 46 N. E. 607, aff. 170 U. S. 189, 18 Sup. Ct. Rep. 573. See also Dent *v.* West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 231, distinguishing Cummings *v.* Missouri, 4 Wall. 277, and explaining *Ex parte* Garland, 4 Wall. 333.]

[2] The repeal of an amnesty law by a constitutional convention was held in State *v.* Keith, 63 N. C. 140, to be *ex post facto* as to the cases covered by the law. An act to validate an invalid conviction would be *ex post facto*. *In re* Murphy, 1 Woolw. 141.

[3] Strong *v.* State, 1 Blackf. 193; Keen *v.* State, 3 Chand. 109; Boston *v.* Cummins, 16 Ga. 102; Woart *v.* Winnick, 3 N. H. 473; State *v.* Arlin, 39 N. H. 179; Clarke *v.* State, 23 Miss. 261; Maul *v.* State, 25 Tex. 166. To provide an alternative punishment of a milder form is not *ex post facto*. Turner *v.* State, 40 Ala. 21.

the punishment prescribed by the new law is or is not more severe than that under the old.

In State *v.* Arlin,[1] the respondent was charged with a robbery, which, under the law as it existed at the time it was committed, was subject to be punished by solitary imprisonment not exceeding six months, and confinement for life at hard labor in the State prison. As incident to this severe punishment, he was entitled by the same law to have counsel assigned him by the government, to process to compel the attendance of witness, to a copy of his indictment, a list of the jurors who were to try him, &c. Before he was brought to trial, the punishment for the offence was reduced to solitary imprisonment not exceeding six months, and confinement at hard labor in the State prison for not less than seven nor more than thirty years. By the new act, the court, *if they thought proper*, were to assign the respondent counsel, and furnish him with process to compel the attendance of witnesses in his behalf; and, acting under this discretion, the court assigned the respondent counsel, but declined to do more; while the respondent insisted that he was entitled to all the privileges to which he would have been entitled had the law remained unchanged. The court held this claim to be unfounded in the law. "It is contended," they say, "that, notwithstanding the severity of the respondent's punishment was mitigated by the alteration of the statute, he is entitled to the privileges demanded, as incidents to the offence with which he is charged, at the date of its commission; in other words, it seems to be claimed, that, by committing the alleged offence, the respondent acquired a vested right to have counsel assigned him, to be furnished with process to procure the attendance of witnesses, and to enjoy all the other privileges to which he would have been entitled if tried under laws subjecting him to imprisonment for life upon conviction. This position appears to us wholly untenable. We have no doubt the privileges the respondent claims were designed and created solely as incidents of the severe punishment to which his offence formerly subjected him, and not as incidents of the offence. When the punishment was abolished, its incidents fell with it; and he might as well claim the right to be punished under the former law as to be entitled to the privileges connected with a trial under it."[2]

[1] 39 N. H. 179.

[2] With great deference it may be suggested whether this case does not overlook the important circumstance, that the new law, by taking from the accused that absolute right to defence by counsel, and to the other privileges by which the old law surrounded the trial, — all of which were designed as securities against unjust convictions, — was directly calculated to increase the party's peril, and was in consequence brought within the reason of the

In Strong *v.* State,[1] the plaintiff in error was indicted and convicted of perjury, which, under the law as it existed at the time it was committed, was punishable by not exceeding one hundred stripes. Before the trial, this punishment was changed to imprisonment in the penitentiary not exceeding seven years. The court held this amendatory law not to be *ex post facto*, as applied to the case. "The words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to retrench the rules of evidence so as to make conviction more easy." "Apply this definition to the act under consideration. Does this statute make a new offence? It does not. Does it increase the malignity of that which was an offence before? It does not. Does it so change the rules of evidence as to make conviction more easy? This cannot be alleged. Does it then increase the punishment of that which was criminal before its enactment? We think not."[2]

So in Texas it has been held that the infliction of stripes, from the peculiarly degrading character of the punishment, was worse than the death penalty. "Among all nations of civilized man, from the earliest ages, the infliction of stripes has been considered more degrading than death itself."[3] While, on the other hand, in South Carolina, where, at the time of the commission of a forgery, the punishment was death, but it was changed before final judgment to fine, whipping, and imprisonment, the new law was applied to the case in passing the sentence.[4] These cases

rule which holds a law *ex post facto* which changes the rules of evidence after the fact, so as to make a less amount or degree sufficient. Could a law be void as *ex post facto* which made a party liable to conviction for perjury in a previous oath on the testimony of a single witness, and another law unobjectionable on this score which deprived a party, when put on trial for a previous act, of all the usual opportunities of exhibiting the facts and establishing his innocence? Undoubtedly, if the party accused was always guilty, and certain to be convicted, the new law must be regarded as mitigating the offence; but, assuming every man to be innocent until he is proved to be guilty, could such a law be looked upon as "mollifying the rigor" of the prior law, or as favorable to the accused, when its mollifying circumstance is more than counterbalanced by others of a contrary character.

[1] 1 Blackf. 193.

[2] Mr. Bishop says of this decision: "But certainly the court went far in this case." 1 Bishop, Crim. Law, § 219 (108).

[3] Herber *v.* State, 7 Tex. 69.

[4] State *v.* Williams, 2 Rich. 418. In Clark *v.* State, 23 Miss. 261, defendant was convicted of a mayhem. Between the commission of the act and his conviction, a statute had been passed, changing the punishment for this offence from the pillory and a fine to imprisonment in the penitentiary, but providing further, that "no offence committed, and no penalty and forfeiture incurred previous to the

illustrate the difficulty of laying down any rule which will be readily and universally accepted as to what is a mitigation of punishment, when its character is changed, and when from the very nature of the case there can be no common standard, by which all minds, however educated, can measure the relative severity and ignominy.

In Hartung *v.* People,[1] the law providing for the infliction of capital punishment had been so changed as to require the party liable to this penalty to be sentenced to confinement at hard labor in the State prison until the punishment of death should be inflicted; and it further provided that such punishment should not be inflicted under one year, nor until the governor should issue his warrant for the purpose. The act was evidently designed for the benefit of parties convicted, and, among other things, to enable advantage to be taken, for their benefit, of any circumstances subsequently coming to light which might show the injustice of the judgment, or throw any more favorable light on the action of the accused. Nevertheless, the court held the act inoperative as to offences before committed. "In my opinion," says *Denio*, J., "it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offences; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished, in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offences; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the

time when this act shall take effect shall be affected by this act, except that when any punishment, forfeiture, or penalty should have been mitigated by it, its provisions should be applied to the judgment to be pronounced for offences committed before its adoption." In regard to this statute the court say: "We think that in every case of offence committed before the adoption of the penitentiary code, the prisoner has the option of selecting the punishment prescribed in that code in lieu of that to which he was liable before its enactment." But inasmuch as the record did not show that the defendant claimed a commutation of his punishment, the court confirmed a sentence imposed according to the terms of the old law. On this subject, see further the cases of Holt *v.* State, 2 Tex. 363; Dawson *v.* State, 6 Tex. 347.

[1] 22 N. Y. 95, 105.

severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the Act of 1860, in the punishment of existing offences of murder, does not fall within either of these exceptions. If it is to be construed to vest in the governor a discretion to determine whether the convict should be executed or remain a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon, the convict is executed according to sentence. If he grants it, his jurisdiction of the case ends. The act in question places the convict at the mercy of the governor in office at the expiration of one year from the time of the conviction, and of all of his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice, or without notice. Under one of the repealed sections of the Revised Statutes, it was required that a period should intervene between the sentence and execution of not less than four, nor more than eight weeks. If we stop here, the change effected by the statute is between an execution within a limited time, to be prescribed by the court, or a pardon or commutation of the sentence during that period, on the one hand, and the placing the convict at the mercy of the executive magistrate for the time, and his successors, to be executed at his pleasure at any time after one year, on the other. The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, even if that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. *The law, moreover, prescribes one year's imprisonment, at hard labor in the State prison, in addition to the punishment of death.* In every case of the execution of a capital sentence, it must be preceded by the year's imprisonment at hard labor. True, the concluding part of the judgment cannot be executed unless the governor concurs by ordering the execution. But both parts may, in any given case, be inflicted, and as the convict is consequently, under this law, exposed to the double infliction, it is, within both the definitions which have been mentioned, an *ex post facto* law. It

changes the punishment, and inflicts a greater punishment than that which the law annexed to the crime when committed. It is enough, in my opinion, that it changes it *in any manner* except by dispensing with divisible portions of it; but upon the other definition announced by Judge *Chase*, where it is implied that the change must be from a less to a greater punishment, this act cannot be sustained." This decision has since been several times followed in the State of New York,[1] and it must now be regarded as the settled law of that State, that "a law changing the punishment for offences committed before its passage is *ex post facto* and void, under the Constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or it is referable to prison discipline or penal administration as its primary object."[2] And this rule seems to us a sound and sensible one, with perhaps this single qualification, — that the substitution of any other punishment for that of death must be regarded as a mitigation of the penalty.[3]

But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.[4] Statutes giving the gov-

[1] Shepherd *v.* People, 25 N. Y. 406; Ratzky *v.* People, 29 N. Y. 124; Kuckler *v.* People, 5 Park. Cr. Rep. 212.

[2] Per *Davies*, J., in Ratzky *v.* People, 29 N. Y. 124. See Miles *v.* State, 40 Ala. 39. If when the act was committed one could escape the death penalty by pleading guilty and a law changes this before trial, it is bad. Garvey *v.* People, 6 Col. 559. So if the option of a jury to inflict death or life imprisonment is taken away, and the former is made the only penalty. Marion *v.* State, 16 Neb. 349, 20 N. W. 289. See Lindzey *v.* State, 65 Miss. 542, 5 So. 99. Otherwise, of an act which allows a prisoner to elect between death and imprisonment. McInturf *v.* State, 20 Tex. App. 335. An act passed after the offence is not *ex post facto* which in a capital case directs that the imprisonment after sentence, and the execution shall be in a penitentiary instead of a jail. *In re* Tyson, 13 Col. 482, 22 Pac. Rep. 810.

[3] See 1 Bishop, Crim. Law, § 219 (108). [One charged with crime cannot be deprived of the benefit of a law enacted after its commission. State *v.* Edwards, — La. Ann. —, 33 So. 209.]

[4] Jurisdiction may be transferred from one court to another. State *v.* Cooler, 30 S. C. 105, 8 S. E. 69. As to what is merely a change in procedure, see dissenting opinions in Kring *v.* Missouri, 107 U. S. 221, 2 Sup. Ct. Rep. 443, cited *supra*, p. 375, note 1; Drake *v.* Jordan, 73 Iowa, 707, 36 N. W. 653. Taking from the jury

ernment additional challenges,[1] and others which authorized the amendment of indictments,[2] have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right.[3]

And a law is not objectionable as *ex post facto* which, in providing for the punishment of future offences, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties

power to judge of the law is a matter of procedure. Marion *v.* State, 20 Neb. 233, 29 N. W. 911.

[1] Walston *v.* Commonwealth, 16 B. Monr. 15; Jones *v.* State, 1 Ga. 610; Warren *v.* Commonwealth, 37 Pa. St. 45; Walter *v.* People, 32 N. Y. 147; State *v.* Ryan, 13 Minn. 370; State *v.* Wilson, 48 N. H. 398; Commonwealth *v.* Dorsey, 103 Mass. 412.

[2] State *v.* Manning, 14 Tex. 402; Lasure *v.* State, 19 Ohio St. 43; Sullivan *v.* Oneida, 61 Ill. 242. See State *v.* Corson, 59 Me. 137. The defendant in any case must be proceeded against and punished under the law in force when the proceeding is had. State *v.* Williams, 2 Rich. 418; Keene *v.* State, 3 Chand. 109; People *v.* Phelps, 5 Wend. 9; Rand *v.* Commonwealth, 9 Gratt. 738. A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of variances which do not prejudice him. Commonwealth *v.* Hall, 97 Mass. 570; Lasure *v.* State, 19 Ohio St. 43. Nor one which reduces the number of the prisoner's peremptory challenges. Dowling *v.* State, 13 Miss. 664. Nor one which, though passed after the commission of the offence, authorizes a change of venue to another county of the judicial district. Gut *v.* State. 9 Wall. 35. Nor one which modifies the grounds of challenge. Stokes *v.* People, 53 N. Y. 164. Nor one which merely modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offence. State *v.* Learned, 47 Me. 426; State *v.* Corson, 59 Me. 137. And see People *v.* Mortimer, 46 Cal. 114. In the absence of statutory permission, if a court allows an indictment to be amended by striking out words as surplusage, it must be resubmitted to the jury. *Ex parte* Bain, 121 U. S. 1, 7 Sup. Ct. Rep. 781. But a statute providing that the rule of law precluding a conviction on the uncorroborated testimony of an accomplice should not apply to cases of misdemeanor, it was held could not have retrospective operation. Hart *v.* State, 40 Ala. 32.

[3] But the legislature can have no power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of the offence. McLaughlin *v.* State, 45 Ind. 338; Brown *v.* People, 29 Mich. 232; People *v.* Olmstead, 30 Mich. 431; State *v.* O'Flaherty, 7 Nev. 153. [A State may between the time of commission of an offence and the time of trial modify the rules of evidence regarding the proof of handwriting. Thompson *v.* Missouri, 171 U. S. 380, 18 Sup. Ct. Rep. 922; aff. 132 Mo. 301, 34 S. W. 31. Upon *ex post facto* laws, see notes to 1 L. ed. U. S. 648, and 4 L. ed. U. S. 529. May enact that jurors shall be selected from "persons of good intelligence, sound judgment, and fair character." Gibson *v.* Mississippi, 162 U. S. 565, 16 Sup. Ct. Rep. 904. May change mode of accusation from indictment to information. *Re* Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. 94. In Mallett *v.* North Carolina, 181 U. S. 589, 21 Sup. Ct. Rep. 730, it is held that a provision for an appeal by the State from an order granting a new trial is not *ex post facto* as applied to a criminal case tried before the statute was passed, the order for a new trial having been made after the enactment of the statute. The opinion cites the principal cases on the constitutional prohibition of *ex post facto* laws in the Federal Supreme Court.]

are often provided by law for a second or any subsequent offence than for the first; and it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account may have taken place before the law was passed.[1] In such case, it is the second or subsequent offence that is punished, not the first;[2] and the statute would be void if the offence to be actually punished under it had been committed before it had taken effect, even though it was after its passage.[3]

Laws impairing the Obligation of Contracts.

The Constitution of the United States also forbids the States passing any law impairing the obligation of contracts.[4] It is

[1] Rand *v.* Commonwealth, 9 Gratt. 738; Ross's Case, 2 Pick. 165; People *v.* Butler, 3 Cow. 347; *Ex parte* Guiterrez, 45 Cal. 429. Extradition treaties may provide for the surrender of persons charged with offences previously committed. *In re* De Giacomo, 12 Blatch. 391.

[2] Rand *v.* Commonwealth, 9 Gratt. 738.

[3] Riley's Case, 2 Pick. 171.

[4] Const. art. 1, § 10. "A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for her constitution is a law within the meaning of the contract clause of the National Constitution." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672, 6 Sup. Ct. Rep. 252; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 6 Sup. Ct. Rep. 329; St. Tammany Water Works *v.* New Orleans Water Works, 120 U. S. 64, 7 Sup. Ct. Rep. 405, and see cases, *ante*, p. 62, note 2. [See, Southwest Mo. L. Co. *v.* Taplin, 113 Fed. 817, in which case the same conclusion was reached, though there was no specific agreement not to erect a municipal plant as in the Walla Walla Case cited *post*, in this note. See also Hamilton, &c. Co. *v.* Hamilton, 146 U. S. 258, 13 Sup. Ct. Rep. 90; Skaneateles W. W. Co. *v.* Skaneateles, 161 N. Y. 154, 55 N. E. 562; Syracuse W. Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; *Re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; Westerly W. W. *v.* Westerly, 75 Fed. Rep. 181. In Detroit *v.* Detroit Cit. St. Ry. Co., 184 U. S. 368, 22 Sup. Ct. Rep. 410, the lines of the railway company were constructed under a statute authorizing construction "under such regulations and upon such terms and conditions as the municipal authorities may from time to time prescribe." The city in its agreement with the company for the construction authorized a particular rate of fare. It subsequently passed an ordinance for the reduction of the rate so fixed. The ordinance was held invalid as impairing the obligation of contract.]

The law which impairs must be one passed after the formation of the contract. Lehigh Water Co. *v.* Easton, 121 U. S. 388, 7 Sup. Ct. Rep. 916. A New York law prohibiting the sale of lottery tickets is not invalid because a lottery, the tickets in which are sold, is legal in Louisiana. People *v.* Noelke, 94 N. Y. 137. That the prohibition does not apply to Congress, see Mitchell *v.* Clark, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312. [See on what laws are void as impairing the obligation of contracts, note to 3 L. ed. U. S. 162; on what contracts are within the rule, note to 10 L. R. A. 405. A city in granting to a water company power to lay pipe in the streets and to supply the citizens with water at reasonable rates, &c., has power to bind itself for a limited period not to erect any competing water-works. Subsequent ordinance providing for the erection of a system of water-works by the city within the limited period is invalid, and its execution may be enjoined. Walla Walla *v.* W. W. Water Co., 172 U. S. 1, 19 Sup. Ct. Rep. 77. Ordinances of a city are laws of the State within the meaning of this provision of the Con-

remarkable that this very important clause was passed over almost without comment during the discussions preceding the adoption of that instrument, though since its adoption no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy. It is but twice alluded to in the papers of the Federalist;[1] and though its great importance is assumed, it is evident that the writer had no conception of the prominence it was afterwards to hold in constitutional discussions, or of the very numerous cases to which it was to be applied in practice.

The first question that arises under this provision is, What is a contract in the sense in which the word is here employed? In the leading case upon this subject, it appeared that the legislature of Georgia had made a grant of land, but afterwards, on an allegation that the grant had been obtained by fraud, a subsequent legislature had passed another act annulling and rescinding the first conveyance, and asserting the right of the State to the land it covered. "A contract," says Ch. J. *Marshall*, "is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. Such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A

stitution. Penn Mutual Life Ins. Co. *v.* Austin, 168 U. S. 685, 18 Sup. Ct. Rep. 223. Provision operating only on contracts thereafter formed cannot impair their obligation. Galveston, H. & S. A. R. Co. *v.* Texas, 170 U. S. 226, 18 Sup. Ct. Rep. 603, aff. 89 Tex. 340, 34 S. W. 746. Where a railroad company accepts a charter and subsequent legislation entitling it to construct a line of railroad and thereby earn certain grants of land, and enters upon the construction of the road, and actually completes an important part of it by the time a new constitution for the State is adopted, that constitution cannot impair the right of the company to earn the lands attaching, under the charter and legislation above referred to, to the remainder of the line thereafter constructed. Houston & T. C. R. Co. *v.* Texas, 170 U. S. 243, 18 Sup. Ct. Rep. 610, rev. 90 Tex. 607, 40 S. W. 402. A State cannot compel the nonresident treasurer of a foreign corporation to act as tax-collector and collect taxes levied by the State upon resident holders of bonds of the corporation in respect of interest upon such bonds, even though the corporation does business within the borders of the State. N. Y., L. E. & W. R. Co. *v.* Pennsylvania, 153 U. S. 628, 14 Sup. Ct. Rep. 952. See also, Bier *v.* McGehee, 148 U. S. 137, 13 Sup. Ct. Rep. 580.]

[1] Federalist, Nos. 7 and 44.

party is, therefore, always estopped by his own grant. Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the Constitution, grants are comprehended under the term 'contracts,' is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operations, the exception must arise from the character of the contracting party, not from the words which are employed." And the court proceed to give reasons for their decision, that violence should not "be done to the natural meaning of words, for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate." [1]

It will be seen that this leading decision settles two important points: first, that an executed contract is within the provision, and, second, that it protects from violation the contracts of States equally with those entered into between private individuals.[2]

[1] Fletcher *v.* Peck, 6 Cranch, 87, 136.

[2] This decision has been repeatedly followed. In the founding of the Colony of Virginia the religious establishment of England was adopted, and before the Revolution the churches of that denomination had become vested, by grants of the crown or colony, with large properties, which continued in their possession after the constitution of the State had forbidden the creation or continuance of any religious establishment possessed of exclusive rights or privileges, or the compelling the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. By statute in 1801, the legislature asserted their right to all the property of the Episcopal churches in the respective parishes of the State; and, among other things, directed and authorized the overseers of the poor and their successors in each parish, wherein any glebe land was vacant or should become so, to sell the same and appropriate the proceeds to the use of the poor of the parish. By this act, it will be seen, the State sought in

And it has since been held that compacts between two States are in like manner protected.[1] These decisions, however, do not

effect to resume grants made by the sovereignty,—a practice which had been common enough in English history, and of which precedents were not wanting in the History of the American Colonies. The Supreme Court of the United States held the grant not revocable, and that the legislative act was therefore unconstitutional and void. Terrett *v.* Taylor, 9 Cranch, 43. See also Town of Pawlet *v.* Clark, 9 Cranch, 292; Davis *v.* Gray, 16 Wall. 203; Hall *v.* Wisconsin, 103 U. S. 5; People *v.* Platt, 17 Johns. 195; Montgomery *v.* Kasson, 16 Cal. 189; Grogan *v.* San Francisco, 18 Cal. 590; Rehoboth *v.* Hunt, 1 Pick. 224; Lowry *v.* Francis, 2 Yerg. 534; University of North Carolina *v.* Foy, 2 Hayw. 310; State *v.* Barker, 4 Kan. 379 and 435. When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. Davis *v.* Gray, 16 Wall. 203; Georgia Pen. Cos. *v.* Nelms, 71 Ga. 301. The lien of a bondholder, who has loaned money to the State on a pledge of property by legislative act, cannot be divested or postponed by a subsequent legislative act. Wabash, &c. Co. *v.* Beers, 2 Black, 448. An agreement to receive coupons of State bonds in payment for State taxes is binding. Hartman *v.* Greenhow, 102 U. S. 672; Poindexter *v.* Greenhow, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962. See Keith *v.* Clark, 97 U. S. 454. [When State officers acting under authority of a statute have received in payment of obligations due to the State warrants drawn on the State treasury, there is an executed contract, and the obligation is discharged, even though the warrants were illegal and void, as being issued with the intention that they circulate as money or as bills of credit or in aid of rebellion. For the courts of the State to place upon a statute thereafter passed a construction which will treat such payments as void and revive the obligation is to impair the obligation of the contract, and therefore to violate the Federal Constitution. Houston & T. C. R. Co. *v.* Texas, 177 U. S. 66, 20 Sup. Ct Rep. 545, rev. 11 S. W. 157. But where the statute under which a State grants permission to a foreign corporation to do business within its borders provides that such permission may be revoked upon violation of the statute by the corporation, a forfeiture of the permission because of such violation does not impair the obligation of any contract. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 20 Sup. Ct. Rep. 518, aff. 19 Tex. Civ. App. 1, 44 S. W. 936. A contract authorized under the interpretation and construction put upon the State constitution by the highest court of the State at the time the contract is entered into cannot be impaired by any subsequent amendment of the constitution or by any change in its construction by the courts of the State. Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. Rep. 736. Upon impairment of obligation of contract by State constitution, see note to 10 L. R. A. 405; by change in interpretation of constitution, note to 16 L. R. A. 646, and one to 44 L. ed. U. S. 886. In this connection, see New Orleans *v.* Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44; and s. c. 167 U. S. 467, 17 Sup. Ct. Rep. 892. A railroad company was organized under general statutes which provided for the alteration, amendment, or repeal of corporate charters. Filing a map of a proposed route does not vest in it any right to condemn lands upon the proposed route, such that the State is precluded from taking these lands for other purposes without impairing, to the damage of the company, the obligation of a contract. Adirondack R. Co. *v.* N. Y., 176 U. S. 335, 20 Sup. Ct. Rep. 460, aff. 160 N. Y. 225, 54 N. E. 689. An appeal bond is a contract hereunder. Schuster *v.* Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182.]

[1] On the separation of Kentucky from Virginia, a compact was entered into between the proposed new and the old State, by which it was agreed "that all private grants and interests of lands, within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." After the ad-

fully determine what under all circumstances is to be regarded as a contract. (*a*) A grant of land by a State is a contract, because in making it the State deals with the purchaser precisely as any other vendor might; and if its mode of conveyance is any different, it is only because, by virtue of its sovereignty, it has power to convey by other modes than those which the general law opens to private individuals. But many things done by the State may seem to hold out promises to individuals which after all cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions. The State creates offices, and appoints persons to fill them; it establishes municipal corporations with large and valuable privileges for its citizens;

mission of the new State to the Union, "occupying claimant" laws were passed by its legislature, such as were not in existence in Virginia, and by the force of which, under certain circumstances, the owner might be deprived of his title to land, unless he would pay the value of lasting improvements made upon it by an adverse claimant. These acts were also held void; the compact was held inviolable under the Constitution, and it was deemed no objection to its binding character, that its effect was to restrict, in some directions, the legislative power of the State entering into it. Green *v.* Biddle, 8 Wheat. 1. See also Hawkins *v.* Barney's Lessee, 5 Pet. 457. After a State has granted lands to a company, and the grantee has fulfilled the conditions of the grant and earned the lands, a further enactment, that the lands shall not be transferred to the company till its debts of a certain class are paid, is void. De Groff *v.* St. Paul, &c. R. R. Co., 23 Minn. 144; Robertson *v.* Land Commissioner, 44 Mich. 274, 6 N. W. 659. After a contract made by a city with a company allowing it to build a railroad in certain streets, has been partly completed, the legislature cannot make the right to finish it conditional on the consent of property owners. Hovelman *v.* Kansas City Ry. Co., 79 Mo. 632. The power to withdraw a franchise does not give a legislature power to authorize a city to require a horse railroad company to pave outside its rails, when the city had contracted with it to pave only inside the rails. Coast Line R. Co. *v.* Savannah, 30 Fed. Rep. 646. See New Orleans *v.* Great South Tel. Co., 40 La. Ann. 41, 3 So. 533; McGee *v.* San Jose, 68 Cal. 91, 8 Pac. 641; [Chicago Union Tr. Co. *v.* Chicago, — Ill. —, 65 N. E. 243.]

(*a*) [Authority to construct and maintain a dam for the purpose of improving a water-power is only a license and may be revoked at any time. St. Anthony Falls W. P. Co. *v.* Bd. of Water Com'rs, 168 U. S. 349, 18 Sup. Ct. Rep. 157. Rate of interest allowed upon an unpaid judgment is not contractual unless the judgment is upon a contract to pay interest at a given rate until the debt is paid, and in all other cases it may be changed at any time by the State, and such changed rate will be operative thenceforth. Morley *v.* L. S. & M. S. R. Co., 146 U. S. 162, 13 Sup. Ct. Rep. 54, aff. 95 N. Y. 667, and following O'Brien *v.* Young, 95 N. Y. 428; 47 Am. Rep. 64. *Contra*, Butler *v.* Rockwell, 17 Col. 290, 29 Pac. 458, 17 L. R. A. 611, and note; Wyoming Nat. Bk. *v.* Brown, 7 Wyo. 494, 53 Pac. 291, 9 Wyo. 153, 61 Pac. 465, on rehearing (June 29, 1900), holds that contract is merged in judgment, and rate of interest on judgment is not contractual. Judgment upon a tort is not a contract, and power to levy taxes may be so restricted as to make such judgment against a city practically worthless. Sherman *v.* Langham, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258; Louisiana *v.* New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211; Louisiana *v.* Police Jury, 111 U. S. 716, 4 Sup. Ct. Rep. 648.]

by its general laws it holds out inducements to immigration; it passes exemption laws, and laws for the encouragement of trade and agriculture; and under all these laws a greater or less number of citizens expect to derive profit and emolument. But can these laws be regarded as contracts between the State and the officers and corporations who are, or the citizens of the State who expect to be, benefited by their passage, so as to preclude their being repealed?

On these points it would seem that there could be no difficulty. When the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government."[1] They may, therefore, discontinue offices or change the salary or other compensation, or abolish or change the organization of municipal corporations at any time, according to the existing legislative view of State policy, unless forbidden by their own constitutions from doing so.[2] And although municipal corporations, as respects the

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518–629, per *Marshall*, Ch. J.

[2] Butler *v.* Pennsylvania, 10 How. 402; United States *v.* Hartwell, 6 Wall. 385; Newton *v.* Commissioners, 100 U. S. 559; Warner *v.* People, 2 Denio, 272; Conner *v.* New York, 2 Sandf. 355, and 5 N. Y. 285; People *v.* Green, 58 N. Y. 295; State *v.* Van Baumbach, 12 Wis. 310; Coffin *v.* State, 7 Ind. 157; Benford *v.* Gibson, 15 Ala. 521; Perkins *v.* Corbin, 45 Ala. 103; Evans *v.* Populus, 22 La. Ann. 121; Commonwealth *v.* Bacon, 6 S. & R. 322; Commonwealth *v.* Mann, 5 W. & S. 403, 418; Koontz *v.* Franklin Co., 76 Pa. St. 154; French *v.* Commonwealth, 78 Pa. St. 339; Augusta *v.* Sweeney, 44 Ga. 463; County Commissioners *v.* Jones, 18 Minn. 199; People *v.* Lippincott, 67 Ill. 333; *In re* Bulger, 45 Cal. 553; Opinions of Justices, 117 Mass. 603; Kendall *v.* Canton, 53 Miss. 526; Williams *v.* Newport, 12 Bush, 438; State *v.* Douglass, 26 Wis. 428; State *v.* Kalb, 50 Wis. 178, 6 N. W. 557; Robinson *v.* White, 26 Ark. 139; Alexander *v.* McKenzie, 2 S. C. 81; Harvey *v.* Com'rs Rush Co., 32 Kan. 150, 4 Pac. 153; Com. *v.* Bailey, 81 Ky. 395. Compare People *v.* Bull, 46 N. Y. 57, 7 Am. Rep. 302; Wyandotte *v.* Drennan, 46 Mich. 478, 9 N. W. 500. "Where an office is created by statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. Such extreme legislation is not to be deemed probable in any case. But we are now discussing the legislative power, not its expediency or propriety. Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference." Per *Sandford*, J., 2 Sandf. 355, 369. "The selection of officers who are nothing more than public agents for the effectuating of public purposes is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular

property which they hold, control, and manage, for the benefit of their citizens, are governed by the same rules and subject to the same liabilities as individuals, yet this property, so far as it has been derived from the State, or obtained by the exercise of the ordinary powers of government, must be held subject to control by the State, but under the restriction only, that it is not to be appropriated to uses foreign to those for which it has been ac-

agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this upon the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense." *Daniel*, J., in Butler *v.* Pennsylvania, 10 How. 402, 416. "But after services have been rendered under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law gives for its enforcement," and cannot be impaired by a change in the State constitution. Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 6 Sup. Ct. Rep. 329. See also Barker *v.* Pittsburgh, 4 Pa. St. 49; Standiford *v.* Wingate, 2 Duv. 443; Taft *v.* Adams, 3 Gray, 126; Walker *v.* Peelle, 18 Ind. 264; People *v.* Haskell, 5 Cal. 357; Dart *v.* Houston, 22 Ga. 506; Williams *v.* Newport, 12 Bush, 438; Territory *v.* Pyle, 1 Oreg. 149; Bryan *v.* Cattell, 15 Iowa, 538. If the term of an office is fixed by the Constitution, the legislature cannot remove the officer, — except as that instrument may allow, — either directly, or indirectly by abolishing the office. People *v.* Dubois, 23 Ill. 547; State *v.* Messmore, 14 Wis. 163; Commonwealth *v.* Gamble, 62 Pa. St. 343, 1 Am. Rep. 422: Lowe *v.* Commonwealth, 3 Met (Ky.) 240; State *v.* Wiltz, 11 La. Ann. 489; Goodin *v.* Thoman, 10 Kan. 191; State *v.* Draper, 50 Mo. 353. Or by shortening the constitutional term. Brewer *v.* Davis, 9 Humph. 212. Compare Christy *v.* Commissioners, 39 Cal. 3. But if after the election of a justice, his town becomes part of a city, his office ceases. Gertum *v.* Board, 109 N. Y. 170, 16 N. E. 328. Nor can the legislature take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them upon an office of its own creation. State *v.* Brunst, 26 Wis. 413, 7 Am. Rep. 84, disapproving State *v.* Dews, R. M. Charl. 397. [See also People *v.* Howland, 155 N. Y. 270, 49 N. E 775, 41 L. R. A. 838. Cameron *v.* Parker, 2 Okla. 277, 38 Pac. 14.] Compare Warner *v.* People, 2 Denio, 272; People *v.* Albertson, 55 N. Y. 50; People *v.* Raymond, 37 N. Y. 428; King *v.* Hunder, 65 N. C. 603, 6 Am. Rep. 754. Nor, where the office is elective, can the legislature fill it, either directly, or by extending the term of the incumbent. People *v.* Bull, 46 N. Y. 57; People *v.* McKinney, 52 N. Y. 374. [Where the constitution prohibits the removal of an officer during his term except for cause, it equally prohibits the transfer of the duties and emoluments of the office. State Prison *v.* Day, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295.] See also on these points cases, p. 99, *supra*. Compare People *v.* Flanagan, 66 N. Y. 237. As to control of municipal corporations, see further Marietta *v.* Fearing, 4 Ohio, 427; Bradford *v.* Cary, 5 Me. 339; Bush *v.* Shipman, 5 Ill. 186; Trustees, &c. *v.* Tatman, 13 Ill. 27; People *v.* Morris, 13 Wend. 325; Mills *v.* Williams, 11 Ired. 558; People *v.* Banvard, 27 Cal. 470; *ante*, ch. viii. But where the State contracts as an individual, it is bound as an individual would be: Davis *v.* Gray, 16 Wall. 203; even though the contract creates an official relation. Hall *v.* Wisconsin, 103 U. S. 5. [A public office is not property, and a provision that "no person shall be deprived of . . . property without . . . the judgment of his peers" is not applicable to a lawful removal from office upon a charge of gross immorality. Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. That notice is necessary to a valid removal of an elected officer, see Jacques *v.* Litle, 51 Kan. 300, 33 Pac. 106, 20 L. R. A. 304.]

quired. And the franchises conferred upon such a corporation, for the benefit of its citizens, must be liable to be resumed at any time by that authority which may mould the corporate powers at its will, or even revoke them altogether. The greater power will comprehend the less.[1] If, however, a grant is made to a municipal corporation, and the parties to it have rights which are protected by the Constitution, the legislature cannot impair them.[2]

[1] In East Hartford *v.* Hartford Bridge Co., 10 How. 511, 533, Mr. Justice *Woodbury*, in speaking of the grant of a ferry franchise to a municipal corporation, says: "Our opinion is . . . that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as these interests demanded. The grantees, likewise the towns, being mere organizations for public purposes, were liable to have their public powers, rights, and duties, modified or abolished at any moment by the legislature. They 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 corporate estate which they can sell or devise to others, or which can be attached and 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 just named, and therefore to be considered as not violated by subsequent legislative changes. It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies." A different doctrine was advanced by Mr. Justice *Barculo*, in Benson *v.* Mayor, &c. of New York, 10 Barb. 234, who cites in support of his opinion, that ferry grants to the city of New York could not be taken away by the legislature, what is said by Chancellor *Kent*, (2 Kent's Com. 275), that "public corporations . . . may be empowered to take and hold private property for municipal uses; and such property is invested with the security of other private rights. So corporate franchises attached to public corporations are legal estates, coupled with an interest, and are protected as private property." This is true in a general sense, and it is also true that, in respect to such property and franchises, the same rules of responsibility are to be applied as in the case of individuals. Bailey *v.* Mayor, &c. of New York, 3 Hill, 531. But it does not follow that the legislature, under its power to administer the government, of which these agencies are a part, and for the purposes of which the grant has been made, may not at any time modify the municipal powers and privileges, by transferring the grant to some other agency, or revoking it when it seems to have become unimportant. A power to tax is not private property or a vested right which when once conferred upon a municipality by legislative act cannot be subsequently modified or repealed. The grant of such power is not a contract. Williamson *v.* New Jersey, 130 U. S. 189, 9 Sup. Ct. Rep. 453; Richmond *v.* Richmond, &c. R. R. Co., 21 Gratt. 604, 611. See *post*, p. 355, note 1. In People *v.* Power, 25 Ill. 187, 191, *Breese*, J., in speaking of a law which provided that three-fourths of the taxes collected in the county of Sangamon, with certain deductions, should be paid over to the city of Springfield, which is situated therein, says: "While private corporations are regarded as contracts which the legislature cannot constitutionally impair, as the trustee of the public interests it has the exclusive and unrestrained control over public corporations; and as it may

pal corporation charged with a trust in favor of an individual, private corporation, or charity, the interest which the *cestui que trust* has under the grant may sustain it against legislative revocation; a vested equitable interest being property in the same sense and entitled to the same protection as a legal.[1]

Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting

create, so it may modify or destroy, as public exigency requires or the public interests demand. Coles *v.* Madison County, Breese, 115. Their whole capacities, powers, and duties are derived from the legislature, and subordinate to that power. If, then, the legislature can destroy a county, they can destroy any of its parts, and take from it any one of its powers. The revenues of a county are not the property of the county, in the sense in which revenue of a private person or corporation is regarded. The whole State has an interest in the revenue of a county; and for the public good the legislature must have the power to direct its application. The power conferred upon a county to raise a revenue by taxation is a political power, and its application when collected must necessarily be within the control of the legislature for political purposes. This act of the legislature nowhere proposes to take from the county of Sangamon, and give to the city of Springfield, any property belonging to the county, or revenues collected for the use of the county. *But if it did it would not be objectionable.* But, on the contrary, it proposes alone to appropriate the revenue which may be collected by the county, by taxes levied on property both in the city and county, in certain proportions ratably to the city and county." It is held in People *v.* Ingersoll, 58 N. Y. 1, that the franchise to levy taxes by a county for county purposes was not exercised by the county as agent for the State, but as principal. And see Bush *v.* Shipman, 5 Ill. 186; Richland County *v.* Lawrence County, 12 Ill. 1; Sangamon Co. *v.* Springfield, 63 Ill. 66; Borough of Dunmore's Appeal, 52 Pa. St. 374; Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143; *ante*, pp. 342, 347, and cases cited. [Statute exempting city's waterworks from taxation is not irrepealable. Covington *v.* Kentucky, 173 U. S. 231, 19 Sup. Ct. Rep. 383.]

[1] See Town of Pawlet *v.* Clark, 9 Cranch, 292, and Terrett *v.* Taylor, 9 Cranch, 43. The municipal corporation holding property or rights in trust might even be abolished without affecting the grant; but the Court of Chancery might be empowered to appoint a new trustee to take charge of the property, and to execute the trust. Montpelier *v.* East Montpelier, 29 Vt. 12. Power to repeal a charter cannot be exercised so as to injure creditors already entitled to payment. Morris *v.* State, 62 Tex. 728. A municipal corporation, like the State, may enter into contracts by legislative action. Where, for example, a village by ordinance grants to a railroad company permission to use the streets of the village for its road-bed, on condition of grading and gravelling them at its own expense, the ordinance when accepted constitutes a contract from which neither party can withdraw. Cincinnati, &c. R. R. Co. *v.* Carthage, 36 Ohio St. 631. See also Hovelman *v.* Kansas City Ry. Co., 79 Mo. 632; Coast Line Ry. Co. *v.* Savannah, 30 Fed. Rep. 646; Los Angeles *v.* Water Co., 61 Cal. 65; Chicago, Mun., &c. Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616. [Grant to a public corporation of all moneys received by a certain county from fines and penalties may be revoked at pleasure of legislature. Watson Seminary *v.* Co. Ct. of Pike Co., 149 Mo. 57, 50 S. W 880, 45 L. R. A. 675.]

them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.[1] As the power to grant unamendable and irrepealable

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518; Trustees of Vincennes University *v.* Indiana, 14 How. 268; Planters' Bank *v.* Sharp, 6 How. 301; Piqua Bank *v.* Knoop, 16 How. 369; Binghamton Bridge Case, 3 Wall. 51; Norris *v.* Trustees of Abingdon Academy, 7 G. & J. 7; Grammar School *v.* Burt, 11 Vt. 632; Brown *v.* Hummel, 6 Pa. St. 86; State *v.* Heyward, 3 Rich. 389; People *v.* Manhattan Co., 9 Wend. 351; Commonwealth *v.* Cullen, 13 Pa. St. 132; Commercial Bank of Natchez *v.* State, 14 Miss. 599; Backus *v.* Lebanon, 11 N. H. 19; Michigan State Bank *v.* Hastings, 1 Doug. (Mich.) 225; Bridge Co. *v.* Hoboken Co., 13 N. J. Eq. 81; Miners' Bank *v.* United States, 1 Greene (Iowa), 553; Edwards *v.* Jagers, 19 Ind. 407; State *v.* Noyes, 47 Me. 189; Bruffet *v.* G. W. R. R. Co., 25 Ill. 353; People *v.* Jackson & Michigan Plank Road Co., 9 Mich. 285; Bank of the State *v.* Bank of Cape Fear, 13 Ired. 75; Mills *v.* Williams, 11 Ired. 558; Hawthorne *v.* Calef, 2 Wall. 10; Wales *v.* Stetson, 2 Mass. 143; Nichols *v.* Bertram, 3 Pick. 342; King *v.* Dedham Bank, 15 Mass. 447; State *v.* Tombeckbee Bank, 2 Stew. 30; Central Bridge *v.* Lowell, 15 Gray, 106; Bank of the Dominion *v.* McVeigh, 20 Gratt. 457; Sloan *v.* Pacific R. R. Co., 61 Mo. 24; State *v.* Richmond, &c. R. R. Co., 73 N. C. 527; Turnpike Co. *v.* Davidson Co., 3 Tenn. Ch. 397; Detroit *v.* Plank Road Co., 43 Mich. 140, 5 N. W. 275; Penn. R. R. Co. *v.* Baltimore, &c. R. R. Co., 60 Md. 263; Com. *v.* Erie & W. Tr. Co., 107 Pa. St. 112; Houston & T. C. Ry. Co. *v.* Texas & P. Ry. Co., 70 Tex. 649, 8 S. W. 498; [City R. Co. *v.* Citizens' Street R. Co, 166 U. S. 557, 17 Sup. Ct. Rep. 653; Mich. Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87; Ingersoll *v.* Nassau Electric R. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236; Franklin Co. Grammar School *v.* Bailey, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405, and note; Nashville, M., & S. Turnp Co. *v.* Davidson County, 106 Tenn. 258, 61 S. W. 68; State *v.* Lebanon & N. Turnp. Co., — Tenn —, 61 S.W. 1096 (Nov. 27, 1900).] The mere passage of an act of incorporation, however, does not make the contract; and it may be repealed prior to a full acceptance by the corporators. Mississippi Society *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723. Or amended, Cincinnati, H. & I. R. R. Co. *v.* Clifford, 113 Ind. 460, 15 N. E. 524. See, further, Chincleclamouche L. & B. Co. *v.* Com., 100 Pa. St. 438. After the adoption of a constitutional amendment allowing amendment and repeal of charters, a corporation, previously chartered, accepted acts of the legislature. Held that its charter thereby became subject to alteration under the amendment, and that it was affected by a constitutional amendment passed thereafter. Penn. R. R. Co. *v.* Duncan, 111 Pa. St. 352. In affirming this decision it is held that the corporation took its charter subject to changes in the constitution and general laws of the State. Penn. R. R. Co. *v.* Miller, 132 U. S. 75, 10 Sup. Ct. Rep. 34. An act, passed after the granting of a charter, allowing the corporation in a proper case to be wound up, is valid. A corporation is subject to such reasonable regulation as the legislature may prescribe short of a material interference with its privileges. Chicago Life Ins. Co *v.* Needles, 113 U. S. 574, 5 Sup. Ct. Rep. 681. [Until the corporation has entered upon the execution of a general power granted to it (*e. g.* to mortgage its property) the legislature may modify at will the conditions under which that power may be exercised (*e. g.* may enact that subsequent judgments against the corporation shall be prior liens upon its property). East Tenn., V. & G. R. Co. *v.* Frazier, 139 U. S. 288, 11 Sup. Ct. Rep. 517.] The provision in a railroad charter prescribing the manner in which it may take lands for its purposes, only gives a remedy which may be altered. Mississippi R. R. Co. *v.* McDonald, 12 Heisk. 54. Giving the right of cumulative voting to stockholders in a corporation with an irrepealable charter,

charters is one readily susceptible of being greatly abused, to the prejudice of important public interests, and has been greatly abused in the past, the people in a majority of the States, in framing or amending their constitutions, have prudently guarded

which provides that each share shall have one vote, is a violation of contract. State *v.* Greer, 78 Mo. 188. It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred — no matter by what means or on what pretence — being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.

And as to the right to regulate charges for transportation of persons and property, see *post*, p. 870.

In Mills *v.* Williams, 11 Ired. 558, 561, *Pearson*, J., states the difference between the acts of incorporation of public and private corporations as follows: "The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this party a portion of the power of the legislature is delegated, to be exercised for the general good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of 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 parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. 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." An incorporated academy, whose endowment comes exclusively from the public, is a public corporation. Dart *v.* Houston, 22 Ga. 506. Compare State *v.* Adams, 44 Mo. 570. [In Skaneateles Water Works Co. *v.* Skaneateles, 161 N. Y 154, 55 N. E. 562, the municipality gave to the water company a franchise to maintain and operate within its corporate limits a system of water-works for furnishing to the municipality and its inhabitants water. Later the municipality took appropriate action for the construction of a system of water-works of its own. The action was enjoined as in violation of the provision of the Federal Constitution against the impairment of contracts. This case differs from Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546, and *Re* Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270, in that in those cases it was a question of whether, where the franchise did not purport to be exclusive, a franchise might be given to a competing company. The Brooklyn case is affirmed in 166 U. S. 685, 17 Sup. Ct. Rep. 718, *sub nom.*, Long Island Water-Supply Co. *v.* Brooklyn. The Skaneateles Case affirms the rule of these cases that such second franchises might be granted, but holds that the municipality itself cannot enter such competition without being open to the constitutional objection. See also Vicksburg Waterworks Co. *v.* Vicksburg. 185 U. S. 65, — Sup. Ct. Rep. —. Westerly Water Works *v.* Westerly, 75 Fed. Rep. 181. See also additional cases cited *ante*, p. 387, note *a*. A statute relieving street railway company from the obligation to repair any portion of the streets over which its tracks are laid, does not impair the obligation of contract. Springfield *v.* Springfield St. Ry. Co, — Mass. —, 64 N. E. 577 (July 15, 1902); Worcester *v.* Worcester St. Ry. Co., — Mass. —, 64 N. E. 581 (July 15, 1902).]

against it by reserving the right to alter, amend, or repeal all laws that may be passed, conferring corporate powers. These provisions give protection from the time of their adoption, but the improvident grants theretofore made are beyond their reach.[1] In many States the constitutions also prohibit special charters, and all corporations are formed by the voluntary association of individuals under general laws.[2]

[1] Respecting the power to amend or repeal corporate grants, some troublesome questions are likely to arise which have only as yet been hinted at in the decided cases. Corporations usually acquire property under their grants; and any property or any rights which become vested under a legitimate exercise of the powers granted, no legislative act can take away. Commonwealth *v.* Essex Co., 13 Gray, 239; Railroad Co. *v.* Maine, 96 U. S. 499; Sinking Fund Cases, 99 U. S. 700; Attorney-General *v.* Railroad Companies, 35 Wis. 425; Detroit *v.* Detroit & Howell P. R. Co., 43 Mich. 140, 5 N. W. 275. See *post*, pp. 837–839. But a legislature may grant to another corporation the franchises of an existing one, and may authorize the taking of its property upon compensation made. Greenwood *v.* Freight Co., 105 U. S. 13. A new constitution may allow water rates to be fixed by a public board, although the company had under the law of its organization the right of representation upon the board. Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48. In many cases the property itself becomes valueless unless its employment in the manner contemplated in the corporate grant may be continued; as in the case, for instance, of railroad property; and whatever individual owners of such property might do without corporate powers, it must be competent for the stockholders to do after their franchises are taken away. Without speculating on the difficulties likely to arise, reference is made to the following cases, in which the reserved power to alter or repeal corporate grants has been considered or touched upon: Worcester *v.* Norwich, &c. R. R. Co., 109 Mass. 103; Railroad Commissioners *v.* Portland, &c. R. R. Co., 63 Me. 269, 18 Am. Rep. 208; State *v.* Maine Cent. R. R. Co., 66 Me. 488; Ames *v.* Lake Superior R. R. Co., 21 Minn. 201; Sprigg *v.* Telegraph Co., 46 Md. 67; State *v.* Com'rs of R. R. Taxation, 37 N. J. 228; State *v.* Mayor of Newark, 35 N. J. 157; West Wis. R. R. Co. *v.* Supervisors, 35 Wis. 257; Union Improvement Co. *v.* Commonwealth, 69 Pa. St. 140; Ill. Cent. R. R. Co. *v.* People, 95 Ill. 313, 1 Am. & Eng. R. R. Cas. 188; Rodemacher *v.* Milwaukee, &c. R. R. Co., 41 Iowa, 297, 20 Am. Rep. 592; Gorman *v.* Pacific R. R. Co., 26 Mo. 441; Gardner *v.* Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238; Yeaton *v.* Bank of Old Dom., 21 Gratt. 593; Tomlinson *v.* Jessup, 15 Wall. 454; Tomlinson *v.* Branch, 15 Wall. 460; Miller *v.* State, 15 Wall. 478; Holyoke Co. *v.* Lyman, 15 Wall. 500; Detroit *v.* Detroit & H. P. R. Co., 43 Mich. 140, 5 N. W. 275; Ashuelot R. R. Co. *v.* Elliott, 58 N. H. 451; [Hamilton Gaslight & Coke Co. *v.* Hamilton, 146 U. S. 258, 13 Sup. Ct. Rep. 90. After subscribers to stock have paid for it in full, the legislature cannot increase their liabilities. Enterprise Ditch Co. *v.* Moffit, 58 Neb. 642, 79 N. W. 560, 45 L. R. A. 647.]

Where no power to amend a charter has been reserved, amendments may nevertheless be made with the consent of the corporation, but the corporation cannot bind its shareholders by the acceptance of amendments which effect fundamental changes in its character or purpose. See Gray *v.* Navigation Co., 2 W. & S. 156, 37 Am. Dec. 500; Stevens *v.* Rutland, &c. R. R. Co., 29 Vt. 545. [Where such power has been reserved, the mode of electing directors may be so modified as to permit cumulative voting in order to secure proportional representation on the board of directors. Looker *v.* Maynard, 179 U. S. 46, 21 Sup. Ct. Rep. 21.]

[2] Where corporations are thus formed, the articles of association, taken in connection with the General Statute under which they are entered into, constitute the charter.

Perhaps the most interesting question which arises in this discussion is, whether it is competent for the legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the power of taxation, or the police power of the State, or the right of eminent domain, as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle that the legislature cannot diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself. If the legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to abuse, and may possibly come in time to make the constitutional provision in question as prolific of evil as it ever has been, or is likely to be, of good.

So far as the power of taxation is concerned, it has been so often decided by the Supreme Court of the United States, though not without remonstrance on the part of State courts,[1] that an agreement by a State, for a consideration received or supposed to be received, that certain property, rights, or franchises shall be exempt from taxation, or be taxed only at a certain agreed rate, is a contract protected by the Constitution, that the question can no longer be considered an open one.[2] In any case, however,

[1] Mechanics' & Traders' Bank *v.* Debolt, 1 Ohio St. 591; Toledo Bank *v.* Bond, 1 Ohio St. 622; Knoop *v.* Piqua Bank, 1 Ohio St. 603; Milan & R. Plank Road Co. *v.* Husted, 3 Ohio St. 578; Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Brewster *v.* Hough, 10 N. H. 138; Backus *v.* Lebanon, 11 N. H. 19; Thorpe *v.* R. & B. R. R. Co., 27 Vt. 140; Brainard *v.* Colchester, 31 Conn. 407; Mott *v.* Pennsylvania R. R. Co., 30 Pa. St. 9; East Saginaw Salt Manuf. Co. *v.* East Saginaw, 19 Mich. 259; West Wis. R. Co. *v.* Supervisor of Trempeleau Co., 35 Wis. 257, 265; Attorney-General *v.* Chicago, &c. R. R. Co., 35 Wis. 425, 572. See also the dissenting opinion of Mr. Justice *Miller*, in Washington University *v.* Rouse, 8 Wall. 439, 441, in which the Chief Justice and Justice *Field* concurred. Also Raleigh, &c. R. R. Co *v.* Reid, 64 N. C. 155. That one legislature cannot deprive another of the right to amend a charter by delegating to a city power to grant corporate rights, see State *v.* Hilbert, 72 Wis. 184, 39 N. W. 326.

[2] New Jersey *v.* Wilson, 7 Cranch, 164; Gordon *v.* Appeal Tax Court, 3 How. 133; Piqua Bank *v.* Knoop, 16 How. 369; Ohio Life & Trust Co. *v.* Debolt, 16 How. 416; Dodge *v.* Woolsey, 18 How. 331; Mechanics' & Traders' Bank *v.* Debolt, 18 How. 380; Mechanics' & Traders' Bank *v.* Thomas, 18 How. 384; McGee *v.* Mathis, 4 Wall. 143; Home of the Friendless *v.* Rouse, 8 Wall. 430; Washington University *v.* Rouse, 8 Wall. 439; Wilmington R. R. Co. *v.* Reid, 13 Wall. 264; Raleigh & Gaston R. R. Co. *v.* Reid, 13 Wall. 269; Humphrey *v.* Pegues, 16 Wall. 244; Pacific R. R. Co. *v.* Maguire, 20 Wall. 36; New Jersey *v.* Yard, 95 U. S. 104; Farrington *v.* Tennessee, 95 U. S. 679; University *v.* Illinois, 99 U. S. 309; New Orleans *v.* Houston, 119 U. S. 265, 7 Sup. Ct. Rep. 198. See also Atwater *v.* Woodbridge, 6 Conn. 223; Osborne *v.* Humphrey, 7 Conn. 335; Parker *v.* Redfield, 10 Conn. 490; Landon *v.* Litchfield, 11 Conn. 251; Herrick *v.* Randolph, 13 Vt. 525; Armington *v.* Barnet, 15 Vt

there must be a consideration, so that the State can be supposed to have received a beneficial equivalent; for it is conceded on all sides that, if the exemption is made as a privilege only, it may be revoked at any time.[1] And it is but reasonable that the exemption be construed with strictness.[2]

745; O'Donnell *v.* Bailey, 24 Miss. 386; St. Paul, &c. R. R. Co. *v.* Parcher, 14 Minn. 297; Grand Gulf R. R. Co. *v.* Buck, 53 Miss. 246; Central R. R. Co. *v.* State, 54 Ga. 401; St. Louis, &c. R. R. Co. *v.* Loftin, 30 Ark. 693; Prop'rs Mt. Auburn Cem. *v.* Cambridge, 150 Mass. 12, 22 N. E. Rep. 66, where an exemption from all public taxes was held to cover a sewer assessment. [And see also Mobile & O. R. Co. *v.* Tennessee, 153 U. S. 486, 14 Sup. Ct. Rep. 968; Stearns *v.* Minnesota, 179 U. S. 223, 21 Sup. Ct. Rep. 73; Berger *v.* United States Steel Corp., — N. J. L. —, 53 Atl. 68. Where the legislature has reserved the right to amend, alter, or repeal any and all corporate charters, the withdrawal of an exemption from taxation does not impair the obligation of any contract. Louisville Water Co. *v.* Clark, 143 U. S. 1, 12 Sup. Ct. Rep. 346.]

[1] Christ Church *v.* Philadelphia, 24 How. 300; Brainard *v.* Colchester, 31 Conn. 407. See also Commonwealth *v.* Bird, 12 Mass. 442; Dale *v.* The Governor, 3 Stew. 387; Com'rs Calhoun Co. *v.* Woodstock Iron Co., 82 Ala. 151, 2 So. 132. [Grand Lodge of Louisiana *v.* New Orleans, 166 U. S. 143, 17 Sup. Ct. Rep. 523. But see Farrington *v.* Tennessee, 95 U. S. 679, and Bk. of Commerce *v.* Tennessee, 161 U. S. 134, 16 Sup. Ct. Rep. 456, both of which seem to overlook the necessity for a consideration.] If an exemption from taxation exists in any case, it must be the result of a deliberate intention to relinquish this prerogative of sovereignty, distinctly manifested. Easton Bank *v.* Commonwealth, 10 Pa. St. 450; Providence Bank *v.* Billings, 4 Pet. 514; Christ Church *v.* Philadelphia, 24 How. 300; Gilman *v.* Sheboygan, 2 Black, 510; Louisville & N. R. R. Co. *v.* Palmes, 109 U. S. 244, 3 Sup. Ct. Rep. 193; Memphis Gaslight Co. *v.* Shelby Co., 109 U. S. 398, 3 Sup. Ct. Rep. 205; Chicago, B. & K. C. Ry. Co. *v.* Guffey, 120 U. S. 569, 7 Sup. Ct. Rep. 693; State *v.* Hilbert, 72 Wis. 184, 39 N. W. 326; Herrick *v.* Randolph, 13 Vt. 525; East Saginaw Salt Manuf. Co. *v.* East Saginaw, 19 Mich. 259; in error, 13 Wall. 373; People *v.* Roper, 35 N. Y. 629; People *v.* Commissioners of Taxes, 47 N. Y. 501; People *v.* Davenport, 91 N. Y. 574; Lord *v.* Litchfield, 36 Conn. 116, 4 Am. Rep. 41; Erie Railway Co. *v.* Commonwealth, 66 Pa. St. 84, 5 Am. Rep. 351; Bradley *v.* McAtee, 7 Bush, 667, 3 Am. Rep. 309; North Missouri R. R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141; Illinois Cent. R. R. Co. *v.* Irvin, 72 Ill. 452. [Covington *v.* Kentucky, 173 U. S. 231, 19 Sup. Ct. Rep. 383; Citizens' Sav. Bk. *v.* Owensboro, 173 U. S. 636, 19 Sup. Ct. Rep. 530, 571; Louisville *v.* Bk. of Louisville, 174 U. S. 439, 19 Sup. Ct. Rep. 753. But taxes cannot, after revocation of an exemption, be levied for any part of the time prior to such revocation. Louisville Water Co. *v.* Kentucky, 170 U. S. 127, 18

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[2] See Cooley on Taxation, 146, and cases cited. Hoge *v.* Railroad Co., 99 U. S. 348; Railway Co. *v.* Philadelphia, 101 U. S. 528; Vicksburg, S. & P. R. R. Co. *v.* Dennis, 116 U. S. 665, 6 Sup. Ct. Rep. 625; Chicago, B. & K. C. Ry. Co. *v.* Guffey, 120 U. S. 569, 7 Sup. Ct. Rep. 693; Yazoo & M. R. R. Co. *v.* Thomas, 132 U. S. 174, 10 Sup. Ct. Rep. 68. [Bk. of Commerce *v.* Tennessee, 163 U. S. 416, 16 Sup. Ct. Rep. 1113, mod. s. c. 161 U. S. 134, 16 Sup. Ct. Rep. 456. Exemption will not be presumed. New Orleans C. & L. R. Co. *v.* New Orleans, 143 U. S. 192, 12 Sup. Ct. 406. Strictly construed, St. Paul, M. & M. R. Co. *v.* Todd County, 142 U. S. 282, 12 Sup. Ct. Rep. 281, aff. 38 Minn. 163, 36 N. W. 109. See also Wheeling & B. Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 11 Sup. Ct. Rep. 301; Joy *v.* St. Louis, 138 U. S. 1, 11 Sup. Ct. Rep. 243, and Freeport W. Co. *v.* Freeport, 180 U. S. 587, 21 Sup. Ct. Rep. 493.]

The power of the legislature to preclude itself in any case from exercising the power of eminent domain is not so plainly decided. It must be conceded, under the authorities, that the State may grant exclusive franchises, — like the right to construct the only

Sup. Ct. Rep. 571, rev. 18 Ky. L. Rep. 620, 37 S. W. 576.] Upon the reorganization of a corporation which had enjoyed an exemption, it passes, if all the "privileges" of the old pass to the new; not, if the "rights and franchises" alone pass. Memphis & L. R. R. R. Co. *v.* R. R. Com'rs, 112 U. S. 609, 5 Sup. Ct. Rep. 299; St. Louis Iron M. & S. Ry. Co. *v.* Berry, 113 U. S. 465, 5 Sup. Ct. Rep. 529; Tennessee *v.* Whitworth, 117 U. S. 139, 6 Sup. Ct. Rep. 645. See Detroit St. Ry. Co. *v.* Guthard, 51 Mich. 180, 16 N. W. 328. [Grant of "powers, rights, and capacities" of old corporation to new does not include exemptions enjoyed by old. Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 Sup. Ct. Rep. 198. Grant of "all the rights and privileges," omitting "and immunities," impliedly excludes the grant of exemption from taxation enjoyed by old company. Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 Sup. Ct. Rep. 471, aff. 91 Tenn. 566. And where a corporation is exempt from taxation and becomes insolvent and its charter is sold under judicial decree, but not the shares of stock of the stockholders, the purchasers acquire only the right to reorganize as a corporation, subject to all the laws then in force, including a constitutional amendment passed after the organization of the original corporation and prior to the sale of the charter. Mercantile Bank *v.* Tennessee, 161 U. S. 161, 16 Sup. Ct. Rep. 466, aff. 95 Tenn. 212, 31 S. W. 989. Delay in accepting a charter containing exemptions from taxation until after a constitutional provision prohibiting exemptions has been passed is fatal. Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193, 16 Sup. Ct. Rep. 466, aff. 95 Tenn. 203, 31 S. W. 992. An act giving a new corporation "all the . . . powers, rights, reservations, restrictions and liabilities given to and imposed upon" the old, does not convey to the new an exemption from taxation enjoyed by the old. Home Ins. & T. Co. *v.* Tennessee, 161 U. S. 198, 16 Sup Ct. Rep. 476, following Phœnix F. & M. Ins. Co. *v.* Tennessee, above; People, &c. *v.* Cook, 148 U. S. 397, 13 Sup. Ct. Rep. 645, aff. 110 N. Y. 443, 18 N. E. 113, 47 Hun, 467. See also Wilmington & W. R. Co. *v.* Alsbrook, 146 U. S. 279, 13 Sup. Ct. Rep. 72. Nor the power to fix tolls. St. Louis & S. F. R. Co. *v.* Gill, 156 U. S. 649, 15 Sup. Ct. Rep. 484, 491, aff. 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; Norfolk & W. R. Co. *v.* Pendleton, 156 U. S. 667, 15 Sup. Ct. Rep. 413. Where a corporation authorized to carry on an insurance business takes advantage, after the adoption of a constitutional provision prohibiting exemptions from taxation, of a statute permitting it to do a banking business, it so radically changes the character of its business as to lose its exemption from taxation. Memphis City Bank *v.* Tennessee, 161 U. S. 186, 16 Sup. Ct. Rep. 468, aff. 91 Tenn. 574, 19 S. W. 1045. And when two corporations are consolidated, a new corporation is formed, and if before the consolidation takes place a constitutional prohibition of exemptions from taxation has been made, the legislative grant to the consolidated corporation of all the "rights, privileges, and immunities" of the old corporations is ineffective to exempt the new from taxation. Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301, 14 Sup. Ct. Rep. 592, aff. 99 Mo. 30, 12 S. W. 290; Yazoo & M. V. R. R. Co. *v.* Adams, 180 U. S. 1, 21 Sup. Ct. Rep. 240, aff. 77 Miss. 302, 305, 315, 24 So. 200, 317, 28 So. 956. Where corporations are taxed upon their capital stock, the consolidated corporation may be compelled by the State under whose laws it is incorporated to pay the tax upon its entire capital stock, and not merely upon that of the consolidating corporation which was formerly a corporation of that State. Ashley *v.* Ryan, 153 U. S. 436, 14 Sup. Ct. Rep. 865. The new corporation is subject to all the laws existing at the time of its organization. People, &c. *v.* Cook, 148 U. S. 397, 13 Sup. Ct. Rep. 645, aff. 110 N. Y. 443, 18 N. E. 113, 47 Hun, 467.]

railroad which shall be built between certain termini; or the only bridge which shall be permitted over a river between specified limits; or to own the only ferry which shall be allowed at a certain point,[1] — but the grant of an exclusive privilege will not prevent the legislature from exercising the power of eminent domain in respect thereto. Franchises, like every other thing of value, and in the nature of property, within the State, are subject to this power; and any of their incidents may be taken away, or themselves altogether annihilated, by means of its exercise.[2] And it is believed that an express agreement in the charter, that the power of eminent domain should not be so exercised as to impair or affect the franchise granted, if not void as an agreement beyond the power of the legislature to make, must be considered as only a valuable portion of the privilege secured by the grant, and as such liable to be appropriated under the power of eminent domain. The exclusiveness of the grant, and the agreement against interference with it, if valid, constitute elements in its value to be taken into account in assessing compensation; but appropriating the franchise in such a case no more violates the obligation of the contract than does the appropriation of land which the State has granted under an express or implied agreement for quiet enjoyment by the grantee, but which nevertheless may be taken when the public need requires.[3] All grants are subject to this implied condition; and it may well be worthy of inquiry, whether the agreement that a franchise granted shall not afterwards be appropriated can have any other or greater force than words which would make it an exclusive franchise, but which, notwithstanding, would not preclude a subsequent grant

[1] West River Bridge Co. *v.* Dix, 16 Vt. 446, and 6 How. 507; Binghamton Bridge Case, 3 Wall. 51; Shorter *v.* Smith, 9 Ga. 517; Piscataqua Bridge *v.* N. H. Bridge, 7 N. H. 35; Boston Water Power Co., *v.* Boston & Worcester R. R. Co., 23 Pick. 360; Boston & Lowell R. R. *v.* Salem & Lowell R. R., 2 Gray, 1; Costar *v.* Brush, 25 Wend. 628; California Telegraph Co. *v.* Alta Telegraph Co., 22 Cal. 398. [Williams *v.* Wingo, 177 U. S. 601, 20 Sup. Ct. Rep. 793.]

[2] Matter of Kerr, 42 Barb. 119; Enfield Toll Bridge Co. *v.* Hartford & N. H. R. R. Co., 17 Conn. 40, 454; West River Bridge Co. *v.* Dix, 16 Vt. 446, and 6 How. 507; Philadelphia & Gray's Ferry Co.'s Appeal, 102 Pa. St. 123.

[3] Alabama, &c. R. R. Co. *v.* Kenney, 39 Ala. 307; Baltimore, &c. Turnpike Co. *v.* Union R. R. Co., 35 Md. 224; Eastern R. R. Co. *v.* Boston, &c. R. R. Co., 111 Mass. 125, 15 Am. Rep. 13. A way may be condemned through a cemetery in spite of a contract to the contrary. *In re* Twenty-second St., 15 Phila. 409, 102 Pa. St. 108. The use of land held by the State under contract to redeliver possession may be condemned. Tait's Exec. *v.* Central Lunatic Asylum, 84 Va. 27, 4 S. E. 697. That property has been acquired by a corporation under the right of eminent domain does not prevent further appropriation of it under the same right. Chicago, &c. R. R. Co. *v.* Lake, 71 Ill. 333; Peoria, &c. R. R. Co. *v.* Peoria, &c. Co., 66 Ill. 174; Eastern R. R. Co. *v.* Boston, &c. R. R. Co., 111 Mass. 125. See *post*, pp. 757, note 3, 806, note 1, and cases referred to.

on making compensation.[1] The words of the grant are as much in the way of the grant of a conflicting franchise in the one case as in the other.

It has also been intimated in a very able opinion that the police power of the State could not be alienated even by express grant.[2] And this opinion is supported by those cases where it

[1] Mr. Greenleaf, in a note to his edition of Cruise on Real Property, Vol. II. p. 67, says upon this subject: "In regard to the position that the grant of the franchise of a ferry, bridge, turnpike, or railroad is in its nature exclusive, so that the State cannot interfere with it by the creation of another similar franchise tending materially to impair its value, it is with great deference submitted that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like. and those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist; and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant that it will not, under any circumstances, open another avenue for the public travel within certain limits, or in a certain term of time; such covenant being an alienation of sovereign powers, and a violation of public duty." See also Redfield on Railways (3d. ed.), Vol. I. p. 258. That the intention to relinquish the right of eminent domain is not to be presumed in any legislative grant, see People *v.* Mayor, &c. of New York, 32 Barb. 102; Illinois & Michigan Canal *v.* Chicago & Rock Island Railroad Co., 14 Ill. 314; Eastern R. R. Co. *v.* Boston, &c. R. R. Co., 111 Mass. 125, 15 Am. Rep. 13; Turnpike Co. *v.* Union R. R. Co., 35 Md. 224.

[2] "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is perhaps no more than the enunciation of a general principle applicable to all free States; and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the policy of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads, to be carried into effect by their by-laws and other regulations, it is, of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would." Thorpe *v.* R. & B. R. R. Co., 27 Vt. 140, 149, per *Redfield*, Ch. J. The legislature cannot make an irrepealable contract as to that which affects public morals or public health, so as to limit the exercise of the police power over the subject-matter. Butcher's Union Co. *v.* Crescent City Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652. See also Indianapolis, &c. R. R. Co. *v.* Kercheval, 16 Ind. 84; Ohio, &c. R. R. Co. *v.* McClelland, 25 Ill. 140. See State *v.* Noyes, 47 Me. 189, on the same subject. In Bradley *v.* McAtee, 7 Bush, 667, 3 Am. Rep. 309, it was decided that a provision in a city

has been held that licenses to make use of property in certain modes may be revoked by the State, notwithstanding they may be connected with grants and based upon a consideration.[1] But this subject we shall recur to hereafter.

It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national Constitution now under consideration. If the tax cases are to be regarded as an exception to this statement, the exception is perhaps to be considered a nominal rather than a

charter that, after the first improvement period covered by a former one. Rowland *v.* State, 12 Tex. App. 418. A merchant's license may be revoked by a police regulation inconsistent with it. State *v.* Burgoyne, 7 Lea, 173. But a municipality cannot add to the statutory grounds for revocation. Lantz *v.* Highstown, 46 N. J. L. 102. Grants of the right to establish lotteries are mere privileges, and as such are revocable. Bass *v.* Nashville, Meigs, 421, 33 Am. Dec. 154; State *v.* Morris, 77 N. C. 512; Stone *v.* Mississippi, 101 U. S. 814; Justice *v.* Com., 81 Va. 209; State *v.* Woodward, 89 Ind. 110; [Douglas *v.* Kentucky, 168 U. S. 488, 18 Sup. Ct. Rep. 199.] But if they are authorized by the constitution, they cannot be abolished by the legislature. New Orleans *v.* Houston, 119 U. S. 265, 7 Sup. Ct. Rep. 198. In short, the State cannot by any legislation irrevocably hamper itself in the exercise of its police power. Toledo, &c. R. R. Co. *v.* Jacksonville, 67 Ill. 37; Chicago Packing Co. *v.* Chicago, 88 Ill. 221; Beer Company *v.* Massachusetts, 97 U. S. 25; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Stone *v.* Mississippi, 101 U. S. 814; People *v.* Commissioners, 59 N. Y. 92. An act requiring all underground electric lines to be laid under the orders of a commission violates no contract rights of their owners. People *v.* Squire, 107 N. Y. 593, 14 N. E. 820. No doubt if a license is revoked for which the State has collected money, good faith would require that the money be returned. Hirn *v.* State, 1 Ohio St. 15.

of a street, repairs should be made at the expense of the city, was not a contract; and on its repeal a lot-owner, who had paid for the improvement, might have his lot assessed for the repairs. Compare Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

[1] See, upon this subject, Brick Presbyterian Church *v.* Mayor, &c. of New York, 5 Cow. 538; Vanderbilt *v.* Adams, 7 Cow. 349; State *v.* Sterling, 8 Mo. 697; Hirn *v.* State, 1 Ohio St. 15; Calder *v.* Kurby, 5 Gray, 597; Brimmer *v.* Boston, 102 Mass. 19. The power of the State, after granting licenses for the sale of liquors and receiving fees therefor, to revoke the licenses by a general law forbidding sales, has been denied in some cases. See State *v.* Phalen, 3 Harr. 441; Adams *v.* Hackett, 27 N. H. 289; Boyd *v.* State, 36 Ala. 329. But there is no doubt this is entirely competent. Freleigh *v.* State, 8 Mo. 606; State *v.* Sterling, 8 Mo. 697; Calder *v.* Kurby, 5 Gray, 597; Met. Board of Excise *v.* Barrie, 34 N. Y. 657; Baltimore *v.* Clunet, 23 Md. 449; Fell *v.* State, 42 Md. 71, 20 Am. Rep. 83; Commonwealth *v.* Brennan, 103 Mass. 70; McKinney *v.* Salem, 77 Ind. 213; Moore *v.* Indianapolis, 120 Ind. 483, 22 N. E. 424; La Croix *v.* Co. Com'rs, 50 Conn. 321; Brown *v.* State, 82 Ga. 224, 7 S. E. 915; Beer Company *v.* Massachusetts, 97 U. S. 25. Compare State *v.* Cooke, 24 Minn. 247; Pleuler *v.* State, 11 Neb. 547, 10 N. W. 481. An additional license may be required within the

real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as contracts in these cases have been supposed to be based upon consideration, by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode.

Exclusive Privileges. Under the rulings of the federal Supreme Court, the grant of any exclusive privilege by a State, if lawfully made, is a contract, and not subject to be recalled.[1] As every exclusive privilege is in the nature of a monopoly, it may at some time become a question of interest, whether there are any, and if so what, limits to the power of the State to grant them. In former times, such grants were a favorite resort in England, not only to raise money for the personal uses of the monarch, but to reward favorites; and the abuse grew to such enormous magnitude that Parliament in the time of Elizabeth, and again in the times of James I., interfered and prohibited them. What is more important to us is, that in 1602 they were judicially declared to be illegal.[2] These, however, were monopolies in the ordinary occupations of life; and the decision upon them would not affect the special privileges most commonly granted. Where the grant is of a franchise which would not otherwise exist, no question can be made of the right of the State to make it exclusive, unless the constitution of the State forbids it; because, in contemplation of law, no one is wronged when he is only excluded from that to which he never had any right. An exclusive right to build and maintain a toll bridge or to set up a ferry may therefore be granted; and the State may doubtless limit, by the requirement of a license, the number of persons who shall be allowed to engage in employments the entering upon which is not a matter of common right, and which, because of their liability to abuse, may require special and extraordinary police supervision. The business of selling intoxicating drinks and of setting up a lottery are illustrations of such employments. But the grant of a monopoly in one of the ordinary and necessary occupations of life must be as clearly illegal in this country as in England; and it would be impossible to defend and sustain it, except upon the broad ground that the legislature may control and regulate the ordinary employments, even to the extent of fixing the prices of labor and of commodities. As no one pretends that the legislature possesses such a power, and as its existence would be wholly inconsistent with regulated liberty, it must follow that lawful grants

[1] *Ante*, p. 395, and cases cited; Slaughter-House Cases, 16 Wall. 36, 74.

[2] Darcy *v.* Allain, 11 Rep. 84.

of special privileges must be confined to cases where they will take from citizens generally nothing which before pertained to them as of common right.[1]

Changes in the General Laws. We have said in another place that citizens have no vested right in the existing general laws of the State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes in the law. Nevertheless there may be laws which amount to propositions on the part of the State, which, if accepted by individuals, will become binding contracts. Of this class are perhaps to be considered bounty laws, by which the State promises the payment of a gratuity to any one who will do any particular act supposed to be for the State interest. Unquestionably the State may repeal such a law at any time;[2] but when the proposition has been accepted by the performance of the act before the law is repealed, the contract would seem to be complete, and the promised gratuity becomes a legal debt.[3] And where a State was owner of the stock of a bank, and by the law its bills and notes were to be received in payment of all debts due to the State, it was properly held that this law constituted a contract with those who should receive the bills before its repeal and that a repeal of the law could not deprive these holders of the right which it assured. Such a law, with the acceptance of the bills under it, "comes within the definition of a contract. It is a contract founded upon a good and valuable consideration, — a consideration beneficial to the State; as its profits are increased by sustaining the credit,

[1] The grant of an exclusive privilege in slaughtering cattle in the vicinity of New Orleans was upheld as an exercise of the police power, in the Slaughter-House Cases, 16 Wall. 36. But the legislature could not by a grant of this kind make an irrepealable contract. In regard to public health and public morals a legislature cannot by any contract limit the exercise of the police power to the prejudice of the general welfare. Butcher's Union Co. *v.* Crescent City Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652. An irrepealable contract giving exclusive privileges with reference to lighting a city, may be made. New Orleans Gaslight Co. *v.* Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. Rep. 252; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683, 6 Sup. Ct. Rep. 265. So as to the privilege of furnishing water. New Orleans Water Works *v.* Rivers, 115 U. S. 674, 6 Sup. Ct. Rep. 273; St. Tammany Water Works *v.* New Orleans Water Works, 120 U. S. 64, 7 Sup. Ct. Rep. 405; Citizens' Water Co. *v.* Bridgeport, &c. Co., 55 Conn. 1, 10 Atl. 170.

[2] Christ Church *v.* Philadelphia, 24 How. 300; East Saginaw Salt Manuf. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82, and 13 Wall. 373. So as to pension to a policeman: Pennie *v.* Reis, 80 Cal. 266, 22 Pac. 176; or an exemption from taxation to persons planting forest trees. Shiner *v.* Jacobs, 62 Iowa, 392, 17 N. W. 613.

[3] People *v.* Auditor-General, 9 Mich. 327. See Montgomery *v.* Kasson, 16 Cal. 189; Adams *v.* Palmer, 51 Me. 480. [State cannot lower the rate of interest upon its warrants already issued. State *v.* Barrett, 25 Mont. 112, 63 Pac. 1030.]

and consequently extending the circulation, of the paper of the bank." [1]

That laws permitting the dissolution of the contract of marriage are not within the intention of the clause of the Constitution under discussion, has been many times affirmed.[2] It has been intimated, however, that, so far as property rights are concerned, the contract must stand on the same footing as any other, and that a law passed after the marriage, vesting the property in the wife for her sole use, would be void, as impairing the obligation of contracts.[3] But certainly there is no such contract embraced in the marriage as would prevent the legislature changing the law, and vesting in the wife solely all property which she should acquire thereafter; and if the property had already become vested in the husband, it would be protected in him, against legislative transfer to the wife, on other grounds than the one here indicated.

"*The obligation of a contract*," it is said, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning: when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other;

[1] Woodruff *v.* Trapnall, 10 How. 190. See Winter *v.* Jones, 10 Ga. 190; Furman *v.* Nichol, 8 Wall. 44. A law which makes coupons on State bonds receivable for all taxes and dues is a contract, the obligation of which no subsequent law can impair. Antoni *v.* Wright, 22 Gratt. 833; Hartman *v.* Greenhow, 102 U. S. 672; Poindexter *v.* Greenhow, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 962; [McCullough *v.* Virginia, 172 U. S. 102, 19 Sup. Ct. Rep. 134, and many cases therein cited. A valuable history of the persistent attempts of Virginia to avoid the obligation of these bonds and their coupons may be found in McGahey *v.* Virginia, 135 U. S. 662, 10 Sup. Ct. Rep. 972.] Compare Cornwall *v.* Com., 82 Va. 644; Com. *v.* Jones, 82 Va. 789; Ellett *v.* Com., 85 Va. 517, 8 S. E. 246. So of county warrants. People *v.* Hall, 8 Col. 485, 9 Pac. 34. An act, changing after issue the place of payment of municipal bonds, is bad. Dillingham *v.* Hook, 32 Kan. 185, 4 Pac. 160. So one requiring bonds payable to bearer to be registered. Priestly *v.* Watkins, 62 Miss. 798. See People *v.* Otis, 90 N. Y. 48. But compare Gurnee *v.* Speer, 68 Ga. 711.

[2] Per *Marshall*, Ch. J., Dartmouth College *v.* Woodward, 4 Wheat. 518, 629; Maynard *v.* Hill, 125 U. S. 190, 8 Sup. Ct. Rep. 723; Maguire *v.* Maguire, 7 Dana, 181; Clark *v.* Clark, 10 N. H. 380; Cronise *v.* Cronise, 54 Pa. St. 255; Carson *v.* Carson, 40 Miss. 349; Adams *v.* Palmer, 51 Me. 480.

[3] Holmes *v.* Holmes, 4 Barb. 295.

hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."[1] "It is the civil obligation of contracts which [the Constitution] is designed to reach; that is, the obligation which is recognized by, and results from, the law of the State in which it is made. If, therefore, a contract when

[1] McCracken *v.* Hayward, 2 How. 608, 612. "The obligation of a contract . . . is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge. It is, then, the municipal law of the State whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, whenever its performance is sought to be enforced." *Washington*, J., in Ogden *v.* Saunders, 12 Wheat. 213, 257, 259. "As I understand it, the law of the contract forms its obligation." *Thompson*, J., *ibid.* 302. "The obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of, the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term 'obligation.'" *Trimble*, J., *ibid.* 318. And see Van Baumbach *v.* Bade, 9 Wis. 559; Johnson *v.* Higgins, 3 Met. (Ky.) 566; People *v.* Ingersoll, 58 N. Y. 1. Requirement of a license tax for permission to do what a contract with the city gives authority to do, without "let, molestation, or hindrance," is void. Stein *v.* Mobile, 49 Ala. 362, 20 Am. Rep. 283. But licenses in general are subject to the taxing power. Home Ins. Co. *v.* Augusta, 93 U. S. 116; Reed *v.* Beall, 42 Miss. 472; Cooley on Taxation, 386, and cases cited. A law taxing a debt to the debtor and making him pay the tax and deduct the amount from the debt is valid. Lehigh V. R. R. Co. *v.* Com., 129 Pa. St. 429, 18 Atl. 410. So where the debtor, a foreign corporation, has paid for the privilege of being exempt from taxation. New York, L. E. & W. R. R. Co. *v.* Com., 129 Pa. St. 463, 18 Atl. 412. A law giving interest on debts, which bore none when contracted, was held void in Goggans *v.* Turnispeed, 1 S. C. (N. S.) 40, 7 Am. Rep. 23. The legislature cannot authorize the compulsory extinction of ground rents, on payment of a sum in gross. Palairet's Appeal, 67 Pa. St. 479, 5 Am. Rep. 450. A State law, discontinuing a public work, does not impair the obligation of contracts, the contractor having his just claim for damages. Lord *v.* Thomas, 64 N. Y. 107. A law giving an abutter a right to damages when a railroad is laid in the street is valid as to changes thereafter made by a railroad, though a city ordinance had given it the right to use the street. Drady *v.* Des Moines, &c. Co., 57 Iowa, 393, 10 N. W. 754. See also Mulholland *v.* Des Moines, &c. Co., 60 Iowa, 740, 13 N. W. 726. A statute providing for reversion of land condemned for railroad purposes if work on the road has ceased for eight years is valid. The property right does not attach to the land independent of its use for public purposes. Skillman *v.* Chicago, &c. Ry. Co., 78 Iowa, 404, 43 N. W. 275. [Where at the time a contract was made a judgment for damages for breach thereof was renewable indefinitely, a later enacted statute limiting absolutely the life of the judgment is void with regard to this contract. Bettman *v.* Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815, and see also Palmer *v.* Laberee, 23 Wash. 409, 63 Pac. 216. Warrant of attorney to holder of note to enter judgment against maker upon default of payment, and issue execution, etc., valid when note was made cannot be invalidated by subsequent statute. Second Ward Savings Bank *v.* Schranck, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569.]

made is by the law of the place declared to be illegal, or deemed to be a nullity, or a *nude pact*, it has no civil obligation; because the law in such cases forbids its having any binding efficacy or force. It confers no legal right on the one party, and no correspondent legal duty on the other. There is no means allowed or recognized to enforce it; for the maxim is *ex nudo pacto non oritur actio*. But when it does not fall within the predicament of being either illegal or void, its obligatory force is coextensive with its stipulations."[1]

Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude. "There are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds, and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts?"[2] But the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely to the remedy may

[1] Story on Const. § 1380. Slave contracts, which were legal when made, are not rendered invalid by the abolition of slavery; nor can the States make them void by their constitutions, or deny remedies for their enforcement. White *v.* Hart, 13 Wall. 646; Osborn *v.* Nicholson, 13 Wall. 654; Jacoway *v.* Denton, 25 Ark. 641. An act of indemnity held not to relieve a sheriff from his obligation on his official bond to account for moneys which had been paid away under military compulsion. State *v.* Gatzweiler, 49 Mo. 17, 8 Am. Rep. 119. The settled judicial construction of a statute, so far as contract rights are thereunder acquired, is to be deemed a part of the statute itself, and enters into and becomes a part of the obligation of the contract; and no subsequent change in construction can be suffered to defeat or impair the contracts already entered into. Douglass *v.* Pike County, 101 U. S. 677, and cases cited. Levy *v.* Hitsche, 40 La. Ann. 500, 4 So. 472; [Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. Rep. 736.] But such construction is not "settled" by a single decision. McLure *v.* Melton, 24 S. C. 559. The same rule applies to the settled construction of a constitution. Louisiana *v.* Pilsbury, 105 U. S. 278. [An ordinance which in effect denies any contract obligation is not a law impairing the obligation of contract though the obligation does exist. The contract may still be enforced if found to exist notwithstanding such denial. St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 21 Sup. Ct. Rep. 575, aff. 78 Minn. 39, 80 N. W. 774, 877.]

[2] *Washington*, J., in Odgen *v.* Saunders, 12 Wheat. 213, 259. As to the indirect modification of contracts by the operation of police laws, see *ante*, pp. 399, 400, notes; *post*, pp. 831–851.

be altered according to the will of the State, provided the alteration does not impair the obligation of the contract;[1] and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.[2]

Changes in Remedies. It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy.[3]

"Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall

[1] Bronson *v.* Kinzie, 1 How. 311, 316, per *Taney*, Ch. J. [Whether impairing remedy impairs obligation of contract, see note to 26 L. ed. U. S. 132.]

[2] Stocking *v.* Hunt, 3 Denio, 274; Van Baumbach *v.* Bade, 9 Wis. 559; Bronson *v.* Kinzie, 1 How. 316; McCracken *v.* Hayward, 2 How. 608; Butler *v.* Palmer, 1 Hill, 324; Van Rensselaer *v.* Snyder, 9 Barb. 302, and 13 N. Y. 299; Conkey *v.* Hart, 14 N. Y. 22; Guild *v.* Rogers, 8 Barb. 502; Story *v.* Furman, 25 N. Y. 214; Coriell *v.* Ham, 4 Greene (Iowa), 455; Heyward *v.* Judd, 4 Minn. 483; Swift *v.* Fletcher, 6 Minn. 550; Maynes *v.* Moore, 16 Ind. 116; Smith *v.* Packard, 12 Wis. 371; Grosvenor *v.* Chesley, 48 Me. 369; Van Rensselaer *v.* Ball, 19 N. Y. 100; Van Rensselaer *v.* Hays, 19 N. Y. 68; Litchfield *v.* McComber, 42 Barb. 288; Paschal *v.* Perez, 7 Tex. 348; Auld *v.* Butcher, 2 Kan. 135; Kenyon *v.* Stewart, 44 Pa. St. 179; Clark *v.* Martin, 49 Pa. St. 299; Rison *v.* Farr, 24 Ark. 161; Oliver *v.* McClure, 28 Ark. 555; Holland *v.* Dickerson, 41 Iowa, 367; Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82; Wales *v.* Wales, 119 Mass. 89; Sanders *v.* Hillsborough Insurance Co., 44 N. H. 238; Huntzinger *v.* Brock, 3 Grant's Cases, 243; Mechanics', &c. Bank Appeal, 31 Conn. 63; Garland *v.* Brown's Adm'r, 23 Gratt. 173; Chattaroi Ry. Co. *v.* Kinner, 81 Ky. 221. A requirement that before a mandamus shall issue to compel the receipt in accordance with contract of coupons for taxes, the petitioner shall pay the tax, and on proving the genuineness of the coupons shall have it refunded, is valid, though adopted after the formation of the contract. Antoni *v.* Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91; Moore *v.* Greenhow, 114 U. S. 338, 5 Sup. Ct. Rep. 1020. See Rousseau *v.* New Orleans, 35 La. Ann. 557. A statute providing for a review of judgments does not enter into contracts so that it may not be changed. Rupert *v.* Martz, 116 Ind. 72, 18 N. E. 381. See United Cos. *v.* Weldon, 47 N. J. L. 59; State *v.* Slevin, 16 Mo. App, 541. But the collection of a special tax cannot be hindered by requiring, after it is voted, a special collection bond with local sureties: Edwards *v.* Williamson, 70 Ala. 146; or a new and cumbrous mode of collection. Seibert *v.* Lewis, 122 U. S. 284, 7 Sup. Ct. Rep. 1190.

[3] Ogden *v.* Saunders, 12 Wheat. 213; Beers *v.* Haughton, 9 Pet. 329; Tennessee *v.* Sneed, 96 U. S. 69; Bumgardner *v.* Circuit Court, 4 Mo. 50; Tarpley *v.* Hamer, 17 Miss. 310; Danks *v.* Quackenbush, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129; Bronson *v.* Newberry, 2 Doug. (Mich.) 38; Rockwell *v.* Hubbell's Admr's, 2 Doug. (Mich.) 197; Evans *v.* Montgomery, 4 W. & S. 218; Holloway *v.* Sherman, 12 Iowa, 282; Sprecker *v.* Wakeley, 11 Wis. 432; Smith *v.* Packard, 12 Wis. 371; Porter *v.* Mariner, 50 Mo. 364; Morse *v.* Goold, 11 N. Y. 281; Penrose *v.* Erie Canal Co., 56 Pa. St. 46; Smith *v.* Van Gilder, 26 Ark. 527; Coosa River St. B. Co. *v.* Barclay, 30 Ala. 120; Baldwin *v.* Newark, 38 N. J. 158; Moore *v.* State, 43 N. J. 203; Newark Savings Bank *v.* Forman, 33 N. J. Eq. 436; Simpson *v.* Savings Bank, 56 N. H. 466.

direct."[1] To take a strong instance: although the law at the time the contract is made permits the creditor to take the body of his debtor in execution, there can be no doubt of the right to abolish all laws for this purpose, leaving the creditor to his remedy against property alone. "Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair the obligation."[2] Nor is there any constitutional objection to

[1] Sturges *v.* Crowninshield, 4 Wheat. 122, 200, per *Marshall*, Ch. J.; Ward *v.* Farwell, 97 Ill. 593. A statute allowing the defence of want of consideration in a sealed instrument previously given does not violate the obligation of contracts. Williams *v.* Haines, 27 Iowa, 251. See further Parsons *v.* Casey, 28 Iowa, 431; Curtis *v.* Whitney, 13 Wall. 68; Cook *v.* Gregg, 46 N. Y. 439. Right accruing under stipulation in a note to waive process and confess judgment may be taken away. Worsham *v.* Stevens, 66 Tex. 89, 17 S. W. 404. A statutory judgment lien may be taken away. Watson *v.* New York Central R. R. Co., 47 N. Y. 157; Woodbury *v.* Grimes, 1 Col 100. *Contra*, Gunn *v.* Barry, 15 Wall. 610. The law may be so changed that a judgment lien shall not attach before a levy. Moore *v.* Holland, 16 S. C. 15. It may be extended before it has expired. Ellis *v.* Jones, 51 Mo. 180. The mode of perfecting a lien may be changed before it has actually attached. Whitehead *v.* Latham, 83 N. C. 232. The value of a mechanic's lien may not be materially affected by a statute making consummate a previously inchoate right of dower. Buser *v.* Shepard, 107 Ind. 417, 8 N. E. 280. The obligation of the contract is not impaired if a substantial remedy remains. Richmond *v.* Richmond, &c. R. R. Co., 21 Gratt. 611. See Mabry *v.* Baxter, 11 Heisk. 682; Edwards *v.* Kearzey, 96 U. S. 595; Baldwin *v.* Newark, 38 N. J. 158; Augusta Bank *v.* Augusta, 49 Me. 507; Thistle *v.* Frostbury Coal Co, 10 Md. 129. It is competent to provide by law that all mortgages not recorded by a day specified shall be void. Vance *v.* Vance, 32 La. Ann. 136; aff. 108 U. S. 514, 2 Sup. Ct. Rep. 854. See Gilfillan *v.* Union Canal Co., 109 U. S. 401, 3 Sup. Ct. Rep. 304; Gurnee *v.* Speer, 68 Ga. 711.

Where the individual liability of officers or stockholders in a corporation is a part of the contract itself, it cannot be changed or abrogated as to existing debts. Hawthorne *v.* Calef, 2 Wall. 10; Corning *v.* McCullough, 1 N. Y. 47; Story *v.* Furman, 25 N. Y. 214; Norris *v.* Wrenshall, 34 Md. 494; Brown *v.* Hitchcock, 36 Ohio St. 667; Providence Savings Institute *v.* Skating Rink, 52 Mo. 452; St. Louis, &c. Co. *v.* Harbine, 2 Mo. App. 134. But where it is imposed as a penalty for failure to perform some corporate or statutory duty, it stands on the footing of all other penalties, and may be revoked in the discretion of the legislature. Union Iron Co. *v.* Pierce, 4 Biss. 327; Bay City, &c. Co. *v.* Austin, 21 Mich. 390; Breitung *v.* Lindauer, 37 Mich. 217; Gregory *v.* Denver Bank, 3 Col. 332. See Coffin *v.* Rich, 45 Me. 507; Weidenger *v.* Spruance, 101 Ill. 278. [Where formerly when building subject to mechanic's lien stood upon mortgaged premises, it had upon foreclosure of lien to be sold and removed from premises, provision may be made by statute that the court when deeming it to be for best interests of parties may order land and building sold at the same time, giving mortgagee priority of claim upon proceeds of land and lienor priority upon those of buildings. Red Riv. V. Nat. Bk. *v.* Craig, 181 U. S. 548, 21 Sup. Ct. Rep. 703.]

[2] Sturges *v.* Crowninshield, 4 Wheat. 122, per *Marshall*, Ch. J.; Mason *v.* Haile, 12 Wheat. 370; Beers *v.* Haughton, 9 Pet

such a modification of those laws which exempt certain portions of a debtor's property from execution as shall increase the exemptions to any such extent as shall not take away or substantially impair the remedy, nor to the modifications being made applicable to contracts previously entered into. The State "may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing-apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community."[1] But a homestead exemption law, where none existed before, cannot be applied to contracts entered into before its enactment;[2] and in several recent cases the authority to increase exemptions and make them applicable to existing contracts has been altogether denied,[3] on the ground that, while professedly

329; Penniman's Case, 103 U. S. 714; Sommers *v.* Johnson, 4 Vt. 278, 24 Am. Dec. 604; Ware *v.* Miller, 9 S. C. 13; Bronson *v.* Newberry, 2 Doug. (Mich.) 38; Maxey *v.* Loyal, 38 Ga. 531. A special act admitting a party imprisoned on a judgment for tort to take the poor debtor's oath was sustained in Matter of Nichols, 8 R. I. 50. [In Alabama, where imprisonment for fraud is not permitted, a law making receipt of deposits by an insolvent banker a crime was held invalid. Carr *v.* State, 106 Ala. 35, 34 L. R. A. 634, 54 Am. St. 17, 17 So. 350; see note to this case in L. R. A. upon constitutionality of imprisonment for debt. Guest who defrauds inn-keeper may be imprisoned. State *v.* Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656.]

[1] Bronson *v.* Kinzie, 1 How. 311, 315, per *Taney*, Ch. J.; Rockwell *v.* Hubbell's Adm'rs, 2 Doug. (Mich.), 197; Quackenbush *v.* Danks, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129; Morse *v.* Goold, 11 N. Y. 281; Sprecker *v.* Wakeley, 11 Wis. 432; Cusic *v.* Douglas, 3 Kan. 123; Maxey *v.* Loyal, 38 Ga. 531; Hardeman *v.* Downer, 39 Ga. 425; Hill *v.* Kessler, 63 N. C. 437; Farley *v.* Dowe, 45 Ala. 324; Sneider *v.* Heidelberger, 45 Ala. 126; *In re* Kennedy, 2 S. C. 216; Martin *v.* Hughes, 67 N. C. 293; Maull *v.* Vaughn, 45 Ala. 134; Breitung *v.* Lindauer, 37 Mich. 217; Coleman *v.* Ballandi, 22 Minn. 144. [Assignments for purpose of evading exemption laws may be prohibited. Sweeney *v.* Hunter, 145 Pa. 363, 22 Atl. 653, 14 L. R. A. 591.]

[2] Gunn *v.* Barry, 15 Wall. 610; Edwards *v.* Kearzey, 96 U. S. 595; Homestead Cases, 22 Gratt. 266; Lessley *v.* Phipps, 49 Miss. 790; Foster *v.* Byrne, 76 Iowa, 295, 35 N. W. 513, 41 N. W. 22; Squire *v.* Mudgett, 61 N. H. 149. It may, however, be made applicable to previous rights of action for torts. Parker *v.* Savage, 6 Lea, 406; McAfee *v.* Covington, 71 Ga. 272. [Statute providing that general assignment for benefit of creditors shall dissolve all attachments made within ten days prior thereto, is invalid as applied to contracts made when right of attachment was absolute. Peninsular Lead & C. Wks. *v.* Union Oil & P. Co., 100 Wis. 488, 76 N. W. 359, 42 L. R. A. 331, 69 Am. St. 934.]

[3] Johnson *v.* Fletcher, 54 Miss. 628, 28 Am. Rep. 388: Wilson *v.* Brown, 58 Ala. 62, 29 Am. Rep. 727; Duncan *v.* Barnett, 11 S. C. 333, 32 Am. Rep. 476;

operating upon the remedy only, they in effect impair the obligation of the contract.[1]

And laws which change the rules of evidence relate to the remedy only; and while, as we have elsewhere shown, such laws may, on general principles, be applied to existing causes of action, so, too, it is plain that they are not precluded from such application by the constitutional clause we are considering.[2] And it has been held that the legislature may even take away a common-law remedy altogether, without substituting any in its place, if another and efficient remedy remains. Thus, a law abolishing distress for rent has been sustained as applicable to leases in force at its passage;[3] and it was also held that an express stipulation in the lease, that the lessor should have this remedy, would not prevent the legislature from abolishing it, because this was a subject concerning which it was not competent for the parties to contract in such manner as to bind the hands of the State. In the language of the court: "If this is a subject on which parties can contract, and if their contracts when made become by virtue of the Constitution of the United States superior to the power of the legislature, then it follows that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated, if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the Constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious. Every such stipulation is in its

Harris *v.* Austell, 2 Bax. 148; Wright *v.* Straub, 64 Tex. 64; Cochran *v.* Miller, 74 Ala. 50; Cohn *v.* Hoffman, 45 Ark. 376. [*Re* Estate of Heilbron, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602. See also Canadian & A. M. & Trust Co. *v.* Blake, 24 Wash. 102, 63 Pac. 1100.]

[1] "Statutes pertaining to the remedy are merely such as relate to the course and form of proceedings, but do not affect the substance of a judgment when pronounced." Per *Merrick*, Ch. J., in Mortun *v.* Valentine, 15 La. Ann. 150. See Watson *v.* N. Y. Central R. R. Co., 47 N. Y. 157; Edwards *v.* Kearzey, 96 U. S. 595. But if after the debt is contracted and before judgment upon it, the debtor marries, it is held in Tennessee that he is thereby entitled to the exemption in land owned by him before. Dye *v.* Cook, 88 Tenn. 275, 12 S. W. 631.

[2] Neass *v.* Mercer, 15 Barb. 318; Rich *v.* Flanders, 39 N. H. 304; Howard *v.* Moot, 64 N. Y. 262; Henry *v.* Henry, 31 S. C. 1, 9 S. E. 726; *post*, pp. 533–537. On this subject see the discussions in the federal courts. Sturges *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213; Bronson *v.* Kinzie, 1 How. 311; McCracken *v.* Hayward, 2 How. 608; Curtis *v.* Whitney, 13 Wall. 68. An act declaring that no policy of life insurance shall be received in evidence, when the application is referred to in it, unless a copy thereof is attached to it, is valid. New Era Life Ass. *v.* Musser, 120 Pa. St. 384, 14 Atl. 155. But the rule that failure to register evidences of titles shall not render them inadmissible in evidence, cannot be changed by a new constitution. This is put on the ground that the only means to establish and enforce the contract would be thus destroyed. Texas Mex. Ry. Co. *v.* Locke, 74 Tex. 370, 12 S. W. 80.

[3] Van Rensselaer *v.* Snyder, 9 Barb. 302, and 13 N. Y. 299; Guild *v.* Rogers, 8 Barb. 502; Conkey *v.* Hart, 14 N. Y. 22.

own nature conditional upon the lawful continuance of the process. The State is no party to their contract. It is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the supreme power to prescribe; and their continuance is not the subject of contract between private parties. In truth, it is not at all probable that the parties made their agreement with reference to the possible abolition of distress for rent. The first clause of this special provision is, that the lessor may distrain, sue, re-enter, or resort to any other legal remedy, and the second is, that in cases of distress the lessee waives the exemption of certain property from the process, which by law was exempted. This waiver of exemption was undoubtedly the substantial thing which the parties had in view; but yet perhaps their language cannot be confined to this object, and it may therefore be proper to consider the contract as if it had been their clear purpose to preserve their legal remedy, even if the legislature should think fit to abolish it. In that aspect of it the contract was a subject over which they had no control."[1]

But a law which deprives a party of all legal remedy must necessarily be void. "If the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the Constitution."[2] This has been held in regard to those cases in which it was sought to deprive certain classes of persons of the right to maintain suits because of their having participated in rebellion against the gov-

[1] Conkey *v.* Hart, 14 N. Y. 22, 30; citing Handy *v.* Chatfield, 23 Wend. 35; Mason *v.* Haile, 12 Wheat. 370; Stocking *v.* Hunt, 3 Denio, 274; and Van Rensselaer *v.* Snyder, 13 N. Y. 299. See Briscoe *v.* Anketell, 28 Miss. 361.

[2] Call *v.* Hagger, 8 Mass. 430. See Osborn *v.* Nicholson, 13 Wall. 662; U. S. *v.* Conway, Hempst. 313; Johnson *v.* Bond, Hempst. 533; West *v.* Sansom, 44 Ga. 295. See Griffin *v.* Wilcox, 21 Ind. 370; Penrose *v.* Erie Canal Co., 56 Pa. St. 46; Thompson *v.* Commonwealth, 81 Pa. St. 314; *post*, p. 517. An act withdrawing all the property of a debtor from the operation of legal process, leaving only a barren right to sue, is void. State *v.* Bank of South Carolina, 1 S. C. 63. As the States are not suable except at their own option, the laws which they may pass for the purpose they may repeal at discretion. Railroad Co. *v.* Tennessee, 101 U. S. 337; Railroad Co. *v.* Alabama, 101 U. S. 832; State *v.* Bank, 3 Bax. 395; and this even after suit has been instituted. Horne *v.* State, 84 N. C. 362; Railroad Co. *v.* Tennessee, *supra*. [The more so where the judgment of the court is only recommendatory. Baltzer *v.* North Carolina, 161 U. S. 240, 16 Sup. Ct. Rep. 500.]

ernment.[1] And where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void, because a substantial denial of right.[2] But a judgment for a tort is not a contract, since it is not based upon the assent of parties.[3]

It has also been held where a statute dividing a town and incorporating a new one enacted that the new town should pay its proportion towards the support of paupers then constituting a charge against the old town, that a subsequent statute exonerating the new town from this liability was void, as impairing the contract created by the first-mentioned statute;[4] but there are cases which have reached a different conclusion, reasoning from the general and almost unlimited control which the State retains over its municipalities.[5] In any case the lawful repeal of a statute cannot constitutionally be made to destroy contracts which have been entered into under it; these being legal when made, they remain valid notwithstanding the repeal.[6]

[1] Rison *v.* Farr, 24 Ark. 611; McFarland *v.* Butler, 8 Minn. 116; Jackson *v.* Butler, 8 Minn. 117. But there is nothing to preclude the people of a State, in an amendment to their constitution, taking away rights of action, or other rights, so long as they abstain from impairing the obligation of contracts, and from imposing punishments. The power to do so has been exercised with a view to the quieting of controversies and the restoration of domestic peace after the late civil war. Thus, in Missouri and some other States, all rights of action for anything done by the State or Federal military authorities during the war were taken away by constitutional provision; and the authority to do this was fully supported. Drehman *v.* Strifel, 41 Mo. 184, in error, 8 Wall. 595. And see Hess *v.* Johnson, 3 W. Va. 645. A remedy also may be denied to a party until he has performed his duty to the State in respect to the demand in suit; *e. g.* paid the tax upon the debt sued for. Walker *v.* Whitehead, 43 Ga. 538; Garrett *v.* Cordell, 43 Ga. 366; Welborn *v.* Akin, 44 Ga. 420. But this is denied as regards contracts entered into before the passage of the law. Walker *v.* Whitehead, 16 Wall. 314.

[2] Oatman *v.* Bond, 15 Wis. 20. As to control of remedies, see *post*, p. 515.

[3] Louisiana *v.* New Orleans, 109 U. S. 285, 3 Sup. Ct. Rep. 211; Freeland *v.* Williams, 131 U. S. 405, 9 Sup. Ct. Rep. 763; Peerce *v.* Kitzmiller, 19 W. Va. 564. In the former case a judgment for injury done by a mob became uncollectible by the diminution by legislation of the taxing power of the city. In the two latter, recovery for a tort committed as an act of war was forbidden after judgment by constitutional amendment. Both the enactment and the amendment were upheld. See also, State *v.* New Orleans, 38 La. Ann. 110, and cases *post*, p. 517, note 3.

[4] Bowdoinham *v.* Richmond, 6 Me. 112.

[5] See *ante*, pp. 268, 269, and cases cited in notes.

[6] Tuolumne Redemption Co. *v.* Sedgwick, 15 Cal. 515; McCauley *v.* Brooks, 16 Cal. 11; Commonwealth *v.* New Bedford Bridge, 2 Gray, 339; State *v.* Phalen, 3 Harr. 441; State *v.* Hawthorn, 9 Mo. 389.

So where, by its terms, a contract provides for the payment of money by one party to another, and, by the law then in force, property would be liable to be seized, and sold on execution to the highest bidder, to satisfy any judgment recovered on such contract, a subsequent law, forbidding property from being sold on execution for less than two-thirds the valuation made by appraisers, pursuant to the directions contained in the law, though pr[illegible]essing to act only on the remedy, amounts to a denial or obstruction of the rights accruing by the contract, and is directly obnoxious to the prohibition of the Constitution.[1] So a law which takes away from mortgagees the right to possession under their mortgages until after foreclosure, is void, because depriving them of the right to the rents and profits, which was a valuable portion of the right secured by the contract. "By this act the mortgagee is required to incur the additional expense of a foreclosure, before obtaining possession, and is deprived of the right to add to his security, by the perception of the rents and profits of the premises, during the time required to accomplish this and the time of redemption, and during that time the rents and profits are given to another, who may or may not appropriate them to the payment of the debt, as he chooses, and the mortgagee in the mean time is subjected to the risk, often considerable, of the depreciation in the value of the security."[2] So a law is void which extends the

[1] McCracken *v.* Hayward, 2 How. 608; Willard *v.* Longstreet, 2 Doug. (Mich.) 172; Rawley *v.* Hooker, 21 Ind. 144. So a law which, as to existing mortgages foreclosable by sale, prohibits the sale for less than half the appraised value of the land, is void for the same reason. Gantly's [illegible]see *v.* Ewing, 3 How. 707; Bronson [illegible] Kinzie, 1 How. 311. See to like effect, Robards *v.* Brown, 40 Ark. 423; Collins *v.* Collins, 79 Ky. 88. So one which takes away the power of sale. O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458. And a law authorizing property to be turned out in satisfaction of a contract is void. Abercrombie *v.* Baxter, 44 Ga. 36. The "scaling laws," so called, under which contracts made while Confederate notes were the only currency, are allowed to be satisfied on payment of a sum equal to what the sum called for by them in Confederate notes was worth when they were made, have been sustained, but this is on the assumption that the contracts are enforced as near as possible according to the actual intent. Harmon *v.* Wallace, 2 S. C. 208; Robeson *v.* Brown, 63 N. C. 554; Hilliard *v.* Moore, 65 N. C. 540; Pharis *v.* Dice, 21 Gratt. 303; Thorington *v.* Smith, 8 Wall. 1. A statute is bad which permits in such case a recovery of what a jury may think is the fair value of the property sold. Effinger *v.* Kenney, 115 U. S. 566, 6 Sup. Ct. Rep. 179.

[2] Mundy *v.* Monroe, 1 Mich. 68, 76; Blackwood *v.* Vanvleet, 11 Mich. 252. Compare Dikeman *v.* Dikeman, 11 Paige, 484; James *v.* Stull, 9 Barb. 482; Cook *v.* Gray, 2 Houst. 455. In the last case it was held that a statute shortening the notice to be given on foreclosure of a mortgage under the power of sale, from twenty-four to twelve weeks, was valid as affecting the remedy only; and that a stipulation in a mortgage that on default being made in payment the mortgagee might sell "according to law," meant according to the law as it should be when sale was made. But see Ashuelot R. R. Co. *v.* Eliot, 52 N. H. 387, and what is said on the general subject in Cochran *v.* Darcy, 5 Rich. 125. A redemption law cannot take from the mortgagee the right

time for the redemption of lands sold on execution, or for delinquent taxes, after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is, that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note.[1] So a law which shortens the time for redemption from a mortgage, after a foreclosure sale has taken place, is void; the rights of the party being fixed by the foreclosure and the law then in force, and the mortgagor being entitled, under the law, to possession of the land until the time for redemption expires.[2] And where by statute a

to recover rents from the owner in possession after foreclosure sale. Travellers Ins. Co. *v.* Brouse, 83 Ind. 62. But the debtor's tenant in possession may be made primarily liable to the mortgagee instead of to the debtor. Edwards *v.* Johnson, 105 Ind. 594, 5 N. E. 716. In Berthold *v.* Fox, 13 Minn. 501, it was decided that in the case of a mortgage given while the law allowed the mortgagee possession during the period allowed for redemption after foreclosure, such law might be so changed as to take away this right. But this seems doubtful. In Baldwin *v.* Flagg, 43 N. J. 495, it was held that where bond and mortgage had been given, it was not competent to provide by subsequent legislation that the mortgage should be first foreclosed, and resort to the bond only had in case of deficiency. Nor that the foreclosure sale should be opened if a judgment is had upon the bond. Coddington *v.* Bispham, 36 N. J. Eq. 574. See Morris *v.* Carter, 46 N. J. L. 260; Toffey *v.* Atcheson, 42 N. J. Eq. 182, 6 Atl. 885. A stipulation in a chattel mortgage that the mortgagee may take possession whenever he deems himself insecure, is not to be impaired by subsequent legislation forbidding him to do so without just cause. Boice *v.* Boice, 27 Minn. 371, 7 N. W. 687. Reducing the rate of interest payable on redemption to the foreclosure purchaser violates no contract with the mortgagee. Conn. Mut. Ins. Co. *v.* Cushman, 108 U. S. 51, 2 Sup. Ct. Rep. 236.

[1] Robinson *v.* Howe, 13 Wis. 341; Dikeman *v.* Dikeman, 11 Paige, 484; Goenen *v.* Schroeder, 8 Minn. 387; January *v.* January, 7 T. B. Monr. 542, 18 Am. Dec. 211; Greenfield *v.* Dorris, 1 Sneed, 550. [Barnitz *v.* Beverly, 163 U. S. 118, 16 Sup. Ct. Rep. 1042, rev. 55 Kan. 466, 42 Pac. 725, 31 L. R. A. 74.] But see Stone *v.* Basset, 4 Minn. 298; Heyward *v.* Judd, 4 Minn. 483; Freeborn *v.* Pettibone, 5 Minn. 277; Davis *v.* Rupe, 114 Ind. 588, 17 N. E. 163. A provision that the right to redeem from a pre-existing mortgage shall not expire if a creditor of the mortgagor comes into equity and gets a decree to enable him to fulfil the conditions of the mortgage and hold the property, is void as against the mortgagee. Phinney *v.* Phinney, 81 Me. 450. So, on the other hand, a law is void which takes away an existing right of a creditor of the mortgagor to redeem from the sale. O'Brien *v.* Krenz, 36 Minn. 136, 30 N. W. 458.

[2] Cargill *v.* Power, 1 Mich. 369. The contrary ruling was made in Butler *v.* Palmer, 1 Hill, 324, by analogy to the Statute of Limitations. The statute, it was said, was no more in effect than saying: "Unless you redeem within the shorter time prescribed, you shall have no action for a recovery of the land, nor shall your defence against an action be allowed, provided you get possession." And in Robinson *v.* Howe, 13 Wis. 341, 346, the court, speaking of a similar right in a party, say: "So far as his right of redemption was concerned, it was not derived from any contract, but was given by the law only; and the time within which he might exercise it might be shortened by the legislature, provided a reasonable time was left in which to exercise it, without impairing the obligation of any contract. And see Smith *v.* Pack-

purchaser of lands from the State had the right, upon the forfeiture of his contract of purchase for the non-payment of the sum due upon it, to revive it at any time before a public sale of the lands, by the payment of all sums due upon the contract, with a penalty of five per cent, it was held that this right could not be taken away by a subsequent change in the law which subjected the forfeited lands to private entry and sale.[1] And a statute which authorizes stay of execution, for an unreasonable or indefinite period, on judgments rendered on pre-existing contracts, is void, as postponing payment, and taking away all remedy during the continuance of the stay.[2] And a law is void on this ground which declares a forfeiture of the charter of a corporation for acts or omissions which constituted no cause of forfeiture at the time they occurred.[3] And it has been held that where a statute au-

ard, 12 Wis. 371, to the same effect. An increase of the rate of interest to be paid on redemption of a pre-existing mortgage is bad. Hillebert *v.* Porter, 28 Minn. 496, 11 N. W. 84.

[1] State *v.* Commissioners of School and University Lands, 4 Wis. 414. A right to reimbursement if a tax purchase is set aside cannot by subsequent legislation be taken away from the purchaser of a tax title. State *v.* Foley, 30 Minn. 350, 15 N. W. 375.

[2] Chadwick *v.* Moore, 8 W. & S. 49; Bunn *v.* Gorgas, 41 Pa. St. 441; Townsend *v.* Townsend, Peck, 1, 14 Am. Dec. 722; Stevens *v.* Andrews, 31 Mo. 205. Hasbrouck *v.* Shipman, 16 Wis. 296; Jacobs *v.* Smallwood, 63 N. C. 112; Webster *v.* Rose, 6 Heisk. 93; Edwards *v.* Kearzey, 96 U. S. 595. In Breitenbach *v.* Bush, 44 Pa. St. 313, and Coxe *v.* Martin, 44 Pa. St. 322, it was held that an act staying all civil process against volunteers who had enlisted in the national service for three years or during the war was valid, — "during the war" being construed to mean unless the war should sooner terminate. See also State *v.* Carew, 13 Rich. 498. A general law that all suits pending should be continued until peace between the Confederate States and the United States, was held void in Burt *v.* Williams, 24 Ark. 94. See also Taylor *v.* Stearns, 18 Gratt. 244; Hudspeth *v.* Davis, 41 Ala. 389; Aycock *v.* Martin, 37 Ga. 124; Coffman *v.* Bank of Kentucky, 40 Miss. 29; Jacobs *v.* Smallwood, 63 N. C. 112; Cutts *v.* Hardee, 38 Ga. 350; Sequestration Cases, 30 Tex. 688. A law permitting a year's stay upon judgments where security is given was held valid in Farnsworth *v.* Vance, 2 Cold. 108; but this decision was overruled in Webster *v.* Rose, 6 Heisk. 93, 19 Am. Rep. 583. A statute was held void which stayed all proceedings against volunteers who had enlisted "during the war," this period being indefinite. Clark *v.* Martin, 3 Grant's Cas. 393. In Johnson *v.* Higgins, 3 Met. (Ky.) 566, it was held that the act of the Kentucky legislature of May 24, 1861, which forbade the rendition in all the courts of the State, of any judgment from date till January 1st, 1862, was valid. It related, it was said, not to the remedy for enforcing a contract, but to the courts which administer the remedy; and those courts, in a legal sense, constitute no part of the remedy. A law exempting soldiers from civil process until thirty days after their discharge from military service was held valid as to all contracts subsequently entered into, in Burns *v.* Crawford, 34 Mo. 330. And see McCormick *v.* Rusch, 15 Iowa, 127. A statute suspending limitation laws during the existence of civil war, and until the State was restored to her proper relations to the Union, was sustained in Bender *v.* Crawford, 33 Tex. 745. Compare Bradford *v.* Shine, 13 Fla. 393.

[3] People *v.* Jackson & Michigan Plank Road Co., 9 Mich. 285, per *Christiancy*, J.; State *v.* Tombeckbee Bank, 2 Stew. 30. See Ireland *v.* Turnpike Co., 19 Ohio St 369.

thorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, and persons bought and paid value for bonds issued accordingly, this power of taxation is part of the contract, and cannot be withdrawn until the bonds are satisfied; that an attempt to repeal or restrict it by statute is void; and that unless the corporation imposes and collects the tax in all respects as if the subsequent statute had not been passed, it will be compelled to do so by *mandamus*.[1] And it has also been held that a statute repealing a former statute, which made the stock of stockholders in a corporation liable for its debts, was, in respect to creditors existing at the time of the repeal, a law impairing the obligation of contracts.[2] In each of these cases it is evident that substantial rights were affected; and so far as the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was assured to him by the law in force when the contract was made. In Pennsylvania it has been held that a statute authorizing a stay of execution on contracts in which the debtor had waived the right was unconstitutional;[3] but it seems to us that an agreement to waive a legal privilege which the law gives as a matter of State policy cannot be binding upon a party, unless the law itself provides for the waiver.[4]

Where, however, by the operation of existing laws, a contract cannot be enforced without some new action of a party to fix his liability, it is as competent to prescribe by statute the requisites to the legal validity of such action as it would be in any case to prescribe the legal requisites of a contract to be thereafter made. Thus, though a verbal promise is sufficient to revive a debt barred by the Statute of Limitations or by bankruptcy, yet this rule may be changed by a statute making all such future promises void un-

[1] Von Hoffman *v.* Quincy, 4 Wall. 535; Murray *v.* Charleston, 96 U. S. 432; Loumand *v.* New Orleans, 102 U. S. 203; Wolff *v.* New Orleans, 103 U. S. 358; Nelson *v.* St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. Rep. 648; Beckwith *v.* Racine, 7 Biss. 142. The liability cannot be escaped by turning a city into a mere taxing district. Mobile *v.* Watson, 116 U. S. 289, 6 Sup. Ct. Rep. 398; O'Connor *v.* Memphis, 6 Lea, 730. See also Soutter *v.* Madison, 15 Wis. 30; Smith *v.* Appleton, 19 Wis. 468; Railway *v.* Munday, 44 N. J. L. 395; Seibert *v.* Lewis, 122 U. S. 284, 7 Sup. Ct. Rep. 1190. For a similar principle, see Sala *v.* New Orleans, 2 Woods, 188.

[2] Hawthorne *v.* Calef, 2 Wall. 10. [Upon individual liability of stockholders for debts of corporation, see note to 40 L. ed. U. S. 751.]

[3] Billmeyer *v.* Evans, 40 Pa. St. 824; Lewis *v.* Lewis, 47 Pa. St. 127. See Laucks' Appeal, 24 Pa. St. 426; Case *v.* Dunmore, 23 Pa. St. 93; Bowman *v.* Smiley, 31 Pa. St. 225.

[4] See Conkey *v.* Hart, 14 N. Y. 22; Handy *v.* Chatfield, 23 Wend. 35.

less in writing.[1] It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it.[2] And for similar reasons the obligation of contracts is not impaired by continuing the charter of a corporation for a certain period, in order to the proper closing of its business.[3]

State Insolvent Laws. In this connection some notice may seem requisite of the power of the States to pass insolvent laws, and the classes of contracts to which they may be made to apply. As this whole subject has been gone over very often and very fully by the Supreme Court of the United States, and the important questions seem at last to be finally set at rest, and moreover as it is comparatively unimportant whenever a federal bankrupt law exists, we content ourselves with giving what we understand to be the conclusions of the court.

1. The several States have power to legislate on the subject of bankrupt and insolvent laws, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy, which authority, when exercised, is paramount, (*a*) and State enactments in conflict with those of Congress upon the subject must give way.[4]

[1] Joy *v.* Thompson, 1 Doug. (Mich.) 373; Kingley *v.* Cousins, 47 Me. 91.

[2] As where the defence of usury to a contract is taken away by statute. Welsh *v.* Wadsworth, 30 Conn. 149; Curtis *v.* Leavitt, 15 N. Y. 9. And see Wood *v.* Kennedy, 19 Ind. 68, and the cases cited, *post*, pp. 535–537. [But the validation, of an invalid contract cannot be made to relate back so as to take precedence of a lien which attached after the invalid contract was created, but before it was validated. Merchants' Bank of Danville *v.* Ballou, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306.]

[3] Foster *v.* Essex Bank, 16 Mass. 245. [Upon the protection of contracts by the constitution, see article in 36 Am. L. Rev. 70.]

[4] Sturges *v.* Crowninshield, 4 Wheat. 122; Farmers' & Mechanics' Bank *v.* Smith, 6 Wheat. 131; Ogden *v.* Saunders, 12 Wheat. 213; Baldwin *v.* Hale, 1 Wall. 223; [Brown *v.* Smart, 145 U. S. 454, 12 Sup. Ct. Rep. 958, aff. 69 Md. 320, 17 Atl. 1101; Ketcham *v.* McNamara, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641.]

(*a*) ["After an adjudication in bankruptcy, an action in replevin in a State court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun;" and if under such attempted action in replevin, any such property is seized, "the district court sitting in bankruptcy" has "jurisdiction by summary proceedings to compel the return of the property seized." Per *Gray*, J., in White *v.* Schloerb, 178 U. S. 542, 20 Sup. Ct. Rep. 1007. Bankruptcy law merely *suspends* State insolvency laws, so that when it is repealed they revive. Butler *v.* Gorely, 146

2. Such State laws, however, discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debts, cannot constitutionally be made to apply to contracts entered into before they were passed, but they may be made applicable to such future contracts as can be considered as having been made in reference to them.[1]

3. Contracts made within a State where an insolvent law exists, between citizens of that State, are to be considered as made in reference to the law, and are subject to its provisions. But the law cannot apply to a contract made in one State between a citizen thereof and a citizen of another State,[2] nor to contracts not made within the State, even though made between citizens of the same State,[3] except, perhaps, where they are citizens of the State passing the law.[4] And where the contract is made between a citizen of one State and a citizen of another, the circumstance that the contract is made payable in the State where the insolvent law exists will not render such contract subject to be discharged under the law.[5] If, however, the creditor in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the Constitution from the reach of the law.[6]

The New Amendments to the Federal Constitution. New provisions for personal liberty, and for the protection of the right to life, liberty, and property, are made by the thirteenth and fourteenth amendments to the Constitution of the United States; and

[1] Ogden *v.* Saunders, 12 Wheat. 213; [Brown *v.* Smart, 145 U. S. 454, 12 Sup. Ct. Rep. 958, aff. 69 Md. 320, 17 Atl. 1101; Hans *v.* Louisiana, 134 U. S. 1, 10 Sup. Ct. Rep. 504.]

[2] Ogden *v.* Saunders, 12 Wheat. 213; Springer *v.* Foster, 2 Story, 383; Boyle *v.* Zacharie, 6 Pet. 348; Woodhull *v.* Wagner, Baldw. 296; Suydam *v.* Broadnax, 14 Pet. 67; Cook *v.* Moffat, 5 How. 295; Baldwin *v.* Hale, 1 Wall. 223; [Hammond Beef & P. Co. *v.* Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528.]

[3] McMillan *v.* McNeill, 4 Wheat. 209.

[4] Marsh *v.* Putnam, 3 Gray, 551.

[5] Baldwin *v.* Hale, 1 Wall. 223; Baldwin *v.* Bank of Newbury, 1 Wall. 234; Gilman *v.* Lockwood, 4 Wall. 409. See also Norris *v.* Atkinson, 64 N. H. 87, 5 Atl. 710.

[6] Clay *v.* Smith, 3 Pet. 411; Baldwin *v.* Hale, 1 Wall. 223; Gilman *v.* Lockwood, 4 Wall. 409; Perley *v.* Mason, 64 N. H. 6, 3 Atl. 629.

U. S. 303, 13 Sup. Ct. Rep. 81, aff. 147 Mass. 8, 16 N. E. 734. And upon effect of removal of a Federal bar to operation of a State statute, see Blair *v.* Ostrander, 109 Iowa, 204, 80 N. W. 330, 47 L. R. A. 469. That supersession of State insolvency law may be only partial, see State *v.* Superior Court for King Co., 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, and upon relation of bankruptcy law to State laws upon insolvency and assignments, see note to this case in L. R. A.]

these will be referred to in the two succeeding chapters.[1] The most important clause in the fourteenth amendment is that part of section one which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[2] This provision very properly puts an end to any question of the title of the freedmen and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions; though, as a principle of State constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in that court on appeal.[3]

[1] See *ante*, pp. 14–17; *post*, pp. 423, 567.

[2] The complete text of this section is as follows: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State 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."

[3] See *ante*, pp. 24–36. Notwithstanding this section, the protection of all citizens in their privileges and immunities, and in their right to an impartial administration of the laws, is just as much the business of the individual State as it was before. This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall "abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws;" and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual. This amendment has received a very full examination at the hands of the Supreme Court of the United States in the Slaughter-House Case, 16 Wall. 36, and in United States *v.* Cruikshank, 92 U. S. 542, with the conclusion above stated. See Story on Const. (4th ed.) App. to Vol. II.

CHAPTER X.

OF THE CONSTITUTIONAL PROTECTIONS TO PERSONAL LIBERTY.

ALTHOUGH the people from whom we derive our laws now possess a larger share of civil and political liberty than any other in Europe, there was a period in their history when a considerable proportion were in a condition of servitude. Of the servile classes one portion were *villeins regardant*, or serfs attached to the soil, and transferable with it, but not otherwise,[1] while the other portion were *villeins in gross*, whose condition resembled that of the slaves known to modern law in America.[2] How these people became reduced to this unhappy condition, it may not be possible to determine at this distance of time with entire accuracy;[3] but in regard to the first class, we may suppose that when a conqueror seized the territory upon which he found them living, he seized also the people as a part of the lawful prize of war, granting them life on condition of their cultivating the soil for his use; and that the second were often persons whose lives had been spared on the field of battle, and whose ownership, in accordance with the custom of barbarous times, would pertain to the persons of their captors. Many other causes also contributed to reduce persons to this condition.[4] At the beginning of the reign of John it has been estimated that one-half of the Anglo-Saxons were in a condition of servitude, and if we go back to the time of

[1] Litt. § 181; 2 Bl. Com. 92. "They originally held lands of their lords on condition of agricultural service, which in a certain sense was servile, but in reality was not so, as the actual work was done by the theows, or slaves. . . . They did not pay rent, and were not removable at pleasure; they went with the land and rendered services, uncertain in their nature, and therefore opposed to rent. They were the originals of copyholders." Note to Reeves, History of English Law, Pt. I. c. 1.

[2] Litt. § 181; 2 Bl. Com. 92. "These are the persons who are described by Sir William Temple as 'a sort of people who were in a condition of downright servitude, used and employed in the most servile works; and belonging, they and their children and effects, to the lord of the soil, like the rest of the stock or cattle upon it.'" Reeves, History of English Law, Pt. I. c. 1.

[3] As to slavery among the Anglo-Saxons, see Stubbs, Const. Hist. of England, ch. V.

[4] For a view of the condition of the servile classes, see Wright, Domestic Manners and Sentiments, 101, 102; Crabbe, History of English Law (ed. of 1829), 8, 78, 365; Hallam, Middle Ages, Pt. II. c. 2; Vaughan, Revolutions in English History, Book 2, c. 8; Broom, Const. Law, 74 *et seq.*

the Conquest, we find a still larger proportion of the people held as the property of their lords, and incapable of acquiring and holding any property as their own.[1] Their treatment was such as might have been expected from masters trained to war and violence, accustomed to think lightly of human life and human suffering, and who knew little of and cared less for any doctrine of human rights which embraced within its scope others besides the governing classes.

It would be idle to attempt to follow the imperceptible steps by which involuntary servitude at length came to an end in England. It was never abolished by statute,[2] and the time when slavery ceased altogether cannot be accurately determined.[3] The causes were at work silently for centuries; the historian did not at the time note them; the statesman did not observe them; they were not the subject of agitation or controversy; but the time arrived when the philanthropist could examine the laws and institutions of his country, and declare that slavery had ceased to be recognized, though at what precise point in legal history the condition became unlawful he might not with certainty specify. Among the causes of its abrogation he might be able to enumerate: 1. That the slaves were of the same race with their masters. There was therefore not only an absence of that antipathy which is often found existing when the ruling and the ruled are of different races, and especially of different color, but instead thereof an active sympathy might often be supposed to exist, which would lead to frequent emancipations. 2. The common law presumed every man to be free until proved to be otherwise; and this pre-

[1] Hume, History of England, Vol. I. App. 1.

[2] Barrington on the Statutes (3d ed.), 272.

[3] Mr. Hargrave says, at the commencement of the seventeenth century. 20 State Trials, 40; May, Const. Hist. c. 11. And Mr. Barrington (on the Statutes 3d ed. p. 278) cites from Rymer a commission from Queen Elizabeth in the year 1574, directed to Lord Burghley and Sir Walter Mildmay, for inquiring into the lands, tenements, and other goods of all her bondmen and bondwomen in the counties of Cornwall, Devonshire, Somerset, and Gloucester, such as were by blood in a slavish condition, by being born in any of her manors, and to compound with any or all of such bondmen or bondwomen for their manumission and freedom. And this commission, he says, in connection with other circumstances, explains why we hear no more of this kind of servitude. And see Crabbe, History of English Law (ed. of 1829), 574. This author says that villeinage had disappeared by the time of Charles II. Hurd says in 1661. Law of Freedom and Bondage, Vol. I. p. 136. And see 2 Bl. Com. 96. Lord Campbell's Lives of the Chief Justices, c. 5. Macaulay says there were traces of slavery under the Stuarts. History of England, c. 1. Hume (History of England, c. 23) thinks there was no law recognizing it after the time of Henry VII., and that it had ceased before the death of Elizabeth. Froude (History of England, c. 1) says in the reign of Henry VIII. it had practically ceased. Mr. Christian says the last claim of villeinage which we find recorded in our courts was in 15th James I. Noy, 27; 11 State Trials, 342. Note to Blackstone, Book 2, p. 96.

sumption, when the slave was of the same race as his master, and had no natural badge of servitude, must often have rendered it extremely difficult to recover the fugitive who denied his thraldom. 3. A residence for a year and a day in a corporate town rendered the villein legally free;[1] so that to him the towns constituted cities of refuge. 4. The lord treating him as a freeman — as by receiving homage from him as tenant, or entering into a contract with him under seal — thereby emancipated him, by recognizing in him a capacity to perform those acts which only a freeman could perform. 5. Even the lax morals of the times were favorable to liberty, since the condition of the child followed that of the father;[2] and in law the illegitimate child was *nullius filius*, — had no father. And, 6. The influence of the priesthood was generally against slavery, and must often have shielded the fugitive and influenced emancipations by appeals to the conscience, especially when the master was near the close of life and the conscience naturally most sensitive.[3] And with all these influences there should be noted the further circumstance, that a class of freemen was always near to the slaves in condition and suffering, with whom they were in association, and between whom and themselves there were frequent intermarriages,[4] and that from these to the highest order in the State there were successive grades; the children of the highest gradually finding their way into those below them, and ways being open by which the children of the lowest might advance themselves, by intelligence, energy, or thrift, through the successive grades above them, until the descendants of dukes and earls were found cultivating the

[1] Crabbe, History of English Law (ed. of 1829), 79. But this was only as to third persons. The claim of the lord might be made within three years. Ibid. And see Mackintosh, History of England, c. 4.

[2] Barrington on Statutes (3d ed.), 276, note; 2 Bl. Com. 93. But in the very quaint account of "Villeinage and Nieffty," in Mirror of Justices, § 28, it is said, among other things, that "those are villeins who are begotten of a freeman and a nief, and born out of matrimony." The ancient rule appears to have been that the condition of the child followed that of the mother; but this was changed in the time of Henry I. Crabbe, History of English Law (ed. of 1829), 78; Hallam, Middle Ages, Pt. II. c. 2.

[3] In 1514, Henry VIII. manumitted two of his villeins in the following words: "Whereas God created all men free, but afterwards the laws and customs of nations subjected some under the yoke of servitude, we think it *pious and meritorious with God* to manumit Henry Knight, a tailor, and John Herle, a husbandman, our natives, as being born within the manor of Stoke Clymereysland, in our county of Cornwall, together with all their issue born or to be born, and all their goods, lands, and chattels acquired, so as the said persons and their issue shall from henceforth by us be free and of free condition." Barrington on Statutes (3d ed.), 275. See Mackintosh, History of England, c. 4. Compare this with a deed of manumission in Massachusetts, to be found in Sumner's Speeches, II. 289; Memoir of Chief Justice Parsons, by his son, 176, note.

[4] Wright, Domestic Manners and Sentiments, 112.

soil, and the man of obscure descent winning a place among the aristocracy of the realm, through his successful exertions at the bar or his services to the State. Inevitably these influences must at length overthrow the slavery of white men which existed in England,[1] and no other ever became established within the realm. Slavery was permitted, and indeed fostered, in the colonies; in part because a profit was made of the trade, and in part also because it was supposed that the peculiar products of some of them could not be profitably cultivated with free labor;[2] and at times masters brought their slaves with them to England and removed them again without question, until in Sommersett's Case, in 1771, it was ruled by Lord *Mansfield* that slavery was repugnant to the common law, and to bring a slave into England was to emancipate him.[3]

The same opinion had been previously expressed by Lord *Holt* but without authoritative decision.[4]

In Scotland a condition of servitude continued to a later period. The holding of negroes in slavery was indeed held to be illegal soon after the Sommersett Case; but the salters and colliers did not acquire their freedom until 1799, nor without an act of Par-

[1] Macaulay (History of England, c. 1) says the chief instrument of emancipation was the Christian religion. Mackintosh (History of England, c. 4), also, attributes to the priesthood great influence in this reform, not only by their direct appeals to the conscience, but by the judges, who were ecclesiastics, multiplying presumptions and rules of evidence consonant to the equal and humane spirit which breathes throughout the morality of the Gospel. Hume (History of England, c. 23) seems to think emancipation was brought about by selfish considerations on the part of the barons, and from a conviction that the returns from their lands would be increased by changing villeinage into socage tenures.

[2] Robertson, America, Book 9; Bancroft, United States, Vol. I. c. 5.

[3] Lofft, 18; 20 Howell State Trials, 1; Life of Granville Sharp, by Hoare, c. 4; Hurd, Law of Freedom and Bondage, Vol. I. p. 189. The judgment of Lord Mansfield is said to have been delivered with evident reluctance. 20 State Trials, 79; per Lord *Stowell*, 2 Hagg. Adm. 105, 110; Broom, Const. Law, 105. Of the practice prior to the decision Lord *Stowell* said: "The personal traffic in slaves resident in England had been as public and as authorized in London as in any of our West India Islands. They were sold on the Exchange, and other places of public resort, by parties themselves resident in London, and with as little reserve as they would have been in any of our West India possessions. Such a state of things continued without impeachment from a very early period up to nearly the end of the last century." The Slave Grace, 2 Hagg. Adm. 105. In this case it was decided that if a slave, carried by his master into a free country, voluntarily returned with him to a country where slavery was allowed by the local law, the *status* of slave would still attach to him, and the master's right to his service be resumed. Mr. Broom collects the authorities on this subject in general, in the notes to Sommersett's Case, Const. Law, 105.

[4] "As soon as a slave comes into England, he becomes free; one may be a villein in England, but not a slave." *Holt*, Ch. J., in Smith *v.* Brown, 2 Salk. 666. See also Smith *v.* Gould, Ld. Raym 1274; s. c. Salk. 666. There is a learned note in Quincy's Rep. 94, collecting the English authorities on the subject of slavery.

liament.[1] A previous statute for their enfranchisement through judicial proceedings had proved ineffectual.[2]

The history of slavery in this country pertains rather to general history than to a work upon State constitutional law. Throughout the land involuntary servitude is abolished by constitutional amendment, except as it may be imposed in the punishment of crime.[3] Nor do we suppose the exception will permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities, in the manner heretofore customary. The laws of the several States allow the letting of the services of the convicts, either singly or in numbers, to contractors who are to employ them in mechanical trades in or near the prison, and under the surveillance of its officers; but it might well be doubted if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition. It is certain that it would be open to very grave abuses, and it is so inconsistent with the general sentiment in countries where slavery does not exist, that it may well be believed not to have been within the understanding of the people in incorporating the exception with the prohibitory amendment.[4]

[1] 39 Geo. III. c. 56.

[2] May's Const. Hist. c. 11.

[3] Amendments to Const. of U. S. art. 13. See Story on the Constitution (4th ed.), c. 46, for the history of this article, and the decisions bearing upon it. The Maryland act for the apprenticing of colored children, which made important and invidious distinctions between them and white children, and gave the master property rights in their services not given in other cases, was held void under this article. Matter of Turner, 1 Abb. U. S. 84. This thirteenth amendment conferred no political rights, and left the negro under all his political disabilities. Marshall *v.* Donovon, 10 Bush, 681. See also United States *v.* Cruikshank, 94 U. S. 542. Contracts for personal services cannot, as a general rule, be enforced, and application to be discharged from service under them on *habeas corpus* is evidence that the service is involuntary. Cases of apprenticeship and cases of military and naval service are exceptional. A person over twenty-one years of age cannot bind himself as apprentice. Clark's Case, 1 Blackf. 122, 12 Am. Dec. 213.

[4] The State has no power to imprison a child in a house of correction who has committed no crime, on a mere allegation that he is "destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice." People *v.* Turner, 55 Ill. 280, 8 Am. Rep. 645. But a female child who begs in public or has no proper parental care, may be confined in an industrial school. County of McLean *v.* Humphrey, 104 Ill. 378; citing Milwaukee Industrial School *v.* Supervisors, 40 Wis. 328; Roth *v.* House of Refuge, 31 Md. 329. See, further, that under proper safeguards vagrant children may be so committed, House of Refuge *v.* Ryan, 37 Ohio St. 197; Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388; Farnham *v.* Pierce, 141 Mass. 203, 6 N. E. 830; People *v.* N. Y. Catholic Protectory, 101 N. Y. 195, 4 N. E. 177. [That in cases of commitment of vicious and incorrigible youth to reform schools jury trial is unnecessary, see State *v.* Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, and note; also Lee *v.* McClelland, 157 Ind. 84, 60 N. E. 692. Court has no power in civil action for damages to person to compel

The common law of England permits the impressment of seafaring men to man the royal navy;[1] but this species of servitude was never recognized in the law of America.[2] The citizen may doubtless be compelled to serve his country in her wars; but the common law as adopted by us has never allowed arbitrary discriminations for this purpose between persons of different avocations.

Unreasonable Searches and Seizures. (*a*)

Near in importance to exemption from any arbitrary control of

plaintiff to submit her body to inspection by defendant's physicians outside of court for purpose of obtaining evidence. All such inspection must be made in court. U. P. Ry. Co. *v.* Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000. *Contra*, Lane *v.* Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153; Wanek *v.* Winona, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448; Ala. G. S. R. Co. *v.* Hill, 90 Ala. 71, 8 So. 90, 9 L. R. A. 442, 24 Am. St. 764. See in this connection Lyon *v.* Manhattan R. Co., 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402; McQuigan *v.* Delaware, L. & W. R. Co., 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, and note, 26 Am. St. 507; Camden & S. R. Co. *v.* Stetson, 177 U. S. 172, 20 Sup. Ct. Rep. 617. But sheriff may lawfully photograph his prisoner and take physical measurements of him, etc., for purposes of future identification. State *v.* Clausmeier, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73.]

[1] Broadfoot's Case, 18 State Trials, 1323; Fost. Cr. Law, 178; Rex *v.* Tubbs, Cowp. 512; *Ex parte* Fox, 5 State Trials, 276; 1 Bl. Com. 419; Broom, Const. Law, 116.

[2] There were cases of impressment in America before the Revolution, but they were never peaceably acquiesced in by the people. See Life and Times of Warren, 55.

(*a*) [Search made by permission of agent or servant in possession is not unreasonable, nor is the taking away of an article there found, the agent consenting thereto, a prohibited seizure. State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227. Where a boiler exploded, killing several persons and wounding many others, and the person in charge was prosecuted for criminal negligence, the property owner may object to an order of court delivering the wreck and premises into the custody of a police officer, charged to keep them unmolested until the time of trial, although it is probable that in the absence of such custody, much valuable real evidence will be lost. Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530, 31 L. R. A. 163, 61 Am. St. 346. The court cannot compel a plaintiff to submit a horse, over whose condition the controversy arises, to the inspection of a veterinary surgeon, even though the inspection is to be made in the presence of the plaintiff or his agent. Martin *v.* Elliott, 106 Mich. 130, 63 N. W. 998, 31 L. R. A. 169; but a statute requiring one person to submit his property to inspection of another for purpose of procuring evidence to aid that other in enforcing his rights is valid. Montana Co. *v.* St. Louis Mining and M. Co., 152 U. S. 160, 14 Sup. Ct. Rep. 506. With regard to inspection of person to procure evidence, see note 1, page 442, *ante*. In Potter *v.* Beale, 50 Fed. Rep. 860, the order of a court that a master should search the trunk of the president of an insolvent national bank and deliver to such president his private papers, and to the receiver all belonging to the bank, was held to be in violation of the prohibition against unreasonable searches and seizures. Money in possession of prisoner under arrest can be taken from him only when there are reasonable grounds for believing it to be connected with the crime charged or that it may be used as evidence. *Ex parte* Hurn, 92 Ala. 102, 9 So. 515, 13 L. R. A. 120, 25 Am. St. 23. Pawnbroker may be compelled to take out license, and to keep list of property received and persons from whom received, and to exhibit such property and list to inspection of

the person (*a*) is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified cases. The maxim that "every man's house is his castle,"[1] is

[1] Broom's Maxims, 321; Ilsley *v.* Nichols, 12 Pick. 270; Swain *v.* Mizner, 8 Gray, 182; People *v.* Hubbard, 24 Wend. 369, 35 Am. Dec. 628; Curtis *v.* Hubbard, 4 Hill, 437; Bailey *v.* Wright, 39 Mich. 96. [That officer may not break and enter to serve a writ of replevin, see Kelley *v.* Schuyler, 20 R. I. 432, 39 Atl. 893, 44 L. R. A. 435. Householder may kill in defending his house against attack. Wilson *v.* State, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654. As to when officer may enter without warrant, see Delafoile *v.* State, 54 N. J. L. 381, 24 Atl. 557, 16 L. R. A. 500, and note.] The eloquent passage in Chatham's speech on General Warrants is familiar: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." And see Lieber on Civil Liberty and Self-Government, c. 6.

mayor and police officers. Shuman *v.* Fort Wayne, 127 Ind. 109, 26 N. E. 660, 11 L. R. A. 378, and note.

Statute authorizing vendors of liquors to sue out search warrants to secure bottles not returned by customers is unconstitutional. Lippman *v.* People, 175 Ill. 101, 51 N. E. 872.]

(*a*) [Sheriff may take photographs, measurements, etc., of his prisoner for purposes of future identification. State *v.* Clausmeier, 151 Ind. 599, 57 N. E. 541, 50 L. R. A. 73. But a person cannot be lawfully arrested merely because he is a "suspicious person," and any statute which attempts to authorize such arrest is void under the clause prohibiting unreasonable seizures. Stoutenburgh *v.* Frazier, 16 D. C. App. 229, 48 L. R. A. 220. Prisoner discharged upon parol may be summarily arrested and recommitted. Fuller *v.* State, 122 Ala. 32, 26 So. 146, 45 L. R. A. 502. Arrest under warrant not supported by oath or affirmation is illegal. State *v.* Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561. But witness refusing to testify before grand jury may be summarily imprisoned by a justice of the peace upon complaint of the grand jury. *Re* Clark, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242. Such power to imprison is judicial however and cannot be conferred upon a county attorney. *Re* Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. 261; nor upon a board of tax commissioners, Langenberg *v.* Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 168. Statute may authorize arrest without warrant in case of misdemeanor committed in presence of officer, as well as in case of breach of peace. Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. 419. Person cannot be surrendered to foreign government except in accordance with treaty stipulations. *Ex parte* McCabe, 46 Fed. Rep. 363, 12 L. R. A. 589. Chairman of board of county commissioners may be authorized by statute to remove summarily to the pauper's place of legal settlement any pauper who applies for public support. Lovell *v.* Seeback, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667. Person arrested without extradition process in sister State is illegally detained and is entitled to be discharged upon *habeas corpus*. *Re* Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. 378; but see cases cited in note. Person brought into State by extradition proceedings and there tried or discharged cannot be arrested upon civil process until a reasonable time has elapsed in which he might have returned to the State from which he was brought. Moletor *v.* Sinnen, 76 Wis. 308, 44 N. W. 1099, 7 L. R. A. 817, 20 Am. St. 71. Person arrested without warrant can be detained only so long as is reasonably necessary to obtain a legal warrant. Leger *v.* Warren, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 193.]

made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.

If in English history we inquire into the original occasion for these constitutional provisions, we shall probably find it in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offences either committed or designed. The final overthrow of this practice is so clearly and succinctly stated in a recent work on the constitutional history of England, that we cannot refrain from copying the account in the note below.[1]

[1] "Among the remnants of a jurisprudence which had favored prerogative at the expense of liberty was that of the arrest of persons under general warrants, without previous evidence of their guilt or identification of their persons. This practice survived the Revolution, and was continued without question, on the ground of usage, until the reign of George III., when it received its death-blow from the boldness of Wilkes and the wisdom of Lord Camden. This question was brought to an issue by No. 45 of the 'North Briton,' already so often mentioned. There was a libel, but who was the libeller? Ministers knew not, nor waited to inquire, after the accustomed forms of law; but forthwith Lord Halifax, one of the secretaries of state, issued a warrant, directing four messengers, taking with them a constable, to search for the authors, printers, and publishers; and to apprehend and seize them, together with their papers, and bring them in safe custody before him. No one having been charged or even suspected, — no evidence of crime having been offered, — no one was named in this dread instrument. The offence only was pointed at, not the offender. The magistrate who should have sought proofs of crime deputed this office to his messengers. Armed with their roving commission, they set forth in quest of unknown offenders; and, unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect. Nor were they trifiers in their work. In three days they arrested no less than forty-nine persons on suspicion, — many as innocent as Lord Halifax himself. Among the number was Dryden Leach, a printer, whom they took from his bed at night. They seized his papers, and even apprehended his journeymen and servants. He had printed one number of the 'North Briton,' and was then reprinting some other numbers; but as he happened not to have printed No. 45, he was released without being brought before Lord Halifax. They succeeded, however, in arresting Kearsley, the publisher, and Balfe, the printer, of the obnoxious number, with all their workmen. From them it was discovered that Wilkes was the culprit of whom they were in search; but the evidence was not on oath; and the messengers received verbal directions to apprehend Wilkes under the general warrant. Wilkes, far keener than the crown lawyers, not seeing his own name there, declared it 'a ridiculous warrant against the whole English nation,' and refused to obey it. But after being in custody of the messengers for some hours, in his own house, he was taken away in a chair, to appear before the secretaries of state. No sooner had he been removed than the messengers, returning to his house, proceeded to rausack his drawers, and carried off all his private papers, including even his will and his pocket-book. When brought into the presence of Lord Halifax and Lord Egremont, questions were put to Wilkes which he refused to answer; whereupon he was committed close prisoner to the Tower, denied the use of pen and paper, and interdicted from receiving the visits of his friends, or even of his professional advisers. From this imprisonment, however, he

The history of this controversy should be read in connection with that in America immediately previous to the American Revo-

was shortly released on a writ of *habeas corpus*, by reason of his privilege as a member of the House of Commons.

"Wilkes and the printers, supported by Lord Temple's liberality, soon questioned the legality of the general warrant. First, several journeymen printers brought action against the messengers. On the first trial Lord Chief Justice *Pratt* —not allowing bad precedents to set aside the sound principles of English law —held that the general warrant was illegal; that it was illegally executed; and that the messengers were not indemnified by statute. The journeymen recovered three hundred pounds damages; and the other plaintiffs also obtained verdicts. In all these cases, however, bills of exceptions were tendered and allowed. Mr. Wilkes himself brought an action against Mr. Wood, under-secretary of state, who had personally superintended the execution of the warrant. At this trial it was proved that Mr. Wood and the messengers, after Wilkes's removal in custody, had taken entire possession of his house, refusing admission to his friends; had sent for a blacksmith, who opened the drawers of his bureau; and having taken out the papers, had carried them away in a sack, without taking any list or inventory. All his private manuscripts were seized, and his pocket-book filled up the mouth of the sack. Lord Halifax was examined, and admitted that the warrant had been made out three days before he had received evidence that Wilkes was the author of the 'North Briton.' Lord Chief Justice *Pratt* thus spoke of the warrant: 'The defendant claimed a right, under precedents, to force persons' houses, break open escritoires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.' The jury found a verdict for the plaintiff, with one thousand pounds damages.

"Four days after Wilkes had obtained his verdict against Mr. Wood, Dryden Leach, the printer, gained another verdict, with four hundred pounds damages, against the messengers. A bill of exceptions, however, was tendered and received in this as in other cases, and came on for hearing before the Court of King's Bench in 1765. After much argument and the citing of precedents showing the practice of the secretary of state's office ever since the Revolution, Lord *Mansfield* pronounced the warrant illegal, saying: 'It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge, and give certain directions to the officer.' The other three judges agreed that the warrant was illegal and bad, 'believing that no degree of antiquity can give sanction to an usage bad in itself.' The judgment was therefore affirmed.

"Wilkes had also brought actions for false imprisonment against both the secretaries of state. Lord Egremont's death put an end to the action against him; and Lord Halifax, by pleading privilege, and interposing other delays unworthy of his position and character, contrived to put off his appearance until after Wilkes had been outlawed, when he appeared and pleaded the outlawry. But at length, in 1769, no further postponement could be contrived; the action was tried, and Wilkes obtained no less than four thousand pounds damages. Not only in this action, but throughout the proceedings, in which persons aggrieved by the general warrant had sought redress, the government offered an obstinate and vexatious resistance. The defendants were harassed by every obstacle which the law permitted, and subjected to ruinous costs. The expenses which government itself incurred in these various actions were said to have amounted to one hundred thousand pounds.

"The liberty of the subject was further assured at this period by another remarkable judgment of Lord *Camden*. In November, 1762, the Earl of Halifax, as

lution, in regard to writs of assistance issued by the courts to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer."[1] All these matters are now a long way in the past; but

secretary of state, had issued a warrant directing certain messengers, taking a constable to their assistance, to search for John Entinck, clerk, the author or one concerned in the writing of several numbers of the 'Monitor, or British Freeholder,' and to seize him, together with his books and papers, and bring him in safe custody before the secretary of state. In execution of this warrant, the messengers apprehended Mr. Entinck in his house, and seized the books and papers in his bureau, writing-desk, and drawers. This case differed from that of Wilkes, as the warrant specified the name of the person against whom it was directed. In respect of the person, it was not a general warrant, but as regards the papers, it was a general search-warrant,—not specifying any particular papers to be seized, but giving authority to the messengers to take all his books and papers according to their discretion.

"Mr. Entinck brought an action of trespass against the messengers for the seizure of his papers, upon which a jury found a special verdict, with three hundred pounds damages. This special verdict was twice learnedly argued before the Court of Common Pleas, where, at length, in 1765, Lord *Camden* pronounced an elaborate judgment. He even doubted the right of the secretary of state to commit persons at all, except for high treason; but in deference to prior decisions, the court felt bound to acknowledge the right. The main question, however, was the legality of a search warrant for papers. 'If this point should be determined in favor of the jurisdiction,' said Lord *Camden*, 'the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' 'This power, so assumed by the secretary of state, is an execution upon all the party's papers in the first instance. His house is rifled; his most valuable papers are taken out of his possession, before the paper, for which he is charged, is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.' It had been found by the special verdict that many such warrants had been issued since the Revolution; but he wholly denied their legality. He referred the origin of the practice to the Star Chamber, which, in pursuit of libels, had given search-warrants to their messenger of the press,—a practice which, after the abolition of the Star Chamber, had been revived and authorized by the licensing act of Charles II., in the person of the secretary of state. And he conjectured that this practice had been continued after the expiration of that act,—a conjecture shared by Lord Mansfield and the Court of King's Bench. With the unanimous concurrence of the other judges of his court, this eminent magistrate now finally condemned this dangerous and unconstitutional practice." May's Constitutional History of England, c. 11. See also Semayne's Case, 5 Coke, 91; 1 Smith's Lead. Cas. 183; Entinck *v.* Carrington, 2 Wils. 275, and 19 State Trials, 1030; note to same case in Broom, Const. Law, 613; Money *v.* Leach, Burr. 1742; Wilkes's Case, 2 Wils. 151, and 19 State Trials, 1405. For debates in Parliament on the same subject, see Hansard's Debates, Vol. XV. pp. 1393-1418; Vol. XVI. pp. 6 and 209. In further illustration of the same subject, see De Lolme on the English Constitution, c. 18; Story on Const. §§ 1901, 1902; Bell *v.* Clapp, 10 Johns. 263, 6 Am. Dec. 339; Sailly *v.* Smith, 11 Johns. 500.

[1] Works of John Adams, Vol. II. pp. 523, 524; 2 Hildreth's U. S. 499; 4 Ban-

it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States,[1] the principles already settled in the common law upon this vital point in civil liberty.

For the service of criminal process, the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works on criminal law, and need not be enumerated here. And there are also cases where search-warrants are allowed to be issued, under which an officer may be protected in the like action. But as search-warrants are a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection, it is essential that these rules be carefully observed.

In the first place, they are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place.[2] And the law, in requiring a showing of reasonable cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it.[3]

In the next place, the warrant which the magistrate issues must particularly specify the place to be searched and the object for which the search is to be made. If a building is to be

croft's U. S. 414; Quincy, Mass. Reports, 51. See also the appendix to these reports, p. 395, for a history of writs of assistance.

[1] U. S. Const. 4th Amendment. The scope of this work does not call for any discussion of the searches of private premises, and seizures of books and papers, which are made under the authority, or claim of authority, of the revenue laws of the United States. Perhaps, under no other laws are such liberties taken by ministerial officers; and it would be surprising to find oppressive action on their part so often submitted to without legal contest, if the facilities they possess to embarrass, annoy, and obstruct the merchant in his business were not borne in mind. The federal decisions, however, go very far to establish the doctrine that, in matters of revenue, the regulations Congress sees fit to establish, however unreasonable they may seem, must prevail. For a very striking case, see Henderson's Distilled Spirits, 14 Wall. 44.

[2] 2 Hale, P. C. 142; Bishop, Cr. Pro. §§ 716–719; Archbold, Cr. Law, 147. An officer may base a complaint upon the information of a third person. Collins *v.* Lean, 68 Cal. 284.

[3] Commonwealth *v.* Lottery Tickets, 5 Cush. 369; Else *v.* Smith, 1 D. & R. 97.

searched, the name of the owner or occupant should be given;[1] or, if not occupied, it should be particularly described, so that the officer will be left to no discretion in respect to the place; and a misdescription in regard to the ownership,[2] or a description so general that it applies equally well to several buildings or places, would render the warrant void in law.[3] Search-warrants are always obnoxious to very serious objections; and very great particularity is justly required in these cases before the privacy of a man's premises is allowed to be invaded by the minister of the law.[4] And therefore a designation of goods to be searched for as "goods, wares, and merchandises," without more particular description, has been regarded as insufficient, even in the case of goods supposed to be smuggled,[5] where there is usually greater difficulty in giving description, and where, consequently, more latitude should be permitted than in the case of property stolen.

Lord *Hale* says: "It is fit that such warrants to search do express that search be made in the daytime; and though I do not say they are unlawful without such restriction, yet they are very inconvenient without it; for many times, under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance."[6] And the statutes upon this subject will generally be found to provide for searches in the daytime only, except in very special cases.

The warrant should also be directed to the sheriff or other proper officer, and not to private persons; though the party complainant may be present for the purposes of identification,[7] and other assistance can lawfully be called in by the officer if necessary.

The warrant must also command that the goods or other arti-

[1] Stone *v.* Dana, 5 Met. 98. See Bell *v.* Rice, 2 J. J. Marsh. 44, 19 Am. Dec. 122.

[2] Sandford *v.* Nichols, 13 Mass. 286; s. c. 7 Am. Dec. 151; Allen *v.* Staples, 6 Gray, 491.

[3] Thus a warrant to search the "houses and buildings of Hiram Ide and Henry Ide," is too general. Humes *v.* Tabor, 1 R. I. 464. See McGlinchy *v.* Barrows, 41 Me. 74; Ashley *v.* Peterson, 25 Wis. 621; Com. *v.* Intox. Liquors, 140 Mass. 287, 3 N. E. 4. So a warrant for the arrest of an unknown person under the designation of John Doe, without further description, is void. Commonwealth *v.* Crotty, 10 Allen, 403. For descriptions held sufficient, see Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6; Com. *v.* Certain Liquors, 146 Mass. 509, 16 N. E. 208.

[4] A warrant for searching a dwelling-house will not justify a forcible entry into a barn adjoining the dwelling-house. Jones *v.* Fletcher, 41 Me. 254; Downing *v.* Porter, 8 Gray, 539; Bishop, Cr. Pro. §§ 716–719.

[5] Sandford *v.* Nichols, 13 Mass. 286, 7 Am. Dec. 151; Archbold, Cr. Law, 143. "A certain quantity of rum being about and not exceeding 100 gallons" is sufficient. State *v.* Fitzpatrick, 16 R. I. 54, 11 Atl. Rep. 767.

[6] 2 Hale, P. C. 150. See Archbold, Cr. Law (7th ed.), 145; Com. *v.* Hinds, 145 Mass. 182, 13 N. E. 397.

[7] 2 Hale, P. C. 150; Archbold, Cr. Law (7th ed.), 145.

cles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods, and the party in whose custody they were, may be disposed of according to law.[1] And it is a fatal objection to such a warrant that it leaves the disposition of the goods searched for to the ministerial officer, instead of requiring them to be brought before the magistrate, that he may pass his judgment upon the truth of the complaint made; and it would also be a fatal objection to a statute authorizing such a warrant if it permitted a condemnation or other final disposition of the goods, without notice to the claimant, and without an opportunity for a hearing being afforded him.[2]

The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offence actually committed.[3] Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him,[4] except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruc-

[1] 2 Hale, P. C. 150; Bell *v.* Clapp, 10 Johns. 263, 6 Am. Dec. 339; Hibbard *v.* People, 4 Mich. 126; Fisher *v.* McGirr, 1 Gray, 1. If the statute ordains that the warrant shall require the officer to to make an inventory, one omitting this command is no protection, though in fact an inventory is made by the officer. Hussey *v.* Davis, 58 N. H. 317.

[2] The "Search and Seizure" clause in some of the prohibitory liquor laws was held void on this ground. Fisher *v.* McGirr, 1 Gray, 1; Greene *v.* Briggs, 1 Curtis, 311; Hibbard *v.* People, 4 Mich. 126. See also Matter of Morton, 10 Mich. 208; Sullivan *v.* Oneida, 61 Ill. 242; State *v.* Snow, 3 R. I. 64, for a somewhat similar principle. It is not competent by law to empower a magistrate on mere information, or on his own personal knowledge, to seize and destroy gaming-tables or devices without a hearing and trial. Lowry *v.* Rainwater, 70 Mo. 152, 35 Am. Rep. 420. An act which declared that all nets, &c. used in catching fish in violation thereof should be forfeited, and might be seized and destroyed or sold by the peace officer, was declared void in Hey Sing Jeck *v.* Anderson, 57 Cal. 251. After seizure of money and acquittal of larceny, the money must be delivered to defendant. State *v.* Williams, 61 Iowa, 517, 16 N. W. 586.

[3] We do not say that it would be incompetent to authorize, by statute, the issue of search-warrants for the prevention of offences in some cases; but it is difficult to state any case in which it might be proper, except in such cases of attempts, or of preparations to commit crime, as are in themselves criminal. [Slot machine to be used as a gambling device. Its seizure justified to prevent the offence. Board of Police Com'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775.]

[4] The fourth amendment to the Constitution of the United States, found also in many State constitutions, would clearly preclude the seizure of one's papers in order to obtain evidence against him; and the spirit of the fifth amendment — that no person shall be compelled in a criminal case to give evidence against himself — would also forbid such seizure. [State *v.* Slamon, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. 711. In this last case it was held a violation of the constitutional right to take a letter while searching for stolen goods by virtue of a search-warrant.]

tion. Those special cases are familiar, and well understood in the law. Search-warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law, for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous material so kept as to endanger the public safety.[1] A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, — and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety.[2] In principle they are

[1] These are the most common cases, but in the following, search-warrants are also sometimes provided for by statute: books and papers of a public character, retained from their proper custody; females supposed to be concealed in houses of ill-fame; children enticed or kept away from parents or guardians; concealed weapons; counterfeit money, and forged bills or papers. See cases under English statutes specified in 4 Broom and Hadley's Commentaries, 332.

[2] Instances sometimes occur in which ministerial officers take such liberties in endeavoring to detect and punish offenders, as are even more criminal than the offences they seek to punish. The employment of spies and decoys to lead men on to the commission of crime, on the pretence of bringing criminals to justice, cannot be too often or too strongly condemned; and that prying into private correspondence by officers which has sometimes been permitted by post-masters, is directly in the face of the law, and cannot be excused. The importance of public confidence in the inviolability of correspondence through the post-office cannot well be overrated; and the proposition to permit letters to be opened at the discretion of a ministerial officer, would excite general indignation. See *Ex parte* Jackson, 96 U. S. 727. In Maine it has been decided that a telegraph operator may be compelled to disclose the contents of a message sent by him for another party, and that no rule of public policy would forbid. State *v.* Litchfield, 58 Me. 267. The case is treated as if no other considerations were involved than those which arise in the ordinary case of a voluntary disclosure by one private person to another, without necessity. Such, however, is not the nature of the communication made to the operator of the telegraph. That instrument is used as a means of correspondence, and as a valuable, and in many cases an indispensable, substitute for the postal facilities; and the communication is made, not be-

objectionable; in the mode of execution they are necessarily odious; and they tend to invite abuse and to cover the commission of crime. We think it would generally be safe for the legislature to regard all those searches and seizures "unreasonable" which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies.[1]

cause the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement. The reasons of a public nature for maintaining the secrecy of telegraphic communication are the same with those which protect correspondence by mail; and though the operator is not a public officer, that circumstance appears to us immaterial. He fulfils an important public function, and the propriety of his preserving inviolable secrecy in regard to communications is so obvious, that it is common to provide statutory penalties for disclosures. If on grounds of public policy the operator should not voluntarily disclose, why do not the same considerations forbid the courts compelling him to do so? Or if it be proper to make him testify to the correspondence by telegraph, what good reason can be given why the postmaster should not be made subject to the process of subpœna for a like purpose, and compelled to bring the correspondence which passes through his hands into court, and open it for the purposes of evidence? This decision has been followed in some other cases. Henisler *v.* Freedman, 2 Pars. Sel. Cas. (Pa.) 274; First National Bank of Wheeling *v.* Merchants' National Bank, 7 W. Va. 544; *Ex parte* Brown, 72 Mo. 83, 37 Am. Rep. 426; Woods *v.* Miller, 55 Iowa, 168, 7 N. W. 484; U. S. *v.* Hunter, 15 Fed. Rep. 712. See Gray, Communication by Telegraph, ch. v.

We should suppose, were it not for the opinions to the contrary by tribunals so eminent, that the public could not be entitled to a man's private correspondence, whether obtainable by seizing it in the mails, or by compelling the operator of the telegraph to testify to it, or by requiring his servants to take from his desks his private letters and journals, and bring them into court on *subpœna duces tecum*. Any such compulsory process to obtain it seems a most arbitrary and unjustifiable seizure of private papers; such an "unreasonable seizure" as is directly condemned by the Constitution. In England, the secretary of state sometimes issues his warrant for opening a particular letter, where he is possessed of such facts as he is satisfied would justify him with the public; but no American officer or body possesses such authority, and its usurpation should not be tolerated. Letters and sealed packages subject to letter postage in the mail can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. *Ex parte* Jackson, 96 U. S. 727. See this case for a construction of the law of Congress for excluding improper matter from the mails. For an account of the former and present English practice on opening letters in the mail, see May, Constitutional History, c. 11; Todd, Parliamentary Government, Vol. I. p. 272; Broom, Const. Law, 615.

[1] A search-warrant for libels and other papers of a suspected party was illegal at the common law. See 11 State Trials, 313, 321; Archbold, Cr. Law (7th ed.), 141; Wilkes *v.* Wood, 19 State Trials, 1153. "Search-warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings or for the maintenance of any mere private right; but their use was confined to the case of public prosecutions instituted and pursued for the suppression of crime and the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said they crept into the law by

We have said that if the officer follows the command of his warrant, he is protected; and this is so even when the complaint proves to have been unfounded.[1] But if he exceed the command by searching in places not described therein, or by seizing persons or articles not commanded, he is not protected by the warrant, and can only justify himself as in other cases where he assumes to act without process.[2] Obeying strictly the command of his warrant, he may break open outer or inner doors, and his justification does not depend upon his discovering that for which he is to make search.[3]

In other cases than those to which we have referred, and subject to the general police power of the State, the law favors the complete and undisturbed dominion of every man over his own premises, and protects him therein with such jealousy that he may defend his possession against intruders, in person or by his servants or guests, even to the extent of taking the life of the intruder, if that seem essential to the defence.[4]

imperceptible practice. But their legality has long been considered to be established on the ground of public necessity; because without them felons and other malefactors would escape detection." *Merrick*, J., in Robinson *v.* Richardson, 13 Gray 456. "To enter a man's house," said Lord *Camden*, "by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition, — a law under which no Englishman would wish to live an hour." See his opinion in Entinck *v.* Carrington, 19 State Trials, 1029; s. c. 2 Wils. 275, and Broom, Const. Law, 558; Huckle *v* Money, 2 Wils. 205; Leach *v.* Money, 19 State Trials, 1001; s. c. 3 Burr. 1692; and 1 W. Bl. 555; note to Entinck *v.* Carrington, Broom, Const. Law, 613. [That the evidence was obtained by an unlawful search and seizure is not sufficient to make it inadmissible. Williams *v.* State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269. An order compelling one to deliver his private papers to another who has no ownership in them is in violation of the constitutional provision against unwarrantable seizures. *Ex parte* Clarke, 126 Cal. 235, 58 Pac. 546, 77 Am. St. 176.]

[1] Barnard *v.* Bartlett, 10 Cush. 501. After the goods seized are taken before the magistrate, the officer is not liable for them to the owner. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

[2] Crozier *v.* Cudney, 9 D. & R. 224; Same case, 6 B. & C. 232; State *v.* Brennan's Liquors, 25 Conn. 278. Where the warrant was for the search of the person, and the goods were found on the floor of the room where he was, their seizure was held lawful. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

[3] 2 Hale, P. C. 151; Barnard *v.* Bartlett, 10 Cush. 501.

[4] That in defence of himself, any member of his family, or his dwelling, a man has a right to employ all necessary violence, even to the taking of life, see Shorter *v.* People, 2 N. Y. 193; Yates *v.* People, 32 N. Y. 509; Logue *v.* Commonwealth, 38 Pa. St. 265; Pond *v.* People, 8 Mich. 150; Maher *v.* People, 24 Ill. 211; Bohannan *v.* Commonwealth, 8 Bush, 481, 8 Am. Rep. 474; Bean *v.* State, 25 Tex. App. 346. But except where a forcible felony is attempted against person or property, he should avoid such consequences, if possible, and cannot justify standing up and resisting to the death, when the assailant might have been avoided by retreat. People *v.* Sullivan, 7 N. Y. 396; Carter *v.* State, 82 Ala. 13, 2 So. 766. But a man assaulted in his dwelling is under no obligation to retreat; his house is his castle, which he may defend to any extremity. And this means not simply the dwelling-house proper, but includes whatever is within

Quartering Soldiers in Private Houses.

A provision is found incorporated in the constitution of nearly every State, that "no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." To us, after four-fifths of a century have passed away since occasion has existed for complaint of the action of the government in this particular, the repetition of this declaration seems to savor of idle form and ceremony; but "a frequent recurrence to the fundamental principles of the Constitution" can never be unimportant, and indeed may well be regarded as "absolutely necessary to preserve the advantages of liberty, and to maintain a free government."[1] It is difficult to imagine a more terrible engine of oppression than the power in the executive to fill the house of an obnoxious person with a company of soldiers, who are to be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of arbitrary power, and in whose presence the ordinary laws of courtesy, not less than the civil restraints which protect person and property, must give way to unbridled will; who is sent as an instrument of punishment, and with whom insult and outrage may appear quite in the line of his duty. However contrary to the spirit of the age such a proceeding may be, it may always be assumed as possible that it may be resorted to in times of great excitement. when party action is generally violent; and "the *dragonnades* of Louis XIV. in France, of James II. in Scotland, and those of more recent and present date in certain countries, furnish sufficient justification for this specific guaranty."[2] The clause, as we find it in the national and State constitutions, has come down to us through the Petition of Right, the Bill of Rights of 1688, and the Declaration of Independence; and it is

the curtilage as understood at the common law. Pond *v.* People, 8 Mich. 150; State *v.* Middleham, 62 Iowa, 150, 17 N. W. 446; State *v.* Scheele, 57 Conn. 307, 18 Atl. 256; Parrish *v.* Com., 81 Va. 1; Bledsoe *v.* Com., 11 S. W. 84, 7 S. W. Rep. 884 (Ky.). And in deciding what force it is necessary to employ in resisting the assault, a person must act upon the circumstances as they appear to him at the time; and he is not to be held criminal because on a calm survey of the facts afterwards it appears that the force employed in defence was excessive. See the cases above cited; also Schnier *v.* People, 23 Ill. 17: Patten *v.* People, 18 Mich. 314; Hinton *v.* State, 24 Tex. 454; People *v.* Flanagan, 60 Cal. 2. But the belief must be *bona fide* and upon reasonable grounds. State *v.* Peacock, 40 Ohio St. 333.

[1] Constitutions of Massachusetts, New Hampshire, Vermont, Florida, Illinois, and North Carolina. See also Constitutions of Virginia, Nebraska, and Wisconsin for a similar declaration.

[2] Lieber, Civil Liberty and Self-Government, c. 11.

but a branch of the constitutional principle, that the military shall in time of peace be in strict subordination to the civil power.[1]

Criminal Accusations.

Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime. At the common law, accusations of felony were made in the form of an indictment by a grand jury; and this process is still retained in many of the States,[2] while others have substituted in its stead an information filed by the prosecuting officer of the State or county. The mode of investigating the facts, however, is the same in all; and this is through a trial by jury, surrounded by certain safeguards which are a well-understood part of the system, and which the government cannot dispense with.

[1] Story on the Constitution, §§ 1899, 1900; Rawle on Constitution, 126. In exceptional cases, however, martial law may be declared and enforced whenever the ordinary legal authorities are unable to maintain the public peace and suppress violence and outrage. Todd, Parliamentary Government in England, Vol. I. p. 342; 1 Bl. Com 413-415. As to martial law in general, see *Ex parte* Milligan, 4 Wall. 129.

[2] The accusation, whether by indictment or information, must be sufficiently specific fairly to apprise the respondent of the nature of the charge against him, so that he may know what he is to answer, and so that the record may show, as far as may be, for what he is put in jeopardy. Whitney *v.* State, 10 Ind. 404; State *v.* O'Flaherty, 7 Nev. 153; State *v.* McKenna, 16 R. I. 398, 17 Atl. Rep. 51. The legislature may allow simplification of old forms of indictment. Com. *v.* Freelove, 150 Mass. 66, 22 N. E. Rep. 435. As to amendment of indictments, see p. 327. A law authorizing commitment without examination, upon summary arrest, of a pardoned convict for violating the condition of his pardon, is invalid. People *v.* Moore, 62 Mich. 496, 29 N. W. 80. The indictment for a State offence can only be by the grand jury of the county of offence. *Ex parte* Slater, 72 Mo. 102; Weyrich *v.* People, 89 Ill. 90. The fourteenth amendment to the federal Constitution is not violated by dispensing with a grand jury. Hurtado *v.* California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292; Kalloch *v.* Superior Court, 56 Cal. 229; State *v.* Boswell, 104 Ind. 541, 4 N. E. 675. [Prosecution by "information" is due process. Balla *v.* Nebraska, 176 U. S. 83, 20 Supt. Ct. Rep. 287.] Nor does it forbid a grand jury of seven, if a State law so provides. Hansenfluck *v.* Com., 85 Va. 702, 8 S. E. Rep. 683. In the federal courts infamous crimes must be prosecuted by indictment, and they are held to be such as are punished by imprisonment in a penitentiary with or without hard labor. *Ex parte* Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935; Mackin *v.* United States, 117 U. S. 348, 6 Sup. Ct. Rep. 777; United States *v.* De Walt, 128 U. S. 393, 9 Sup. Ct. Rep. 111. See State *v.* West, 42 Minn. 147, 43 N. W. 845. Compare State *v.* Nolan, 15 R. I. 529, 10 Atl. 481. [*Re* Butler, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764, and note on infamous crimes; that the judge in charging the grand jury must be temperate in his language, see Clair *v.* State, 40 Neb. 531, 59 N. W. 118, 28 L. R. A. 367, and note. Upon number of jurors necessary or proper to act on grand jury, see State *v.* Belvel, 89 Iowa, 405, 56 N. W. 545, 27 L. R. A. 846, and note; organization of grand jury, State *v.* Noyes, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, and note, 41 Am. St. 45. Concurrence of nine cannot be made sufficient by statute where constitution does not so provide. State *v.* Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50, and note.]

First, we may mention that the humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact.[1]

If there were any mode short of confinement which would, with reasonable certainty, insure the attendance of the accused to answer the accusation, it would not be justifiable to inflict upon him that indignity, when the effect is to subject him, in a greater or less degree, to the punishment of a guilty person,

[1] See Sullivan *v.* Oneida, 61 Ill. 242. An act making the fact of killing of cattle by a railroad train *prima facie* evidence of negligence, and such negligence a misdemeanor on the part of the superintendent and president, is void as depriving of this presumption. State *v.* Divine, 98 N. C. 778, 4 S. E. 477. It is sometimes claimed that where insanity is set up as a defence in a criminal case, the defendant takes upon himself the burden of proof to establish it, and that he must make it out beyond a reasonable doubt. See Clark *v.* State, 12 Ohio, 494; Loeffner *v.* State, 10 Ohio, N. S. 599; Bond *v.* State, 23 Ohio, N. S. 346; State *v.* Felton, 32 Iowa, 49; McKenzie *v.* State, 42 Ga. 334; Boswell *v.* Commonwealth, 20 Gratt. 860; Baccigalupo *v.* Commonwealth, 33 Gratt. 807, 36 Am. Rep. 795; State *v.* Hoyt, 47 Conn. 518; Wright *v.* People, 4 Neb. 407; State *v.* Pratt, 1 Houst. C. C 249; State *v.* Hurley, 1 Houst. C. C. 28; State *v.* De Rancé, 34 La. An. 186. Or at least by a clear preponderance of evidence. Boswell *v.* State, 63 Ala. 307, 35 Am. Rep. 20; State *v.* Redemeier, 71 Mo. 173, 36 Am. Rep. 462; Webb *v.* State, 9 Tex. App. 490; Johnson *v.* State, 10 Tex. App. 571; State *v.* Coleman, 27 La. An. 691; State *v.* Strauder, 11 W. Va. 745, 823; Ortwein *v.* Commonwealth, 76 Pa. St. 414, 18 Am. Rep. 420; State *v.* Starling, 6 Jones (N. C.), 366; State *v.* Payne, 86 N. C. 609; State *v.* Smith, 53 Mo. 267; People *v.* McDonnell, 47 Cal. 134; Commonwealth *v.* Eddy, 7 Gray, 583; Danforth *v.* State, 75 Ga. 614; Ball *v.* Com., 81 Ky. 662; State *v.* Bundy, 24 S. C. 439. Other well-considered cases do not support this view. The burden of proof, it is held, rests throughout upon the prosecution to establish all the conditions of guilt; and the presumption of innocence that all the while attends the prisoner entitles him to an acquittal, if the jury are not reasonably satisfied of his guilt. See State *v.* Marler, 2 Ala. 43; Commonwealth *v.* Myers, 7 Met. 500; Polk *v.* State, 19 Ind. 170; Chase *v.* People, 40 Ill. 352; People *v.* Schryver, 42 N. Y. 1; Stevens *v.* State, 31 Ind. 485; State *v.* Pike, 49 N. H. 399; State *v.* Jones, 50 N. H. 349; People *v.* McCann, 16 N. Y. 58; Commonwealth *v.* Kimball, 24 Pick. 373; Commonwealth *v.* Dana, 2 Met. 340; Hopps *v.* People, 31 Ill. 385; People *v.* Garbutt, 17 Mich. 23; State *v.* Klinger, 43 Mo. 127; State *v.* Hundley, 46 Mo. 414; State *v.* Lowe, 93 Mo. 547, 5 S. W. 889; Ballard *v.* State, 19 Neb. 609, 28 N. W. 271; State *v.* Crawford, 11 Kan. 32; Brotherton *v.* People, 75 N. Y. 159; O'Connell *v.* People, 87 N. Y. 377; Pollard *v.* State, 53 Miss. 410; Cunningham *v.* State, 56 Miss. 269, 31 Am. Rep. 360. But the prosecution may rely upon the presumption of sanity which exists in all cases, until the defence puts in evidence which creates a reasonable doubt. People *v.* Finley, 38 Mich. 482. And see Caldwell *v.* State, 66 Ind. 94, 32 Am. Rep. 94. A statute may require insanity to be specially pleaded. Bennett *v.* State, 57 Wis. 69, 14 N. W. 912. [Accused is entitled to appear without manacles unless he is violent and disorderly. Keeping him manacled at trial will cause a reversal of a judgment against him. State *v.* Williams, 18 Wash. 47, 50 Pac. 580, 39 L. R. A. 821, 63 Am. St. 869. Upon this right, see note to this case in L. R. A.]

while as yet it is not determined that he has committed any crime. If the punishment on conviction cannot exceed in severity the forfeiture of a large sum of money, then it is reasonable to suppose that such a sum of money, or an agreement by responsible parties to pay it to the government in case the accused should fail to appear, would be sufficient security for his attendance; and therefore, at the common law, it was customary to take security of this character in all cases of misdemeanor; one or more friends of the accused undertaking for his appearance for trial, and agreeing that a certain sum of money should be levied of their goods and chattels, lands and tenements, if he made default. But in the case of felonies, the privilege of giving bail before trial was not a matter of right; and in this country, although the criminal code is much more merciful than it formerly was in England, and in some cases the allowance of bail is almost a matter of course, there are others in which it is discretionary with the magistrate to allow it or not, and where it will sometimes be refused if the evidence of guilt is strong or the presumption great. Capital offences are not generally regarded as bailable; at least, after indictment, or when the party is charged by the finding of a coroner's jury;[1] and this upon the supposition that one who may be subjected to the terrible punishment that would follow a conviction, would not for any mere pecuniary considerations remain to abide the judgment.[2] And where the death penalty is abolished and imprisonment for life substituted, it is believed that the rule would be the same notwithstanding this change, and bail would still be denied in the case of the highest offences, except under very peculiar circumstances.[3] In the case of other felonies it is not usual to refuse bail, and in some of the State constitutions it has been deemed important to make it a matter of right in all cases except on capital charges "when the proof is evident or the presumption great."[4]

[1] Matter of Barronet, 1 El. & Bl. 1; *Ex parte* Tayloe, 5 Cow. 39. In homicide it is said bail should be refused if the evidence is such that the judge would sustain a capital conviction upon it. *Ex parte* Brown, 65 Ala. 446.

[2] State *v.* Summons, 19 Ohio, 139.

[3] The courts have power to bail, even in capital cases. United States *v.* Hamilton, 3 Dall. 17; United States *v.* Jones, 3 Wash. 209; State *v.* Rockafellow, 6 N. J. 332; Commonwealth *v.* Semmes, 11 Leigh, 665; Commonwealth *v.* Archer, 6 Gratt. 705; People *v.* Smith, 1 Cal. 9; People *v.* Van Horne, 8 Barb. 158. In England when all felonies were capital it was discretionary with the courts to allow bail before trial. 4 Bl. Com. 297, and note.

[4] The constitutions of a majority of the States now contain provisions to this effect. And see Foley *v.* People, 1 Ill. 31; Ullery *v.* Commonwealth, 8 B. Monr. 3; Shore *v.* State, 6 Mo. 640; State *v.* Summons, 19 Ohio, 139; *Ex parte* Wray, 30 Miss. 673; Moore *v.* State, 36 Miss.

When bail is allowed, *unreasonable bail* is not to be required; but the constitutional principle that demands this is one which, from the very nature of the case, addresses itself exclusively to the judicial discretion and sense of justice of the court or magistrate empowered to fix upon the amount. That bail is reasonable which, in view of the nature of the offence, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party's attendance. In determining this, some regard should be had to the prisoner's pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with the like offence. When the court or magistrate requires greater security than in his judgment is needful to secure attendance, and keeps the prisoner in confinement for failure to give it, it is plain that the right to bail which the constitution attempts so carefully to secure has been disregarded; and though the wrong is one for which, in the nature of the case, no remedy exists, the violation of constitutional privilege is aggravated, instead of being diminished, by that circumstance.[1]

The presumption of innocence is an absolute protection against conviction and punishment, except either, *first*, on confession in open court; or, *second*, on proof which places the guilt beyond any reasonable doubt. Formerly, if a prisoner arraigned for felony stood mute wilfully, and refused to plead, a terrible mode was resorted to for the purpose of compelling him to do so; and this might even end in his death:[2] but a more merciful proceeding is now substituted; the court entering a plea of not guilty for a party who, for any reason, fails to plead for himself.

137; *Ex parte* Banks, 28 Ala. 89; *Ex parte* Dykes, 83 Ala. 114, 3 So. 306; *Ex parte* Kendall, 100 Ind. 599; *In re* Malison, 36 Kan. 725, 14 Pac. 144; Matter of Troia, 64 Cal. 152, 28 Pac. 231. [*Re* Losasso, 15 Col. 163, 24 Pac. 1080, 10 L. R. A. 847, and note.]

[1] The magistrate in taking bail exercises an authority essentially judicial. Regina *v.* Badger, 4 Q. B. 468; Linford *v.* Fitzroy, 13 Q. B. 240. As to his duty to look into the nature of the charge and the evidence to sustain it, see Barronet's Case, 1 El. & Bl. 1. See Carmody *v.* State, 105 Ind. 546, 5 N. E. 679, as to fixing amount of bail in advance for different classes of cases.

[2] 4 Bl. Com. 324. In treason, petit felony, and misdemeanors, wilfully standing mute was equivalent to a conviction, and the same punishment might be imposed; but in other cases there could be no trial or judgment without plea; and an accused party might therefore sometimes stand mute and suffer himself to be pressed to death, in order to save his property from forfeiture. Poor Giles Corey, accused of witchcraft, was perhaps the only person ever pressed to death for refusal to plead in America, 3 Bancroft's U. S. 93; 2 Hildreth's U. S. 160. For English cases, see Cooley's Bl. Com. 325, note. Now in England the court enters a plea of not guilty for a prisoner refusing to plead, and the trial proceeds as in other cases.

Again, it is required that the trial be *speedy*; and here also the injunction is addressed to the sense of justice and sound judgment of the court.[1] In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused.[2] When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses.[3] Very much, however, must be left to the judgment of the prosecuting officer in these cases; and the court would not compel the government to proceed to trial at the first term after indictment found or information filed, if the officer who represents it should state, under the responsibility of his official oath, that he was not and could not be ready at that time.[4] But further delay would not generally be allowed without a more specific showing of the causes which prevent the State proceeding to trial, including the names of the witnesses, the steps taken to procure them,[5] and the facts expected to be proved by them, in order that the court might judge of the reasonableness of the

[1] Speedy trial is said to mean a trial so soon after indictment as the prosecution can, by a fair exercise of reasonable diligence, prepare for trial; regard being had to the terms of court. United States *v.* Fox, 3 Mont. 512; Creston *v.* Nye, 74 Iowa, 369, 37 N. W. 777. If it becomes necessary to adjourn the court without giving trial, the prisoner should be bailed, though not otherwise entitled to it. *Ex parte* Caplis, 58 Miss. 358.

[2] It is the duty of the prosecuting attorney to treat the accused with judicial fairness: to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of public justice. But we trust it is not often that cases occur like one in Tennessee, in which the Supreme Court felt called upon to set aside a verdict in a criminal case, where by the artifice of the prosecuting officer the prisoner had been induced to go to trial under the belief that certain witnesses for the State were absent, when in fact they were present and kept in concealment by this functionary. Curtis *v.* State, 6 Cold. 9.

[3] See this discussed in *Ex parte* Stanley, 4 Nev. 113; [and *In re* Begerow, 133 Cal. 349, 65 Pac. 828, 85 Am. St. 178. A valuable monographic note to this case discussing the law of this clause of the constitution is found at pages 187 to 204 inclusive of 85 Am. St.]

[4] Watts *v.* State, 26 Ga. 231.

[5] The Habeas Corpus Act, 31 Ch. II. c. 2, § 1, required a prisoner charged with crime to be released on bail, if not indicted the first term after the commitment, unless the king's witnesses could not be obtained; and that he should be brought to trial as early as the second term after the commitment. The principles of this statute are considered as having been adopted into the American common law. *Post*, p. 490. See *In re* Garvey, 7 Col. 502, 4 Pac. 758; *In re* Edwards, 35 Kan. 99, 10 Pac. 539.

application, and that the prisoner might, if he saw fit to take that course, secure an immediate trial by admitting that the witnesses, if present, would testify to the facts which the prosecution have claimed could be proved by them.[1]

It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.[2]

[1] Such an admission, if made by the prisoner, is binding upon him, and dispenses with the necessity of producing the witnesses. United States *v.* Sacramento, 2 Mont. 239, 25 Am. Rep. 742; Hancock *v.* State, 14 Tex. App. 392; State *v.* Fooks, 65 Iowa, 452, 21 N. W. 773. But in general the right of the prisoner to be confronted with the witnesses against him cannot be waived in advance. Bell *v.* State, 2 Tex. App. 216, 28 Am. Rep. 429. Nor can he be forced to admit what an absent witness would testify to. Wills *v.* State, 73 Ala. 362. A statute forbidding a continuance if the prosecutor admits that defendant's absent witness would testify as stated in the affidavit for continuance, is void. State *v.* Berkley, 92 Mo. 41, 4 S. W. 24.

[2] See People *v.* Kerrigan, 73 Cal. 222, 14 Pac. 849; People *v.* Swafford, 65 Cal. 223, 3 Pac. 809; Grimmett *v.* State, 22 Tex. App. 36, 2 S. W. 631; State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330. [Right to a public trial is violated where citizens and taxpayers are excluded from court room to such an extent that only a very few are admitted, while there is ample room for them in the court room, and many apply for admission and are refused. People *v.* Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, and note, 28 Am. St. 294. Not only is the accused entitled to a public trial, but also, that such trial shall be in a court in which each step shall be in the presence of the presiding judge of the court who has full authority to protect his every legal right. Where the judge calls an attorney to the bench and leaves him in charge while the judge absents himself from the court room for a quarter of an hour, the trial going on in the meantime, there is a dissolution of the court, and the trial is void, and a new trial will be ordered. Ellerbee *v.* State, 75 Miss. 522, 22 So. 950, 41 L. R. A. 569, and see note to this case in L. R. A. upon when temporary absence of judge is fatal to the trial.]

But a far more important requirement is that the proceeding to establish guilt shall not be inquisitorial. A peculiar excellence of the common-law system of trial over that which has prevailed in other civilized countries, consists in the fact that the accused is never compelled to give evidence against himself. Much as there was in that system that was heartless and cruel, it recognized fully the dangerous and utterly untrustworthy character of extorted confessions, and was never subject to the reproach that it gave judgment upon them.[1]

[1] See Lieber's paper on Inquisitorial Trials, Appendix to Civil Liberty and Self-Government. Also the article on Criminal Procedure in Scotland and England, Edinb. Review, Oct., 1858 [and one in 15 Harv. L. Rev. 610, on the History of the Privilege against Self-Crimination. See also an article on "Physical Examinations in Divorce Cases" in 35 Am. L. Rev. 698, and one on "Physical Examinations in Personal Injury Cases" in 1 Mich. L. Rev. 193, 277.] And for an illustration of inquisitorial trials in our own day, see Trials of Troppman and Prince Pierre Bonaparte, Am. Law Review, Vol. V. p. 14. Judge *Foster* relates from Whitelocke, that the Bishop of London having said to Felton, who had assassinated the Duke of Buckingham, "If you will not confess you must go to the rack," the man replied, "If it must be so, I know not whom I may accuse in the extremity of my torture, — Bishop Laud, perhaps, or any lord of this board." "Sound sense," adds Foster, "in the mouth of an enthusiast and ruffian." Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used. De Lolme on Constitution of England (ed. of 1807), p. 181, note; 4 Bl Com. 325; Broom, Const. Law, 148; Trial of Felton, 3 State Trials, 368, 371; Fortescue De Laud, c. 22, and note by Amos; Brodie, Const. Hist. c. 8. A legislative body has no more right than a court to make its examination of parties or witnesses inquisitorial. Emery's Case, 107 Mass. 172. See further, Horstman *v.* Kaufman, 97 Pa. St. 147; Blackwell *v.* State, 67 Ga. 76; State *v.* Lurch, 12 Oreg. 95, 6 Pac. 405. [The right to refuse to answer any question, the answer to which might incriminate the witness, is not sufficiently preserved by a statute which provides merely that such answer shall never be given against the witness in any trial to which he may be subjected. If it is desired to compel him to answer such question, he must be made absolutely exempt from trial and punishment for any offence thus disclosed in pertinent response to the question which he is compelled to answer. This applies to proceedings before grand juries and legislative committees as well as trial juries. See Counselman *v.* Hitchcock, 142 U. S. 547, 12 Sup. Ct. Rep. 195, where the subject is fully discussed by Mr. Justice *Blatchford*. See review of Counselman *v.* Hitchcock, 5 Harv. L. Rev. 24; *In re* Walsh, 104 Fed. Rep. 518; *In re* Scott, 95 Fed. Rep. 816, and *In re* Rosser, 96 Fed. Rep. 305, are decided on authority of Counselman *v.* Hitchcock, *supra*; Mackel *v.* Rochester, 102 Fed. Rep. 314, seems opposed to the doctrine of that case. And where he is made absolutely exempt from trial and punishment for any offence thus disclosed, he is compellable to answer. Brown *v.* Walker, 161 U. S. 591, 16 Sup. Ct. Rep. 644, 5 Inters. Com. Rep. 369; *Ex parte* Cohen, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. 127; *Re* Buskett, 106 Mo. 602, 17 S. W. 753, 14 L. R. A. 407, and note, 27 Am. St. 378; Bradley *v.* Clarke, 133 Cal. 196, 65 Pac. 395. For a case where the court was extremely tender of the recalcitrant witness, see *Ex parte* Miskimins, 8 Wyo. 302, 58 Pac. 411, 49 L. R. A. 831, and see also the dissenting opinion of *Knight*, J. Property of the accused, other than his papers, even though seized upon his own premises without authority and by a trespass, may be introduced in evidence against him. State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227. Witness is privileged not to be com-

It is the law in some of the States, when a person is charged with crime, and is brought before an examining magistrate, and the witnesses in support of the charge have been heard, that the prisoner may also make a statement concerning the transaction charged against him, and that this may be used against him on the trial if supposed to have a tendency to establish guilt. But the prisoner is to be first cautioned that he is under no obligation to answer any question put to him unless he chooses; and that whatever he says and does must be entirely voluntary.[1] He is also to be allowed the presence and advice of counsel; and if that privilege is denied him it may be sufficient reason for discrediting any damaging statements he may have made.[2] When, however, the statute has been complied with, and no species of coercion appears to have been employed, the statement the prisoner may have made is evidence which can be used against him on his trial, and is generally entitled to great weight.[3] And in any other case except treason[4] the confession of the accused may be received in evidence to establish his guilt, provided no circumstance accompanies the making of it which should detract from its weight in producing conviction.

pelled to testify against himself in contempt proceedings. *Ex parte* Gould, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. 57. Officer of corporation cannot be compelled to report under oath whether corporation has violated Anti-Trust Act. State *v.* Simmons Hardware Co., 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676. Testimony as to marks and scars introduced to identify prisoner is not inadmissible because obtained by forcible examination of prisoner's body. O'Brien *v.* State, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323, and note. But see State *v.* Height, — Iowa, —, 91 N. W. 935, in which case physicians making a compulsory physical examination of the accused were not permitted to testify. An action to exclude a foreign corporation from the State is a civil action, and the defendant corporation may be compelled to give evidence against itself. State *v.* Standard Oil Co., 61 Neb. 28, 84 N. W. 413.]

[1] See Rev. Stat. of New York, Pt. 4, c. 2, tit. 2, §§ 14–16.

[2] Rex *v.* Ellis, Ry. & Mood. 432. However, there is no absolute right to the presence of counsel, or to publicity in these preliminary examinations, unless given by statute. Cox *v.* Coleridge, 1 B. & C. 37.

[3] It should not, however, be taken on oath, and if it is, that will be sufficient reason for rejecting it. Rex *v.* Smith, 1 Stark. 242; Rex *v.* Webb, 4 C. & P. 564; Rex *v.* Lewis, 6 C. & P. 161; Rex *v.* River, 7 C. & P. 177; Regina *v.* Pikesley, 9 C. & P. 124; People *v.* McMahon, 15 N. Y. 384. "The view of the English judges, that an oath, even where a party is informed he need answer no questions unless he pleases, would, with most persons, overcome that caution, is, I think, founded on good reason and experience. I think there is no country — certainly there is none from which any of our legal notions are borrowed — where a prisoner is ever examined on oath." People *v.* Thomas, 9 Mich. 314, 318, per *Campbell*, J. A person compelled to testify before the grand jury cannot be indicted upon evidence so secured. State *v.* Gardiner, — Minn. —, 92 N. W. 529 (Dec. 19, 1902). See upon the general subject, Greenleaf on Evidence, ed. 16, § 333 *a*, and notes.

[4] In treason there can be no conviction unless on the testimony of two witnesses to the same overt act, or on confession in open court. Const. of United States, art. 3, § 3.

But to make it admissible in any case it ought to appear that it was made voluntarily, and that no motives of hope or fear were employed to induce the accused to confess.[1] The evidence ought to be clear and satisfactory that the prisoner was neither threatened nor cajoled into admitting what very possibly was untrue. Under the excitement of a charge of crime, coolness and self-possession are to be looked for in very few persons; and however strongly we may reason with ourselves that no one will confess a heinous offence of which he is not guilty, the records of criminal courts bear abundant testimony to the contrary. If confessions could prove a crime beyond doubt, no act which was ever punished criminally would be better established than witchcraft;[2] and the judicial executions which have been justified by such confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case. As "Mr. Justice *Parke* several times observed," while holding one of his circuits, "too great weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say."[3] And when the admission is full and positive, it perhaps quite as often happens that it has been made under the influence of the terrible fear excited by the charge, and in the hope that confession may ward off some of the consequences likely to follow if guilt were persistently denied.

A confession alone ought not to be sufficient evidence of the *corpus delicti*. There should be other proof that a crime has actually been committed; and the confession should only be allowed for the purpose of connecting the defendant with the

[1] See Smith *v.* Commonwealth, 10 Gratt. 734; Shifflet *v.* Commonwealth, 14 Gratt. 652; Page *v.* Commonwealth, 27 Gratt. 954; Williams *v.* Commonwealth, 27 Gratt. 997; United States *v.* Cox, 1 Cliff. 5, 21; Jordan's Case, 32 Miss. 382; Runnels *v.* State, 28 Ark. 121; Commonwealth *v.* Holt, 121 Mass. 61; Miller *v.* People, 39 Ill. 457.

[2] See Mary Smith's Case, 2 Howell's State Trials, 1049; Case of Essex Witches, 4 Howell's State Trials, 817; Case of Suffolk Witches, 6 Howell's State Trials, 647; Case of Devon Witches, 8 Howell's State Trials, 1017. It is true that torture was employed freely in cases of alleged witchcraft, but the delusion was one which often seized upon the victims as well as their accusers, and led the former to freely confess the most monstrous and impossible actions. Much curious and valuable information on this subject may be found in "Superstition and Force," by Lea; "A Physician's Problems," by Elam; and Lecky, History of Rationalism.

[3] Note to Earle *v.* Picken, 5 C. & P. 542. See also 1 Greenl. Ev. § 214, and note; Commonwealth *v.* Curtis, 97 Mass. 574; Derby *v.* Derby, 21 N. J. Eq. 36; State *v.* Chambers, 39 Iowa, 179.

offence.[1] And if the party's hopes or fears are operated upon to induce him to make it, this fact will be sufficient to preclude the confession being received; the rule upon this subject being so strict that even saying to the prisoner it will be better for him to confess, has been decided to be a holding out of such inducements to confession, especially when said by a person having a prisoner in custody, as should render the statement obtained by means of it inadmissible.[2] If, however, statements have been made before

[1] In Stringfellow *v.* State, 26 Miss. 157, a confession of murder was held not sufficient to warrant conviction, unless the death of the person alleged to have been murdered was shown by other evidence. In People *v.* Hennessy, 15 Wend. 147, it was decided that a confession of embezzlement by a clerk would not warrant a conviction where that constituted the sole evidence that an embezzlement had been committed. So on an indictment for blasphemy, the admission by the defendant that he spoke the blasphemous charge, is not sufficient evidence of the uttering. People *v.* Porter, 2 Park. Cr. R. 14. And see State *v.* Guild, 10 N. J. 163, 18 Am. Dec. 404; Long's Case, 1 Hayw. 524; People *v.* Lambert, 5 Mich. 349; Ruloff *v.* State, 18 N. Y. 179; Hector *v.* State, 2 Mo. 166, 22 Am. Dec. 454; Roberts *v.* People, 11 Col. 213, 17 Pac. 637; Winslow *v.* State, 76 Ala. 42.

[2] Rex *v.* Enoch, 5 C. & P. 539; State *v.* Bostick, 4 Harr. 563; Boyd *v.* State, 2 Humph. 390; Morehead *v.* State, 9 Humph. 635; Commonwealth *v.* Taylor, 5 Cush. 605; Rex *v.* Partridge, 7 C. & P. 551; Commonwealth *v.* Curtis, 97 Mass. 574; State *v.* Staley, 14 Minn. 105; Frain *v.* State, 40 Ga. 529; Austine *v.* State, 51 Ill. 236; People *v.* Phillips, 42 N. Y. 200; State *v.* Brokman, 46 Mo. 566; Commonwealth *v.* Mitchell, 117 Mass. 431; Commonwealth *v.* Sturtivant, 117 Mass. 122; Corley *v.* State, 50 Ark. 305, 7 S. W. 255. Mr. *Phillips* states the rule thus: "A promise of benefit or favor, or threat or intimation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducements, either of hope or fear. The prosecutor, or the prosecutor's wife or attorney, or the prisoner's master or mistress, or a constable, or a person assisting him in the apprehension or custody, or a magistrate acting in the business, or other magistrate, has been respectively looked upon as having authority in the matter; and the same principle applies if the inducement has been held out by a person without authority, but in the presence of a person who has such authority, and with his sanction, either express or implied." 1 Phil. Ev. by Cowen, Hill, and Edwards, 544, and cases cited. But we think the better reason is in favor of excluding confessions where inducements have been held out by any person, whether acting by authority or not. Rex *v.* Simpson, 1 Mood. C. C. 410; State *v.* Guild, 10 N. J. 163, 18 Am. Dec. 404; Spears *v.* State, 2 Ohio St. 583; Commonwealth *v.* Knapp, 9 Pick. 496; Rex *v.* Clewes, 4 C. & P. 221; Rex *v.* Kingston, 4 C. & P. 387; Rex *v.* Dunn, 4 C. & P. 543; Rex *v.* Walkley, 6 C. & P. 175; Rex *v.* Thomas, 6 C. & P. 353. "The reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage or fear of injury to state things which are not true." Per *Morton*, J. in Commonwealth *v.* Knapp, 9 Pick. 496, 502; People *v.* McMahon, 15 N. Y. 387. "There are not wanting many opposing authorities, which proceed upon the idea, that "a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess." 1 Greenl. Ev. § 223. No supposition could be more fallacious; and, in point of fact, a case can scarcely occur in which some one, from age, superior wisdom, or experience, or from his relations to the accused or to the prosecutor, would not be likely to exercise more influence upon his mind than some

the confession which were likely to do away with the effect of the inducements, so that the accused cannot be supposed to have

of the persons who are regarded as "in authority" under the rule as stated by Mr. Phillips. Mr. Greenleaf thinks that, while as a rule of law all confessions made to persons in authority should be rejected, "promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law, that a confession must be voluntary, being strictly adhered to, and the question, whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge under all the circumstances of the case." 1 Greenl. Ev. § 223. This is a more reasonable rule than that which admits such confessions under all circumstances; but it is impossible for a judge to say whether inducements, in a particular case, *have* influenced the mind or not; if their nature were such that they were calculated to have that effect, it is safer, and more in accordance with the humane principles of our criminal law, to presume, in favor of life and liberty, that the confessions were "forced from the mind by the flattery of hope, or by the torture of fear" (per *Eyre*, C. B., Warickshall's Case, 1 Leach, C. C. 299), and exclude them altogether. In case of doubt as to the fact that the confession was voluntary, the jury should be left to exclude it, if they think it involuntary. Com. *v.* Preece, 140 Mass. 276, 5 N. E. 494; People *v.* Barker, 60 Mich. 277, 27 N. W. 539. In Ellis *v.* State, 65 Miss. 44, 3 So. 188, it is held the duty of the court to decide whether it was voluntary, and that the jury may or may not believe it true, if admitted. This whole subject is very fully considered in note to 2 Leading Criminal Cases, 182. And see Whart. Cr. Law, § 686 *et seq.* The cases of People *v.* McMahon, 15 N. Y. 385, and Commonwealth *v.* Curtis, 97 Mass. 574, have carefully considered the general subject. In the second of these, the prisoner had asked the officer who made the arrest, whether he had better plead guilty, and the officer had replied that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." After this he made statements which were relied upon to prove guilt. These statements were not allowed to be given in evidence. Per *Foster, J.*: "There is no doubt that any inducement of temporal fear or favor coming from one in authority, which preceded and may have influenced a confession, will cause it to be rejected, unless the confession is made under such circumstances as show that the influence of the inducement has passed away. No cases require more careful scrutiny than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions. Commonwealth *v.* Taylor, 5 Cush. 610; Commonwealth *v.* Tuckerman, 10 Gray, 193; Commonwealth *v.* Morey, 1 Gray, 461. 'Saying to the prisoner that it will be the worse for him if he does not confess, or that it will be the better for him if he does, is sufficient to exclude the confession, according to constant experience.' 2 Hale, P. C. 659; 1 Greenl. Ev. § 219; 2 Bennett and Heard's Lead. Cr. Cas. 164; Ward *v.* State, 50 Ala. 120. Each case depends largely on its own special circumstances. But we have before us an instance in which the officer actually held out to the defendant the hope and inducement of a lighter sentence if he pleaded guilty. And a determination to plead guilty at the trial, thus induced, would naturally lead to an immediate disclosure of guilt." And the court held it an unimportant circumstance that the advice of the officer was given at the request of the prisoner, instead of being volunteered. A voluntary confession obtained by artifice is admissible. State *v.* Brooks, 92 Mo. 542, 5 S. W. 257, 330; Heldt *v.* State, 20 Neb. 492, 30 N. W. 626. So, if made in response to a simple request by the officer in charge of the person. Ross *v.* State, 67 Md. 286, 10 Atl. 218. Statements made to the grand jury as individuals in the jury room are admissible. State *v.* Coffee, 56 Conn. 399, 16 Atl. 151. But not those made to a coroner by an ignorant foreigner, without counsel, or knowledge of his rights. People *v.*

acted under their influence, the confession may be received in evidence;[1] but the showing ought to be very satisfactory on this point before the court should presume that the prisoner's hopes did not still cling to, or his fears dwell upon, the first inducements.[2]

Before prisoners were allowed the benefit of assistance from counsel on trials for high crimes, it was customary for them to make such statements as they saw fit concerning the charge against them, during the progress of the trial, or after the evidence for the prosecution was put in; and upon these statements the prosecuting officer or the court would sometimes ask questions, which the accused might answer or not at his option. And although this practice has now become obsolete, yet if the accused in any case should manage or assist in his own defence, and should claim the right of addressing the jury, it would be difficult to confine him to "the record" as the counsel may be confined in his argument. A disposition has been manifested of late to allow the accused to give evidence in his own behalf; and statutes to that effect are in existence in some of the States, the operation of which is believed to have been generally satisfactory.[3] These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance;[4] and if he does testify, he is at liberty to stop at any

Mondon, 103 N. Y. 211, 8 N. E. 496. The rule does not cover statements of facts not involving guilt, but which in connection with other facts may tend to show it. People *v.* Le Roy, 65 Cal. 613, 4 Pac. 649. See, upon the general subject of admissibility of confessions with reference to their voluntary character, Greenleaf on Evidence, ed. 16, §§ 219–230.

[1] State *v.* Guild, 10 N. J. 163, 18 Am. Dec. 404; Commonwealth *v.* Harman, 4 Pa. St. 269; State *v.* Vaigneur, 5 Rich. 391; Rex *v.* Cooper, 5 C. & P. 535; Rex *v.* Howes, 6 C. & P. 404; Rex *v.* Richards, 5 C. & P. 318; Thompson *v.* Commonwealth, 20 Gratt. 724.

[2] See State *v.* Roberts, 1 Dev. 259; Rex *v.* Cooper, 5 C. & P. 535; Thompson *v.* Commonwealth, 20 Gratt. 724; State *v.* Lowhorne, 66 N. C. 538; Thompson *v.* State, 19 Tex. App. 593; Coffee *v.* State, 25 Fla. 501, 6 So. 493; [People *v.* Stewart, 75 Mich. 21, 42 N. W. 662.] Before the confession can be received, it must be shown by the prosecution that it was voluntary. State *v.* Garvey, 28 La. Ann. 955, 26 Am. Rep. 123. Compare Hopt *v.* Utah, 110 U. S. 574, 4 Sup. Ct. Rep. 202.

[3] See American Law Register, Vol. V. N. S. pp. 129, 705; Ruloff *v.* People, 45 N. Y. 213. As such statutes do not compel, even morally, a defendant to testify, they are valid. People *v.* Courtney, 94 N. Y. 490. In Tennessee, the prisoner's statement is not, in a legal sense, testimony, but the jury may nevertheless believe and act upon it. Wilson *v.* State, 3 Heisk. 342.

[4] People *v.* Tyler, 36 Cal. 522; State *v.* Cameron, 40 Vt. 555. For a case rest-

point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under

ing upon an analogous principle, see Carne *v.* Litchfield, 2 Mich. 340. A different view would seem to be taken in Maine. See State *v.* Bartlett, 55 Me. 200. The views of the court are thus stated in the recent case of State *v.* Cleaves, 59 Me. 298, 8 Am. Rep. 422. The judge below had instructed the jury that the fact that the defendant did not go upon the stand to testify was a proper matter to be taken into consideration by them in determining the question of her guilt or innocence. This instruction was sustained. *Appleton*, Ch. J. "It has been urged that this view of the law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered. The instruction given was correct, and in entire accordance with the conclusions to which, after mature deliberation, we have arrived. State *v.* Bartlett, 55 Me. 200; State *v.* Lawrence, 57 Me. 375."

In People *v.* Tyler, 36 Cal. 522, 529, *Sawyer*, Ch. J., expresses the contrary view as follows: "At the trial, by his plea of not guilty, the party charged denies the charge against him. This is itself a positive act of denial, and puts upon the people the burden of affirmatively proving the offence alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty; and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if at the trial, when for all the purposes of the trial the burden is on the people to prove the offence charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say in substance that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the very act of exercising his option, as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself. Whatever the ordinary rule of evidence, with reference to inferences to be drawn from the failure of parties to produce evidence that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify in his own behalf; that to permit such an inference would be to violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question." See also Commonwealth *v.* Bonner, 97 Mass. 587; Commonwealth *v.* Morgan, 107 Mass. 109; Commonwealth *v.* Nichols, 114 Mass. 285, 19 Am. Rep. 346; Commonwealth *v.* Scott, 123 Mass. 239, 25 Am. Rep. 87; Bird *v.* State, 50 Ga. 585. In New York and Ohio, by statute, unfavorable inferences are not allowed to be drawn from the fact of the defendant not offering himself as a witness. See

the circumstances, they think it entitled to;[1] otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.[2]

Brandon *v.* People, 42 N. Y. 265; Connors *v.* People, 50 N. Y. 240; Stover *v.* People, 56 N. Y. 315; Calkins *v.* State, 18 Ohio St. 366.

In Devries *v.* Phillips, 63 N. C. 53, the Supreme Court of North Carolina held it not admissible for counsel to comment to the jury on the fact that the opposite party did not come forward to be sworn as a witness as the statute permitted. In Michigan the wife of an accused party may be sworn as a witness with his assent; but it has been held that his failure to call her was not to subject him to inferences of guilt, even though the case was such that, if his defence was true, his wife must have been cognizant of the facts. Knowles *v.* People, 15 Mich. 408.

When a defendant in a criminal case takes the stand in his own behalf, he is subject to impeachment like other witnesses. Fletcher *v.* State, 49 Ind. 124, 19 Am. Rep. 673; Mershon *v.* State, 51 Ind. 14; State *v.* Beal, 68 Ind. 345; Morrison *v.* State, 76 Ind. 335; Commonwealth *v.* Bonner, 97 Mass. 587; Commonwealth *v.* Gallagher, 126 Mass. 54; State *v.* Hardin, 46 Iowa, 623, 26 Am. Rep. 174; Gifford *v.* People, 87 Ill. 211. As to the extent to which a prisoner may be cross-examined, see Hanoff *v.* State, 37 Ohio St. 178; People *v.* Noelke, 94 N. Y. 137; State *v.* Clinton, 67 Mo. 380; State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441; People *v.* O'Brien, 66 Cal. 602, 6 Pac. 695. [That cross-examination may be full and searching, see Fitzpatrick *v.* United States, 178 U. S. 304, 20 Sup. Ct. Rep. 944.] On the whole subject of the accused as witness, see 4 Crim. Law Mag. 323.

[1] In State *v.* Ober, 52 N. H. 459, 13 Am. Rep. 88, the defendant was put on trial for an illegal sale of liquors; and having offered himself as a witness, was asked on cross-examination a question directly relating to the sale. He declined to answer, on the ground *that it might tend to criminate him*. Being convicted, it was alleged for error that the court suffered the prosecuting officer to comment on this refusal to the jury. The Supreme Court held this no error. This ruling is in entire accord with the practice which has prevailed without question in Michigan, and which has always assumed that the right of comment, where the party makes himself his own witness, and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstains from asserting his statutory privilege.

The case of Conners *v.* People, 50 N. Y. 240, is different. There the defendant, having taken the stand as a witness, objected to answer a question; but was directed by the court to do so, and obeyed the direction. This was held no error because he had waived his privilege. If the defendant had persisted in refusing we are not advised what action the court would have deemed it proper to take, and it is easy to conceive of serious embarrassments in such a case. Under the Michigan practice, when the court had decided the question to be a proper one it would have been left to the defendant to answer or not at his option, but if he failed to answer what seemed to the jury a proper inquiry, it would be thought surprising if they gave his imperfect statement much credence. On this point see further State *v.* Wentworth, 65 Me. 234, 20 Am. Rep. 688; State *v.* Witham, 72 Me. 531.

As to extent to which comment may be made upon the defendant's testimony or his failure to make it full, see Heldt *v.* State, 20 Neb. 492, 30 N. W. 626; Watt *v.* People, 126 Ill. 9, 18 N. E. 340; State *v.* Graves, 95 Mo. 510, 8 S. W. 739; State *v.* Ward, 61 Vt. 153, 17 Atl. Rep. 483.

[2] The statute of Michigan of 1861, p. 169, removed the common-law disabilities of parties to testify and added, "Nothing in this act shall be construed as giving the right to compel a defendant in criminal cases to testify; but any such

The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court.[1]

defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined on any such statement." It has been held that this statement should not be under oath. People *v.* Thomas, 9 Mich. 314. That its purpose was to give every person on trial for crime an opportunity to make full explanation to the jury, in respect to the circumstances given in evidence which are supposed to have a bearing against him. Annis *v.* People, 13 Mich. 511. That the statement is evidence in the case, to which the jury can attach such weight as they think it is entitled to. Maher *v.* People, 10 Mich. 212. That the court has no right to instruct the jury that, when it conflicts with the testimony of an unimpeached witness, they must believe the latter in preference. Durant *v.* People, 13 Mich. 351. And that the prisoner while on the stand, is entitled to the assistance of counsel in directing his attention to any branch of the charge, that he may make explanations concerning it if he desires. Annis *v.* People, 13 Mich. 511. The prisoner does not cease to be a defendant by becoming a witness, nor forfeit rights by accepting a privilege. In People *v.* Thomas, 9 Mich. 321, *Campbell*, J., in speaking of the right which the statute gives to cross-examine a defendant who has made his statement, says: "And while his constitutional right of declining to answer questions cannot be removed, yet a refusal by a party to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury." See Commonwealth *v.* Mullen, 97 Mass. 547; Commonwealth *v.* Curtis, 97 Mass. 574; Commonwealth *v.* Morgan, 107 Mass. 199. In Florida under a similar statute the prisoner may make his statement even after the evidence is closed. Higginbotham *v.* State, 19 Fla. 557. [Defendant may be compelled to testify against his interest in civil cases. Levy *v.* Superior Court of San Francisco, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811, and note in L. R. A. And in criminal cases the accused may be compelled to stand up before the jury for identification. People *v.* Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. 741, and note in L. R. A. Where accused offers himself as witness he may be cross-examined. People *v.* Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669, and note. The constitutional maxim which protects one from testifying against himself is available to one though he is not on trial. Counselman *v.* Hitchcock, 142 U. S. 547, 12 Sup. Ct. Rep. 195.]

[1] State *v.* Thomas, 64 N. C. 74; Goodman *v.* State, Meigs, 197; Jackson *v.* Commonwealth, 19 Gratt. 656. See Skaggs *v.* State, 108 Ind. 53, 8 N. E. 695. By the old common law, a party accused of felony was not allowed to call witnesses to contradict the evidence for the Crown; and this seems to have been on some idea that it would be derogatory to the royal dignity to permit it. Afterwards, when they were permitted to be called, they made their statements without oath; and it was not uncommon for both the prosecution and the court to comment upon their testimony as of little weight because unsworn. It was not until Queen Anne's time that they were put under oath.

The rule that the prisoner shall be confronted with the witnesses against him does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules of the common law in other cases. United States *v.* Benner, Baldw. 234; United States *v.* Little, 2 Wash. C. C. 159; United States *v.* Ortega, 4 Wash. C. C. 531; People *v.* Jones, 24 Mich. 215. But the *corpus delicti* — *e. g.* the fact of marriage in an indictment for bigamy — cannot be proved by certificates. People *v.* Lambert, 5 Mich. 349. Compare Patterson *v.* State, 17 Tex. App. 102. [On right to be confronted with witnesses, see Motes *v.* United States, 178 U. S. 458, 20 Sup. Ct. Rep. 993; also Gore *v.* State, 52 Ark. 285, 12 S. W. 561, 5 L. R. A. 832, and note. Jury may view the premises where the crime was committed, and the prisoner has no right to be present. People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368; upon view by jury, see note to this case in L. R. A.]

The defendant is entitled to be confronted with the witnesses against him;[1] and if any of them be absent from the Commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction.[2] The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party.[3] So, also, if a person is

[1] Bell *v.* State, 2 Tex. App. 216, 28 Am. Rep. 429. It has been held competent, even in a criminal case, to make the certificate of the proper official accountant *prima facie* evidence of an official delinquency in the tax collector. Johns *v.* State, 55 Md. 350. [So a statute making evidence that a bank failed and that deposits were received by an officer of the bank shortly before the failure, *prima facie* evidence of a taking with knowledge of insolvency is valid. State *v.* Buck, 120 Mo. 479, 25 S. W. 673. See also, People *v.* Cannon, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. 668.]

It is not competent for the legislature to make reputation evidence against an accused of a public offence, — *e. g.* of keeping a place for the sale of liquors, — which the jury are bound to follow. State *v.* Beswick, 13 R. I. 211; *contra*, State *v.* Thomas, 47 Conn. 546, 36 Am. Rep. 98. It may be made sufficient evidence, provided the jury, while free to convict upon it, are not bound to do so. State *v.* Wilson, 15 R. I. 180, 1 Atl. 415. [The prisoner must be allowed to see witness's face and to be near enough to hear what witness says and to watch its effect upon jury. State *v.* Mannion, 19 Utah, 505, 57 Pac. 542, 45 L. R. A. 638. Record which does not show the prisoner present during the entire trial is fatally defective. French *v.* State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. 855.]

[2] People *v.* Howard, 50 Mich. 239, 15 N. W. 101. But a statute may give the prisoner the right to take depositions out of the State upon condition that the State shall have the like right. Butler *v.* State, 97 Ind. 378.

[3] 1 Greenl. Ev. §§ 163–166; Bishop, Cr. Pro. §§ 520–527; Whart. Cr. Law, § 667; 2 Phil. Ev. by Cowen, Hill, and Edwards, 217, 229; Beets *v.* State, Meigs, 108; Kendricks *v.* State, 10 Humph. 479; United States *v.* McComb, 5 McLean, 286; Summons *v.* State, 5 Ohio St. 325; Pope *v.* State, 22 Ark. 371; Brown *v.* Commonwealth, 73 Pa. St. 321; Johnson *v.* State, 1 Tex. App. 333: O'Brien *v.* Commonwealth, 6 Bush, 563; Commonwealth *v.* Richards, 18 Pick. 434; People *v.* Murphy, 45 Cal. 137; People *v.* Devine, 46 Cal. 45; Davis *v.* State, 17 Ala. 354; Marler *v.* State, 67 Ala. 55; State *v.* Johnson, 12 Nev. 121; State *v.* Hooker, 17 Vt. 658; State *v.* Elliott, 90 Mo. 350, 2 S. W. 411; Hair *v.* State, 16 Neb. 601, 21 N. W. 464; State *v.* Fitzgerald, 63 Iowa, 268, 19 N. W. 202. [Mattox *v.* United States, 156 U. S. 237, 15 Sup. Ct. Rep. 337; s. c. 146 U. S. 140, 13 Sup. Ct. Rep. 50. *Contra*, Cline *v.* State, 36 Tex. Crim. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. 850. See, upon this right of confrontation, note to Cline *v.* State, *supra*, 61 Am. St. 886, and dissenting opinion of *Henderson*, J., in same case.] Compare Puryear *v.* State, 63 Ga. 692; State *v.* Campbell, 1 Rich. 124. That the legislature may make the notes of the official stenographer evidence in a subsequent trial, see State *v.* Frederic, 69 Me. 400,

on trial for homicide, the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused; the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth.[1] Not that such evidence is of very conclusive character; it is not always easy for the hearer to determine how much of the declaration related to what was seen and positively known, and how much was surmise and suspicion only; but it is admissible from the necessity of the case, and the jury must judge of the weight to be attached to it.

In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment.[2] But misdemeanors may be tried in the absence of the accused.

3 Am. Cr. R. 78. See People *v.* Sligh, 48 Mich. 54, 11 N. W. 782. Whether evidence that the witness cannot be found after diligent inquiry, or is out of the jurisdiction, would be sufficient to let in proof of his former testimony, see Bul. N. P. 239, 242; Rex *v.* Hagan, 8 C. & P. 167; Sills *v.* Brown, 9 C. & P. 601; People *v.* Chung Ah Chue, 57 Cal. 567. Evidence of a witness at a former trial, alive but out of the State, is inadmissible. Owens *v.* State, 63 Miss. 450.

[1] Greenl. Ev. § 156; 1 Phil. Ev. by Cowen, Hill, and Edwards, 285–289; Whart. Cr. Law, §§ 669–682; Donnelly *v.* State, 26 N. J. 463; Anthony *v.* State, Meigs, 265; Hill's Case, 2 Gratt. 594; State *v.* Freeman, 1 Speers, 57; State *v.* Brunetto, 13 La. Ann. 45; Dunn *v.* State, 2 Ark. 229; Mose *v.* State, 35 Ala. 421; Brown *v.* State, 32 Miss. 433; Whitley *v.* State, 38 Ga. 70; State *v.* Quick, 15 Rich. 158; Jackson *v.* Commonwealth, 19 Gratt. 656; State *v.* Oliver, 2 Houst. 585; People *v.* Simpson, 48 Mich. 474, 12 N. W. 662; State *v.* Saunders, 14 Oreg. 300, 12 Pac. 441; State *v.* Vansant, 80 Mo. 67. This whole subject was largely considered in Morgan *v.* State, 31 Ind. 193; State *v.* Framburg, 40 Iowa, 555.

[2] See Andrews *v.* State, 2 Sneed. 550; Jacobs *v.* Cone, 5 S. & R. 335; Witt *v.* State, 5 Cold. 11; State *v.* Alman, 64 N. C. 364; Gladden *v.* State, 12 Fla. 577; Maurer *v.* People, 43 N. Y. 1; note to Winchell *v.* State, 7 Cow. 525; Hopt *v.* Utah, 110 U. S. 574, 4 Sup. Ct. Rep. 202; Smith *v.* People, 8 Col. 457, 8 Pac. 920; State *v.* Kelly, 97 N. C. 401, 2 S. E. 185. In capital cases the accused stands upon all his rights, and waives nothing. Nomaque *v.* People, Breese, 145; Dempsey *v.* People, 47 Ill. 325; People *v.* McKay, 18 Johns. 217; Burley *v.* State, 1 Neb. 385. The court cannot make an order changing the venue in a criminal case in the absence of and without notice to the defendant. *Ex parte* Bryan, 41 Ala. 404. Nor in the course of the trial allow evidence to be given to the jury in his absence, even though it be that of a witness which had been previously reduced to writing. Jackson *v.* Commonwealth, 19 Gratt. 656; Wade *v.* State, 12 Ga. 25. See People *v.* Bragle, 88 N. Y. 585. And in a capital case the record

The Traverse Jury.

Accusations of criminal conduct are tried at the common law by jury;[1] and wherever the right to this trial is guaranteed by the constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law,[2] and with all the common-law inci-

must affirmatively show the presence of the accused at the trial, and when the verdict is received and sentence pronounced. Dougherty *v.* Commonwealth, 69 Pa. St. 286. As to right to be present, at a view of the *locus in quo*, see People *v.* Lowrey, 70 Cal. 193, 11 Pac. 605; State *v.* Congdon, 14 R. I. 458; Schular *v.* State, 105 Ind. 289, 4 N. E. 870; People *v.* Thorn, 156 N. Y. 286, 50 N. E. 947, 4 L. R. A. 368, and note in L. R. A., at argument of motion for a new trial: People *v.* Ormsby, 48 Mich. 494, 12 N. W. 671; State *v.* Jefcoat, 20 S. C. 383; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; when jury come in for further instructions: Shipp *v.* State, 11 Tex. App. 46; Roberts *v.* State, 111 Ind. 340, 12 N. E. 500; State *v.* Myrick, 38 Kan. 238, 16 Pac. 330; State *v.* Jones, 29 S. C. 201, 7 S. E. Rep. 296. Whether any of the steps in the trial can be taken in the defendant's absence if he is under bail, see Barton *v.* State, 67 Ga. 653; Sahlinger *v.* People, 102 Ill. 241; State *v.* Smith, 90 Mo. 37, 1 S. W. 753; Gore *v.* State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832. [If the accused wilfully absents himself pending the trial, it may proceed in his absence. Gore *v.* State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832, and note.]

[1] See in general Thompson and Merriam on Juries. It is worthy of note that all that is extant of the legislation of the Plymouth Colony for the first five years, consists of the single regulation, "that all criminal facts, and also all manner of trespasses and debts between man and man, shall be tried by the verdict of twelve honest men, to be impanelled by authority, in form of a jury, upon their oath." 1 Palfrey's New England, 340. [Upon right to trial by jury, see Thompson *v.* Utah, 170 U. S. 343, 18 Sup. Ct. Rep. 620, and note to 42 L. ed. U. S. 1061. The right to trial by jury may be conditioned upon furnishing an affidavit of merits in actions ex contractu. Fidelity & Deposit Co. *v.* United States, — U. S. —, 23 Sup. Ct. Rep. 120 (Dec. 1. 1902).]

[2] Cases of contempt of court were never triable by jury; and the object of the power would be defeated in many cases if they were. The power to punish contempts summarily is incident to courts of record. King *v.* Almon, 8 St. Trials, 53; Respublica *v.* Oswald, 1 Dall. 319, 1 Am. Dec. 246; Mariner *v.* Dyer, 2 Me. 165; Morrison *v.* McDonald, 21 Me. 550; State *v.* White, T. U. P. Charl. 136; Yates *v.* Lansing, 9 Johns. 395, 6 Am. Dec. 290; Sanders *v.* Metcalf, 1 Tenn. Ch. 419; Clark *v.* People, 1 Ill. 340, 12 Am. Dec. 177; People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528; State *v.* Morrill, 16 Ark. 384; Gorham *v.* Luckett, 6 B. Monr. 638; State *v.* Woodfin, 5 Ired. 199; *Ex parte* Adams, 25 Miss. 883; State *v.* Copp, 15 N. H. 212; State *v.* Mathews, 37 N. H. 450; Neel *v.* State, 9 Ark. 259; State *v.* Tipton, 1 Blackf. 166; Middlebrook *v.* State, 43 Conn. 259; Garrigus *v.* State, 93 Ind. 239; Chafee *v.* Quidnick Co., 13 R. I. 442. [Tinsley *v.* Anderson, 171 U. S. 101, 18 Sup. Ct. Rep. 805. Upon powers of court to punish for contempt, see note to 22 L. ed. U. S. 205; limits to rule of no review of contempt proceedings, note to 22 L. ed. U. S. 354. Also, Smith *v.* Speed, — Okla. —, 55 L. R. A. 402. A court of review may cut down an excessive verdict and give judgment for the modified amount without violating the right to a jury trial. Burdick *v.* Missouri Pacific Ry. Co. 123 Mo. 221, 27 S. W. 453.] This is true of the federal courts. United States *v.* Hudson, 7 Cranch, 32; United States *v.* New Bedford Bridge, 1 Wood. & M. 401. See *Ex parte* Robinson, 19 Wall. 505; *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77. The legislature may designate the cases in which a court may punish summarily. *In re* Oldham, 89 N. C. 23; State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. Rep. 407. Whether justices of

dents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused.[1] (*a*)

the peace may punish contempts in the absence of any statute conferring the power, will perhaps depend on whether the justice's court is or is not deemed a court of record. See Lining *v.* Bentham, 2 Bay, 1; *Re* Cooper, 32 Vt. 253; *Ex parte* Kerrigan, 33 N. J. 345; Rhinehart *v.* Lance, 43 N. J. 311, 39 Am. Rep. 592. But court commissioners have no such power. *In re* Remington, 7 Wis. 643; Haight *v.* Lucia, 36 Wis. 355; *Ex parte* Perkins, 29 Fed. Rep. 900: nor notaries; Burtt *v.* Pyle, 89 Ind. 398; but see Dogge *v.* State, 21 Neb. 272, 31 N. W. 929. Nor can the legislature confer it upon municipal councils. Whitcomb's Case, 120 Mass. 118. As the courts in punishing contempts are dealing with cases which concern their own authority and dignity, and which are likely to suggest, if not to excite, personal feelings and animosities, the case should be plain before they should assume the authority. Bachelder *v.* Moore, 42 Cal. 415. See Storey *v.* People, 79 Ill. 45; Hollingsworth *v.* Duane, Wall. C. C. 77; *Ex parte* Bradley,

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[1] See note to p. 590, *post*. A citizen not in the land or naval service, or in the militia in actual service, cannot be tried by court-martial or military commission, on a charge of discouraging volunteer enlistments or resisting a military conscription. *In re* Kemp, 16 Wis. 359. See *Ex parte* Milligan, 4 Wall. 2. The constitutional right of trial by jury extends to newly created offences. Plimpton *v.* Somerset, 33 Vt. 283; State *v.* Peterson, 41 Vt. 504. *Contra*, Tims *v.* State, 26 Ala. 165 [case of an inferior offence]. But not to offences against city by-laws. McGear *v.* Woodruff, 33 N. J. 213. *Ex parte* Schmidt, 24 S. C. 363; Wong *v.* Astoria, 13 Oreg. 538, 11 Pac. 295; Lieberman *v.* State, 26 Neb. 464, 42 N. W. 419; Mankato *v.* Arnold, 36 Minn. 62, 30 N. W. 305. [Ogden *v.* City of Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506.] Otherwise if the offence is a crime. *In re* Rolfs, 30 Kan. 758, 1 Pac. 523; Creston *v.* Nye, 74 Iowa, 369, 37 N. W. 777. A provision in an excise law, authorizing the excise board to revoke licenses, is not void as violating the constitutional right of jury trial. People *v.* Board of Commissioners, 59 N. Y. 92. See LaCroix *v.* Co. Com'rs, 50 Conn. 321. [A jury may by statute be dispensed with where the defendant pleads guilty, and the court may be empowered to examine witnesses and determine from their testimony what is the degree of the offence. This is true even in capital cases. Hallinger *v.* Davis, 146 U. S. 314, 13 Sup. Ct. Rep. 105; and see note to 36 L. ed. U. S. 986; State *v.* Almy, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744; Craig *v.* State, 49 Ohio St. 415, 30 N. E. 1120, 16 L. R. A. 358. The jury may by law be required to be drawn from a special list secured by a special commissioner by eliminating unfit persons from the general list. People *v.* Dunn, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247. Fixing of period of sentence is no part of constitutional function of jury of which it cannot be deprived. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 46 L. R. A. 109. Statute authorizing dismissal of part of jury and receipt of verdict from remainder is void. McRae *v.* Grand Rapids, L. & D. R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750. Where the Constitution gives right to trial by jury in civil cases, it is a violation of that right for the court to take the question of negligence from the jury though the facts are undisputed if different inferences may be drawn from such facts. Shobert *v.* May, — Oreg. —, 60 Pac. 466, 55 L. R. A. 810. The power of a court to set aside the verdict of a jury as against the weight of evidence is not in conflict with the constitutional right to trial by jury. Hintz *v.* Mich. Cent. Ry. Co., — Mich. —, 93 N. W. 631.]

(*a*) [But any State is competent to establish through its constitution a jury of fewer than twelve persons for the trial of criminal charges, and it may probably provide that less than the whole number of jurors may render a verdict. Maxwell *v.* Dow, 176 U. S. 581, 20 Sup. Ct. Rep. 448, 494. M. was tried upon an information filed by the prosecuting attorney of a Utah county, charging him with robbery. He

A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case, as they are presented in

7 Wall. 364. If the contempt is in the presence of the court, it may be punished without notice or opportunity for defence. *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77. See State *v.* Gibson, 33 W. Va. 97, 10 S. E. Rep. 58. A libellous publication as to a pending cause may be punished as a contempt. Cooper *v.* People, 13 Col. 373, 22 Pac. Rep. 790. [The power to punish a party for contempt of court cannot be so used as to deprive him of his right to a defense upon the merits in the principal case. A decree *pro confesso* entered after striking a party's answer from the files as a punishment for his refusal to obey an order of the court is void for want of due process. Hovey *v.* Elliott, 167 U. S. 409, 17 Sup. Ct. Rep. 841, aff. 145 N. Y. 126, 39 N. E. 841. See the whole subject of contempts very fully discussed by Mr. Justice *White* in delivering the opinion of the court in this case. See, also, Carter *v.* Commonwealth, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310; Telegram Newspaper Co. *v.* Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. 280; Dahnke *v.* People, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; Dixon *v.* People, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; State *v.* Circuit Court, 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 554, 65 Am. St. 90; *Re* Huron, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822, 62 Am. St. 614, and note in L. R. A.; Coleman *v.* Roberts, 113 Ala. 323, 21 So. 449, 36 L. R. A. 84, 59 Am. St. 111; *Ex parte* Senior, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; Dailey *v.* Superior Court of San Francisco, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. 160; Clair *v.* State, 40 Neb. 534, 59 N. W. 118, 28 L. R. A. 367; Mullin *v.* People, 15 Col. 437, 24 Pac. 880, 9 L. R. A. 566, and note, 22 Am. St. 414; Thomas *v.* People, 14 Col. 254, 23 Pac. 326, 9 L. R. A. 569. Court has no inherent power to prohibit the publication of testimony given before it. *Re* Shortridge, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. 78.]

Charges of vagrancy and disorderly conduct were never triable by jury. See full review by *Alvey*, J., in State *v.* Glenn,

was tried before a jury composed of but eight jurors, was convicted, sentenced to imprisonment in the State prison, and duly committed.

Section 13, Article 1, of the Constitution of Utah provides: "Offences heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it." Section 10, Article 1, of that Constitution is as follows: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction, a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded."

M. after incarceration "applied to the supreme court of the State for a writ of *habeas corpus*, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under Article 5 of the Amendments to the Constitution of the United States, and also violated section 1 of Article 14 of those Amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under Article 6, and also violated section 1 of Article 14 of such Amendments; (3) that a trial by such a jury, and his subsequent imprisonment by reason of the verdict of that jury, deprived him of his

the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury

54 Md. 572. Also State *v.* Anderson, 40 N. J. 224. Petty offences need not be so tried. *Ex parte* Wooten, 62 Miss. 174; Inwood *v.* State, 42 Ohio St. 186; *Ex parte* Marx, 86 Va. 40, 9 S. E. 617. [Nor are breaches of the rules prescribed for the discipline of the national guard. State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 42 L. R. A. 749. Nor is a summary proceeding for a restraining order. *Ex parte* Keeler, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785. But an offence triable by jury at time of adoption of Constitution cannot subsequently be made triable without jury in the first instance. Miller *v.* Com., 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441, and note. The provision being considered does not require trial by jury of offences before consuls under the authority of treaty stipulations, though such offence was committed on the deck of an American vessel. Ross *v.* McIntyre, 140 U. S. 453, 11 Sup. Ct. Rep. 897. Nor can one ordered to leave this country under the Chinese exclusion act object that he was not given a jury trial of his claimed right to remain. Fong Yue Ting *v.* United States, 149 U. S. 698, 13 Sup. Ct. Rep. 1016. The procedure in equity to enforce a mechanics' lien is not in conflict with the constitutional right to trial by jury. Hathorne *v.* Panama Park Co., — Fla. —, 32 So. 812.] But one may not be imprisoned for two years as an habitual drunkard upon a chamber order. State *v.* Ryan, 70 Wis. 676, 36 N. W. 823.

[And a commitment until further order of court is void for indefiniteness. *Ex parte* Curtis, 10 Okla. 660, 63 Pac. 963. That right to jury extends to trial of issues of fact in *quo warranto* proceedings, see Buckman *v.* State, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806, and note. But not to actions of book-account. Hall *v.* Armstrong, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366. Nor to assessment of damages for negligence on default of answer. Dean *v.* Willamette Bridge Co., 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614.]

liberty without due process of law, in violation of section 1 of Article 14, which provides that no State shall deprive any person of life, liberty, or property without due process of law."

"The supreme court of the State, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the State prison to undergo the remainder of his sentence; and he then sued out a writ of error and brought the case" before the Supreme Court of the United States.

Said that court, speaking by Mr. Justice *Peckham*: "The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of Hurtado *v.* California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292. The case has since been frequently approved. Hallinger *v.* Davis, 146 U. S. 314, 322, 991, 13 Sup. Ct. Rep. 105; McNulty *v.* California, 149 U. S. 645, 13 Sup. Ct. Rep. 959; Hodgson *v.* Vermont, 168 U. S. 262, 272, 18 Sup. Ct. Rep. 80; Holden *v.* Hardy, 169 U. S. 366, 384, 18 Sup. Ct. Rep. 383; Brown *v.* New Jersey, 175 U. S. 172, 176, 20 Sup. Ct. Rep. 77; Bolln *v.* Nebraska, 176 U. S. 83, 20 Sup. Ct. Rep. 287.

"But the plaintiff in error contends that the Hurtado case did not decide the question whether the State law violated that clause in the Fourteenth Amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . . In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the Fifth Amendment. Yet this amendment was held in the Hurtado case not to apply to a prosecution for murder in a State court pursuant to a State law. The claim was made in that case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the States themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the federal government. By holding that the conviction upon an information was valid, the court necessarily held that the

as the Constitution guarantees to accused parties, when a less

indictment was not necessary; that exemption from trial for an infamous crime, excepting under an indictment, was not one of those privileges of a citizen of the United States which a State was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case."

That the first ten Amendments to the Constitution of the United States "were intended as restraints and limitations upon the powers of the general government, . . . and did not have any effect upon the powers of the respective States . . . has been many times decided," citing Spies *v.* Illinois, 123 U. S. 86, 131, 166, 8 Sup. Ct. Rep. 21; Holden *v.* Hardy, 169 U. S. 366, 382, 787, 18 Sup. Ct. Rep. 383; Brown *v.* New Jersey, 175 U. S. 172, 174, 20 Sup. Ct. Rep. 77. These cases cite many others to the same effect. That the Fourteenth Amendment did not extend these restrictions to the States was decided in the Slaughter-House Cases, 16 Wall. 36.

In conclusion, Mr. Justice *Peckham* says: "It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. Caldwell *v.* Texas, 137 U. S. 692, 11 Sup. Ct. Rep. 224; Leeper *v.* Texas, 139 U. S. 462, 11 Sup. Ct. Rep. 577. It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of Mr. Justice *Matthews*, in the Hurtado case, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal government. As was stated by Mr. Justice *Brewer*, in delivering the opinion of the court in Brown *v.* New Jersey, 175 U. S. 172, 20 Sup. Ct. Rep. 77, the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

"Judged by the various cases in this court, we think there is no error in this record, and the judgment of the Supreme Court of Utah must therefore be affirmed." To this there was a vigorous dissenting opinion by Mr. Justice *Harlan*, chiefly upon the ground that the holding of the court made the amendment clause in question only declaratory of the earlier law.]

number is not allowed in express terms (*a*); and the necessity of a full panel could not be waived — at least in case of felony — even by consent.[1] The infirmity in case of a trial by jury of less than twelve, by consent, would be that the tribunal would be one

[1] Work *v.* State, 2 Ohio St. 296; Cancemi *v.* People, 18 N. Y. 128; Brown *v.* State, 8 Blackf. 561; 2 Lead. Cr. Cas. 337; Hill *v.* People, 16 Mich. 351. And see State *v.* Cox, 3 Eng. 436; Murphy *v.* Commonwealth, 1 Met. (Ky.) 365; Tyzee *v.* Commonwealth, 2 Met. (Ky.) 1; State *v.* Mansfield, 41 Mo. 470; Brown *v.* State, 16 Ind. 496; Opinions of Judges, 41 N. H. 550; Lincoln *v.* Smith, 27 Vt. 328; Dowling's Case, 13 Miss. 664; Tillmann *v.* Arlles, 13 Miss. 373; Vaughan *v.* Seade, 30 Mo. 600; Kleinschmidt *v.* Dunphy, 1 Mont. 118; Allen *v.* State, 54 Ind. 461; State *v.* Everett, 14 Minn. 447; State *v.* Lockwood, 43 Wis. 403; State *v.* Davis, 66 Mo. 484; Williams *v.* State, 12 Ohio St. 622; Allen *v.* State, 54 Ind. 461; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; Mays *v.* Com., 82 Va. 550; Harris *v.* People, 128 Ill. 585, 21 N. E. 563; State *v.* Stewart, 89 N. C. 563. In Commonwealth *v.* Dailey, 12 Cush. 80, it was held that, in a case of misdemeanor, the consent of the defendant that a verdict might be received from eleven jurors was binding upon him, and the verdict was valid. See also State *v.* Borowsky, 11 Nev. 119; Murphy *v.* Commonwealth, 1 Met. (Ky.) 365; Connelly *v.* State, 60 Ala. 89, 31 Am. Rep. 34; State *v.* Sackett, 39 Minn. 69, 38 N. W. 773. No distinction is made in the last case between felony and misdemeanor in this regard. In Iowa the right to jury trial is regarded as a personal privilege which may be waived. State *v.* Polson, 29 Iowa, 133; State *v.* Kaufman, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148. But not in case of homicide. State *v.* Carman, 63 Iowa, 130, 18 N. W. 691. And in Connecticut and Ohio, under statutes permitting a defendant in a criminal case to elect to be tried by the court, his election is held to bind him. State *v.* Worden, 46 Conn. 349, 33 Am. Rep. 27; Dillingham *v.* State, 5 Ohio St. 280. Such a statute is valid: Edwards *v.* State, 45 N. J. L. 419; except as to a capital case. Murphy *v.* State, 97 Ind. 579. In Hill *v.* People, 16 Mich. 356, it was decided that if one of the jurors called was an alien, the defendant did not waive the objection by failing to challenge him, if he was not aware of the disqualification; and if the court refused to set aside the verdict on affidavits showing these facts, the judgment upon it would be reversed on error. The case of State *v.* Quarrel, 2 Bay, 156, is *contra*. The case of State *v.* Stone, 3 Ill. 326, in which it was held competent for the court, even in a capital case, to strike off a juryman after he was sworn, because of alienage, affords some support for Hill *v.* People. ["Struck" juries are permissible. Lommen *v.* Minneapolis Gaslight Co., 65 Minn. 190, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. 450.]

(*a*) [That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, see Thompson *v.* Utah, 170 U. S. 343, 349, 18 Sup. Ct. Rep. 620; and that their verdict shall be unanimous in all Federal courts where a jury trial is held, see American Pub. Co. *v.* Fisher, 166 U. S. 464, 17 Sup. Ct. Rep. 618, and Springville *v.* Thomas, 166 U. S. 707, 17 Sup. Ct. Rep. 717. See also Capital Traction Co. *v.* Hof, 174 U. S. 1, 19 Sup. Ct. Rep. 580. Upon number of jurymen necessary to jury, etc., see note to 14 L. ed. U. S. 394. With regard to grand jury, and that it must, unless otherwise expressly stated in constitution, consist of not less than twelve, whose verdict must be concurred in by twelve, see State *v.* Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33, and note. Under the constitution of Wyoming providing that the right to a jury trial in criminal cases shall remain inviolate, but that in civil cases a jury may consist of less than twelve, it is held that a statute providing that a verdict might be found in civil cases by an agreement of three-fourths of the jurors is void. First Nat'l Bank of Rock Springs *v.* Foster, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056, 54 L. R. A. 549.]

unknown to the law, created by mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offence against the State. But in those cases which formerly were not triable by jury, if the legislature provide for such a trial now, they may doubtless create for the purpose a statutory tribunal, composed of any number of persons, and no question of constitutional power or right could arise.

Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause,[1] but also peremptory without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed;[2] and the accused will thus have the benefit on his trial

[1] Inability to read and write may be made good cause for challenge. McCampbell *v.* State, 9 Tex. App. 124, 35 Am. Rep. 726. But not inability to understand English, in New Mexico, in the absence of statute. Terr. *v.* Romine, 2 New Mexico, 114. See, on the subject of challenges for opinion formed, Hayes *v.* Missouri, 120 U. S. 68, 7 Sup. Ct. Rep. 350; Spies *v.* Illinois, 123 U. S. 131, 8 Sup. Ct. Rep. 21; Hopt *v.* Utah, 120 U. S. 430, 7 Sup. Ct. Rep. 614; Palmer *v.* State, 42 Ohio St. 596; State *v.* Munchrath, 78 Iowa, 268, 43 N. W. 211. [Coughlin *v.* People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; and upon challenges generally, notes to 41 L. ed. U. S. 104 and 20 L. ed. U. S. 659.]

[2] Offences against the United States are to be tried in the district, and those against the State in the county in which they are charged to have been committed: Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635; but courts are generally empowered, on the application of an accused party, to order a change of venue, where for any reason a fair and impartial trial cannot be had in the locality. See Hudson *v.* State, 3 Cold. 355; Rowan *v.* State, 30 Wis. 129; State *v.* Mooney, 10 Iowa, 507; State *v.* Read, 49 Iowa, 85; Wayrick *v.* People, 89 Ill. 90; Manly *v.* State, 52 Ind. 215; Gut *v.* State, 9 Wall. 35; State *v.* Allee, 61 N. H. 423. [State *v.* McCarty, 52 Ohio St. 363, 39 N. E. 1041, 27 L. R. A. 534.] It has been held incompetent to order such a change of venue on the application of the prosecution. Kirk *v.* State, 1 Cold, 344. See also Wheeler *v.* State, 24 Wis. 52; Osborn *v.* State, 24 Ark. 629. [People *v.* Powell, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75.] And in another case in Tennessee it was decided that a statute which permitted offences committed near the boundary line of two counties to be tried in either was an invasion of the constitutional principle stated in the text. Armstrong *v.* State, 1 Cold. 338. See also State *v.* Denton, 6 Cold. 539. *Contra*, State *v.* Robinson, 14 Minn. 447; Willis *v.* State, 10 Tex. App. 493. [Statute providing that where the blow is struck outside the state and the stricken one dies within the state, the crime shall be deemed to have been committed at the place of death was sustained in *Ex parte* McNeely, 36 W. Va. 84, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. 831. Jury cannot be summoned from country districts to exclusion of residents of city in which crime occurred. Zanone *v.* State, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556.]

The case of Dana decided by Judge *Blatchford*, when U. S. District Judge for the southern district of New York, is of interest in this connection. The "New York Sun," of which Mr. Charles A. Dana was editor-in-chief, published an article reflecting upon the public conduct of an official at Washington. This article was claimed to be a libel. The actual offence, if any, was committed in New York; but a technical publication also took place in

of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses. The jury must unanimously concur in the verdict (*a*). This is a very old requirement in the English common law, and it has been adhered to, notwithstanding very eminent men have assailed it as unwise and inexpedient.[1] And the jurors must be left free to act in accordance with the dictates of their judgment. The final decision of the facts is to rest with them, and interference by the court with a view to coerce them into a verdict against their convictions is unwarrantable and irregular. A judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced.[2] Still

Washington, by the sale of papers there. The offended party chose to have his complaint tried summarily by a police justice of the latter city, instead of submitting it to a jury required to be indifferent between the parties. A federal commissioner issued a warrant for Mr. Dana's arrest in New York for transportation to Washington for trial; but Judge *Blatchford* treated the proceeding with little respect, and ordered Mr. Dana's discharge. Matter of Dana, 7 Ben. 1. It would have been a singular result of a revolution where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a federal officer to every territory into which his paper might find its way, to be tried in each in succession for offences which consisted in a single act not actually done in any of them. [Upon right of accused to object to local judge for prejudice, see State *v.* Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 680.]

[1] For the origin of this principle, see Forsyth, Trial by Jury, c. 11. The requirement of unanimity does not prevail in Scotland, or on the Continent. Among the eminent men who have not approved it may be mentioned Locke and Jeremy Bentham. See Forsyth, *supra*; Lieber, Civil Liberty and Self-Government, c. 20. [Unanimity necessary. American Publishing Co. *v.* Fisher, 166 U. S. 464, 17 Sup. Ct. Rep. 618; Springville City *v.* Thomas, 166 U. S. 707, 17 Sup. Ct. Rep. 717.]

[2] A judge who urges his opinion upon the facts to the jury decides the cause, while avoiding the responsibility. How often would a jury be found bold enough to declare their opinion in opposition to that of the judge upon the bench, whose words would fall upon their ears with all the weight which experience, learning, and commanding position must always carry with them? What lawyer would care to sum up his case, if he knew that the judge, whose words would be so much more influential, was to declare in his favor, or would be bold enough to argue the facts to the jury, if he knew the judge was to declare against him? Blackstone has justly remarked that "in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances,

(*a*) [But see the note on Maxwell *v.* Dow, note (*a*), page 454, *ante*. And upon number and agreement of jurors necessary to constitute a valid verdict, see note to 43 L. R. A. 33. See also Jacksonville, T. & K. W. R. Co. *v.* Adams, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272, and note. That statute may make majority of three-fourths sufficient in civil cases, where the constitution expressly so provides, see Hess *v.* White, 9 Utah, 61, 33 Pac. 243, 24 L. R. A. 277.]

less would he be justified in refusing to receive and record the verdict of the jury, because of its being, in his opinion, rendered in favor of the prisoner when it ought not to have been (*a*).

He discharges his duty of giving instructions to the jury when he informs them what in his view the law is which is applicable to the case before them, and what is essential to constitute the offence charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the judge, make out beyond any reasonable doubt that the accused party is guilty as alleged.[1]

How far the jury are to judge of the law as well as of the facts, is a question, a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict; they have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt. Where a

stretching and warping others, and distinguishing away the remainder." 3 Bl. Com. 380. These are evils which jury trial is designed to prevent; but the effort must be vain if the judge is to control by his opinion, where the law has given him no power to command. In Lord Campbell's Lives of the Chancellors, c. 181, the author justly condemns the practice with some judges in libel cases, of expressing to the jury their belief in the defendant's guilt. On the trial of parties, charged with a libel on the Empress of Russia, Lord *Kenyon*, sneering at the late Libel Act, said: "I am bound by my oath to declare my own opinion, and I should forget my duty were I not to say to you that it is a gross libel." Upon this Lord *Campbell* remarks: "Mr. Fox's act only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, 'Gentlemen, I am of opinion that this is a wilful, malicious, and atrocious murder?' For a considerable time after the act passed, against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say: 'As the legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.'" Upon this subject, see McGuffie *v.* State, 17 Ga. 497; State *v.* McGinnis, 5 Nev. 337; Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544; People *v.* Gastro, 75 Mich. 127, 42 N. W. 937.

[1] The independence of the jury, with respect to the matters of fact in issue before them, was settled by Penn's Case, 6 Howell's State Trials, 951, and by Bushel's Case, which grew out of it, and is reported in Vaughan's Reports, 135. A very full account of these cases is also found in Forsyth on Trial by Jury, 397. See Bushel's Case also in Broom's Const. Law, 120, and the valuable note thereto. Bushel was foreman of the jury which refused to find a verdict of guilty at the dictation of the court, and he was punished as for contempt of court for his refusal, but was released on *habeas corpus*.

(*a*) [But when verdict is unintelligible or its parts are repugnant the jury may be sent back to correct it. Grant *v.* State, 33 Fla. 291, 14 So. 757, 23 L. R. A. 723, and note upon correction of verdict.]

general verdict is thus given, the jury necessarily determine in their own mind what the law of the case is;[1] and if their determination is favorable to the prisoner, no mode is known to the law in which it can be reviewed or reversed. A writ of error does not lie on behalf of the Commonwealth to reverse an acquittal, unless expressly given by statute;[2] nor can a new trial be granted in such a case;[3] but neither a writ of error nor a motion for a new trial could remedy an erroneous acquittal by the jury, because, as they do not give reasons for their verdict, the precise grounds for it can never be legally known, and it is always presumable that it was given in favor of the accused because the evidence was not sufficient in degree or satisfactory in character; and no one is at liberty to allege or assume that they have disregarded the law.

Nevertheless, as it is the duty of the court to charge the jury upon the law applicable to the case, it is still an important question whether it is the duty of the jury to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty either to follow it if it accords with their own convictions, or to disregard it if it does not.

In one class of cases, that is to say, in criminal prosecutions for libels, it is now very generally provided by the State constitutions, or by statute, that the jury shall determine the law and the

[1] "As the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must besides [unless they see fit to return a special finding] comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law." De Lolme on the Constitution of England, c. 13. In January, 1735, Zenger, the publisher of Zenger's Journal in New York, was informed against for a libel on the governor and other officers of the king in the province. He was defended by Hamilton, a Quaker lawyer from Philadelphia, who relied upon the truth as a defence. The court excluded evidence of the truth as constituting no defence, but Hamilton appealed to the jury as the judges of the law, and secured an acquittal. Street's Council of Revision, 71.

[2] See State *v.* Reynolds, 4 Hayw. 110; United States *v.* More, 3 Cranch, 174; People *v.* Dill, 2 Ill. 257; People *v.* Royal, 2 Ill. 557; Commonwealth *v.* Cummings, 3 Cush. 212; People *v.* Corning, 2 N. Y. 9; State *v.* Kemp, 17 Wis. 669; compare State *v.* Robinson, 37 La. Ann. 673. A constitutional provision, saving "to the defendant the right of appeal" in criminal cases, does not, by implication, preclude the legislature from giving to the prosecution the same right, State *v.* Tait, 22 Iowa, 143. Compare People *v.* Webb, 38 Cal. 467; State *v.* Lee, 10 R. I 494.

[3] People *v.* Comstock, 8 Wend. 549; State *v.* Brown, 16 Conn. 54; State *v.* Kanouse, 20 N. J. 115; State *v.* Burns, 3 Tex. 118; State *v.* Taylor, 1 Hawks, 462.

facts.[1] How great a change is made in the common law by these provisions it is difficult to say, because the rule of the common law was not very clear upon the authorities; but for that very reason, and because the law of libel was sometimes administered with great harshness, it was certainly proper and highly desirable that a definite and liberal rule should be thus established.[2]

In all other cases the jury have the clear legal right to return a simple verdict of guilty or not guilty, and in so doing they necessarily decide such questions of law as well as of fact as are involved in the general question of guilt. If their view conduce to an acquittal, their verdict to that effect can neither be reviewed

[1] See Constitutions of Alabama, Connecticut, California, Delaware, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, New York, Pennsylvania, South Carolina, Tennessee, and Texas. See *post*, p. 596, note. That of Maryland makes the jury judges of the law in all criminal cases; and the same rule is established by constitution or statute in some other States. In Holder *v.* State, 5 Ga. 444, the following view was taken of such a statute: "Our penal code declares, 'On every trial of a crime or offence contained in this code, or for any crime or offence, the jury shall be judges of the law and the fact, and shall in every case give a general verdict of guilty or not guilty, and on the acquittal of any defendant or prisoner, no new trial shall on any account be granted by the court.' Juries were, at common law, in some sense judges of the law. Having the right of rendering a general verdict, that right involved a judgment on the law as well as the facts, yet not such a judgment as necessarily to control the court. The early commentators on the common law, notwithstanding they concede this right, yet hold that it is the duty of the jury to receive the law from the court. Thus Blackstone equivocally writes: 'And such public or open verdict may be either general, *guilty* or *not guilty*, or special, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated, it be murder or manslaughter, or no crime at all. This is where they *doubt* the matter of the law, and therefore *choose* to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and of finding a general verdict, *if they think proper* so to hazard a breach of their oaths,' &c. 4 Bl. Com. 361; Co. Lit. 228 *a*; 2 Hale, P. C. 313. Our legislature have left no doubt about this matter. The juries in Georgia can find no special verdict at law. They are declared to be judges of the law and the facts, and are required in every case to give a general verdict of guilty or not guilty; so jealous, and rightfully jealous, were our ancestors of the influence of the State upon the trial of a citizen charged with crime. We are not called upon in this case to determine the relative strength of the judgment of the court and the jury, upon the law in criminal cases, and shall express no opinion thereon. We only say it is the right and duty of the court to declare the law in criminal cases as well as civil, and that it is at the same time the right of the jury to judge of the law as well as of the facts in criminal cases. I would not be understood as holding that it is not the province of the court to give the law of the case distinctly in charge to the jury; it is unquestionably its privilege and its duty to instruct them as to what the law is, and officially to direct their finding as to the law, yet at the same time in such way as not to limit the range of their judgment." See also McGuffie *v.* State, 17 Ga. 497; Clem *v.* State, 31 Ind. 480; and *post*, p. 652, *et seq.*

[2] For a condensed history of the struggle in England on this subject, see May's Constitutional History, c. 9. See also Lord Campbell's Lives of the Chancellors, c. 178; Introduction to Speeches of Lord Erskine, edited by James L. High; Forsyth's Trial by Jury, c. 12.

nor set aside. In such a case, therefore, it appears that they pass upon the law as well as the facts, and that their finding is conclusive. If, on the other hand, their view leads them to a verdict of guilty, and it is the opinion of the court that such verdict is against law, the verdict will be set aside and a new trial granted. In such a case, although they have judged of the law, the court sets aside their conclusion as improper and unwarranted. But it is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases comes from the merciful maxim of the common law, which will not suffer an accused party to be twice put in jeopardy for the same cause, however erroneous may have been the first acquittal. In theory, therefore, the rule of law would seem to be, that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority.[1]

There are, however, opposing decisions,[2] and it is evident that

[1] United States *v.* Battiste, 2 Sum. 240; Stettinus *v.* United States, 5 Cranch, C. C. 573; United States *v.* Morris, 1 Curt. 53; United States *v.* Riley, 5 Blatch. 204; United States *v.* Greathouse, 4 Sawyer, 459; Montgomery *v.* State, 11 Ohio, 427; Robbins *v.* State, 8 Ohio St. 131; Commonwealth *v.* Porter, 10 Met. 263; Commonwealth *v.* Anthes, 5 Gray, 185; Commonwealth *v.* Rock, 10 Gray, 4; State *v.* Peace, 1 Jones, 251; Handy *v.* State, 7 Mo. 607; Nels *v.* State, 2 Tex. 280; State *v.* Tally, 23 La. Ann. 677; State *v.* Tisdale, 41 La. Ann. 338, 6 So. 579; People *v.* Pine, 2 Barb. 566; Carpenter *v.* People, 8 Barb. 603; People *v.* Finnigan, 1 Park C. R. 147; Safford *v.* People, 1 Park C. R. 474; McMath *v.* State, 55 Ga. 303; Hamilton *v.* People, 29 Mich. 173; McGowan *v.* State, 9 Yerg. 184; Pleasant *v.* State, 13 Ark. 360; Montee *v.* Commonwealth, 3 J. J. Marsh. 132; Commonwealth *v.* Van Tuyl, 1 Met. (Ky.) 1; Pierce *v.* State, 13 N. H. 536; People *v.* Stewart, 7 Cal. 40; Mullinex *v.* People, 76 Ill. 211; Batre *v.* State, 18 Ala. 119; reviewing previous cases in the same State. "As the jury have the right, and if required by the prisoner are bound to return a general verdict of guilty or not guilty, they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact as are involved in the general question, and there is no mode in which their opinions upon questions of law can be reviewed by this court or by any other tribunal. But this does not diminish the obligation resting upon the court to explain the law. The instructions of the court in matters of law may safely guide the consciences of the jury, unless they know them to be wrong; and when the jury undertake to decide the law (as they undoubtedly have the power to do) in opposition to the advice of the court, they assume a high responsibility, and should be very careful to see clearly that they are right." Commonwealth *v.* Knapp, 10 Pick. 496; cited with approval in McGowan *v.* State, 9 Yerg. 195, and Dale *v.* State, 10 Yerg. 555. And see Kane *v.* Commonwealth, 89 Pa. St. 522, 33 Am. Rep. 787; Habersham *v.* State, 56 Ga. 61, 2 Am. Cr. Rep. 45; Hunt *v.* State, 81 Ga. 140, 7 S. E. 142. Even where the jury are judges of the law and facts and instructions are only advisory, error in the charge is prejudicial. State *v.* Rice, 56 Iowa, 431; Hudelson *v.* State, 94 Ind. 426. Even if there is no dispute, a court cannot direct a conviction. United States *v.* Taylor, 3 McCrary, 500.

[2] See especially State *v.* Croteau, 23 Vt. 14, where will be found a very full and carefully considered opinion, holding that at the common law the jury are the judges of the law in criminal cases. See also State *v.* Wilkinson, 2 Vt. 280; Doss *v.* Commonwealth, 1 Gratt. 557; State *v.*

the judicial prerogative to direct conclusively upon the law cannot be carried very far or insisted upon with much pertinacity, when the jury have such complete power to disregard it, without the action degenerating into something like mere scolding. Upon this subject the remarks of Mr. Justice *Baldwin*, of the Supreme Court of the United States, to a jury assisting him in the trial of a criminal charge, and which are given in the note, seem peculiarly dignified and appropriate, and at the same time to embrace about all that can properly be said to a jury on this subject.[1]

Jones, 5 Ala. 666; State *v.* Snow, 18 Me. 346; State *v.* Allen, 1 McCord, 525, 10 Am. Dec. 687; Armstrong *v.* State, 4 Blackf. 247; Warren *v.* State, 4 Blackf. 150; Stocking *v.* State, 7 Ind. 326; Lynch *v.* State, 9 Ind. 541; Nelson *v.* State, 2 Swan, 482; People *v.* Thayers, 1 Park. C. R. 596; People *v.* Videto, 1 Park. C. R. 603. The subject was largely discussed in People *v.* Croswell, 3 Johns. Cas. 337. In Virginia, it is said that unless instructions are asked, a court should in general not instruct the jury upon the law; Dejarnette *v.* Com., 75 Va. 867, and in Maryland it seems to be optional with the court to instruct them. Broll *v.* State, 45 Md. 356.

[1] "In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defence. You may find a general verdict of guilty or not guilty, as you think proper, or you may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquit the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they think it not applicable, or do not choose to apply it to the case.

"But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; and the court do not act, and cannot judge, there remaining nothing to act upon.

"This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law, that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule." United States *v.* Wilson, Baldw. 108. We quote also from an Alabama case: "When the power of juries to find a general verdict, and consequently their right to determine without appeal both law and fact, is admitted, the abstract question whether it is or is not their duty to receive the law from the court becomes rather a question of casuistry or conscience than one of law; nor can we think that anything is gained in the administration of criminal justice by urging the jury to disregard the opinion of the court upon the law of the case. It must, we think, be admitted, that the judge is better qualified to expound the law, from his previous training, than the jury; and in practice, unless he manifests a wanton disregard of the rights of the prisoner, — a circumstance which rarely happens in this age of the world and in this country, — his opinion of the law will be received by the jury as an authoritative exposition, from their conviction of his superior knowledge of the subject. The right of the jury is doubtless one of inestimable value, especially in those cases where it may be supposed that the government has an interest in the conviction of the criminal; but in this country, where the government in all its branches, executive, legislative, and judicial, is created by the people, and is in fact their servant, we

One thing more is essential to a proper protection of accused parties, and that is, that one shall not be subject to be twice put in jeopardy upon the same charge. One trial and verdict must, as a general rule, protect him against any subsequent accusation of the same offence,[1] whether the verdict be for or against him,

are unable to perceive why the jury should be invited or urged to exercise this right contrary to their own convictions of their capacity to do so, without danger of mistake. It appears to us that it is sufficient that it is admitted that it is their peculiar province to determine facts, intents, and purposes; that it is their right to find a general verdict, and consequently that they must determine the law; and whether in the exercise of this right they will distrust the court as expounders of the law, or whether they will receive the law from the court, must be left to their own discretion under the sanction of the oath they have taken." State *v.* Jones, 5 Ala. 672. But as to this case, see Batre *v.* State, 18 Ala. 119.

It cannot be denied that discredit is sometimes brought upon the administration of justice by juries acquitting parties who are sufficiently shown to be guilty, and where, had the trial been by the court, a conviction would have been sure to follow. In such cases it must be supposed that the jury have been controlled by their prejudices or their sympathies. However that may be, it by no means follows that because the machinery of jury trial does not work satisfactorily in every case, we must therefore condemn and abolish the system, or, what is still worse, tolerate it, and yet denounce it as being unworthy of public confidence. The remarks of Lord *Erskine*, the most distinguished jury lawyer known to English history, may be quoted as peculiarly appropriate in this connection: "It is of the nature of everything that is great and useful, both in the animate and inanimate world, to be wild and irregular, and we must be content to take them with the alloys which belong to them, or live without them. . . . Liberty herself, the last and best gift of God to his creatures, must be taken just as she is. You might pare her down into bashful regularity, shape her into a perfect model of severe, scrupulous law; but she would then be liberty no longer; and you must be content to die under the lash of this inexorable justice which you have exchanged for the banners of freedom."

The province of the jury is sometimes invaded by instructions requiring them to adopt, as absolute conclusions of law, those deductions which they are at liberty to draw from a particular state of facts, if they regard them as reasonable: such as that a homicide must be presumed malicious, unless the defendant proves the contrary; which is a rule contradictory of the results of common observation; or that evidence of a previous good character in the defendant ought to be disregarded, unless the other proof presents a doubtful case; which would deprive an accused party of his chief protection in many cases of false accusations and conspiracies. See People *v.* Garbutt, 17 Mich. 9; People *v.* Lamb, 2 Keyes, 360; State *v.* Henry, 5 Jones (N. C.), 66; Harrington *v.* State, 19 Ohio St. 269; Silvus *v.* State, 22 Ohio St. 90; State *v.* Patterson, 45 Vt. 308; Remsen *v.* People, 43 N. Y. 6; Kistler *v.* State, 54 Ind. 400. Upon the presumption of malice in homicide, the reader is referred to the Review of the Trial of Professor Webster, by Hon. Joel Parker, in the North American Review, No. 72, p. 178. See also, upon the functions of judge and jury respectively, the cases of Commonwealth *v.* Wood, 11 Gray, 86; Maher *v.* People, 10 Mich. 212; Commonwealth *v.* Billings, 97 Mass. 405; State *v.* Patterson, 63 N. C. 520; State *v.* Newton, 4 Nev. 410. [See, upon the right of the jury to pass upon the law, note to State *v.* Whitmore in 42 Am. St. Rep. 290–295; 13 Am. Law Reg. 355, and 7 Crim. Law Mag. 652. No more scholarly contribution to the discussion of this general subject of "Law and Fact in Jury Trials" can be found than in the late Professor Thayer's "Preliminary Evidence at the Common Law," c. 5.]

[1] By the same offence is not signified the same *eo nomine*, but the same criminal act or omission. Hershfield *v.* State, 11 Tex. App. 297; Wilson *v.* State, 24 Conn. 57; State *v.* Thornton, 37 Mo. 360;

and whether the courts are satisfied with the verdict or not. We shall not attempt in this place to collect together the great number of judicial decisions bearing upon the question of legal jeopardy, and the exceptions to the general rule above stated; for these the reader must be referred to the treatises on criminal law, where the subject will be found to be extensively treated. It will be sufficient for our present purpose to indicate very briefly some general principles.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance.[1] And a jury is

Holt *v.* State, 38 Ga. 187; Commonwealth *v.* Hawkins, 11 Bush, 603; People *v.* Majors, 65 Cal. 138, 3 Pac. 597; People *v.* Stephens, 79 Cal. 428, 21 Pac. 856; State *v.* Colgate, 31 Kan. 511, 3 Pac. 346; State *v.* Mikesell, 70 Iowa, 176, 30 N. W. 474; Hurst *v.* State, 86 Ala. 604, 6 So. 120; Moore *v.* State, 71 Ala. 307. [The same act may be an offence against two or more jurisdictions, and each may punish it. *Re* Chapman, 166 U. S. 661, 17 Sup. Ct. Rep. 677; Crossley *v.* California, 168 U. S. 640, 18 Sup. Ct. Rep. 242; s. c., below, People *v.* Worden, 113 Cal. 569, 45 Pac. 844. Where accused is acquitted of the offence charged, he cannot thereafter be prosecuted for perjury in swearing that he did not commit the offence charged. Cooper *v.* Commonwealth, 106 Ky. 909, 51 S. W. 780, 45 L. R. A. 216. That same act may involve two offences against the State, see Commonwealth *v.* Vaughn, 101 Ky. 603, 42 S. W. 117, 45 L. R. A. 858, and note thereto in L. R. A. Where putative father is liable to fine, no appeal can be allowed against successful defendant in a bastardy proceeding. State *v.* Ostwalt, 118 N. C. 1208, 24 S. E. 660, 32 L. R. A. 396. Statute giving State right of appeal upon questions of law in criminal cause is valid. State *v.* Lee, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. 202.]

[1] Commonwealth *v.* Cook, 6 S. & R. 586; State *v.* Norvell, 2 Yerg. 24; Williams *v.* Commonwealth, 2 Gratt. 568; People *v.* McGowan, 17 Wend. 386; Mounts *v.* State, 14 Ohio, 295; Price *v.* State, 19 Ohio, 423; Wright *v.* State, 5 Ind. 292; State *v.* Nelson, 26 Ind. 366; State *v.* Spier, 1 Dev. 491; State *v.* Ephraim, 2 Dev. & Bat. 162; Commonwealth *v.* Tuck, 20 Pick. 356; People *v.* Webb, 28 Cal. 467; People *v.* Cook, 10 Mich. 164; State *v.* Ned, 7 Port. 217; State *v.* Callendine, 8 Iowa, 288; [State *v.* Rook, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186; State *v.* Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238.] If a defendant is arraigned before a justice who has jurisdiction, and pleads guilty, and the prosecutor dismisses the case, he has been in jeopardy. Boswell *v.* State, 111 Ind. 47. It cannot be said, however, that a party is in legal jeopardy in a prosecution brought about by his own procurement; and a former conviction or acquittal is consequently no bar to a second indictment, if the former trial was brought about by the procurement of the defendant, and the conviction or acquittal was the result of fraud or collusion on his part. Commonwealth *v.* Alderman, 4 Mass. 477; State *v.* Little, 1 N. H. 257; State *v.* Lowry, 1 Swan, 35; State *v.* Green, 16 Iowa, 239. See also State *v.* Reed, 26 Conn. 202; Bigham *v.* State, 59 Miss. 529; State *v.* Simpson, 28 Minn. 66, 9 N. W. 78; McFarland *v.* State, 68 Wis. 400, 32 N. W. 226. And if a jury is called and sworn, and then discharged for the reason that it is discovered the defendant has not been arraigned, this will not constitute a bar. United States *v.* Riley, 5 Blatch. 204. In State *v.* Garvey, 42 Conn. 232, it is held that a prosecution *nol. prossed* after the jury is sworn is no bar to a new prosecution, "If the prisoner does not claim a verdict, but waives his right to insist upon it." See Hoffman *v.* State, 20 Md. 425. [See notes to 21 L. ed. U. S. 872, 6 L. ed. U. S.

said to be thus charged when they have been impanelled and sworn.[1] The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause.[2]

If, however, the court had no jurisdiction of the cause,[3] or if the indictment was so far defective that no valid judgment could be rendered upon it,[4] or if by any overruling necessity the jury are discharged without a verdict,[5] which might happen from the

165, 4 L. R. A. 513, and 1 L. R. A. 451. Indefinite suspension of sentence and discharge without recognizance after plea of guilty amounts to a complete loss of power over prisoner, and he cannot subsequently be taken and sentenced. People *v.* Allen, 155 Ill. 61, 39 N. E. 563, 41 L. R. A. 473; but the court may after sentence suspend in whole or in part the execution thereof, and may at any time thereafter within the term in which such sentence was rendered revoke the suspension of execution. Weber *v.* State, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472. See also People *v.* Monroe Co. Ct., 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856. Statute giving complainant in criminal case for illegal fishing a right of appeal in case of acquittal is void. People *v.* Miner, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342, and note.]

[1] McFadden *v.* Commonwealth, 23 Pa. St. 12; Lee *v.* State, 26 Ark. 260, 7 Am. Rep. 611; O'Brian *v.* Commonwealth, 9 Bush, 333, 15 Am. Rep. 715. The jury must be of competent men. If, after the jury is sworn but before any evidence is taken, an incompetent juror is set aside, there has been no jeopardy. People *v.* Barker, 60 Mich. 277, 27 N. W. 539; State *v.* Pritchard, 16 Nev. 101. Compare Adams *v.* State, 99 Ind. 244; Whitmore *v.* State, 43 Ark. 271.

[2] People *v.* Barrett, 2 Caines, 304; Commonwealth *v.* Tuck, 20 Pick. 365; Mounts *v.* State, 14 Ohio, 295; State *v.* Connor, 5 Cold. 311; State *v.* Callendine, 8 Iowa, 288; Baker *v.* State, 12 Ohio St. 214; Grogan *v.* State, 44 Ala. 9; State *v.* Alman, 64 N. C. 364; Nolan *v.* State, 55 Ga. 521; Pizaño *v.* State, 20 Tex. App. 139. It is otherwise in Vermont. State *v.* Champeau, 53 Vt. 313, 36 Am. Rep. 754. A judge cannot order discharge in order to try again upon another complaint. Com. *v.* Hart, 149 Mass. 7, 20 N. E. 310. [Proof that a juror is sick must be given in open court in order to justify discharge of jury and retention of prisoner. Telephone message is insufficient. State *v.* Nelson, 19 R. I. 467, 34 Atl. 990, 33 L. R. A. 559, 61 Am. St. 780. See also Upchurch *v.* State, 36 Tex. Cr. 624, 38 S. W. 206, 44 L. R. A. 694. Where one in his defence to a prosecution for an assault with intent to murder offers to prove a former conviction of a battery for the same attack, held a good defence. People *v.* McDonald, — Cal. —, 69 Pac. 1006. But see Reg. *v.* Morris, 10 Cox C. C. 480, where a prosecution for an assault, afterward resulting in death, is held to be no bar of a prosecution for the felony.]

[3] Commonwealth *v.* Goddard, 13 Mass. 455; People *v.* Tyler, 7 Mich. 161; Montross *v.* State, 61 Miss. 429; State *v.* Shelly, 98 N. C. 673, 4 S. E. 530; Brown *v.* State, 79 Ga. 324, 4 S. E. 861. Acquittal by court-martial is no bar to a prosecution in the criminal courts. State *v.* Rankin, 4 Cold. 146; United States *v.* Cashiel, 1 Hughes, 552.

[4] Gerard *v.* People, 4 Ill. 363; Pritchett *v.* State, 2 Sneed, 285; People *v.* Cook, 10 Mich. 164; Mount *v.* Commonwealth, 2 Duv. 93; People *v.* McNealy, 17 Cal. 333; Kohlheimer *v.* State, 39 Miss. 548; State *v.* Kason, 20 La. Ann. 48; Black *v.* State, 36 Ga. 447; Commonwealth *v.* Bakeman, 105 Mass. 53; State *v.* Ward, 48 Ark. 36, 2 S. W. 191; People *v.* Clark, 67 Cal. 99, 7 Pac. 178; Garvey's Case, 7 Col. 384, 4 Pac. 758.

[5] United States *v.* Perez, 9 Wheat. 579; State *v.* Ephraim, 2 Dev. & Bat. 166; Commonwealth *v.* Fells, 9 Leigh, 620; People *v.* Goodwin, 18 Johns. 205;

sickness or death of the judge holding the court,[1] or of a juror,[2] or the inability of the jury to agree upon a verdict after reasonable time for deliberation and effort;[3] or if the term of the court as fixed by law comes to an end before the trial is finished;[4] or the jury are discharged with the consent of the defendant expressed or implied;[5] or if, after verdict against the accused, it has been set aside on his motion (*a*) for a new trial, or on writ of error,[6]

Commonwealth *v.* Bowden, 9 Mass. 194; Hoffman *v.* State, 20 Md. 425; Price *v.* State, 36 Miss. 533. In State *v.* Wiseman, 68 N. C. 203, the officer in charge of the jury was found to have been conversing with them in a way calculated to influence them unfavorably towards the evidence of the prosecution, and it was held that this was such a case of necessity as authorized the judge to permit a juror to be withdrawn, and that it did not operate as an acquittal. See also State *v.* Washington, 89 N. C. 535. If a *nolle prosequi* to an indictment is entered after the jury is sworn, because it is found that the person alleged to have been murdered is misnamed, this is no bar to a new indictment which shall give the name correctly. Taylor *v.* State, 35 Tex. 97.

[1] Nugent *v.* State, 4 Stew. & Port. 72.

[2] Hector *v.* State, 2 Mo. 166; State *v.* Curtis, 5 Humph. 601; Mahala *v.* State, 10 Yerg. 532; Commonwealth *v.* Fells, 9 Leigh, 613; Doles *v.* State, 97 Ind. 555; State *v.* Emery, 59 Vt. 84, 7 Atl. 129. [Or from the fact just then brought to the judge's notice that one of the jurors had sat upon the grand jury that returned the indictment. Thompson *v.* United States, 155 U. S. 271, 15 Sup. Ct. Rep. 73. Or was otherwise incompetent. Simmons *v.* United States, 142 U. S. 148, 12 Sup. Ct. Rep. 171.]

[3] People *v.* Goodwin, 18 Johns. 187; Commonwealth *v.* Olds, 5 Lit. 140; Dobbins *v.* State, 14 Ohio St. 493; Miller *v.* State, 8 Ind. 325; State *v.* Walker, 26 Ind. 346; Commonwealth *v.* Fells, 9 Leigh, 613; Winsor *v.* The Queen, L. R. 1 Q. B. 289; State *v.* Prince, 63 N. C. 529; Moseley *v.* State, 33 Tex. 671; Lester *v.* State, 33 Ga. 329; *Ex parte* McLaughlin, 41 Cal. 211, 10 Am. Rep. 272; People *v.* Harding, 53 Mich. 481, 18 N. W. 555, 19 N. W. 155; Conklin *v.* State, 25 Neb. 784, 41 N. W. 788; Powell *v.* State, 17 Tex. App. 345; State *v.* Sutfin, 22 W. Va. 771. [Upon discharging jury without a verdict, see notes to 21 L. ed. U. S. 872, and 6 L. ed. U. S. 165. That jury may be discharged when unable to agree, and prisoner may then be retried, see State *v.* Hager, 61 Kan. 504, 59 Pac. 1080, 48 L. R. A. 254; *Re* Allison, 13 Col. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. 224. See also United States *v.* Perez, 9 Wheaton, 579. The opposite conclusion is reached by the Supreme Court of Pennsylvania in Com. *v.* Fitzpatrick, 121 Pa. St. 109, 15 Atl. 466, 6 Am. St. 757; Dreyer *v.* Illinois, — U. S. —, 23 Sup. Ct. Rep. 28.]

[4] State *v.* Brooks, 3 Humph. 70; State *v.* Battle, 7 Ala. 259; Mahala *v.* State, 10 Yerg. 532; State *v.* Spier, 1 Dev. 491; Wright *v.* State, 5 Ind. 290. See Whitten *v.* State, 61 Miss. 717.

[5] State *v.* Slack, 6 Ala. 676; Elijah *v.* State, 1 Humph. 103; Commonwealth *v.* Stowell, 9 Met. 572; People *v.* Curtis, 76 Cal. 57, 17 Pac. 941; People *v.* White, 68 Mich. 648, 37 N. W. 34; State *v.* Parker, 66 Iowa, 586, 24 N. W. 225. As to the effect of jury's separation by defendant's consent, see State *v.* Ward, 48 Ark. 36, 2 S. W. 191; Hilands *v.* Com., 111 Pa. St. 1, 2 Atl. 70.

[6] Kendall *v.* State, 65 Ala. 492; State *v.* Blaisdell, 59 N. H. 328; Gannon *v.* People, 127 Ill. 507, 21 N. E. 525; State *v.* Brecht, 41 Minn. 50, 42 N. W. 602; People *v.* Hardisson, 61 Cal. 378. See Com. *v.* Downing, 150 Mass. 197, 22 N. E. 912. And it seems, if the verdict is so defective that no judgment can be rendered upon it, it may be set aside even against the defendant's objection, and a new trial had. State *v.* Redman, 17 Iowa, 329.

(*a*) See Murphy *v.* Massachusetts, 177 U. S. 155, 20 Sup. Ct. Rep. 639, aff. 174 Mass. 369, 54 N. E. 860.

or the judgment thereon been arrested,[1] — in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection. But where the legal bar has once attached, (*a*) the government cannot avoid it by varying the form of the charge in a new accusation: if the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second.[2] And if a prisoner is acquitted on some of the counts in an indictment, and convicted on others, and a new trial is obtained on his motion, he can be put upon trial a second time on those counts only on which he was before convicted, and is forever discharged from the others.[3]

[1] Casborus *v.* People, 13 Johns. 351; State *v.* Clark, 69 Iowa, 196, 28 N. W. 537. But where the indictment was good, and the judgment was erroneously arrested, the verdict was held to be a bar. State *v.* Norvell, 2 Yerg. 24. See People *v.* Webb, 28 Cal. 467. So if the error was in the judgment and not in the prior proceedings, if the judgment is reversed, the prisoner must be discharged. See *post*, p. 473. But it is competent for the legislature to provide that on reversing the erroneous judgment in such case, the court, if the proper proceedings are regular, shall remand the case for the proper sentence. McKee *v.* People, 32 N. Y. 239. [Upon correction of sentence and re-sentence, see note to 36 L. ed. U. S. 969.] It is also competent, by statute, in the absence of express constitutional prohibition, to allow an appeal or writ of error to the prosecution, in criminal cases. See cases, p. 462, note 2.

[2] State *v.* Cooper, 13 N. J. 360; Commonwealth *v.* Roby, 12 Pick. 504; People *v.* McGowan, 17 Wend. 386; Price *v.* State, 19 Ohio, 423; Leslie *v.* State, 18 Ohio St. 395; State *v.* Benham, 7 Conn. 414. See Mitchell *v.* State, 42 Ohio St. 383; Williams *v.* Com., 78 Ky. 93; Sims *v.* State, 66 Miss. 33, 5 So. 525. [Where judge is authorized to discharge jury when a juror becomes sick, such discharge must be in open court and in presence of prisoner; else he will be allowed to plead former jeopardy. Upchurch *v.* State, 36 Tex. Cr. 624, 38 S. W. 206, 44 L. R. A. 694; State *v.* Nelson, 10 R. I. 467, 34 Atl. 990, 33 L. R. A. 559; and upon former jeopardy by reason of discharge of jury in prisoner's absence, see note to this case in L. R. A. Where injunction may issue to prevent a prohibited act, punishment for contempt in disobeying the injunction will not prevent a prosecution for the crime. State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. 174. The fact that acquittal was secured by bribery of prosecuting attorney does not invalidate plea of former jeopardy. Shideler *v.* State, 129 Ind. 523, 28 N. E. 537, 29 N. E. 36, 16 L. R. A. 225, 28 Am. St. 206.]

[3] Campbell *v.* State, 9 Yerg. 333; State *v.* Kettle, 2 Tyler, 475; Morris *v.* State, 8 S. & M. 762; Esmon *v.* State, 1 Swan, 14; Guenther *v.* People, 24 N. Y. 100; State *v.* Kattleman, 35 Mo. 105; State *v.* Ross, 29 Mo. 39; State *v.* Martin, 30 Wis. 216, 11 Am. Rep. 567; United States *v.* Davenport, Deady, 264, 1 Green, Cr. R. 429; Stuart *v.* Commonwealth, 28 Gratt. 950; Johnson *v.* State, 29 Ark. 31; Barnett *v.* People, 54 Ill. 331; *contra*, State *v.* Behimer, 20 Ohio St. 572. A *nolle prosequi* on one count of an indictment after a jury is called and sworn, is a bar to a new indictment for the offence charged therein. Baker *v.* State, 12 Ohio St. 214; Murphy *v.* State, 25 Neb. 807, 41 N. W.

(*a*) [As to when jeopardy attaches, see notes to 4 L. R. A. 543, and 1 L. R. A. 451; also to 21 L. ed. U. S. 872, and to 6 L. ed. U. S. 165.]

Excessive Fines and Cruel and Unusual Punishments.

It is also a constitutional requirement that excessive bail shall not be required, nor cruel and unusual punishments inflicted.

Within such bounds as may be prescribed by law, the question what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised; and there may be cases in which a punishment, though not beyond any limit fixed by statute, is nevertheless so clearly excessive as to be erroneous in law.[1] A fine should have some reference to the party's ability to pay it. By Magna Charta a freeman was not to be amerced for a small fault, but according to the degree of the fault, and for a great crime in proportion to the heinousness of it, *saving to him his contenement*; and after the same manner a merchant, *saving to him his merchandise*. And a villein was to be amerced after the same manner, *saving to him his wainage*. The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions.

792. See Com. *v.* Dunster, 145 Mass. 101, 13 N. E. 350. [On the subject of double jeopardy, see 50 Cent. L. Jour. 143.]

[1] The subject of cruel and unusual punishments was somewhat considered in Barker *v.* People, 3 Cow. 686, where the opinion was expressed by Chancellor *Sanford* that a forfeiture of fundamental right — *e. g.* the right to jury trial — could not be imposed as a punishment, but that a forfeiture of the right to hold office might be. But such a forfeiture could not be imposed without giving a right to trial in the usual mode. Commonwealth *v.* Jones, 10 Bush, 725. In Done *v.* People, 5 Park. 364, the cruel punishments of colonial times, such as burning alive and breaking on the wheel, were enumerated by *W. W. Campbell, J.*, who was of opinion that they must be regarded as "cruel" if not "unusual," and therefore as being now forbidden. [And where the criminal is convicted of many offences, he cannot complain if the punishments therefor are cumulated, provided the punishment for a single offence is not excessive, although the aggregate punishments may amount to imprisonment for a term much greater than his natural life. O'Neil *v.* Vermont, 144 U. S. 323, 12 Sup. Ct. Rep. 693; but see the vigorous dissenting opinion of Mr. Justice *Field* in this case, and also the dissenting opinion of *Harlan* and *Brewer*, JJ. And see also State *v.* Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561, and note thereto in L. R. A., in which cases upon "cruel and unusual punishment" are collected. In Whitaker's case it was held, that a total imprisonment for 2160 days or fine of $720 for 72 violations imposed within one hour and forty minutes, though upon separate complaints, was within the prohibition of the constitution. Also *Ex parte* Keeler, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785. See also People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211, upon cumulative punishment, holding that punishment for several offences charged in separate counts of same indictment is unlawful: that punishment for one offence exhausts the power of the court under that indictment. Life imprisonment for constructive rape is not invalid, even though the legal age of consent is as high as sixteen years, and the female lacked only a few months of that age, and actually consented, and the male was a mere youth. Com. *v.* Murphy, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. 496.]

It has been decided by the Supreme Court of Connecticut that it was not competent in the punishment of a common-law offence to inflict fine and imprisonment without limitation. The precedent, it was said, cited by counsel contending for the opposite doctrine, of the punishment for a libel upon Lord Chancellor Bacon, was deprived of all force of authority by the circumstances attending it; the extravagance of the punishment being clearly referable to the temper of the times. "The common law can never require a fine to the extent of the offender's goods and chattels, or sentence of imprisonment for life. The punishment is both uncertain and unnecessary. It is no more difficult to limit the imprisonment of an atrocious offender to an adequate number of years than to prescribe a limited punishment for minor offences. And when there exists no firmly established practice, and public necessity or convenience does not imperiously demand the principle contended for, it cannot be justified by the common law, as it wants the main ingredients on which that law is founded. Indefinite punishments are fraught with danger, and ought not to be admitted unless the written law should authorize them."[1]

It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offence which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of pun-

[1] Per *Hosmer*, Ch. J., in State *v.* Danforth, 3 Conn. 112–116. *Peters*, J., in the same case, pp. 122–124, collects a number of cases in which perpetual imprisonment was awarded at the common law, but, as his associates believed, unwarrantably. Compare Blydenburg *v.* Miles, 39 Conn. 481. [Fixing by statute the minimum fine to be collected for a certain offence, but not the maximum, is not the imposition of an excessive fine. Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436. Prisoner upon conviction may, where statute authorizes, be sentenced for the maximum period with power to prison managers to release upon parol and good behavior after satisfactory conduct during minimum period. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; People *v.* Bd. of Managers, &c., 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; *contra*, People *v.* Cummings, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note. A statute providing for a more severe punishment for a second conviction is not for that reason invalid. Moore *v.* Missouri, 159 U. S. 673, 16 Sup. Ct. Rep. 179, aff. 121 Mo. 514, 26 S. W. 345.]

ishment, or in States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishment. In such States the public sentiment must be regarded as having condemned them as "cruel," and any punishment which if ever employed at all, has become altogether obsolete, must certainly be looked upon as "unusual."[1]

A defendant, however, in any case is entitled to have the precise punishment meted out to him which the law provides, and no other. A different punishment cannot be substituted on the ground of its being less in severity. Sentence to transportation for a capital offence would be void; and as the error in such a case would be in the judgment itself, the prisoner would be entitled to his discharge, and could not be tried again.[2] If, however, the legal punishment consists of two distinct and severable

[1] In New Mexico it has been decided that flogging may be made the punishment for horse-stealing: Garcia *v.* Territory, 1 New Mex. 415; so for wife-beating. Foote *v.* State, 59 Md. 264. For the nonpayment of fine for unlicensed liquor selling, street labor may be imposed. *Ex parte* Bedell, 20 Mo. App. 125. See further as to unusual punishments, *Ex parte* Swann, 96 Mo. 44, 9 S. W. 10; People *v.* Haug, 68 Mich. 549, 37 N. W. 21.

The power in prison keepers to inflict corporal punishment for the misconduct of convicts cannot be delegated to contractors for convict labor or their managers. Cornell *v.* State, 6 Lea, 624. The keeper of a workhouse may not be authorized to inflict such punishment at his discretion. Smith *v.* State, 8 Lea, 744. A jailer may not chain up a prisoner for several hours by the neck so he cannot lie or sit. *In re* Birdsong, 39 Fed. Rep. 599. [Punishment of death may be inflicted by electric shock. *Re* Kemmler, 136 U. S. 436, 10 Sup. Ct. Rep. 930, aff. People *v.* Durston, 55 Hun, 64, 119 N. Y. 569, 24 N. E. 6, 16 Am. St. 859; McElvaine *v.* Brush, 142 U. S. 155, 12 Sup. Ct. Rep. 156, aff. 121 N. Y. 250, 24 N. E. 455, 125 N. Y. 596, 26 N. E. 929; *Re* Storti, 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520. Permitting the warden to fix the particular day of execution does not render statute void upon the theory that such permission tends to aggravate the punishment. *Id.* A sentence fixing a maximum and minimum term of imprisonment, the prison board to determine when the prisoner shall be discharged within such limits, is not within the constitutional prohibition. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. An act of Congress providing for the arrest, trial, and punishment of one as a "suspicious person" is invalid as providing a punishment without an offence, which is cruel and unusual. Stoutenburgh *v.* Frazier, 16 D. C. App. 229, 48 L. R. A. 220. An act providing the death penalty for assault upon a railway train with intent to commit robbery or other felony, does not prescribe a cruel or unusual punishment. Terr. of New Mexico *v.* Ketchum, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90. A statute providing that any tramp who shall threaten to do injury to the person or property of any person shall be imprisoned in the State penitentiary, is not one providing for cruel or unusual punishments. State *v.* Hogan, 63 Ohio St. 202, 58 N. E. 572, 81 Am. St. 626.]

[2] Bourne *v.* The King, 7 Ad. & El. 58; Lowenberg *v.* People, 27 N. Y. 336; Hartung *v.* People, 26 N. Y. 167; Elliott *v.* People, 13 Mich. 365; *Ex parte* Page, 49 Mo. 291; Christian *v.* Commonwealth, 5 Met. 530; *Ex parte* Lange, 18 Wall. 163; McDonald *v.* State, 45 Md. 90. See also Whitebread *v.* The Queen, 7 Q. B. 582; Rex *v.* Fletcher, Russ. & Ry. 58. It is competent, however, to provide by statute that on setting aside an erroneous sentence the court shall proceed to impose the sentence which the law required. Wilson *v.* People, 24 Mich. 410; McDonald *v.* State, 45 Md. 90.

things, — as fine and imprisonment, — the imposition of either is legal, and the defendant cannot be heard to complain that the other was not imposed also.[1]

The Right to Counsel. (a)

Perhaps the privilege most important to the person accused of crime, connected with his trial, is that to be defended by counsel. From very early days a class of men who have made the laws of their country their special study, and who have been accepted for the confidence of the court in their learning and integrity, have been set apart as officers of the court, whose special duty it should be to render aid to the parties and the court[2] in the application of the law to legal controversies. These persons, before entering upon their employment, were to take an oath of fidelity to the courts whose officers they were, and to their clients;[3] and

[1] See Kane *v.* People, 8 Wend. 203. When one has been convicted and sentenced to confinement, it is not competent, after the period of his sentence has expired, to detain him longer in punishment for misbehavior in prison; and a statute to that effect is unwarranted. Gross *v.* Rice, 71 Me. 241. The whole measure of punishment must be imposed at once. The judgment cannot be split up. People *v.* Felker, 61 Mich. 110, 114, 27 N. W. 869, 28 N. W. 83. Cumulative punishment may be imposed: Lillard *v.* State, 17 Tex. App. 114; State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586, [sustained in 144 U. S. 323, 12 Sup. Ct. Rep. 693, but with very vigorous dissenting opinions from *Field*, *Harlan*, and *Brewer*, JJ. But see State *v.* Whitaker, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561; *Ex parte* Keeler, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785, and People *ex rel.* Tweed *v.* Liscomb, 60 N. Y. 559, 19 Am. Rep. 211]; so increased punishment for second offence may be imposed. Kelly *v.* People, 115 Ill. 583, 4 N. E. 644; Chenowith *v.* Com., 11 Ky. L. 561, 12 S. W. 585.

[2] In Commonwealth *v.* Knapp, 9 Pick. 498, the court denied the application of the defendant that Mr. Rantoul should be assigned as his counsel, because, though admitted to the Common Pleas, he was not yet an attorney of the Supreme Court, and that court, consequently, had not the usual control over him; and, besides, counsel was to give aid to the court as well as to the prisoner, and therefore it was proper that a person of more legal experience should be assigned.

[3] "Every countor is chargeable by the oath that he shall do no wrong nor falsity,

(a) [The right to compulsory process by which to secure witnesses in his favor is also an important right of the accused. Where the constitution secures this right, the witnesses thus compelled to appear do not thereby become entitled to claim their fees of the county. Henderson, Petitioner, in State *v.* Evans, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 426; Whittle *v.* Saluda Co., 59 S. C. 554, 38 S. E. 168. Where important witnesses for the accused are absent from the court without his fault, a continuance must be granted until they can be brought in. Ryder *v.* State, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. 331. But after a reasonable time and opportunity have been allowed for this purpose, the prosecution may be allowed to proceed upon the admission of the prosecutor that the witnesses for the accused would, if present, testify as accused alleges they would. It is not necessary to admit that such testimony is true. Atkins *v.* Commonwealth, 98 Ky. 539, 33 S. W. 948, 32 L. R. A. 108; Hoyt *v.* People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239, and note; State *v.* Gibbs, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749, and note.

it was their special duty to see that no wrong was done their clients by means of false or prejudiced witnesses, or through the perversion or misapplication of the law by the court. Strangely enough, however, the aid of this profession was denied in the very cases in which it was needed most, and it has cost a long struggle, continuing even into the present century, to rid the English law of one of its most horrible features. In civil causes and on the trial of charges of misdemeanor, the parties were entitled to the aid of counsel in eliciting the facts, and in presenting both the facts and the law to the court and jury; but when the government charged a person with treason or felony, he was denied this privilege.[1] Only such legal questions

contrary to his knowledge, but shall plead for his client the best he can, according to his understanding." Mirror of Justices, c. 2, § 5. The oath in Pennsylvania, on the admission of an attorney to the bar, "to behave himself in the office of an attorney, according to the best of his learning and ability, and with all good fidelity, as well to the court as to the client; that he will use no falsehood, nor delay any man's cause, for lucre or malice," is said, by Mr. Sharswood, to present a comprehensive summary of his duties as a practitioner. Sharswood's Legal Ethics, p. 3. The advocate's oath, in Geneva, was as follows: "I solemnly swear, before Almighty God, to be faithful to the Republic, and to the canton of Geneva; never to depart from the respect due to the tribunals and authorities; never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defence of an accused person; never to employ, knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of facts or law; to abstain from all offensive personality, and to advance no fact contrary to the honor and reputation of the parties, if it be not indispensable to the cause with which I may be charged; not to encourage either the commencement or continuance of a suit from any motives of passion or interest; nor to reject, for any consideration personal to myself, the cause of the weak, the stranger, or the oppressed." In "The Lawyer's Oath, its Obligations, and some of the Duties springing out of them," by D. Bethune Duffield, Esq., a masterly analysis is given of this oath; and he well says of it: "Here you have the creed of an upright and honorable lawyer. The clear, terse, and lofty language in which it is expressed needs no argument to elucidate its principles, no eloquence to enforce its obligations. It has in it the sacred savor of divine inspiration, and sounds almost like a restored reading from Sinai's original, but broken tablets."

[1] When an ignorant person, unaccustomed to public assemblies, and perhaps feeble in body or in intellect, was put upon trial on a charge which, whether true or false, might speedily consign him to an ignominious death, with able counsel arrayed against him, and all the machinery of the law ready to be employed in bringing forward the evidence of circumstances indicating guilt, it is painful to contemplate the barbarity which could deny him professional aid. Especially when in most cases he would be imprisoned immediately on being apprehended, and would thereby be prevented from making even the feeble preparations which might otherwise have been within his power. A "trial" under such circumstances would be only a judicial murder in very many cases. The spirit in which the old law was administered may be judged of from the case of Sir William Parkins, tried for high treason before Lord *Holt* and his associates in 1695, after the statute 7 Wm. III. c. 3, allowing counsel to prisoners indicted for treason, had been passed, but *one day* before it was to take effect. He prayed to be allowed counsel, and quoted the preamble to the statute that such allowance was just and reasonable. His prayer was denied; Lord

as he could suggest was counsel allowed to argue for him; and this was but a poor privilege to one who was himself unlearned in the law, and who, as he could not fail to perceive the monstrous injustice of the whole proceeding, would be quite likely to accept any perversion of the law that might occur in the course of it as regular and proper, because quite in the spirit that denied him a defence. Only after the Revolution of 1688 was a full defence allowed on trials for treason,[1] and not until 1836

Holt declaring that he must administer the law as he found it, and could not anticipate the operation of an act of Parliament, even by a single day. The accused was convicted and executed. See Lieber's Hermeneutics, c. 4, § 15; Sedgwick on Stat. and Const. Law, 31. In proceedings by the Inquisition against suspected heretics the aid of counsel was expressly prohibited. Lea's Superstition and Force, 377.

[1] See an account of the final passage of this bill in Macaulay's "England," Vol. IV. c. 21. It is surprising that the effort to extend the same right to all persons accused of felony was so strenuously resisted afterwards, and that, too, notwithstanding the best lawyers in the realm admitted its importance and justice. "I have myself," said Mr. Scarlett, "*often* seen persons I thought innocent convicted, and the guilty escape, for want of some acute and intelligent counsel to show the bearings of the different circumstances on the conduct and situation of the prisoner." House of Commons Debates, April 25, 1826. "It has lately been my lot," said Mr. Denman, on the same occasion, "to try two prisoners who were deaf and dumb, and who could only be made to understand what was passing by the signs of their friends. The cases were clear and simple; but if they had been circumstantial cases, in what a situation would the judge and jury be placed, when the prisoner could have no counsel to plead for him." The cases *looked* clear and simple to Mr. Denman; but how could he know they would not have looked otherwise, had the coloring of the prosecution been relieved by a counter-presentation for the defence? See Sydney Smith's article on Counsel for Prisoners, 45 Edinb. Rev. p. 74; Works, Vol. II. p. 353. The plausible objection to extending the right was, that the judge would be counsel for the prisoner, — a pure fallacy at the best, and, with some judges, a frightful mockery. Baron *Garrow*, in a charge to a grand jury, said: "It has been truly said that, in criminal cases, judges were counsel for the prisoners. So, undoubtedly, they were, as far as they could be, to prevent undue prejudice, to guard against improper influence being excited against prisoners; but it was impossible for them to go further than this, for they could not suggest the course of defence prisoners ought to pursue; for judges only saw the deposition so short a time before the accused appeared at the bar of their country, that it was quite impossible for them to act fully in that capacity."

If one would see how easily, and yet in what a shocking manner, a judge might pervert the law and the evidence, and act the part of both prosecutor and king's counsel, while assuming to be counsel for the prisoner, he need not go further back than the early trials in our own country, and he is referred for a specimen to the trials of Robert Tucker and others for piracy, before Chief Justice *Trott* at Charleston, S. C., in 1718, as reported in 6 State Trials (Emlyn), 156 *et seq.* Especially may he there see how the statement of prisoners in one case, to which no credit was given for their exculpation, was used as hearsay evidence to condemn a prisoner in another case. All these abuses would have been checked, perhaps altogether prevented, had the prisoners had able and fearless counsel. But without counsel for the defence, and under such a judge, the witnesses were not free to testify, the prisoners could not safely make even the most honest explanation, and the jury, when they retired, could only feel that returning a verdict in accordance with the opinion of the judge was merely matter of form. Sydney Smith's lecture on "The judge that smites

was the same privilege extended to persons accused of other felonies.[1]

With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defence by counsel. And generally it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment,[2] and few, it is to be hoped, would be disposed to do so.

In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with all its accustomed incidents. Among these is that shield of protection which is thrown around the confidence the relation of counsel and client requires, and which does not permit the disclosure by the former, even in the courts of justice, of communications which may have

contrary to the law" is worthy of being carefully pondered in this connection. "If ever a nation was happy, if ever a nation was visibly blessed by God, if ever a nation was honored abroad, and left at home under a government (which we can now conscientiously call a liberal government) to the full career of talent, industry, and vigor, we are at this moment that people, and this is our happy lot. First, the Gospel has done it, and then justice has done it; and he who thinks it his duty that this happy condition of existence may remain, must guard the piety of these times, and he must watch over the spirit of justice which exists in these times. First, he must take care that the altars of God are not polluted, that the Christian faith is retained in purity and in perfection; and then, turning to human affairs, let him strive for spotless, incorruptible justice; praising, honoring, and loving the just judge, and abhorring as the worst enemy of mankind him who is placed there to 'judge after the law, and who smites contrary to the law.'"

[1] By statute 6 & 7 Wm. IV. c. 114; 4 Cooley's Bl. Com. 355; May's Const. Hist. c. 18.

[2] Vice *v.* Hamilton County, 19 Ill. 18; Wayne Co. *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636; House *v.* White, 5 Bax. 690. It has been held that, in the absence of express statutory provisions, counties are not obliged to compensate counsel assigned by the court to defend poor prisoners. Bacon *v.* Wayne County, 1 Mich. 461; Wayne Co. *v.* Waller, 90 Pa. St. 99, 35 Am. Rep. 636. But there are several cases to the contrary. Webb *v.* Baird, 6 Ind. 13; Hall *v.* Washington County, 2 Greene (Iowa), 473; Carpenter *v.* Dane County, 9 Wis. 277. But we think a court has a right to require the service, whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice. Said Chief Justice *Hale* in one case: "Although serjeants have a monopoly of practice in the Common Pleas, they have a right to practice, and do practice, at this bar; and if we were to assign one of them as counsel, and he was to refuse to act, we should make bold to commit him to prison." Life of Chief Justice Hale, in Campbell's Lives of the Chief Justices, Vol. II.

been made to him by the latter, with a view to pending or anticipated litigation. This is the client's privilege; the counsel cannot waive it; and the court would not permit the disclosure even if the client were not present to take the objection.[1]

Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client's guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law.[2] The worst

[1] The history and reason of the rule which exempts counsel from disclosing professional communications are well stated in Whiting *v.* Barney, 30 N. Y. 330. And see 1 Phil. Ev., by Cowen, Hill, and Edwards, 130 *et seq.*; Earle *v.* Grant, 46 Vt. 113; Machette *v.* Wanless, 2 Col. 169. The privilege would not cover communications made, not with a view to professional assistance, but in order to induce the attorney to aid in a criminal act. People *v.* Blakely, 1 Park. Cr. R. 176; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 398. And see the analogous case of Hewitt *v.* Prince, 21 Wend. 79. Nor communications before a crime with a view to being guided as to it. Orman *v.* State, 22 Tex. App. 604, 3 S. W. 468; People *v.* Van Alstine, 57 Mich. 69, 23 N. W. 594. But it is not confined to cases where litigation is begun or contemplated: Root *v.* Wright, 84 N. Y. 72; or to cases where a fee is received: Andrews *v.* Simms, 33 Ark. 771; Bacon *v.* Fisher, 80 N. Y. 394, 36 Am. Rep. 627; [Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839;] and is not waived by the party becoming a witness for himself. Dettenhofer *v.* State, 34 Ohio St. 91, 32 Am. Rep. 362; Sutton *v.* State, 16 Tex. App. 490; but see Jones *v.* State, 65 Miss. 179, 3 So. 379. Communications to a State's attorney with a view to a prosecution are privileged. Vogel *v.* Gruaz, 110 U. S. 311, 4 Sup. Ct. Rep. 12. Communications extraneous or impertinent to the subject-matter of the professional consultation are not privileged. Dixon *v.* Parmelee, 2 Vt. 185. See Brandon *v.* Gowing, 7 Rich. 459. Or communications publicly made in the presence of others. Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502. See Perkins *v.* Grey, 55 Miss. 153; Moffatt *v.* Hardin, 22 S. C. 9; [Kramer *v.* Kister, 187 Pa. 227, 40 Atl. 1008, 44 L. R. A. 432.] Or to the communications made to or by the attorney when acting for both parties. Hanlon *v.* Doherty, 109 Ind. 37, 9 N. E. 782; Cady *v.* Walker, 62 Mich. 157, 28 N. W. 805; Goodwin, &c. Co.'s Appeal, 117 Pa. St. 514, 12 Atl. 736. Or to an attorney if he acts as a mere scrivener. Smith *v.* Long, 106 Ill. 485; Todd *v.* Munson, 53 Conn. 579, 4 Atl. 99. Or facts within the personal knowledge of counsel, such as the dating of a bond. Rundle *v.* Foster, 3 Tenn. Ch. 658. The privilege extends to communications by other means than words: State *v.* Dawson, 90 Mo. 149, 1 S. W. 827; and to communications to a legal adviser, who is not a licensed attorney. Benedict *v.* State, 44 Ohio St. 679, 11 N. E. 125; Ladd *v.* Rice, 57 N. H. 374. [But see 1 Greenleaf on Evidence, ed. 16, § 239, and cases cited. See also People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. 501. It is waived by asking the attorney who drew a will to be a witness to it. Matter of Coleman, 111 N. Y. 220, 19 N. E. 71.]

It has been intimated in New York that the statute making parties witnesses has done away with the rule which protects professional communications. Mitchell's Case, 12 Abb. Pr. R. 249; note to 1 Phil. Ev., by Cowen, Hill, and Edwards, 159 (marg.). Supposing this to be so in civil cases, the protection would still be the same in the case of persons charged with crime, for such persons cannot be compelled to give evidence against themselves, so that the reason for protecting professional confidence is the same as formerly.

[2] If one would consider this duty and the limitations upon it fully, he should read the criticisms upon the conduct of Mr. Charles Phillips on the trial of Courvoisier for the murder of Lord William

criminal is entitled to be judged by the laws; and if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether.[1]

But how persistent counsel may be in pressing for the acquittal of his client, and to what extent he may be justified in throwing his own personal character as a weight in the scale of justice, are questions of ethics rather than of law. No counsel is justifiable who defends even a just cause with the weapons of fraud and falsehood, and no man on the other hand can excuse himself for accepting the confidence of the accused, and then betraying it by a feeble and heartless defence. And in criminal cases we think the court may sometimes have a duty to perform in seeing that

Russell. See Sharswood, Legal Ethics, 46; Littell, Living Age, Vol. XXIV. pp. 179, 230; Vol. XXV. pp. 289, 306; West. Rev. Vol. XXXV. p. 1.

[1] There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court. The famous scene between Mr. Justice *Buller* and Mr. Erskine, on the trial of the Dean of St. Asaph for libel, — 5 Campbell's Lives of the Chancellors, c. 158; Erskine's Speeches, by Jas. L. High, Vol. I. p. 242, — will readily occur to the reader as one of the exceptional cases. Lord *Campbell* says of Erskine's conduct: "This noble stand for the independence of the bar would alone have entitled Erskine to the statue which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle, no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. His example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England." And elsewhere, in speaking of Mr. Fox's Libel Act, he makes the following somewhat extravagant remark: "I have said, and I still think, that this great constitutional triumph is mainly to be ascribed to Lord Camden, who had been fighting in the cause for half a century, and uttered his last words in the House of Lords in its support; but had he not received the invaluable assistance of Erskine, as counsel for the Dean of St. Asaph, *the Star Chamber might have been re-established in this country.*" And Lord *Brougham* says of Erskine: "He was an undaunted man; he was an undaunted advocate. To no court did he ever truckle, neither to the court of the King, neither to the court of the King's Judges. Their smiles and their frowns he disregarded alike in the fearless discharge of his duty. He upheld the liberty of the peers against the one; he defended the rights of the people against both combined to destroy them. If there be yet amongst us the power of freely discussing the acts of our rulers; if there be yet the privilege of meeting for the promotion of needful reforms; if he who desires wholesome changes in our Constitution be still recognized as a patriot, and not doomed to die the death of a traitor, — let us acknowledge with gratitude that to this great man, under Heaven, we owe this felicity of the times." Sketches of Statesmen of the Time of George III. A similar instance of the independence of counsel is narrated of that eminent advocate, Mr. Samuel Dexter, in the reminiscenses of his life by "Sigma," published at Boston, 1857, p. 61. See Stor on Const. (4th ed.) § 1064, note.

the prisoner suffers nothing from inattention or haste on the part of his counsel, or impatience on the part of the prosecuting officer or of the court itself. Time may be precious to the court; but it is infinitely more so to him whose life or whose liberty may depend upon the careful and patient consideration of the evidence; when the counsel for the defence is endeavoring to sift the truth from the falsehood, and to subject the whole to logical analysis, so as to show that how suspicious soever the facts may be, they are nevertheless consistent with innocence. Often indeed it must happen that the impression of the prisoner's guilt, which the judge and the jury unavoidably receive when the case is opened to them by the prosecuting officer, will, insensibly to themselves, color all the evidence in the case, so that only a sense of duty will induce a due attention to the summing up for the prisoner, which after all may prove unexpectedly convincing. Doubtless the privilege of counsel is sometimes abused in these cases; we cannot think an advocate of high standing and character has a right to endeavor to rob the jury of their opinion by asseverating his own belief in the innocence of his client; and cases may arise in which the court will feel compelled to impose some reasonable restraints upon the address to the jury;[1] but it is better in these cases to err on the side of liberality; and restrictions which do not leave to counsel, who are apparently acting in good faith, such reasonable time and opportunity as they may deem necessary for presenting their client's case fully, may possibly in some cases be so far erroneous in law as to warrant setting aside a verdict of guilty.[2]

Whether counsel are to address the jury on questions of law in criminal cases, generally, is a point which is still in dispute. If the jury in the particular case, by the constitution or statutes of the State, are judges of the law, it would seem that counsel should be allowed to address them fully upon it,[3] though the contrary seems to have been held in Maryland:[4] while in Massachusetts where it is expected that the jury will receive the law from the

[1] Thus it has been held, that, even though the jury are the judges of the law in criminal cases, the court may refuse to allow counsel to read law books to the jury. Murphy *v.* State, 6 Ind. 490. And see Lynch *v.* State, 9 Ind. 541; Phœnix Ins. Co. *v.* Allen, 11 Mich. 501.

[2] In People *v.* Keenan, 13 Cal. 581, a verdict in a capital case was set aside on this ground.

[3] Lynch *v.* State, 9 Ind. 541; Murphy *v.* State, 6 Ind. 490.

[4] Franklin *v.* State, 12 Md 236. What was held there was, that counsel should not argue the constitutionality of a statute to the jury; and that the Constitution, in making the jury judges of the law, did not empower them to decide a statute invalid. This ruling corresponds to that of Judge *Chase* in United States *v.* Callendar, Whart. State Trials, 688, 710. But see remarks of *Perkins*, J., in Lynch *v.* State, 9 Ind. 542.

court, it is nevertheless held that counsel has a right to address them upon the law.[1] It is unquestionably more decorous and more respectful to the bench that argument upon the law should always be addressed to the court; and such, we believe, is the general practice. The jury hear the argument, and they have a right to give it such weight as it seems to them properly to be entitled to.

For misconduct in their practice, the members of the legal profession may be summarily dealt with by the courts, who will not fail, in all proper cases, to use their power to protect clients or the public, as well as to preserve the profession from the contamination and disgrace of a vicious associate.[2] A man of bad reputation may be expelled for that alone;[3] and counsel who has

[1] Commonwealth v. Porter, 10 Met. 263; Commonwealth v. Austin, 7 Gray, 51.

[2] "As a class, attorneys are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless assertors of the principles of civil liberty, existing, where alone they can exist, in a government, not of parties nor of men, but of laws. On the other hand, to declare them irresponsibe to any power but public opinion and their consciences, would be incompatible with free government. Individuals of the class may, and sometimes do, forfeit their professional franchise by abusing it; and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable to protect the court, the administration of justice, and themselves. Abuses must necessarily creep in; and, having a deep stake in the character of their profession, they are vitally concerned in preventing it from being sullied by the misconduct of unworthy members of it. No class of the community is more dependent on its reputation for honor and integrity. It is indispensable to the purposes of its creation to assign it a high and honorable standing; but to put it above the judiciary, whose official tenure is good behavior and whose members are removable from office by the legislature, would render it intractable; and it is therefore necessary to assign it but an equal share of independence. In the absence of specific provision to the contrary, the power of removal is, from its nature, commensurate with the power of appointment, and it is consequently the business of the judges to deal with delinquent members of the bar, and withdraw their faculties when they are incorrigible." *Gibson*, Ch. J., *In re* Austin *et al.*, 5 Rawle, 191, 203, 28 Am. Dec. 657. See State v. Kirke, 12 Fla. 278; Rice's Case, 18 B. Monr. 472; Walker v. State, 4 W. Va. 749.

An attorney may be disbarred for a personal attack upon the judge for his conduct as such; but the attorney is entitled to notice, and an opportunity to be heard in defence. Beene v. State, 22 Ark. 149. See *In re* Wallace, L. R. 1 P. C. 283; *Ex parte* Bradley, 7 Wall. 364; Withers v. State, 35 Ala. 252; Matter of Moore *et al.*, 63 N. C. 397; *Ex parte* Biggs, 64 N. C. 202; Bradley v. Fisher, 13 Wall. 335; Dickens's Case, 67 Pa. St. 169.

[3] For example, one whose reputation for truth and veracity is such that his neighbors would not believe him when under oath. Matter of Mills, 1 Mich. 393. See *In re* Percy, 36 N. Y. 651; People v. Ford, 54 Ill. 520. An attorney convicted and punished for perjury, and disbarred, was refused restoration, notwithstanding his subsequent behavior had been unexceptionable. *Ex parte* Garbett, 18 C. B. 493. See Matter of McCarthy, 42 Mich 71, 51 N. W. 963; *Ex parte* Walls, 64 Ind. 461. An attorney disbarred for collusion to procure false testimony. Matter of Gale, 75 N. Y. 526. See Matter of Eldridge, 82 N. Y. 161, 37 Am. Rep. 558. For inducing a commissioner to admit to bail without right a convicted prisoner. State v. Burr, 19 Neb. 593, 28 N. W. 261. For antedating jurat and acknowledgment. Matter of

once taken part in litigation, and been the adviser or become entrusted with the secrets of one party, will not afterwards be suffered to engage for an opposing party, notwithstanding the original employment has ceased, and there is no imputation upon his motives.[1] And, on the other hand, the court will not allow counsel to be made the instrument of injustice, nor permit the client to exact of him services which are inconsistent with the obligation he owes to the court and to public justice, — a higher and more sacred obligation than any which can rest upon him to gratify a client's whims, or to assist in his revenge.[2]

Aretander, 26 Minn. 25, 1 N. W. 43. For embezzlement of client's papers, though he has settled with client. *In re* Davies, 93 Pa. St. 116. For want of fidelity to client. Matter of Wool, 36 Mich. 299; Strout *v.* Proctor, 71 Me. 288; Slemmer *v.* Wright, 54 Iowa, 164, 6 N. W. 181; People *v.* Murphy, 119 Ill. 159, 6 N. E. 488. If he commits a crime in his professional capacity he may be disbarred, though he has not been convicted of the crime. State *v.* Winton, 11 Oreg. 456, 5 Pac. 337. Even if it is not committed as an attorney. The rule is not inflexible that he must be convicted before disbarment. *Ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569; Delano's Case, 58 N. H. 5. See *Ex parte* Steinman, 95 Pa. St. 220. One may be disbarred for publishing a libel on the court unless some constitutional or statutory provision forbids. State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407.

[1] In Gaulden *v.* State, 11 Ga. 47, the late solicitor-general was not suffered to assist in the defence of a criminal case, because he had, in the course of his official duty, instituted the prosecution, though he was no longer connected with it. And see Wilson *v.* State, 16 Ind. 392. A late city attorney for accepting a retainer not to appear for the city in certain cases against it, appealed by him while such attorney, was suspended for six months from practice. *In re* Cowdery, 69 Cal. 32, 10 Pac. 47.

[2] Upon this subject the remarks of Chief Justice *Gibson* in Rush *v.* Cavanaugh, 2 Pa. St. 189, are worthy of being repeated in this connection. The prosecutor in a criminal case had refused to pay the charges of the counsel employed by him to prosecute in the place of the attorney-general, because the counsel, after a part of the evidence had been put in, had consented that the charge might be withdrawn. In considering whether this was sufficient reason for the refusal, the learned judge said: "The material question is, did the plaintiff violate his professional duty to his client in consenting to withdraw his charge, . . . instead of lending himself to the prosecution of one whom he then and has since believed to be an innocent man?

"It is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as to the client; and he violates it when he consciously presses for an unjust judgment; much more so when he presses for the conviction of an innocent man. But the prosecution was depending before an alderman, to whom, it may be said, the plaintiff was bound to no such fidelity. Still he was bound by those obligations which, without oaths, rest upon all men. The high and honorable office of a counsel would be degraded to that of a mercenary, were he compellable to do the bidding of his client against the dictates of his conscience. The origin of the name proves the client to be subordinate to his counsel as his patron. Besides, had the plaintiff succeeded in having Crean held to answer, it would have been his duty to abandon the prosecution at the return of the recognizance. As the office of attorney-general is a public trust which involves, in the discharge of it, the exercise of an almost boundless discretion by an officer who stands as impartial as a judge, it might be doubted whether counsel retained by a private

The Writ of Habeas Corpus.

It still remains to mention one of the principal safeguards to personal liberty, and the means by which illegal restraints upon it are most speedily and effectually remedied. To understand this guaranty, and the instances in which the citizen is entitled to appeal to the law for its enforcement, we must first have a correct idea of what is understood by personal liberty in the law, and inquire what restraints, if any, must exist to its enjoyment.

Sir William Blackstone says, personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.[1] It appears, therefore, that this power of locomotion is not entirely unrestricted, but that by due course of law certain qualifications and limitations may be imposed upon it without infringing upon constitutional liberty. Indeed, in organized society, liberty is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surround him and every other citizen with protections against the lawless acts of others.[2]

prosecutor can be allowed to perform any part of his duty; certainly not unless in subservience to his will and instructions. With that restriction, usage has sanctioned the practice of employing professional assistants, to whom the attorney-general or his regular substitute may, if he please, confide the direction of the particular prosecution; and it has been beneficial to do so where the prosecuting officer has been overmatched or overborne by numbers. In that predicament the ends of justice may require him to accept assistance. But the professional assistant, like the regular deputy, exercises not his own discretion, but that of the attorney-general, whose *locum tenens* at sufferance he is; and he consequently does so under the obligation of the official oath." And see Meister *v.* People, 31 Mich. 99. [In furtherance of the full discharge of the duties which an attorney owes to his client and to the court, he is granted certain privileges. One is to be exempt from the service of process while attending upon the court and in going to and returning from the same. Hoffman *v.* Judge of Circuit Court, 113 Mich. 109, 71 N. W. 480; 38 L. R. A. 663; 67 Am. St. 458. Similar exemption in regard to service of summons and other civil process extends to parties and witnesses. Mulhearn *v.* Press Publishing Co., 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101.]

[1] 1 Bl. Com. 134. Montesquieu says: "In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power." Spirit of the Laws, Book 11, c. 3.

[2] "Liberty," says Mr. Webster, "is the creature of law, essentially different from that authorized licentiousness that trespasses on right. It is a legal and a refined idea, the offspring of high civilization, which the savage never understood, and never can understand. Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose that lib-

In examining the qualifications and restrictions which the law imposes upon personal liberty, we shall find them classed, according to their purpose, as, first, those of a public, and, second, those of a private nature.

The first class are those which spring from the relative duties and obligations of the citizen to society and to his fellow-citizens. These may be arranged into sub-classes as follows: (1) Those imposed to prevent the commission of crime which is threatened; (2) those in punishment of crime committed; (3) those in punishment of contempts of court or legislative bodies, or to render their jurisdiction effectual; (4) those necessary to enforce the duty citizens owe in defence of the State;[1] (5) those which may become important to protect the community against the acts of those who, by reason of mental infirmity, are incapable of self-control. All these limitations are well recognized and generally understood, but a particular discussion of them does not belong to our subject. The second class are those which spring from the helpless or dependent condition of individuals in the various relations of life.

1. The husband, at the common law, is recognized as having legal custody of and power of control over the wife, with the right to direct as to her labor, and to insist upon its performance. The precise nature of the restraints which may be imposed by the husband upon the wife's actions, it is not easy, from the nature of the case, to point out and define; but at most they can only be such gentle restraints upon her liberty as improper conduct on her part may appear to render necessary;[2] and the general tendency of public sentiment, as well as of the modern decisions, has been in the direction of doing away with the arbitrary power which the husband was formerly supposed to possess, and of placing

erty consists in a paucity of laws. If one wants few laws let him go to Turkey. The Turk enjoys that blessing. The working of our complex system, full of checks and restraints on legislative, executive, and judicial power, is favorable to liberty and justice. Those checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury." Works, Vol. II. p. 393.

[1] In Judson *v.* Reardon, 16 Minn. 431, a statute authorizing the members of a municipal council to arrest and imprison without warrant persons refusing to obey the orders of fire wardens at a fire was held unwarranted and void.

[2] 2 Kent, 181. See Cochran's Case, 8 Dowl. P. C. 630. The husband, however, is under no obligation to support his wife except at his own home; and it is only when he wrongfully sends her away, or so conducts himself as to justify her in leaving him, that he is bound to support her elsewhere. Rumney *v.* Keyes, 7 N. H. 570; Allen *v.* Aldrich, 20 N. H. 63; Shaw *v.* Thompson, 16 Pick. 198; Clement *v.* Mattison, 3 Rich. 93. In such a case his liability to supply her with necessaries cannot be restricted by giving notice to particular persons not to trust her. Bolton *v.* Prentice, 2 Strange, 1214; Harris *v.* Morris, 4 Esp. 41; Watkins *v.* De Armond, 89 Ind. 553.

the two sexes in the marriage relation upon a footing nearer equality. It is believed that the right of the husband to chastise the wife, under any circumstances, would not be recognized in this country; and such right of control as the law gives him would in any case be forfeited by such conduct towards the wife as was not warranted by the relation, and which should render it improper for her to live and cohabit with him, or by such conduct as, under the laws of the State, would entitle her to a divorce.[1] And he surrenders his right of control also, when he consents to her living apart under articles of separation.[2]

2. The father of an infant, being obliged by law to support his child, has a corresponding right to control his actions, and to employ his services during the continuance of legal infancy. The child may be emancipated from this control before coming of age, either by the express assent of the father, or by being turned away from his father's house, and left to care for himself;[3] though in neither case would the father be released from an obligation which the law imposes upon him to prevent the child becoming a public charge, and which the State may enforce whenever necessary. The mother, during the father's life, has a power of control subordinate to his; but on his death,[4] or conviction and sentence to imprisonment for felony,[5] she succeeds to the relative rights which the father possessed before. (*a*)

3. The guardian has a power of control over his ward, corresponding in the main to that which the father has over his child, though in some respects more restricted, while in others it is broader. The appointment of guardian, when made by the courts,

[1] Hutcheson *v.* Peck, 5 Johns. 196; Love *v.* Moynahan, 16 Ill. 277.

[2] Saunders *v.* Rodway, 16 Jur. 1005, 13 Eng. L. & Eq. 463.

[3] Whiting *v.* Earle, 3 Pick. 201; 15 Am. Dec. 207; McCoy *v.* Huffman, 8 Cow. 841; State *v.* Barrett, 45 N. H. 15; Wolcott *v.* Rickey, 22 Iowa, 171; Fairhurst *v.* Lewis, 23 Ark. 435; Hardwick *v.* Pawlet, 36 Vt. 320.

[4] Dedham *v.* Natick, 16 Mass. 135; Com'rs Harford Co. *v.* Hamilton, 60 Md. 340.

[5] Bailey's Case, 6 Dowl. P. C. 311. If, however, there be a guardian appointed for the child by the proper court, his right to the custody of the child is superior to that of the parent. Macready *v.* Wolcott, 33 Conn. 321.

(*a*) [Upon the principle that an ounce of prevention is worth a pound of cure, the State is asserting more and more control over children allowed by their parents to grow up in evil associations, and for the prevention of crime to which such courses so strongly tend recent statutes authorize the summary arrest and detention, in reform schools and like institutions, of youth of incorrigibly vicious habits. Such detention is not looked upon as imprisonment and punishment to the validity of which a jury trial is necessary. State *v.* Brown, 50 Minn. 353, 52 N. W. 935, 36 Am. St. 651, 16 L. R. A. 691, and note on commitment of minors to reformatories without conviction of crime. To the same effect, see Lee *v.* McClelland, 157 Ind. 84, 60 N. E. 692.]

is of local force only, being confined to the State in which it is made, and the guardian would have no authority to change the domicile of the ward to another State or country. But the appointment commonly has reference to the possession of property by the ward, and over this property the guardian is given a power of control which is not possessed by the father, as such, over the property owned by his child.[1]

4. The relation of master and apprentice is founded on a contract between the two, generally with the consent of the parent or party standing *in loco parentis* to the latter, by which the master is to teach the apprentice some specified trade or means of living, and the apprentice, either wholly or in part in consideration of the instruction, is to perform services for the master while receiving it. This relation is also statutory and local, and the power to control the apprentice is assimilated to that of the parent by the statute law.[2]

5. The power of the master to impose restraints upon the action of the servant he employs is of so limited a nature that practically it may be said to rest upon continuous voluntary assent. If the servant misconducts himself, or refuses to submit to proper control, the master may discharge him, but cannot resort to confinement or personal chastisement.

6. The relation of teacher and scholar places the former more nearly in the place of the parent than either of the two preceding relations places the master. While the pupil is under his care, he has a right to enforce obedience to his commands lawfully given in his capacity of teacher, even to the extent of bodily chastisement or confinement. And in deciding questions of discipline he acts judicially, and is not to be made liable, either civilly or criminally, unless he has acted with express malice, or been guilty of such excess in punishment that malice may fairly be implied. All presumptions favor the correctness and justice of his action.[3]

7. Where parties bail another, in legal proceedings, they are regarded in law as his jailers, selected by himself, and with the

[1] Cooley's Bl. Com. 462, and cases cited.

[2] The relation is one founded on personal trust and confidence, and the master cannot assign the articles of apprenticeship except by consent of the apprentice and of his proper guardian. Haley *v.* Taylor, 3 Dana, 222; Nickerson *v.* Howard, 19 Johns. 113; Tucker *v.* Magee, 18 Ala. 99.

[3] State *v.* Pendergrass, 2 Dev. & Bat. 365; Cooper *v.* McJunkin, 4 Ind. 290; Commonwealth *v.* Randall, 4 Gray, 38; Anderson *v.* State, 3 Head, 455; Lander *v.* Seaver, 32 Vt. 114; Morrow *v.* Wood, 35 Wis. 59; Patterson *v.* Nutter, 78 Me. 509, 7 Atl. 273; Sheehan *v.* Sturges, 53 Conn. 481, 2 Atl. 841; Vanvactor *v.* State, 113 Ind. 276, 15 N. E. 341.

right to his legal custody for the purpose of seizing and delivering him up to the officers of the law at any time before the liability of the bail has become fixed by a forfeiture being judicially declared on his failure to comply with the condition of the bond.[1] This is a right which the bail may exercise in person or by agent, and without resort to judicial process.[2]

8. The control of the creditor over the person of his debtor, through the process which the law gives for the enforcement of his demand, is now very nearly abolished, thanks to the humane provisions which have been made of late by statute or by constitution. In cases of torts and where debts were fraudulently contracted, or where there is an attempt at a fraudulent disposition of property with intent to delay the creditor, or to deprive him of payment, the body of the debtor is allowed to be seized and confined; but the reader must be referred to the constitution and statutes of his State for specific information on this subject. (*a*)

These, then, are the legal restraints upon personal liberty. For any other restraint, or for any abuse of the legal rights which have been specified, the party restrained is entitled to immediate process from the courts, and to speedy relief.

The right to personal liberty did not depend in England on any statute, but it was the birthright of every freeman. As slavery ceased it became universal, and the judges were bound to protect it by proper writ when infringed. But in those times when the power of Parliament was undefined and in dispute, and the judges held their offices only during the king's pleasure, it was almost a matter of course that rights should be violated, and that legal redress should be impracticable, however clear those rights might be. But in many cases it was not very clear what the legal

[1] Harp *v.* Osgood, 2 Hill, 216; Commonwealth *v.* Brickett, 8 Pick. 138; Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690. The principal may be followed, if necessary, out of the jurisdiction of the court in which the bail was taken, and arrested wherever found. Parker *v.* Bidwell, 3 Conn. 84. Even though it be out of the State. Harp *v.* Osgood, *supra*. And doors, if necessary, may be broken in order to make the arrest. Read *v.* Case, 4 Conn. 166, 10 Am. Dec. 110; Nicolls *v.* Ingersoll, 7 Johns. 145. After the recognizance is defaulted, surrender does not discharge the bail. State *v.* McGuire, 16 R. I. 519, 17 Atl. 918. Nor will surrender discharge surety on bond for the support of a deserted wife. Miller *v.* Com., 127 Pa. St. 122, 17 Atl. 864.

[2] Parker *v.* Bidwell, 3 Conn. 84; Nicolls *v.* Ingersoll, 7 Johns. 145; Worthen *v.* Prescott, 60 Vt. 68, 11 Atl. 690.

(*a*) [Obligation arising under order of court to pay money for support of a husband, is not a debt. Livingston *v.* Los Angeles Sup. Ct., 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175. And a defendant may be imprisoned for refusing to pay alimony as ordered. Barclay *v.* Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; State *v.* Cook, 66 Ohio, 566, 64 N. E. 567. Person removing baggage from hotel or lodging-house when such baggage is subject to lien for unpaid bills may be punished by imprisonment. State *v.* Engle, 156 Ind. 339, 58 N. E. 698.]

rights of parties were. The courts which proceeded according to the course of the common law, as well as the courts of chancery, had limits to their authority which could be understood, and a definite course of proceeding was marked out for them by statute or by custom; and if they exceeded their jurisdiction and invaded the just liberty of the subject, the illegality of the process would generally appear in the proceedings. But there were two tribunals unknown to the common law, but exercising a most fearful authority, against whose abuses it was not easy for the most upright and conscientious judge in all cases to afford relief. These were, 1. The Court of Star Chamber, which became fully recognized and established in the time of Henry VII., though originating long before. Its jurisdiction extended to all sorts of offences, contempts of authority and disorders, the punishment of which was not supposed to be adequately provided for by the common law; such as slanders of persons in authority, the propagation of seditious news, refusal to lend money to the king, disregard of executive proclamations, &c. It imposed fines without limit, and inflicted any punishment in the discretion of its judges short of death. Even jurors were punished in this court for verdicts in State trials not satisfactory to the authorities. Although the king's chancellor and judges were entitled to seats in this court, the actual exercise of its powers appears to have fallen into the hands of the king's privy council, which sat as a species of inquisition, and exercised almost any authority it saw fit to assume.[1] The court was abolished by the Long Parliament in 1641. 2. The Court of High Commission, established in the time of Elizabeth, and which exercised a power in ecclesiastical matters corresponding to that which the Star Chamber assumed in other cases, and in an equally absolute and arbitrary manner. This court was also abolished in 1641, but was afterwards revived for a short time in the reign of James II.

It is evident that while these tribunals existed there could be no effectual security to liberty. A brief reference to the remarkable struggle which took place during the reign of Charles I. will perhaps the better enable us to understand the importance of those common-law protections to personal liberty to which we shall have occasion to refer, and also of those statutory securities which have since been added.

[1] See Hallam, Constitutional History, c. 1 and 8; Todd, Parliamentary Government in England, Vol. II. c. 1. The rise and extension of authority of this court, and its arbitrary character, are very fully set forth in Brodie's Constitutional History of the British Empire, to which the reader is referred for more particular information.

When the king attempted to rule without the Parliament, and in 1625 dissolved that body, and resorted to forced loans, the grant of monopolies, and the levy of ship moneys, as the means of replenishing a treasury that could only lawfully be supplied by taxes granted by the commons, the privy council was his convenient means of enforcing compliance with his will. Those who refused to contribute to the loans demanded were committed to prison. When they petitioned the Court of the King's Bench for their discharge, the warden of the Fleet made return to the writ of *habeas corpus* that they were detained by warrant of the privy council, informing him of no particular cause of imprisonment, but that they were committed by the special command of his majesty. Such a return presented for the decision of the court the question, "Is such a warrant, which does not specify the cause of detention, valid by the laws of England?" The court held that it was, justifying their decision upon supposed precedents, although, as Mr. Hallam says, "it was evidently the consequence of this decision that every statute from the time of Magna Charta, designed to protect the personal liberties of Englishmen, became a dead letter, since the insertion of four words in a warrant (*per speciale mandatum regis*), which might become matter of form, would control their remedial efficacy. And this wound was the more deadly in that the notorious cause of these gentlemen's imprisonment was their withstanding an illegal exaction of money. Everything that distinguished our constitutional laws, all that rendered the name of England valuable, was at stake in this issue."[1] This decision, among other violent acts, led to the Petition of Right, one of the principal charters of English liberty, but which was not assented to by the king until the judges had intimated that if he saw fit to violate it by arbitrary commitments, they would take care that it should not be enforced by their aid against his will. And four years later, when the king committed members of Parliament for words spoken in debate offensive to the royal prerogative, the judges evaded the performance of their duty on *habeas corpus*, and the members were only discharged when the king gave his consent to that course.[2]

The Habeas Corpus Act was passed in 1679, mainly to prevent such abuses and other evasions of duty by judges and ministerial officers, and to compel prompt action in any case in which illegal imprisonment was alleged. That act gave no new right to the

[1] Hallam, Const. Hist. c. 7. See also Brodie, Const. Hist. Vol. II. c. 1.

[2] Hallam, Const. Hist. c. 8; Brodie, Const. Hist. Vol. I. c. 8.

subject, but it furnished the means of enforcing those which existed before.[1] The preamble recited that "whereas great delays have been used by sheriffs, jailers, and other officers to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus*, to them directed, by standing out on *alias* or *pluries habeas corpus*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison in such cases, where by law they are bailable, to their great charge and vexation. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters," the act proceeded to make elaborate and careful provisions for the future. The important provisions of the act may be summed up as follows: That the writ of *habeas corpus* might be issued by any court of record or judge thereof, either in term-time or vacation, on the application of any person confined, or of any person for him; the application to be in writing and on oath, and with a copy of the warrant of commitment attached, if procurable; the writ to be returnable either in court or at chambers; the person detaining the applicant to make return to the writ by bringing up the prisoner with the cause of his detention, and the court or judge to discharge him unless the imprisonment appeared to be legal, and in that case to take bail if the case was bailable; and performance of all these duties was made compulsory, under heavy penalties. Thus the duty which the judge or other officer might evade with impunity before, he must now perform or suffer punishment. The act also provided for punishing severely a second commitment for the same cause, after a party had once been discharged on *habeas corpus*, and also made the sending of inhabitants of England, Wales, and Berwick-upon-Tweed abroad for imprisonment illegal, and subject to penalty. Important as this act was,[2] it was less broad in its scope than the remedy had been before, being confined to cases of imprisonment for criminal or supposed criminal matters;[3] but the attempt in Parliament nearly a century later to extend its provisions to other

[1] Hallam, Const. Hist. c. 13; Beeching's Case, 4 B. & C. 136; Matter of Jackson, 15 Mich. 436. [For a valuable article on the History of the Writ of Habeas Corpus, see 18 Law Quar. Rev. 61.]

[2] Mr. Hurd, in the appendix to his excellent treatise on the Writ of Habeas Corpus, gives a complete copy of the act. See also appendix to Lieber, Civil Liberty and Self-Government; Broom, Const. Law, 218.

[3] See Mayor of London's Case, 3 Wils. 198; Wilson's Case, 7 Queen's Bench Rep. 984.

cases was defeated by the opposition of Lord *Mansfield*, on the express ground that it was unnecessary, inasmuch as the common-law remedy was sufficient;[1] as perhaps it might have been, had officers been always disposed to perform their duty. Another attempt in 1816 was successful.[2]

The Habeas Corpus Act was not made, in express terms, to extend to the American colonies, but it was in some expressly, and in others by silent acquiescence, adopted and acted upon, and all the subsequent legislation in the American States has been based upon it, and has consisted in little more than a re-enactment of its essential provisions.

What Courts issue the Writ.

The protection of personal liberty is for the most part confided to the State authorities, and to the State courts the party must apply for relief on *habeas corpus* when illegally restrained. There are only a few cases in which the federal courts can interfere; and those are cases in which either the illegal imprisonment is under pretence of national authority, or in which this process becomes important or convenient in order to enforce or vindicate some right, or authority under the Constitution or laws of the United States.

The Judiciary Act of 1789 provided that each of the several federal courts should have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and that either of the justices of the Supreme Court, as well as the district judges, should have power to grant writs of *habeas corpus* for the purposes of an inquiry into the cause of commitment; provided that in no case should such writs extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed to trial before some court of the same, or were necessary to be brought into court to testify.[3] Under this statute no court of the United States or judge thereof could issue a *habeas corpus* to bring up a prisoner in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. And this was so whether the imprisonment was under civil or criminal process.[4]

[1] Life of Mansfield by Lord Campbell, 2 Lives of Chief Justices, c. 35; 15 Hansard's Debates, 807 *et seq.*

[2] By Stat. 56 Geo. III. c. 100. See Broom, Const. Law, 224.

[3] 1 Statutes at Large, 81.

[4] *Ex parte* Dorr, 3 How. 103.

During what were known as the nullification troubles in South Carolina, the defect of federal jurisdiction in respect to this writ became apparent, and another act was passed, having for its object, among other things, the protection of persons who might be prosecuted under assumed State authority for acts done under the laws of the United States. This act provided that either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.[1]

In 1842 further legislation seemed to have become a necessity, in order to give to the federal courts authority upon this writ over cases in which questions of international law were involved, and which, consequently, could properly be disposed of only by the jurisdiction to which international concerns were by the Constitution committed. The immediate occasion for this legislation was the arrest of a subject of Great Britain by the authorities of the State of New York, for an act which his government avowed and took the responsibility of, and which was the subject of diplomatic correspondence between the two nations. An act of Congress was consequently passed, which provides that either of the justices of the Supreme Court, or any judge of any District Court of the United States in which a prisoner is confined, in addition to the authority previously conferred by law, shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein,

[1] 4 Stat. at Large, 634. See *Ex parte* Robinson, 6 McLean, 355, 1 Bond, 39. Robinson was United States marshal, and was imprisoned under a warrant issued by a State court for executing process under the Fugitive Slave Law, and was discharged by a justice of the Supreme Court of the United States under this act. See also United States *v.* Jailer of Fayette Co., 2 Abb. U. S. 265. The relator in that case was in custody of the jailer under a regular commitment charging him under the laws of Kentucky with murder. He averred and offered to show that the act with which he was charged was done by him under the authority of the United States, and in execution of its laws. The federal district judge entered upon an examination of the facts on *habeas corpus*, and ordered the relator discharged. A similar ruling has been made where a marshal was charged in a State court with murder committed while protecting a Justice of the Supreme Court from an attack. *In re* Neagle, 39 Fed. Rep. 833, aff. 135 U. S. 1, 10 Sup. Ct. Rep. 658. See also *Ex parte* Virginia, 100 U. S. 339; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Clark, 100 U. S. 399; *Ex parte* Bridges, 2 Woods, 428; *Ex parte* McKean, 3 Hughes, 23; *Ex parte* Jenkins, 2 Wall. Jr. 521.

shall be committed, or confined, or in custody, under, or by any authority, or law, or process founded thereon, of the United States or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction of any foreign State or sovereignty, the validity or effect whereof depends upon the law of nations, or under color thereof.[1]

In 1867 a further act was passed, which provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.[2]

These are the cases in which the national courts and judges have jurisdiction of this writ: in other cases the party must seek his remedy in the proper State tribunal.[3] And although the State courts formerly claimed and exercised the right to inquire into the lawfulness of restraint under the national authority,[4] it is now settled by the decision of the Supreme Court of the United States, that the question of the legality of the detention in such cases is one for the determination, exclusively, of the federal judiciary, so that, although a State court or judge may issue this process in any case where illegal restraint upon liberty is alleged, yet when it is served upon any officer or person who detains another in custody under the national authority, it is his duty, by proper return, to make known to the State court or judge the authority by which he holds such person, but not further to obey

[1] 5 Stat. at Large, 539. McLeod's Case, which was the immediate occasion of the passage of this act, will be found reported in 25 Wend. 482, and 1 Hill, 377, 37 Am. Dec. 328. It was reviewed by Judge Talmadge in 26 Wend. 663, and a reply to the review appears in 3 Hill, 635.

[2] R. S. U. S. § 751 *et seq.* See *In re* Brosnahan, 18 Fed. Rep. 62; *In re* Ah Jow, 29 Fed. Rep. 181; *In re* Chow Goo Pooi, 25 Fed. Rep. 77. While in advance of trial in a State court for an offence against a State law which is void under the federal Constitution, a federal court may discharge a defendant, yet ordinarily when bail is granted it will not do so. *Ex parte* Royall, 117 U. S. 241, 254, 6 Sup. Ct. Rep. 734, 742. [Upon jurisdiction of U. S. courts to issue writs of *habeas corpus*, see Tinsley *v.* Anderson, 171 U. S. 101, 18 Sup. Ct. Rep. 805, and notes to 43 L. ed. U. S. 91, 4 L. R. A. 236, 27 L. ed. U. S. 288, and 1 L. ed. U. S. 490. Upon suspension of writ of *habeas corpus*, see note to 12 L. ed. U. S. 581.]

[3] *Ex parte* Dorr, 3 How. 103; Barry *v.* Mercein, 5 How. 103; De Krafft *v.* Barney, 2 Black, 704. See United States *v.* French, 1 Gall. 1; *Ex parte* Barry, 2 How. 65. [For valuable note upon *habeas corpus*, collecting many cases, see 43 L. ed. U. S. 92.]

[4] See the cases collected in Hurd on Habeas Corpus, B. 2, c. 1, § 5, and in Abb. Nat. Dig. 609, note.

the process; and that as the State judiciary have no authority within the limits of the sovereignty assigned by the Constitution to the United States, the State court or judge can proceed no further with the case.[1]

The State constitutions recognize the writ of *habeas corpus* as an existing remedy in the cases to which it is properly applicable, and designate the courts or officers which may issue it; but they do not point out the cases in which it may be employed. Upon this subject the common law and the statutes must be our guide; and although the statutes will be found to make specific provision for particular cases, it is believed that in no instance which has fallen under our observation has there been any intention to restrict the remedy, and make it less broad and effectual than it was at the common law.[2]

[1] Ableman *v.* Booth, 21 How. 506. *Harlan*, J., says: "Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers in the general government, acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States." Robb *v.* Connolly, 111 U. S. 624, 4 Sup. Ct. Rep. 544.

See Norris *v.* Newton, 5 McLean, 92; United States *v.* Rector, 5 McLean, 174; Spangler's Case, 11 Mich. 298; *In re* Hopson, 40 Barb. 34; *Ex parte* Hill, 5 Nev. 154; *Ex parte* Bur, 49 Cal. 159. Notwithstanding the decision of Ableman *v.* Booth, the State courts have frequently since assumed to pass definitely upon cases of alleged illegal restraint under federal authority, and this, too, by the acquiescence of the federal officers. As the remedy in the State courts is generally more expeditious and easy than can be afforded in the national tribunals, it is possible that the federal authorities may still continue to acquiesce in such action of the State courts, in cases where there can be no reason to fear that they will take different views of the questions involved from those likely to be held by the federal courts. Nevertheless, while the case of Ableman *v.* Booth stands unreversed, the law must be held to be as there declared. It has been approved in Tarble's Case, 13 Wall. 397, Chief Justice *Chase* dissenting.

An agent of a State to receive from another State a person under extradition proceedings is not an officer of the United States, nor is his detention of the prisoner so far under national authority that a State court may not compel him to bring in the prisoner for an inquiry into the legality of his detention; that is, whether the warrant and the delivery to the agent were in conformity to the federal statutes. In summing up the discussion

[2] See Matter of Jackson, 15 Mich. 417, where this whole subject is fully considered. The application for the writ is not necessarily made by the party in person, but may be made by any other person on his behalf, if a sufficient reason is stated for its not being made by him personally. The Hottentot Venus Case, 13 East, 195; Child's Case, 29 Eng. L. & Eq. 259. A wife may have the writ to release her husband from unlawful imprisonment, and may herself be heard on the application. Cobbett's Case, 15 Q. B. 181, note; Cobbett *v.* Hudson, 10 Eng. L. & Eq. 318; s. c. 15 Q. B. 988. Lord *Campbell* in this case cites the case of the wife of John Bunyan, who was heard on his behalf

We have elsewhere referred to certain rules regarding the validity of judicial proceedings.[1] In the great anxiety on the part of our legislatures to make the most ample provision for speedy relief from unlawful confinement, authority to issue the writ of *habeas corpus* has been conferred upon inferior judicial officers, who make use of it sometimes as if it were a writ of error, under which they might correct the errors and irregularities of other judges and courts, whatever their relative jurisdiction and dignity. Any such employment of the writ is an abuse.[2] Where a party who is in confinement under judicial process is brought up on *habeas corpus*, the court or judge before whom he is returned will inquire: 1. Whether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process.[3] If so, mere irregularities or errors of judgment in the

when in prison. [See note to 43 L. ed. U. S. 92.]

[1] See *post*, p. 575 *et seq.*

[2] *Ex parte* Clay, 98 Mo. 578, 11 S. W. 998; State *v.* Hayden, 35 Minn. 283, 28 N. W. 659; Willis *v.* Bayles, 105 Ind. 363, 5 N. E. 8; State *v.* Orton, 67 Iowa, 554, 25 N. W. 775; People *v.* Liscomb, 60 N. Y. 559, 574; Petition of Crandall, 34 Wis. 177; *Ex parte* Van Hagan, 25 Ohio St. 426; *Ex parte* Shaw, 7 Ohio St. 81; *Ex parte* Parks, 93 U. S. 18, 23; Perry *v.* State, 41 Tex. 488; Matter of Underwood, 30 Mich. 502; Matter of Eaton, 27 Mich. 1; *In re* Burger, 39 Mich. 203; *Ex parte* Simmons, 62 Ala. 416; *Re* Stupp, 12 Blatch. 501; *Ex parte* Winslow, 9 Nev. 71; *Ex parte* Hartman, 44 Cal. 32; *In re* Falvey, 7 Wis. 630; Petition of Semler, 41 Wis. 517; *In re* Stokes, 5 Sup. Ct. (N. Y.) 71; Prohibitory Amendment Cases, 24 Kan. 700; *Ex parte* Thompson, 93 Ill. 89; *Ex parte* Fernandez, 10 C. B. N. S. 2, 37. This is so, even though there be no appellate tribunal in which the judgment may be reviewed in the ordinary way. *Ex parte* Plante, 6 Lower Can. Rep. 106. The writ cannot be used to prevent the commission upon a trial of anticipated errors. *Ex parte* Crouch, 112 U. S. 178, 5 Sup. Ct. Rep. 96. It is worthy of serious consideration whether, in those States where the whole judicial power is by the constitution vested in certain specified courts, it is competent by law to give to judicial officers not holding such courts authority to review, even indirectly, the decisions of the courts, and to discharge persons committed under their judgments. Such officers could exercise only a special statutory authority. Yet its exercise in such cases is not only judicial, but it is in the nature of appellate judicial power. The jurisdiction of the Supreme Court of the United States to issue the writ in cases of confinement under the order of the District Courts, was sustained in *Ex parte* Bollman & Swartwout, 4 Cranch, 75, and Matter of Metzger, 5 How. 176, on the ground that it was appellate. It is original only where a State is a party, or an ambassador, minister, or consul. *Ex parte* Hung Hang, 108 U. S. 552, 2 Sup. Ct. Rep. 863. See also *Ex parte* Kearney, 7 Wheat. 38; *Ex parte* Watkins, 7 Pet. 568; *Ex parte* Milburn, 9 Pet. 704; Matter of Kaine, 14 How. 103; Matter of Eaton, 27 Mich. 1; Matter of Buddington, 29 Mich. 472.

[3] The validity of the appointment or election of an officer *de facto* cannot be inquired into on *habeas corpus*. *Ex parte* Strahl, 16 Iowa, 369; Russell *v.* Whiting, 1 Wins. (N. C.) 463. Otherwise if a mere usurper issues process for the imprisonment of a citizen. *Ex parte* Strahl, *supra*.

If the record shows that relator stands convicted of that which is no crime, he is of course entitled to his discharge. *Ex parte* Kearney, 55 Cal. 212. So if punished for contempt in disobeying a void order of court. *In re* Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164; *Ex parte*

exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the court issuing the process, or on regular appellate proceedings.[1] 2. If the process is not void for want of jurisdiction, the further inquiry will be made, whether, by law, the case is bailable, and if so, bail will be taken if the party offers it; otherwise he will be remanded to the proper custody.[2]

This writ is also sometimes employed to enable a party to enforce a right of control which by law he may have, springing from some one of the domestic relations; especially to enable a parent to obtain the custody and control of his child, where it is detained from him by some other person. The courts, however, do not generally go farther in these cases than to determine what is for the best interest of the child; and they do not feel com-

Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724. So if he is held under a sentence which contravenes an express constitutional immunity, as when sentenced a second time for the same offence. Nielsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. Rep. 672. See, also, *Ex parte* Royall, 117 U. S. 241, 254, 6 Sup. Ct. Rep. 734, 742; *In re* Dill, 32 Kan. 648, 5 Pac. 39; Brown *v.* Duffus, 66 Iowa, 193, 23 N. W. 396; *Ex parte* Rollins, 80 Va. 314; *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. 298. The question of jurisdiction of a court of limited jurisdiction is open upon this writ. People *v.* The Warden, &c., 100 N. Y. 20, 2 N. E. 870.

[1] People *v.* Cassels, 5 Hill, 164; Bushnell's Case, 9 Ohio St. 183; *Ex parte* Watkins, 7 Pet. 568; Matter of Metzger, 5 How. 176; *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *Ex parte* Harding, 120 U. S. 782, 7 Sup. Ct. Rep. 780; Petition of Smith, 2 Nev. 338; *Ex parte* Gibson, 31 Cal. 619; Hammond *v.* People, 32 Ill. 472. per *Breese*, J. In State *v.* Shattuck, 45 N. H. 211, *Bellows*, J., states the rule very correctly as follows: "If the court had jurisdiction of the matter embraced in these causes, this court will not, on *habeas corpus*, revise the judgment. State *v.* Towle, 42 N. H. 541; Ross's Case, 2 Pick. 166; and Riley's Case, 2 Pick. 171; Adams *v.* Vose, 1 Gray, 51. If in such case the proceedings are irregular or erroneous, the judgment is voidable and not void, and stands good until revised or annulled in a proper proceeding instituted for that purpose; but when it appears that the magistrate had no jurisdiction, the proceedings are void, and the respondent may be discharged on *habeas corpus*. State *v.* Towle, before cited; *Ex parte* Kellogg, 6 Vt. 509. See also State *v.* Richmond, 6 N. H. 232; Burnham *v.* Stevens, 33 N. H. 247; Hurst *v.* Smith, 1 Gray, 49." If the court has jurisdiction of an offence, its judgment as to what acts are necessary to constitute it cannot be reviewed. *In re* Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1263.

[2] It is not a matter of course that the party is to be discharged even where the authority under which he is held is adjudged illegal. For it may appear that he should be lawfully confined in different custody; in which case the proper order may be made for the transfer. Matter of Mason, 8 Mich. 70; Matter of Ring, 28 Cal. 247; *Ex parte* Gibson, 31 Cal. 619. See People *v.* Kelly, 97 N. Y. 212. And where he is detained for trial on an imperfect charge of crime, the court, if possessing power to commit *de novo*, instead of discharging him, should proceed to inquire whether there is probable cause for holding him for trial, and if so, should order accordingly. Hurd on Habeas Corpus, 416. A discharge on *habeas corpus* is, apart from statute, conclusive upon the State. People *v.* Fairman, 59 Mich. 568, 26 N. W. 569; State *v.* Miller, 97 N. C. 451; Gagnet *v.* Reese, 20 Fla. 438. A refusal to discharge is not conclusive. Application may be made to another judge. *In re* Snell, 31 Minn. 110, 16 N. W. 692. But a statute making such refusal conclusive, unless reversed on appeal, is valid. *Ex parte* Hamilton, 65 Miss. 98, 3 So. 68. See *Ex parte* Cuddy, 40 Fed. Rep. 62.

pelled to remand him to any custody where it appears not to be for the child's interest. The theory of the writ is, that it relieves from improper restraint; and if the child is of an age to render it proper to consult his feelings and wishes, this may be done in any case;[1] and it is especially proper in many cases where the parents are living in separation and both desire his custody. The right of the father, in these cases, is generally recognized as best; but this must depend very much upon circumstances, and the tender age of the child may often be a controlling consideration against his claim. The courts have large discretionary power in these cases, and the tendency of modern decisions has been to extend, rather than restrict it.[2]

There is no common-law right to a trial by jury of the questions of fact arising on *habeas corpus;* but the issues both of fact and of law are tried by the court or judge before whom the proceeding is had;[3] though without doubt a jury trial might be provided for by statute, and perhaps even ordered by the court in some cases.[4]

Right of Discussion and Petition.

The right of the people peaceably to assemble, and to petition the government for a redress of grievances is one which "would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."[5] But it has not been

[1] Commonwealth *v.* Aves, 18 Pick. 193; Shaw *v.* Nachwes, 43 Iowa, 653; Garner *v.* Gordan, 41 Ind. 92; People *v.* Weissenbach, 60 N. Y. 385.

[2] Barry's Case may almost be said to exhaust all the law on this subject. We refer to the various judicial decisions made in it, so far as they are reported in the regular reports. 8 Paige, 47; 25 Wend. 64; People *v.* Mercein, 3 Hill, 399; 2 How. 65; Barry *v.* Mercein, 5 How. 105. See also the recent case of Adams *v.* Adams, 1 Duv. 167. For the former rule, see The King *v.* De Manneville, 5 East, 221; *Ex parte* Skinner, 9 J. B. Moore, 278. The rules of equity prevail at present in England on the question of custody. *In re* Brown, L. R. 13 Q. B. D. 614. Cases illustrating the doctrine that the good of the child will control: Com. *v.* Hart, 14 Phila. 352; *Ex parte* Murphy, 75 Ala. 409; Sturtevant *v.* State, 15 Neb. 459; Bonnett *v.* Bonnett, 61 Iowa, 199, 16 N. W. 91; Jones *v.* Darnall, 103 Ind. 569, 2 N. E. 229. Where the court is satisfied that the interest of the child would be subserved by refusing the custody to either of the parents, it may be confided to a third party. Chetwynd *v.* Chetwynd, L. R. 1 P. & D. 39; *In re* Goodenough, 19 Wis. 274. See Matter of Heather Children, 50 Mich. 261, where the guardian of their estate was refused the custody of their persons.

[3] See Hurd on Habeas Corpus, 297–302, and cases cited; Baker *v.* Gordon, 23 Ind. 209.

[4] See Matter of Hakewell, 22 Eng L. & Eq. 395; s. c. 12 C. B. 232.

[5] Story on the Constitution, § 1894.

thought unimportant to protect this right by statutory enactments in England; and indeed it will be remembered that one of the most notable attempts to crush the liberties of the kingdom made the right of petition the point of attack, and selected for its contemplated victims the chief officers in the Episcopal hierarchy. The trial and acquittal of the seven bishops in the reign of James II. constituted one of the decisive battles in English constitutional history;[1] and the right which was then vindicated is "a sacred right which in difficult times shows itself in its full magnitude, frequently serves as a safety-valve if judiciously treated by the recipients, and may give to the representatives or other bodies the most valuable information. It may right many a wrong, and the deprivation of it would at once be felt by every freeman as a degradation. The right of petitioning is indeed a necessary consequence of the right of free speech and deliberation, — a simple, primitive, and natural right. As a privilege it is not even denied the creature in addressing the Deity."[2] Happily the occasions for discussing and defending it have not been numerous in this country, and have been confined to an exciting subject now disposed of.[3]

Right to bear Arms.

Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms.[4] A standing army is peculiarly obnoxious in any free government, and the jealousy of such an army has at times been so strongly manifested in England as to lead to the belief that even though recruited from among themselves, it was more dreaded by the people as an instrument of oppression than a tyrannical monarch or any foreign power. So impatient did the English people become of the very

[1] See this case in 12 Howell's State Trials, 183: 3 Mod. 212. Also in Broom, Const. Law, 408. See also the valuable note appended by Mr. Broom, p. 493, in which the historical events bearing on the right of petition are noted. Also, May, Const. Hist. c. 7; 1 Bl Com. 143.

[2] Lieber, Civil Liberty and Self-Government, c. 12.

[3] For the discussions on the right of petition in Congress, particularly with reference to slavery, see 1 Benton's Abridgement of Debates, 397; 2 Benton's Abridgement of Debates, 57–60, 182–188, 209, 436–444; 12 Benton's Abridgement of Debates, 660–679, 705–743; 13 Benton's Abridgement of Debates, 5–28, 266–290, 557–562. Also Benton's Thirty Years' View, Vol. I. c. 135, Vol. II. c. 32, 33, 36, 37. Also the current political histories and biographies. The right to petition Congress is one of the attributes of national citizenship, and as such is under the protection of the national authority. United States *v.* Cruikshank, 92 U. S. 542, 552, per *Waite*, Ch. J. No such proceeding as a petition of right to a court to determine the constitutionality of a statute is now recognized. *In re* Miller, 5 Mackey, 507.

[4] 1 Bl. Com. 143.

army that liberated them from the tyranny of James II. that they demanded its reduction even before the liberation became complete; and to this day the British Parliament render a standing army practically impossible by only passing a mutiny act from session to session. The alternative to a standing army is "a well-regulated militia;" but this cannot exist unless the people are trained to bearing arms. The federal and State constitutions therefore provide that the right of the people to bear arms shall not be infringed; but how far it may be in the power of the legislature to regulate the right we shall not undertake to say.[1] Happily there neither has been, nor, we may hope, is likely to be, much occasion for an examination of that question by the courts.[2]

[1] See Wilson *v.* State, 33 Ark. 557.

[2] In Bliss *v.* Commonwealth, 2 Lit. 90, the statute to "prevent persons wearing concealed arms" was held unconstitutional, as infringing on the right of the people to bear arms in defence of themselves and of the State. But see Nunn *v.* State, 1 Kelly, 243; State *v.* Mitchell, 3 Blackf. 229; Aynette *v.* State, 2 Humph. 154; State *v.* Buzzard, 4 Ark. 18; Carroll *v.* State, 28 Ark. 99, 18 Am. Rep. 538; State *v.* Jumel, 13 La. Ann. 399; 1 Green, Cr. Rep. 481; Owen *v.* State, 31 Ala. 387; Cockrum *v.* State, 24 Tex. 394; Andrews *v.* State, 3 Heisk. 165, 8 Am. Rep. 8; State *v.* Wilburn, 7 Bax. 51; State *v.* Reid, 1 Ala. 612; State *v.* Shelby, 90 Mo. 302, 2 S. W. 468. A statute prohibiting the open wearing of arms upon the person was held unconstitutional in Stockdale *v.* State, 32 Ga. 225, and one forbidding carrying, either publicly or privately, a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver, was sustained, except as to the last-mentioned weapon; and as to that it was held that, if the weapon was suitable for the equipment of a soldier the right of carrying it could not be taken away. As bearing also upon the right of self-defence, see Ely *v.* Thompson, 3 A. K. Marsh. 73, where it was held that the statute subjecting free persons of color to corporal punishment for "lifting their hands in opposition" to a white person was unconstitutional. And see, in general, Bishop on Stat. Crimes, c. 36, and cases cited. [Unauthorized bodies of men may be prohibited the right to drill or parade with arms, and to associate as a military organization. Com. *v.* Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606. A regulation forbidding the carrying of weapons generally is invalid, though such regulation as to concealed weapons is valid. *Re* Brickey, — Idaho, —, 70 Pac. 609.]

CHAPTER XI.

OF THE PROTECTION TO PROPERTY BY "THE LAW OF THE LAND."

THE protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the twenty-ninth chapter of Magna Charta, "which alone," says Sir William Blackstone, "would have merited the title that it bears of the *Great* Charter."[1] The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of the State constitutions;[2] and though verbal differences

[1] 4 Bl. Com. 424. The chapter, as it stood in the original charter of John, was: "Ne corpus liberi hominis capiatur nec imprisonetur nec disseisietur nec utlagetur nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per judicium parium suorum, vel per legem terræ." No freeman shall be taken or imprisoned or disseised or outlawed or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land. In the charter of Henry III. it was varied slightly, as follows: "Nullus liber homo capiatur vel imprisonetur, aut disseisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ." See Blackstone's Charters. The Petition of Right — 1 Car. I. c. 1 — prayed, among other things, "that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent, by act of Parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command, without any charge." The Bill of Rights — 1 Wm. and Mary, § 2, c. 2 — was confined to an enumeration and condemnation of the illegal acts of the preceding reign; but the Great Charter of Henry III. was then, and is still, in force.

[2] The following are the constitutional provisions in the several States: —

Alabama: "That, in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, or be deprived of his life, liberty, or property, but by due course of law." Art. 1, § 7. — *Arkansas:* "That no person shall . . . be deprived of his life, liberty, or property, without due process of law." Art. 1, § 9. — *California:* Similar to that of Alabama. Art. 1, § 8. — *Connecticut:*

appear in the several provisions, no change in language, it is thought, has in any case been made with a view to essential

Same as Alabama. Art. 1, § 9. — *Delaware:* Like that of Alabama, substituting for "course of law," "the judgment of his peers, or the law of the land." Art. 1, § 7. — *Florida:* Similar to that of Alabama. Art. 1, § 9. — *Georgia:* "No person shall be deprived of life, liberty, or property, except by due process of law." Art. 1, § 3. — *Illinois:* "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1, § 2. — *Colorado:* The same. Art. 1, § 25. — *Iowa:* The same. Art. 1, § 9. — *Kentucky:* "Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." Art. 13, § 12. — *Maine:* "Nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers, or the law of the land." Art. 1, § 6. — *Maryland:* "That no man ought to be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, § 23. — *Massachusetts:* "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, Art. 12. — *Michigan:* "No person shall . . . be deprived of life, liberty, or property, without due process of law." Art. 6, § 32. — *Minnesota:* Like that of Michigan. Art. 1, § 7. — *Mississippi:* The same. Art. 1, § 2. — *Missouri:* Same as Delaware. Art. 1, § 18. — *Nevada:* "Nor be deprived of life, liberty, or property, without due process of law." Art. 1, § 8. — *New Hampshire:* Same as Massachusetts Bill of Rights, Art. 15. — *New York:* Same as Nevada. Art. 1, § 6. — *North Carolina:* "That no person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, § 17. — *Pennsylvania:* Like Delaware. Art. 1, § 9. — *Rhode Island:* Like Delaware. Art. 1, § 10. — *South Carolina:* Like that of Massachusetts, substituting "person" for "subject." Art. 1, § 14. — *Tennessee:* "That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 1, § 8. — *Texas:* "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Art. 1, § 16. — *West Virginia:* "No person, in time of peace, shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 6. Under each of the remaining constitutions, equivalent protection to that which these provisions give is believed to be afforded by fundamental principles recognized and enforced by the courts. [A corporation is within the term "person" and "man" as used in the various constitutional provisions as to "Law of the Land" and "Due Process." Knoxville & Ohio Ry. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Johnson *v.* Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338. A corporation is not, however, a "citizen" within the meaning of that term as used in section 2 of article 4, of the federal constitution, nor within the meaning of that term as used in section 1 of article 14, of the amendments referring to privileges and immunities of citizens of the several States, and of the United States respectively. Hawley *v.* Hurd, 72 Vt. 122, 47 Atl. 401, 82 Am. St. 922; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281. "Property" within the meaning of the term as used in the federal constitution involves the right to acquire and dispose of the subject of the right. Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 955, 76 Am. St. 682. "Liberty" in the constitutional sense involves the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession, and to enjoy the

change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process [or course] of law" is sometimes used, sometimes "the law of the land," and in some cases both; but the meaning is the same in every case.[1] And, by the fourteenth amendment, the guaranty is now incorporated in the Constitution of the United States.[2]

If now we shall ascertain the sense in which the phrases "due process of law" and "the law of the land" are employed in the several constitutional provisions which we have referred to, when the protection of rights in property is had in view, we shall be able, perhaps, to indicate the rule, by which the proper conclusion may be reached in those cases in which legislative action is objected to, as not being "the law of the land;" or judicial or ministerial action is contested as not being "due process of law," within the meaning of these terms as the Constitution employs them.

If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."[3]

fruits thereof. Harbison *v.* Knoxville Iron Co., *supra.*]

[1] 2 Inst. 50; Bouv. Law Dic. "Due process of Law," "Law of the Land;" State *v.* Simons, 2 Speers, 767; Vanzant *v.* Waddell, 2 Yerg. 260; Wally's Heirs *v.* Kennedy, 2 Yerg. 554, 24 Am. Dec. 511; Greene *v.* Briggs, 1 Curt. 311; Murray's Lessee *v.* Hoboken Land Co., 18 How. 272, 276, per *Curtis*, J.; Parsons *v.* Russell, 11 Mich. 113, 129, per *Manning*, J.; Ervine's Appeal, 16 Pa. St. 256; Banning *v.* Taylor, 24 Pa. St. 289, 292; State *v.* Staten, 6 Cold. 244; Huber *v.* Reily, 53 Pa. St. 112.

[2] See *ante*, p. 15.

[3] Dartmouth College *v.* Woodward, 4 Wheat. 519; Works of Webster, Vol. V.

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "'The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'"[1] When the law

p. 487. And he proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

[1] Per *Bronson*, J., in Taylor *v.* Porter, 4 Hill, 140, 145. See also Jones *v.* Perry, 10 Yerg. 59, 30 Am. Dec. 430; Ervine's Appeal, 16 Pa. St. 256; Arrowsmith *v.* Burlington, 4 McLean, 489; Lane *v.* Dorman, 4 Ill. 238; Reed *v.* Wright, 2 Greene (Iowa), 15; Woodcock *v.* Bennett, 1 Cow. 711; Kinney *v.* Beverley, 2 H. & M. 536; Commonwealth *v.* Byrne, 20 Gratt. 165; Rowan *v.* State, 30 Wis. 129, 11 Am. Rep. 559. "Those terms, 'law of the land,' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life, without crime? Yet all this he may suffer if an act of the assembly simply denouncing those penalties upon particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution; for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and divesting the rights of property, it has been repeatedly held in this State, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for those purposes." Hoke *v.* Henderson, 4 Dev. 15, 25 Am. Dec. 677. In Bank of Michigan *v.* Williams, 5 Wend. 478, 486, Mr. Justice *Sutherland* says, vested rights "are protected under general principles of paramount, and, in this country, of universal authority." Mr. Broom says: "It is indeed an essential principle of the law of England, 'that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no

of the land is spoken of, "undoubtedly a pre-existing rule of conduct" is intended, "not an *ex post facto* rescript or decree made for the occasion. The design" is "to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute." [1] There are nevertheless many cases in which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called; and in preceding pages it has been shown that special legislative acts designed to accomplish the like end, are allowable in some cases. The necessity for "general rules," therefore, is not such as to preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in court.[2]

On the other hand, we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land. Mr. Justice *Edwards* has said in one case: "Due process of law undoubtedly means, in the due course of legal proceedings, accord-

more industry, no more justice, no more valor; for who will labor? who will hazard his person in the day of battle for that which is not his own? The Banker's Case, by *Turnor*, 10. And therefore our customary law is not more solicitous about anything than 'to preserve the property of the subject from the inundation of the prerogative.' Ibid." Broom's Const. Law, 228.

[1] *Gibson*, Ch. J., in Norman *v.* Heist, 5 W. & S. 171, 173. There is no power which can authorize the dispossession by force of an owner whose property has been sold for taxes, without giving him opportunity for trial. Calhoun *v.* Fletcher, 63 Ala. 574.

[2] See Wynehamer *v.* People, 13 N. Y. 378, 432, per *Selden*, J. In Janes *v.* Reynolds, 2 Tex. 250, Chief Justice *Hemphill* says: "The terms 'law of the land' . . . are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." And see Vanzant *v.* Waddell, 2 Yerg. 260, per *Peck*, J.; Hard *v.* Nearing, 44 Barb. 472. Nevertheless there are many cases, as we have shown, *ante*, pp. 140, 152, in which private laws may be passed in entire accord with the general public rules which govern the State; and we shall refer to more cases further on.

ing to those rules and forms which have been established for the protection of private rights."[1] And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following, from an opinion by Mr. Justice *Johnson* of the Supreme Court of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[2]

The principles, then, upon which the process is based are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.[3] When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have

[1] Westervelt *v.* Gregg, 12 N. Y. 202, 209. See, also, State *v.* Staten, 6 Cold. 233; McMillen *v.* Anderson, 95 U. S. 37; Pearson *v.* Yewdall, 95 U. S. 294; Pennoyer *v.* Neff, 95 U. S. 714; Davidson *v.* New Orleans, 96 U. S. 97; and cases in notes pp. 18, 19, *ante*, in which the true meaning of due process of law is considered. Also San Mateo County *v.* Southern Pacific R. R. Co., 13 Fed. Rep. 722. [See Maxwell *v.* Dow, 176 U. S. 581, 20 Sup. Ct. Rep. 448, 494; Bolln *v.* Nebraska, 176 U. S. 83, 20 Sup. Ct. Rep. 287; Brown *v.* New Jersey, 175 U. S. 172, 20 Sup. Ct. Rep. 77; Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383; Hodgson *v.* Vermont, 168 U. S. 262, 18 Sup. Ct. Rep. 80; McNulty *v.* California, 149 U. S. 645, 13 Sup. Ct. Rep. 959; Hallinger *v.* Davis, 146 U. S. 314, 13 Sup. Ct. Rep. 105; also extensive citations of cases in notes upon "what constitutes due process of law," appended to 42 L. ed. U. S. 865, and 24 L. ed. U. S. 436.]

[2] Bank of Columbia *v.* Okely, 4 Wheat. 235, 244. "What is meant by 'the law of the land'? In this State, taking as our guide Zylstra's Case, 1 Bay, 382; White *v.* Kendrick, 1 Brev. 469; State *v.* Coleman & Maxcy, 1 McMull. 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to be considered amenable for all time to come." Per *O'Neill*, J., in State *v.* Simons, 2 Speers, 761, 767. See, also, State *v.* Doherty, 60 Me. 509. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied, and which protected private rights, were not departed from.

[3] Hurtado *v.* California, 110 U. S. 516, 4 Sup. Ct. Rep. 111, 292; [Maxwell *v.* Dow, 176 U. S. 581, 20 Sup. Ct. Rep. 448, 494, and cases therein cited. States have full power to regulate the amendment of pleadings in their courts. Carr *v.* Nichols, 157 U. S. 370, 15 Sup. Ct. Rep. 640.]

become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession;"[1] but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[2]

[1] Vanzant *v.* Waddell, 2 Yerg. 260; Lenz *v.* Charlton, 23 Wis. 478; Pennoyer *v.* Neff, 95 U. S. 714.

[2] See Wynehamer *v.* People, 13 N. Y. 378, 432, per *Selden*, J.; Kalloch *v.* Superior Court, 56 Cal. 229; Baltimore *v.* Scharf, 54 Md. 499. In State *v.* Allen, 2 McCord, 56, the court, in speaking of process for the collection of taxes, say: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" To the same effect are *In re* Hackett, 53 Vt. 354; Weimer *v.* Bunbury, 30 Mich. 201. And see Hard *v.* Nearing, 44 Barb. 472; New Orleans *v.* Cannon, 10 La. Ann. 764; McCarrol *v.* Weeks, 5 Hayw. 246; Sears *v.* Cottrell, 5 Mich. 250; Gibson *v.* Mason, 5 Nev. 283. The fourteenth amendment has not enlarged the meaning of the words "due process of law." Whatever was such in a State before that amendment, is so still. Hence, a statute is good which allows execution on judgments against a town to be levied on the goods of individual inhabitants. Eames *v.* Savage, 77 Me. 212. Taking property under the taxing power is due process of law. Davidson *v.* New Orleans, 96 U. S. 97; Kelly *v.* Pittsburgh, 104 U. S. 78; High *v.* Shoemaker, 22 Cal. 363. [Weyerhauser *v.* Minnesota, 176 U. S. 550, 20 Sup. Ct. Rep. 485. Upon sufficiency of opportunity for hearing upon assessment, see Pittsburgh C. C. & St. L. R. Co. *v.* Board of Public Works, 172 U. S. 32, 19 Sup. Ct. Rep. 90.] See, also, Cruikshanks *v.* Charleston, 1 McCord, 360; State *v.* Mayhew, 2 Gill, 487; Harper *v.* Commissioners, 23 Ga. 566; Myers *v.* Park, 8 Heisk. 550. So is the seizure and sale under proceedings prescribed by law, of stray beasts. Knoxville *v.* King, 7 Lea, 441; Hamlin *v.* Mack, 33 Mich. 103; Stewart *v.* Hunter, 16 Oreg. 62, 16 Pac. 876. That the owner should have notice of the sale, see Varden *v.* Mount, 78 Ky. 86. [A collateral-inheritance tax-law which makes no provision for notice to heirs, legatees, and devisees, and affords no opportunity for them to be heard in the matter of appraisal, is void. Ferry *v.* Campbell, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92.] An act allowing an agent of a humane society to condemn and kill an animal and fix its value conclusively without notice is not due process of law. King *v.* Hayes, 80 Me. 206, 13 Atl. 882. But a health officer may be empowered to kill a diseased beast, if the owner may afterwards contest the existence of conditions which made the beast a nuisance, and obtain redress, if such conditions are not shown to have existed. Newark & S. O. Co. *v.* Hunt, 50 N. J. L. 308, 12 Atl. 697. [Where such officer seizes and kills healthy animals, the owner does not thereby acquire any claim against the *State*. Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.] It is

Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department in every instance must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action. Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions divesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment.[1] The purpose must be public, and must have

no violation of this principle to exclude from the State debauched women who are being imported for improper purposes. Matter of Ah Fook, 49 Cal. 403. [Upon what constitutes "due process of law," see valuable notes to 42 L. ed. U. S. 865, and 24 L. ed. U. S. 436, and see cases cited in note 1, page 505, *ante*. Issuance and record of writ of error in court of first instance may be made sufficient notice to adverse party that suit is to be continued in the higher court. State *v.* Canfield, 40 Fla. 36, 23 So. 591, 42 L. R. A. 72. Expulsion from benevolent society under proper by-laws is, though it deprives of property rights. Moore *v.* Natl. Com. of K. & L. of S., — Kan. —, 70 Pac. 352.]

[1] Lebanon Sch. Dist. *v.* Female Sem., 12 Atl. 857 (Pa.); People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692. The latter case is with reference to the transfer to a receiver of the assets of a dissolved corporation. It is not competent to provide that the claimant or purchaser of property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer, and confined to his action on the bond as his only remedy. Foule *v.* Mann, 53 Iowa, 42, 3 N. W. 814; Sunberg *v.* Babcock, 61 Iowa, 601, 16 N. W. 716. See, also, Ehlers *v.* Stoeckle, 37 Mich. 261. *Contra*, Hein *v.* Davidson, 96 N. Y. 175. Compare Dodd *v.* Thomas, 69 Mo. 364. A lien may be created by statute in favor of a laborer for a contractor, as against the owner of logs, between whom and the laborer there is no privity of contract. Reilly *v.* Stephenson, 62 Mich. 509, 29 N. W. 99. But

reference to the needs or convenience of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights.[1]

Nevertheless, in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even divest legal titles in favor of substantial equities where the legal and equitable rights do not chance to concur in the same persons.

The chief restriction upon this class of legislation is, that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions, and charters, but it was the

such laborer may not enforce a lien in spite of any contract between the contractor and owner, or of payment by the latter. John Spry Lumber Co. *v.* Sault Sav. Bank, 77 Mich. 199, 43 N. W. 778. Nor can the owner's failure to enjoin the labor be made conclusive evidence of his assent to it. Meyer *v.* Berlandi, 39 Minn. 448, 40 N. W. 513. A mechanic's lien may be made applicable to buildings in process of erection. Colpetzer *v.* Trinity Church, 24 Neb. 113, 37 N. W. 931. [The one in possession of property may be taxed therefor, even though the property belongs to another. Such taxation is not a taking of the property of one person for the benefit of another, for the taxpayer has a lien upon the property for the tax he has paid. Minneapolis & N. El. Co. *v.* Traill Co., 9 N. D. 213, 82 N. W. 727, 50 L. R. A. 266. One electric light company cannot be authorized to use poles of another unless provision is made for compensation and for regulation of joint use. Citizens' El. Light & P. Co. *v.* Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411. Statutes inaugurating the so-called "Torrens System" for registration of land titles have been before the courts and attacked for violation of the rule of "due process," but have been usually upheld. Tyler *v.* Registration Court Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; People *ex rel.* Deneen *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. 175, 44 L. R. A. 801; State *ex rel.* Douglas *v.* School District, 85 Minn. 230, 88 N. W. 751, 57 L. R. A. 297. The validity of such act was denied in State *ex rel.* Monnett *v.* Guilbert, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. 756. And see the Massachusetts case in the Supreme Court of the United States, 179 U. S. 405, 21 Sup. Ct. Rep. 206.]

[1] Taylor *v.* Porter, 4 Hill, 140; Osborn *v.* Hart, 24 Wis. 89, 91, 1 Am. Rep. 161. In Matter of Albany Street, 11 Wend. 149, 25 Am. Dec. 618, it is intimated that the clause in the Constitution of New York, witholding private property from public use except upon compensation made, of itself implies that it is not to be taken *in invitum* for individual use. And see Matter of John & Cherry Streets, 19 Wend. 659. A different opinion seems to have been held by the Supreme Court of Pennsylvania, when they decided in Harvey *v.* Thomas, 10 Watts, 63, that the legislature might authorize the laying out of private ways over the lands of unwilling parties, to connect the coalbeds with the works of public improvement, the constitution not in terms prohibiting it. See note to p. 765, *post*.

old fundamental law, springing from the original frame and constitution of the realm."[1]

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.[2]

And it may be well at this point to examine in the light of the reported cases the question, What is a vested right in the constitutional sense? and when we have solved that question, we may be the better able to judge under what circumstances one may be justified in resisting a change in the general laws of the State affecting his interests, and how far special legislation may control his rights without coming under legal condemnation. In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws;[3] but as changes of circumstances and of public opinion,

[1] Arg. Nightingale *v.* Bridges, Show. 138. See also case of Alton Woods, 1 Rep. 45 *a*; Alcock *v.* Cooke, 5 Bing. 340; Bowman *v.* Middleton, 1 Bay, 252; Kennebec Purchase *v.* Laboree, 2 Me. 275, 11 Am. Dec. 79; *ante*, p. 68, and note, p. 244, and note. Any one may acquire and hold any species of property, and the acquisition cannot be taxed as a privilege. But the use may be regulated to prevent injury to others. Stevens *v.* State, 2 Ark. 291, 35 Am. Dec. 72.

[2] The evidences of a man's rights — the deeds, bills of sale, promissory notes, and the like — are protected equally with his lands and chattels, or rights and franchises of any kind; and the certificate of registration and right to vote may be properly included in the category. State *v.* Staten, 6 Cold. 233. See Davies *v.* McKeeby, 5 Nev. 369.

[3] The interest acquired in the practice of learned professions, that is, "the right to continue their prosecution," is property which cannot be arbitrarily taken away. *Field*, J., in Dent *v.* West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 213. The office of an attorney is property, and he cannot be deprived of it except for professional misconduct or proved unfitness. The public discussion of the official conduct of a judge is not professional misconduct, unless it is designed to acquire an influence over the conduct of the judge in the exercise of his judicial functions by the instrumentality of popular prejudice. *Ex parte* Steinman, 95 Pa. St. 220. But see State *v.* McClaugherty, 33 W. Va. 250, 10 S. E. 407. [Right of property involves right to dispose of same, and statute prescribing who shall and who shall not sell the common proprietary medicines and restricting such sale to registered pharmacists is taking property without due process. Noel *v.* State, 187 Ill. 587, 58 N. E. 616, 79 Am. St. 238, 52 L. R. A. 287. Property in the constitutional sense is said, in Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 955, 76 Am. St. 682, to include everything having an exchangeable value and as well the right to acquire and dispose of the thing which is the subject of property rights. The office of Governor of a State is not "property." Taylor *v.* Beckham, 178 U. S. 548, 20 Sup. Ct. Rep. 890, 1009. It is held in Hoover *v.* McChesney, 81 Fed. Rep. 472, that the right to use the mails is "property" in the sense that one cannot be deprived of it without

as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.[1] In many cases the courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with "the law of the land;" and the right of one man is divested by way of enforcing a higher and better right in another. Of these cases we do not propose to speak: constitutional questions cannot well arise concerning them, unless they are attended by circumstances of irregularity which are supposed to

a chance to be heard and defend. The so-called "right to privacy" has, in several cases, been asserted and protection asked for it through the judicial department of the government, but in the cases which have arisen the courts have declined to recognize such a property or personal right. Atkinson *v.* Doherty & Co., 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. 507, and cases cited in the opinion; Roberson *v.* Rochester, etc. Co., 171 N. Y. 538, 64 N. E. 442, Articles in 4 Harv. Law Rev. 193; 22 Canada Law Times, 281, by E. L. Adams, counsel in Roberson case, *supra*; 175 No. Am. Review, 361; 2 Columbia Law Review, 437; Corliss *v.* E. W. Walker Co., 57 Fed. Rep. 434, 31 L. R. A. 283, 64 Fed. Rep. 280; Schuyler *v.* Curtis, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. 671. See also articles in 10 Am. Lawyer, 293, and 55 Cent. Law Journal, 123. The ticket brokerage legislation has been frequently before the courts on constitutional grounds and as against the constitutional objection has been usually upheld. Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238; *Ex parte* Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55; Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. 329. *Contra*, People *ex rel.* Tyroler *v.* Warden, etc., 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 261, 68 Am. St. 763.]

[1] "A person has no property, no vested interest, in any rule of the common law . . . Rights of property which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations." *Waite*, Ch. J., in Munn *v.* Illinois, 94 U. S. 113, 134. See Railroad Co. *v.* Richmond, 96 U. S. 521; Transportation Co. *v.* Chicago, 99 U. S. 635; Newton *v.* Commissioners, 100 U. S. 548; *post*, 548, note. The State may take away rights in a public fishery by appropriating the water to some other use. Howes *v.* Grush, 131 Mass. 207. [But not the previously acquired right of a co-tenant to enter and extract ores without accounting therefor. Butte & B. Consol. Min. Co. *v.* Mont. Ore P. Co., 25 Mont. 41, 63 Pac. 825. The rights of a stockholder as the owner of stock cannot be taken through the retirement of stock by conversion into bonds. Berger *v.* United States Steel Corporation, 63 N. J. Eq. 809, 53 Atl. 68, rev. 63 N. J. Eq. 506, 53 Atl. 14.]

take them out of the general rule. All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order. What we desire to reach in this connection is the true meaning of the term "vested rights" when employed for the purpose of indicating the interests of which one cannot be deprived by the mere force of legislative enactment, or by any other than the recognized modes of transferring title against the consent of the owner, to which we have alluded.

Interests in Expectancy.

First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.[1] Acts of the legislature, as has been well said by Mr. Justice *Woodbury*, cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."[2] And Chancellor *Kent*, in speaking of retrospective statutes, says that while such a statute, "affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general

[1] Weidenger *v.* Spruance, 101 Ill. 278. See Wanser *v.* Atkinson, 43 N. J. 571. [The right of a minor to redeem, when he comes of age, lands forfeited during his minority through failure to pay taxes is vested. Moore *v.* Irby, 69 Ark. 102, 61 S. W. 371.]

[2] Merrill *v.* Sherburne, 1 N. H. 199, 213, 8 Am. Dec. 52. See Rich *v.* Flanders, 39 N. H. 304. And cases, *ante*, p. 402, note 2.

welfare, even though they might operate in a degree upon existing rights." [1]

And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent (*a*) are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession, — a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise.[2]

If this be so, the nature of estates must, to a certain extent, be subject to legislative control and modification.[3] In this country estates tail have been very generally changed into estates in fee simple, by statutes the validity of which is not disputed.[4] Such

[1] 1 Kent, Com. 445. See Briggs *v.* Hubbard, 19 Vt. 86; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; Baugher *v.* Nelson, 9 Gill, 299; Gilman *v.* Cutts, 23 N. H. 376, 382; Foule *v.* Mann, 53 Iowa, 42, 3 N. W. 184.

[2] *In re* Lawrence, 1 Redfield, Sur. Rep. 310. [See also Bass *v.* Roanoke Nav. & W. P. Co., 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247, and note on power to defeat contingent interests; McNeer *v.* McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256, and note on power to change or destroy dower, curtesy, &c.]

But after property has once vested under the laws of descent, it cannot be divested by any change in those laws. Norman *v.* Heist, 5 W. & S. 171. And the right to change the law of descents in the case of the estate of a person named without his consent being had, was denied in Beall *v.* Beall, 8 Ga. 210. See *post*, pp. 512, 540, 541, and notes.

[3] Smith on Stat. and Const. Construction, 412.

[4] De Mill *v.* Lockwood, 3 Blatch. 56. The legislature may by special act confirm a conveyance in fee simple by a

a [These rules do not control succession to land among the members of Indian tribes. Such succession, so long as the tribal organization is still recognized by the Federal government, is according to the laws, usages and customs of the tribe. Jones *v.* Meehan, 175 U. S. 1, 20 Sup. Ct. Rep. 1.]

statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not therefore open to objection by him.[1] But no other person in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases.[2]

The cases of rights in property to result from the marriage relation must be referred to the same principle. At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away.[3] But other interests were merely in expectancy. He could have a right as tenant by the courtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely,—that is to say, until it becomes initiate,—the legislature must have full right to modify or even to abolish it.[4] And the same rule will

tenant in tail. Comstock *v.* Gay, 51 Conn. 45.

[1] On the same ground it has been held in Massachusetts that statutes converting existing estates in joint tenancy into estates in common were unobjectionable. They did not impair vested rights, but rendered the tenure more beneficial. Holbrook *v.* Finney, 4 Mass. 565, 3 Am. Dec. 243; Miller *v.* Miller, 16 Mass. 59; Annable *v.* Patch, 3 Pick. 360; Burghardt *v.* Turner, 12 Pick. 533. Moreover, such statutes do no more than either tenant at the common law has a right to do, by conveying his interest to a stranger. See Bombaugh *v.* Bombaugh, 11 S. & R. 192; Wildes *v.* Vanvoorhis, 15 Gray, 139.

[2] See 1 Wash. Real Pr. 81–84, and notes. The exception to this statement, if any, must be the case of tenant in tail after possibility of issue extinct; where the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested.

[3] Westervelt *v.* Gregg, 12 N. Y. 202. See Mr. Bishop's criticism of this case — which, however, does not reach the general principle above stated — in 2 Bishop, Law of Married Women, § 46, and note. Rights under an ante-nuptial contract, which become vested by the marriage, cannot be impaired by subsequent legislation. Desnoyer *v.* Jordan, 27 Minn. 295, 7 N. W. 140. [Where at the time community property is acquired, power to dispose of it rests entirely in the husband, subsequent legislation requiring the assent of the wife to its disposition is invalid with regard to such property. Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. 170. An act taking away a statutory right of the husband in the wife's land which existed at the time of the marriage, is void as to such right. Rose *v.* Rose, 104 Ky. 48, 46 S. W. 524, 81 Am. St. 430.]

[4] Hathon *v.* Lyon, 2 Mich. 93; Tong *v.* Marvin, 15 Mich. 60. And see the cases cited in the next note. The right of a tenant by the courtesy initiate is vested, and it cannot be taken away to the injury of the husband's creditors.

apply to the case of dower; though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or anything more than a mere expectancy at any time before it is consummated by the husband's death.[1] In neither of these cases does the marriage alone give a

Wyatt *v.* Smith, 25 W. Va. 813. See Hershizer *v.* Florence, 39 Ohio St. 516. But see to the contrary, Breeding *v.* Davis, 77 Va. 639; Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335.

[1] When dower is duly assigned it becomes a right not to be divested by subsequent legislation. Talbot *v.* Talbot, 14 R. I. 57. The law in force at the death of the husband is the measure of the right of the widow to dower. Noel *v.* Ewing, 9 Ind. 37; May *v.* Fletcher, 40 Ind. 575; Lucas *v.* Sawyer, 17 Iowa, 517; Sturdevant *v.* Norris, 30 Iowa, 65; Melizet's Appeal, 17 Pa. St. 449; Barbour *v.* Barbour, 46 Me. 9; Magee *v.* Young, 40 Miss. 164; Bates *v.* McDowell, 58 Miss. 815; Walker *v.* Deaver, 5 Mo. App. 139; Guerin *v.* Moore, 25 Minn. 462; Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168; Ware *v.* Owens, 42 Ala. 212; Pratt *v.* Tefft, 14 Mich. 191; Bennett *v.* Harms, 51 Wis. 251, 8 N. W. 222. But if we apply this rule universally, we shall run into some absurdities, and most certainly in some cases encounter difficulties which will prove insurmountable. Suppose the land has been sold by the husband without relinquishment of dower, and the dower right is afterwards by statute enlarged, will the wife obtain the enlarged dower at the expense of the purchaser? Or suppose it is diminished; will the purchaser thereby acquire an enlarged estate which he never bought or paid for? These are important questions, and the authorities furnish very uncertain and unsatisfactory answers to them. In Illinois it is held that though the estate is contingent, the right to dower, when marriage and seisin unite, is vested and absolute, and is as completely beyond legislative control as is the principal estate. Russell *v.* Rumsey, 35 Ill. 362; Steele *v.* Gellatly, 41 Ill. 39. See Lawrence *v.* Miller, 2 N. Y. 245. But it is also held that after marriage a new right corresponding to dower may be conferred upon the husband, and that his homestead right depends on the law in force at the wife's death. Henson *v.* Moore, 104 Ill. 403. In North Carolina before 1867, the wife had dower only in the lands of which the husband died seised; the statute then restored the common-law right to dower held to be inapplicable to lands which the husband had previously acquired. Sutton *v.* Asken, 66 N. C. 172, 8 Am. Rep. 500; Hunting *v.* Johnson, 66 N. C. 189; Jenkins *v.* Jenkins, 82 N. C. 202; O'Kelly *v.* Williams, 84 N. C. 281. In Iowa it is held that when the law of dower is changed after the husband has conveyed lands subject to the inchoate right, the dower is to be measured by the law in force when the conveyance was made. Davis *v.* O'Ferrall, 4 Greene (Iowa), 168; Young *v.* Wolcott, 1 Iowa, 174; O'Ferrall *v.* Simplot, 4 Iowa, 381; Moore *v.* Kent, 37 Iowa, 20; Craven *v.* Winter, 38 Iowa, 471. In Indiana, on the other hand, a statute enlarging the right of dower to one-third of the land in fee simple was so applied as to deprive the widow, in cases where the husband had previously conveyed, of both the statutory dower and the dower at the common law, thereby enlarging the estate of the purchaser. Strong *v.* Clem, 12 Ind. 37; Logan *v.* Walton, 12 Ind. 839; Bowen *v.* Preston, 48 Ind. 367; Taylor *v.* Sample, 51 Ind. 423. See May *v.* Fletcher, 40 Ind. 575. A provision that upon a judicial sale of the husband's property the inchoate dower right shall vest does not apply to a mechanic's lien resting on the whole property before the act passed. Buser *v.* Shepard, 107 Ind. 417, 8 N. E. 280. In Missouri it is held that the widow takes dower according to the law in force at the husband's death, except as against those who had previously acquired specific rights in the estate, and as to them her right must depend on the law in force at the time their rights originated. Kennedy *v.* Insurance Co., 11 Mo. 204. In Williams *v.* Courtney, 77 Mo. 587, it is held that, marriage and seisin concurring, dower cannot be barred by a guardian's sale of the husband's property. In Massachusetts

vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition.[1]

Change of Remedies.

Again: *the right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself.[2] As a general rule, every State has complete control over the remedies which it offers to suitors in its courts.[3] It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence.[4] And it may

doubt is expressed of the right of the away by a repeal of the statute. See *ante*, 407, note 1.

[3] Rosier *v.* Hale, 10 Iowa, 470; Smith *v.* Bryan, 34 Ill. 364; Lord *v.* Chadbourne, [illegible]; Rockwell *v.* Hubbell's Adm'rs, [illegible] (Mich.) 157; Cusic *v.* Dougias, 3 Kan. 123; Holloway *v.* Sherman, 12 Iowa, 282; McCormick *v.* Rusch, 15 Iowa, 127; McArthur *v.* Goddin, 12 Bush, 274; Grundy *v.* Commonwealth, 12 Bush, 350; Briscoe *v.* Anketell, 28 Miss. 361.

[4] Hope *v.* Johnson, 2 Yerg. 125; Foster *v.* Essex Bank, 16 Mass. 245, 9 Am. Dec. 168; Paschall *v.* Whitsett, 11 Ala. 472; Commonwealth *v.* Commissioners, &c., 6 Pick. 501; Whipple *v.* Farrar, 3 Mich. 436; United States *v.* Samperyac, 1 Hemp. 118; Sutherland *v.* De Leon, 1 Tex. 250; Anonymous, 2 Stew. 228. See also Lewis *v.* McElvain, 16 Ohio, 347; Trustees, &c. *v.* McCaughey, 2 Ohio St. 152; Hepburn *v.* Curts, 7 Watts, 300; Schenley *v.* Commonwealth, 36 Pa. St. 29; Bacon *v.* Callender, 6 Mass. 303; Brackett *v.* Norcross, 1 Me. 92; Ralston *v.* Lothain, 18 Ind. 303; White School House *v.* Post, 31 Conn. 241; Van Rensselaer *v.* Hayes, 19 N. Y. 68; Van Rensselaer *v.* Ball, 19 N. Y. 100; Sedgwick Co. *v.* Bunker, 16 Kan. 498; Danville *v.* Pace, 25 Gratt. 1. Thus it may give a legal remedy where before there was only one in equity. Bartlett *v.* Lang, 2 Ala. 401. In Bolton *v.* Johns, 5 Pa. St. 145, the extreme ground was taken that the legislature might give a lien on property for a prior debt, where no contract would be

legislature to cut off the inchoate right of dower. Dunn *v.* Sargent, 101 Mass. 336, 340. But in Hamilton *v.* Hirsch, 2 Wash. Terr. 223, 5 Pac. 215, such power is affirmed.

[1] Westervelt *v.* Gregg, 12 N. Y. 202; Norris *v.* Beyea, 13 N. Y. 273; Kelly *v.* McCarthy, 3 Bradf. 7. And see Plumb *v.* Sawyer, 21 Conn. 351; Clark *v.* McCreary, 12 S. & M. 247; Jackson *v.* Lyon, 9 Cow. 664; *ante*, pp. 406–415. On the point whether the husband can be regarded as having an interest in the wife's choses in action, before he has reduced them to possession, see Bishop, Law of Married Women, Vol. II. §§ 45, 46. If the wife has a right to personal property subject to a contingency, the husband's contingent interest therein cannot be taken away by subsequent legislation. Dunn *v.* Sargent, 101 Mass. 336. It is competent to provide by statute that married women shall hold their property free from claims of husbands, and to make the law apply to those already married. Rugh *v.* Ottenheimer, 6 Oreg. 231, 25 Am. Rep. 513. See Pritchard *v.* Citizens' Bank, 8 La. 130, 23 Am. Dec. 132. But vested rights belonging to the husband *jure uxoris* cannot thus be divested. Hershizer *v.* Florence, 39 Ohio St. 516; Koehler *v.* Miller, 21 Ill. App. 557.

[2] See *ante*, p. 410, and cases cited. It has been held in some cases that the giving of a lien by statute does not confer a vested right, and it may be taken

abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains.[1] If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide;[2] and if it be amended instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.[3] And any rule or regu-

violated in doing so. In Towle *v.* Eastern Railroad, 18 N. H. 546, the power of the legislature to give retrospectively a remedy for consequential damages caused by the taking of property for a public use was denied. On the ground that the remedy only is affected, a judgment against a principal on an existing bond, may be made conclusive on the surety. Pickett *v.* Boyd, 11 Lea, 498. So a resale on mortgage foreclosure, if the purchase price is inadequate, may be allowed as to an existing mortgage. Chaffe *v.* Aaron, 62 Miss. 29; and a foreclosure of a tax lien, if the title fails. Schoenheit *v.* Nelson, 16 Neb. 235, 20 N. W. 205. [A lien for the whole value of labor or material furnished may be made to take precedence of any mortgage or other contract, lien, or conveyance arising subsequent to the beginning of the labor or of the supply of the material, but prior to the completion thereof, upon condition that notice of such lien shall be filed prior to filing of mortgage, &c. Hightower *v.* Bailey & Koerner, 22 Ky. L. 88, 56 S. W. 147, 49 L. R. A. 255.]

[1] Stocking *v.* Hunt, 3 Denio, 274; Van Rensselaer *v.* Read, 26 N. Y. 558; Lennon *v.* New York, 55 N. Y. 361; Parker *v.* Shannohouse, 1 Phil. (N. C.) 209. An existing remedy may be modified and the modified remedy made applicable to existing rights. Phelps' Appeal, 98 Pa. St. 546.

[2] Bank of Hamilton *v.* Dudley, 2 Pet. 492; Ludlow *v.* Johnson, 3 Ohio, 553, 17 Am. Dec. 609; Yeaton *v.* United States, 5 Cranch, 281; Schooner Rachel *v.* United States, 6 Cranch, 329. If an act is repealed without any saving of rights, no judgment can afterwards be taken under it. State *v.* Passaic, 36 N. J. 382; Menard County *v.* Kincaid, 71 Ill. 587; Musgrove *v.* Vicksburg, &c. R. R. Co., 50 Miss. 677; Abbott *v.* Commonwealth, 8 Watts, 517, 34 Am. Dec. 492. But it is well said in Pennsylvania that before a statute should be construed to take away the remedy for a prior injury, it should clearly appear that it embraces the very case. Chalker *v.* Ives, 55 Pa. St. 81. And see Newsom *v.* Greenwood, 4 Oreg. 119.

[3] See cases cited in last note. Also Commonwealth *v.* Duane, 1 Binney, 601, 2 Am. Dec. 497; United States *v.* Passmore, 4 Dall. 372; Patterson *v.* Philbrook, 9 Mass. 151; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 95; State *v.* Daley, 29 Conn. 272; Rathbun *v.* Wheeler, 29 Ind. 601; State *v.* Norwood, 12 Md. 195; Bristol *v.* Supervisors, &c., 20 Mich. 95; Sumner *v.* Miller, 64 N. C. 688. [Pending the decision upon an appeal, the constitution was so amended that whereas under the old rule the appeal had been upon questions of law alone, it was under the new to be upon questions of fact also. The case was thereupon remanded, in order that the evidence might be incorporated in the record upon a new trial, and the whole brought up again if either party were dissatisfied. Cassard *v.* Tracy, 52 La. Ann. 835, 27 So. 368, 49 L. R. A. 272. A mechanic's lien, which is a security given by statute and is in the nature of a remedy, rather than a right springing from contract or the rules of the common law, may be abolished by general statute without disturbing vested rights. Wilson *v.* Simon, 91 Md. 1, 45 Atl. 1022, 80 Am. St. 427. But a statute taking away the lien of a judgment having effect by operation of law upon the recovery of the judgment, is void as to judgments on contracts made before the enactment of the statute. Merchants' Bank *v.* Ballou, 98 Va. 112, 32 S. E. 481, 81 Am. St. 715, 44 L. R. A. 306. A statute exempting the earnings of a married man from compulsory process for the collection of debt is

lation in regard to the remedy which does not, under pretence of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.[1]

But a vested right of action is property in the same sense in which tangible things are property; and is equally protected against arbitrary interference.[2] Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away.[3] And every man is entitled to a certain remedy in the law for all wrongs against his person or his

valid as going to the remedy only. Kirkman *v.* Bird, 22 Utah, 100, 61 Pac. 338, 83 Ann. St. 774.]

[1] See *ante*, pp. 406-416; Lennon *v.* New York, 55 N. Y. 361. The right to a particular mode of procedure is not a vested right. A statute allowing attorney's fees may affect pending causes. Drake *v.* Jordan, 73 Iowa, 707, 36 N. W. 653.

[2] It is not incompetent, however, to compel the party instituting a suit to pay taxes on the legal process as a condition. Harrison *v.* Willis, 7 Heisk. 35, 19 Am. Rep. 604. [That right of action is property and cannot be made worthless by legislative grant of property of one corporation to another, see Angle *v.* Chicago, M. & St. P. R. Co., 151 U. S. 1, 14 Sup. Ct. Rep. 240.]

[3] Dash *v.* Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291; Streubel *v.* Milwaukee & M. R. R. Co., 12 Wis. 67; Clark *v.* Clark, 10 N. H. 380; Westervelt *v.* Gregg, 12 N. Y. 202; Thornton *v.* Turner, 11 Minn. 339; Ward *v.* Barnard, 1 Aik. 121; Keith *v.* Ware, 2 Vt. 174; Lyman *v.* Mower, 2 Vt. 517; Kendall *v.* Dodge, 3 Vt. 360; State *v.* Auditor, &c., 33 Mo. 287; Griffin *v.* Wilcox, 21 Ind. 370; Norris *v.* Doniphan, 4 Met. (Ky.) 385; Terrill *v.* Rankin, 2 Bush, 453; Williar *v.* Baltimore, &c. Association, 45 Md. 516; Dunlap *v.* Toledo, &c. Ry. Co., 50 Mich. 470, 15 N. W. 555. The legislature cannot interfere with the enforcement of a judgment by enactments subsequent to it. Strafford *v.* Sharon, 61 Vt. 126, 17 Atl. 793. An act of the Dominion Parliament of Canada, assuming to authorize a railroad company to issue bonds in substitution for others previously issued, and at a lower rate of interest, and declaring that the holders should be deemed to assent, was held void, because opposed to the fundamental principles of justice. Gebhard *v.* Railroad Co., 17 Blatch. 416. An equitable title to lands, of which the legal title is in the State, is under the same constitutional protection that the legal title would be. Wright *v.* Hawkins, 28 Tex. 452. Where an individual is allowed to recover a sum as a penalty, the right may be taken away at any time before judgment. Pierce *v.* Kimball, 9 Me. 54, 23 Am. Dec. 537; Oriental Bank *v.* Freeze, 18 Me. 109; Engle *v.* Schurtz, 1 Mich. 150; Confiscation Cases, 7 Wall. 454; Washburn *v.* Franklin, 35 Barb. 599; Welch *v.* Wadsworth, 30 Conn. 149; O'Kelly *v.* Athens Manuf. Co., 36 Ga. 51; United States *v.* Tynen, 11 Wall. 88; Chicago & Alton R. R. Co. *v.* Adler, 56 Ill. 344; Van Inwagen *v.* Chicago, 61 Ill. 31; Lyon *v.* Morris, 15 Ga. 480; *post*, p. 547; [but not after judgment. Dunham *v.* Anders, 128 N. C. 207, 38 S. E. 832.] See also Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9; Coles *v.* Madison County, Breese, 115, 12 Am. Dec. 161; Parmelee *v.* Lawrence, 48 Ill. 331; *post*, pp. 536, 537. The legistature may remit penalties accruing to a county. State *v.* Baltimore, &c. R. R. Co., 12 Gill & J. 399, 38 Am. Dec. 317. Whether claims arising in tort are protected against State legislation by the federal Constitution, see State *v.* New Orleans, 32 La. Ann. 709; Langford *v.* Fly, 7 Humph. 585; Parker *v.* Savage, 6 Lea, 406; Griffin *v.* Wilcox, 21 Ind. 370; Johnson *v.* Jones, 44 Ill. 142; Drehman *v.* Stifel, 41 Mo. 184; 8 Wall. 595. See cases *ante*, p. 411, note 3. [The rule against disturbing vested rights does not preclude a declaration of a rule of law at variance with that made in other cases. Mobile Transportation Co. *v.* Mobile, — U. S. —, 23 Sup. Ct. Rep. 170.]

property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it.[1] Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law.[2] Even Congress, it has been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested by them of all redress in the courts.[3] And if the legislature cannot confiscate

[1] Thus, a person cannot be precluded by test oaths from maintaining suits. McFarland *v.* Butler, 8 Minn. 116; *ante*, p. 410, note. Before attacking a tax deed, payment of taxes and value of improvements may be required. Coats *v.* Hill, 41 Ark. 149. See Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858; Lombard *v.* Antioch College, 60 Wis. 459, 19 N. W. 367. But free recourse to the courts is denied, if a deposit of double the amount of the purchase-money and all taxes, &c., is required before suit. Lassiter *v.* Lee, 68 Ala. 287. See *post*, pp. 526, 527, note.

[2] Griffin *v.* Mixon, 38 Miss. 424. See next note. Also Rison *v.* Farr, 24 Ark. 161; Woodruff *v.* Scruggs, 27 Ark. 26; Hodgson *v.* Millward, 3 Grant's Cas. 406; Ieck *v.* Anderson, 57 Cal. 251, a case of forfeiting nets for illegal fishing; Boorman *v.* Santa Barbara, 65 Cal. 313, 4 Pac. 31, a case of assessing benefits upon lands for improvements without notice. But no constitutional principle is violated by a statute which allows judgment to be entered up against a defendant who has been served with process, unless within a certain number of days he files an affidavit of merits. Hunt *v.* Lucas, 97 Mass. 404. Nor by an ordinance allowing a city, on default of the owner, to build a sidewalk and charge the property with the expense, if when sued on the tax bill, he has his day in court. Kansas City *v.* Huling, 87 Mo. 203. An act subjecting a prisoner's property from the time of his arrest to a lien for the fine and costs, is valid. Silver Bow Co. *v.* Strombaugh, 9 Mont. 81, 22 Pac. 453.

[3] Griffin *v.* Wilcox, 21 Ind. 370. In this case the act of Congress of March 3, 1863, which provided "that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress," was held to be unconstitutional. The same decision was made in Johnson *v.* Jones, 44 Ill. 142. It was said in the first of these cases that "this act was passed to deprive the citizens of all redress for illegal arrests and imprisonment; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments." And it may be added that those acts which are justified by military or martial law are equally legal with those justified by the common law. So in Hubbard *v.* Brainerd, 35 Conn. 563, it was decided that Congress could not take away a vested right to sue for and recover back an illegal tax which had been paid under protest to a collector of the national revenue. See also Bryan *v.* Walker, 64 N. C. 141. Nor can the right to have a void tax sale set aside be made conditional on the payment of the illegal tax. Wilson *v.* McKenna, 52 Ill. 43, and other cases cited, *post*, p. 528, note. The case of Norris *v.* Doniphan, 4 Met. (Ky.) 385, may properly be cited in this connection. It was there held that the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of

property or rights, neither can it authorize individuals to assume at their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners.[1] And a statute which authorizes a party

rebels, and for other purposes," in so far as it undertook to authorize the confiscation of the property of citizens as a punishment for treason and other crimes, by proceedings *in rem* in any district in which the property might be, without presentment and indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt only as would be proof of any fact in admiralty or revenue cases, was unconstitutional and void, and therefore that Congress had no power to prohibit the State courts from giving the owners of property seized the relief they would be entitled to under the State laws. A statute which makes a constitutional right to vote depend upon an impossible condition is void. Davies *v.* McKeeby, 5 Nev. 369. See further, State *v.* Staten, 6 Cold. 233; Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant, 406. Where no express power of removal is conferred on the executive, he cannot declare an office forfeited for misbehavior; but the forfeiture must be declared in judicial proceedings. Page *v.* Hardin, 8 B. Monr. 648; State *v.* Prichard, 36 N. J. 101. The legislature cannot declare the forfeiture of an official salary for misconduct. *Ex parte* Tully, 4 Ark. 220, 88 Am. Dec. 33.

[1] The log-driving and booming corporations, which were authorized to be formed under a general law in Michigan, were empowered, whenever logs or lumber were put into navigable streams without adequate force and means provided for preventing obstructions, to take charge of the same, and cause it to be run, driven, boomed, &c., at the owner's expense; and it gave them a lien on the same to satisfy all just and reasonable charges, with power to sell the property for those charges and for the expenses of sale, on notice, either served personally on the owner, or posted as therein provided. In Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich. 139, 147, it was held that the power which this law assumed to confer was in the nature of a public office; and *Campbell*, J., says: "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parcelled out by the Constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property. And it is plain that the exercise of such a power is an act in its nature public, and not private. The case, however, involves more than the assumption of control. The corporation, or rather its various agents, must of necessity determine when the case arises justifying interference; and having assumed possession it assesses its own charges; and having assessed them, proceeds to sell the property seized to pay them, with the added expense of such sale. These proceedings are all *ex parte*, and are all proceedings *in invitum*. Their validity must therefore be determined by the rules applicable to such cases. Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be divested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and the facts. When his property is wanted *in specie*, for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt or penalty or forfeiture may be set up against him, the

to seize the property of another, without process or warrant, and to sell it without notification to the owner, for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the Constitution.[1]

Limitation Laws.

Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or laches. If one who is dispossessed "be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect (*nam leges vigilantibus, non dormientibus subveniunt*), and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would sooner have been sued."[2] Statutes of limitation are passed which fix upon a

determination of his liability becomes a judicial question; and all judicial functions are required by the Constitution to be exercised by courts of justice, or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination."

[1] A statute of New York authorized any person to take into his custody and possession any animal which might be trespassing upon his lands, and give notice of the seizure to a justice or commissioner of highways of the town, who should proceed to sell the animal after posting notice. From the proceeds of the sale, the officer was to retain his fees, pay the person taking up the animal fifty cents, and also compensation for keeping it, and the balance to the owner, if he should claim it within a year. In Rockwell *v.* Nearing, 35 N. Y. 307, 308, *Porter*, J., says of this statute: "The legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by persons other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution." And he distinguishes these proceedings from those in distraining cattle *damage feasant*, which are always remedial, and under which the party is authorized to detain the property in pledge for the payment of his damages. See also opinion by *Morgan*, J., in the same case, pp. 314–317, and the opinions of the several judges in Wynehamer *v.* People, 13 N. Y. 395, 419, 434, and 468. Compare Campbell *v.* Evans, 45 N. Y. 356; Cook *v.* Gregg, 46 N. Y. 439; Grover *v.* Huckins, 26 Mich. 476; Campau *v.* Langley, 39 Mich. 451, 33 Am. Rep. 414.

[2] 3 Bl. Com. 188; Broom, Legal Maxims, 857.

reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose.[1] Every government is under obligation to its citizens to afford them all needful legal remedies;[2] but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.[3]

When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title.[4] It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance.[5]

[1] Such a statute was formerly construed with strictness, and the defence under it was looked upon as unconscionable, and not favored; but Mr. Justice *Story* has well said, it has often been matter of regret in modern times that the decisions had not proceeded upon principles better adopted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. Bell *v.* Morrison, 1 Pet. 351, 360. See Lessingwell *v.* Warren, 2 Black, 599; Toll *v.* Wright, 37 Mich. 93.

[2] Call *v.* Hagger, 8 Mass. 423.

[3] Beal *v.* Nason, 14 Me. 344; Bell *v.* Morrison, 1 Pet. 351; Stearns *v.* Gittings, 23 Ill. 387; State *v.* Jones, 21 Md. 432. See Biddle *v.* Hooven, 120 Pa. St. 221, 13 Atl. 927.

[4] Brent *v.* Chapman, 5 Cranch, 358; Newby's Adm'rs *v.* Blakey, 3 H. & M. 57; Parish *v.* Eager, 15 Wis. 532; Bagg's Appeal, 43 Pa. St. 512; Lessingwell *v.* Warren, 2 Black, 599; Bicknell *v.* Comstock, 113 U. S. 149, 5 Sup. Ct. Rep. 399. See cases cited in next note. [A statute extending the time for filing a bill of exceptions is held to be invalid as applied to cases in which judgment was rendered before its enactment. Johnson *v.* Gebhauer, — Ind. —, 64 N. E. 855.]

[5] Although there is controversy on this point, we consider the text fully warranted by the following cases: Holden *v.* James, 11 Mass. 396; Wright *v.* Oakley, 5 Met. 400; Lewis *v.* Webb, 3 Me. 326; Atkinson *v.* Dunlap, 50 Me. 111; Davis *v.* Minor, 2 Miss. 183, 28 Am. Dec 325; Hicks *v.* Steigleman, 49 Miss. 377; Knox *v.* Cleveland, 13 Wis. 245; Sprecker *v.* Wakeley, 11 Wis. 432; Pleasants *v.* Rohrer, 17 Wis. 577; Moor *v.* Luce, 29 Pa. St. 260; Morton *v.* Sharkey, McCahon (Kan.), 113; McKinney *v.* Springer, 3 Blackf. 506; Bradford *v.* Brooks, 2 Aik. 284, 16 Am. Dec. 715; Stipp *v.* Brown, 2 Ind. 647;

All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law.[1] Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession;[2] but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently

Briggs *v.* Hubbard, 19 Vt. 86; Wires *v.* Farr, 25 Vt. 41; Woart *v.* Winnick, 3 N. H. 473, 14 Am. Dec. 384; Rockport *v.* Walden, 54 N. H. 167, 20 Am. Rep. 131; Thompson *v.* Caldwell, 3 Lit. 137; Couch *v.* McKee, 6 Ark. 495; Reynolds *v.* Baker, 6 Cold. 221; Trim *v.* McPherson, 7 Cold. 15; Girdner *v.* Stephens, 1 Heisk. 280, 2 Am. Rep. 700; Yancy *v.* Yancy, 5 Heisk. 353, 13 Am. Rep. 5; Bradford *v.* Shine's Ex'rs, 13 Fla. 393, 7 Am. Rep. 239; Lockhart *v.* Horn, 1 Woods, 628; Horbach *v.* Miller, 4 Neb. 31; Pitman *v.* Bump, 5 Oreg. 17; Thompson *v.* Read, 41 Iowa, 48; Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Union Savings Bank *v.* Taber, 13 R. I. 683; McDuffee *v.* Sinnott, 119 Ill. 449, 10 N. E. 385. [McEldowney *v.* Wyatt, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609, and note; Bd. of Edu. *v.* Blodgett, 155 Ill. 441, 40 N. E. 1025, 31 L. R. A. 70, 46 Am. St. 348; Lawrence *v.* Louisville, 96 Ky. 595, 29 S. W. 450, 27 L. R. A. 560, 49 Am. St. 309; Ireland *v.* Mackintosh, 22 Utah, 296, 61 Pac. 901.] In some cases an inclination has been manifested to distinguish between the case of property adversely possessed, and a claim not enforced; and while it is conceded that the title to the property cannot be disturbed after the statute has run, it is held that the claim, under new legislation, may still be enforced; the statute of limitations pertaining to the remedy only, and not barring the right. So it was held in Jones *v.* Jones, 18 Ala. 248, where the remedy on the claim in dispute had been barred by the statute of another State where the debtor then resided. [See *post*, 529, note (*a*).] And see Bentinck *v.* Franklin, 38 Tex. 458. In Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209, a similar ruling was made, though against vigorous dissent. It was held that one has no property in the bar of the statute as a defence to a promise to pay a debt, and that such bar may be removed by a statute in such case after it has become complete. But this last-mentioned doctrine is rejected in an opinion of much force by *Dixon*, Ch. J., in Brown *v.* Parker, 28 Wis. 21, 28. To like effect is McCracken Co. *v.* Merc. Trust Co., 84 Ky. 344, 1 S. W. 585. And see Rockport *v.* Walden, 54 N. H. 167, 20 Am. Rep. 131; McMerty *v.* Morrison, 62 Mo. 140; Goodman *v.* Munks, 8 Port. (Ala.) 84; Harrison *v.* Stacy, 6 Rob. (La.) 15; Baker *v.* Stonebraker's Adm'r, 36 Mo. 338; Shelby *v.* Guy, 11 Wheat. 361. The law of the forum governs as to limitations. Barbour *v.* Erwin, 14 Lea, 716; Stirling *v.* Winter, 80 Mo. 141. See Chevrier *v.* Robert, 6 Mont. 319, 12 Pac. 702; Thompson *v.* Reed, 75 Me. 404. But the statute of limitations may be suspended for a period as to demands not already barred. Wardlaw *v.* Buzzard, 15 Rich. 158; Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270; Bender *v.* Crawford, 33 Tex. 745, 7 Am. Rep. 270; Pearsall *v.* Kenan, 79 N. C. 472, 28 Am. Rep. 330. A class of cases may be excepted from the operation of the statute, though barred when such excepting act was passed. Sturm *v.* Fleming, 31 W. Va. 701, 8 S. E. 263. [And see a peculiar case in Bates *v.* Cullum, 177 Pa. 633, 35 Atl. 861, 31 L. R. A. 440, 55 Am. St. 753.] The legislature may compel a county to pay a claim barred by the general statute. Caldwell Co. *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

[1] Stearns *v.* Gittings, 23 Ill. 387, per *Walker*, J.; Sturges *v.* Crowninshield, 4 Wheat. 122, 207, per *Marshall*, Ch. J. Pearce *v.* Patton, 7 B. Monr. 162; Griffin *v.* McKenzie, 7 Ga. 163; Colman *v.* Holmes, 44 Ala. 124.

[2] Stearns *v.* Gittings, 23 Ill. 387; Hill *v.* Kricke, 11 Wis. 442.

been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.[1]

All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so, it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;[2] though what shall be considered

[1] Groesbeck *v.* Seeley, 13 Mich. 329. In Case *v.* Dean, 16 Mich. 12, it was held that this statute could not be enforced as a limitation law in favor of the party in possession, inasmuch as it did not proceed on the idea of limiting the time for bringing suit, but by a conclusive rule of evidence sought to pass over the property to the claimant under the statutory sale in all cases, irrespective of possession. See also Baker *v.* Kelly, 11 Minn. 480; Eldridge *v.* Kuehl, 27 Iowa, 160, 173; Monk *v.* Corbin, 58 Iowa, 503, 12 N. W. 571; Farrar *v.* Clark, 85 Ind. 449; Dingey *v.* Paxton, 60 Miss. 1038. The case of Leffingwell *v.* Warren, 2 Black, 599, is *contra*. That case follows Wisconsin decisions. In the leading case of Hill *v.* Kricke, 11 Wis. 442, the holder of the original title was not in possession; and what was decided was that it was not necessary for the holder of the tax title to be in possession in order to claim the benefit of the statute; ejectment against a claimant being permitted by law when the lands were unoccupied. See also Barrett *v.* Holmes, 102 U. S. 651. To stop the running of the statute it is not necessary that the owner should be in continuous possession. Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465. This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of laches in not asserting claims to property, when he already possesses and enjoys the property? The old maxim is, "That which was originally void cannot by mere lapse of time be made valid;" and if a void claim by force of an act of limitation can ripen into a conclusive title as against the owner in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed.

[2] So held of a statute which took effect some months after its passage, and which, in its operation upon certain classes of cases, would have extinguished adverse claims unless asserted by suit before the act took effect. Price *v.* Hopkin, 13 Mich. 318. See also Koshkonong *v.* Burton, 104 U. S. 668; King *v.* Belcher, 30 S. C. 381, 9 S. E. 359; People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022; Call *v.* Hagger, 8 Mass. 423; Proprietors, &c. *v.* Laboree, 2 Me. 294; Society, &c. *v* Wheeler, 2 Gall. 141; Blackford *v.* Peltier, 1 Blackf. 36; Thornton *v.* Turner, 11 Minn. 336; State *v.* Messenger, 27 Minn. 119, 6 N. W. 457; Osborn *v.* Jaines, 17 Wis. 573; Morton *v.* Sharkey, McCahon (Kan.), 113; Berry *v.* Ransdell, 4 Met. (Ky.) 292; Ludwig *v.* Stewart, 32 Mich. 27; Hart *v.* Bostwick, 14 Fla. 162. In the case last cited it was held that a statute which only allowed thirty days in which to bring action on an existing demand was unreasonable and void. And see what is said in Auld *v.* Butcher, 2 Kan. 135. Compare Davidson *v.* Lawrence, 49 Ga. 335; Kimbro *v.* Bank of Fulton, 49 Ga. 419. In Terry *v.* Ander-

a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.[1]

Alterations in the Rules of Evidence.

It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citi-

son, 95 U. S. 628, a statute which as to the demand sued upon limited the time to ten and a half months was held not unreasonable. In Krone *v.* Krone, 37 Mich. 308, the limitation which was supported was to one year where the general law gave six. In Pereless *v.* Watertown, 6 Biss. 79, Judge *Hopkins*, U. S. District Judge, decided that a limitation of one year for bringing suits on municipal securities of a class generally sold abroad was unreasonable and void. But a statute giving a new remedy against a railroad company for an injury, may limit to a short time, *e. g.* six months, the time for bringing suit. O'Bannon *v.* Louisville, &c. R. R. Co., 8 Bush, 348. So the remedy by suit against stockholders for corporate debts, it is held, may be limited to one year. Adamson *v.* Davis, 47 Mo. 268. [Six months is not an unreasonably short time to which to limit the assertion of all then existing claims to lands hitherto sold for non-payment of taxes. Turner *v.* New York, 168 U. S. 90, 18 Sup. Ct. Rep. 38. Nine months is not an unreasonably short time to allow for bringing suit upon a judgment rendered nearly twelve years before. Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715. That statute must expressly provide a reasonable time to be open, after it goes into effect, and not merely after it is enacted, see Gilbert *v.* Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; *contra*, Osborne *v.* Lindstrom, above.] It is always competent to extend the time for bringing suit before it has expired. Keith *v.* Keith, 26 Kan. 27. [Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616.] A statute fixing a time for taking out a sheriff's deed after sale applies to a prior sale if a reasonable time is left. Ryhiner *v.* Frank, 105 Ill. 326.

[1] Stearns *v.* Gittings, 23 Ill. 389; Call *v.* Hagger, 8 Mass. 423; Smith *v.* Morrison, 22 Pick. 430; Price *v.* Hopkin, 13 Mich. 318; De Moss *v.* Newton, 31 Ind. 219. [Wheeler *v.* Jackson, 137 U. S. 245, 11 Sup. Ct. Rep. 76, and note in 34 L. ed. U. S. 659.] But see Berry *v.* Ransdell, 4 Met. (Ky.) 292.

It may be remarked here, that statutes of limitation do not apply to the State unless they so provide expressly. Gibson *v.* Choteau, 13 Wall. 92; State *v.* Piland, 81 Mo. 519; State *v.* School Dist., 34 Kan. 237, 8 Pac. 208. [Nor is the defence of laches or stale claim good as against a State or the United States. United States *v.* Dalles Military Road Co., 140 U. S. 599, 11 Sup. Ct. Rep. 988. But a creditor of the State cannot take advantage of the State's exemption where he seeks to subject debts due the State to the satisfaction of his claim by means of garnishment proceedings. Cressey *v.* Meyer, 138 U. S. 525, 11 Sup. Ct. Rep. 387.] And State limitation laws do not apply to the United States. United States *v.* Hoar, 2 Mas. 311; People *v.* Gilbert, 18 Johns. 227; Rabb *v.* Supervisors, 62 Miss. 589; United States *v.* Nashville, &c. Ry. Co., 118 U. S. 120, 6 Sup. Ct. Rep. 1006. [Although the United States may take advantage of them. Stanley *v.* Schwalby, 147 U. S. 508, 13 Sup. Ct. Rep. 418.] Nor to suits for the infringement of patents. May *v.* Logan Co., 30 Fed. Rep. 250. And it has been held that the right to maintain a public nuisance cannot be acquired under the statute. State *v.* Franklin Falls Co., 49 N. H. 240.

zens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature;[1] and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties in suits to testify, might lawfully apply to existing causes of action.[2] So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract;[3] and a statute making the protest of a promissory note evidence of the facts therein stated.[4] These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice.[5]

A strong instance in illustration of legislative control over evidence will be found in the laws of some of the States in regard to conveyances of lands upon sales to satisfy delinquent taxes. Independent of special statutory rule on the subject, such conveyances would not be evidence of title. They are executed under a statutory power; and it devolves upon the claimant under them to show that the successive steps which under the statute lead to such conveyance have been taken. But it cannot be doubted that this rule may be so changed as to make a tax-deed *prima facie* evi-

[1] Kendall *v.* Kingston, 5 Mass. 524; Ogden *v.* Saunders, 12 Wheat. 213, 349; per *Marshall*, Ch. J.; Fales *v.* Wadsworth, 23 Me. 553; Karney *v.* Paisley, 13 Iowa, 89; Commonwealth *v.* Williams, 6 Gray, 1; Hickox *v.* Tallman, 38 Barb. 608; Webb *v.* Den, 17 How. 576; Pratt *v.* Jones, 25 Vt. 303. [Pennsylvania Co. *v.* McCann, 54 Ohio St. 10, 42 N. E. 768, 31 L. R. A. 651.] See *ante*, p. 409, and note.

[2] Rich *v.* Flanders, 39 N. H. 304. A very full and satisfactory examination of the whole subject will be found in this case. To the same effect is Southwick *v.* Southwick, 49 N. Y. 510. And see Cowan *v.* McCutchen, 43 Miss. 207; Carothers *v.* Hurly, 41 Miss. 71. The right to testify existing when a contract is made may be taken away. Goodlett *v.* Kelly, 74 Ala. 213.

[3] Gibbs *v.* Gale, 7 Md. 76.

[4] Fales *v.* Wadsworth, 23 Me. 553.

[5] Per *Marshall*, Ch. J., in Ogden *v.* Saunders, 12 Wheat. 213, 249; Webb *v.* Den, 17 How. 576; Delaplaine *v.* Cook, 7 Wis. 44; Kendall *v.* Kingston, 5 Mass. 524; Towler *v.* Chatterton, 6 Bing. 258; Himmelman *v.* Carpentier, 47 Cal. 42.

dence that all the proceedings have been regular, and that the purchaser has acquired under them a complete title.[1] The burden of proof is thereby changed from one party to the other; the legal presumption which the statute creates in favor of the purchaser being sufficient, in connection with the deed, to establish his case, unless it is overcome by countervailing testimony. Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void.[2] But they divest no title, and are not even retrospective in character. They merely establish what the legislature regards as a reasonable and just rule for the presentation by the parties of their rights before the courts in the future.

But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, (*a*) its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial;[3] and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would

[1] Hand *v.* Ballou, 12 N. Y. 541; Forbes *v.* Halsey, 26 N.Y. 53; Delaplaine *v.* Cook, 7 Wis. 44; Allen *v.* Armstrong, 16 Iowa, 508; Adams *v.* Beale, 19 Iowa, 61; Amberg *v.* Rogers, 9 Mich. 332; Lunsden *v.* Cross, 10 Wis. 282; Lacey *v.* Davis, 4 Mich. 140; Wright *v.* Dunham, 13 Mich. 414; Abbott *v.* Lindenbower, 42 Mo. 162, 46 Mo. 291. [Marx *v.* Hanthorn, 148 U. S. 172, 13 Sup. Ct. Rep. 508.] The rule once established may be abolished, even as to existing deeds. Hickox *v.* Tallman, 38 Barb. 608; Strode *v.* Washer, 17 Oreg. 50, 16 Pac. 926; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

[2] See Webb *v.* Den, 17 How. 576.

[3] Tift *v.* Griffin, 5 Ga. 185; Lenz *v.* Charlton, 23 Wis. 478; Conway *v.* Cable, 37 Ill. 82; *ante*, p. 523, note; *post*, pp. 579–585, and notes.

(*a*) [And in criminal cases the doing of a certain act may be made *prima-facie* evidence of criminal intent. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. 447.]

preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.[1] And a statute which should make the certificate or opinion of an officer conclusive evidence of the illegality of an existing contract would be equally nugatory;[2] though perhaps if parties should enter into

[1] Groesbeck *v.* Seeley, 13 Mich. 329; Case *v.* Dean, 16 Mich. 12; White *v.* Flynn, 23 Ind. 46; Corbin *v.* Hill, 21 Iowa, 70; Abbott *v.* Lindenbower, 42 Mo. 162, 46 Mo. 291; Dingey *v.* Paxton, 60 Miss. 1038. [Wilson *v.* Wood, 10 Okla. 279, 61 Pac. 1045.] And see the well-reasoned case of McCready *v.* Sexton, 29 Iowa, 356; Little Rock, &c. R. R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55. Also Wright *v.* Cradlebaugh, 3 Nev. 341. As to how far the legislature may make the tax-deed conclusive evidence that mere irregularities have not intervened in the proceedings, see Smith *v.* Cleveland, 17 Wis. 556; Allen *v.* Armstrong, 16 Iowa, 508. It may be conclusive as to matters not essential and jurisdictional. Matter of Lake, 40 La. Ann. 142, 3 So. 479; Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401. Undoubtedly the legislature may dispense with mere matters of form in the proceedings as well after they have taken place as before; but this is quite a different thing from making tax-deeds conclusive on points material to the interest of the property owner. See further, Wantlan *v.* White, 19 Ind. 470; People *v.* Mitchell, 45 Barb. 212; McCready *v.* Sexton, *supra*. It is not competent for the legislature to compel an owner of land to redeem it from a void tax sale as a condition on which he shall be allowed to assert his title against it. Conway *v.* Cable, 37 Ill. 82; Hart *v.* Henderson, 17 Mich. 218; Wilson *v.* McKenna, 52 Ill. 43; Reed *v.* Tyler, 56 Ill. 288; Dean *v.* Borchsenius, 30 Wis. 236. But it seems that if the tax purchaser has paid taxes and made improvements, the payment for these may be made a condition precedent to a suit in ejectment against him. Pope *v.* Macon, 23 Ark. 644. See cases *ante*, 518, note 1. In Wright *v.* Cradlebaugh, 3 Nev. 341, 349, *Beatty*, C. J., says: "We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a good defence to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of the right of setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being encumbered with those of B. . . . Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the constitution, would be a protection to him or his property." See Taylor *v.* Miles, 5 Kan. 498, 7 Am. Rep. 558. [Certificate of a public weigh-master cannot be made conclusive. Vega Steamship Co. *v.* Cons. Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843.]

[2] Young *v.* Beardsley, 11 Paige, 93. See also Howard Co. *v.* State, 120 Ind. 282, 22 N. E. 255. But a provision that six months after the passage of the act certain tax-deeds made on past sales should be conclusive evidence, has been upheld. People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022. An act to authorize persons whose sheep are killed by dogs, to present their claim to the selectmen of the town for allowance and payment by the town, and giving the town after payment an action against the owner of the dog for the amount so paid, is void, as taking away trial by jury, and as author-

a contract in view of such a statute then existing, its provisions might properly be regarded as assented to and incorporated in their contract, and therefore binding upon them.[1]

Retrospective Laws. (*a*)

Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected.[2] In both cases the demand is gone, and to restore it would be to create a new contract for the parties, — a thing quite beyond the power of legislation.[3] So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment.[4] But there are many cases in which, by existing laws, defences based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defence if it possesses the power to do so.

izing the selectmen to pass upon one's rights without giving him an opportunity to be heard. East Kingston *v.* Towle, 48 N. H. 57, 2 Am. Rep. 174.

[1] See *post*, p. 581, note.

[2] *Ante*, p. 521, note, and cases cited.

[3] Albertson *v.* Landon, 42 Conn. 209.

[4] In Medford *v.* Learned, 16 Mass. 215, it was held that where a pauper had received support from the parish, to which by law he was entitled, a subsequent legislative act could not make him liable by suit to refund the cost of the support. This case was approved and followed in People *v.* Supervisors of Columbia, 43 N. Y. 130. See *ante*, p. 518, and note; Towle *v.* Eastern R. R., 18 N. H. 547. A right of action may not be given against a husband to a creditor of the wife upon her contract. Addoms *v.* Marx, 50 N. J. L. 253, 12 Atl. 909. A railroad company cannot be made responsible for the coroner's inquest and burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, &c., irrespective of any wrong or negligence of the company or its servants. Ohio & M. R. R. Co. *v.* Lackey, 78 Ill. 55. Absolute liability, irrespective of negligence, cannot be imposed on a railroad company for stock killing. Cateril *v.* Union Pac. Ry. Co., 2 Idaho, 540, 21 Pac. 416, Bielenberg *v.* Montana N. Ry. Co., 8 Mont. 271, 20 Pac. 314. In Atchison, &c. R. R. Co. *v.* Baty, 6 Neb. 37, 29 Am. Rep. 356, it is held incompetent to make a railroad company liable to double the value of stock accidentally injured or destroyed on the railroad track. But the contrary was held in Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110. In such cases attorney's fees may be allowed. Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. But see Wilder *v.* Chicago & W. M. Ry. Co., 70 Mich. 382, 38 N. W. 289. See cases on above points, *post*, 841, note 1.

(*a*) [Upon retroactive laws, vested rights, &c., see note to 41 L. ed. 94. An inheritance-tax law, void for lack of provision for notice, may be corrected in this regard, and is then applicable to property not yet distributed, although the testator died before the law was amended. Ferry *v.* Campbell, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92.]

In regard to these cases, we think investigation of the authorities will show that *a party has no vested right in a defence based upon an informality not affecting his substantial equities.* (*a*) And this brings us to a particular examination of a class of statutes which is constantly coming under the consideration of the courts, and which are known as *retrospective laws*, by reason of their reaching back to and giving to a previous transaction some different legal effect from that which it had under the law when it took place.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State constitution, and provided further that no other objection exists to them than their retrospective character.[1] Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.[2] And some of the States have

[1] Thornton *v.* McGrath, 1 Duvall, 349; Aldridge *v.* Railroad Co., 2 Stew. & Port. 199, 23 Am. Dec. 307; State *v.* Squires, 26 Iowa, 340; Beach *v.* Walker, 6 Conn. 190; Schenley *v.* Commonwealth, 36 Pa. St. 57; Shonk *v.* Brown, 61 Pa. St. 320; Lane *v.* Nelson, 79 Pa. St. 407. [Miller *v.* Hixson, 64 Ohio, 39, 59 N. E. 749.]

[2] Dash *v.* Van Kleeck, 7 Johns. 477; 5 Am. Dec. 291; Sayre *v.* Wisner, 8 Wend. 661; Watkins *v.* Haight, 18 Johns. 138; Bay *v.* Gage, 36 Barb. 447; Norris *v.* Beyea, 13 N. Y. 273; Drake *v.* Gilmore, 52 N. Y. 389; Quackenbush *v.* Danks, 1 Denio, 128; Hapgood *v.* Whitman, 13 Mass. 464; Medford *v.* Learned, 16 Mass. 215; Gerry *v.* Stoneham, 1 Allen, 319; Kelley *v.* Boston, &c. R. R. Co., 135 Mass. 448; Perkins *v.* Perkins, 7 Conn. 558, 18 Am. Dec. 120; Plumb *v.* Sawyer, 21 Conn. 351; Hubbard *v.* Brainerd, 35 Conn. 563; Sturgis *v.* Hull, 48 Vt. 302; Briggs *v.* Hubbard, 19 Vt. 86; Hastings *v.* Lane, 15 Me. 134; Torrey *v.* Corliss, 32 Me. 333; Atkinson *v.* Dunlop, 50 Me. 111; Rogers *v.* Greenbush, 58 Me. 395; Guard *v.* Rowan, 3 Ill. 499; Garrett *v.* Doe, 2 Ill. 335; Thompson *v.* Alexander, 11 Ill. 54; Conway *v.* Cable, 37 Ill. 82; *In re* Tuller, 79 Ill. 99; Knight *v.* Begole, 56 Ill. 122; McHaney *v.* Trustees of Schools, 68 Ill. 140; Hatcher *v.* Toledo, &c. R. R. Co., 62 Ill. 477; Harrison *v.* Metz, 17 Mich. 377; Thomas *v.* Collins, 58 Mich. 64, 24 N. W. 553; Danville *v.* Pace, 25 Gratt. 1; Cumberland, &c. R. R. Co. *v.* Washington Co. Court, 10 Bush, 564; State *v.* Barbee, 3 Ind. 258; State *v.* Atwood, 11 Wis. 422; Bartruff *v.* Remey, 15 Iowa, 257; Knoulton *v.* Redenbaugh, 40 Iowa, 114; Allbyer *v.* State, 10 Ohio St. 588; Colony *v.* Dublin, 32 N. H. 432; *Ex parte* Graham, 13 Rich. 277; Garrett *v.* Beaumont, 24 Miss. 377; Clark *v.* Baltimore, 29 Md. 277; Williams *v.* Johnson, 30 Md. 500; State *v.* The Auditor, 41 Mo. 25; State *v.* Ferguson, 62 Mo. 77; Merwin *v.* Ballard,

(*a*) [Danforth *v.* Groton Water Co., 178 Mass. 472, 59 N. E. 1033, 85 Am. St. 495. See Dunbar *v.* Boston, & P. Ry. Co., 181 Mass. 383, 63 N. E. 916.]

deemed it just and wise to forbid such laws altogether by their constitutions.[1]

A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon;[2] irregularities in the

66 N. C. 398; Tyson *v.* School Directors, 51 Pa. St. 9; Haley *v.* Philadelphia, 68 Pa. St. 45, 8 Am. Rep. 153; Baldwin *v.* Newark, 38 N. J. 158; Warshung *v.* Hunt, 47 N. J. L. 256; McGeehan *v.* State Treasurer, 37 La. Ann. 156; State *v.* Pinckney, 22 S. C. 484; Richmond *v.* Supervisors, 83 Va. 204, 2 S. E. 26. This doctrine applies to amendments of statutes. Ely *v.* Holton, 15 N. Y. 595. If no vested right is disturbed, a retroactive effect may be given a statute, though the language does not render it necessary, provided such is the clear intent. People *v.* Spicer, 99 N. Y. 225, 1 N. E. 680.

[1] See the provision in the Constitution of New Hampshire, considered in Woart *v.* Winnick, 3 N. H. 473, 14 Am. Dec. 384; Clark *v.* Clark, 10 N. H. 380; Willard *v.* Harvey, 24 N. H. 344; Rich *v.* Flanders, 39 N. H. 304; and Simpson *v.* Savings Bank, 56 N. H. 466; and that in the Constitution of Texas, in De Cordova *v.* Galveston, 4 Tex. 470; and that in the Constitution of Missouri, in State *v.* Hernan, 70 Mo. 441; State *v.* Greer, 78 Mo. 188. The provision covers only civil, not criminal cases. State *v.* Johnson, 81 Mo. 60. A statute, passed after a municipality has levied a tax, may annul it before it becomes due and put the right to levy it in another body. State *v.* St. Louis, &c. Ry. Co., 79 Mo. 420. The Constitution of Ohio provides that "the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; provided, however, that the General Assembly may, by general laws, authorize the courts to carry into effect the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this State, and upon such terms as shall be just and equitable." Under this clause it was held competent for the General Assembly to pass an act authorizing the courts to correct mistakes in deeds of married women previously executed, whereby they were rendered ineffectual. Goshorn *v.* Purcell, 11 Ohio St. 641. An act for the payment of bounties for past services was held not retrospective, in State *v.* Richland, 20 Ohio St. 389. [An act "for refunding taxes erroneously paid" is bad as applied to past transactions. Hamilton Co. Comm'rs *v.* Rasche, 50 Ohio St. 103, 33 N. E. 408, 19 L. R. A. 584.] Under a provision in the Constitution of Tennessee that no retrospective law shall be passed, it has been held that a statute passed after a death cannot allow for the first time a recovery for the loss suffered by the children of deceased from the death. Railroad *v.* Pounds, 11 Lea, 127. But a law authorizing a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases which arose before its passage, was held not a retrospective law within the meaning of this clause. Fisher's Negroes *v.* Dobbs, 6 Yerg. 119. So of a law making a judgment against the principal conclusive upon the surety. Pickett *v.* Boyd, 11 Lea, 408. See further, Society *v.* Wheeler, 2 Gall. 105; Officer *v.* Young, 5 Yerg. 320, 26 Am. Dec. 268. Under like provision in the Colorado Constitution a statute is void which allows a writ of error on a judgment in respect to which an appeal was barred. Willoughby *v.* George, 5 Col. 80. Legislation may be ordered to take immediate effect notwithstanding retrospective laws are forbidden. Thomas *v.* Scott, 23 La. Ann. 689.

That the legislature cannot retrospectively construe statutes and bind parties thereby, see *ante*, p. 134 *et seq.*

[2] Butler *v.* Toledo, 5 Ohio St. 225; Strauch *v.* Shoemaker, 1 W. & S. 166;

organization or elections of corporations;[1] irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause;[2] irregular proceedings in court, &c.[3]

The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. (*a*)

McCoy *v.* Michew, 7 W. & S. 383; Montgomery *v.* Meredith, 17 Pa. St. 42; Dunden *v.* Snodgrass, 18 Pa. St. 151; Williston *v.* Colkett, 9 Pa. St. 38; Boardman *v.* Beckwith, 18 Iowa, 292; The Iowa R. R. Land Co. *v.* Soper, 39 Iowa, 112; Lennon *v.* New York, 55 N. Y. 361; Smith *v.* Hard, 59 Vt. 13, 8 Atl. 317. Officers may be authorized to extend inquiries over years preceding; no new liability is imposed upon the taxpayer. Sturges *v.* Carter, 114 U. S. 511, 5 Sup. Ct. Rep. 1014. It is not unconstitutional to prohibit the vacating of assessments for irregularities. Astor *v.* New York, 62 N. Y. 580. The limit of power in validating assessments is very clearly shown by *McKinstry*, J., in People *v.* Lynch, 51 Cal. 15. And see Walter *v.* Bacon, 8 Mass. 468; Locke *v.* Dane, 9 Mass. 360; Patterson *v.* Philbrook, 9 Mass. 151; Trustees *v.* McCaughy, 2 Ohio St. 152. Compare Forster *v.* Forster, 129 Mass. 559. Acts of officers void for jurisdictional defects cannot be validated. Houseman *v.* Kent Circ. Judge, 58 Mich. 364, 25 N. W. 369; Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321. Nor can irregularities be cured after a suit is brought to recover money received by a township on a sale of land for an illegal tax. Daniells *v.* Watertown, 61 Mich. 514, 28 N. W. 673. The right to provide for a reassessment of taxes irregularly levied is undoubted. See Brevoort *v.* Detroit, 24 Mich. 322; State *v.* Newark, 34 N. J. 236; Musselman *v.* Logansport, 29 Ind. 533; Street Railroad Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348; Redwood Co. *v.* Winona, &c. Co., 40 Minn. 512, 41 N. W. 465. But, of course, if the vice is in the nature of the tax itself, it will continue and be fatal, however often the process of assessment may be repeated. See *post*, p. 545.

[1] Syracuse Bank *v.* Davis, 16 Barb. 188; Mitchell *v.* Deeds, 49 Ill. 416; People *v.* Plank Road Co., 86 N. Y. 1.

[2] See Menges *v.* Wartman, 1 Pa. St, 218; Yost's Report, 17 Pa. St. 524; Bennett *v.* Fisher, 26 Iowa, 497; Allen *v.* Archer, 49 Me. 346; Commonwealth *v.* Marshall, 69 Pa. St. 328; State *v.* Union, 33 N. J. 350; State *v.* Guttenberg, 38 N. J. 419; Mut. Ben. Life Ins. Co. *v.* Elizabeth, 42 N. J. 235; Rogers *v.* Stephens, 62 N. Y. 623; Unity *v.* Burrage, 103 U. S. 447. By the Constitution of Missouri, the legislature is forbidden to legalize the unauthorized or invalid acts of any officer or agent of the State, or of any county or municipality. Art. 4, § 53.

[3] Lane *v.* Nelson, 79 Pa. St. 407; Tilton *v.* Swift, 40 Iowa, 78; Supervisors *v.* Wisconsin Cent. R. R. Co., 121 Mass. 460; Cookerly *v.* Duncan, 87 Ind. 332; Muncie Nat. Bank *v.* Miller, 91 Ind. 441; Johnson *v.* Com'rs Wells Co., 107 Ind. 15, 8 N. E. 1. See cases *post*, 546, note 2.

(*a*) [But this rule must be applied with discretion; *e. g.*, the legislature could not provide, after a sale had been made under notice not sufficiently long to satisfy the

A few of the decided cases will illustrate this principle. In Kearney *v.* Taylor[1] a sale of real estate belonging to infant tenants in common had been made by order of court in a partition suit, and the land bid off by a company of persons, who proposed subdividing and selling it in parcels. The sale was confirmed in their names, but by mutual arrangement the deed was made to one only, for convenience in selling and conveying. This deed failed to convey the title, because not following the sale. The legislature afterwards passed an act providing that, on proof being made to the satisfaction of the court or jury before which such deed was offered in evidence that the land was sold fairly and without fraud, and the deed executed in good faith and for a sufficient consideration, and with the consent of the persons reported as purchasers, the deed should have the same effect as though it had been made to the purchasers. That this act was unobjectionable in principle was not denied; and it cannot be doubted that a prior statute, authorizing the deed to be made to one for the benefit of all and with their assent, would have been open to no valid objection.[2]

In certain Connecticut cases it was insisted that sales made of real estate on execution were void, because the officer had included in the amount due, several small items of fees not allowed by law. It appeared, however, that, after the sales were made, the legislature had passed an act providing that no levy should be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, should be valid and effectual to transmit the title of the real estate levied upon. The liability of the officer

[1] 15 How. 494. And see Boyce *v.* Sinclair, 3 Bush, 261; Weed *v.* Donovan, 114 Mass. 181.

[2] See Davis *v.* State Bank, 7 Ind. 316; and Lucas *v.* Tucker, 17 Ind. 41, for decisions under statutes curing irregular sales by guardians and executors. In many of the States general laws will be found providing that such sales shall not be defeated by certain specified defects and irregularities.

statute then in existence, that the shorter notice should be sufficient, though it might originally have made the shorter period sufficient. See Finlayson *v.* Peterson, 5 N. D. 587, 67 N. W. 953, 33 L. R. A. 532, 57 Am. St. 584; also Lowe *v.* Harris, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379, and note. Nor can the legislature supersede the necessity for allowing a party a hearing before decreeing a sale of his property. Roche *v.* Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533. While the legislature may validate a levy of taxes void for some irregularity, as insufficient notice, &c., it cannot validate a sale and tax deed based upon such void levy. Dever *v.* Cornwell, 10 N. D. 125, 86 N. W. 227. Where an election was void for lack of authority to hold it, the legislature cannot subsequently empower a board of education to borrow money with the assent of two-thirds of the voters voting at an election, and declare the preceding election sufficient, although that precise proposition was the one submitted. Berkley *v.* Bd. of Education, 22 Ky. 638, 58 S. W. 506.]

for receiving more than his legal fees was at the same time left unaffected. In the leading case the court say: "The law, undoubtedly, is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable, and for necessary services in the performance of his duty; of consequence they are eminently just, and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced."[1]

In another Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not empowered by the State law to perform that ceremony, and that the marriages were therefore invalid. The legislature had afterwards passed an act declaring all such marriages valid, and the court sustained the act. It was assailed as an exercise of the judicial power; but this it clearly was not, as it purported to settle no controversies, and merely sought to give effect to the desire of the parties, which they had ineffectually attempted to carry out by means of the ceremony which proved insufficient. And while it was not claimed that the act was void in so far as it made effectual the legal relation of matrimony between the parties, it was nevertheless insisted that rights of property dependent upon that relation could not be affected by it, inasmuch as, in order to give such rights, it must operate retrospectively. The court in disposing of the case are understood to express the opinion that, if the legislature possesses the power to validate an imperfect marriage, still more clearly does it have power to affect incidental rights. "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy, or contract marriage with any other persons at pleasure. It is a strong exercise of power to compel two persons to marry without their consent, and a palpable perversion of strict legal right. At the same time the retrospective law thus far directly operating on vested rights is admitted to be unquestionably valid, because it is manifestly just."[2]

[1] Beach *v.* Walker, 6 Conn. 190, 197. See Booth *v.* Booth, 7 Conn. 350; Mather *v.* Chapman, 6 Conn. 54; Norton *v.* Pettibone, 7 Conn. 319; Welch *v.* Wadsworth, 30 Conn. 149; Smith *v.* Merchand's Ex'rs, 7 S. & R. 260; Underwood *v.* Lilly, 10 S. & R. 97; Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Pa. St. 218; Weister *v.* Hade, 52 Pa. St. 474; Ahl *v.* Gleim, 52 Pa. St. 432; Selsby *v.* Redlon, 19 Wis. 17; Parmelee *v.* Lawrence, 48 Ill. 331. [A statute giving a *bona fide* occupant of lands the right to allowance for the value of improvements made on the lands is valid as to improvements made before the enactment of the statute. So held in Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. 132.]

[2] Goshen *v.* Stonington, 4 Conn. 209, 221, 10 Am. Dec. 121, per *Hosmer*, J. And

It is not to be inferred from this language that the court understood the legislature to possess power to select individual members of the community, and force them into a relation of marriage with each other against their will. That complete control which the legislature is supposed to possess over the domestic relations can hardly extend so far. The legislature may perhaps divorce parties, with or without cause, according to its own view of justice or public policy; but for the legislature to marry parties against their consent, we conceive to be decidedly against "the law of the land." The learned court must be understood as speaking here with exclusive reference to the case at bar, in which the legislature, by the retrospective act, were merely removing a formal defect in certain marriages which the parties had assented to, and which they had attempted to form. Such an act, unless special circumstances conspired to make it otherwise, would certainly be "manifestly just," and therefore might well be held "unquestionably valid." And if the marriage was rendered valid, the legal incidents would follow of course. In a Pennsylvania case the validity of certain grading and paving assessments was involved, and it was argued that they were invalid for the reason that the city ordinance under which they had been made was inoperative, because not recorded as required by law. But the legislature had passed an act to validate this ordinance, and had declared therein that the omission to record the ordinance should not affect or impair the lien of the assessments against the lot owners. In passing upon the validity of this act, the court express the following views: "Whenever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In Hepburn *v.* Curts,[1] it was said, 'The legislature, provided it does not violate the constitutional provisions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.' What more has been done in this case? . . . While (the ordinance) was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered

see State *v.* Adams, 65 N. C. 537, where it was held that the act validating the previous marriages of slaves was effectual, and a subsequent marriage in disregard of it would be bigamy. The legislature may remove after a marriage a disability created by its former action. Baity *v.* Cranfil, 91 N. C. 203. That the legislature may legitimize children, see Andrews *v.* Page, 3 Heisk. 653. The power to validate void marriages held not to exist in the legislature where, by the constitution, the whole subject was referred to the courts. White *v.* White, 105 Mass. 325.

[1] 7 Watts, 300.

to become of no effect by the failure to record it. Notwithstanding this, the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is at most but a formal defect in the remedy provided, — an oversight. That such defects may be cured by retroactive legislation need not be argued."[1]

On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power. (*a*)

By statute of Ohio, all bonds, notes, bills, or contracts negotiable or payable at any unauthorized bank, or made for the purpose of being discounted at any such bank, were declared to be void. While this statute was in force a note was made for the purpose of being discounted at one of these institutions, and was actually discounted by it. Afterwards the legislature passed an act, reciting that many persons were indebted to such bank, by bonds, bills, notes, &c., and that owing, among other things, to doubts of its right to recover its debts, it was unable to meet its own obligations, and had ceased business, and for the purpose of winding up its affairs had made an assignment to a trustee; therefore the said act authorized the said trustee to bring suits on the said bonds, bills, notes, &c., and declared it should not be lawful for the defendants in such suits "to plead, set up, or insist upon, in defence, that the notes, bonds, bills, or other written evidences of such indebtedness are void on account of being contracts against or in violation of any statute law of this State, or on account of their being contrary to public policy." This law was sustained as a law "that contracts may be enforced," and as in furtherance of equity and good morals.[2] The original invalid-

[1] Schenley *v.* Commonwealth, 36 Pa. St. 29, 57. See also State *v.* Newark, 27 N. J. 185; Den *v.* Downam, 13 N. J. 135; People *v.* Seymour, 16 Cal. 332; Grim *v.* Weissenburg School District, 57 Pa. St. 433; State *v.* Union, 33 N. J. 350. The legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one. Mitchell *v.* Deeds, 49 Ill. 416.

[2] Lewis *v.* McElvain, 16 Ohio, 347. But where an act is forbidden by statute under penalty, and therefore illegal, the mere repeal of the statute will not legal-

(*a*) [Utter *v.* Franklin, 172 U. S. 416, 19 Sup. Ct. Rep. 183. See also Erskine *v.* Nelson Co., 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696, and note; Shields *v.* Clifton H. Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. 700.]

ity was only because of the statute, and that statute was founded upon reasons of public policy which had either ceased to be of force, or which the legislature regarded as overborne by countervailing reasons. Under these circumstances it was reasonable and just that the makers of such paper should be precluded from relying upon such invalidity.[1]

By a statute of Connecticut, where loans of money were made, and a bonus was paid by the borrower over and beyond the interest and bonus permitted by law, the demand was subject to a deduction from the principal of all the interest and bonus paid. A construction appears to have been put upon this statute by business men which was different from that afterwards given by the courts, and a large number of contracts of loan were in consequence subject to the deduction. The legislature then passed a "healing act," which provided that such loans theretofore made should not be held, by reason of the taking of such bonus, to be usurious, illegal, or in any respect void; but that, if otherwise legal, they were thereby confirmed, and declared to be valid, as to principal, interest, and bonus. The case of Goshen *v.* Stonington[2] was regarded as sufficient authority in support of this act; and the principle to be derived from that case was stated to be "that where a statute is expressly retroactive, and the object and

ize it. Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423.

[1] Trustees *v.* McCaughy, 2 Ohio St. 152; Johnson *v.* Bentley, 16 Ohio, 97. See also Syracuse Bank *v.* Davis, 16 Barb. 188. By statute, notes issued by unincorporated banking associations were declared void. This statute was afterwards repealed, and action was brought against bankers on notes previously issued. Objection being taken that the legislature could not validate the void contracts, the judge says: "I will consider this case on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihilated. The object of the [original] act was not to vest any right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers they were violators of the law, and objects not of protection but of punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the legislature pardon the crime, without consulting those who committed it? . . . How can the defendants say there was no contract, when the plaintiff produces their written engagement for the performance of a duty, binding in conscience if not in law? Although the contract, for reasons of policy, was so far void that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained; and it would be going very far to say that the legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction." Hess *v.* Werts, 4 S. & R. 356, 361. See also Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Pa. St. 218; Boyce *v.* Sinclair, 3 Bush, 264.

[2] 4 Conn. 209. 224, 10 Am. Dec. 121. See *ante*, pp. 532–534.

effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."[1]

After the courts of the State of Pennsylvania had decided that the relation of landlord and tenant could not exist in that State under a Connecticut title, a statute was passed which provided that the relation of landlord and tenant "shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth, on the trial of any case now pending or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding." In a suit which was pending and had been once tried before the statute was passed, the statute was sustained by the Supreme Court of that State, and afterwards by the Supreme Court of the United States, into which last-mentioned court it had been removed on the allegation that it violated the obligation of contracts. As its purpose and effect was to remove from contracts which the parties had made a legal impediment to their enforcement, there would seem to be no doubt, in the light of the other authorities we have referred to, that the conclusion reached was the only just and proper one.[2]

In the State of Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, by reason of the omission on the part of the officer taking the acknowledgment to state in his certificate that, before and at the time of the grantor making the acknowledgment, he made the contents known to her by reading or otherwise. An act was afterwards passed which provided that "any deed heretofore exe-

[1] Savings Bank *v.* Allen, 28 Conn. 97, 102. See also Savings Bank *v.* Bates, 8 Conn. 505; Andrews *v.* Russell, 7 Blackf. 474; Grimes *v.* Doe, 8 Blackf. 371; Thompson *v.* Morgan, 6 Minn. 292; Parmelee *v.* Lawrence, 48 Ill. 331. In Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9, and in Woodruff *v.* Scruggs, 27 Ark. 26, 11 Am. Rep. 777, a statute forbidding the interposition of the defence of usury was treated as a statute repealing a penalty. See further, Lewis *v.* Foster, 1 N. H. 61; Wilson *v.* Hardesty, 1 Md. Ch. 66; Welch *v.* Wadsworth, 30 Conn. 149; Wood *v.* Kennedy, 19 Ind. 68; Washburn *v.* Franklin, 35 Barb. 599; Parmelee *v.* Lawrence, 48 Ill. 331; Danville *v.* Pace, 25 Gratt. 1. The case of Gilliland *v.* Phillips, 1 S. C. 152, is *contra*; but it discusses the point but little, and makes no reference to these cases. The legislature may impose interest at an increased rate on a debt past due, when the act takes effect. Cummings *v.* Howard, 63 Cal. 503. [Building and loan associations may be exempted from the operation of usury laws. Iowa Savings & L. Assn. *v.* Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. 197.]

[2] Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380. And see Watson *v.* Mercer, 8 Pet. 88; Gross *v.* U.S. Mtge. Co., 108 U. S. 477, 2 Sup. Ct. Rep. 940; Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Payne *v.* Treadwell, 16 Cal. 220; Maxey *v.* Wise, 25 Ind. 1.

cuted pursuant to law, by husband and wife, shall be received in evidence in any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." This statute, though with some hesitation at first, was held to be unobjectionable. The deeds with the defective acknowledgments were regarded by the legislature and by the court as being sufficient for the purpose of conveying at least the grantor's equitable estate; and if sufficient for this purpose, no vested rights would be disturbed, or wrong be done, by making them receivable in evidence as conveyances.[1]

Other cases go much farther than this, and hold that, although the deed was originally ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties by giving it effect.[2] At first sight these cases may seem

[1] Chestnut *v.* Shane's Lessee, 16 Ohio, 599, overruling Connell *v.* Connell, 6 Ohio, 358; Good *v.* Zercher, 12 Ohio, 364; Meddock *v.* Williams, 12 Ohio, 377; and Silliman *v.* Cummins, 13 Ohio, 116. Of the dissenting opinion in the last case, which the court approve in 16 Ohio, 609–610, they say: "That opinion stands upon the ground that the act operates only upon that class of deeds where enough had been done to show that a court of chancery ought, in each case, to render a decree for a conveyance, assuming that the certificate was not such as the law required. And where the title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation." See also Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Journeay *v.* Gibson, 56 Pa. St. 57; Grove *v.* Todd, 41 Md. 633, 20 Am. Rep. 76; Montgomery *v.* Hobson, Meigs, 437. [May validate a defective acknowledgment. Summer *v.* Mitchell, 29 Fla. 179, 10 So. 562, 14 L. R. A. 815, 30 Am. St. 106.] But the legislature, it has been declared, has no power to legalize and make valid the deed of an insane person. Routsong *v.* Wolf, 35 Mo. 174. In Illinois it has been decided that a deed of release of dower executed by a married woman, but not so acknowledged as to be effectual, cannot be validated by retrospective statute, because to do so would be to take from the woman a vested right. Russell *v.* Rumsey, 35 Ill. 362.

[2] Lessee of Walton *v.* Bailey, 1 Binn. 470; Underwood *v.* Lilly, 10 S. & R. 97; Barnet *v.* Barnet, 15 S. & R. 72, 16 Am. Dec. 516; Tate *v.* Stooltzfoos, 16 S. & R. 35, 16 Am. Dec. 546; Watson *v.* Mercer, 8 Pet. 88; Carpenter *v.* Pennsylvania, 17 How. 456; Davis *v.* State Bank, 7 Ind. 316; Estate of Sticknoth, 7 Nev. 227; Ferguson *v.* Williams, 58 Iowa, 717, 13 N. W. 49; Johnson *v.* Taylor, 60 Tex. 360; Johnson *v.* Richardson, 44 Ark. 305; Goshorn *v.* Purcell, 11 Ohio St. 641. In the last case the court say: "The act of the married woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of that mistake; and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of

to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property without an opportunity for trial, inasmuch as they proceed upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of divesting him of it, and passing it over to the grantee.[1] Apparently, therefore, there would seem to be some force to the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away in such a case is *the right in the party to avoid his contract*, — a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.[2] As the point is put by Chief Justice *Parker* of Massachusetts, a party cannot have a vested right to do wrong;[3] or, as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."[4]

The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other

[1] This view has been taken in some similar cases. See Russell *v.* Rumsey, 35 Ill. 362; Alabama, &c. Ins. Co. *v.* Boykin, 38 Ala. 510; Orton *v.* Noonan, 23 Wis. 102; Dale *v.* Medcalf, 9 Pa. St. 108.

[2] In Gibson *v.* Hibbard, 13 Mich. 214, a check, void at the time it was given for want of a revenue stamp, was held valid after being stamped as permitted by a subsequent act of Congress. A similar ruling was made in Harris *v.* Rutledge, 19 Iowa, 387. The case of State *v.* Norwood, 12 Md. 195, is still stronger. The curative statute was passed after judgment had been rendered against the right claimed under the defective instrument, and it was held that it must be applied by the appellate court. See *post*, p. 544.

justice." Similar language is employed in the Pennsylvania cases. See further, Dentzel *v.* Waldie, 30 Cal. 138; Skellenger *v.* Smith, 1 Wash. Ter. 369.

[3] Foster *v.* Essex Bank, 16 Mass. 245. See also Lycoming *v.* Union, 15 Pa. St. 166, 170. There is no vested right in the statutory defence that a contract was made on Sunday. Berry *v.* Clary, 77 Me. 482, 1 Atl. 360.

[4] State *v.* Newark, 25 N. J. 185, 197. Compare Blount *v.* Janesville, 31 Wis. 648; Brown *v.* New York, 63 N. Y. 239; Hughes *v.* Cannon, 2 Humph. 594. A law merely taking away an unconscionable defence is valid. Read *v.* Plattsworth, 107 U. S. 568, 2 Sup. Ct. Rep. 108. In New York, &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473, the right of the legislature to validate a void contract was denied on the ground that to validate it would be to take the property of the contracting party without due process of law. The cases which are *contra* are not examined in the opinion, or even referred to.

persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he held when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests.[1]

If, however, a grantor undertakes to convey more than he possesses, or contrary to the conditions or qualifications which, for the benefit of others, are imposed upon his title, or in fraud of the rights of others whose representative or agent he is, so that the defect in his conveyance consists not in any want of due formality, nor in any disability imposed by law, it is not in the power of the legislature to validate it retrospectively; and we may add, also, that it would not have been competent to authorize it in advance. In such case the rights of others intervene, and they are entitled to protection on the same grounds, though for still stronger reasons, which exist in the case of the *bona fide* purchasers above referred to.[2]

[1] Brinton *v.* Seevers, 12 Iowa, 389; Southard *v.* Central R. R. Co., 26 N. J. 13; Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177; Norman *v.* Heist, 5 W. & S. 171; Greenough *v.* Greenough, 11 Pa. St. 489; Les Bois *v.* Bramell, 4 How. 449; McCarthy *v.* Hoffman, 23 Pa. St. 507; Sherwood *v.* Fleming, 25 Tex. 408; Wright *v.* Hawkins, 28 Tex. 452. See Fogg *v.* Holcomb, 64 Iowa, 621, 21 N. W. 111; McGehee *v.* McKenzie, 43 Ark. 156. The legislature cannot validate an invalid trust in a will, by act passed after the death of the testator, and after title vested in the heirs. Hilliard *v.* Miller, 10 Pa. St. 326. See Snyder *v.* Bull, 17 Pa. St. 54; McCarthy *v.* Hoffman, 23 Pa. St. 507; Bolton *v.* Johns, 5 Pa. St. 145; State *v.* Warren, 28 Md. 338. The cases here cited must not be understood as establishing any different principle from that laid down in Goshen *v.* Stonington, 4 Conn. 209, where it was held competent to validate a marriage, notwithstanding the rights of third parties would be incidentally affected. Rights of third parties are liable to be incidentally affected more or less in any case in which a defective contract is made good; but this is no more than might happen in enforcing a contract or decreeing a divorce. See *post*, p. 548. Also Tallman *v.* Janesville, 17 Wis. 71.

[2] In Shonk *v.* Brown, 61 Pa. St. 327,

We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized, the case falls within the principle above laid down, and the right of the legislature to confirm it must be recognized.[1]

the facts were that a married woman held property under a devise, with an express restraint upon her power to alienate. She nevertheless gave a deed of the same, and a legislative act was afterwards obtained to validate this deed. Held void. *Agnew*, J.: "Many cases have been cited to prove that this legislation is merely confirmatory and valid, beginning with Barnet *v.* Barnet, 15 S. & R. 72, and ending with Journeay *v.* Gibson, 50 Pa. St. 57. The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature intervenes to do justice. But the case before us is different. [The grantor] had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift, which the donor impressed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the legislature to enforce. Her heirs have a right to say, . . . 'The legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.'" "The true principle on which retrospective laws are supported was stated long ago by *Duncan*, J., in Underwood *v.* Lilly, 10 S. & R. 101; to wit, where they impair no contract, or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted." In White Mountains R. R. Co. *v.* White Mountains R. R. Co. of N. H., 50 N. H. 50, it was decided that the legislature had no power, as against non-assenting parties, to validate a fraudulent sale of corporate property. In Alter's Appeal, 67 Pa. St. 341, 5 Am. Rep. 433, the Supreme Court of Pennsylvania declared it incompetent for the legislature, after the death of a party, to empower the courts to correct a mistake in his will which rendered it inoperative, — the title having already passed to his heirs. But where it was not known that the decedent left heirs, it was held competent, as against the State, to cure defects in a will after the death, and thus prevent an escheat. Estate of Sticknoth, 7 Nev. 223.

[1] See Shaw *v.* Norfolk R. R. Corp., 5 Gray, 162, in which it was held that the legislature might validate an unauthorized assignment of a franchise. Also May *v.* Holdridge, 23 Wis. 93, and cases cited, in which statutes authorizing the reassessment of irregular taxes were sustained. In this case, *Paine*, J., says: "This rule must of course be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the im-

This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law, and the authority given was conferred by statute retrospectively.[1]

It has not usually been regarded as a circumstance of importance in these cases, whether the enabling act was before or after the corporation had entered into the contract in question; and if the legislature possesses that complete control over the subject of taxation by municipal corporations which has been declared in many cases, it is difficult to perceive how such a corporation can successfully contest the validity of a special statute, which only sanctions a contract previously made by the corporation, and which, though at the time *ultra vires*, was nevertheless for a public and local object, and compels its performance through an exercise of the power of taxation.[2]

provement, and provide for a reassessment of the tax to pay for it." And see Brewster *v.* Syracuse, 19 N. Y. 116; Kunkle *v.* Franklin, 13 Minn. 127; Boyce *v.* Sinclair, 3 Bush, 261; Dean *v.* Borchsenius, 30 Wis. 236; Stuart *v.* Warren, 37 Conn. 225. A city ordinance may be validated retrospectively. Truchelut *v.* Charleston, 1 N. & McC. 227; Morris *v.* State, 62 Tex. 728. Otherwise where the city had no power to annex territory as it tried to do. Strosser *v.* Fort Wayne, 100 Ind 443.

[1] See, among other cases, McMillan *v.* Boyles, 6 Iowa, 304; Gould *v.* Sterling, 23 N. Y. 456; Thompson *v.* Lee County, 3 Wall. 327; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; Board of Commissioners *v.* Bright, 18 Ind. 93; Gibbons *v.* Mobile, &c. R. R. Co., 36 Ala. 410.

[2] In Hasbrouck *v.* Milwaukee, 13 Wis. 37, it appeared that the city of Milwaukee had been authorized to contract for the construction of a harbor, at an expense not to exceed $100,000. A contract was entered into by the city providing for a larger expenditure; and a special legislative act was afterwards obtained to ratify it. The court held that the subsequent legislative ratification was not sufficient, *proprio vigore*, and without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the city. The court say, per *Dixon*, Ch. J.: "The question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the legislature, in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled right of property, and to take the property of one individual or corporation and transfer it to another." This reasoning is of course to be understood in the light of the particular case before the court; that is to say, a case in which the contract was to do something not within the ordinary functions of local government. See the case explained and defended by the same eminent judge in Mills *v.* Charlton, 29 Wis. 400. Compare Fisk *v.* Kenosha, 26 Wis. 23, 33; Knapp *v.* Grant, 27 Wis. 147; and Single *v.* Supervisors of Marathon, 38 Wis. 363, in which the right to validate a contract which might originally have been author-

Nor is it important in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision;[1] and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.[2] It has been held that a statute allowing amend-

ized was fully affirmed. And see Marshall *v.* Silliman, 61 Ill. 218, 225, opinion by Chief Justice *Lawrence*, in which, after referring to Harward *v.* St. Clair, &c. Drainage Co., 51 Ill. 130; People *v.* Mayor of Chicago, 51 Ill. 17; Hessler *v.* Drainage Com'rs, 53 Ill. 105; and Lovingston *v.* Wider, 53 Ill. 302, it is said, "These cases show it to be the settled doctrine of this court, that, under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already remarked, has received the sanction of express enactment in our existing constitution. That was the effect of the curative act under consideration, and it was therefore void." The cases of Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143; Brewster *v.* Syracuse, 19 N. Y. 116; and Thomas *v.* Leland, 24 Wend. 65, especially, go much further than is necessary to sustain the text. See also Bartholomew *v.* Harwinton, 33 Conn. 408; People *v.* Mitchell, 35 N. Y. 551; Barbour *v.* Camden, 51 Me. 608; Weister *v.* Hade, 52 Pa. St. 474; State *v.* Sullivan, 43 Ill. 412; Johnson *v.* Campbell, 49 Ill. 316. In Brewster *v.* Syracuse, parties had constructed a sewer for the city at a stipulated price which had been fully paid to them. The charter of the city forbade the payment of extra compensation to contractors in any case. The legislature afterwards passed an act empowering the Common Council of Syracuse to assess, collect, and pay over the further sum of $600 in addition to the contract price; and this act was held constitutional. In Thomas *v.* Leland, certain parties had given bond to the State, conditioned to pay into the treasury a certain sum of money as an inducement to the State to connect the Chenango Canal with the Erie at Utica, instead of at Whitestown as originally contemplated, — the sum mentioned being the increased expense in consequence of the change. Afterwards the legislature, deeming the debt thus contracted by individuals unreasonably partial and onerous, passed an act, the object of which was to levy the amount on the owners of real estate in Utica. This act seemed to the court unobjectionable. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had before been given securing the same money can detract from its validity. Should an individual volunteer to secure a sum of money, in itself properly leviable, by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?" Here, it will be perceived, the corporation was compelled to assume an obligation which it had not even attempted to incur, but which private persons, for considerations which seemed to them sufficient, had taken upon their own shoulders. We have expressed doubts of the correctness of this decision, *ante*, p. 338, note, where a number of cases are cited, bearing upon the point.

[1] Bacon *v.* Callender, 6 Mass. 303; Butler *v.* Palmer, 1 Hill, 324; Cowgill *v.* Long, 15 Ill. 202; Miller *v.* Graham, 17 Ohio St. 1; State *v.* Squires, 26 Iowa, 340; Patterson *v.* Philbrook, 9 Mass. 151.

[2] Watson *v.* Mercer, 8 Pet. 88; Mather *v.* Chapman, 6 Conn. 54; People *v.* Su-

ments to indictments in criminal cases might constitutionally be applied to pending suits;[1] and even in those States in which retrospective laws are forbidden, a cause must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced.[2] And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered.[3]

But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it

pervisors, &c., 20 Mich. 95; Satterlee *v.* Matthewson, 16 S. & R. 169, and 2 Pet. 380; Excelsior Mfg. Co. *v.* Keyser, 62 Miss. 155; Phenix Ins. Co. *v.* Pollard, 63 Miss. 641; M'Lane *v.* Bonn, 70 Iowa, 752, 30 N. W. 478; Johnson *v.* Richardson, 44 Ark. 365. See cases, p. 539, note 1, *ante*. A statute giving a wife a right to recover in her own name for personal injury, may apply to a pending action. McLimans *v.* Lancaster, 63 Wis. 596, 23 N. W. 689, following Weldon *v.* Winslow, L. R. 13 Q. B. D. 784. But an act which is penal as to a plaintiff cannot apply to a pending suit. Powers *v.* Wright, 62 Miss. 35. After an appeal bond was signed by an attorney, the court held such bonds void, and then the legislature attempted to validate all existing bonds so signed. This was held bad as against the appellee in the case. Andrews *v.* Beane, 15 R. I. 451, 8 Atl. 540. See Thweatt *v.* Bank, 81 Ky. 1. [Judgment correct when rendered on account of invalidity of law under which action was brought, may be reversed upon appeal when in the interim the statute has been corrected by amendment providing for proper notice to parties interested. Ferry *v.* Campbell, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92.]

[1] State *v.* Manning, 14 Tex. 402.

[2] Rich *v.* Flanders, 39 N. H. 304.

[3] State *v.* Norwood, 12 Md. 195. *Contra*, Wright *v.* Graham, 42 Ark. 140. In Yeaton *v.* United States, 5 Cranch, 281, a vessel had been condemned in admiralty, and pending an appeal the act under which the condemnation was declared was repealed. The court held that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some special provision of statute was made for that purpose. See also Schooner Rachel *v.* United States, 6 Cranch, 329; Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 95; Union Iron Co. *v.* Pierce, 4 Biss. 327; Norris *v.* Crocker, 13 How. 429; Insurance Co. *v.* Ritchie, 5 Wall. 541; *Ex parte* McCardle, 7 Wall. 506; United States *v.* Tynen, 11 Wall. 88; Engle *v.* Shurts, 1 Mich. 150. In the McCardle Case the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending. Per *Chase*, Ch. J.: "Jurisdiction is power to declare the law; and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." But where a State has jurisdiction of a subject, *e. g.* pilotage, until Congress establishes regulations, and penalties are incurred under a State act, and afterwards Congress legislates on the subject, this does not repeal, but only suspends the State law; and a penalty previously incurred may still be collected. Sturgis *v.* Spofford, 45 N. Y. 446. And see People *v.* Hobson, 48 Mich. 27, 11 N. W. 771. [Refusal to pay alimony may be by statute made a contempt of court, punishable by imprisonment, and as this affects the remedy only it may operate retrospectively. Judd *v.* Judd, 125 Mich. 228, 84 N. W. 134.]

had and could have no power to permit or sanction in advance.[1] There lies before us at this time a volume of statutes of one of the States, in which are contained acts declaring certain tax-rolls valid and effectual, notwithstanding the following irregularities and imperfections: a failure in the supervisor to carry out separately, opposite each parcel of land on the roll, the taxes charged upon such parcel, as required by law; a failure in the supervisor to sign the certificate attached to the roll; a failure in the voters of the township to designate, as required by law, in a certain vote by which they had assumed the payment of bounty moneys, whether they should be raised by tax or loan; corrections made in the roll by the supervisor after it had been delivered to the collector; the including by the supervisor of a sum to be raised for township purposes without the previous vote of the township, as required by law; adding to the roll a sum to be raised which could not lawfully be levied by taxation without legislative authority; the failure of the supervisor to make out the roll within the time required by law; and the accidental omission of a parcel of land which should have been embraced by the roll. In each of these cases, except the last, the act required by law, and which failed to be performed, might by previous legislation have been dispensed with; and perhaps in the last case there might be question whether the roll was rendered invalid by the omission referred to, and, if it was, whether the subsequent act could legalize it.[2] But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good. If, for instance, a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be beyond the reach of curative legislation.[3] And if persons or property

[1] Kimball *v.* Rosendale, 42 Wis. 407; Maxwell *v.* Goetschius, 40 N. J. 383, 29 Am. Rep. 242.

[2] See Weeks *v.* Milwaukee, 10 Wis. 242; Dean *v.* Gleason, 16 Wis. 1; *post*, p. 742, note.

[3] This is clearly shown by *McKinstry*, J., in People *v.* Lynch, 51 Cal. 15. And see Billings *v.* Detten, 15 Ill. 218, Conway *v.* Cable, 37 Ill. 82, and Thames Manufacturing Co. *v.* Lathrop, 7 Conn. 550, for cases where curative statutes were held not effectual to reach defects in tax proceedings. As to what defects may or may not be cured by subsequent legislation, see Allen *v.* Armstrong, 16 Iowa, 508; Smith *v.* Cleveland, 17 Wis. 556, and Abbott *v.* Lindenhower, 42 Mo. 162. In Tallman *v.* Janesville, 17 Wis. 71, the constitutional authority of the legislature to cause an irregular tax to be reassessed in a subsequent year, where the rights of *bona fide* purchasers had intervened, was disputed; but the court sustained the authority as "a salutary and highly beneficial feature of our systems of taxation," and "not to be abandoned because in some instances it produces individual hardships." Certainly *bona fide* purchasers, as between themselves and the State,

should be assessed for taxation in a district which did not include them, not only would the assessment be invalid, but a healing statute would be ineffectual to charge them with the burden.[1] In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.[2]

Statutory Privileges and Exemptions.

The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned, — exemptions from the performance of public duties upon juries, or in the militia, and the like; exemptions of property or person from assessment for the purposes of taxation; exemptions of property from being seized on attachment, or execution, or for the payment of taxes; exemption from highway labor, and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require. The State demands the performance of military duty by those persons only who are within certain specified ages; but if, in the opinion of the legislature, the public exigencies should demand military service from all other persons capable of bearing arms, the privilege of exemption might be recalled, without violation of any constitutional principle.

must take their purchases subject to all public burdens justly resting upon them. The case of Conway *v.* Cable is instructive. It was there held, among other things, — and very justly, as we think, — that the legislature could not make good a tax sale effected by fraudulent combination between the officers and the purchasers. The general rule is undoubted, that a sale for illegal taxes cannot be validated. Silsbee *v.* Stockel, 44 Mich. 561, 7 N. W. 160, 367; Brady *v.* King, 53 Cal. 44; Harper *v.* Rowe, 53 Cal. 233. In Miller *v.* Graham, 17 Ohio St. 1, a statute validating certain ditch assessments was sustained, notwithstanding the defects covered by it were not mere irregularities; but that statute gave the parties an opportunity to be heard as to these defects.

[1] See Wells *v.* Weston, 22 Mo. 384; People *v.* Supervisors of Chenango, 11 N. Y. 563; Hughey's Lessee *v.* Horrel, 2 Ohio, 231; Covington *v.* Southgate, 15 B. Monr. 491; Morford *v.* Unger, 8 Iowa, 82; *post*, pp. 718–721.

[2] So held in McDaniel *v.* Correll, 19 Ill. 226, where a statute came under consideration which assumed to make valid certain proceedings in court which were void for want of jurisdiction of the persons concerned. A void appeal bond cannot be validated so as to give to an appellate court jurisdiction which has failed by reason of such defective bond. Andrews *v.* Beane, 15 R. I. 451, 8 Atl. 540. See also Israel *v.* Arthur, 7 Col. 5, 1 Pac. 488; Yeatman *v.* Day, 79 Ky. 186; Roche *v.* Waters, 72 Md. 264, 19 Atl. 535; Denny *v.* Mattoon, 2 Allen, 361; Nelson *v.* Rountree, 23 Wis. 367; Griffin's Ex'r *v.* Cunningham, 20 Gratt. 31, 109, per *Joynes, J.*; Richards *v.* Rote, 68 Pa. St. 218; State *v.* Doherty, 60 Me. 504; Pryor *v.* Downey, 50 Cal. 388; 19 Am. Rep. 656. If land is assessed for taxation in a town where it does not lie, it is not competent to make the tax-deed evidence of title. Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465. Compare Walpole *v.* Elliott, 18 Ind. 258, in which there was not a failure of jurisdiction, but an irregular exercise of it.

The fact that a party had passed the legal age under an existing law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require them.[1] In like manner, exemptions from taxation are always subject to recall, when they have been granted merely as a privilege, and not for a consideration received by the public; as in the case of exemption of buildings for religious or educational purposes, and the like.[2] So, also, are exemptions of property from execution.[3] So, a license to carry on a particular trade for a specified period, may be recalled before the period has elapsed.[4] So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered.[5] So, an offered bounty may be recalled, except as to so much as was actually earned while the offer was a continuing one; and the fact that a party has purchased property or incurred expenses in preparation for earning the bounty cannot preclude the recall.[6] A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon

[1] Commonwealth *v.* Bird, 12 Mass. 443; Swindle *v.* Brooks, 34 Ga. 67; Mayer, *Ex parte*, 27 Tex. 715; Bragg *v.* People, 78 Ill. 328; Moore *v.* Cass, 10 Kan. 288; Murphy *v.* People, 37 Ill. 447; State *v.* Miller, 2 Blackf. 35; State *v.* Quimby, 51 Me. 395; State *v.* Wright, 53 Me. 328; State *v.* Forshner, 43 N. H. 89; Dunlap *v.* State, 76 Ala. 460; *Ex parte* Thompson, 20 Fla. 887. And see Dale *v.* The Governor, 3 Stew. 387.

[2] See *ante*, pp. 395, 396, and notes. All the cases concede the right in the legislature to recall an exemption from taxation, when not resting upon contract. The subject was considered in People *v.* Roper, 35 N. Y. 629, in which it was decided that a limited immunity from taxation, tendered to the members of voluntary military companies, might be recalled at any time. It was held not to be a contract, but "only an expression of the legislative will for the time being, in a matter of mere municipal regulation." And see Christ Church *v.* Philadelphia, 24 How. 300; Lord *v.* Litchfield, 36 Conn. 116; East Saginaw Salt Mfg. Co. *v.* East Saginaw, 19 Mich. 259; s. c. in error, 13 Wall. 373. [Citizens' Saving Bank *v.* Owensboro, 173 U. S. 636, 19 Sup. Ct. Rep. 530, 571.]

[3] Bull *v.* Conroe, 13 Wis. 233.

[4] See *ante*, pp. 399–401, notes.

[5] Oriental Bank *v.* Freeze, 18 Me. 109. The statute authorized the plaintiff, suing for a breach of a prison bond, to recover the amount of his judgment and costs. This was regarded by the court as in the nature of a penalty; and it was therefore held competent for the legislature, even after breach, to so modify the law as to limit the plaintiff's recovery to his actual damages. See *ante*, p. 516, note 2, and cases cited.

[6] East Saginaw Salt Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82, and 13 Wall. 373. But as to so much of the bounty as was actually earned before the change in the law, the party earning it has a vested right which cannot be taken away. People *v.* Auditor-General, 9 Mich. 327. And it has been held competent in changing a country seat to provide by law for compensation, through taxation, to the residents of the old site. Wilkinson *v.* Cheatham, 43 Ga. 258.

the faith of the sovereign grantor.[1] A statutory right to have cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed.[2] A mill-dam act which confers upon the person erecting a dam the right to maintain it, and flow the lands of private owners on paying such compensation as should be assessed for the injury done, may be repealed even as to dams previously erected.[3] These illustrations must suffice under the present head.

Consequential Injuries.

It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others.[4] This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public.[5] The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment.[6] The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can con-

[1] Per *Smith*, J., in Pratt *v.* Brown, 3 Wis. 603, 611. See *post*, pp. 837–840.

[2] *Ex parte* McCardle, 7 Wall. 506. See State *v.* Slevin, 16 Mo. App. 541. And that the right to an appeal, if not expressly given by consitution, need not be provided for. Kundinger *v.* Saginaw, 59 Mich. 325, 26 N. W. 634; Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581; La Croix *v.* Co. Com'rs, 50 Conn. 321. Time may be shortened during a period of disability, in which one may bring an appeal after such disability is removed. Rupert *v.* Martz, 116 Ind. 72, 18 N. E. 381.

[3] Pratt *v.* Brown, 3 Wis. 603. But if the party maintaining the dam had paid to the other party for the permanent flowing of his land a compensation assessed under the statute, it might be otherwise.

[4] For the doctrine *damnum absque injuria*, see Broom's Maxims, 185; Sedgwick on Damages, 30, 112; Cooley on Torts, 93.

[5] See *ante*, p 209, and cases cited in note. Also Wilkinson *v.* Cheatham, 43 Ga. 258; Fearing *v.* Irwin, 55 N. Y. 486; Newton *v* Commissioners, 100 U. S. 548; Howes *v.* Grush, 131 Mass. 207; Heller *v.* Atchison, &c. R. R Co., 28 Kan. 625.

[6] Goshen *v.* Richmond, 4 Allen, 458; Bridgewater *v.* Plymouth, 97 Mass. 382.

stitute no obstacle.[1] But indeed it seems idle to specify instances, inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

We have now endeavored to indicate what are and what are not to be regarded as vested rights, and to classify the cases in which individual interests, in possession or expectancy, are protected against being divested by the direct interposition of legislative authority. Some other cases may now be considered, in which legislation has endeavored to control parties as to the manner in which they should make use of their property, or has permitted claims to be created against it through the action of other parties against the will of the owners. We do not allude now to the control which the State may possess through an exercise of the police power, — a power which is merely one of regulation with a view to the best interests and the most complete enjoyment of rights by all, — but to that which, under a claim of State policy, and without any reference to wrongful act or omission by the owner, would exercise a supervision over his enjoyment of undoubted rights, or which, in some cases, would compel him to recognize and satisfy demands upon his property which have been created without his assent.

In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government.[2] But the ideas which

[1] The State of Massachusetts granted to a corporation the right to construct a toll-bridge across the Charles River, under a charter which was to continue for forty years, afterwards extended to seventy, at the end of which period the bridge was to become the property of the Commonwealth. During the term the corporation was to pay 200*l.* annually to Harvard College. Forty-two years after the bridge was opened for passengers, the State incorporated a company for the purpose of erecting another bridge over the same river, a short distance only from the first, and which would accommodate the same passengers. The necessary effect would be to decrease greatly the value of the first franchise, if not to render it altogether worthless But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury. Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, and 11 Pet. 420. See also Turnpike Co. *v.* State, 3 Wall. 210; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Hollister *v.* Union Co, 9 Conn. 436, 25 Am. Dec. 36; English *v.* New Haven, &c. Co., 32 Conn. 240; Binghamton Bridge Case, 27 N. Y. 87, and 3 Wall. 51; Lehigh Valley Water Co.'s App, 102 Pa. St. 515; Rockland Water Co. *v.* Camden & R. W. Co., 80 Me. 544, 15 Atl. 785; Montjoy *v.* Pillow, 64 Miss. 705, 2 So. 108. See cases cited *ante*, p. 296, note 1.

[2] Montesquieu's Spirit of the Laws,

suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the State of Kentucky at an early day an act was passed to compel the owners of wild lands to make certain improvements upon them within a specified time, and it declared them forfeited to the State in case the statute was not complied with. It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property, if he failed to improve it according to a standard which the legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion; and if defensible on principle, then a law which should authorize the officer to enter a man's dwelling and seize and confiscate his furniture if it fell below, or his food if it exceeded an established legal standard, would be equally so. But in a free country such laws when mentioned are condemned instinctively.[1]

But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought on grounds of strict

B. 7. Such laws, though common in some countries, have never been numerous in England. See references to the legislation of this character, 4 Bl. Com. 170. Some of these statutes prescribed the number of courses permissible at dinner or other meal, while others were directed to restraining extravagance in dress. See Hallam, Mid. Ages, c. 9, pt. II.; and as to Roman sumptuary laws, Encyc. Metrop. Vol. X. p. 110. Adam Smith said of such laws, "It is the highest impertinence and presumption in kings and ministers to pretend to watch over the economy of private people, and to restrain their expense, either by sumptuary laws, or by prohibiting the importation of foreign luxuries." Wealth of Nations, B. 2, c. 3. As to prohibitory Liquor Laws, see *post*, pp. 845–851.

[1] The Kentucky statute referred to was declared unconstitutional in Gaines *v.* Buford, 1 Dana, 484. See also Violett *v.* Violett, 2 Dana, 325.

equity to constitute a charge upon the land improved. If they have been made in good faith, and under a reasonable expectation on the part of the person making them, that he was to reap the benefit of them, and if the owner has stood by and suffered them to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures, and perhaps no sufficient reason why provision should not be made by law for their recovery.

Accordingly in the several States statutes will be found which undertake to provide for these equitable claims. These statutes are commonly known as *betterment laws;* and as an illustration of the whole class, we give the substance of that adopted in Vermont. It provided that after recovery in ejectment, where he or those through whom he claimed had purchased or taken a lease of the land, supposing at the time that the title purchased was good, or the lease valid to convey and secure the title and interest therein expressed, the defendant should be entitled to recover of the plaintiff the full value of the improvements made by him or by those through whom he claimed, to be assessed by jury, and to be enforced against the land, and not otherwise. The value was ascertained by estimating the increased value of the land in consequence of the improvements; but the plaintiff at his election might have the value of the land without the improvements assessed, and the defendant should purchase the same at that price within four years, or lose the benefit of his claim for improvements. But the benefit of the law was not given to one who had entered on land by virtue of a contract with the owner, unless it should appear that the owner had failed to fulfil such contract on his part.[1]

This statute, and similar ones which preceded it, have been adjudged constitutional by the Supreme Court of Vermont, and have frequently been enforced. In an early case the court explained the principle of these statutes as follows: "The action for betterments, as they are termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the defendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been if no labor had been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken

[1] Revised Statutes of Vermont of 1839, p. 216.

from the civil law, where ample provision was made for reimbursing to the *bona fide* possessor the expense of his improvements, if he was removed from his possession by the legal owner. It gives to the possessor not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterments thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it, and the value if no improvement had been made. If the owner takes the land together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."[1]

The last circumstance stated in this opinion — the negligence of the owner in asserting his claim — is evidently deemed important in some States, whose statutes only allow a recovery for improvements by one who has been in possession a certain number of years. But a later Vermont case dismisses it from consideration as not being a necessary ground on which to base the right of recovery. "The right of the occupant to recover the value of his improvements," say the court, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity; viz., that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money; is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements without compensation to him who made them. This principle of natural justice has been very widely — we may say universally — recognized."[2]

[1] Brown *v.* Storm, 4 Vt. 37. This class of legislation was also elaborately examined and defended by *Trumbull*, J., in Ross *v.* Irving, 14 Ill. 171, and in some of the other cases referred to in the succeeding note. See also Bright *v.* Boyd, 1 Story, 478, 2 Story, 605.

[2] Whitney *v.* Richardson, 31 Vt. 300,

Betterment laws, then, recognize the existence of an equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed *in statu quo*, and the statute accomplishes justice as nearly as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as nearly as possible according to natural justice.[1]

306. For other cases in which similar laws have been held constitutional, see Armstrong *v.* Jackson, 1 Blackf. 374; Fowler *v.* Halbert, 4 Bibb, 54; Withington *v.* Corey, 2 N. H. 115; Bacon *v.* Callender, 6 Mass. 303; Pacquette *v.* Pickness, 19 Wis. 219; Childs *v.* Shower, 18 Iowa, 261; Scott *v.* Mather, 14 Tex. 235; Saunders *v.* Wilson, 19 Tex. 194; Brackett *v.* Norcross, 1 Me. 89; Hunt's Lessee *v.* McMahan, 5 Ohio, 132; Longworth *v.* Worthington, 6 Ohio, 9; Stump *v.* Hornback, 94 Mo. 26, 6 S. W. 356. See further, Jones *v.* Carter, 12 Mass. 314; Coney *v.* Owen, 6 Watts, 435; Steele *v.* Spruance, 22 Pa. St. 256; Lynch *v.* Brodie, 63 Pa. St. 206; Dothage *v.* Stuart, 35 Mo. 251; Fenwick *v.* Gill, 38 Mo. 510; Howard *v.* Zeyer, 18 La. Ann. 407; Pope *v.* Macon, 23 Ark. 644; Marlow *v.* Adams, 24 Ark. 109; Ormond *v.* Martin, 37 Ala. 598; Love *v.* Shartzer, 31 Cal. 487; Griswold *v.* Bragg, 48 Conn. 577, 18 Blatch. 202; Guild *v.* Kidd, 48 Mich. 307, 12 N. W. 158. [Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. 132.] For a contrary ruling, see Nelson *v.* Allen, 1 Yerg. 360, in which, however, Judge *Catron* in a note says the question was really not involved. Mr. Justice *Story* held in Society, &c. *v.* Wheeler, 2 Gall. 105, that such a law could not constitutionally be made to apply to improvements made before its passage; but this decision was made under the New Hampshire Constitution, which forbade retrospective laws. The principles of equity upon which such legislation is sustained would seem not to depend upon the time when the improvements were made. See Davis's Lessee *v.* Powell, 13 Ohio, 308. In Childs *v.* Shower, 18 Iowa, 261, it was held that the legislature could not constitutionally make the value of the improvements a personal charge against the owner of the land, and authorized a personal judgment against him. The same ruling was had in McCoy *v.* Grandy, 3 Ohio St. 463. A statute had been passed authorizing the occupying claimant at his option, after judgment rendered against him for the recovery of the land, to demand payment from the successful claimant of the full value of his lasting and valuable improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. The court say: "The occupying claimant act, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, goes to the utmost stretch of the legislative power touching this subject. And the statute . . . providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the Constitution."

[1] In Harris *v.* Inhabitants of Marblehead, 10 Gray, 40, it was held that the betterment law did not apply to a town

Unequal and Partial Legislation.

In the course of our discussion of this subject, it has been seen that some statutes are void though general in their scope, while others are valid though establishing rules for single cases only. An enactment may therefore be the law of the land without being a general law. And this being so, it may be important to consider in what cases constitutional principles will require a statute to be general in its operation, and in what cases, on the other hand, it may be valid without being general. We speak now in reference to general constitutional principles, and not to any peculiar rules which may have become established by special provisions in the constitutions of individual States.

The cases relating to municipal corporations stand upon peculiar grounds from the fact that those corporations are agencies of government, and as such are subject to complete legislative control. Statutes authorizing the sale of property of minors and other persons under disability are also exceptional, in that they are applied for by the parties representing the interests of the owners, and are remedial in their character. Such statutes are supported by the presumption that the parties in interest would consent if capable of doing so; and in law they are to be considered as assenting in the person of the guardians or trustees of their rights. And perhaps in any other case, if a party petitions for legislation and avails himself of it, he may justly be held estopped from disputing its validity;[1] so that the great bulk of private legislation which is adopted from year to year may at once be dismissed from this discussion.

Laws public in their objects may, unless express constitutional provision forbids,[2] be either general or local in their application;

which had appropriated private property for the purposes of a school-house, and erected the house thereon. The law, it was said, did not apply "where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house, or any other building erected upon it." But as a matter of constitutional authority, we see no reason to doubt that the legislature might extend such a law even to the cases of this description.

[1] This doctrine was applied in Ferguson *v.* Landram, 5 Bush, 230, to parties who had obtained a statute for the levy of a tax to refund bounty moneys, which statute was held void as to other persons. And see Motz *v.* Detroit, 18 Mich. 495; Dewhurst *v.* Allegheny, 95 Pa. St. 437; Andrus *v.* Board of Police, 41 La. Ann. 697, 6 So. 603. A man may be bound by his assent to an act changing the rules of descent in his particular case, though it would be void if not assented to. Beall *v.* Beall, 8 Ga. 210.

[2] See *ante*, pp. 176–181, notes, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all per-

they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like.[1] The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid.[2] These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens.[3] The business of common carriers, for instance,

sons within the territorial limits described in the act. State *v.* County Commissioners of Baltimore, 29 Md. 516. See Pollock *v.* McClurken, 42 Ill. 370; Haskel *v.* Burlington, 30 Iowa, 232; Unity *v.* Burrage, 103 U. S. 447. Liquor sales may be forbidden in the country and permitted in the towns. State *v.* Berlin, 21 S. C. 292; Howell *v.* State, 71 Ga. 324. See Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463. Compare Hatcher *v.* State, 12 Lea, 308. An act may be made a misdemeanor in certain counties only. Davis *v.* State, 68 Ala. 58; State *v.* Moore, 104 N. C. 714, 10 S. E. 143. But a law is void which makes pool selling innocent under certain circumstances, while it is generally an offence. Daly *v.* State, 13 Lea, 228. [An act requiring repayment of taxes erroneously paid cannot be made applicable to a single county. Hamilton Co. Com'rs *v.* Rasche, 50 Ohio St. 103, 33 N. E. 408, 19 L. R. A. 584.]

[1] See the Iowa R. R. Land Co. *v.* Soper, 39 Iowa, 112; Matter of Goodell, 39 Wis. 232, 20 Am. Rep. 42; Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383.

[2] The constitutional requirement of equal protection of the laws does not make necessary the same local regulations, municipal powers, or judicial organization or jurisdiction. Missouri *v.* Lewis, 101 U. S. 22. See Strauder *v.* W. Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339.

[3] The prohibition of special legislation for the benefit of individuals does not preclude laws for the benefit of particular classes; as, for example, mechanics and other laborers. Davis *v.* State, 3 Lea, 375. But under it peculiar provisions as to liens cannot be made applicable to but two counties. Woodard *v.* Brien, 14 Lea, 520. [When the laws already provide for the inspection of grain, live-stock, and dressed meats, an exception of dealers in such products from the provisions of an act requiring commission merchants in cities of specified size to take out licenses is not void on account of arbitrariness. Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. 103.] A statute exempting from taxation property to the amount of $500 of widows and maids

or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. (*a*) If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge. (*b*)

But a statute would not be constitutional which should proscribe a class or a party for opinion's sake,[1] or which should

held unconstitutional because unequal. State *v.* Indianapolis, 69 Ind. 375, 35 Am. Rep. 223; Warner *v.* Curran, 75 Ind. 309. [A statute forbidding contracts between railway companies and their employees, and exempting such companies from liability for damages for personal injuries, is void as class legislation and as an unreasonable restraint upon freedom of contract. Shaver *v.* Pennsylvania Ry. Co., 71 Fed. Rep. 931.]

It is not competent to except from right to recover for injury from defective sidewalk all who do not reside in States where similar injuries constitute right of action. Pearson *v.* Portland, 69 Me. 278, 31 Am. Rep. 276. The rule of non-liability of the master to a servant for injury suffered through a fellow-servant's negligence may be abrogated as to railroad companies. Missouri Pac. Ry. Co. *v.* Mackeye, 33 Kan. 298, 6 Pac. 291. A police regulation, affecting all railroads, to enforce a quicker delivery of freight is valid. Little Rock, &c. Ry. Co. *v.* Hanniford, 49 Ark. 291, 5 S. W. 294. [A statute rendering telegraph companies liable for mental anguish caused by failure to promptly transmit and deliver messages does not deprive them of property without due process of law or deny them the equal protection of the law. Simmons *v.* West. U. Tel. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607.] So one forbidding burying an animal killed by a train. Bannon *v.* State, 49 Ark. 167, 4 S. W. 655. An attorney fee, as a penalty, may be allowed for non-compliance with fencing law if animal is so killed. Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. *Contra*, Wilder *v.* Chicago, &c. Ry. Co., 76 Mich. 382, 38 N. W. 289; South, &c. R. R. Co. *v.* Morris, 65 Ala. 193; as class legislation. [See in addition upon statutes allowing attorney's fees in particular classes of cases. Gano *v.* Minneapolis & St. L. Ry. Co., 114 Iowa, 713, 87 N. W. 714, 55 L. R. A. 263, and cases cited. Hocking Valley Coal Co. *v.* Rosser, 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 386; Vogel *v.* Pekoe, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Cameron *v.* Chicago, M. & St. P. Ry. Co., 60 Minn. 100, 61 N. W. 814, 31 L. R. A. 553; Title Guaranty Co. *v.* Wrenn, 35 Oreg. 62, 56 Pac. 271, 76 Am. St. 454.]

[1] The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indorser or supporter of the Helper book, shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introducing into legislation the princi-

(*a*) [The classification underlying such legislation must be a reasonable one. If arbitrary or unreasonable, the courts do not hesitate to declare the legislation void. Sutton *v.* State, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589. A statute providing for the treatment of inebriates at the expense of the county, and limiting the operation of such legislation to counties having a population of fifty thousand or more, is void as being unreasonable to so restrict its application. Murray *v.* Board of Co. Com'rs, 81 Minn. 359, 84 N. W. 103, 83 Am. St. 379, 51 L. R. A. 828.]

(*b*) [But see People *v.* Coolidge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493, apparently *contra*.]

select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt.[1]

ple of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question" Baltimore *v.* State, 15 Md. 376, 468, 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of these facts of general notoriety, which, like the names of political parties, are a part of the public history of the times. A statute requiring causes in which the venue has been changed to be remanded on the affidavits of three unconditional Union men, that justice can be had in the courts where it originated, held void, on the principles stated in the text, in Brown *v.* Haywood, 4 Heisk. 357.

It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution. State *v.* Jackson, 80 Mo. 175; State *v.* Gibson, 36 Ind. 389, 10 Am. Rep. 42; State *v.* Hairston, 63 N. C. 451; State *v.* Kenny, 76 N. C. 251, 22 Am. Rep. 683; Ellis *v.* State, 42 Ala. 525; Green *v.* State, 58 Ala. 190, 29 Am. Rep. 739; Kinney's Case, 30 Gratt. 858; Frasher *v.* State, 3 Tex. App. 263, 30 Am. Rep. 131; Lonas *v.* State, 3 Heisk. 287, 1 Green, Cr. R. 452; *Ex rel.* Hobbs & Johnson, 1 Woods, 537; *Ex parte* Kinney, 3 Hughes, 9; *Ex parte* Francois, 3 Woods, 367. [The exclusion of colored persons from a jury on account of color violates the constitutional provision for the protection of civil rights. State *v.* Peoples, 131 N. C. 784, 42 S. E. 814.] It is also said colored children may be required to attend separate schools, if impartial provision is made for their instruction. State *v.* Duffy, 7 Nev. 342, 8 Am. Rep. 713; Cory *v.* Carter, 48 Ind. 327; Ward *v.* Flood, 48 Cal. 36; State *v.* McCann, 21 Ohio St. 198; People *v.* Gallagher, 93 N. Y. 438; Bertonneau *v.* School Directors, 3 Woods, 177. But some States forbid this. People *v.* Board of Education, 18 Mich. 400; Clark *v.* Board of Directors, 24 Iowa, 266; Dove *v.* School District, 41 Iowa, 689; Chase *v.* Stephenson, 71 Ill. 383; People *v.* Board of Education of Quincy, 101 Ill. 308; Board of Education *v.* Tinnon, 26 Kan. 1; Pierce *v.* Union Dist., 46 N. J. L. 76; Kaine *v.* Com., 101 Pa. St. 490. See Dawson *v.* Lee, 83 Ky. 49. And when separate schools are not established for colored children, they are entitled to admission to the other public schools. State *v.* Duffy, *supra*. Where separate schools are allowed, property of whites cannot be taxed for white schools alone, and of negroes for negro schools. Puitt *v.* Com'rs, 94 N. C. 709; Claybrook *v.* Owensboro, 16 Fed. Rep. 297.

[1] Lin Sing *v.* Washburn, 20 Cal. 534; Brown *v.* Haywood, 4 Heisk. 357. A San Francisco ordinance required every male person imprisoned in the county jail to have his hair cut to an uniform length of one inch. This was held invalid, as being directed specially against the Chinese. Ah Kow *v.* Nonan, 5 Sawyer, 552. See Yick Wo *v.* Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. [A statute defining a "tramp" and prescribing a heavier punishment for certain criminal conduct

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.[1] Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriæ*, when not forbidden, may grant authority to the guardians or trustees of incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the dis-

of such persons than is attached to similar conduct of others is not invalid for that reason. It is uniform in its application to all within the class. State *v.* Hogan, 63 Ohio, 202, 58 N. E. 572, 52 L. R. A. 863. See *post*, 837, a. Upon question of special legislation see Arms *v.* Ayer, 192 Ill. 601, 61 N. E. 851, 85 Am. St. 357.] In Louisiana an ordinance forbidding the sale of goods on Sunday, but excepting from its operation those keeping their places of business closed on Saturday, was held partial and therefore unconstitutional. Shreveport *v.* Levy, 26 La. Ann. 671, 21 Am. Rep. 553. A Sunday closing law is not unequal because it excepts certain business as necessary. Lieberman *v* State, 26 Neb. 464, 42 N. W. 419. A liquor seller may not be forbidden to sign the bond of another liquor seller. Kuhn *v.* Common Council, 70 Mich. 534, 38 N. W. 470. Nor may the right to sell liquor, where a lawful business, be made dependent on the caprice or private judgment of the board which approves the sellers' bond. People *v.* Haug, 68 Mich. 549, 37 N. W. 21. Keeping open after legal hours cannot be declared a breach of the peace for which an arrest may be made without a warrant. *Id.* There is no reason, however, why the law should not take notice of peculiar views held by some classes of people, which unfit them for certain public duties, and excuse them from the performance of such duties; as Quakers are excused from military duty, and persons denying the right to inflict capital punishment are excluded from juries in capital cases. These, however, are in the nature of exemptions, and they rest upon considerations of obvious necessity. [A fire tax upon property is void as to railroads unless their property is accorded equality of opportunity with other property taxed to be protected by the measures provided out of the proceeds of such taxes. Atchison, T. & S. F. R. Co. *v.* Clark, 60 Kan. 826, 58 Pac. 477, 47 L. R. A. 77. The recent "department store" legislation enacted in some form in several of the States has been before the courts in several cases, and has generally been overturned as an arbitrary and unreasonable restraint upon the freedom to contract, as an attempt to use the police power of the State where there is no occasion for its exercise, and as denying property rights to one class in the community, permitted to others. Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 75 Am. St. 93; State *ex rel.* Wyatt *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. 705, 48 L. R. A. 265.]

[1] The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. Holden *v.* James, 11 Mass. 396; Davison *v.* Johonnot, 7 Met. 388. See *ante*, p. 521, note. The general exemption laws cannot be varied for particular cases or localities. Bull *v.* Conroe, 13 Wis. 233, 244. The legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law. Teft *v.* Teft, 3 Mich. 67; Simonds *v.* Simonds, 103 Mass. 572. See, for the same principle, Alter's Appeal, 67 Pa. St. 341. The authority in emergencies to suspend the civil laws in a part of the State only, by a declaration of martial law, we do not call in question by anything here stated. Nor in what we have here said do we have any reference to suspensions of the laws generally, or of any particular law, under the extraordinary circumstances of rebellion or war.

charge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."[1] This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.[2]

[1] Locke on Civil Government, § 142; State *v.* Duffy, 7 Nev. 349; Strauder *v.* W. Virginia, 100 U. S. 303; Bernier *v.* Russell, 89 Ill. 60. [This principle is not to be carried so far as to put all persons on an equality as to rights which are not natural rights. So though there be a statute providing that the masculine shall include all genders, a woman is not entitled to admission to the bar under a statute providing that "any male citizen," possessing certain qualifications, shall be admitted, and such statute is valid. *Re* Maddox, 93 Md. 727, 50 Atl. 487, 55 L. R. A. 298, and cases cited in note.]

[2] In Lewis *v.* Webb, 3 Me. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." See also Durham *v.* Lewiston, 4 Me. 140; Holden *v.* James, 11 Mass. 396; Piquet, Appellant, 5 Pick. 65; Budd *v.* State, 3 Humph. 483; Van Zant *v.* Waddell, 2 Yerg. 260; People *v.* Frisbie, 26 Cal. 135; Davis *v.* Menasha, 21 Wis. 491; Lancaster *v.* Barr, 25 Wis. 560; Brown *v.* Haywood, 4 Heisk. 357; Wally's Heirs *v.* Kennedy, 2 Yerg. 554, 24 Am. Dec. 511. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law, by another; whereas the like general law affecting the whole community equally could not have been passed." Special burdens cannot be laid upon a particular class in the community. Millett *v.* People, 117 Ill. 294, 7 N. E. 631. Miners and manufacturers alone cannot be forbidden to pay in store orders. State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285. See, also, Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. 354; State *v.* Fire Creek, &c. Co.,

Special courts cannot be created for the trial of the rights and obligations of particular parties;[1] and those cases in which legislative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend general laws in special cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its

33 W. Va. 188, 10 S. E. 288. [Statute attempting to give laborers, employed by any corporation that fails to pay its laborers monthly, "a lien on all the property of said corporation . . . which lien shall take preference over all other liens except duly recorded mortgages or deeds of trust," and in addition "a reasonable attorney's fee" upon suit brought thereunder, is void as involving an unconstitutional discrimination. Johnson *v.* Goodyear Mining Co., 127 Cal. 4, 59 Pac. 301, 47 L. R. A. 368; and see other cases pro and con in notes on equal protection on pp. 15 and 560, *ante* and *post*. A statute making it unlawful to prevent or attempt to prevent an employee from joining any lawful labor organization, or to discharge a laborer because of his connection with such organization, is void as violating the constitutional guarantee against depriving any person of life, liberty, or property without due process of law. Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283; State *v.* Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. 443.] Recovery against newspaper publishers for libel cannot be limited to actual damage, provided a retraction is published and the libel was published in good faith. Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731. Otherwise in Minnesota. Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936. See further, Officer *v.* Young, 5 Yerg. 320; Griffin *v.* Cunningham, 20 Gratt. 31 (an instructive case); Dorsey *v.* Dorsey, 37 Md. 64, 11 Am. Rep. 528; Trustees *v.* Bailey, 10 Fla. 238; Lawson *v.* Jeffries, 47 Miss. 686, 12 Am. Rep. 342; Arnold *v.* Kelley, 5 W. Va. 446; *ante*, pp. 137–139. But an act was sustained in Minnesota which gave one individual a right of appeal from the legal tribunal and denied it to others. Dike *v.* State, 38 Minn. 366, 38 N. W. 95. [The legislature cannot restrict the power of the courts to determine whether the facts in a case coming before the court amount to negligence or not, nor can it make the failure of a railroad commissioner to require a flagman to be stationed at a railway crossing conclusive that the failure of the railway company to station one there is not negligence. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679.] And physicians who have not a diploma and have not practised a certain time in the State may be required to take out a license. State *v.* Green, 112 Ind. 462, 14 N. E. 352; People *v.* Phippen, 70 Mich. 6, 37 N. W. 888. *Contra* in New Hampshire, State *v.* Pennoyer, 65 N. H. 113, 18 Atl. 878; State *v.* Hinman, 65 N. H. 103, 18 Atl. 194. See further cases, p. 890, note 2, *post*.

[1] As, for instance, the debtors of a particular bank. Bank of the State *v.* Cooper, 2 Yerg. 599, 24 Am. Dec. 517. Compare Durkee *v.* Janesville, 28 Wis. 464, in which it was declared that a special exemption of the city of Janesville from the payment of costs in any proceeding against it to set aside a tax or tax sale was void. And see Memphis *v.* Fisher, 9 Bax. 240. In Matter of Nichols, 8 R. I. 50, a special act admitting a tort debtor committed to jail to take the poor debtor's oath and be discharged, was held void. The legislature cannot confer upon a corporation privileges or exemptions which it could not confer constitutionally upon a private person. Gordon *v.* Building Association, 12 Bush, 110. As to what is not a violation of this principle, see United States *v.* Union Pac. R. R. Co., 98 U. S. 569.

generality. Distinctions in these respects must rest upon some reason upon which they can be defended, — like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. (*a*) To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their "pursuit of happiness;" [1] and those who should claim a right to do so ought to be able to show a specific authority there-

[1] Burlamaqui (Politic. Law, c. 3, § 15) defines *natural liberty* as the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men. See 1 Bl. Com. 125. Lieber says: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." Civil Liberty and Self-Government. "Legal Liberty," says Mackintosh, in his essay on the Study of the Law of Nature and of Nations, "consists in every man's security against wrong."

(*a*) [Act requiring commission-merchants engaged in the sale of farm produce to give bonds in specified sum conditioned upon faithful performance of contracts, held bad in People *v.* Coolidge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493, 83 Am. St. 352. On the other hand, such legislation was sustained in State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 77 Am. St. 681, and in Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. 103, 47 L. R. A. 802. The exemption of real estate dealers and contractors whose business does not amount to $1,000 per annum, from the operation of an ordinance imposing a license tax for the transaction of business, is unconstitutional. Com. *v.* Clark, 195 Pa. 634, 46 Atl. 286, 57 L. R. A. 348. A statute providing for the inspection of coal mines is not void for exempting mines not employing more than five men. Consol. Coal Co. *v.* Illinois, 185 U. S. 203, 22 Sup. Ct. Rep. 616; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431; Brown & Allen *v.* Jacobs Pharmacy Co., 115 Ga. 429, 41 So. 553, 57 L. R. A. 547. An ordinance giving a monopoly to union labor by providing that all city contracts shall provide that none but union labor shall be employed, is unconstitutional as class legislation. Fiske *v.* State, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291. A statute requiring persons before practising osteopathy to study four years, and pass certain examinations, while not requiring equivalent preparation of those practising according to other schools of medicine, is unconstitutional. State *v.* Gravette, 65 Ohio, 289, 62 N. E. 325, 87 Am. St. 605, 55 L. R. A. 791. See also Cook *v.* Marshall Co., — Iowa, —, 92 N. W. 372; Verges *v.* Milwaukee Co., — Wis. —, 92 N. W. 44.]

for, instead of calling upon others to show how and where the authority is negatived.

Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.[1]

[1] In the Case of Monopolies, Darcy *v.* Allain, 11 Rep. 84, the grant of an exclusive privilege of making playing cards was adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; *for the end* of all these monopolies is for the private gain of the patentees." And see Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; State *v.* Cincinnati, &c. Gas Co., 18 Ohio St. 262. Compare with these, State *v.* Milwaukee Gas Light Co., 29 Wis. 454. On this ground it has been denied that the State can exercise the power of taxation on behalf of corporations who undertake to make or to improve the thoroughfares of trade and travel for their own benefit. The State, it is said, can no more tax the community to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build and own railroads in consideration of expected incidental benefits, than it can make them to the men who build stores or manufactories in consideration of similar expected benefits. People *v.* Township Board of Salem, 20 Mich. 452. See further, as to monopolies, Chicago *v.* Rumpff, 45 Ill. 90; Gale *v.* Kalamazoo, 23 Mich. 344. In State *v.* Mayor, &c. of Newark, 35 N. J. 157, 10 Am. Rep. 223, the doctrine of the text was applied to a case in which by statute the property of a society had been exempted from "taxes and assessments;" and it was held that only the ordinary public taxes were meant, and the property might be subjected to local assessments for municipal purposes. State grants are not exclusive unless made so in express terms. Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42, 36 Am Dec. 374; Gaines *v.* Coates, 51 Miss. 335; Wright *v.* Nagle, 101 U. S. 791. Where monopolies are forbidden, it is nevertheless competent to give exclusive rights to a water company to supply a city for a term of years. Memphis *v.* Water Co., 5 Heisk. 495. A corporation formed under a general law allowing formation of gas companies cannot as part of its corporate purposes include the purchase and holding of shares of existing gas companies, thus creating a monopoly. People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798. See People *v.* Refining Co, 7 N. Y. Supp. 406. [City council's grant of exclusive right to remove garbage from all places within city limits, was sustained in Walker *v.* Jameson, 140 Ind. 591, 39 N. E. 869, 28 L. R. A. 679, 49 Am. St. 222; and in Smiley *v.* McDonald, 42 Neb. 5, 60 N. W. 355, 27 L. R. A. 540, 47 Am. St. 684; but not in *Re* Lowe, 54 Kan. 757, 39 Pac. 710, 27 L. R. A. 545; upon such contracts, see note in 27 L. R. A. 540. The question of equality of protection and privilege under the Constitution was before the Supreme Court of the United States in Connolly *v.* Union Sewer-Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431, and in speaking of an anti-trust statute of Illinois which exempted from its operation producers of agricultural products and raisers of live stock, that court said: "The difficulty is not met by saying that generally speaking the State, when enacting laws, may, in its discretion, make a classification of firms, corporations, and associations in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the

The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or designed. It has been held that a statute requiring attorneys to render services in suits for poor persons without fee or reward, was to be confined strictly to the cases therein prescribed, and if by its terms it expressly covered civil cases only, it could not be extended to embrace defences of criminal prosecutions.[1] So

enforcement of those constitutional provisions intended to secure that equality of rights which is the security of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." The Connolly case is followed in People *v.* Butler St. F. & I. Co., — Ill. —, 66 N. E. 349. The prior cases on the validity of legislation affecting different classes differently are cited in the opinion, and certain of them distinguished, particularly Magoun *v.* Illinois Trust & S. B. Co., 170 U. S. 283, 18 Sup. Ct. Rep. 594, and American Sugar R. Co. *v.* Louisiana, 179 U. S. 89, 21 Sup. Ct. Rep. 43. See also Iowa Life Ins. Co. *v.* Lewis, — U. S. —, 23 Sup. Ct. Rep. 126, upon the right of a State to provide for the recovery of damages and attorney's fees against life and health insurance companies for failure to pay losses when they mature, against the objection of class legislation. In the opinion, Fidelity Mut. L. Ins. Asso. *v.* Mettler, 185 U. S. 308, 22 Sup. Ct. Rep. 662, is relied upon and followed, the court holding the act valid. In Magoun *v.* Illinois, etc., *supra*, the court made the following declaration of the principles applicable to the determination of questions of classification of objects for purposes of legislation: "The State may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion, and this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid, because not depending on scientific or marked differences in things or persons or their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." In Boorum *v.* Connelly, 66 N. J. L. 197, 48 Atl. 955, 88 Am. St. 469, it is held, upon the authority of Van Riper *v.* Parsons, 40 N. J. L. 123, and Rutgers *v.* Mayor of Brunswick, 42 N. J. L. 51, that "a law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law, without regard to the consideration that, within this State, there happens to be but one individual of that class, or one place where it produces effect."]

[1] Webb *v.* Baird, 6 Ind. 13. [Legislature cannot confine the use of low-test petroleum oil for lighting purposes to apparatus of one maker, where there are others adapted to the same use. State *v.* Santee, 111 Iowa, 1, 82 N. W. 445, 53 L. R. A. 763, 82 Am. St. 489. It may be noted that this case is not authority for the doctrine that a State may not under any circumstances create a monopoly. A statute requiring a longer course of study as a condition to the obtaining of a limited certificate for the practice of "osteopathy" than is required of those contemplating the regular practice of medicine, is void for inequality. State *v.* Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791, 87 Am. St. 605; a statute for the regulation of the practice of medicine excluded from its operation,

where a constitutional provision confined the elective franchise to "*white* male citizens," and it appeared that the legislation of the State had always treated of negroes, mulattoes, and *other colored persons* in contradistinction to white, it was held that although quadroons, being a recognized class of colored persons, must be excluded, yet that the rule of exclusion would not be carried further.[1] So a statute making parties witnesses against themselves cannot be construed to compel them to disclose facts which would subject them to criminal punishment.[2] And a statute which authorizes summary process in favor of a bank against debtors who have by express contract made their obligations payable at such bank, being in derogation of the ordinary principles of private right, must be subject to strict construction.[3] These cases are only illustrations of a rule of general acceptance.[4]

There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all;[5] and if it is important that they should exist, the proper State authority must be left to select the grantees.[6] Of this class are grants of the franchise to be a corporation.[7] Such grants, however, which con-

osteopaths, dentists, and non-residents called in consultation or engaged in practice adjacent to the State line, and was upheld as a reasonable classification. Parks *v.* State, — Ind. —, 61 N. E. 862. An act imposing a penalty upon the failure of an insurance company to pay its losses as provided in its contracts, is not unconstitutional, as not applicable to the obligations of all persons. New York Life Ins. Co. *v.* English, — Tex. Civ. App. —, 70 S. W. 440. Decided on authority of Association *v.* Mettler, 185 U. S. 308, 22 Sup. Ct. Rep. 662.]

[1] People *v.* Dean, 14 Mich. 406. See Bailey *v.* Fiske, 34 Me. 77; Monroe *v.* Collins, 17 Ohio St. 665. The decisions in Ohio were still more liberal, and ranked as white persons all who had a preponderance of white blood. Gray *v.* State, 4 Ohio, 353; Jeffres *v.* Ankeny, 11 Ohio, 372; Thacker *v.* Hawk, 11 Ohio, 376; Anderson *v.* Millikin, 9 Ohio St. 568. But see Van Camp *v.* Board of Education, 9 Ohio St. 406. Happily all such questions are now disposed of by constitutional amendments. It seems, however, in the opinion of the Supreme Court of California, that these amendments do not preclude a State denying to a race, *e. g.* the Chinese, the right to testify against other persons. People *v.* Brady, 40 Cal. 198, 6 Am. Rep. 604.

[2] Broadbent *v.* State, 7 Md. 416. See Knowles *v.* People, 15 Mich. 408.

[3] Bank of Columbia *v.* Okely, 4 Wheat. 235.

[4] See 1 Bl. Com. 89, and note.

[5] Mason *v.* Bridge Co., 17 W. Va. 396. But a franchise is not necessarily exclusive so long as there is nothing to prevent granting like power to another corporation. Matter of Union Ferry Co., 98 N. Y. 139.

[6] In Gordon *v.* Building Association, 12 Bush, 110, it is decided that a special privilege granted to a particular corporation to take an interest on its loans greater than the regular interest allowed by law is void; it not being granted in consideration of any obligation assumed by the corporation to serve the public.

[7] That proper grants of this sort are not to be regarded as partial legislation, see Tipton *v.* Locomotive Works, 103 U. S. 523, 1 Am. & Eng. R. R. Cas. 517: North and S. Ala. R. R. Co. *v.* Morris, 65 Ala. 193.

fer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators.[1] The just presumption in every such case is, that the State has granted in express terms all that it designed to grant at all. "When a State," says the Supreme Court of Pennsylvania, "means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. . . . In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending [its privileges], let the legislature see to it, but let it be remembered that nothing but plain English words will do it."[2] This is sound doctrine, and should be vigilantly observed and enforced.

[1] Providence Bank *v.* Billings, 4 Pet. 514; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 544; Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172; Richmond, &c. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Parker *v.* Sunbury & Erie R. R. Co., 19 Pa. St. 211; Wales *v.* Stetson, 2 Mass. 143; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, and 3 Wall. 51; State *v.* Krebs, 64 N. C. 604. [Stein *v.* Bienville Water S. Co., 141 U. S. 67, 11 Sup. Ct. Rep. 892; Central Transp. Co. *v.* Pullman's P. C. Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478; Skaneateles Waterworks Co. *v.* Skaneateles, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687.]

[2] Pennsylvania R. R. Co. *v.* Canal Commissioners, 21 Pa. St. 9, 22. And see Commonwealth *v.* Pittsburg, &c. R. R. Co., 24 Pa. St. 159; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, 93, per *Wright*, J.; Baltimore *v.* Baltimore, &c. R. R. Co., 21 Md. 50; Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42, 36 Am. Dec. 374; Richmond *v.* Richmond & Danville R. R. Co., 21 Gratt. 604; Holyoke Co. *v.* Lyman, 15 Wall. 500; Delancey *v.* Insurance Co., 52 N. H. 581; Spring Valley Water Works *v.* San Francisco, 52 Cal. 111; Gaines *v.* Coates, 51 Miss. 335. We quote from the Supreme Court of Connecticut in Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294, 306: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted, the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled. Acts of the former kind,

And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate. "Private statutes," says *Parsons*, Ch. J., "made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication."[1] And the grant of ferry rights, or the right to erect a toll-bridge, and the like, is not only to be

being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that their interests might be promoted at the sacrifice or to the injury of those of others whose interests should be equally regarded. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others."

[1] Coolidge *v.* Williams, 4 Mass. 140. See also Dyer *v.* Tuscaloosa Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655; Grant *v.* Leach, 20 La. Ann. 329. In Sprague *v.* Birdsall, 2 Cow. 419, it was held that one embarking upon the Cayuga Lake six miles from the bridge of the Cayuga Bridge Co., and crossing the lake in an oblique direction, so as to land within sixty rods of the bridge, was not liable to pay toll under a provision in the charter of said company which made it unlawful for any person to cross within three miles of the bridge without paying toll. In another case arising under the same charter, which authorized the company to build a bridge across the lake *or* the outlet thereof, and to rebuild in case it should be destroyed or carried away by the ice, and prohibited all other persons from erecting a bridge within three miles of the place where a bridge should be erected by the company, it was held, after the company had erected a bridge across the lake and it had been carried away by the ice, that they had no authority afterwards to rebuild across the *outlet* of the lake, two miles from the place where the first bridge was built, and that the restricted limits were to be measured from the place where the first bridge was erected. Cayuga Bridge Co. *v.* Magee, 2 Paige, 116, 6 Wend. 85. In Chapin *v.* The Paper Works, 30 Conn. 461, it was held that statutes giving a preference to certain creditors over others should be construed with reasonable strictness, as the law favored equality. In People *v.* Lambier, 5 Denio, 9, it appeared that an act of the legislature had authorized a proprietor of lands lying in the East River, which is an arm of the sea, to construct wharves and bulkheads in the river, in front of his land, and there was at the time a public highway through the land, terminating at the river. Held, that the proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the street was, by operation of law, extended from the former terminus over the newly made land to the water. Compare Commissioners of Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; Kingsland *v.* Mayor, &c., 35 Hun, 458; Backus *v.* Detroit, 49 Mich. 110, 13 N. W. 380.

construed strictly against the grantees, but it will not be held to exclude the grant of a similar and competing privilege to others, unless the terms of the grant render such construction imperative.[1]

The Constitution of the United States contains provisions which are important in this connection. One of these is, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States,[2] and all persons born or naturalized in the United States, and subject to its jurisdiction, are declared to be citizens thereof, and of the State wherein they reside.[3] The States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States,[4] or to deprive any person of life, liberty,

[1] Mills *v.* St. Clair County, 8 How. 569; Mohawk Bridge Co. *v.* Utica & S. R. R. Co., 6 Paige, 554; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, 3 Wall. 51; Montjoy *v.* Pillow, 64 Miss. 705, 2 So. 108. See cases, *ante*, p. 549, note 1. Compare Hacket *v.* Wilson, 12 Oreg. 25, 6 Pac. 652. A ferry franchise may be limited to carrying one way, and another granted for carrying the other. Power *v.* Athens, 99 N. Y. 592, 2 N. E. 609. An exclusive ferry franchise over a river within certain limits does not prevent carrying up and down the river from a point within the limits. Broadnax *v.* Baker, 94 N. C. 675. See Hunter *v.* Moore, 44 Ark. 181.

[2] Const. of United States, art. 4, § 2. See *ante*, pp. 37, 38.

[3] Const. of United States, 14th Amendment.

[4] "The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of the respective governments. A citizen of the United States, as such, has the right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws. Story on Const. 4th ed. § 1937. These, therefore, are among the privileges of citizens of the United States. So every citizen may petition the federal authorities which are set over him, in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege: Crandall *v.* Nevada, 6 Wall. 35; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas or within the jurisdiction of a foreign government. Slaughter House Cases, 16 Wall. 36. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship.

"One very plain and unquestionable immunity is exemption from any tax, burden, or imposition under State laws, as a condition to the enjoyment of any right or privilege under the laws of the United States. A State, therefore, cannot require one to pay a tax as importer, under the laws of Congress, of foreign merchandise: Ward *v.* Maryland, 12 Wall. 163; nor impose a tax upon travellers passing by public conveyances out of the State: Crandall *v.* Nevada, 6 Wall. 35; nor impose conditions to the right of citizens of other States to sue its citizens in the federal courts. Insurance Co. *v.* Morse, 20 Wall. 445. These instances sufficiently indicate the general rule. Whatever one may claim as of right

or property, without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws.[1] Al-

under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. Slaughter House Cases, 16 Wall. 36. And such a right or privilege is abridged whenever the State law interferes with any legitimate operation of the federal authority which concern his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal Constitution or Laws." Cooley, Principles of Const. Law, 216. See United States *v.* Reese, 92 U. S. 214; United States *v.* Cruikshank, 92 U. S. 542; Hall *v.* De Cuir, 95 U. S. 485; Kirkland *v.* Hotchkiss, 100 U. S. 491. [It is a privilege of a citizen of the United States to inform the proper United States officer of any infraction of the laws of the United States, and any conspiracy to prevent the exercise of this privilege is a crime. *Re* Quarles, 158 U. S. 532, 15 Sup. Ct. Rep. 959. But not to practise law before a State Court. *Ex parte* Lockwood, 154 U. S. 116, 14 Sup. Ct. Rep. 1082. A citizen of the United States while in custody of a Federal marshal is entitled as such citizen to protection from unlawful violence. Logan *v.* United States, 144 U. S. 263, 12 Sup. Ct. Rep. 617. Right to vote for a United States representative is a privilege of a properly qualified citizen. Wiley *v.* Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17. So, to use the United States flag in any way not prohibited by Congress. Ruhstrat *v.* People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. 30. But not the right to purchase or receive as gift, intoxicating liquors. People *v.* Bray, 105 Cal. 344, 38 Pac. 731, 27 L. R. A. 158.]

[1] Const. of United States, 14th Amendment. See cases pp. 14–18, *ante*. The fourteenth amendment is violated by a statute which allows the overseers of the poor to commit paupers and vagrants to the work-house without trial. Portland *v.* Bangor, 65 Me. 120; Dunn *v.* Burleigh, 62 Me. 24. It does not confer the right of suffrage upon females. Van Valkenburgh *v.* Brown, 43 Cal. 43; Bradwell *v.* State, 16 Wall. 130; Minor *v.* Happersett, 21 Wall. 162. See *ante*, pp. 556, 557, notes.

Granting licenses for the sale of intoxicating drinks to males only does not violate a constitutional provision which forbids the grant of special privileges or immunities. Blair *v.* Kilpatrick, 40 Ind. 315. [State may require a licensed pharmacist to procure from the county officers a druggist's license for the sale of spirituous liquors before he can use them in the preparation of pharmacists' compounds. Gray *v.* Connecticut, 159 U. S. 74, 15 Sup. Ct. Rep. 985. Upon constitutionality of laws regulating sale of liquors, see note to 28 L. ed. U. S. 696. State may compel one person to submit his property to inspection of another for purpose of procuring evidence to aid that other in enforcing his rights. Montana Co. *v.* St. Louis Mining and Milling Co., 152 U. S. 160, 14 Sup. Ct. Rep. 506; but a court cannot. Martin *v.* Elliott, 106 Mich. 130, 63 N. W. 998, 31 L. R. A. 169. With regard to inspection of person to procure evidence, see note 4, page 423, *ante*. But a State cannot deny the right of a seller of merchandise to give with the thing sold a trading-stamp which entitles the purchaser to something of value upon presentation to a third person. State *v.* Dalton, 22 R. I. 77, 46 Atl. 231, 48 L. R. A. 775. Though it may impose a license tax upon dealers using trading stamps, and so may a city, authorized to require licenses for any lawful purpose. Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205. An act prohibiting payment of laborers in scrip, truck, &c., and made applicable only to trusts and corporations employing ten or more persons is void as denying the equal protection of the laws. State *v.* Haun, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369. But see State *v.* Brown & S. Mfg. Co., 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856; and Com. *v.* Hillside Coal Co., 22 Ky. L. 559, 58 S. W. 441 (Sept. 27, 1900), both of which are *contra*. A statute which requires railroads to transport cattle in car-load lots at the usual rates, and in addition to furnish the shipper free transportation to and from the point of destination of the

though the precise meaning of "privileges and immunities" is not very conclusively settled as yet, it appears to be conceded

cattle, is void as denying the equal protection of the laws. Atchison, T. & S. F. R. Co. *v.* Campbell, 61 Kan. 430, 59 Pac. 1051, 48 L. R. A. 251. The defendant cannot claim that he is denied the equal protection of the laws simply because he is one of a class expressly excepted from the shield of a statute of limitations. Narron *v.* Wilmington & W. R. Co., 122 N. C. 856, 29 S. E. 356, 40 L. R. A. 415. Statute providing that where corporation neglects to file list of officers upon whom process against it may be served, copies of such process may be left with register of deeds of county in which is the principal office of corporation, is invalid as not providing due process. Pinney *v.* Providence L. & Inv. Co., 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577, and note. Where defendant in a divorce suit denies that plaintiff is his wife, no decree for temporary alimony can issue against him until this question has been determined adversely to him. Hite *v.* Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. 82. Due process of law is satisfied where persons yet unborn are represented by a guardian *ad litem*. Loring *v.* Hildreth, 170 Mass. 328, 49 N. E. 652, 40 L. R. A. 127, 64 Am. St. 301. Prohibition to sell trout, or to have them for purpose of sale, does not deprive of property without due process, so long as owner is permitted to eat them or give them away. State *v.* Schuman, 36 Oreg. 16, 58 Pac. 661, 47 L. R. A. 153. Commission merchants dealing in farm produce may be compelled to take out licenses, and submit their business to inspection, and give bonds to secure the faithful performance of their duties to their consignors. State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442, 76 Am. St. 681; *contra*, People *v.* Berrien Circuit Judge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493, 83 Am. St. 352. See other cases, *ante*, 561, note *a*. Statute prohibiting officers of railroad and mining corporations from having any interest in mercantile business in a certain county, but not prohibiting those of other corporations, is void. Luman *v.* Hitchins Bros. Co., 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393. An act requiring employers of unnaturalized foreign-born persons to pay a per-diem tax for each such employee, and deduct the same from his wages, is a denial of the equal protection of the laws. Juniata Limestone Co. *v.* Fagley, 187 Pa. 193, 40 Atl. 977, 42 L. R. A. 442. A creditor whose debt is secured by mortgage cannot be restricted in his remedy to the property mortgaged. Such a restriction imposed upon freedom of contract is an arbitrary and unwarranted infringement of the liberty of the citizen. Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302. Nor can the right to contract for payment in gold coin be taken away by State statute. *Ib.* Temporary confinement of a person duly alleged to be insane, made during pendency of determination of question of insanity, is an unwarranted deprival of liberty. Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 353. Denial of right to make defence in contempt proceedings is a denial of due process. McClatchy *v.* Superior Court of Sacramento Co., 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; and striking out defendant's answer in proceedings for contempt renders void any judgment thereafter entered against him, in the action. Hovey *v.* Elliott, 145 N. Y. 126, 39 N. E. 841, 39 L. R. A. 449, aff. in 167 U. S. 409, 17 Sup. Ct. Rep. 841. Employer is not unlawfully deprived of his property when he has entrusted it to his travelling salesman, and an innkeeper seizes it from such salesman to enforce payment of hotel bill. Brown Shoe Co. *v.* Hunt, 103 Iowa, 586, 72 N. W. 765, 39 L. R. A. 291, 64 Am. St. 198. Non-residents may be partially or wholly exempted from penalties for allowing stock to run at large within the limits of the city. Broadfoot *v.* Fayetteville, 121 N. C. 418, 28 S. E. 515, 39 L. R. A. 245, 61 Am. St. 668; Jones *v.* Duncan, 127 N. C. 118, 37 S. E. 135. An act for the registration of land titles, making such registration conclusive evidence in certain cases, was held void because it did not provide for actual notice to claimants within the State, attempting to make a constructive notice sufficient. State *v.* Guilbert, 56 Ohio, 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. 756. Service

that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business

upon the highest officer or agent within the jurisdiction, where the party is a non-resident joint-stock association, is sufficient. State *v.* Adams Express Co., 56 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225. Equal protection of the laws is denied by a statute requiring citizens of all other counties to secure licenses before fishing in two specified counties, none being required of citizens of those counties. State *v.* Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561. Warrant of arrest not supported either by oath or affirmation is void. *Ib.* A State may limit the liability of a railroad company for fires caused by sparks from its locomotives, in the entire absence of negligence, to the uninsured value of the property burned, and the insurer whose contract subrogated him to the rights of the insured against the tort feasor cannot complain that he is denied the equal protection of the law or deprived of property without due process. Leavitt *v.* Canadian P. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152. A statute abolishing the fellow-servant rule as to railway employees, held constitutional in Callahan *v.* St. Louis M. B. T. Co., — Mo. —, 71 S. W. 208, following Tullis *v.* Railway Co., 175 U. S. 348, 20 Sup. Ct. Rep. 136. Statute authorizing administration of property of person who has disappeared and not been heard of for seven years is void. Carr *v.* Brown, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 204. So is a statute providing for an *ante mortem* probate of a will. Lloyd *v.* Chambers, 56 Mich. 236, 23 N. W. 28. After verdict of guilty, due process will not prevent denial of request for investigation of sanity of prisoner. Baughn *v.* State, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577; upon insanity after commission of criminal act, see note to this case in L. R. A. Law prescribing eight hour day for work in underground mines is valid. Holden *v.* Hardy, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103; see this case in Supreme Court of the United States, 169 U. S. 366, 18 Sup. Ct. Rep. 383, where the judgment of the State Court is affirmed. *Contra*, *Re* Morgan, 26 Col. 415, 58 Pac. 1071, 47 L. R. A. 52, and see Ritchie *v.* People, 155 Ill. 98, 40 N. E. 454, 462, 29 L. R. A. 79, 46 Am. St. 315, denying validity of an act providing that no woman should be employed in any clothing manufactory more than eight hours per day. See also Low *v.* Rees Printing Co., 43 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. 670. Wages cannot be required to be computed upon weight of coal as it comes from mine before it is sorted. Ramsey *v.* People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; *Re* Preston, 63 Ohio St. 428, 59 N. E. 101; *contra*, Peel Splint Coal Co. *v.* State, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385. Statute forbidding payment of employees in anything but money is void. State *v.* Haun, 61 Kan. 146, 59 Pac. 340. In People *v.* Hill, 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634, a law compelling a person financially able, to support his pauper sister was sustained. It is not clear, however, upon what ground such a law can be sustained. The support of a pauper is either a public or a private purpose. If the former, it would seem that moneys to be used therefor should be raised by taxation, and to saddle the support of such pauper upon a person of whose family she is not a member, and who is by no act or neglect of his own chargeable with her creation and existence, is to violate the uniformity and equality necessary to legitimate taxation. If the purpose is private, the case against the validity of the law is still stronger. That service of process by publication may be made sufficient in case no officers or agents of a domestic corporation can be found within the State, see Bernhardt *v.* Brown, 118 N. C. 700, 119 N. C. 506, 24 S. E. 527, 715, 26 S. E. 162, 36 L. R. A. 402. Statute permitting certain agents of humane societies to kill neglected, abandoned, or diseased animals without notice to owner, is void. Loesch *v.* Koehler, 144 Ind. 278, 41 N. E. 326, 35 L. R. A. 682. Where State's lien for taxes had expired by limitation, the State cannot arbitrarily seize the property. Owner must have notice and opportunity to defend. Kipp *v.* Elwell, 65 Minn. 525, 68 N. W. 105, 33 L. R. A. 435. Parties to be affected by location of section-corners must have notice of the time at which such location is to be determined.

therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to

Davis *v.* St. Louis County Comr's, 65 Minn. 310, 67 N. W. 997, 33 L. R. A. 432. Private property cannot be taken for private use, nor can fishermen be authorized by law to cross private property against the will of the owner in order to reach public fishing grounds. New England Tr. & S. Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569. See also Priewe *v.* Wisconsin State L. & Imp. Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645. Denial of dramshop license to a person who does not bring petition signed by requisite number of residents is not denial of equal protection, &c. Swift *v.* People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470. Arbitrarily to single out a certain class of men (*e. g.* barbers) and deny to them the right to pursue their ordinary vocation upon Sunday deprives them of property without due process. Eden *v.* People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. 365. Granting the right of appeal to resident land-holders in annexation proceedings, and not to non-resident land-holders, is not a denial of the equal protection of the laws. Taggart *v.* Claypole, 145 Ind. 590, 44 N. E. 18, 32 L. R. A. 586. Nor is a discrimination between different localities and between different kinds of fish in game laws. Nor is a summary seizure and destruction of nets, used in violation of such laws. Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380. Statute may allow successful plaintiff in certain cases reasonable attorney's fees, without allowing successful defendant in same cases his attorney's fees. Cameron *v.* Chicago, M. & St. P. R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553; Vogel *v.* Pekoc, 157 Ill. 339, 42 N. E. 886, 30 L. R. A. 491; see also Union C. Life Ins. Co. *v.* Chowning, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; Perkins *v.* St. Louis, I. M & S. R. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; *contra*, Hocking Valley Coal Co. *v.* Rosser, 53 Ohio St. 12, 41 N. E. 263, 29 L. R. A. 386; Phenix Ins. Co. *v.* Hart, 112 Ga. 765, 38 S. E. 67, and see also Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255; Atchison, T., etc. R. Co. *v.* Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609. Railroads cannot arbitrarily be required to haul freight over long lines connecting certain points at same rates as are charged for hauling over short lines connecting those points. State *v.* Sioux City, O. & W. R. Co., 46 Neb. 682, 65 N. W. 766, 791, 31 L. R. A. 47. Notice by letter and by publication is sufficient when the defendant cannot be found and that fact is established by affidavit. Bickerdike *v.* Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782. Making any person who drives a herd of animals over a hillside road liable for all damage done by them, does not discriminate against him. Brim *v.* Jones, 11 Utah, 200, 39 Pac. 825, 29 L. R. A. 97; aff. in 165 U. S. 180, 17 Sup. Ct. Rep. 282. Refractory witness before grand jury may be summarily imprisoned by justice of peace upon complaint of the grand jury. *Re* Clark, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242. Statute authorizing a probate judge to declare a turnpike road abandoned and vacated, no provision being made for jury trial or for right of appeal, is void. Salt Creek V. T. Co. *v.* Parks, 50 Ohio St. 568, 35 N. E. 804, 28 L. R. A. 769. Statute authorizing execution against members of limited partnership to extent of unpaid subscriptions in satisfaction of debts of partnership is valid if amount unpaid is subject to judicial ascertainment. Rouse, H. & Co. *v.* Donovan, 104 Mich. 234, 62 N. W. 359, 27 L. R. A. 577, 53 Am. St. 457. Where tenement-house owner is entitled to trial before any penalty can be assessed against him, he is not entitled to be heard before board of health can issue order requiring him to furnish city water on each floor of tenement house. Health Dept. *v.* Rector of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. 578. *Held*, that a statute authorizing a road supervisor to enter without notice upon private lands, and take therefrom gravel needed in repairing highways, is valid so long as it contains provisions whereby land-owner is permitted to sue and recover from the county his damages. Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355. State may compel corporations to pay employees at time of discharge, although

the usual remedies for the collection of debts and the enforcement

regular pay day has not yet arrived, but cannot prevent deduction for damages caused by employee's breach of contract resulting in his discharge. Leep *v.* St. Louis, I. M. & S. R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. 109, 23 L. R. A. 264. Where property receives no benefit whatever from a local improvement, collection of an assessment thereon would amount to a taking without due process, and will be enjoined. Oregon & C. R. Co. *v.* Portland, 25 Oreg. 229, 35 Pac. 452, 22 L. R. A. 713. A statute attempting to compel the issue of interchangeable railway mileage tickets, and their acceptance by other roads in payment of fare, without giving any lien on tangible property, or providing any fund for their redemption, is void. Att.-Gen. *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112. Attempted vacation of portion of street solely for private benefit is void. Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393. Statute attempting to deprive lot-owners of right to build out to street line, without providing compensation for such deprivation, is void. St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226. Scrip and truck act sustained. Peel Splint Coal Co. *v.* State, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. 396; *contra*, Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. 863; State *v.* Fire Creek C. & C. Co., 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. 891. Statute restricting right of banking to corporations is bad. State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, and note, 44 Am. St. 756; *contra*, State *v.* Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420. So is one forbidding employer to levy fine upon employee for defective work. Com. *v.* Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, and note, 31 Am. St. 533. So in one requiring judgment debtor, at whose suit execution sale is set aside, to repay to purchaser in such sale the money paid by purchaser. Gilman *v.* Tucker, 128 N. Y. 190, 28 N. E. 1040, 13 L. R. A. 304, 26 Am. St. 464. Except as expressly provided in the Constitution, the right to appeal is subject to legislative regulation. Sullivan *v.* Haug, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263. State may absolutely prohibit the taking of opium into the human body. Territory *v.* Ah Lim, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395. In Chavannes *v.* Priestly, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193, it was held that a person may be adjudged insane without notice to him, and thereupon may be confined as an insane person, — certainly a most unusual declaration; *contra*, *Re* Gannon, 16 R. I. 726, 19 Atl. 331, 5 L. R. A. 359, and note. But where a writ of capias issues, directing the sheriff to seize the body of the alleged lunatic, give him notice of the inquisition about to be held, and have him before the court at the trial, if not inconsistent with his health and safety, and a guardian *ad litem* is duly appointed and acts, the proceedings will not, merely because the sheriff returns that it is inconsistent with the health and safety of the alleged lunatic to have him before the court, be adjudged void in the absence of allegation and proof that he requested to be permitted to appear at the trial, and was denied that right. Simon *v.* Craft, 182 U. S. 427, 21 Sup. Ct. Rep. 836, aff. 118 Ala. 625, 24 So. 380. See also Bumpus *v.* French, 179 Mass. 131, 60 N. E. 414; State *v.* Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 525. *Collins*, J., speaking for the court, says: "To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence. The question here is not whether the tribunal may proceed in and with some regard to the rights of the person before it, but rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld

of other personal rights; and the right to be exempt, in property

unless this right is secured, for the object may be attained in defiance of the Constitution, and without due process of law." See extended note to this case in 43 Am. St. 531–541, on "due process of law," as applied to lunatics. Service of summons upon resident defendants who can be found within the State is insufficient, if made by publication only. Bardwell *v.* Anderson, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152. Ordinance authorizing arrest and incarceration without warrant or hearing, upon mere refusal to "move on," when so commanded by police officer, is void. State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529, and note. Statute penalizing the sending or taking of any note, bond, account, or chose in action out of the State for the purpose of suing and issuing garnishment or like process thereon, against any resident of the State, is void as depriving creditor of property without due process of law. *Re* Flukes, 157 Mo. 125, 57 S. W. 545, 51 L. R. A. 176. Statute restricting the number of persons a lodging-house keeper may allow to sleep in a single room, but making no provision concerning innkeepers, is void for arbitrary discrimination. Bailey *v.* People, 190 Ill. 28, 60 N. E. 98. New lien cannot be made superior to an older lien without opportunity to older lienor to be heard. Fisher *v.* Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192. In Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007, it was held that a statute which made it a criminal offence to intimidate by discharge or threats of discharge any employee from joining a labor union, was void as being a deprival of liberty without due process of law. And in People *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. 605, it was held that an act requiring that contracts thereafter entered into for the construction of public works should bind the contractor to pay his laborers the prevailing rates of wages, was void as an undue deprival of his liberty. See also, in this connection, People *v.* Coler, 166 N. Y. 1, 58 N. E. 776. No distinction can be made between aliens and citizens in regard to occupations which may be carried on of common right. State *v.* Montgomery, 94 Me. 192, 47 Atl. 165. Determination of insufficiency of a pauper's support cannot be made by a commission which has no power to administer oaths nor to examine witnesses. Church *v.* South Kingstown, 22 R. I. 381, 48 Atl. 3. Taxing holders of mortgages issued by individuals, and exempting those of mortgages issued by quasi-public corporations, is a denial of equal protection. Russell *v.* Croy, 161 Mo. 69, 63 S. W. 849. A statute of Nebraska making combinations in restraint of trade illegal, and exempting labor unions, is held valid in Cleland *v.* Anderson, — Neb. —, 92 N. W. 306. The same statute is declared of no validity for violation of the rule of equal privileges and equal protection in Niagara Ins. Co. *v.* Cornell, 110 Fed. Rep. 816. The sale, by the State, of ice accumulating on navigable waters, violates the 14th Amendment guaranty of equal protection and privileges. Rossmiller *v.* State, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93. In Connolly *v.* Union Sewer-Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431, the court says: "As the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the State to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of the police powers, must yield to that law. . . . 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law of the land.' The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety, but if by their necessary operation its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." In Otis & Gassman *v.* Parker, — U. S. —, 23 Sup. Ct. Rep. 168, a provision of the Constitution of California was before the court upon the objection that it violated the 14th Amendment. The provision reads: "All contracts for the sales of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void," and further that any money paid

and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.[1] To this extent, at least, discriminations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made — as they usually are — to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident.[2] The protection by due process of law has already been considered. It was not within the power

on such contracts may be recovered back. It was held by a divided court that the provision was not in conflict with the Federal Constitution, against the contentions, that it destroyed the values of this class of property without due process of law, and that it unduly discriminated against this class of property while other familiar objects of speculation, such as cotton or grain, were not touched. It would seem that the prohibition, unless the contract provides for immediate delivery, of sales of such property as the law recognizes, is certainly carrying the police power to its boundary line. For other cases upon due process, equal protection, &c., see Wadsworth *v.* Union P. R. Co., 18 Col. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. 309; People *v.* Yonkers, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481; Attorney-General *v.* Jochim, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. 606; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; Morton *v.* New York, 140 N. Y. 207, 35 N. E. 490, 22 L. R. A. 241; Schiltz *v.* Roenitz, 86 Wis. 31, 56 N. W. 194, 21 L. R. A. 483, 39 Am. St. 878; State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; State *v.* Wolfer, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. 582; Jenkins *v.* Ballantyne, 8 Utah, 245, 30 Pac. 760, 16 L. R. A. 689; Anderton *v.* Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830; Louisville Safety Vault & T. Co. *v.* Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579, and extensive note on constitutional equality of privileges, immunities, and protection; Burdett *v.* Allen, 35 W. Va. 317, 13 S. E. 1012, 14 L. R. A. 327; State *v.* Burgdoerfer, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846; *Re* Bonds Madera Irrigation District, 92 Cal. 296, 341, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. 106; Grand Rapids *v.* Powers, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, and note on establishment of dock lines, 28 Am. St. 276. *Re* Clayton, 59 Conn. 510, 21 Atl. 1005, 13 L. R. A. 66, 21 Am. St. 128; Lehew *v.* Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. 895; Louisville, N. A. & C. R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 787 (short-cause calendar); State *v.* Robbins, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; State *v.* Santee, 111 Iowa, 1, 82 N. W. 445; State *v.* Warren, 113 N. C. 683, 18 S. E. 498; Attorney General *v.* Boston & A. Ry. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112; State *v.* Eby, — Mo. —, 71 S. W. 52; State *v.* Mitchell, — Me. —, 53 Atl. 887. In which last case a hawker's and peddler's act requiring those paying less than $25.00 in taxes on stock to pay a license fee, and exempting those paying that amount or more of taxes on stock, was held invalid as violating the right of equal protection.]

[1] Corfield *v.* Coryell, 4 Wash. 380; Campbell *v.* Morris, 3 H. & McH. 554; Crandall *v.* State, 10 Conn. 339; Oliver *v.* Washington Mills, 11 Allen, 268.

[2] Campbell *v.* Morris, 3 H. & McH. 554; State *v.* Medbury, 3 R. I. 138. And see generally the cases cited, *ante*, p. 37, note. Exemption from garnishment does not apply to a non-resident debtor except by express provision. Kile *v.* Montgomery, 73 Ga. 337.

of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.

Judicial Proceedings.

Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, arises as often when judicial action is in question as in any other cases. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of the judicial authority are much better defined than those of the legislative, and each case can generally be brought to the test of definite and well-settled rules of law.

The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. (*a*) Jurisdiction is, *first*, of the subject-matter; and, *second*, of the persons whose rights are to be passed upon.[1]

A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.

It is a maxim in the law that consent can never confer jurisdiction:[2] by which is meant that the consent of parties cannot

[1] "Jurisdiction is a power constitutionally conferred upon a court, a single judge, or a magistrate, to take cognizance and decide causes according to law, and to carry their sentence into execution. The tract of land within which a court, judge, or magistrate has jurisdiction is called his *territory:* and his power in relation to his territory is called his *territorial jurisdiction.*" 3 Bouv. Inst. 71.

[2] Coffin *v.* Tracy, 3 Caines, 129; Blin *v.* Campbell, 14 Johns. 432; Cuyler *v.* Rochester, 12 Wend. 165; Dudley *v.* Mayhew, 3 N. Y. 9; Preston *v.* Boston, 12 Pick. 7; Chapman *v.* Morgan, 2 Greene (Iowa), 374; Thompson *v.* Steamboat Morton, 2 Ohio St. 26; Gilliland *v.* Administrator of Sellers, 2 Ohio St. 223; Dicks *v.* Hatch, 10 Iowa, 380; McCall *v.* Peachey, 1 Call, 55; Bents *v.* Graves, 3 McCord, 280; Overstreet *v.* Brown, 4 McCord, 79; Green *v.* Collins, 6 Ired. 139; Boswick *v.* Perkins, 4 Ga. 47; Georgia R. R. &c. *v.* Harris, 5 Ga. 527; State *v.* Bonney, 34

(*a*) [Any action taken by a court in the absence of the facts upon which its jurisdiction rightfully rests is void, and may be collaterally impeached. Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, rev. 5 Wash. 309, 31 Pac. 873, 34 Am. St. 863.]

empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory.[1]

In regard to private controversies, the law always encourages voluntary arrangements;[2] and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award; and a mere neglect by either party to object to the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an

Me. 223; Little *v.* Fitts, 33 Ala. 313; Ginn *v.* People, 16 Mich. 351; White *v.* Buchanan, 6 Cold. 32; Collins *v.* Collins, 37 Pa. St. 387; Green *v.* Creighton, 18 Miss. 159.

[1] Bostwick *v.* Perkins, 4 Ga. 47; Hill *v.* Rogers, 9 Ill. 131; Neill *v.* Keese, 5 Tex. 23; Ames *v.* Boland, 1 Minn. 365; Brady *v.* Richardson, 18 Ind. 1 White *v.* Buchanan, 6 Cold. 32; Andrews *v.* Wheaton, 23 Conn. 112; Callamer *v.* Page, 35 Vt. 387.

[2] Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Coyner *v.* Lynde, 10 Ind. 282.

individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented or not. Those cases in which it has been held that the constitutional right of trial by jury cannot be waived are strongly illustrative of the legal view of this subject.[1]

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purposes of the hearing.[2]

Sometimes jurisdiction of the subject-matter will depend upon considerations of locality, either of the thing in dispute or of the parties. At law certain actions are local, and others are transitory. The first can only be tried where the property which is the subject of the controversy, or in respect to which the controversy has arisen, is situated. The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different States or countries.[3] The question of jurisdiction in these cases is sometimes determined by the common law, and sometimes is matter of statutory regulation. But there is a class of cases in respect to which the courts of the several States of the Union are constantly being called upon to exercise authority, and in which, while the jurisdiction is conceded to rest on considerations of locality, there has not, unfortunately, at all times been entire harmony of decision as to what shall confer jurisdiction. We refer now to suits for divorce from the bonds of matrimony.

The courts of one State or country have no general authority to grant divorce, unless for some reason they have control over the particular marriage contract which is sought to be annulled. But what circumstance gives such control? Is it the fact that the marriage was entered into in such country or State? Or that

[1] Brown *v.* State, 8 Blackf. 561; Work *v.* Ohio, 2 Ohio St. 296; Cancemi *v.* People, 18 N. Y. 128; People *v.* Smith, 9 Mich. 193; Hill *v.* People, 16 Mich. 351; Whorton *v.* Morange, 62 Ala. 201; Fleishman *v.* Walker, 91 Ill. 318; Shissler *v.* People, 93 Ill. 472. See also State *v.* Turner, 1 Wright, 20.

[2] Winchester *v.* Ayres, 4 Greene (Iowa), 101. See *post*, 589, note.

[3] See a case where a judgment of a United States court was treated as of no force, because the court had not jurisdiction in respect to the plaintiff. Vose *v.* Morton, 4 Cush. 27. As to third persons, a judgment against an individual may sometimes be treated as void, when he was not suable in that court or in that manner, notwithstanding he may have so submitted himself to the jurisdiction as to be personally bound. See Georgia R. R. &c. *v.* Harris, 5 Ga. 527; Hinchman *v.* Town, 10 Mich. 508.

the alleged breach of the marriage bond was within that jurisdiction? Or that the parties resided within it either at the time of the marriage or at the time of the offence? Or that the parties now reside in such State or country, though both marriage and offence may have taken place elsewhere? Or must marriage, offence, and residence, all or any two of them, combine to confer the authority? These are questions which have frequently demanded the thoughtful attention of the courts, who have sought to establish a rule at once sound in principle, and that shall protect as far as possible the rights of the parties, one or the other of whom, unfortunately, under the operation of any rule which can be established, it will frequently be found has been the victim of gross injustice.

We conceive the true rule to be that the actual, *bona fide* residence of either husband or wife within a State will give to that State authority to determine the *status* of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offence; and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.[1]

[1] There are a number of cases in which this subject has been considered. In Inhabitants of Hanover *v.* Turner, 14 Mass. 227, instructions to a jury were sustained, that if they were satisfied the husband, who had been a citizen of Massachusetts, removed to Vermont merely for the purpose of procuring a divorce, and that the pretended cause for divorce arose, if it ever did arise, in Massachusetts, and that the wife was never within the jurisdiction of the court of Vermont, then and in such case the decree of divorce which the husband had obtained in Vermont must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage between the parties. See also Vischer *v.* Vischer, 12 Barb 640; and McGiffert *v.* McGiffert, 31 Barb. 69. In Chase *v.* Chase, 6 Gray, 157, the same ruling was had as to a foreign divorce, notwithstanding the wife appeared in and defended the foreign suit. In Clark *v.* Clark, 8 N. H. 21, the court refused a divorce on the ground that the alleged cause of divorce (adultery), though committed within the State, was so committed while the parties had their domicile abroad. This decision was followed in Greenlaw *v.* Greenlaw, 12 N. H. 200. The court say: "If the defendant never had any domicile in this State, the libellant could not come here bringing with her a cause of divorce [illegible] which this court had jurisdiction. If at the time of the [alleged offence] the domicile of the parties was in Maine, and the facts furnished no cause for a divorce there, she could not come here and allege those matters which had already

But to render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or the parties in-

occurred, as a ground for a divorce under the laws of this State. Should she under such circumstances obtain a decree of divorce here, it must be regarded as a mere nullity elsewhere." In Frary *v.* Frary, 10 N. H. 61, importance was attached to the fact that the *marriage* took place in New Hampshire; and it was held that the court had jurisdiction of the wife's application for a divorce, notwithstanding the offence was committed in Vermont, but during the time of the wife's residence in New Hampshire. See also Kimball *v.* Kimball, 13 N. H. 222; Batchelder *v.* Batchelder, 14 N. H. 380; Payson *v.* Payson, 34 N. H. 518; Hopkins *v.* Hopkins, 35 N. H. 474; Foss *v.* Foss, 58 N. H. 283; Norris *v.* Norris, 64 N. H. 523, 15 Atl. 19. See Trevino *v.* Trevino, 54 Tex. 261. In Wilcox *v.* Wilcox, 10 Ind. 436, it was held that the residence of the libellant at the time of the application for a divorce was sufficient to confer jurisdiction, and a decree dismissing the bill because the cause for divorce arose out of the State was reversed. And see Tolen *v.* Tolen, 2 Blackf. 407. Compare Jackson *v.* Jackson, 1 Johns. 424; Barber *v.* Root, 10 Mass. 260; Borden *v.* Fitch, 15 Johns. 121; Bradshaw *v.* Heath, 13 Wend. 407. In any of these cases the question of actual residence will be open to inquiry whenever it becomes important, notwithstanding the record of proceedings is in due form, and contains the affidavit of residence required by the practice. Leith *v.* Leith, 39 N. H. 20. And see McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; Hoffman *v.* Hoffman, 46 N. Y. 30; People *v.* Dawell, 25 Mich. 247; Reed *v.* Reed, 52 Mich. 117, 17 N. W. 720; Gregory *v.* Gregory, 78 Me. 187, 3 Atl. 280; Neff *v.* Beauchamp, 74 Iowa, 92, 36 N. W. 905; Chaney *v.* Bryan, 15 Lea, 589. [A recital in proceedings for divorce of the facts necessary to give jurisdiction may be contradicted in a suit in another State between the same parties. Bell *v.* Bell, 181 U. S. 175, 21 Sup. Ct. Rep. 551; Andrews *v.* Andrews, — U. S. —, 23 Sup. Ct. Rep. 237. An injunction may issue against setting up a pretended judgment fraudulently obtained in another State in bar of divorce proceedings. Streitwolf *v.* Streitwolf, 181 U. S. 179, 21 Sup. Ct. Rep. 553.] In a purely collateral civil action, jurisdiction is conclusively presumed. Waldo *v.* Waldo, 52 Mich. 94, 17 N. W. 709. And see Van Orsdal *v.* Van Orsdal, 67 Iowa, 35, 24 N. W. 579. The Pennsylvania cases agree with those of New Hampshire, in holding that a divorce should not be granted unless the cause alleged occurred while the complainant had domicile within the State. Dorsey *v.* Dorsey, 7 Watts, 349; Hollister *v.* Hollister, 6 Pa. St. 449; McDermott's Appeal, 8 W. & S. 251. And they hold also that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the common domicile of both. Calvin *v.* Reed, 35 Pa. St. 375; Elder *v.* Reel, 62 Pa. St. 308, 1 Am. Rep. 414. If a divorce is procured on publication in another State from that of the husband's domicile, where the offence was committed, it is a nullity in the latter State. Flower *v.* Flower, 42 N. J. Eq. 152. See Cook *v.* Cook, 56 Wis. 195, 44 N. W. 33, 443. If one is in good faith a resident, his motive in coming to the State is immaterial. Colburn *v.* Colburn, 70 Mich. 647, 38 N. W. 607; Gregory *v.* Gregory, 76 Me. 535. But residence must be actual, not merely legal. Tipton *v.* Tipton, 87 Ky. 213, 8 S. W. 440. For cases supporting to a greater or less extent the doctrine stated in the text, see Harding *v.* Alden, 9 Greenl. 140; Ditson *v.* Ditson, 4 R. I. 87; Pawling *v.* Bird's Ex'rs, 13 Johns. 192; Kerr *v.* Kerr, 41 N. Y. 272; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Cooper *v.* Cooper, 7 Ohio, 594; Mansfield *v.* McIntyre, 10 Ohio, 28; Smith *v.* Smith, 4 Greene (Iowa), 266; Yates *v.* Yates, 13 N. J. Eq. 280; Maguire *v.* Maguire, 7 Dana, 181; Waltz *v.* Waltz, 18 Ind. 449; Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubell *v.* Hubell, 3 Wis. 662; Gleason *v.* Gleason, 4 Wis. 64; Hare *v.* Hare, 10 Tex. 355; D'Auvilliers *v.* De Livaudais, 32 La. Ann. 605; Gettys *v.* Gettys, 3

terested, be subjected to the process of the court. Certain cases are said to proceed *in rem*, because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. Of the first class, admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing

Lea, 260; Smith *v.* Smith, 19 Neb. 706, 28 N. W. 296. And see Story, Confl. Laws, § 230 *a*; Bishop on Mar. and Div. (1st ed.) § 727 *et seq.*; *Ibid.* (4th ed.) Vol. II. § 155 *et seq.* The cases of Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Elder *v.* Reel, 62 Pa. St. 308, 1 Am. Rep. 414; People *v.* Dawell, 25 Mich. 247; Strait *v.* Strait, 3 McArthur, 415; State *v.* Armington, 25 Minn. 29; Sewall *v.* Sewall, 122 Mass. 156, 23 Am. Rep. 299; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; Litowich *v.* Litowich, 19 Kan. 451, 27 Am. Rep. 145; [Bell *v.* Bell, 181 U. S. 175, 21 Sup. Ct. Rep. 551;] are very explicit in declaring that where neither party is domiciled within a particular State, its courts can have no jurisdiction in respect to their marital *status*, and any decree of divorce made therein must be nugatory. A number of the cases cited hold that the wife may have a domicile separate from the husband, and may therefore be entitled to a divorce, though the husband never resided in the State. These cases proceed upon the theory that, although in general the domicile of the husband is the domicile of the wife, yet that if he be guilty of such act or dereliction of duty in the relation as entitles her to have it partially or wholly dissolved, she is at liberty to establish a separate jurisdictional domicile of her own. Ditson *v.* Ditson, 4 R. I. 87; Harding *v.* Alden, 9 Me. 140; Maguire *v.* Maguire, 7 Dana, 181; Hollister *v.* Hollister, 6 Pa. St. 449; Derby *v.* Derby, 14 Ill. App. 645. The doctrine in New York seems to be, that a divorce obtained in another State, without personal service of process or appearance of the defendant, is absolutely void: Vischer *v.* Vischer, 12 Barb. 640; McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; People *v.* Baker, 76 N. Y. 78, 32 Am. Rep. 274; Cross *v.* Cross, 103 N. Y. 628, 15 N. E. 333; though there is actual notice. O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110. So in Ontario, Magurn *v.* Magurn, 11 Ont. App. 178. See Cox *v.* Cox, 19 Ohio St. 502, 2 Am. Rep. 415; [Matter of Christensen, 17 Utah, 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. 794.] An appearance by defendant afterwards for the purposes of a motion to set aside the decree, which motion was defeated on technical grounds, will not affect the question. Hoffman *v.* Hoffman, 46 N. Y. 30, 7 Am. Rep. 299.

Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of Ditson *v.* Ditson, 4 R. I. 87, which reviews and comments upon a number of the cases cited, and particularly upon the Massachusetts cases of Barber *v.* Root, 10 Mass. 260; Inhabitants of Hanover *v.* Turner, 14 Mass. 227; Harteau *v.* Harteau, 14 Pick. 181; and Lyon *v.* Lyon, 2 Gray, 367. The divorce of one party divorces both. Cooper *v.* Cooper, 7 Ohio, 594. And will leave both at liberty to enter into new marriage relations, unless the local statute expressly forbids the guilty party from contracting a second marriage. See Commonwealth *v.* Putnam, 1 Pick. 136; Baker *v.* People, 2 Hill, 325. [A divorce was decreed and prohibited marriage within a limited period. A marriage was consummated in another State within the period of prohibition, and this marriage upheld in *In re* Wood's Estate, — Cal. —, 69 Pac. 960.] A party who has gone into another State and procured a divorce will not be heard to allege his own fraud to impeach it. Elliott *v.* Wohlfrom, 55 Cal. 384. A divorce good at the place of domicile will be sustained in England though the cause would not sustain a divorce there. Harvey *v.* Farnie, L. R. 8 App. Cas. 43; Turner *v* Thompson, L. R. 13 P. D. 37.

to which the controversy relates. In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to render judgment.[1] Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear.[2] Some cases also partake of the nature both of proceedings *in rem* and of personal actions, since, although they proceed by seizing property, they also contemplate the service of process on defendant parties. Of this class are the proceedings by foreign attachment, in which the property of a non-resident or concealed debtor is seized and retained by the officer as security for the satisfaction of any judgment that may be recovered against him, but at the same time process is issued to be served upon the defendant, and which must be served, or some substitute for service had, before judgment can be rendered.

In such cases, as well as in divorce suits, it will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any

[1] Doughty *v.* Hope, 3 Denio, 594. See Matter of Empire City Bank, 18 N. Y. 199; Nations *v.* Johnson, 24 How. 204, 205; Blackwell on Tax Titles, 213.

[2] Jack *v.* Thompson, 41 Miss. 49. As to the right of an attorney to notice of proceedings to disbar him, see notes to pp. 481, 482, and 583. "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." See Bragg's Case, 11 Coke, 99 *a*; Rex *v.* Chancellor of Cambridge, 1 Str. 567; Cooper *v.* Board of Works, 14 C. B. N. S. 194; Meade *v.* Deputy Marshal, 1 Brock. 324; Goetcheus *v.* Mathewson, 61 N. Y. 420; Underwood *v.* McVeigh, 23 Gratt. 409; McVeigh *v.* United States, 11 Wall. 259; Littleton *v.* Richardson, 34 N. H. 179; Black *v.* Black, 4 Bradf. Sur. Rep. 174, 205; Mead *v.* Larkin, 66 Ala. 87; Succession of Townsend, 36 La. Ann. 417. [A statute permitting commitment to a hospital for the insane without any provision for notice to the person alleged to be insane, is unconstitutional. *Re* Lambert, 134 Cal. 626, 66 Pac. 851, 55 L. R. A. 856; see, a statute contemplating proceedings in lunacy in the absence of the alleged lunatic, construed in Simon *v.* Craft, 182 U. S. 427, 21 Sup. Ct. Rep. 836.] Where, however, a statute provides for the taking of a certain security, and authorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment. Lewis *v.* Garrett's Adm'r, 6 Miss. 434; People *v.* Van Eps, 4 Wend. 387; Chappee *v.* Thomas, 5 Mich. 53; Gildersleeve *v.* People, 10 Barb. 35; People *v.* Lott, 21 Barb. 130; Pratt *v.* Donovan, 10 Wis. 378; Murray *v.* Hoboken Land Co., 18 How. 272; Philadelphia *v.* Commonwealth, 52 Pa. St. 451; Whitehurst *v.* Coleen, 53 Ill. 247. [Decree based upon constructive service of summons against a dead man is absolutely void. Greenstreet *v.* Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735.]

such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless a substituted service is admissible. A substituted service is provided by statute for many such cases; generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it home, if possible, to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon.[1]

[1] "It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon purely *ex parte* proceedings, without a pretence of notice, or any provision for defending, would be a violation of the constitution, and be void; but where the legislature has presented a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal." *Denio, J.*, in Matter of Empire City Bank, 18 N. Y. 199, 215. See also, per *Morgan, J.*, in Rockwell *v.* Nearing, 35 N. Y. 302, 314; Nations *v.* Johnson, 24 How. 195; Beard *v.* Beard, 21 Ind. 321; Mason *v.* Messenger, 17 Iowa, 261; Cupp *v.* Commissioners of Seneca Co., 19 Ohio St. 173; Campbell *v.* Evans, 45 N. Y. 356; Happy *v.* Mosher, 48 N. Y. 313; Jones *v.* Driskell, 94 Mo. 190, 7 S. W. 111; Palmer *v.* McCormick, 28 Fed. Rep. 541; Traylor *v.* Lide, 7 S. W. 58 (Tex.). If an absent defendant returns pending publication, he need not be personally served. Duché *v.* Voisin, 18 Abb. N. C. 358. Jurisdiction cannot be acquired by ordering goods of a non-resident for the mere purpose of attaching them. Copas *v.* Anglo-Am. Prov. Co., 73 Mich. 541, 41 N. W. 690. In Burnham *v.* Commonwealth, 1 Duv. 210, a personal judgment against the absconding officers of the provisional government was sustained. But in the case of constructive notice, if the party appears, he has a right to be heard, and this cannot be denied him, even though he be a rebel. McVeigh *v.* United States, 11 Wall. 259, 267. [So a court cannot deprive a party of the right to be heard upon an application for an injunction because guilty of a previous contempt. Harley *v.* Montana O. P. Co., — Mont. —, 71 Pac. 407 (Jan. 26, 1903). There is no valid service upon a foreign corporation where the service is merely upon the president, and he is in the State purely upon private business, and the corporation is not and has not been doing business within the State. Fitzgerald & M. Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 Sup. Ct. Rep. 36; but if thereafter the corporation appears in court by its attorneys, and goes to the trial of the case upon its merits, the invalidity of service is waived. *Ib.* A statute providing for service upon the agent of a non-resident doing business in the State, is void. Cabanne *v.* Graf, — Minn. —, 92 N. W. 461. Upon the sufficiency of notice by registered letter to last known address of party, in proceedings to determine priority of water rights, see Farm Ins. Co. *v.* Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747; in determining title to lands under the Torrens Land Registration system, Tyler *v.* Bd. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433. A judgment creating a preference for a labor debt over pre-existing lien without notice and opportunity to be heard given

But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings.[1] Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due

the lien holder, is void. Fisher *v.* Weinman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192; sale of property to pay license fee without notice is void sale. Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658.]

[1] Pawling *v.* Willson, 13 Johns. 192; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Curtis *v.* Gibbs, 1 Penn. 399; Miller's Ex'r *v.* Miller, 1 Bailey, 242; Cone *v.* Cotton, 2 Blackf. 82; Kilburn *v.* Woodworth, 5 Johns. 37; Robinson *v.* Ward's Ex'r, 8 Johns. 86; Hall *v.* Williams, 6 Pick. 232; Bartlet *v.* Knight, 1 Mass. 401; St. Albans *v.* Bush, 4 Vt. 58; Fenton *v.* Garlick, 6 Johns. 194; Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Denison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 Conn. 380, 10 Am. Dec. 151; Hoxie *v.* Wright, 2 Vt. 263; Prosser *v.* Warner, 47 Vt. 657, 19 Am. Rep. 132; Newell *v.* Newton, 10 Pick. 470; Starbuck *v.* Murray, 5 Wend. 148, 21 Am. Dec. 172; Armstrong *v.* Harshaw, 1 Dev. 187; Bradshaw *v.* Heath, 13 Wend. 407; Bates *v.* Delavan, 5 Paige, 299; Webster *v.* Reid, 11 How. 437; Gleason *v.* Dodd, 4 Met. 333; Green *v.* Custard, 23 How. 484; Eliot *v.* McCormick, 144 Mass. 10, 10 N. E. 705. A personal judgment on such service when sued on is no basis for recovery. Needham *v.* Thayer, 147 Mass. 536, 18 N. E. 429; Eastman *v.* Dearborn, 63 N. H. 364. But see Everhart *v.* Holloway, 55 Iowa, 179, 7 N. W. 506. A personal judgment cannot be based on service by publication or personal service out of the State. Denny *v.* Ashley, 12 Col. 165, 20 Pac. 331. Service by publication may suffice for a decree of partition of land, but not to create a personal demand for costs. Freeman *v.* Alderson, 119 U. S. 185, 7 Sup. Ct. Rep. 165. So if notice is served in another State. Cloyd *v.* Trotter, 118 Ill. 391. A judgment *in personam* declaring bonds void does not bind a non-resident holder where the only notice was constructive by publication. Pana *v.* Bowler, 107 U. S. 529, 21 Sup. Ct. Rep. 704. In *Ex parte* Heyfron, 8 Miss. 127, it was held that an attorney could not be stricken from the rolls without notice of the proceeding, and opportunity to be heard. And see *ante*, p. 481, note. Leaving notice with one's family is not equivalent to personal service. Rape *v.* Heaton, 9 Wis. 329. At least after defendant has himself left the State. Amsbaugh *v.* Exchange Bank, 33 Kan. 100, 5 Pac. 384. And see Bimeler *v.* Dawson, 5 Ill. 536.

process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered. (*a*)

The same rule applies in divorce cases. The courts of the State where the complaining party resides have jurisdiction of the subject-matter; and if the other party is a non-resident, they must be authorized to proceed without personal service of process. The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage;[1] and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject could only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there.[2]

But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the State, it would be competent to provide by law for the seizure and appropriation of such property, under the

[1] Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Mansfield *v.* McIntyre, 10 Ohio, 28; Ditson *v.* Ditson, 4 R. I. 87; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549; Maguire *v.* Maguire, 7 Dana, 181; Hawkins *v.* Ragsdale, 80 Ky. 353. It is immaterial in these cases whether notice was actually brought home to the defendant or not. And see Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369. But see *contra*, People *v.* Baker, 76 N. Y. 78; O'Dea *v.* O'Dea, 101 N. Y. 23, 4 N. E. 110; Magurn *v.* Magurn, 11 Ont. App. 178; Flower *v.* Flower, 42 N. J. Eq. 152, 7 Atl. 669.

[2] This must be so on general principles, as the appointment of guardians for minors is of local force only. See Morrell *v.* Dickey, 1 Johns. Ch. 153; Woodworth *v.* Spring, 4 Allen, 321; Potter *v.* Hiscox, 30 Conn. 508; Kraft *v.* Wickey, 4 G. & J. 322, 23 Am. Dec. 569. In Kline *v.* Kline, 57 Iowa, 386, 10 N. W. 825, an order awarding custody of children was held inoperative when at the time the children were in another State; and in People *v.* Allen, 40 Hun, 611, an order made where all parties resided was held binding in another State. The case of Townsend *v.* Kendall, 4 Minn. 412, appears to be *contra*, but some reliance is placed by the court on the statute of the State which allows the foreign appointment to be recognized for the purposes of a sale of the real estate of a ward.

(*a*) [Statute providing for service by publication in actions *in rem* is due process. See note, 87 Am. St. Rep. 360.]

decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the State.[1]

When the question is raised whether the proceedings of a court may not be void for want of jurisdiction, it will sometimes be important to note the grade of the court, and the extent of its authority. Some courts are of general jurisdiction, by which is meant that their authority extends to a great variety of matters; while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to certain specified cases. The want of jurisdiction is equally fatal in the proceedings of each; but different rules prevail in showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process.[2]

There is also another difference between these two classes of

[1] See Jackson *v.* Jackson, 1 Johns. Ch. 424; Harding *v.* Alden, 9 Me. 140, 23 Am. Dec. 549; Holmes *v.* Holmes, 4 Barb. 295; Crane *v.* Meginnis, 1 Gill & J. 463; Maguire *v.* Maguire, 7 Dana, 181, 19 Am. Dec. 237; Townsend *v.* Griffin, 4 Harr. 440; Sowders *v.* Edmunds, 76 Ind. 123. In Beard *v.* Beard, 21 Ind. 321, *Perkins*, J., after a learned and somewhat elaborate examination of the subject, expresses the opinion that the State may permit a personal judgment for alimony in the case of a resident defendant, on service by publication only, though he concealed that there would be no such power in the case of non-residents. Upon a California divorce a wife is not entitled to dower in Oregon lands, which in such case is allowed in Oregon, although the California court had jurisdiction. Barrett *v.* Failing, 111 U. S. 523, 4 Sup. Ct. Rep. 598.

[2] See Dakin *v.* Hudson, 6 Cow. 221; Cleveland *v.* Rogers, 6 Wend. 438; People *v.* Wright, 5 N. Y. 467; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Wall *v.* Trumbull, 16 Mich. 228; Denning *v.* Corwin, 11 Wend. 647; Bridge *v.* Ford, 4 Mass. 641; Smith *v.* Rice, 11 Mass. 507; Barrett *v.* Crane, 16 Vt. 246; Tift *v.* Griffin, 4 Ga. 185; Jennings *v.* Stafford, 1 Ired. 404; Perrine *v.* Farr, 22 N. J. 356; State *v.* Metzger, 26 Mo. 65; Owen *v.* Jordan, 27 Ala. 608; Hill *v.* Pride, 4 Call, 107; Sullivan *v.* Blackwell, 28 Miss. 737. If without the aid of parol evidence a justice's judgment is void, it cannot be aided by filing a transcript of it in a court of general jurisdiction. Barron *v.* Dent, 17 S. C. 75. If a court of general jurisdiction exercises special powers in a proceeding not after the course of the common law, the essential jurisdictional facts must appear of record. Furgeson *v.* Jones, 20 Pac. 812 (Oreg.).

tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect.[1] But in the case of a court of special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record.[2] This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions.[3]

[1] See this subject considered at some length in Wilcox *v.* Kassick, 2 Mich. 165. The record cannot be contradicted by parol. Littleton *v.* Smith, 119 Ind. 230, 21 N. E. 886; Turner *v.* Malone, 24 S. C. 398; Boyd *v.* Roane, 49 Ark. 397, 5 S. W. 704; Harris *v.* McClanahan, 11 Lea, 181. General recitals may be contradicted by more specific ones in the same record. Cloud *v.* Pierce City, 86 Mo. 457. And see Adams *v.* Cowles, 95 Mo. 501, 8 S. W. 711; Rape *v.* Heaton, 9 Wis. 329; Bimeler *v.* Dawson, 5 Ill. 536; Webster *v.* Reid, 11 How. 437.

[2] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* Mayor, &c. of N. Y., 5 N. Y. 434; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Sears *v.* Terry, 26 Conn. 273; Brown *v.* Foster, 6 R. I. 564; Fawcett *v.* Fowlis, 1 Man. & R. 102. But see Facey *v.* Fuller, 13 Mich. 527, where it was held that the entry in the docket of a justice that the parties appeared and proceeded to trial was conclusive. And see Selin *v.* Snyder, 7 S. & R. 172.

[3] Britain *v.* Kinnaird, 1 B & B. 432. Conviction under the Bumboat Act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the fact. *Dallas*, Ch. J.: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear, on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree, that if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel, still, it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person, place, and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree: but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? Does not the place, does not the subject-

When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void.[1] An

matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged; and how could the magistrate decide but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction; and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally; and if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend everything against a stinted jurisdiction: that is not the rule now; and nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that magistrates will do what is right." *Richardson*, J., in the same case, states the real point very clearly: "Whether the vessel in question were a boat or no was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession; could the magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged, in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present we are not to look to the inconvenience, but at the law; but surely if the magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged." See also Basten *v.* Carew, 3 B. & C. 648; Fawcett *v.* Fowlis, 7 B. & C. 394; Ashcroft *v.* Bourne, 3 B. & Ad. 684; Mather *v.* Hodd, 8 Johns. 44; Mackaboy *v.* Commonwealth, 2 Virg. Cas. 270; *Ex parte* Kellogg, 6 Vt. 509; State *v.* Scott, 1 Bailey, 294; Facey *v.* Fuller, 13 Mich. 527; Wall *v.* Trumbull, 16 Mich. 228; Sheldon *v.* Wright, 5 N. Y. 497; Wanzer *v.* Howland, 10 Wis. 16; Ricketts *v.* Spraker, 77 Ind. 371; Fanning *v.* Krapfl, 68 Iowa, 244, 26 N. W. 133; Schee *v.* La Grange, 78 Iowa, 101, 42 N. W. 616; Sims *v.* Gay, 109 Ind. 501, 9 N. E. 120; Epping *v.* Robinson, 21 Fla. 36; Freeman on Judgments, § 523, and cases cited.

[1] *Ex parte* Kellogg, 6 Vt. 509; Edgerton *v.* Hart, 8 Vt. 208; Carter *v.* Walker, 2 Ohio St. 339; White *v.* Crow, 110 U. S.

irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case;[1] and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it.[2]

We have thus briefly indicated the cases in which judicial action may be treated as void because not in accordance with the law of the land. The design of the present work does not permit an enlarged discussion of the topics which suggest themselves in this connection, and which, however interesting and important, do not specially pertain to the subject of constitutional law.

183, 4 Sup. Ct. Rep. 71; Fox *v.* Cottage, &c. Ass., 81 Va. 677; King *v.* Burdett, 28 W. Va. 601; Levan *v.* Millholland, 114 Pa. St. 49, 7 Atl. 194; Weiss *v.* Guerineau, 109 Ind. 438, 9 N. E. 399; Rosenheim *v.* Hartsock, 90 Mo. 357, 2 S. W. 473; Head *v.* Daniels, 38 Kan. 1, 15 Pac. 911; Spillman *v.* Williams, 91 N. C. 483; Freeman on Judgments, § 135. See Matthews *v.* Densmore, 109 U. S. 216, 3 Sup. Ct. Rep. 126; Bonney *v.* Bowman, 63 Miss. 166. Compare Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36. Even if a court, after acquiring jurisdiction, were to render judgment without trial or an opportunity for hearing, the judgment would not be void, but only erroneous. Clark *v.* County Court, 55 Cal. 193. [Mere errors in the administration of the law do not constitute want of due process of law. Lent *v.* Tillson, 140 U. S. 316, 11 Sup. Ct. Rep. 825.]

A judge cannot perform any judicial act when he is beyond the limits of his State; not even the granting of a *certiorari*. Buchanan *v.* Jones, 12 Ga. 612.

[1] "The doing or not doing that in the conduct of a suit at law, which, conformably to the practice of the court, ought or ought not to be done." Bouv. Law Dic. See Dick *v.* McLaurin, 63 N. C. 185.

[2] Robinson *v.* West, 1 Sandf. 19; Malone *v.* Clark, 2 Hill, 657; Wood *v.* Randall, 4 Hill, 264; Baker *v.* Kerr, 13 Iowa, 384; Loomis *v.* Wadhams, 8 Gray, 557; Warren *v.* Glynn, 37 N. H. 340. A strong instance of waiver is where, on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Randolph Co. *v.* Ralls, 18 Ill. 29; Wells *v.* Scott, 4 Mich. 347; Tower *v.* Lamb, 6 Mich. 362. If an objection to proceeding with a jury of less than twelve is overruled, it is not waived by moving for judgment on the findings of such jury. Eshelman *v.* Chicago, &c. Ry. Co., 67 Iowa, 296, 25 N. W. 251.

But a party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers.[1] Proceedings in any such case would be void; but they must be carefully distinguished from those cases in which the court has itself acted, though irregularly. All the State constitutions preserve the right of trial by jury, (*a*) for civil

[1] Hall *v.* Marks, 34 Ill. 358; Chandler *v.* Nash, 5 Mich. 409. It is not competent to provide by statute that the judge may call a member of the bar to sit in his place in a special case. "The legislature has no power to authorize a district judge to place his judicial robe upon the shoulders of any man." Winchester *v.* Ayres, 4 Greene (Iowa), 101. See Wright *v.* Boon, 2 Greene (Iowa), 458; Michales *v.* Hine, 3 Greene (Iowa), 470; Smith *v.* Frisbie, 7 Iowa, 486. To allow it would be to provide a mode for choosing judges different from that prescribed by the Constitution. State *v.* Phillips, 27 La. Ann. 663; State *v.* Fritz, 27 La. Ann. 689. Even the consent of parties would not give the judge this authority. Hoagland *v.* Creed, 81 Ill. 506; Andrews *v.* Beck, 23 Tex. 455; Haverly I. M. Co. *v.* Howeutt, 6 Col. 574. In Missouri there is statutory provision for a special judge. State *v.* Hosmer, 85 Mo. 553. Under the Tennessee statute a special judge can act only in civil cases. Neil *v.* State, 2 Lea, 674. It is competent to send a case to referees or to a master for investigation of accounts. Underwood *v.* McDuffee, 15 Mich. 361; Hard *v.* Burton, 79 Ill. 501. All the issues in a case involving accounts may be referred. Huston *v.* Wadsworth, 5 Col. 213. But it is not competent to give the referee powers of final decision. Johnson *v.* Wallace, 7 Ohio, 342; King *v.* Hopkins, 57 N. H. 334; St. Paul, &c. R. R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334. A decree for the payment of money must specify the precise amount to be paid, and not leave it to subsequent computation. Aldrich *v.* Sharp, 4 Ill. 261; Smith *v.* Trimble, 27 Ill. 152. For the general principle that judicial power cannot be delegated, see further, Gough *v.* Dorsey, 27 Wis. 119; Milwaukee Industrial School *v.* Supervisors, 40 Wis. 328; Allor *v.* County Auditors, 43 Mich. 76, 4 N. W. 492; Ward *v.* Farwell, 97 Ill. 593. [The indeterminate sentence law giving authority to the prison board to determine the term of imprisonment within limits fixed by the judgment of the court is not in violation of the rule against the delegation of judicial power. Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109. Dreyer *v.* People, 188 Ill. 40, 58 N. E. 620. *Contra*, in Michigan, People *v.* Cummings, 88 Mich. 249, 50 N. W. 310. See also, 9 Yale Law Jour. 17.] A justice having power to issue writs as the commencement of suit, cannot issue them in blank to be filled up by parties or by ministerial officers. Pierce *v.* Hubbard, 10 Johns. 405; Craighead *v.* Martin, 25 Minn. 41. But a writ will not necessarily be quashed because filled up by an unauthorized person. Kinne *v.* Hinman, 58 N. H. 363. The clerk of a court of record may be authorized to enter up judgment in vacation against a defendant whose indebtedness is admitted of record: Lathrop *v.* Snyder, 17 Wis. 110; but not in other cases. See Grattan *v.* Matteson, 54 Iowa, 229, 6 N. W. 298; Keith *v.* Kellogg, 97 Ill. 147. Such an entry not authorized or approved by the court is void. Balm *v.* Nunn, 63 Iowa, 641, 19 N. W. 810; Mitchell *v.* St. John, 98 Ind. 598. For the distinction between judicial and ministerial action, see Flournoy *v.* Jeffersonville, 17 Ind. 169; People *v.* Bennett, 29 Mich. 451. [Statute providing for charging a town with maintenance of a pauper upon report of a commission whose members are not required to take an oath, or to administer oaths to witnesses, or to pronounce judgment, violates provision for due process of law. Church *v.* South Kingstown, 22 R. I. 381, 48 Atl. 3, 53 L. R. A. 739.]

(*a*) [Upon extent of this right, see note to 41 L. ed. U. S. 113.]

as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before.[1] But in doing this, they preserve the historical jury of twelve men,[2] with all its incidents, unless a contrary purpose clearly appears. The party is therefore entitled to examine into the qualifications and im-

[1] Backus *v.* Lebanon, 11 N. H. 19; Opinions of Judges, 41 N. H. 550; Dane Co. *v.* Dunning, 20 Wis. 210; Stilwell *v.* Kellogg, 14 Wis. 461; Mead *v.* Walker, 17 Wis. 189; Commissioners *v.* Seabrook, 2 Strob. 560; Tabor *v.* Cook, 15 Mich. 322; Lake Erie, &c. R. R. Co. *v.* Heath, 9 Ind. 558; Byers *v.* Commonwealth, 42 Pa. St. 89; State *v.* Peterson, 41 Vt. 504; *In re* Hackett, 53 Vt. 354; Buffalo, &c. R. R. Co. *v.* Ferris, 26 Tex. 588; Sands *v.* Kimbark, 27 N. Y. 147; Howell *v.* Fry, 19 Ohio St. 556; Guile *v.* Brown, 38 Conn. 237; Howe *v.* Plainfield, 37 N. J. 145; Commissioners *v.* Morrison, 22 Minn. 178. These provisions do not apply to equitable causes or proceedings: Flaherty *v.* McCormick, 113 Ill. 538; State *v.* Churchill, 48 Ark. 426, 3 S. W. 352, 880; Mahan *v.* Cavender, 77 Ga. 118; *In re* Burrows, 33 Kan. 675, 7 Pac. 148; Eikenberry *v.* Edwards, 67 Iowa, 619, 25 N. W. 832; McKinsey *v.* Squires, 32 W. Va. 41, 9 S. E. 55; not even to enjoining and abating a building as a liquor nuisance: Carleton *v.* Rugg, 149 Mass. 550, 22 N. E. 55; [Kansas *v.* Ziebold, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Littleton *v.* Fritz, 65 Iowa, 488, 22 N. W. 611;] nor to special statutory drainage proceedings: Lipes *v.* Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; nor to proceedings to determine lunacy: County of Black Hawk *v.* Springer, 58 Iowa, 417, 10 N. W. 791; Crocker *v.* State, 60 Wis. 553, 19 N. W. 435; nor to summary landlord and tenant proceedings: Frazee *v.* Beattie, 26 S. C. 348, 2 S. E. 125; nor to a hearing as to damages on default in tort: Seeley *v.* Bridgeport, 53 Conn. 1, 22 Atl. 1017; nor to insolvency proceedings. Weston *v.* Loyhed, 30 Minn. 221, 14 N. W. 892; *contra*, Risser *v.* Hoyt, 53 Mich. 185, 18 N. W. 611. Nor do they prevent a court from denying a new trial unless plaintiff remits a part of the verdict. Arkansas V. L. &c. Co. *v.* Mann, 130 U. S. 69, 9 Sup. Ct. Rep. 458. [Nor directing a verdict, Treat Mfg. Co. *v.* Standard Steel and Iron Co., 157 U. S. 674, 15 Sup. Ct. Rep. 718.] Nor summary distress for rent if a jury may be had, by replevying property seized. Blanchard *v.* Raines, 20 Fla. 467. They do prevent making the findings of appraisers conclusive evidence of value, ownership, and injury, where stock is killed by a railroad. Graves *v.* Nor. Pac. R. R. Co., 5 Mont. 556, 6 Pac. 16. That notwithstanding jury trial is preserved, the jurisdiction of justices to try petty cases without jury may be extended, see Beers *v.* Beers, 4 Conn. 535, 10 Am. Dec. 186; Keddie *v.* Moore, 2 Murph. 41, 5 Am. Dec. 518. [That length and complication of accounts will not warrant compulsory reference to a master and denial of jury in New York, see Steck *v.* Colorado F. & I. Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67, and see note hereto in L. R. A. on compulsory reference and right to jury trial.]

[2] See *ante*, p. 453. And see the general examination of the subject historically in Hagany *v.* Cohnen, 29 Ohio St. 82; and Copp *v.* Henniker, 55 N. H. 179. A statute allowing less than twelve to sit if a juror is sick is bad. Eshelman *v.* Chicago, &c. Ry. Co., 67 Iowa, 296, 25 N. W. 251. But a jury of six may be allowed in inferior courts. Higgins *v.* Farmers' Ins. Co., 60 Iowa, 50, 14 N. W. 118. One of less than twelve may act in statutory highway proceedings. McManus *v.* McDonough, 107 Ill. 95. [And judgment may be given upon a special verdict, even though such verdict is inconsistent with the general verdict. Walker *v.* Southern P. Railroad, 165 U. S. 593, 17 Sup. Ct. Rep. 421.]

partiality of jurors ;[1] and to have the proceedings public ;[2] and no conditions can be imposed upon the exercise of the right that shall impair its value and usefulness.[3] It has been held, however, in many cases, that it is competent to deny to parties the privilege of a trial in a court of first instance, provided the right is allowed on appeal.[4] It is undoubtedly competent to create new tribunals without common-law powers, and to authorize them to proceed without a jury ; but a change in the forms of action will not authorize submitting common-law rights to a tribunal in which no jury is allowed.[5] In any case, we suppose a failure to award

[1] Palmore *v.* State, 29 Ark. 249; Paul *v.* Detroit, 32 Mich. 108.

[2] Watertown Bank, &c. *v.* Mix, 51 N. Y. 558.

[3] Greene *v.* Briggs, 1 Curt. C. C. 311; Lincoln *v.* Smith, 27 Vt. 328; Norristown, &c. Co. *v.* Burket, 26 Ind. 53; State *v.* Gurney, 37 Me. 156; Copp *v.* Henniker, 55 N. H. 179. It is not inadmissible, however, to require of a party demanding a jury that he shall pay the jury fee. Randall *v.* Kehlor, 60 Me. 37; Conners *v.* Burlington, &c. Ry. Co., 74 Iowa, 383, 37 N. W. 966; Conneau *v.* Geis, 73 Cal. 176, 14 Pac. 580.

[4] Emerick *v.* Harris, 1 Binn. 416; Biddle *v.* Commonwealth, 13 S. & R. 405; McDonald *v.* Schell, 6 S. & R. 240; Keddie *v.* Moore, 2 Murph. 41; Wilson *v.* Simonton, 1 Hawks, 482; Monford *v.* Barney, 8 Yerg. 444; Beers *v.* Beers, 4 Conn. 535, 10 Am. Dec. 186; State *v.* Brennan's Liquors, 25 Conn. 278 ; Curtis *v.* Gill, 34 Conn. 49; Reckner *v.* Warner, 22 Ohio St. 275; Jones *v.* Robbins, 8 Gray, 329; Hapgood *v.* Doherty, 8 Gray, 373; Flint River, &c. Co. *v.* Foster, 5 Ga. 194; State *v.* Beneke, 9 Iowa, 203; Lincoln *v.* Smith, 27 Vt. 328, 360; Steuart *v.* Baltimore, 7 Md. 500; Commonwealth *v.* Whitney, 108 Mass. 5; Maxwell *v.* Com'rs Fulton Co., 119 Ind. 20, 19 N. E. 617, 21 N. E. 453; Helverstine *v.* Yantes, 88 Ky. 695, 11 S. W. 811; Beasley *v.* Beckley, 28 W. Va. 81; State *v.* Fitzpatrick, 16 R. I. 54, 60, 11 Atl. 767, 773; [Brown *v.* Epps, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676; *Re* Jahn, 55 Kan. 694, 41 Pac. 956. *Contra*, State *v.* Gerry, 68 N. H. 495, 38 Atl. 272, 38 L. R. A. 228.] But the recognizance to the lower court on appeal must not be burdened with unreasonable conditions. Liquors of McSorley, 15 R. I. 608, 10 Atl. 659. Compare *In re* Marron, 60 Vt. 199, 12 Atl. 523. But that this could not be admissible in criminal cases was held in Matter of Dana, 7 Benedict, 1, by Judge *Blatchford*, who very sensibly remarks, "In my judgment the accused is entitled, not to be first convicted by a court, and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury." On a charge of criminal conspiracy, a prisoner has a right to jury trial, "from the first moment and in whatever court he is put on trial for the offence charged." Callan *v.* Wilson, 127 U. S. 540, 8 Sup. Ct. Rep. 1301. If in a lower court one has had a jury trial and appeals to a higher *nisi prius* court, he cannot be deprived of *a* jury there. McGinty *v.* Carter, 48 N. J. L. 113, 3 Atl. 78. That the right to jury trial in civil cases may be waived by failure to demand it, see Gleason *v.* Keteltas, 17 N. Y. 491; Baird *v.* Mayor, 74 N.Y. 382; Garrison *v.* Hollins, 2 Lea, 684; Foster *v.* Morse, 132 Mass. 354. That it is competent to provide that the failure to file an affidavit of defence shall entitle the plaintiff to judgment, see Hoffman *v.* Locke, 19 Pa. St. 57; Lawrance *v.* Born, 86 Pa. St. 225; Dortie *v.* Lockwood, 61 Ga. 293.

[5] See Rhines *v.* Clark, 51 Pa. St. 96. Compare Haines *v.* Levin, 51 Pa. St. 412; Haine's Appeal, 73 Pa. St. 169. [Wiggins & Johnson *v.* Williams, 36 Fla. 637, 18 So. 859, 30 L. R. A. 754.] Whether jury trial is of right in *quo warranto* cases, see State *v.* Allen, 5 Kan. 213; State *v.* Johnson, 26 Ark. 281; Williamson *v.* Lane, 52 Tex. 335; State *v.* Vail, 53 Mo. 97; State *v.* Lupton, 64 Mo. 415, 27 Am Rep. 253; People *v.* Cicott, 16 Mich. 283; People *v.* Railroad Co., 57

a jury on proper demand would be an irregularity merely, rendering the proceedings liable to reversal, but not making them void.

There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just in this rule, that Lord *Coke* has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." [1]

This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause.[2] Nor is it essential that the judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named.[3]

N. Y. 161; Royal *v.* Thomas, 28 Gratt. 130, 26 Am. Rep. 335; and cases, p. 938, note 2, *post*.

[1] Co. Lit. § 212. See Day *v.* Savadge, Hobart, 85. We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act of Parliament void; though they would never find such an intent in the statute, if any other could possibly be made consistent with the words.

[2] Washington Ins. Co. *v.* Price, Hopk. Ch. 2; Sigourney *v.* Sibley, 21 Pick. 101; Freeman on Judgments, § 144. A judge of probate cannot act upon an estate of which he is executor: Bedell *v.* Bailey, 58 N. H. 62; or creditor, Burks *v.* Bennett, 62 Tex. 274. Compare Matter of Hancock, 91 N. Y. 284. A justice may sit, although he has received for collection the note in suit. Moon *v.* Stevens, 53 Mich. 144, 18 N. W. 600.

[3] Washington Ins. Co. *v.* Price, Hopk. Ch. 1; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759; Pearce *v.* Atwood, 13 Mass. 324; Kentish Artillery *v.* Gardiner, 15 R. I. 296, 3 Atl. 662; Peck *v.* Freeholders of Essex, 20 N. J. 457; Commonwealth *v.* McLane, 4 Gray, 427; Dively *v.* Cedar Falls, 21 Iowa, 565; Clark *v.* Lamb, 2 Allen, 396; Stockwell *v.* White Lake, 22 Mich. 341; Petition of New Boston, 49 N. H. 328. If the property of a judge from its situation will be affected like complainant's by his ruling he cannot sit. North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315. [Owner of property subject to tax to pay bonded indebtedness of city cannot sit as judge in a case in which validity of such indebtedness is involved. Meyer *v.* San Diego, 121 Cal. 102, 113, 53 Pac. 434, 1128. 41 L. R. A. 762, 66 Am. St. 22. Nor can one who has theretofore been an attorney in the case, although the relation of attorney and client has ceased. State *v.* Hocker, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114, and note. Nor if he is a vestryman can he act in a case involving the interests of his church. State *v.* Young, 31 Fla. 594, 12 So. 673, 19 L. R. A. 636, 34 Am. St. 41.] As to disqualification by relationship, see Russell *v.* Belcher, 76 Me. 501; Patterson *v.* Collier, 75 Ga. 419; Jordan *v.* Moore, 65 Tex. 363; Hume *v.* Commercial Bank, 10 Lea, 1.

Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord *Campbell* observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."[1]

It is matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy. The maxim itself, it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act;[2] but we prefer the opinion of Chancellor *Sandford* of New York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights, or his own wrongs.[3]

It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be, that the

[1] Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759, 793.

[2] Ranger *v.* Great Western R., 5 House of Lords Cases, 72, 88; Stuart *v.* Mechanics' & Farmers' Bank, 19 Johns. 496.

[3] Washington Insurance Co. *v.* Price, Hopk. Ch. 1. This subject was considered in Hall *v.* Thayer, 105 Mass. 219, and an appointment by a judge of probate of his wife's brother as administrator of an estate of which her father was a principal creditor was held void. And see People *v.* Gies, 25 Mich. 83. [In Florida a judge is disqualified to sit in a cause in which the husband of a niece of the judge is a party. State *v.* Wall, 41 Fla. 463, 26 So. 1020, 49 L. R. A. 548. A judge whose wife is a stockholder in a corporation cannot sit in the trial of a cause to which it is party. First Nat. Bank *v.* McGuire, 12 S. D. 226, 80 N. W. 1074, 47 L. R. A. 413, 76 Am. St. 598.]

interest is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual.[1] And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest.[2] And it is very common, in a certain class of cases, for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the State, which passes the law, or the municipalities, which are its component parts and subject to its control, can be regarded as such.

But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State, when framing their constitution, may possibly establish so great an anomaly, if they see fit;[3] but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.[4]

[1] Commonwealth *v.* Reed, 1 Gray, 475; Justices *v.* Fennimore, 1 N. J. 190; Commissioners *v.* Little, 3 Ohio, 289; Minneapolis *v.* Wilkin, 30 Minn. 140, 14 N. W. 581. See Foreman *v.* Marianna, 43 Ark. 324, case of annexing territory; Sauls *v.* Freeman, 24 Fla. 209, 225, 4 So. 525, 577, case of changing county seat. [And a judge who is member of a State bar association may pass upon disbarment proceedings brought by the association, although, if the proceedings fail, costs will go against the association. *Ex parte* Bar Association, 92 Ala. 113, 8 So. 768, 12 L. R. A. 134.]

[2] Commonwealth *v.* Ryan, 5 Mass. 90; Hill *v.* Wells, 6 Pick. 104; Commonwealth *v.* Emery, 11 Cush. 406; State *v.* Craig, 80 Me. 85, 13 Atl. 129; *In re* Guerrero, 69 Cal. 88, 10 Pac. 261.

[3] Matter of Leefe, 2 Barb. Ch. 39. Even this must be deemed doubtful since the adoption of the fourteenth article of the amendments to the Federal Constitution, which denies to the State the right to deprive one of life, liberty, or property, without due process of law.

[4] See Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich 139; Hall *v.* Thayer, 105 Mass. 219; State *v.* Crane, 36 N. J. 394; Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350; Scuffletown Fence Co. *v.* McAllister, 12 Bush, 312; Reams *v.* Kearns, 5 Cold. 217. No power to make a municipal corporation party and judge in the same controversy can constitutionally be given. Lanfear *v.* Mayor, 4 La. 97, 23 Am. Dec. 477.

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground.[1] The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.[2]

Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do;[3] but that is the extent of his power.

[1] Richardson *v.* Welcome, 6 Cush. 332; Dimes *v.* Proprietors of Grand Junction Canal, 3 H. L. Cas. 759. And see Sigourney *v.* Sibley, 21 Pick. 101; Oakley *v.* Aspinwall, 3 N. Y. 547. But it is held in Pettigrew *v.* Washington Co., 43 Ark. 33, that after judgment it is too late to object that relationship to a party disqualified a judge. But see succeeding note.

[2] In Queen *v.* Justices of Hertfordshire, 6 Q. B. 753, it was decided that, if any one of the magistrate hearing a case at sessions was interested, the court was improperly constituted, and an order made in the case should be quashed. It was also decided that it was no answer to the objection that there was a majority in favor of the decision without reckoning the interested party, nor that the interested party withdrew before the decision, if he appeared to have joined in discussing the matter with the other magistrates. See also the Queen *v.* Justices of Suffolk, 18 Q. B. 416; The Queen *v.* Justices of London, 18 Q. B. 421; Peninsula R. R. Co. *v.* Howard, 20 Mich. 18.

[3] Richardson *v.* Boston, 1 Curtis, C. C. 250; Washington Insurance Co. *v.* Price, Hopk. Ch. 1; Buckingham *v.* Davis, 9 Md. 324; Heydenfeldt *v.* Towns, 27 Ala. 423; State *v.* Judge, 37 La. Ann. 253. If the judge who renders judgment in a cause had previously been attorney in it, the judgment is a nullity. Reams *v.* Kearns, 5 Cold. 217; Slaven *v.* Wheeler, 58 Tex. 23. [Or if he has advised one of the parties upon his rights in regard to any fact involved in the case. Tampa St. R. & P. Co. *v.* Tampa Suburban R. Co., 30 Fla. 595, 11 So. 562, 17 L. R. A. 681.] So though the case in suit is not precisely the one in which he has been consulted. Newcome *v.* Light, 68 Tex. 141.

CHAPTER XII.

LIBERTY OF SPEECH AND OF THE PRESS.

THE first amendment to the Constitution of the United States provides, among other things, that Congress shall make no law abridging the freedom of speech or of the press. The privilege which is thus protected against unfriendly legislation by Congress, is almost universally regarded not only as highly important, but as being essential to the very existence and perpetuity of free government. The people of the States have therefore guarded it with jealous care, by provisions of similar import in their several constitutions, and a constitutional principle is thereby established which is supposed to form a shield of protection to the free expression of opinion in every part of our land.[1]

[1] The following are the constitutional provisions: *Maine:* Every citizen may freely speak, write, and publish his sentiments on any subject, being responsible for the abuse of this liberty. No law shall be passed regulating or restraining the freedom of the press; and, in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact. Declaration of Rights, § 4.—*New Hampshire:* The liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved. Bill of Rights, § 22. — *Vermont:* That the people have a right to freedom of speech, and of writing and publishing their sentiments concerning the transactions of government; therefore the freedom of the press ought not to be restrained. Declaration of Rights, Art. 13. — *Massachusetts:* The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth. Declaration of Rights, Art. 10. — *Rhode Island:* The liberty of the press being essential to the security of freedom in a State, any person may publish his sentiments on any subject, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defence to the person charged. Art. 1, § 20. — *Connecticut:* No law shall ever be passed to curtail or restrain the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court. Art. 1, §§ 6 and 7. — *New York:* Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libellous is true, and was pub-

It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and per-

lished with good motives and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact. Art. 1, § 8. — *New Jersey:* Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. Art. 1, § 5. — *Pennsylvania:* That the printing-press shall be free to every person who may undertake to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers, relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. Art 1, § 7. — *Delaware:* The press shall be free to every citizen who undertakes to examine the official conduct of men acting in public capacity, and any citizen may print on any such subject, being responsible for the abuse of that liberty. In prosecutions for publications investigating the proceedings of officers, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury may determine the facts and the law, as in other cases. Art. 1, § 5. — *Maryland:* That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that privilege. Declaration of Rights, Art. 40. — *West Virginia:* No law abridging the freedom of speech or of the press shall be passed; but the legislature may provide for the restraint and punishment of the publishing and vending of obscene books, papers, and pictures, and of libel and defamation of character, and for the recovery in civil action by the aggrieved party of suitable damages for such libel or defamation. Attempts to justify and uphold an armed invasion of the State, or an organized insurrection therein during the continuance of such invasion or insurrection, by publicly speaking, writing, or printing, or by publishing, or circulating such writing or printing, may be by law declared a misdemeanor, and punished accordingly. In prosecutions and civil suits for libel, the truth may be given in evidence; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the verdict shall be for the defendant. Art. 2, §§ 4 and 5. — *Kentucky:* That printing-presses shall be free to every person who undertakes to examine the proceedings of the General Assembly, or any branch of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In all prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases. Art. 13, §§ 9 and 10. — *Tennessee:* Nearly the same as Pennsylvania. Art 1, § 19. — *Ohio*

petuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not assume to create

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge liberty of speech or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. Art. 1, § 11. — *Iowa*, Art. 1, § 7, and *Nevada*, Art. 1, § 9. Substantially same as Ohio. — *Illinois:* Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defence. Art. 2, § 4. — *Indiana:* No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print freely on any subject whatever, but for the abuse of that right every person shall be responsible. In all prosecutions for libel, the truth of the matters alleged to be libellous may be given in justification. Art. 1, §§ 9 and 10. — *Michigan:* In all prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. The jury shall have the right to determine the law and the fact. Art 6, § 25. — *Wisconsin:* Same as New York. Art. 1, § 3. — *Minnesota:* The liberty of the press shall forever remain inviolate, and all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of such right. Art. 1, § 3. — *Oregon:* No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right. Art. 1, § 8. — *California:* Same as New York. Art. 1, § 9. — *Kansas:* The liberty of the press shall be inviolate, and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury; and if it shall appear that the alleged libellous matter was published for justifiable ends, the accused party shall be acquitted. Bill of Rights, § 11. — *Missouri:* That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write, or publish whatever he will on every subject, being responsible for all abuse of that liberty; and that in all prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact. Art. 2, § 14. — *Nebraska:* Same as Illinois. Art. 1, § 5. — *Arkansas:* The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man, and all persons may freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of such right. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted. Art. 1, § 2. — *Florida:* Every person may freely speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions and civil actions for libel, the truth may be given in evidence to the jury; and if it appear that the matter charged as libellous is true, and was published with good motives, the party shall be acquitted or exonerated. Declaration of Rights, § 10. — *Georgia:* No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty. Art. 1, § 1, par. 15. — *Louisiana:* No law shall be passed . . . abridging the freedom of speech or of the press. Bill of Rights, Art. 4. — *North Carolina:* The freedom of

new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the pre-existing law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they undertake to assure.

At the common law, however, it will be found that liberty of the press was neither well protected nor well defined. The art of printing, in the hands of private persons, has, until within a comparatively recent period, been regarded rather as an instrument of mischief, which required the restraining hand of the government, than as a power for good, to be fostered and encouraged. Like a vicious beast it might be made useful if properly harnessed and restrained. The government assumed to itself the right to determine what might or might not be published; and censors were appointed without whose permission it was criminal to publish a book or paper upon any subject. Through all the changes

the press is one of the great bulwarks of liberty, and therefore ought never to be restrained; but every individual shall be held responsible for the abuse of the same. Declaration of Rights, § 20. — *South Carolina:* All persons may freely speak, write, and publish their sentiments on any subject, being responsible for the abuse of that right; and no laws shall be enacted to restrain or abridge the liberty of speech or of the press. In prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall be judges of the law and the facts. Art. 1, §§ 7 and 8. —*Alabama:* That any citizen may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty. That in prosecutions for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court. Art. 1, §§ 5 and 13. — *Mississippi:* The freedom of speech and of the press shall be held sacred; and in all indictments for libel, the jury shall determine the law and the facts, under the direction of the court. Art. 1, § 4. — *Texas:* Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the official conduct of officers or men in a public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and in all prosecutions for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases. Art. 1, §§ 5 and 6. — *Virginia:* That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments, and any citizen may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty. Art. 1, § 14. —*Colorado:* That no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that [in] all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact. Art. 2, § 10.

of government, this censorship was continued until after the Revolution of 1688, and there are no instances in English history of more cruel and relentless persecution than for the publication of books which now would pass unnoticed by the authorities. To a much later time the press was not free to publish even the current news of the day where the government could suppose itself to be interested in its suppression. Many matters, the publication of which now seems important to the just, discreet, and harmonious administration of free institutions, and to the proper observation of public officers by those interested in the discharge of their duties, were treated by the public authorities as offences against good order, and contempts of their authority. By a fiction not very far removed from the truth, the Parliament was supposed to sit with closed doors. No official publication of its debates was provided for, and no other was allowed.[1] The brief sketches which found their way into print were usually disguised under the garb of discussions in a fictitious parliament, held in a foreign country. Several times the Parliament resolved that any such publication, or any intermeddling by letter-writers, was a breach of their privileges, and should be punished accordingly on discovery of the offenders. For such a publication in 1747 the editor of the "Gentleman's Magazine" was brought to the bar of the House of Commons for reprimand, and only discharged on expressing his contrition. The general publication of parliamentary debates dates only from the American Revolution, and even then was still considered a technical breach of privilege.[2]

The American Colonies followed the practice of the parent country.[3] Even the laws were not at first published for general

[1] In 1641, Sir Edward Deering was expelled and imprisoned for publishing a collection of his own speeches, and the book was ordered to be burned by the common hangman. See May's Const. Hist. c. 7.

[2] See May's Constitutional History, c. 7, 9, and 10, for a complete account of the struggle between the government and the press, resulting at last in the complete enfranchisement and protection of the latter in the publication of all matters of public interest, and in the discussion of public affairs. Freedom to report proceedings and debates was due at last to Wilkes, who, worthless as he was, proved a great public benefactor in his obstinate defence of liberty of the press and security from arbitrary search and arrest. A fair publication of a debate is now held to be privileged; and comments on public legislative proceedings are not actionable, so long as a jury shall think them honest and made in a fair spirit, and such as are justified by the circumstances. Wason *v.* Walter, Law Rep. 4 Q. B. 73.

[3] The General Court of Massachusetts "appointed two persons, in October, 1662, licensers of the press, and prohibited the publishing any books or papers which should not be supervised by them; and in 1668 the supervisors having allowed of the printing 'Thomas à Kempis de Imitatione Christi,' the court interposed, 'it being wrote by a popish minister, and containing some things less safe to be infused among the people,' and therefore they commended to the licensers a more full revisal, and ordered the press to stop in the mean time." 1 Hutchinson's Mass.

circulation, and it seemed to be thought desirable by the magistrates to keep the people in ignorance of the precise boundary between that which was lawful and that which was prohibited, as more likely to make them avoid all doubtful actions. The magistrates of Massachusetts, when compelled by public opinion to suffer the publication of general laws in 1649, permitted it under protest, as a hazardous experiment. For publishing the laws of one session in Virginia, in 1682, the printer was arrested and put under bonds until the king's pleasure could be known, and the king's pleasure was declared that no printing should be allowed in the Colony.[1] There were not wanting instances of the public burning of books, as offenders against good order. Such was the fate of Elliot's book in defence of unmixed principles of popular freedom,[2] and Calef's book against Cotton Mather, which was given to the flames at Cambridge.[3] A single printing-press was introduced into the Colony so early as 1639;[4] but the publication even of State documents did not become free until 1719, when, after a quarrel between Governor Shute and the House, he directed that body not to print one of their remonstrances, and, on their disobeying, sought in vain to procure the punishment of their printer.[5] When Dongan was sent out as Governor of New York in 1683, he was expressly instructed to suffer no printing,[6] and that Colony obtained its first press in 1692, through a Philadelphia printer being driven thence for publishing an address from a Quaker, in which he accused his brethren in office of being inconsistent with their principles in exercising political authority.[7] So late as 1671, Governor Berkeley of Virginia expressed his thankfulness that neither free schools nor printing were introduced in the Colony, and his trust that these breeders of disobedience, heresy, and sects, would long be unknown.[8]

The public bodies of the united nation did not at once invite publicity to their deliberations. The Constitutional Convention of 1787 sat with closed doors, and although imperfect reports

257, 2d ed. See 1 Tyler, Hist. of Am. Literature, 112, 113. A license is given in Mass. Hist. Col. 3d Ser. vol. 7, p. 171.

[1] 1 Hildreth, History of the United States, 561.

[2] 1 Hutchinson's Mass. (2d ed.) 211; 2 Bancroft, 73; 1 Hildreth, 452; 2 Palfrey's New England, 511, 512.

[3] 1 Bancroft, 97; 2 Hildreth, 166.

[4] The press was actually brought over in 1638, but not set up until the following year, and nothing but the Freeman's Oath and an almanac printed until 1640. 1 Thomas, Hist. of Printing, 140; Mass. Hist. Col. 4th Ser. vol. 6, pp. 99, 376. There is a "Narrative of Newspapers in New England" in Mass. Hist. Col. 1st Ser. vol. 5, p. 208.

[5] 2 Hildreth, 298.

[6] 2 Hildreth, 77.

[7] 2 Hildreth, 171.

[8] 1 Hildreth, 526; 2 Hen. Stat. 517; 1 Tyler, Hist. of Am. Literature, 89; Wise's Seven Decades of the Union, 310.

of the debates have since been published, the injunction of secrecy upon its members was never removed. The Senate for a time followed this example, and the first open debate was had in 1793, on the occasion of the controversy over the right of Mr. Gallatin to a seat in that body.[1] The House of Representatives sat with open doors from the first, tolerating the presence of reporters,— over whose admission, however, the Speaker assumed control,— and refusing in 1796 the pittance of two thousand dollars for full publication of debates.

It must be evident from these historical facts that liberty of the press, as now understood and enjoyed, is of very recent origin;[2] and commentators seem to be agreed in the opinion that the term itself means only that liberty of publication without the previous permission of the government, which was obtained by the abolition of the censorship. In a strict sense, Mr. Hallam says, it consists merely in exemption from a licenser.[3] A similar view is expressed by De Lolme. "Liberty of the press," he says, "consists in this: that neither courts of justice, nor any other judges whatever, are authorized to take notice of writings *intended* for the press, but are confined to those which are actually printed."[4] Blackstone also adopts the same opinion,[5] and it has been followed by American commentators of standard authority as embodying correctly the idea incorporated in the constitutional law of the country by the provisions in the American Bills of Rights.[6]

It is conceded on all sides that the common-law rules that subjected the libeller to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions. The words of Ch. J. *Parker* of Massachusetts on this subject have been frequently quoted, generally recognized as sound in principle, and accepted as authority. "Nor does our constitu-

[1] "This broke the spell of deliberations in secret conclave; and a few days afterwards, on the 20th of the same month, a general resolution was adopted by the Senate, that, after the end of the present annual session, its proceedings in its legislative capacity should be with open doors, unless in special cases which, in the judgment of the body, should require secrecy." Life of Madison, by Rives, Vol. III. p. 371.

The first legislative body in America to throw open its debates to the public was the General Court of Massachusetts, in 1766, on the motion of Otis. Tudor's Life of Otis, 252.

[2] It is mentioned neither in the English Petition of Rights nor in the Bill of Rights; of so little importance did it seem to those who were seeking to redress grievances in those days.

[3] Hallam's Const. Hist. of England, c. 15.

[4] De Lolme, Const. of England, 254.

[5] 4 Bl. Com. 151.

[6] Story on Const. § 1889; 2 Kent, 17 *et seq.*; Rawle on Const. c. 10.

tion or declaration of rights," he says, speaking of his own State, "abrogate the common law in this respect, as some have insisted. The sixteenth article declares that 'liberty of the press is essential to the security of freedom in a State; it ought not therefore to be restrained in this Commonwealth.' The *liberty* of the press, not its licentiousness: this is the construction which a just regard to the other parts of that instrument, and to the wisdom of those who founded it, requires. In the eleventh article it is declared that 'every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character;' and thus the general declaration in the sixteenth article is qualified. Besides, it is well understood and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications and has been practised by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow-subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms, which does not protect him who uses them for annoyance or destruction."[1]

But, while we concede that liberty of speech and of the press does not imply complete exemption from responsibility for every thing a citizen may say or publish, and complete immunity to ruin the reputation or business of others so far as falsehood and detraction may be able to accomplish that end, it is nevertheless believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous

[1] Commonwealth *v.* Blanding, 3 Pick. 304, 313. See charge of Chief Justice *McKean*, 5 Hildreth (Pa.), 166; Wharton's State Trials, 323; State *v.* Lehre, 2 Rep. Const. Court, 809; Respublica *v.* Dennie, 4 Yeates, 267, 2 Am. Dec. 402; Jones *v.* Townsend, 21 Fla. 431. [An enactment that "every person who shall sell, offer to sell, give, or lend any book, magazine, pamphlet, or paper devoted wholly or principally to the publication of criminal news, or pictures and stories of deeds of bloodshed, lust, or crime, shall be fined," does not infringe the liberty of speech or of the press. State *v.* McKee, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542, 84 Am. St. 124. Nor does an ordinance prohibiting any public speech or address on Boston Common. Com. *v.* Davis, 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. 389; aff. 167 U. S. 173, 17 Sup. Ct. Rep. 731. Nor a statute against wrongful and wilful acts seriously endangering the public peace, and making such misdemeanors, and punishable as such. So held in People *v.* Most, 171 N. Y. 423, 64 N. E. 175. In which case Most was convicted of publishing an article advocating wholesale murder of government officials. An order to State officers not to engage in politics, and not to make public speeches, is void. Lonthan *v.* Com., 79 Va. 196.]

censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.

An examination of the controversies which have grown out of the repressive measures resorted to for the purpose of restraining the free expression of opinion will sufficiently indicate the purpose of the guaranties which have since been secured against such restraints in the future. Except so far as those guaranties relate to the mode of trial, and are designed to secure to every accused person the right to be judged by the opinion of a jury upon the criminality of his act, their purpose has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. To guard against repressive measures by the several departments of the government, by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation, was the general purpose; and there was no design or desire to modify the rules of the common law which protected private character from detraction and abuse, except so far as seemed necessary to secure to accused parties a fair trial. The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offence, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. (*a*) Or, to state the same thing in somewhat different words,

(*a*) [Statute may make it a crime to send an offensive dun or a letter threatening to publish the debtor as a "dead beat." State *v.* McCabe, 135 Mo. 450, 37 S. W. 123, 34 L. R. A. 127, 58 Am. St. 589. Upon constitutional freedom of speech and of press, see note in 32 L. R. A. 829. In Wallace *v.* Georgia C. & N. Ry. Co., 94 Ga. 732, 22 S. E. 579, it was held that this constitutional provision not only secured the

we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted.

At the common law an action would lie against any person publishing a false and malicious communication tending to disgrace or injure another. Falsehood, malice, and injury were the elements of the action; but as the law presumed innocence of crime or misconduct until the contrary was proved, the falsity of an injurious publication was presumed until its truth was averred and substantiated by the defendant; and if false, malice in the publication was also presumed unless the publication was privileged under rules to be hereafter stated. There were many cases, also, where the law presumed injury, and did not call upon the complaining party to make any other showing that he was damnified than such implication as arose from the character of the communication itself. One of these was where the words imputed a crime involving moral turpitude, and subjecting the guilty party to an infamous punishment;[1] and it was not important that the

[1] Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337; Alexander *v.* Alexander, 9 Wend. 141; Young *v.* Miller, 3 Hill, 21; Davis *v.* Brown, 27 Ohio St. 326; Todd *v.* Rough, 10 S. & R. 18; Beck *v.* Stitzel, 21 Pa. St. 522; Stitzell *v.* Reynolds, 67 Pa. St. 54; Klumph *v.* Dunn, 66 Pa. St. 141; Shipp *v.* McGraw, 3 Murph. 463, 9 Am. Dec. 611; Hoag *v.* Hatch, 23 Conn. 585; Billings *v.* Wing, 7 Vt. 439; Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355; Montgomery *v.* Deeley, 3 Wis. 709; Filber *v.* Dauhterman, 26 Wis. 518; Perdue *v.* Burnett, Minor, 138; M'Cuen *v.* Ludlum, 17 N. J. 12; Gage *v.* Shelton, 3 Rich. 242; Pollard *v.* Lyon, 91 U. S. 225; Wagaman *v.* Byers, 17 Md. 183; Castleberry *v.* Kelly, 26 Ga. 606; Burton *v.* Burton, 3 Greene (Iowa), 316; Simmons *v.* Holster, 13 Minn. 249; Seller *v.* Jenkins, 97 Ind. 430; Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456; Lemons *v.* Wells, 78 Ky. 117; Brooks *v.* Harison, 91 N. Y. 83; Bacon *v.* Mich. Centr. R. R. Co., 55 Mich. 224, 21 N. W. 324; Boogher *v.* Knapp, 76 Mo. 457. Words imputing a non-indictable offence are thus actionable. Webb *v.* Beavan, L. R. 11 Q. B. D. 609. A simple charge of drunkenness is not, though an ordinance punishes public indecent intoxication. Seery *v.* Viall, 16 R. I. 517, 17 Atl. 552. See Melvin *v.* Weiant, 36 Ohio St. 184; Pollock *v.* Hastings, 88 Ind. 248; Sterling *v.* Jugenheimer, 69 Iowa, 210, 28 N. W. 559; Christal *v.* Craig, 80 Mo. 367, for other illustrations of charges not actionable *per se*. If, however, the words, though seeming to charge a crime, are equivocal, and may be understood in an innocent sense, they will not be actionable without the proper averment to show the sense in which they were used; as, for instance, where one is charged with having sworn falsely; which may or may not be a crime. Gilman *v.* Lowell, 8 Wend. 573; Sheely *v.* Biggs, 2 Har. & J. 363, 3 Am. Dec. 552; Brown *v.* Hanson, 53 Ga. 632; Crone *v.*

liberty to speak, but by implication the liberty to refrain from speaking, and applied the principle to a statute requiring employers to assign the reason for discharging an employee, holding such statute invalid.]

charge imported a crime already punished, or for which a prosecution was barred by limitation of time.[1] Another was where one was charged with contagious disease; the effect of the charge, if believed, being to exclude him from the society of his fellows.[2] Another was where the charge affected the party in his business, office, or means of livelihood, as where it was said of a postmaster that he would rob the mail;[3] or of a trader, to whom credit is important, that he is insolvent;[4] and the like. Still another was where any injurious charge holding a party up to public contempt, scorn, or ridicule was propagated by printing, writing, signs, burlesques, &c.[5] And although it was formerly held that to charge a

Angell, 14 Mich. 340; Bricker *v.* Potts, 12 Pa. St. 200; Casselman *v.* Winship, 3 Dak. 292, 19 N. W. 412. It is not necessary, however, that technical words be employed; if the necessary inference, taking the words together, is a charge of crime, it is sufficient. Morgan *v.* Livingston, 2 Rich. 573; True *v.* Plumley, 36 Me. 466; Curtis *v.* Curtis, 10 Bing. 477; Stroebel *v.* Whitney, 31 Minn. 384, 18 N. W. 98; Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475. Compare Pollock *v.* Hastings, 88 Ind. 248; Fawsett *v.* Clark, 48 Md. 494. But to say of one "He has stolen my land" is not actionable *per se*, land not being the subject of larceny. Ogden *v.* Riley, 14 N. J. 186; Underhill *v.* Welton, 32 Vt. 40; Ayers *v.* Grider, 15 Ill. 37; Edgerly *v.* Swain, 32 N. H. 478; Trabue *v.* Mays, 3 Dana, 138; Perry *v.* Man, 1 R. I. 263; Wright *v.* Lindsay, 20 Ala. 428; Cock *v.* Weatherby, 13 Miss. 333. See, as to charge of stealing fixtures, Trimble *v.* Foster, 87 Mo. 49.

[1] Carpenter *v.* Tarrant, Cas. temp. Hardw. 339; Smith *v.* Stewart, 5 Pa. St. 372; Holley *v.* Burgess, 9 Ala. 728; Van Ankin *v.* Westfall, 14 Johns 233; Krebs *v.* Oliver, 12 Gray, 239; Baum *v.* Clause, 5 Hill, 196; Utley *v.* Campbell, 5 T. B. Monr. 396; Indianapolis Sun *v.* Horrell, 53 Ind. 527; Boogher *v.* Knapp, 8 Mo. App. 591; Leyman *v.* Latimer, L. R. 3 Ex. D. 352.

[2] Taylor *v.* Hall, 2 Stra. 1389; Carslake *v.* Mapledoram, 2 T. R. 473; Watson *v.* McCarthy, 2 Kelly, 57; Nichols *v.* Guy, 2 Ind. 82; Irons *v.* Field, 9 R. I. 216; Kaucher *v.* Blinn, 20 Ohio, N. S. 62.

[3] Craig *v.* Brown, 5 Blackf. 44. For other illustrations the following cases may be referred to: Gottbehuet *v.* Hubachek, 36 Wis. 515; Robbins *v.* Treadway, 2 J. J. Marsh. 540; Hook *v.* Hackney, 16 S. & R. 385; Harris *v.* Terry, 98 N. C. 131, 3 S. E. 745; De Pew *v.* Robinson, 95 Ind. 109; Pratt *v.* Pioneer Press Co., 35 Minn. 251, 28 N. W. 708; Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81; Franklin *v.* Browne, 67 Ga. 272; Hartford *v.* State, 96 Ind. 461. See also Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177; Singer *v.* Bender, 64 Wis. 169, 24 N. W. 903; Dooling *v.* Budget Pub. Co., 144 Mass. 258, 10 N. E. 809.

[4] Brown *v.* Smith, 13 C. B. 596; Lindsey *v.* Smith, 7 Johns. 359; Mott *v.* Comstock, 7 Cow. 654; Lewis *v.* Hawley, 2 Day, 495; Nelson *v.* Borchenius, 52 Ill. 236; Orr *v.* Skofield, 56 Me. 183; Weiss *v.* Whittemore, 28 Mich. 366; Newell *v.* How, 31 Minn. 235, 17 N. W. 383; Williams *v.* Smith, L. R. 22 Q. B. D. 134. [That blacklisting is sometimes libel, even when party blacklisted is in debt, see Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; upon blacklisting as libel, see note to this case in L. R. A.]

[5] Janson *v.* Stuart, 1 T. R. 748; Van Ness *v.* Hamilton, 19 Johns. 349; Clegg *v.* Laffer, 10 Bing. 250; Steele *v.* Southwick, 9 Johns. 214; Pollard *v.* Lyon, 91 U. S. 225; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349; State *v.* Smily, 37 Ohio St. 30; Stewart *v.* Swift Spec. Co., 76 Ga. 280; Johnson *v.* Com., — Pa. St. —, 14 Atl. 425; Bettner *v.* Holt, 70 Cal. 270, 11 Pac. 713: Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499. For illustrations of charges held not within this rule, see Trimble *v.* Anderson, 79 Ala. 514; Allen *v.* Cape Fear, &c. Ry. Co., 100 N. C.

female verbally with want of chastity was not actionable without proof of special damage,[1] yet of late a disposition has been exhibited to break away from this rule in favor of one more just and sensible,[2] and the statutes of several of the States have either made adultery and incontinence punishable as crimes, whereby to charge them becomes actionable *per se* under the common-law rule, or else in express terms have declared such a charge actionable without proof of special damage.[3]

But in any other case a party complaining of a false, malicious, and disparaging communication might maintain an action therefor, on averment and proof of special damage;[4] though the truth

397, 6 S. E. 105, and cases in Cooley on Torts, 242, note 4.

[1] Gascoign *v.* Ambler, 2 Ld. Raym. 1004; Graves *v.* Blanchet, 2 Salk. 696; Wilby *v.* Elston, 8 C. B. 142; Buys *v.* Gillespie, 2 Johns. 115, 3 Am. Dec. 404; Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337; Bradt *v.* Towsley, 13 Wend. 253; Dyer *v.* Morris, 4 Mo. 214; Stanfield *v.* Boyer, 6 H. & J. 248; Woodbury *v.* Thompson, 3 N. H. 194; Berry *v.* Carter, 4 Stew. & Port. 387, 24 Am. Dec. 762; Elliot *v.* Ailsbury, 2 Bibb, 473, 5 Am. Dec. 631; Linney *v.* Maton, 13 Tex. 449; Underhill *v.* Welton, 32 Vt. 40; Castleberry *v.* Kelly, 26 Ga. 606.

[2] See the cases of Sexton *v.* Todd, Wright, 317; Wilson *v.* Runyan, Wright, 651; Malone *v.* Stewart, 15 Ohio, 319; Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Klewin *v.* Bauman, 53 Wis. 244; Moberly *v.* Preston, 8 Mo. 462; Sidgreaves *v.* Myatt, 22 Ala. 617; Terry *v.* Bright, 4 Md. 430; Spencer *v.* McMasters, 16 Ill. 105.

[3] See Frisbie *v.* Fowler, 2 Conn. 707; Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675; Miller *v.* Parish, 8 Pick. 384; Robbins *v.* Fletcher, 101 Mass. 115; Pledger *v.* Hathcock, 1 Ga. 550; Smally *v.* Anderson, 2 T. B. Monr. 56, 15 Am. Dec. 121; Williams *v.* Bryant, 4 Ala. 44; Dailey *v.* Reynolds, 4 Greene (Iowa), 354; Symonds *v.* Carter, 32 N. H. 458; McBrayer *v.* Hill, 4 Ired. 136; Morris *v.* Barkley, 1 Lit. 64; Phillips *v.* Wiley, 2 Lit. 153; Watts *v.* Greenlee, 2 Dev. 115; Drummond *v.* Leslie, 5 Blackf. 453; Worth *v.* Butler, 7 Blackf. 251; Richardson *v.* Roberts, 23 Ga. 215; Burford *v.* Wible, 32 Pa. St. 95; Freeman *v.* Price, 2 Bailey, 115; Regnier *v.* Cabot, 7 Ill. 34; Ranger *v.* Goodrich, 17 Wis. 78; Adams *v.* Rankin, 1 Duvall, 58; Downing *v.* Wilson, 36 Ala. 717; Cox *v.* Bunker, Morris, 269; Smith *v.* Silence, 4 Iowa, 321; Truman *v.* Taylor, 4 Iowa, 424; Beardsley *v.* Bridgeman, 17 Iowa, 290; Patterson *v.* Wilkinson, 55 Me. 42; Mayer *v.* Schleichter, 29 Wis. 646; Kelly *v.* Flaherty, 16 R. I. 234, 14 Atl. 876; Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291; Barnett *v.* Ward, 36 Ohio St. 107; Kedrolivansky *v.* Niebaum, 70 Cal. 216, 11 Pac. 641. The injustice of the common-law rule is made prominent in those cases where it has been held that an allegation that, in consequence of the charge, the plaintiff had fallen into disgrace, contempt, and infamy, and lost her credit, reputation, and peace of mind (Woodbury *v.* Thompson, 3 N. H. 194), and that she is shunned by her neighbors (Beach *v.* Ranney, 2 Hill, 310), was not a sufficient allegation of special damage to support the action. In the following States, and perhaps some others, to impute unchastity to a female is actionable *per se* by statute: Alabama, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New York, North Carolina, and South Carolina.

[4] Kelley *v.* Partington, 3 Nev. & M. 117; Steele *v* Southwick, 9 Johns. 214; Hallock *v.* Miller, 2 Barb. 630; Powers *v.* Dubois, 17 Wend. 63; Weed *v.* Foster, 11 Barb. 203; Cooper *v.* Greeley, 1 Denio, 347; Stone *v.* Cooper, 2 Denio, 293; Wilson *v.* Cottman, 65 Md. 190, 3 Atl. 890. The damage, however, must be of a pecuniary character. Beach *v.* Ranney, 2 Hill, 309. But very slight damage has been held sufficient to support considerable recoveries. Williams *v.* Hill, 19 Wend. 305; Bradt *v.* Towsley, 13 Wend.

of the charge, if pleaded and established, was generally a complete defence.[1]

In those cases in which the injurious charge was propagated by printing, writing, signs, burlesques, &c., there might also be a criminal prosecution, as well as a suit for private damages. The criminal prosecution was based upon the idea that the tendency of such publications was to excite to a breach of the public peace;[2] and it might be supported, in cases where the injurious publication related to whole classes or communities of people, without singling out any single individual so as to entitle him to a private remedy.[3] On similar grounds to publish injurious

253; Olmsted *v.* Miller, 1 Wend. 506; Moore *v.* Meagher, 1 Taunt. 39; Knight *v.* Gibbs, 1 Ad. & El. 43.

[1] See Heard on Libel and Slander, § 151; Townsend on Libel and Slander, § 73; Bourland *v.* Eidson, 8 Gratt. 27; Scott *v.* McKinnish, 15 Ala. 662; Porter *v.* Botkins, 59 Pa St. 484; Hutchinson *v.* Wheeler, 35 Vt. 330; Thomas *v.* Dunnaway, 30 Ill. 373; Huson *v.* Dale, 19 Mich. 17; Jarnigan *v.* Fleming, 43 Miss. 710; Knight *v.* Foster, 39 N. H. 576. [Upon truth as a defence, see note to 2 L. R. A. 592.]

[2] Commonwealth *v.* Clap, 4 Mass. 168, 3 Am. Dec. 213; State *v.* Lehre, 2 Brev. 446, 4 Am. Dec. 596.

[3] In Palmer *v.* Concord, 48 N. H. 311, suit was brought against a town for the destruction of a printing press by a mob. The defence was, that plaintiff had caused the mob by libellous articles published in his paper reflecting upon the army. *Smith, J.*, says: "The first of these articles charges the United States forces in Virginia with cowardice, and holds them up as objects of ridicule therefor. The fourth article calls the army a 'mob;' and although the charges of murder and robbery may perhaps be considered as limited in their application, the charge of cowardice against the whole army is repeated. The fifth article in effect charges those bodies of soldiers who passed through, or occupied, Hampton, Martinsburg, Fairfax, or Germantown, with improper treatment of persons of all ages and sexes, in each of those places. If such charges had been made against a single soldier named in the articles, they would *prima facie* have constituted a libel. The tendency to expose him to contempt or ridicule could not be doubted, and the tendency to injure his professional reputation would be equally apparent. A soldier's character for courage or discipline is as essential to his good standing as a merchant's reputation for honesty, or a physician's reputation as to professional learning or skill, would be in their respective callings. And by military law, to which the soldier is amenable, we suppose cowardice would be regarded as a crime punishable by severe penalties. As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libellous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether 'the fact of numbers defamed does not add to the enormity of the act.' See 2 Bishop on Criminal Law (3d ed.), § 922; Holt on Libel, 216-217; Russell on Crimes (1st Am. ed.), 305-332. In Sumner *v.* Buel, 12 Johns. 475, where a majority of the court held that a civil action could not be maintained by an officer of a regiment, for a publication reflecting on the officers generally, unless there was an averment of special damage,

charges against a foreign prince or ruler was also held punishable as a public offence, because tending to embroil the two nations, and to disturb the peace of the world.[1] These common-law rules are wholesome, and are still in force.

We are not so much concerned, however, with the general rules pertaining to the punishment of injurious publications, as with those special cases where, for some reason of general public policy, the publication is claimed to be privileged, and where, consequently, it may be supposed to be within the constitutional protection. It has always been held, notwithstanding the general rule that malice is to be inferred from a false and injurious publication, that there were some cases to which the presumption would not apply. These are the cases which are said to be privileged. The term "privileged" is applied to two classes of communications: First, those which, for reasons of State policy, the law will not suffer to be the foundation of a civil action; and, second, those in which the circumstances are held to rebut the

Thompson, Ch. J., said, p. 478: 'The offender in such case does not go without punishment. The law has provided a fit and proper remedy, by indictment; and the generality and extent of such libels make them more peculiarly public offences.' In Ryckman *v.* Delavan, 25 Wend. 186, *Walworth*, Chancellor, — who held, in opposition to the majority of the Court of Errors, that the plaintiff could not maintain a civil suit, because the publication reflected upon a class of individuals, and not upon the plaintiff personally, — said, pp. 195-196: 'There are many cases in the books where the writers and publishers of defamatory charges, reflecting upon the conduct of particular classes or bodies of individuals, have been proceeded against by indictment or information, although no particular one was named or designated therein to whom the charge had a personal application. All those cases, however, whether the libel is upon an organized body of men, as a legislature, a court of justice, a church, or a company of soldiers, or upon a particular class of individuals, proceed upon the ground that the charge is a misdemeanor, although it has no particular personal application to the individual of the body or class libelled; because it tends to excite the angry passions of the community either in favor of or against the body or class in reference to the conduct of which the charge is made, or because it tends to impair the confidence of the people in their government or in the administrations of its laws.' In the course of his opinion the chancellor mentions a Scotch case (Shearlock *v.* Beardsworth, 1 Murray's Report of Jury Cases) where a civil suit was maintained, which was 'brought by a lieutenant-colonel, in behalf of his whole regiment, for defamation, in calling them a regiment of cowards and blackguards.' In Rex *v.* Hector Campbell, King's Bench, Hil. Term, 1808 (cited in Holt on Libel, 249, 250), an information was granted for a libel on the College of Physicians; and the respondent was convicted and sentenced. Cases may be supposed where publications, though of a defamatory nature, have such a wide and general application that, in all probability, a breach of the peace would not be caused thereby; but it does not seem to us that the present publication belongs to that class.

"Our conclusion is that the jury should have been instructed that the first, fourth, and fifth articles were *prima facie* libellous; and that the publication of those articles must be regarded as 'illegal conduct,' unless justified or excused by facts sufficient to constitute a defence to an indictment for libel."

[1] 27 State Trials, 627; 2 May, Const. History of England, c. 9.

legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge.[1] The first class is absolutely privileged; it embraces but few cases, which for the most part concern the administration of the government in some of its branches (*a*); the second is conditionally privileged, and the cases falling within it are more numerous. They are generally cases in which a party has a duty to discharge which requires that he should be allowed to speak freely and fully that which he believes; or where he is himself directly interested in the subject-matter of the communication, and makes it with a view to the protection or advancement of his own interest, or where he is communicating confidentially with a person interested in the communication, and by way of advice or admonition.[2] Many such cases suggest themselves which are purely of private concern: such as answers to inquiries into the character or conduct of one formerly employed by the person to whom the inquiry is addressed, and of whom the information is sought with a view to guiding the inquirer in his own action in

[1] Lewis *v.* Chapman, 16 N. Y. 369, 373, per *Selden*, J.; Townsend on Libel and Slander, § 209. "It properly signifies this and nothing more: that the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice." *Daniel*, J., in White *v.* Nichols, 3 How. 266, 287. And see Dillard *v.* Collins, 25 Gratt. 343; McIntyre *v.* McBean, 13 Q. B. (Ontario) 534.

[2] When a communication is made in confidence, either by or to a person interested in the communication, supposing it to be true, or by way of admonition or advice, it seems to be a general rule that malice (*i. e.* express malice) is essential to the maintenance of an action." 1 Starkie on Slander, 321. See Harrison *v.* Bush, 5 El. & Bl. 344; Somerville *v.* Hawkins, 10 C. B. 583; Wright *v.* Woodgate, 2 Cr. M. & R. 576; Whiteley *v.* Adams, 45 C. B. N. S. 392. A paper signed by a number of parties agreeing to join in the expense of prosecuting others, who were stated therein to have "robbed and swindled" them, is privileged. Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360. The statement in a report of an incorporated society cautioning the public against trusting a person who had formerly been employed in collecting subscriptions for them, is privileged. Gasset *v.* Gilbert, 6 Gray, 94. But see Holliday *v.* Ont. Farmers, &c. Co., 1 Ont. App. 483. And the communication by a merchant to a subsequent employer of a clerk whom he had recommended, of facts which caused him to change his opinion, is privileged. Fowles *v.* Bowen, 30 N. Y. 20. And so is a communication made in good faith by a person employed in a confidential relation. Atwill *v.* Mackintosh, 120 Mass. 177. So is one charging a child with stealing, made in answer to inquiry of the mother. Long *v.* Peters, 47 Iowa, 239. So is a statement of an investigating officer as to the worthiness of a person, to one interested in aiding him. Waller *v.* Loch, L. R. 7 Q. B. D. 619. So is a statement by a vendor's servant to the vendee of cattle, of the former's fraud. Mott *v.* Dawson, 46 Iowa, 533.

(*a*) [Publication by a town of a report made to it by its investigating committee, upon manner in which a contract with the town has been performed, is privileged. Howland *v.* Maynard, 159 Mass. 434, 21 L. R. A. 500, 34 N. E. 515.]

determining upon employing the same person;[1] answers to inquiries by one tradesman of another as to the solvency of a person whom the inquirer has been desired to trust;[2] answers by a creditor to inquiries regarding the conduct and dealings of his debtor, made by one who had become surety for the debt;[3] communications from an agent to his principal, reflecting injuriously upon the conduct of a third person in a matter connected with the agency;[4] communications to a near relative respecting the character of a person with whom the relative is in negotiation for marriage;[5] and as many more like cases as would fall within the same reasons.[6] The rules of law applicable to these cases are

[1] Pattison *v.* Jones, 8 B. & C. 578; Elam *v.* Badger, 23 Ill. 498; Noonan *v.* Orton, 32 Wis. 106; Hatch *v.* Lane, 105 Mass. 394; Bradley *v.* Heath, 12 Pick. 163. Compare Fryer *v.* Kinnersley, 15 C. B. N. S. 422. If the employer states his honest suspicion of the employee's guilt, the fact that he does not fully believe him guilty will not remove the privilege of the occasion. Billings *v.* Fairbanks, 139 Mass. 66, 29 N. E. 544.

[2] Smith *v.* Thomas, 2 Bing. N. C. 372; Storey *v.* Challands, 8 C. & P. 234. A statement made in honest belief to an inquirer as to credit of a person who has referred him to the speaker, is privileged. Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261. But the reports of a mercantile agency, published and distributed to its customers without regard to their special interest in any particular case, are not privileged. Taylor *v.* Church, 8 N. Y. 452; Sunderlin *v.* Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; Beardsley *v.* Tappan, 5 Blatch. 497; King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705; Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753. But reports in response to inquiries from those who have such special interest are privileged. Ormsby *v.* Douglass, 37 N. Y. 477; Trussell *v.* Scarlett, 18 Fed. Rep. 214; Erber *v.* Dun, 12 Fed. Rep. 526. See also State *v.* Lonsdale, 48 Wis. 348, 4 N. W. 390; Locke *v.* Bradstreet Co., 22 Fed. Rep. 771; Woodruff *v.* Bradstreet Co., 116 N. Y. 217, 22 N. E. 354; Johnson *v.* Bradstreet Co., 77 Ga. 172.

[3] Dunman *v.* Bigg, 1 Camph. 269, note; White *v.* Nicholls, 3 How. 266.

[4] Washburn *v.* Cooke, 3 Denio, 110. See Easley *v.* Morse, 9 Ala. 266.

[5] Todd *v.* Hawkins, 8 C. & P. 88. But there is no protection to such a communication from a stranger. Joannes *v.* Bennett, 5 Allen, 170. Nor from a friend, unless it is in reply to a request for it. Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75.

[6] As to whether a stranger volunteering to give information injurious to another, to one interested in the knowledge, is privileged in so doing, see Coxhead *v.* Richards, 2 M. G. & S. 569; and Bennett *v.* Deacon, 2 M. G. & S. 628. A letter volunteering to an employer information of his servant's untrustworthiness is not privileged when sent to effect the writer's purpose, and not in good faith to protect the employer. Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91. Where a confidential relation of any description exists between the parties, the communication is privileged; as where the tenant of a nobleman had written to inform him of his gamekeeper's neglect of duty. Cockagne *v.* Hodgkisson, 5 C. & P. 543. Where a son-in-law wrote to warn his mother-in-law of the bad character of a man she was about to marry. Todd *v.* Hawkins, 8 C. & P. 88. Where a banker communicated with his correspondent concerning a note sent to him for collection; the court saying that "all that is necessary to entitle such communications to be regarded as privileged is, that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving the information, and to deprive the act of an appearance of officious intermeddling with the affairs of others." Lewis *v.* Chapman, 16 N. Y. 369, 375. Where one communicated to an employer his suspicions of dishonest conduct in a servant towards himself.

very well settled, and are not likely to be changed with a view to greater stringency.[1]

Libels upon the Government.

At the common law it was indictable to publish anything against the constitution of the country, or the established system of government. The basis of such a prosecution was the tendency of publications of this character to excite disaffection with the government, and thus induce a revolutionary spirit. The law always, however, allowed a calm and temperate discussion of public events and measures, and recognized in every man a right to give every public matter a candid, full, and free discussion. It was only when a publication went beyond this, and tended to excite tumult, that it became criminal.[2] It cannot be doubted, however, that the common-law rules on this subject were administered in many cases with great harshness, and that the courts, in the interest of repression and at the instigation of the government, often extended them to cases not within their reasons. This was especially true during the long and bloody struggle with France, at the close of the last and beginning of the present century, and for a few subsequent years, until a rising public discontent with political prosecutions began to lead to acquittals, and finally to abandonment of all such attempts to restrain the free expression of sentiments on public affairs. Such prosecutions have now altogether ceased in England. Like the censorship of the press, they have fallen out of the British constitutional system. "When the press errs, it is by the press itself that its errors are left to be corrected. Repression has ceased to be the policy of rulers, and statesmen have at length fully realized the wise maxim of Lord *Bacon*, that 'the punishing of wits enhances their authority, and a forbidden writing is thought to be a certain

Amann *v.* Damm, 8 C. B. N. S. 597. Where a tradesman published in a newspaper that his servant had left his employ, and taken upon himself to collect the tradesman's bills. Hatch *v.* Lane, 105 Mass. 394. Compare Lawler *v.* Earle, 5 Allen, 22. [A publication by the officers of a church through their church paper, made after inquiry, that their pastor is unworthy of his position, and is insubordinate and unworthy of confidence, where such publication is made in good faith and without malice, is privileged. Redgate *v.* Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236.]

[1] See further, Harrison *v.* Bush, 5 El. & Bl. 344; Shipley *v.* Todhunter, 7 C. & P. 680; Lawler *v.* Earle, 5 Allen, 22; Grimes *v.* Coyle, 6 B. Mour. 301; Rector *v.* Smith, 11 Iowa, 302; Goslin *v.* Cannon, 1 Harr. 3; Joannes *v.* Bennett, 5 Allen, 169; State *v.* Burnham, 9 N. H. 34; Campbell *v.* Bannister, 79 Ky. 205; Beeler *v.* Jackson, 64 Md. 589, 2 Atl. 916; Billings *v.* Fairbanks, 136 Mass. 177; Bacon *v.* Mich. Centr. R. R. Co., 66 Mich. 166, 33 N. W. 181.

[2] Regina *v.* Collins, 9 C. & P. 456, per *Littledale*, J. See the proceedings against Thomas Paine, 27 State Trials, 357.

spark of truth that flies up in the faces of them that seek to tread it out.'"[1]

We shall venture to express a doubt if the common-law principles on this subject can be considered as having been practically adopted in the American States. It is certain that no prosecutions could now be maintained in the United States courts for libels on the general government, since those courts have no common-law jurisdiction,[2] and there is now no statute, and never was except during the brief existence of the Sedition Law, which assumed to confer any such power.

The Sedition Law was passed during the administration of the elder Adams, when the fabric of government was still new and untried, and when many men seemed to think that the breath of heated party discussions might tumble it about their heads. Its constitutionality was always disputed by a large party, and its impolicy was beyond question. It had a direct tendency to produce the very state of things it sought to repress; the prosecutions under it were instrumental, among other things, in the final overthrow and destruction of the party by which it was adopted, and it is impossible to conceive, at the present time, of any such state of things as would be likely to bring about its re-enactment, or the passage of any similar repressive statute.[3]

When it is among the fundamental principles of the government that the people frame their own constitution, and that in doing so they reserve to themselves the power to amend it from time to time, as the public sentiment may change, it is difficult to conceive of any sound principle on which prosecutions for libels on the system of government can be based, except when they are made in furtherance of conspiracy with the evident intent and purpose to excite rebellion and civil war.[4] It is very easy to lay down a rule for the discussion of constitutional questions; that they are privileged, if conducted with calmness and temperance, and that they are not indictable unless they go beyond the bounds of fair discussion. But what is calmness and temperance, and what is fair in the discussion of supposed evils in the government? And if something is to be allowed "for a

[1] May, Constitutional History, c. 10.

[2] United States v. Hudson, 7 Cranch, 32. See *ante*, p. 46, and cases cited in note.

[3] For prosecutions under this law, see Lyon's Case, Wharton's State Trials, 333; Cooper's Case, Wharton's State Trials, 659; Haswell's Case, Wharton's State Trials, 684; Callendar's Case, Wharton's State Trials, 688. And see 2 Randall, Life of Jefferson, 417-421; 5 Hildreth, History of United States, 247, 365.

[4] The author of the Life and Times of Warren very truly remarks that "the common-law offence of libelling a government is ignored in constitutional systems, as inconsistent with the genius of free institutions." P. 47.

little feeling in men's minds,"[1] how great shall be the allowance? The heat of the discussion will generally be in proportion to the magnitude of the evil as it appears to the party discussing it; must the question whether he has exceeded due bounds or not be tried by judge and jury, who may sit under different circumstances from those under which he has spoken, or at least after the heat of the occasion has passed away, and who, feeling none of the excitement themselves, may think it unreasonable that any one else should ever have felt it? The dangerous character of such prosecutions would be the more glaring if aimed at those classes who, not being admitted to a share in the government, attacked the constitution in the point which excluded them. Sharp criticism, ridicule, and the exhibition of such feeling as a sense of injustice engenders, are to be expected from any discussion in these cases; but when the very classes who have established the exclusion as proper and reasonable are to try as judges and jurors the assaults made upon it, they will be very likely to enter upon the examination with a preconceived notion that such assaults upon their reasonable regulations must necessarily be unreasonable. If any such principle of repression should ever be recognized in the common law of America, it might reasonably be anticipated that in times of high party excitement it would lead to prosecutions by the party in power, to bolster up wrongs and sustain abuses and oppressions by crushing adverse criticism and discussion. The evil, indeed, could not be of long continuance; for, judging from experience, the reaction would be speedy, thorough, and effectual; but it would be no less a serious evil while it lasted, the direct tendency of which would be to excite discontent and to breed a rebellious spirit. Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all the proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.

The English common-law rule which made libels on the constitution or the government indictable, as it was administered by

[1] Regina *v.* Collins, 9 C. & P. 456, 460, per *Littledale*, J.

the courts, seems to us unsuited to the condition and circumstances of the people of America, and therefore never to have been adopted in the several States. If we are correct in this, it would not be in the power of the State legislatures to pass laws which should make mere criticism of the constitution or of the measures of government a crime, however sharp, unreasonable, and intemperate it might be. The constitutional freedom of speech and of the press must mean a freedom as broad as existed when the constitution which guarantees it was adopted, and it would not be in the power of the legislature to restrict it, unless it might be in those cases of publications injurious to private character, or public morals or safety, which come strictly within the reasons of civil or criminal liability at the common law, but in which, nevertheless, the common law as we have adopted it failed to provide a remedy. It certainly could not be said that freedom of speech was violated by a law which should make imputing the want of chastity to a female actionable without proof of special damage; for the charge is one of grievous wrong, without any reason in public policy demanding protection to the communication; and the case is strictly analogous to many other cases where the common law made the party responsible for his false accusations. The constitutional provisions do not prevent the modification of the common-law rules of liability for libels and slanders, but they would not permit bringing new cases within those rules when they do not rest upon the same or similar reasons.[1]

[1] In Respublica *v.* Dennie, 4 Yeates, 267, 2 Am. Dec. 402, the defendant was indicted in 1805 for publishing the following in a public newspaper: "A democracy is scarcely tolerated at any period of national history. Its omens are always sinister, and its powers are unpropitious. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on its trial here, and its issue will be civil war, desolation, and anarchy. No wise man but discerns its imperfections, no good man but shudders at its miseries, no honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptible and vicious is a memorable example of what the villany of some men can devise, the folly of others receive, and both establish in spite of reason, reflection, and sensation." Judge *Yeates* charged the jury, among other things, as follows: "The seventh section of the ninth article of the constitution of the State must be our guide upon this occasion; it forms the solemn compact between the people and the three branches of the government, — the legislative, executive, and judicial powers. Neither of them can exceed the limits prescribed to them respectively. To this exposition of the public will every branch of the common law and of our municipal acts of assembly must conform; and if incompatible therewith, they must yield and give way. Judicial decisions cannot weigh against it when repugnant thereto. It runs thus: 'The printing-presses shall be free to every person who under-

Criticism upon Officers and Candidates for Office.

There are certain cases where criticism upon public officers, their actions, character, and motives, is not only recognized as

takes to examine the proceedings of the legislature, or any branch of the government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.' Thus it is evident that legislative acts, or of any branch of the government, are open to public discussion; and every citizen may freely speak, write, or print on any subject, but is accountable for the abuse of that privilege. There shall be no licensers of the press. Publish as you please in the first instance, without control; but you are answerable both to the community and the individual if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to private men affected by injurious publications, unless the discussion be proper for public information. But 'if one uses the weapon of truth wantonly for disturbing the peace of families, he is guilty of a libel.' Per General *Hamilton*, in Croswell's Trial, p. 70. The matter published is not proper for public information. The common weal is not interested in such a communication, except to suppress it.

"What is the meaning of the words 'being responsible for the abuse of that liberty,' if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? The expressions relate to and pervade every part of the sentence. The objection that the determinations of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them when party spirit runs high, in other criminal prosecutions. But we have no other constitutional mode of decision pointed out to us, and we are bound to use the method described.

"It is no infraction of the law to publish temperate investigations of the nature and forms of government. The day is long past since Algernon Sidney's celebrated treatise on government, cited on this trial, was considered as a treasonable libel. The enlightened advocates of representative republican government pride themselves in the reflection that the more deeply their system is examined, the more fully will the judgments of honest men be satisfied that it is the most conducive to the safety and happiness of a free people. Such matters are 'proper for public information.' But there is a marked and evident distinction between such publications and those which are plainly accompanied with a criminal intent, deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power by the known constituted authorities. These latter writings are subversive of all government and good order. 'The liberty of the press consists in publishing the truth, from good motives and for justifiable ends, though it reflects on government or on magistrates.' Per General *Hamilton*, in Croswell's Trial, pp. 63, 64. It disseminates political knowledge, and, by adding to the common stock of freedom, gives a just confidence to every individual. But the malicious publications which I have reprobated infect insidiously the public mind with a subtle poison, and produce the most mischievous and alarming consequences by their tendency to anarchy, sedition, and civil war. We cannot, consistently with our official duty, declare such conduct dispunishable. We believe that it is not justified by the words or meaning of our constitution. It is true it may not be easy in every instance to draw the exact distinguishing

legitimate, but large latitude and great freedom of expression are permitted, so long as good faith inspires the communication. There are cases where it is clearly the duty of every one to speak freely what he may have to say concerning public officers, or those who may present themselves for public positions. Through the ballot-box the electors approve or condemn those who ask their suffrages; and if they condemn, though upon grounds the most unjust or frivolous, the law affords no redress. Some officers, however, are not chosen by the people directly, but designated through some other mode of appointment. But the public have a right to be heard on the question of their selection; and they have the right, for such reasons as seem to their minds sufficient, to ask for their dismissal afterwards. They have also the right to complain of official conduct affecting themselves, and

line. To the jury it peculiarly belongs to decide on the intent and object of the writing. It is their duty to judge candidly and fairly, leaning to the favorable side when the criminal intent is not clearly and evidently ascertained.

"It remains, therefore, under our most careful consideration of the ninth article of the Constitution, for the jury to divest themselves of all political prejudices (if any such they have), and dispassionately to examine the publication which is the ground of the present prosecution. They must decide on their oaths, as they will answer to God and their country, whether the defendant, as a factious and seditious person, with the criminal intentions imputed to him, in order to accomplish the object stated in the indictment, did make and publish the writing in question. Should they find the charges laid against them in the indictment to be well founded, they are bound to find him guilty. They must judge for themselves on the plain import of the words, without any forced or strained construction of the meaning of the author or editor, and determine on the correctness of the innuendoes. To every word they will assign its natural sense, but will collect the true intention from the context, the whole piece. They will accurately weigh the probabilities of the charge against a literary man. Consequences they will wholly disregard, but firmly discharge their duty. Representative republican governments stand on immovable bases, which cannot be shaken by theoretical systems. Yet if the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously, and wilfully aimed at the independence of the United States, the Constitution thereof, or of this State, they should convict the defendant. If, on the other hand, the production was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously, or that the censures on democracy were bestowed on pure unmixed democracy, where the people *en masse* execute the sovereign power without the medium of their representatives (agreeably to our forms of government), as have occurred at different times in Athens, Sparta, Rome, France, and England, then, however the judgments of the jury may incline them to think individually, they should acquit the defendant. In the first instance the act would be criminal; in the last it would be innocent. If the jury should doubt of the criminal intention, then also the law pronounces that he should be acquitted. 4 Burr. 2552, per Lord *Mansfield*." Verdict, not guilty. The fate of this prosecution was the same that would attend any of a similar character in this country, admitting its law to be sound, except possibly in cases of violent excitement, and when a jury could be made to believe that the defendant contemplated and was laboring to produce a change of government, not by constitutional means, but by rebellion and civil war.

to petition for a redress of grievances. A principal purpose in perpetuating and guarding the right of petition is to insure to the public the privilege of being heard in these and the like cases.

In New York a party was prosecuted for a libel contained in a petition signed by him and a number of other citizens of his county, and presented to the council of appointment, praying for the removal of the plaintiff from the office of district attorney of the county, which, the petition charged, he was prostituting to private purposes. The defendant did not justify the truth of this allegation, and the plaintiff had judgment. On error, the sole question was, whether the communication was to be regarded as privileged, that character having been denied to it by the court below. The prevailing opinion in the court of review characterized this as "a decision which violates the most sacred and unquestionable rights of free citizens; rights essential to the very existence of a free government; rights necessarily connected with the relations of constituent and representative; the right of petitioning for a redress of grievances, and the right of remonstrating to the competent authority against the abuse of official functions." The privilege of the petitioners was fully asserted and maintained, and it was decided that to support an action for libel upon the petition, the plaintiff must assume the burden of showing that it was malicious and groundless, and presented for the purpose of injuring his character.[1] Such a petition, it was said, although containing false and injurious aspersions, did not *prima facie* carry with it the presumption of malice.[2] A similar ruling was made by the Supreme Court of Pennsylvania, where a party was prosecuted for charges against a justice of the peace, contained in a deposition made to be presented to the governor.[3] A subsequent New York case enlarged this rule somewhat, and required of the plaintiff, in order to sustain his action in any such case, to prove not only malice in the defendant, but also a want of probable cause for believing the injurious charges which the petition contained. The action for libel, in such a case, it was said, was in the nature of an action for malicious prosecution; and in that action malice and want of probable cause are both

[1] Thorn *v.* Blanchard, 5 Johns. 508, 528, per *Clinton*, Senator.

[2] *Ibid.* p. 526, per *L'Hommedieu*, Senator. A petition to the town council for the removal of a constable charging unfitness and misconduct is privileged unless express malice is shown. Kent *v.* Bongartz, 15 R. I. 72, 22 Atl. 1023.

[3] Gray *v.* Pentland, 2 S. & R. 23; Fisk *v.* Soniat, 33 La. Ann. 1400. A remonstrance against the employment of a school teacher is privileged. Van Arsdale *v.* Laverty, 69 Pa. St. 103. For similar cases of privilege, see Larkin *v.* Noonan, 19 Wis. 82; Whitney *v.* Allen, 62 Ill. 472; Reid *v.* Delorne, 2 Brev. 76; Decker *v.* Gaylord, 35 Hun, 584.

necessary ingredients.[1] And it has also been held that in such a case the court will neither compel the officer to whom it was addressed to produce the petition in evidence, nor suffer its contents to be proved by parol.[2]

The rule of protection which these cases lay down is generally conceded to be sound, and it has been applied in many other cases coming within the same reasons.[3] To make it applicable,

[1] Howard *v.* Thompson, 21 Wend. 319. See Harris *v.* Huntington, 2 Tyler, 129, 4 Am. Dec. 728; Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228; State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217; Hill *v.* Miles, 9 N. H. 9; Cook *v.* Hill, 3 Sandf. 341; Whitney *v.* Allen, 62 Ill. 472; Forbes *v.* Johnson, 11 B. Monr. 48. But in Banner Pub. Co. *v.* State, 16 Lea, 176, it is held that false charges against State officers are not justified by probable cause and absence of malice.

[2] Gray *v.* Pentland, 2 S. & R. 23. See Hare *v.* Mellor, 3 Lev. 138.

[3] In Kershaw *v.* Bailey, 1 Exch. 743, the defendant was prosecuted for slander in a communication made by him to the vestry, imputing perjury to the plaintiff as a reason why the vestry should not return him on the list of persons qualified to serve as constables. The defendant was a parishioner, and his communication was held privileged. In O'Donaghue *v.* McGovern, 23 Wend. 26, a communication from a member of a church to his bishop, respecting the character, moral conduct, and demeanor of a clergyman of the church, was placed upon the same footing of privilege. And see Reid *v.* Delorme, 2 Brev. 76; Chapman *v.* Calder, 14 Pa. St. 365; Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495. The proceedings of a church tribunal are *quasi* judicial, and those who participate in its proceedings in good faith and within the scope of its authority are privileged in law. Farnsworth *v.* Storrs, 5 Cush. 412; Fairchild *v.* Adams, 11 Cush. 549; Remington *v.* Congdon, 2 Pick. 310; Lucas *v.* Case, 9 Bush, 297; Kleizer *v.* Symmes, 40 Ind. 562; Servatius *v.* Pichel, 34 Wis. 292; Chapman *v.* Calder, 14 Pa. St. 365; Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698; York *v.* Pease, 2 Gray, 282; Dunn *v.* Winters, 2 Humph. 512; McMillan *v.* Birch, 1 Binn. 178, 2 Am. Dec. 426. Making charges to a church having authority to discipline is not actionable unless there is express malice: Dial *v.* Holter, 6 Ohio St. 228; Over *v.* Hildebrand, 92 Ind. 19; and words spoken between members of the same church in the course of discipline are privileged. Jarvis *v.* Hatheway, 3 Johns. 180; Landis *v.* Campbell, 79 Mo. 433. But an accusation by a church member against one who is not a church member cannot be considered privileged. Coombs *v.* Rose, 8 Blackf. 155. Nor accusations by a parishioner against a clergyman not made to church authorities. State *v.* Bienvenu, 30 La. Ann. 378. A letter to a member of a minister's association about another member written by one not a member is not privileged. Shurtleff *v.* Parker, 130 Mass. 293. The preferring of charges to a lodge of Odd Fellows by one member against another is privileged: Streety *v.* Wood, 15 Barb. 105; and reports made to a lodge of Odd Fellows and published with the minutes are privileged. Kirkpatrick *v.* Eagle Lodge, 26 Kan. 384. An affidavit as to the credibility of a witness at a masonic trial is not privileged where neither the witness nor affiant is a member of the lodge. Nix *v.* Caldwell, 81 Ky. 293. A communication is privileged if made in good faith with a view to recovering stolen goods. Grimes *v.* Coyle, 6 B. Monr. 301; Brow *v.* Hathaway, 13 Allen, 239; Eames *v.* Whittaker, 123 Mass. 342. An agreement by partners to prosecute persons suspected of robbing the firm is privileged. Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360. And so is a communication advising a sheriff to prosecute a person for larceny, sent by a law student who was employed by the sheriff. Washburne *v.* Cooke, 3 Denio, 110. An advertisement warning the public against negotiable notes alleged to have been stolen is privileged. Commonwealth *v.*

however, it is essential that the petition or remonstrance be addressed to the body or officer having the power of appointment or removal, or the authority to give the redress or grant the relief which is sought; or at least that the petitioner should really and in good faith believe he is addressing himself to an authority possessing power in the premises.[1]

Such being the rule of privilege when one is interested in the discharge of powers of a public nature is addressing himself to the body having the authority of appointment, supervision, or removal, the question arises whether the same reasons do not require the like privilege when the citizen addresses himself to

Featherstone, 9 Phil. (Pa.) 591. Words spoken in good faith by a public officer in discharge of his official duties are privileged. Mayo *v.* Sample, 18 Iowa, 306; Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418; *In re* Invest. Com., 16 R. I. 751, 11 Atl. 429; Dewe *v.* Waterbury, 6 Can. S. C. R. 143. So is a communication in good faith by a school principal to the trustees of charges against the character of a subordinate. Halstead *v.* Nelson, 36 Hun, 149. See O'Connor *v.* Sill, 60 Mich. 175, 27 N. W. 13. A remonstrance to the board of excise, against the granting of a license to the plaintiff, comes under the same rule of protection. Vanderzee *v.* McGregor, 12 Wend. 545. See also Kendillon *v.* Maltby, 1 Car. & Marsh. 402; Woodward *v.* Lander, 6 C. & P. 548. So does a statement by a mayor to a council as to the unfitness of a city attorney for his post. Greenwood *v.* Cobbey, 26 Neb. 419, 42 N. W. 413. A report by officers to stockholders is privileged, but not, it seems, the publication of it. Philadelphia, &c. R. R. Co. *v.* Quigley, 21 How. 202. A statement of causes of discharge of an employee, given only to officers of the employing company, and of other like companies for their protection, is conditionally privileged. Missouri Pac. Ry. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555.

[1] This is recognized in all the cases referred to. See also Fairman *v.* Ives, 5 B. & Ald. 642. In that case a petition addressed by a creditor of an officer in the army to the Secretary of War, *bona fide* and with a view of obtaining through his interference the payment of a debt due, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, was held not to support an action. A letter to the Postmaster-General complaining of the conduct of a postmaster, with a view to the redress of grievances, is privileged. Woodward *v.* Lander, 6 C. & P. 548; Cook *v.* Hill, 3 Sandf. 341. A statement to a legislative committee in good faith as to a matter with which it had power to deal is privileged. Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963. And a complaint to a master, charging a servant with a dishonest act which had been imputed to the complaining party, has also been held privileged. Coward *v.* Wellington, 7 C. & P. 531. And see, further, Hosmer *v.* Loveland, 19 Barb. 111. A petition is privileged while being circulated. Vanderzee *v.* McGregor, 12 Wend. 545; Streety *v.* Wood, 15 Barb. 105. If, however, a petition is circulated and exhibited, but never presented, the fact that the libellous charge has assumed the form of a petition will not give it protection. State *v.* Burnham, 9 N. H. 34. And see Hunt *v.* Bennett, 19 N. Y. 173; Van Wyck *v.* Aspinwall, 17 N. Y. 190. An address by citizens to an officer requesting his resignation on the ground of his corruption is not privileged. Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058. [Mere conclusions stated unqualifiedly as facts, and without mention of the specific facts upon which they are based, are not privileged. Eikhoff *v.* Gilbert, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451. But in South Dakota an elector may call a candidate for aldermanic honors a thief, if he makes the allegation to other electors and does it in good faith. Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182.]

his fellow-citizens in regard to the conduct of persons elevated to offices by their suffrages, or in regard to the character, capacity, or fitness of those who may present themselves, or be presented by their friends, — which always assumes their assent, — as candidates for public positions.

When Morgan Lewis was governor of the State of New York, and was a candidate for re-election, a public meeting of his opponents was called, at which an address was adopted reviewing his public conduct, and bringing various charges against him. Among other things he was charge with want of fidelity to his party, with pursuing a system of family aggrandizement in his appointments, with signing the charter of a bank, having notice that it had been procured by fraudulent practices, with publishing doctrines unworthy of a chief magistrate and subversive of the dearest interests of society, with attempting to destroy the liberty of the press by vexatious prosecutions, and with calling out the militia without occasion, thereby putting them to unnecessary trouble and expense. These seem to have been the more serious charges. The chairman of the meeting signed the address, and he was prosecuted by the governor for the libel contained therein. No justification was attempted upon the facts, but the defendant relied upon his constitutional privilege. His defence was not sustained. Said Mr. Justice *Thompson*, speaking for the court: —

"Where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and on failure thereof the law implies a criminal intent.[1] If a libel contains an imputation of a crime, or is actionable without showing special damage, malice is, *prima facie*, implied; and if the defendant claims to be exonerated, on the ground of want of malice, it lies with him to show it was published under such circumstances as to rebut this presumption of law.[2] The manner and occasion of the publication have been relied on for this purpose, and in justification of the libel. It has not been pretended but that the address in question would be libellous if considered as the act of an individual; but its being the act of a public meeting, of which the defendant was a member, and the publication being against a candidate for a public office, have been strenuously urged as affording a complete justification. The doctrine contended for by the defendant's counsel results in the position that every publication ushered forth under the sanction of a public political meeting, against a candidate for an elective office, is beyond the reach of legal inquiry. To such a proposition I can never yield my assent. Although it was urged by the defendant's counsel, I cannot discover

[1] 5 Burr. 2667; 4 T. R. 127. [2] 1 T. R. 110.

any analogy whatever between the proceedings of such meetings and those of courts of justice, or any other organized tribunals known in our law for the redress of grievances. That electors should have a right to assemble, and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct specific and unfounded crimes. It would, in my judgment, be a monstrous doctrine to establish, that, when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes with impunity. Candidates have rights as well as electors; and those rights and privileges must be so guarded and protected as to harmonize one with the other. If one hundred or one thousand men, when assembled together, undertake to charge a man with specific crimes, I see no reason why it should be less criminal than if each one should do it individually at different times and places. All that is required, in the one case or the other, is, not to transcend the bounds of truth. If a man has committed a crime, any one has a right to charge him with it, and is not responsible for the accusation; and can any one wish for more latitude than this? Can it be claimed as a privilege to accuse *ad libitum* a candidate with the most base and detestable crimes? There is nothing upon the record showing the least foundation or pretence for the charges. The accusations, then, being false, the *prima facie* presumption of law is, that the publication was malicious; and the circumstance of the defendant being associated with others does not *per se* rebut this presumption. How far this circumstance ought to affect the measure of damages is a question not arising on the record. It may in some cases mitigate, in others enhance, them. Every case must necessarily, from the nature of the action, depend on its own circumstances, which are to be submitted to the sound discretion of a jury. It is difficult, and perhaps impracticable, to prescribe any general rule on the subject."[1]

The difficulty one meets with in the examination of this opinion is in satisfying himself in what manner the privileges of electors, of which it speaks, are protected by it. It is not discovered that the citizen who publicly discusses the qualifications and fitness of the candidate for public office who challenges his suffrage is, by this decision, so far as suits for recovery of private damages are concerned, placed on any different footing in the law from that

[1] Lewis *v.* Few, 5 Johns. 1, 35. See also Curtis *v.* Mussey, 6 Gray, 261; Aldrich *v.* Printing Co., 9 Minn. 133.

occupied by one who drags before the public the character of a private individual. In either case, if the publication proves to be false, the law, it seems, attaches to it a presumption of malice. Nothing in the occasion justifies or excuses the act in one case more than in the other. It is true, it is intimated that it may lie in the sound discretion of a jury to be moderate in the imposition of damages, but it is also intimated that the jury would be at liberty to consider the circumstances of the public meeting an aggravation. There is absolutely no privilege of discussion to the elector under such a rule; no right to canvass the character and conduct of candidates any more than the character and conduct of others. Whatever reasons he may give his neighbors for voting against a candidate, he must be prepared to support by evidence in the courts. In criminal prosecutions, if he can prove the truth of his charges, he may be protected in some cases where he would not be if the person assailed was not thus appealing to public favor; for when the State prosecutes, the accused must in all cases make a showing of a justifiable occasion for uttering even the truth, and this occasion for speaking the truth of a candidate the pending election may supply.

The case above quoted has the sanction of a subsequent decision of the Court for the Correction of Errors, which in like manner repudiated the claim of privilege.[1] The office then in question was that of Lieutenant-Governor, and the candidate was charged in public newspapers with habits of intoxication which unfitted him for the position. And this last decision has since been followed as authority by the Superior Court of New York; in a case which differs from it in the particular that the office which the plaintiff was seeking was not elective, but was to be filled by an appointing board.[2]

The case of King *v.* Root[3] will certainly strike any one as remarkable when the evidence on which it was decided is considered. The Lieutenant-Governor was charged in the public press with intoxication in the Senate Chamber, exhibited as he was proceeding to take his seat as presiding officer of that body. When prosecuted for libel, the publishers justified the charge as true, and brought a number of witnesses who were present on the occasion, and who testified to the correctness of the statement. There was therefore abundant reason for supposing the charge to

[1] King *v.* Root, 4 Wend. 113, 21 Am. Dec. 102.

[2] Hunt *v.* Bennett, 4 E. D. Smith, 617; s. c. 19 N. Y. 173. See Duncombe *v.* Daniell, 8 C. & P. 213.

[3] 4 Wend. 113, 21 Am. Dec. 102. See the same case in the Supreme Court, 7 Cow. 613. It has recently been followed in Illinois, in the case of Rearick *v.* Wilcox, 81 Ill. 77.

have been published in the full belief in its truth. If it was true, there was abundant reason, on public grounds, for making the publication. Nevertheless, the jury were of opinion that the preponderance of evidence was against the truth of the charge, and being instructed that the only privilege the defendants had was "simply to publish the truth and nothing more," and that the unsuccessful attempt at justification — which in fact was only the forming of such an issue, and supporting it by such evidence as showed the defendants had reason for making the charge — was in itself an aggravation of the offence, they returned a verdict for the plaintiff, with large damages. Throughout the instructions to the jury the judge presiding at the trial conceded to the defendant no privilege of discussion whatever as springing from the relation of elector and candidate, or of citizen and representative, but the case was considered and treated as one where the accusation must be defended precisely as if no public considerations were in any way involved.[1]

The law of New York is not placed by these decisions on a footing very satisfactory to those who claim the utmost freedom of discussion in public affairs. The courts of that State have treated this subject as if there were no middle ground between absolute immunity for falsehood and the application of the same strict rules which prevail in other cases. Whether they have duly considered the importance of publicity and discussion on all matters of general concern in a representative government must be left to the consideration of judicial tribunals, as these questions shall come before them in the future. It is perhaps safe to say that the general public sentiment and the prevailing customs allow a greater freedom of discussion, and hold the elector less

[1] See also Onslow *v.* Horne, 3 Wils. 177; Harwood *v.* Astley, 1 New Rep. 47. It is libellous to charge a candidate with dishonesty and corruption: Rearick *v.* Wilcox, 81 Ill. 77; Wheaton *v.* Beecher, 66 Mich. 307, 33 N. W. 503; with being under indictment: Jones *v.* Townsend, 21 Fla. 431; with being guilty of forgery: Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671; with being a professional gambler, thief, and bully: Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757; with bartering away a public improvement for his own private interests: Powers *v.* Dubois, 17 Wend. 63; to utter such falsehoods as will cause persons not to vote for him. Brewer *v.* Weakley, 2 Overt. 99, 5 Am. Dec. 656. Charges made through a newspaper against a candidate for an office filled by appointment do not, it seems, stand on the same footing as if the office were elective. Hunt *v.* Bennett, 19 N. Y. 173. It is no justification for a libel against a candidate that it was published by the order of a public meeting of citizens. Lewis *v.* Few, 5 Johns. 1. By an honest mistake the chairman of a political meeting read a letter charging a candidate with official misconduct, and it was held he was not liable, as the statement was conditionally privileged. Briggs *v.* Garrett, 111 Pa. St. 404, 2 Atl. 513.

strictly to what he may be able to justify as true, than is done by these decisions.[1]

A much more reasonable rule — though still, we think, not sufficiently comprehensive and liberal — was indicated by *Pollock*, C. B., in a case where it was urged upon the court that a sermon, preached but not published, was the subject of criticism in the enlarged style of commentary which that word seems to introduce according to the decided cases; and that the conduct of a clergyman with reference to the parish charity, and especially to the rules governing it, justified any *bona fide* remarks, whether founded in truth in point of fact, or justice in point of commentary, provided only they were an honest and *bona fide* comment. "My brother Wilde," he says, "urged upon the court the importance of this question; and I own I think it is a question of very grave and deep importance. He pressed upon us that, wherever the public had an interest in such a discussion, the law ought to protect it, and work out the public good by permitting public opinion, through the medium of the public press, to operate upon such transactions. I am not sure that so extended a rule is at all necessary to the public good. I do not in any degree complain; on the contrary, I think it quite right that all matters that are entirely of a public nature — conduct of ministers, conduct of judges, the proceedings of all persons who are responsible to the public at large — are deemed to be public property; and that all *bona fide* and honest remarks upon such persons and their conduct may be made with perfect freedom, and without being questioned too nicely for either justice or truth."[2] But these remarks were somewhat aside from the case then before the learned judge, and though supported by similar remarks from his associates, yet one of those associates deemed it important to draw such a distinction as to detract very much from the value

[1] "Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the action of the magistrates; this privilege in all ages has been and always will be abused. The best of men could not escape the censure and envy of the times they lived in. Yet this evil is not so great as it might appear at first sight. A magistrate who sincerely aims at the good of society will always have the inclinations of a great majority on his side, and an impartial posterity will not fail to render him justice. The [illegible] of the freedom of speech are the excesses of liberty. They ought to be repressed; but to whom dare we commit the care of doing it? An evil magistrate, entrusted with power to *punish for words*, would be armed with a weapon the most destructive and terrible. Under pretence of pruning off the exuberant branches, he would be apt to destroy the tree." Franklin, Works by Sparks, Vol. II. p. 285.

[2] Gathercole *v.* Miall, 15 M. & W. 310, 332. See Commonwealth *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212, per *Parsons*, Ch. J.; Townshend on Libel and Slander, § 260.

of this privilege. "It seems," he says, "there is a distinction, although I must say I really can hardly tell what the limits of it are, between the comments on a man's public conduct and upon his private conduct. I can understand that you have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor; I can understand that; but I do not know where the limit can be drawn distinctly between where the comment is to cease, as being applied solely to a man's public conduct, and where it is to begin as applicable to his private character; because, although it is quite competent for a person to speak of a judgment of a judge as being an extremely erroneous and foolish one, — and no doubt comments of that sort have great tendency to make persons careful of what they say, — and although it is perfectly competent for persons to say of an actor that he is a remarkably bad actor, and ought not to be permitted to perform such and such parts, because he performs them so ill, yet you ought not to be allowed to say of an actor that he has disgraced himself in private life, nor to say of a judge or of a minister that he has committed felony, or anything of that description, which is in no way connected with his public conduct or public judgment; and therefore there must be some limits, although I do not distinctly see where those limits are to be drawn. No doubt, if there are such limits, my brother Wilde is perfectly right in saying that the only ground on which the verdict and damages can go is for the excess, and not for the lawful exercise of the criticism." [1]

The radical defect in this rule, as it seems to us, consists in its assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct; that a thoroughly dishonest man may be a just minister, and that a judge who is corrupt and debauched in private life may be pure and upright in his judgments; in other words, that an evil tree is as likely as any other to bring forth good fruits. Any such assumption is false to human nature, and contradictory to general experience; and whatever the law may say, the general public will still assume that a corrupt life will influence public

[1] *Alderson*, B., same case, p. 238. The publication of a false statement of specific acts of misconduct in office of a public man are not privileged. Davis *v.* Shepstone, L. R. 11 App. Cas. 187. Charges against the private character of a sheriff who has not announced himself as a candidate for re-election are not made on a privileged occasion. Com. *v.* Wardwell, 136 Mass. 164. [And publication of charges, when made outside the territory over which the officer's power extends, is not privileged. State *v.* Haskins, 109 Iowa, 656, 80 N. W. 1063, 47 L. R. A. 223.]

conduct, and that a man who deals dishonestly with his fellows as individuals will not hesitate to defraud them in their aggregate and corporate capacity, if the opportunity shall be given him. They are therefore interested in knowing what is the character of their public servants, and what sort of persons are offering themselves for their suffrages. And if this be so, it would seem that there should be some privilege of comment; that that privilege could only be limited by good faith and just intention; and that of these it was the province of a jury to judge, in view of the nature of the charges made and the reasons which existed for making them.

The English cases allow considerable latitude of comment to publishers of public journals, upon subjects in the discussion of which the public may reasonably be supposed to have an interest, and they hold the discussions to be privileged if conducted within the bounds of moderation and reason.[1] A more recent case, however, limits the range of privilege somewhat, and suggests a distinction which we are not aware has ever been judicially pointed out in this country, and which we are forced to believe the American courts would be slow to adopt. The distinction is this: That if the officer or functionary whose conduct is in question is one in whose duties the general public, and not merely the local public, has an interest, then a discussion of his conduct is privileged; otherwise it is not. Thus the public journals are privileged to com-

[1] In Kelley *v.* Sherlock, Law Rep. 1 Q. B. 686, it was held that a sermon commenting upon public affairs — *e. g.* the appointment of chaplains for prisons and the election of a Jew for mayor — was a proper subject for comment in the papers. And in Kelly *v.* Tinling, Law Rep. 1 Q. B. 699, a church-warden, having written to the plaintiff, the incumbent, accusing him of having desecrated the church by allowing books to be sold in it during service, and by turning the vestry-room into a cooking-apartment, the correspondence was published without the plaintiff's permission in the defendant's newspaper, with comments on the plaintiff's conduct. *Held*, that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was therefore not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified.

In Wason *v.* Walter, L. R. 4 Q. B. 73, the proprietor of the "London Times" was prosecuted for comments in his paper upon a debate in the House of Lords. The plaintiff had presented a petition to that body, charging Sir Fitzroy Kelly with having, many years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons; and praying inquiry, and his removal from an office he held, if the charge was found true. A debate ensued, and the charge was wholly refuted. *Held*, that this was a subject of great public concern, on which a writer in a public newspaper had full right to comment; and the occasion was therefore so far privileged that the comments would not be actionable so long as a jury should think them honest, and made in a fair spirit, and such as were justified by the circumstances disclosed in the debate. The opinion by Chief Justice *Cockburn* is very clear and pointed, and reviews all the previous decisions. See further, Fairchild, *v.* Adams, 11 Cush. 549; Terry *v.* Fellows, 21 La. Ann. 375.

ment freely within the limits of good faith, on the manner in which a judge performs his duties, but they are not privileged in like manner in the case of an official charged with purely local duties, such, for instance, as the physician to a local public charity. We cannot believe there is any sufficient reason for allowing free discussion in the one case and not in the other; but the opinion is of sufficient importance to justify special attention being directed to it.[1] And in this country it has been held that where a charge against an officer or a candidate respects only his qualifications for the office, and does not impugn his character, it forms no basis for a recovery of damages. To address to the electors of a district letters charging that a candidate for office is of impaired understanding, and his mind weakened by disease, is presenting that subject to "the proper and legitimate tribunal to try the question." "Talents and qualifications for office are mere matters of opinion, of which the electors are the only competent judges."[2]

[1] Purcell *v.* Sowler, L. R. 1 C. P. Div. 781. The plaintiff was medical officer of the Knutsford workhouse, and the alleged libel consisted in a report of an inquiry by the board in charge into his conduct and the treatment of the poor under him, and comments thereon. The following cases are commented upon and distinguished: Davis *v.* Duncan, 9 C. P. 396; Kelly *v.* Tinling, L. R. 1 Q. B. 699; Henwood *v.* Harrison, L. R. 7 C. P. 606; Wason *v.* Walter, L. R. 4 Q. B. 73. It is clear that a trustee of a mining corporation is not such an officer as to be subjected to general criticism under the privilege of the press. Wilson *v.* Fitch, 41 Cal. 363. [Charges must have a better foundation than mere rumors in order to be privileged. State *v.* Ford, 82 Minn. 452, 85 N. W. 217.]

[2] Mayrant *v.* Richardson, 1 Nott & McCord, 348, 9 Am. Dec. 707. It is not libellous to publish in good faith any charges against a candidate for office, affecting his qualifications and fitness for the office: Commonwealth *v.* Morris, 1 Va. Cases, 175, 5 Am. Dec. 515; Commonwealth *v.* Odell, 3 Pittsb. (Pa.) 449; Commonwealth *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212; Mott *v.* Dawson, 46 Iowa, 533; Bays *v.* Hunt, 60 Iowa, 251, 14 N. W. 785; State *v.* Balch, 31 Kan. 465, 2 Pac. 609; Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678; Express Printing Co. *v.* Copeland, 64 Tex. 354; [Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. 126; Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182;] to charge him with being idle, uneducated, and ignorant: Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757. But see cases, *ante*, p. 624, note 1. [And see Belknap *v.* Ball, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. 622.] It is libellous to charge an officer with having taken a bribe: Hamilton *v.* Eno, 81 N. Y. 116; Wilson *v.* Noonan, 35 Wis. 321; with corruption or want of integrity: Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380; Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436; Littlejohn *v.* Greeley, 13 Abb. Pr. 41; Dole *v.* Van Rensselaer, 1 Johns. Cas. 330; Negley *v.* Farrow, 60 Md. 158; Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; [Augusta Evening News *v.* Radford, 91 Ga. 494, 17 S. E. 612, 20 L. R. A. 533, 44 Am. St. 53;] with being intoxicated while in discharge of his official duties: King *v.* Root, 4 Wend. 113, 21 Am. Dec. 102; Gottbehuet *v.* Hubachek, 36 Wis. 515; to charge a judge with being destitute of capacity or attainments necessary for his station: Robbins *v.* Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Spiering *v.* Andrae, 45 Wis. 330, 30 Am. Rep. 744; to charge him with being disqualified and liable to impeachment: Richardson *v.* State, 66 Md. 205, 7 Atl. 43; see Cooper *v.* People, 13 Col. 337, 373, 22 Pac. 790; to charge an officer with having done that which should remove him from his seat: Hook *v.* Hackney, 16 S. & R.

Statements in the Course of Judicial Proceedings.

Among the cases which are so absolutely privileged on reasons of public policy, that no inquiry into motives is permitted in an action for slander or libel, is that of a witness giving evidence in the course of judicial proceedings. It is familiar law that no action will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged.[1] The remedy against a dishonest witness is confined to the criminal prosecution for perjury.[2] So what a juror may say to his fellows in the jury-room while they are considering their verdict, concerning one of

385; Lansing *v.* Carpenter, 9 Wis. 540; to charge a sealer of weights and measures with "tampering with" and "doctoring" such weights and measures: Eviston *v.* Cramer, 47 Wis. 659, 3 N. W. 392; to charge a city physician with causing the death of a patient by reckless treatment. Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403; see Hart *v.* Von Gumpach, L. R. 4 Priv. C. 439; s. c. 4 Moak, 138; to call a member of Congress "a fawning sycophant, a misrepresentative in Congress, and a grovelling office seeker." Thomas *v.* Crosswell, 7 Johns. 264, 5 Am. Dec. 269. It is not libellous to charge a judge with improprieties which would be no cause of impeachment: Robbins *v.* Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; nor with ordering unreasonable bail: Miner *v.* Detroit Post, &c. Co., 49 Mich. 358, 13 N. W. 773; or an officer with giving his wife work in a public office and paying her in her maiden name: Bell *v.* Sun Printing, &c., Co., 42 N. Y. Sup. Ct. 567; and it is not libellous for a committee of a college of pharmacy to charge an inspector of drugs with gross violation of duty, in a report made in good faith which was presented to the Secretary of the Treasury. Van Wyck *v.* Aspinwall, 17 N. Y. 190, 4 Duer, 268. To charge corruption, intimidation, and fraud in an election is actionable *per se*. Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50. See Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367. [For a case in which the candidate was charged with nearly all the crimes in the calendar, see Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. 803.]

[1] Allen *v.* Crofoot, 2 Wend. 515, 20 Am. Dec. 647; Marsh *v.* Ellsworth, 50 N. Y. 309; Terry *v.* Fellows, 21 La. Ann. 375; Smith *v.* Howard, 28 Iowa, 51; Shock *v.* McChesney, 4 Yeates, 507, 2 Am. Dec. 415; Calkins *v.* Sumner, 13 Wis. 193; Barnes *v.* McCrate, 32 Me. 442; Dunlap *v.* Glidden, 31 Me. 435; Hutchinson *v.* Lewis, 75 Ind. 55; Verner *v.* Verner, 64 Miss. 321, 1 So. 479. See White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503. So of an answer to a legislative committee, though not under oath. Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963. [So with relevant testimony before a committee of a board of aldermen having power to compel the same. Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.]

[2] But he is not protected if what is testified is not pertinent or material to the cause, and he has been actuated by malice in stating it. White *v.* Carroll, 42 N. Y. 160, 1 Am. Rep. 503; Barnes *v.* McCrate, 32 Me. 442; Kidder *v.* Parkhurst, 3 Allen, 393; Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602. But in Hunckel *v.* Voneiff, 69 Md. 179, 14 Atl. 500, 17 Atl. 1056, the privilege is held to cover reflections thrown out needlessly. He is not, however, to be himself the judge of what is pertinent or material when questions are put to him, and no objection or warning comes to him from court or counsel. Calkins *v.* Sumner, 13 Wis. 193. See also Warner *v.* Paine, 2 Sandf. 195; Garr *v.* Selden, 4 N. Y. 91; Jennings *v.* Paine, 4 Wis. 358; Perkins *v.* Mitchell, 31 Barb. 461; Revis *v.* Smith, 18 C. B. 126; Grove *v.* Brandenburg, 7 Blackf. 234; Cunningham *v.* Brown, 18 Vt. 123; Dunlap *v.* Glidden, 31 Me. 435; Steinecke *v.* Marx, 10 Mo. App. 580. See Liles *v.* Gaster, 42 Ohio St. 631.

the parties to the suit who has been a witness therein, cannot be the subject of an action for slander.[1] False accusations, however, contained in the affidavits or other proceedings, by which a prosecution is commenced for supposed crime, or in any other papers in the course of judicial proceedings, are not so absolutely protected. They are privileged,[2] but the party making them is liable to action, if actual malice be averred and proved.[3] Preliminary information, furnished with a view to set on foot an inquiry into an alleged offence, or to institute a criminal prosecution, is, in like manner, privileged;[4] but the protection only extends to those

[1] Dunham *v.* Powers, 42 Vt. 1; Rector *v.* Smith, 11 Iowa, 302.

[2] Astley *v.* Younge, Burr. 807; Strauss *v.* Meyer, 48 Ill. 385; Vausse *v.* Lee, 1 Hill (S. C.), 197, 26 Am. Dec. 168; Bunton *v.* Worley, 4 Bibb, 38, 7 Am. Dec. 735; Sanders *v.* Rollinson, 2 Strobh. 447; Francis *v.* Wood, 75 Ga. 648; but not if spoken without *bona fide* intention of prosecuting: Marshall *v.* Gunter, 6 Rich. 419; or in a court which does not have jurisdiction of the case. Hosmer *v.* Loveland, 19 Barb. 111. All allegations in pleadings, if pertinent, are absolutely privileged. Strauss *v.* Meyer, 48 Ill 385; Lea *v.* White, 4 Sneed, 111; Forbes *v.* Johnson, 11 B. Monr. 48; Vinas *v.* Merch. &c. Co., 33 La. Ann. 1265; Prescott *v.* Tousey, 53 N. Y. S. C. 56; Wilson *v.* Sullivan, 81 Ga. 238, 7 S. E. 274; Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721. See Lanning *v.* Christy, 30 Ohio St. 115. So, though the complaint is dismissed. Dada *v.* Piper. 41 Hun, 254. A petition alleging misconduct in office filed by a receiver against his co-receiver in the action in which they were appointed is privileged. Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518. Charges made in the interest of his client by an attorney in opposition to the discharge of an insolvent debtor are absolutely privileged. Hollis *v.* Meux, 69 Cal. 625, 11 Pac. 248. But libellous words spoken of a third person in the pleadings, if relevant, are only conditionally privileged: Ruohs *v.* Backer, 6 Heisk. 395, 19 Am. Rep. 598; Davis *v.* McNees, 8 Humph. 40; and when not pertinent and material are not privileged. McLaughlin *v.* Cowley, 127 Mass. 316, 131 Mass. 70; Wyatt *v.* Buell, 47 Cal. 624.

[3] Padmore *v.* Lawrence, 11 Ad. & El. 380; Kine *v.* Sewell, 3 M. & W. 297; Burlingame *v.* Burlingame, 8 Cow. 141; Kidder *v.* Parkhurst, 3 Allen, 393; Doyle *v.* O'Doherty, 1 Car. & Marsh. 418; Wilson *v.* Collins, 5 C. & P. 373; Home *v.* Bentinck, 2 Brod. & Bing. 130; Jarvis *v.* Hathaway, 3 Johns. 180. In Goslin *v.* Cannon, 1 Harr. 3, it was held that where a crime had been committed, expressions of opinion founded upon facts within the knowledge of the party, or communicated to him, made prudently and in confidence to discreet persons, and made obviously in good faith with a view only to direct their watchfulness, and enlist their aid in recovering the money stolen, and detecting and bringing to justice the offender, were privileged. The cause, occasion, object, and end, it was said, was justifiable, proper, and legal, and such as should actuate every good citizen. If a party, in presenting his case to a court, wanders from what is material to libel another, the libel is not privileged. Wyatt *v.* Buell, 47 Cal. 624.

[4] Grimes *v.* Coyle, 6 B. Monr. 301. The subject of communications privileged on grounds of public policy will be found considered, at some length and with ability, in the recent case of Dawkins *v.* Lord Paulet, Law Rep. 5 C. B. 94. The publication complained of was by a military officer to his superior concerning the qualifications and capacity of the plaintiff as a subordinate military officer under him; and it was averred that the words were published by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not *bona fide*, or in the *bona fide* discharge of defendant's duty as superior officer. On demurrer, a majority of the court (*Mellor* and *Lush*, JJ.) held the action would not lie: planting themselves, in part, on

communications which are in the course of the proceedings to bring the supposed offender to justice, or are designed for the purpose of originating or forwarding such proceedings; and communications not of that character are not protected, even although judicial proceedings may be pending for the investigation of the offence which the communication refers to.[1] Still less would a party be justified in repeating a charge of crime, after the person charged has been examined on his complaint, and acquitted of all guilt.[2]

Privilege of Counsel.

One of the most important cases of privilege, in a constitutional point of view, is that of counsel employed to represent a party in judicial proceedings. The benefit of the constitutional right to counsel depends very greatly on the freedom with which he is allowed to act, and to comment on the facts appearing in the case, and on the inferences deducible therefrom. The character, conduct, and motives of parties and their witnesses, as well as of other persons more remotely connected with the proceedings, enter very largely into any judicial inquiry, and must form the subject of comment, if they are to be usefully sifted and weighed. To make the comment of value, there must be the liberty to examine the case in every possible light, to advance theories, and to suggest to those having the power of decision any view of the facts and of the motives of actors which shall appear tenable or even plausible. It sometimes happens in criminal proceedings, that, while no reasonable doubt can exist that a crime has been com-

grounds of public policy, and in part, also, on the fact that the military code provided a remedy for wrongs of the nature complained of; and quoting with approval Johnstone *v.* Sutton, 1 T. R. 544, and Dawkins *v.* Lord Rokeby, 4 N. & F. 841. *Cockburn*, Ch. J., delivered an able dissenting opinion. The decision is criticised in Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384, where an analogous communication was held privileged conditionally, but not absolutely.

[1] Dancaster *v.* Hewson, 2 M. & Ry. 176. Statements by a justice as to what was said by a person applying for a warrant but not as part of a judicial hearing are not privileged. McDermott *v.* Evening Journal Co., 43 N. J. L. 488.

[2] Burlingame *v.* Burlingame, 8 Cow. 141. In Mower *v.* Watson, 11 Vt. 536, an action was brought for slander in saying to a witness who was giving his testimony on a material point in a cause then on trial, to which defendant was a party, "That 's a lie," and for repeating the same statement to counsel for the opposite party afterwards. The words were held not to be privileged. To the same effect are the cases of McClaughry *v.* Wetmore, 6 Johns. 82, and Kean *v.* McLaughlin, 2 S. & R. 469. See also Torrey *v.* Field, 10 Vt. 353; Gilbert *v.* People, 1 Denio, 41. A report made by a grand jury upon a subject which they conceive to be within their jurisdiction, but which is not, is nevertheless privileged. Rector *v.* Smith, 11 Iowa, 302. Matter inserted as part of a justice's official return is privileged, if believed by the justice to be material to the return. Aylesworth *v.* St. John, 25 Hun, 156.

mitted, there may be very grave doubt whether the prosecutor or the accused is the guilty party; and to confine the counsel for the defence to such remarks concerning the prosecutor as he might justify, if he had made them without special occasion, would render the right to counsel, in such cases, of little or no value. The law is not chargeable with the mockery of assuming to give a valuable privilege which, when asserted, is found to be so hampered and restricted as to be useless.

The rule upon this subject was laid down in these words in an early English case: "A counseller hath privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false; for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question; but matter not pertinent to the issue, or the matter in question, he need not deliver; for he is to discern in his discretion what he is to deliver, and what not; and although it be false, he is excusable, it being pertinent to the matter. But if he give in evidence anything not material to the issue, which is scandalous, he ought to aver it to be true; otherwise he is punishable; for it shall be considered as spoken maliciously and without cause; which is a good ground for the action. . . . So if counsel object matter against a witness which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable, what he delivers by information, although it be false."[1] The privilege of counsel in these cases is the same with that of the party himself,[2] and the limitation upon it is concisely suggested in a Pennsylvania case, "that if a man should abuse his privilege, and, under pretence of pleading his cause, designedly wander from the point in question, and maliciously heap slander upon his adversary, I will not say that he is not responsible in an action at law."[3] Chief Justice *Shaw* has stated the rule very fully and clearly: "We take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they

[1] Brook *v.* Montague, Cro. Jac. 90. See this case approved and applied in Hodgson *v.* Scarlett, 1 B. & Ald. 232. And see Mackay *v.* Ford, 5 H. & M. 792.

[2] Hoar *v.* Wood, 3 Met. 193, per *Shaw*, Ch. J.

[3] McMillan *v.* Birch, 1 Binney, 178, 2 Am. Dec. 426, per *Tilghman*, Ch. J. For the liability of counsel for inserting irrelevant and injurious matter in the pleadings, see McLaughlin *v.* Cowley, 127 Mass. 316. The client is not answerable for the slanders of his counsel in managing his cause. Bayly *v.* Fourchy, 32 La. Ann. 136.

are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they are relevant or pertinent to the cause or subject of inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are entrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party, or counsel who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives, or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statement may be at once controlled and met by evidence and argument of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still, this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech in conducting the causes and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions." [1]

[1] Hoar *v.* Wood, 3 Met. 193, 197. See also Padmore *v.* Lawrence, 11 Ad. & El. 380; Ring *v.* Wheeler, 7 Cow. 725; Mower *v.* Watson, 11 Vt. 536, 34 Am. Dec. 704; Gilbert *v.* People, 1 Denio, 41; Hastings *v.* Lusk, 22 Wend. 410, 34 Am. Dec. 380; Bradley *v.* Heath, 12 Pick. 163; Stackpole *v.* Hennen, 6 Mart. n. s. 481, 17 Am. Dec. 187; Shelfer *v.* Gooding, 2 Jones (N. C.), 175; Lea *v.* White, 4 Sneed, 111; Marshall *v.* Gunter, 6 Rich. 419; Ruohs *v.* Backer, 6 Heisk. 395; Jennings *v.* Paine, 4 Wis. 358; Lawson *v.* Hicks, 38 Ala. 279; Lester *v.* Thurmond, 51 Ga. 118; Maulsby *v.* Reifsnider, 69 Md. 143, 14 Atl. 505. In a unanimous opinion in both the Divisional and Appeal Courts it has been held recently in England that counsel stand on the same ground as witnesses and judges; that their statements when made in the course of a judicial proceeding, are absolutely privileged, even though they are false, malicious, and irrelevant to the issue in the case, and without reasonable and probable cause. Munster *v.* Lamb, L. R. 11 Q. B. D. 588. In Hastings *v.* Lusk, *supra*, it is said that the privilege of counsel is as broad as that of a legislative body; however false and malicious may be the

Privilege of Legislators.

The privilege of a legislator in the use of language in debate is made broader and more complete than that of the counsel or party in judicial proceedings by constitutional provisions, which give him complete immunity, by forbidding his being questioned in any other place for anything said in speech or debate.[1] In an early case in Massachusetts, the question of the extent of this constitutional privilege came before the Supreme Court, and was largely discussed, as well by counsel as by the court. The constitutional provision then in force in that State was as follows: "The freedom of deliberation, speech, and debate in either house cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." The defendant was a member of the General Court, and was prosecuted for uttering slanderous words to a fellow-member in relation to the plaintiff. The member to whom the words were uttered had moved a resolution, on the suggestion of the plaintiff, for the appointment of an additional notary-public in the county where the plaintiff resided. The mover, in reply to an inquiry privately made by defendant, as to the source of his information that such appointment was necessary, had designated the plaintiff, and the defendant had replied by a charge against the plaintiff of a criminal offence. The question before the court was, whether this reply was privileged. The house was in session at the time, but the remark was not made in course of speech or debate, and had no other connection with the legislative proceedings than is above shown.

Referring to the constitutional provision quoted, the learned judge who delivered the opinion of the court in this case thus expressed his views: "In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the

charge made by him affecting the reputation of another, an action of slander will not lie, provided what is said be pertinent to the question under discussion. And see Harden *v.* Cumstock, 2 A. K. Marsh. 480, 12 Am. Dec. 168; Warner *v.* Paine, 2 Sandf. 195; Garr *v.* Selden, 4 N. Y. 91; Marsh *v.* Ellsworth, 50 N. Y. 309; Spaids *v.* Barrett, 57 Ill. 289; Jennings *v.* Paine, 4 Wis. 358.

[1] There are provisions to this effect in every State Constitution except those of North Carolina, South Carolina, Mississippi, Texas, California, and Nevada. Mr. Cushing, in his work on the Law and Practice of Legislative Assemblies, § 602, has expressed the opinion that these provisions are unnecessary, and that the protection is equally complete without them.

people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect, the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrest on mesne (or original) process, during his going to, returning from, or attending the General Court. Of these privileges, thus secured to each member, he cannot be deprived by a resolve of the house, or by an act of the legislature.

"These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office; and I would define the article as securing to every member exemption from prosecution for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house, and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber. He cannot be exercising the functions of his office as member of a body, unless the body be in existence. The house must be in session to enable him to claim this privilege, and it is in session notwithstanding occasional adjournments for short intervals for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body of which he is a member is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions as a representative, in committee, either in debating or assenting to or draughting a report. Neither can I deny the member his privilege when executing the duties of his office, in a convention of both houses, although the convention should be holden in the Senate Chamber." And after considering the hardships that might result to individ-

uals in consequence of this privilege, he proceeds: "A more extensive construction of the privileges of the members secured by this article I cannot give, because it could not be supported by the language or the manifest intent of the article. When a representative is not acting as a member of the house, he is not entitled to any privileges above his fellow-citizens; nor are the rights of the people affected if he is placed on the same ground on which his constituents stand." And coming more particularly to the facts then before the court, it was shown that the defendant was not in the discharge of any official duty at the time of uttering the obnoxious words; that they had no connection or relevancy to the business then before the house, but might with equal pertinency have been uttered at any other time or place, and consequently could not, even under the liberal rule of protection which the court had laid down, be regarded as within the privilege.[1]

Publication of Privileged Communications through the Press.

If now we turn from the rules of law which protect communications because of the occasion on which they are made, and the duty resting upon the person making them, to those rules which concern the spreading before the world the same communications, we shall discover a very remarkable difference. It does not follow because a counsel may freely speak in court as he believes or is instructed, that therefore he may publish his speech through the public press. The privilege in court is necessary to the complete discharge of his duty to his client; but when the suit is ended, that duty is discharged, and he is not called upon to appeal from the court and the jury to the general public.[2] Indeed such an appeal, while it could not generally have benefit to the client in view, would be unfair and injurious to the parties reflected upon by the argument, inasmuch as it would take only a partial and one-sided view of the case, and the public would not have, as the court and jury did, all the facts of the case as given in evidence before them, so that they might be in position to weigh the arguments fairly and understandingly, and reject injurious inferences not warranted by the evidence.

The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend

[1] Coffin *v.* Coffin, 4 Mass. 1, 27, 3 Am. Dec. 189. See Jefferson's Manual, § 3; Hosmer *v.* Loveland, 19 Barb. 111; State *v.* Burnham, 9 N. H. 34.

[2] The publication of slanderous remarks of counsel during a trial is not privileged. Com. *v.* Godshalk, 13 Phila. 575.

nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself.

It seems to be settled that a fair and impartial account of judicial proceedings, which have not been *ex parte*, but in the hearing of both parties, is, generally speaking, a justifiable publication.[1] But it is said that, if a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence.[2] A plea that the supposed libel was, in substance, a true account and report of a trial has been held bad;[3] and a statement of the circumstances of a trial as from counsel in the case has been held not privileged.[4] The report must also be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever, in addition to what forms strictly and properly the legal proceedings.[5] And if the nature of the case is

[1] Hoare *v.* Silverlock, 9 C. B. 20; Lewis *v.* Levy, E. B. & E. 537; Ryalls *v.* Leader, Law Rep. 1 Exch. 296. And see Stanley *v.* Webb, 4 Sandf. 21; Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548; Torrey *v.* Field, 10 Vt. 353; Fawcett *v.* Charles, 13 Wend. 473; McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465. But it is held the report must not only be fair, but be without malice. Stevens *v.* Sampson, L. R. 5 Ex. D. 53. A fair report of a judgment without publishing the evidence is *prima facie* privileged. MacDougall *v.* Knight, L. R. 17 Q. B. D. 636. The privilege extends to the publication of testimony taken on an investigation by Congress. Terry *v.* Fellows, 21 La. Ann. 375. And of the proceedings on trials in voluntary organizations. Barrows *v.* Bell, 7 Gray, 301. There is no privilege in publishing the contents of a bill or petition merely filed before a hearing. Barber *v.* St. Louis, &c. Co., 3 Mo. App. 377; Cowley *v.* Pulsifer, 137 Mass. 392.

[2] Lewis *v.* Walter, 4 B. & Ald. 605.

[3] Flint *v.* Pike, 4 B. & C. 473. See Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81.

[4] Saunders *v.* Mills, 6 Bing. 213; Flint *v.* Pike, 4 B. & C. 473. And see Stanley *v.* Webb, 4 Sandf. 21; Lewis *v.* Walter, 4 B. & Ald. 605. A statement made by a newspaper, not purporting to be upon the authority of judicial proceedings, is not privileged. Storey *v.* Wallace, 60 Ill. 51. See Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81. And a publication of judicial proceedings is not privileged if it contain intrinsic evidence that it was not published for good motives, and for justifiable ends. Saunders *v.* Baxter, 6 Heisk. 369. The publication in a medical journal of an account of the proceedings of a medical society in the expulsion of a member for cause is privileged. Barrows *v.* Bell, 7 Gray, 301. And so is the publication in a denominational organ of resolutions of an association of ministers. Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698.

[5] Stiles *v.* Nokes, 7 East, 493; Delegal *v.* Highley, 3 Bing. N. C. 950. And see Lewis *v.* Clement, 3 B. & Ald. 702; Pittock *v.* O'Neill, 63 Pa. St. 253, 3 Am. Rep. 544; Clark *v.* Binney, 2 Pick. 112; Scripps *v.* Reilly, 38 Mich. 10; Bathrick *v.* Detroit Post, &c. Co., 50 Mich. 629, 16 N. W.

such as to make it improper that the proceedings should be spread before the public because of their immoral tendency, or of the blasphemous or indecent character of the evidence exhibited, the publication, though impartial and full, will be a public offence, and punishable accordingly.[1]

It has, however, been held, that the publication of *ex parte* proceedings, or mere preliminary examinations, though of a judicial character, is not privileged; and when they reflect injuriously upon individuals, the publisher derives no protection from their having already been delivered in court.[2] The reason for

172. Publication of a report of a judgment with a headline "Hotel Proprietors Embarrassed," is not privileged. Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331. A statement that one was arrested after testifying, on account of his criminating evidence, is not privileged as a report of a judicial proceeding. Godshalk *v.* Metzgar, — Pa. St. — 17 Atl. 215.

[1] Rex *v.* Carlile, 3 B. & Ald. 167; Rex *v.* Creevey, 1 M. & S. 273. [But a court has no inherent power to prohibit the publication of such testimony, nor to punish such publication as a contempt. *Re* Shortridge, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. 78.]

[2] Duncan *v.* Thwaites, 3 B. & C. 556; Flint *v.* Pike, 4 B. & C. 473; Charlton *v.* Watton, 6 C. & P. 385; Rex *v.* Lee, 5 Esp. 123; Rex *v.* Fisher, 2 Camp. 563; Delegal *v.* Highley, 3 Bing. N. C. 950; Behrens *v.* Allen, 3 Fost. & F. 135; Cincinnati Gazette Co. *v.* Timberlake, 19 Ohio, N. S. 548; Mathews *v.* Beach, 5 Sandf. 256; Huff *v.* Bennett, 4 Sandf. 120; Stanley *v.* Webb, 4 Sandf. 21; Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33. It seems, however, that if the proceeding has resulted in the discharge of the person accused, or in a decision that no cause exists for proceeding against him, a publication of an account of it is privileged. In Curry *v.* Walter, 1 B. & P. 525, the Court of Common Pleas held that, in an action for libel, it was a good defence, under the plea of not guilty, that the alleged libel was a true account of what had passed upon a motion in the Court of King's Bench for an information against two magistrates for corruption in refusing to license an inn; the motion having been refused for want of notice to the magistrates. In Lewis *v.* Levy, El. Bl. & El. 537, the publisher of a newspaper gave a full report of an examination before a magistrate on a charge of perjury, resulting in the discharge of the defendant; and the Court of Queen's Bench sustained the claim of privilege; distinguishing the case from those where the party was held for trial, and where the publication of the charges and evidence might tend to his prejudice on the trial. The opinion of Lord *Campbell* in the case, however, seems to go far towards questioning the correctness of the decisions above cited. See especially his quotation from the opinion of Lord *Denman*, delivered before a committee of the House of Lords, in the year 1843, on the law of libel: "I have no doubt that [police reports] are extremely useful for the detection of guilt by making facts notorious, and for bringing those facts more correctly to the knowledge of all parties interested in unravelling the truth. The public, I think, are perfectly aware that those proceedings are *ex parte*, and they become more and more aware of it in proportion to their growing intelligence; they know that such proceedings are only in course of trial, and they do not form their opinion until the trial is had. Perfect publicity in judicial proceedings is of the highest importance in other points of view, but in its effects on character I think it desirable. The statement made in open court will probably find its way to the ears of all in whose good opinion the party assailed feels an interest, probably in an exaggerated form, and the imputation may often rest upon the wrong person; both these evils are prevented by correct reports." In the case of Lewis *v.* Levy, it was insisted that the privilege of publication only extended to the proceedings of the superior courts of law and equity; but the court gave no counte-

distinguishing these cases from those where the parties are heard is thus stated by Lord *Ellenborough*, in the early case of The King *v.* Fisher:[1] "Jurors and judges are still but men; they cannot always control feeling excited by inflammatory language. If they are exposed to be thus warped and misled, injustice must sometimes be done. Trial at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. The benefit they produce is great and permanent, and the evil that arises from them is rare and incidental. But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice. It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and character. We would then wish to meet a jury of our countrymen with unbiassed minds. But for this there can be no security, if such publications are permitted." And in another case it has been said: "It is our boast that we are governed by that just and salutary rule upon which security of life and character often depends, that every man is presumed innocent of crimes charged upon him, until he is proved guilty. But the circulation of charges founded on *ex parte* testimony, of statements made, often under excitement, by persons smarting under real or fancied wrongs, may prejudice the public mind, and cause the judgment of conviction to be passed long before the day of trial has arrived. When that day of trial comes, the rule has been reversed, and the presumption of guilt has been substituted for the presumption of innocence. The chances of a fair and impartial trial are diminished. Suppose the charge to be utterly groundless. If every preliminary *ex parte* complaint which may be made before a police magistrate may, with entire impunity, be published and scattered broadcast over the land, then the character of the innocent, who may be the victim of a conspiracy, or of charges proved afterwards to have arisen entirely from misapprehension, may be cloven down, without any malice on the part of the publisher. The

nance to any such distinction. See also Wason *v.* Walter, L. R. 4 Q. B. 73; Terry *v.* Fellows, 21 La. Ann. 375.

[1] 2 Camp. 563. Compare with this and the cases cited in the preceding note, Ryalls *v.* Leader, L. R. 1 Exch. 295; Smith *v.* Scott, 2 C. & K. 580; Ackerman *v.* Jones, 37 N. Y. Sup. C. R. 42. It is clear that the report is not privileged, if accompanied with injurious comments. Stiles *v.* Nokes, 7 East, 493; Commonwealth *v.* Blanding, 3 Pick. 304, 15 Am. Dec. 214; Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33; Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544.

refutation of slander, in such cases, generally follows its propagation at distant intervals, and brings often but an imperfect balm to wounds which have become festered, and perhaps incurable. It is not to be denied that occasionally the publication of such proceedings is productive of good, and promotes the ends of justice. But, in such cases, the publisher must find his justification, not in privilege, but the truth of the charges." [1]

Privilege of Publishers of News.

Among the inventions of modern times, by which the world has been powerfully influenced, and from which civilization has received a new and wonderful impulse, must be classed the newspaper. Beginning with a small sheet, insignificant alike in matter and appearance, published at considerable intervals, and including but few in its visits, it has become the daily vehicle, to almost every family in the land, of information from all quarters of the globe, and upon every subject. Through it, and by means of the electric telegraph, the public proceedings of every civilized country, the debates of the leading legislative bodies, the events of war, the triumphs of peace, the storms in the physical, and the agitations in the moral and mental world, are brought home to the knowledge of every reading person, and, to a very large extent, before the day is over on which the events have taken place. And not public events merely are discussed and described, but the actions and words of public men are made public property; and any person sufficiently eminent or notorious to become an object of public interest will find his movements chronicled in this index of the times. Every party has its newspaper organs; every shade of opinion on political, religious, literary, moral, industrial, or financial questions has its representative; every locality has its press to advocate its claims, and advance its interests, and even the days regarded as sacred have their special papers to furnish reading suitable for the time. The newspaper is also the medium by means of which all classes of the people communicate with each other concerning their wants and desires, and through which they offer their wares, and seek bargains. As

[1] Stanley *v.* Webb, 4 Sandf. 21, 30. See this case approved and followed in Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548, where, however, the court are careful not to express an opinion whether a publication of the proceedings on preliminary examinations may not be privileged, where the accused is present with full opportunity of defence. See Rex *v.* Fisher, 2 Camp. 563; Duncan *v.* Thwaites, 3 B. & C. 556; Flint *v.* Pike, 4 B. & C. 473; Charlton *v.* Watton, 6 C. & P. 385; Behrens *v.* Allen, 3 F. & F. 135; Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33.

it has gradually increased in value, and in the extent and variety of its contents, so the exactions of the community upon its conductors have also increased, until it is demanded of the newspaper publisher that he shall daily spread before his readers a complete summary of the events transpiring in the world, public or private, so far as those readers can reasonably be supposed to take an interest in them; and he who does not comply with this demand must give way to him who will.

The newspaper is also one of the chief means for the education of the people. The highest and the lowest in the scale of intelligence resort to its columns for information; it is read by those who read nothing else, and the best minds of the age make it the medium of communication with each other on the highest and most abstruse subjects. Upon politics it may be said to be the chief educator of the people; its influence is potent in every legislative body; it gives tone and direction to public sentiment on each important subject as it arises; and no administration in any free country ventures to overlook or disregard an element so pervading in its influence, and withal so powerful.

And yet it may be doubted if the newspaper, as such, has ever influenced at all the current of the common law, in any particular important to the protection of the publishers. The railway has become the successor of the king's highway, and the plastic rules of the common law have accommodated themselves to the new condition of things; but the changes accomplished by the public press seem to have passed unnoticed in the law, and, save only where modifications have been made by constitution or statute, the publisher of the daily paper occupies to-day the position in the courts that the village gossip and retailer of scandal occupied two hundred years ago, with no more privilege and no more protection.

We quote from an opinion by the Supreme Court of New York, in a case where a publisher of a newspaper was prosecuted for libel, and where the position was taken by counsel, that the publication was privileged: "It is made a point in this case, and was insisted upon in argument, that the editor of a public newspaper is at liberty to copy an item of news from another paper, giving at the same time his authority, without subjecting himself to legal responsibility, however libellous the article may be, unless express malice be shown. It was conceded that the law did not, and ought not, to extend a similar indulgence to any other class of citizens; but the counsel said that a distinction should be made in favor of editors, on the ground of the peculiarity of their occupation. That their business was to disseminate useful knowledge among the

people; to publish such matters relating to the current events of the day happening at home or abroad as fell within the sphere of their observation, and as the public curiosity or taste demanded; and that it was impracticable for them at all times to ascertain the truth or falsehood of the various statements contained in other journals. We were also told that if the law were not thus indulgent, some legislative relief might become necessary for the protection of this class of citizens. *Undoubtedly if it be desirable to pamper a depraved public appetite or taste*, if there be any such, by the republication of all the falsehoods and calumnies upon private character that may find their way into the press, — to give encouragement to the widest possible circulation of these vile and defamatory publications by protecting the retailers of them, — some legislative interference will be necessary, for no countenance can be found for the irresponsibility claimed in the common law. That reprobates the libeller, whether author or publisher, and subjects him to both civil and criminal responsibility. His offence is there ranked with that of the receiver of stolen goods, the perjurer and suborner of perjury, the disturber of the public peace, the conspirator, and other offenders of like character." And again: "The act of publication is an adoption of the original calumny, which must be defended in the same way as if invented by the defendant. The republication assumes and indorses the truth of the charge, and when called on by the aggrieved party, the publisher should be held strictly to the proof. If he chooses to become the indorser and retailer of private scandal, without taking the trouble of inquiring into the truth of what he publishes, there is no ground for complaint if the law, which is as studious to protect the character as the property of the citizen, holds him to this responsibility. The rule is not only just and wise in itself, but if steadily and inflexibly adhered to and applied by courts and juries, will greatly tend to the promotion of truth, good morals, and common decency on the part of the press, by inculcating caution and inquiry into the truth of charges against private character before they are published and circulated throughout the community."[1]

[1] Hotchkiss *v.* Oliphant, 2 Hill, 510–513, per *Nelson*, Ch. J. And see King *v.* Root, 4 Wend. 113–138, 21 Am. Dec. 102, per *Walworth*, Chancellor. "It has been urged upon you that conductors of the public press are entitled to peculiar indulgences and have special rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity." Instructions approved in Sheckell *v.* Jackson, 10 Cush. 25. And see Palmer *v.* Concord, 48 N. H. 211. In People *v.* Wilson, 64 Ill. 195, 16 Am. Rep. 528, a publication

If this strong condemnatory language were confined to the cases where private character is dragged before the public for detraction and abuse, to pander to a depraved appetite for scandal, its propriety and justice and the force of its reasons would be at once conceded. But a very large proportion of what the newspapers spread before the public relates to matters of public concern, in which, nevertheless, individuals figure, and must therefore be mentioned in any account or discussion. To a great extent, also, the information comes from abroad; the publisher can have no knowledge concerning it, and no inquiries which he could make would be likely to give him more definite information, unless he delays the publication until it ceases to be of value to his readers. Whatever view the law may take, the public sentiment does not brand the publisher of a newspaper as libeller, conspirator, or villain, because the telegraph despatches transmitted to him from all parts of the world, without any knowledge on his part concerning the facts, are published in his paper, in reliance upon the prudence, care, and honesty of those who have charge of the lines of communication, and whose interest it is to be vigilant and truthful. The public demand and expect accounts of every important meeting, of every important trial, and of all the events which have a bearing upon trade and business, or upon political affairs. It is impossible that these shall be given in all cases without matters being mentioned derogatory to individuals; and if the question were a new one in the law, it might be worthy of inquiry whether some line of distinction could not be drawn which would protect the publisher when giving in good faith such items of news as would be proper, if true, to spread before the public, and which he gives in the regular course of his employment, in pursuance of a public demand, and without any negligence, as they come to him from the usual and legitimate sources, which he has reason to rely upon; at the same time leaving him liable when he makes his columns the vehicle of private gossip, detraction, and malice.

regarding a pending cause calculated to bring public odium upon the court in respect to its treatment of the case, was punished as a contempt of court. See also Respublica *v.* Oswald, 1 Dall. 319, 1 Am. Dec. 246; Respublica *v.* Passmore, 3 Yeates, 441, 2 Am. Dec. 388; People *v.* Freer, 1 Caines, 518; Tenney's Case, 23 N. H. 162; Sturoc's Case, 48 N. H. 428; State *v.* Morrill, 16 Ark. 384; State *v.* Frew, 24 W. Va. 416. But not publications as to a past proceeding. Cheadle *v.* State, 110 Ind. 301, 11 N. E. 426. As to the power in England to punish the like conduct as a contempt, see The King *v.* Clement, 4 B. & Ald. 218; The Queen *v.* Lefroy, L. R. 8 Q. B. 134, 2 Moak, 250. But in Storey *v.* People, 79 Ill. 45, 22 Am. Rep. 158, it was held a publisher could not be punished as for contempt for an article reflecting on the grand jury, because, under the guaranty of freedom of the press in the Constitution of Illinois, he was entitled to jury trial.

The question, however, is not new, and when the authorities are examined it appears that they have generally held the proprietors of public journals to the same rigid responsibility with all other persons who publish what is injurious. If what they give as news proves untrue as well as damaging to individuals, malice in the publication is presumed.[1] It is no excuse that what was published was copied without comment from another paper,[2] or was given as a rumor merely,[3] or that the source of the information was stated as a part of the publication,[4] or that the publication was made in the paper without the knowledge of the proprietor, as an advertisement or otherwise,[5] or that it is a correct and impartial account of a public meeting,[6] or that it is the speech of a murderer at the gallows,[7] or that it has to do with the conduct of the plaintiff as a public official.[8] Criticisms

[1] Barnes *v.* Campbell, 59 N. H. 128; McAllister *v.* Detroit Free Press Co., 76 Mich. 388, 43 N. W. 431; Pratt *v.* Pioneer Press Co., 30 Minn. 41, 14 N. W. 62; Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904. See Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671; Negley *v.* Farrow, 60 Md. 158. [Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 21 L. R. A. 493.]

[2] Hotchkiss *v.* Oliphant, 2 Hill, 510. [Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 21 L. R. A. 493; Burt *v.* Advertiser N. Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.] Even though they be preceded by the statement that they are so copied: Sanford *v.* Bennett, 24 N. Y. 20; and accompanied by a statement of disbelief. Com. *v.* Chambers, 15 Phila. 415.

[3] Wheeler *v.* Shields, 3 Ill. 348; Mason *v.* Mason, 4 N. H. 110. See State *v.* Butman, 15 La. Ann. 166; Parker *v.* Mequeen, 8 B. Monr. 16; Sans *v.* Joerris, 14 Wis. 663; Hampton *v.* Wilson, 4 Dev. 468; Beardsley *v.* Bridgman, 17 Iowa, 290; Hawkins *v.* Lumsden, 10 Wis. 359; Knight *v.* Foster, 39 N. H. 576; Carpenter *v.* Bailey, 53 N. H. 590; Farr *v.* Rasco, 9 Mich. 353; Sheahan *v.* Collins, 20 Ill. 325; McDonald *v.* Woodruff, 2 Dill. 241; Rex *v.* Newman, 1 El. & Bl. 268.

[4] Dole *v.* Lyon, 10 Johns. 447, 6 Am. Dec. 346; Mapes *v.* Weeks, 4 Wend. 659; Inman *v.* Foster, 8 Wend. 602; Hotchkiss *v.* Oliphant, 2 Hill, 510; Cates *v.* Kellogg, 9 Ind. 506; Fowler *v.* Chichester, 26 Ohio St. 9; Cummerford *v.* McAvoy, 15 Ill. 311.

[5] Andres *v.* Wells, 7 Johns. 260, 5 Am. Dec. 257; Huff *v.* Bennett, 4 Sandf. 120, 6 N. Y. 337; Marten *v.* Van Schaick, 4 Paige, 479; Commonwealth *v.* Nichols, 10 Met. 259.

[6] Dawson *v.* Duncan, 7 El. & Bl. 229. See Lewis *v.* Few, 5 Johns. 1.

[7] Sanford *v.* Bennett, 24 N. Y. 20.

[8] King *v.* Root, 4 Wend. 113, 21 Am. Dec. 102. The action was for a libel, published in the "New York American," reflecting upon Root, who was candidate for lieutenant-governor. We quote from the opinion of the chancellor: "It is insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge, and the party libelled had no right to recover, unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting, it would be destroying the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office, without being answerable for the truth of such publications. No honest man could afford to be an editor, and no man who had any character to lose would be a candidate for office under such a construction of the law of libel. The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish." Notwithstanding the deplorable consequences here predicted from too great license to the press, it is matter

on works of art and literary productions are allowable, but they must be fair and temperate, and the author himself must not be criticised under cover of a criticism of his works; nor must it be assumed that because he seeks the favor of the public for his productions, he thereby makes his private character and conduct public property.[1] For further privilege it would seem that publishers of news must appeal to the protection of public opinion, or they must call upon the legislature for such modification of the law as may appear important to their just protection.

But there is a difference between the mere publication of items of news in which the public may take an interest, as news merely, and the discussion of matters which concern the public because they are their own affairs. It is one thing to reproduce in the newspaper injurious reports respecting individuals, however willing the public may be to hear them, and a very different thing to discuss the public conduct of a high official. A private individual only challenges public criticism when his conduct becomes or threatens to be injurious to others; public characters and public institutions invite it at all times. The distinction is palpable, and it indicates a line of privilege which is by no means unimportant to the publishers of public journals, even when their right is determined by the same standard which determines the right of all other persons. If they may not publish news with impunity, they may at least discuss with freedom and boldness all matters of

of daily observation that the press, in its comments upon public events and public men, proceeds in all respect as though it were privileged; public opinion would not sanction prosecutions by candidates for office for publications amounting to technical libels, but which were nevertheless published without malice in fact; and the man who has a "character to lose" presents himself for the suffrages of his fellow-citizens in the full reliance that detraction by the public press will be corrected through the same instrumentality, and that unmerited abuse will react on the public opinion in his favor. Meantime the press is gradually becoming more just, liberal, and dignified in its dealings with political opponents, and vituperation is much less common, reckless, and bitter now than it was at the beginning of the century, when repression was more often resorted to as a remedy. [That fair criticism of public men is allowable, see Burt *v.* Advertiser N. Co., 154 Mass. 238, 23 N. E. 1, 13 L. R. A. 97, and note. See also Smith *v.* Burrus, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. 329.]

[1] See Cooper *v.* Stone, 24 Wend. 434; Cooper *v.* Barber, 24 Wend. 105; Cooper *v.* Greeley, 1 Denio, 347. A newspaper criticism on a play is not privileged. If it goes beyond fair criticism in the jury's opinion it is libellous. Merivale *v.* Carson, L. R. 20 Q. B. D. 275. As to criticisms on public entertainments, see Fry *v.* Bennett, 5 Sandf. 54, and 28 N. Y. 324; Dibdin *v.* Swan, 1 Esp. 28; Green *v.* Chapman, 4 Bing. N. C. 92. As to how far sermons, preached, but not otherwise published, form a proper subject for comment and criticism by the public press, see Gathercole *v.* Miall, 15 M. & W. 318. If one sends a communication to a paper which is altered before publication, he is liable for it as published only if he has ratified it as changed. Dawson *v.* Holt, 11 Lea, 583.

public concern, because this is the privilege of every one.[1] The privilege extends to matters of government in all its grades and all its branches; to the performance of official duty by all classes of public officers and agents; to the courts, the prisons, the reformatories, the public charities, and the public schools; to all means of transportation and carriage, even when in private hands and management. But the privilege is not limited to these; but extends to all schemes, projects, enterprises, and organizations of a semi-public nature, which invite the public favor, and depend for their success on public confidence.[2] The soundness of a bank or an insurance company, the humanity of the managers of a private asylum, the integrity of a board of trade, the just management of a public fair, are all matters which directly and immediately concern the interest of the public. That interest can only be adequately protected through the liberty of public discussion, and to deny this would be to offer impunity to fraudulent schemes and enterprises. The law invites such discussion, because of the public interest in it, and it extends its protection to all publications which do not appear on their face, and are not shown otherwise, to have been inspired by malice. The publisher of a newspaper may open his columns to them freely, so long as they are restricted within the limits of good faith, not because he makes the furnishing of news his business, but because the discussion is the common right and liberty of every citizen.[3]

[1] But a newspaper has no peculiar privilege to publish charges of corruption against an officer, or of crime against a candidate. Negley *v.* Farrow, 60 Md. 158; Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671. And see cases, p. 628, note, *ante*. [Newspapers are not privileged to attempt by their comments to intimidate the judges of a court and compel them to submit to popular clamor the decision of a particular case before the court. Until the decision has been rendered, the newspapers have no right to comment upon or to criticise what they suppose that it will be. After it is rendered, and not until then, is it properly before the public. Conduct contrary to this rule is a contempt of court and may be punished as such. State *v.* Bee Pub. Co., 60 Neb. 282, 83 N. W. 204, 50 L. R. A. 195; State *v.* Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717; People *v.* Stapleton, 18 Col. 568, 33 Pac. 167, 23 L. R. A. 787; Cooper *v.* People, 13 Col. 337, 373, 22 Pac. 790, 6 L. R. A. 430. But it is not a contempt of court to charge a judge, who is a candidate for re-election, with corruption and partiality in the decision of actions already adjudicated. State *v.* Circuit Court, 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 551, 65 Am. St. 90.]

[2] See Crane *v.* Waters, 10 Fed. Rep. 619. *Lowell*, J., 26 Alb. Law Jour. 217.

[3] The following extracts are made from an opinion in Atkinson *v.* Detroit Free Press, 46 Mich. 341, 376, 9 N. W. 501, which was a suit for libel in a publication concerning what appeared to be the dishonest bankruptcy of a member of the Detroit Board of Trade. As the case went off on an unimportant point, the extracts are given as the views of the judge from whose opinion they are taken.

"What is a case of privilege? In general terms it may be said to be a case in which the circumstances rebut the presumption of legal malice. By legal malice is meant no more than the wrongful

The publisher of a newspaper, however, even when responsible for all the actual damage which a party may suffer in consequence

intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact. Wason *v.* Walter, L. R. 4 Q. B. 73, 87. If one traduce another, whether knowing him or not, and whether intending to do him an injury or not, the law considers it as done of malice because it is wrongful and intentional. It equally works an injury whether injury was intended or not, and if there was no excuse for the slander, there should be an appropriate remedy. Bromage *v.* Prosser, 4 B. & C. 247, 255. But the presumption of law may be rebutted by the circumstances under which the defamatory words have been uttered or published; and whenever this is the case no right of action can arise, even though the character of the party concerned may have suffered, unless he is able to show that there was malice in fact. Wason *v.* Walter, L. R. 4 Q. B. 73, 87; Toogood *v.* Spyring, 1 C. M. & R. 181; Lewis *v.* Levy, El. Bl. & El. 537; Taylor *v.* Hawkins, 16 Q. B. 308, 321; Clark *v.* Molyneaux, L. R. 3 Q. B. D. 237; Barrows *v.* Bell, 7 Gray, 301; Terry *v.* Fellows, 21 La. Ann. 375; McBee *v.* Fulton, 47 Md. 403.

"The privilege in a communication springs from the fact that there existed in the case some obligation or duty to speak or publish on the subject. Sometimes this obligation is mandatory; the duty is either imposed by law, or the circumstances render it so far imperative that the party upon whom it rests must suffer some penalty or loss unles she recognizes and performs it. In such cases the protection should be as conclusive as the duty is imperative. We have an illustration in the case of a witness in court; the law compels him to state what he knows that is relevant and competent in the controversy, and he will not be suffered to refuse if he would. But the conflicts in testimony give abundant evidence that witnesses are frequently mistaken; and if they must testify under a responsibility to civil suits for all mistakes injurious to the reputation of other persons, we should encounter such evasion of process and such suppression of the facts as would in many cases make the truth practically unattainable. In a civil suit against the witness, therefore, the law will not permit malice to be alleged or shown; if the witness testify falsely with evil intent, he may be indicted and punished; but in a civil suit which brings it in question, his evidence must be conclusively presumed to have been given under the inspiration of proper motives. The same conclusive presumption will attend the filing of the necessary pleadings and other papers in a cause, and the arguments of counsel, provided they do not wander from the case for the purposes of vituperation or harmful imputation upon character, conduct, or motives. Torrey *v.* Field, 10 Vt. 353; Gilbert *v.* People, 1 Denio, 41; Hoar *v.* Wood, 3 Met. 193; Strauss *v.* Meyer, 48 Ill. 386; Johnson *v.* Brown, 13 W. Va. 71. But there are other cases in which the privilege is only *prima facie* and conditional; it exists so far as to rebut any legal presumption of malice, and constitutes a protection until actual malice is shown. It is therefore a privilege conditioned on the publication having been made with proper motives, but the proof of bad motives — or, in other words, of malice in fact — must be made by the party who asserts it. Spill *v.* Maule, L. R. 4 Ex. 232; Shurtleff *v.* Stevens, 51 Vt. 501. Such a case is where a voter publicly criticises and condemns the character or conduct of a candidate for public honors; he has a right to do this, and is *prima facie* protected in his criticism; but if it is made to appear that his privilege is used as a cloak for groundless and malicious assaults, the protection ceases, because the reason on which it rests ceases. The privilege is the handmaid of good faith.

"In the cases of qualified privilege, the duty to speak or publish is not imperative in the sense that a law is violated if it is not recognized; it may be a moral or social duty of imperfect obligation. Lord *Campbell*, Ch. J., in Harrison *v.* Bush, 5 E. & B. 344. Indeed, most cases of conditional privilege are cases in which a party may speak or abstain at his option; and if he speaks, it is because others desire and have a right to receive information on some subject which specially

of injurious publications in his paper, cannot properly be made liable for exemplary or vindictive damages, if the article com-

concerns them, or because in his opinion some moral, social, or political obligation demands it. The law imposes upon no citizen the duty to call the attention of the public to the maladministration of public affairs, or to the misconduct of public servants; but good citizenship may require him to speak, if his real motive in doing so is to bring about a reform of abuses, or to defeat the re-election or re-appointment of an incompetent officer. Palmer *v.* Concord, 48 N. H. 211, 216. And nothing is plainer than that to hold him to the strict and literal truth of every statement, recital, and possible inference would be to subject the right to conditions making any attempt at public discussion practically worthless. Lord *Campbell* has well shown in Harrison *v.* Bush, 5 El. & Bl. 344, and especially by his reference to the cases of Rex *v.* Baille, 21 State Trials, 1, and Fairman *v.* Ives, 5 B. & Ald. 642, that the law cherishes this right, and regards liberally its exercise for the public good, so that an honest mistake in seeking the proper remedy through the publication will not be suffered to constitute a ground for recovery. Chief Justice *Parker* thus states the true rule in State *v.* Burnham, 9 N. H. 34, 41: 'If the end to be attained is justifiable; as, if the object is the removal of an incompetent officer, or to prevent the election of an unsuitable person to office, or, generally, to give useful information to the community or to those who have a right and ought to know, in order that they may act upon such information, the occasion is lawful, and the party may then justify or excuse the publication.' Still more comprehensive is the language of the trial judge in Kelly *v.* Sherlock, L. R. 1 Q. B. 686, 689: 'Every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury, — we are all of us the subjects for public discussion. So also is it matter of public interest, the dispute between the plaintiff [a clergyman] and his organist, and the way in which a church is used: they are all public matters, and may be publicly discussed. And provided a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone, and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position renders himself open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position. In this country, everything, either by speech or writing, may be discussed for the benefit of the public.' This strong language is approved in Kelly *v.* Tinling, L. R. 1 Q. B. 699; and in Henwood *v.* Harrison, L. R. 7 C. P. 606, 622, the principle is declared to be 'a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals.' The same principle is found in Toogood *v.* Spyring, 1 C. M. & R. 181; Whitely *v.* Adams, 15 C. B. (N. S.), 417; Gott *v.* Pulsifer, 122 Mass. 235; McBee *v.* Fulton, 47 Md. 403; Shurtleff *v.* Stevens, 51 Vt. 501.

[And after recapitulating the facts]:

"'There is no room for plausible suggestion that these matters were not of public concern. The Detroit Board of Trade is a public institution, in the sense that it challenges public confidence by giving assurances that it is composed of individuals whose business integrity is known and undoubted. The public had reason to trust and confide in Clark, because he had been accepted as a suitable and proper member for this body; and reason is found in this record for the belief that his associates trusted him because he had won their confidence, and not because of any actual responsibility It is as important to the city of Detroit that it should have an honorable and trustworthy board of trade — a board that would reject and spurn association with one known or believed to be unreliable and dishonest — as it is that it should have a trustworthy mayor or con-

plained of was inserted in his paper without his personal knowledge, and he has been guilty of no negligence in the selection of

troller, or police authorities or other public functionaries. The business prosperity of a commercial city must depend quite as largely upon the honor and integrity of its commercial classes as upon the character of its political rulers; and confidence in these must cease unless fraud, when it appears, can be publicly rebuked.

"The defendant is publisher of a daily journal, established to give the facts of important current events, and to discuss, for the information and instruction of its readers, public affairs. This case affords neither occasion nor excuse for any general discussion of the liberty of the press in giving news; what was done here might have been done by any individual in a pamphlet under the same privilege that protects a newspaper. Nor has the fact that the liberty of the press is frequently and most grossly abused any relevancy in this case; we are concerned only with the question whether the liberty of public discussion was abused in the particular case. The conductors of the defendant's paper, in the regular course of their business, had had brought to their attention the facts of a transaction which no one ventures to defend. This transaction in its direct consequences was calculated to defraud a number of persons of considerable sums of money; in its indirect consequences it was likely to disturb the prevailing confidence in an important public institution, and to injure the business reputation of the city. They investigated the case, and laid the results before the public. No doubt they might have used more carefully-guarded language, and avoided irritating head lines; but in a case of palpable fraud, which this seemed to be and was, something must be excused to honest indignation; for the beneficial ends to be subserved by public discussion would, in large measure, be defeated if dishonesty must be handled with delicacy, and fraud spoken of with such circumspection and careful and differential choice of words as to make it appear in the discussion a matter of indifference. It is complained that the paper followed its first publication with a review of the whole case a week after it was all settled; but this review was quite as proper as the first notice. No settlement could relieve the case of its worse aspects. If Clark had repented before he left Windsor, and had followed his money in its remarkable journey, by hack and sail-boat, on foot and in carriage, and recovered it for the use of his creditors, he ought still to have been brought to the bar of public opinion to be dealt with for his extraordinary conduct whereby a considerable percentage of his assets had already been wasted. Mott *v.* Dawson, 46 Iowa, 533. The defendant's paper would have been unworthy of the confidence and support of commercial men if its conductors had shut their eyes to such a transaction. If the plaintiff was not in fault, then it was his misfortune that it was impossible to deal with the case without bringing him into the discussion.

"The communication in this case being privileged, and there being in its terms no manifest abuse of the privilege, it was incumbent on the plaintiff to give some evidence of malice before he was entitled to ask a verdict in his favor. Taylor *v.* Hawkins, 16 Q. B. 308, 321; Henwood *v.* Harrison, L. R. 7 C. B. 606. The case therefore failed to be made out. If such a discussion of a matter of public interest were *prima facie* an unlawful act, and the author were obliged to justify every statement by evidence of its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value. It would be better to restore the censorship of a despotism than to assume to give a liberty which can only be accepted under a responsibility that is always threatening, and may at any time be ruinous. A caution in advance after despotic methods would be less objectionable than a caution in damages after, in good faith, the privilege had been exercised. No public discussion of important matters involving the conduct and motives of individuals could possibly be at the same time valuable and safe under the rules for which the plaintiff contends. It is a plausible suggestion that strict rules of responsibility are essential to the protection of reputation; but it is most deceptive, for every man

agents, and no personal misconduct, and is not shown habitually to make his paper the vehicle of detraction and malice.[1]

Publication of Legislative Proceedings.

Although debates, reports, and other proceedings in legislative bodies are privileged, it does not seem to follow that the publication of them is always equally privileged. The English decisions do not place such publications on any higher ground of right than any other communication through the public press. A member of Parliament, it is said, has a right to publish his speech, but it must not be made the vehicle of slander against any individual, and if it is, it is a libel.[2] And in another case: "A member of [the House of Commons] has spoken what he thought material, and what he was at liberty to speak, in his character as a member of that house. So far he was privileged; but he has not stopped there, but, unauthorized by the house, has chosen to publish an account of that speech, in what he has pleased to call a more corrected form, and in that publication has thrown out reflections injurious to the character of an individual." And he was convicted and fined for the libel.[3]

The circumstance that the publication was unauthorized by the house was alluded to in this opinion, but the rule of law would seem to be unaffected by it, since it was afterwards held that an order of the house directing a report made to it to be published did not constitute any protection to the official printer, who had

of common discernment, who observes what is taking place around him, and what influences control public opinion, cannot fail to know that reputation is best protected when the press is free. Impose shackles upon it and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence? The undoubted truth is that honesty reaps the chief advantages of free discussion; and fortunately it is honesty also that is least liable to suffer serious injury when the discussion incidentally affects it unjustly." And see Miner *v.* Detroit Post & Tribune, 49 Mich. 358, 13 N. W. 773.

[1] Daily Post Co. *v.* McArthur, and Detroit Free Press *v.* Same, 16 Mich. 447; Perret *v.* New Orleans Times, 25 La. Ann. 170; Scripps *v.* Reilly, 35 Mich. 371; Same *v.* Same, 38 Mich. 10; Evening News *v.* Tryon, 42 Mich. 529, 4 N. W. 267, 36 Am. Rep. 450. A statutory provision that in actions against newspapers only actual damages to property, business, &c., should be recovered, if the publication was in good faith and did not involve a criminal charge, and if, as soon as possible, a correction was published, is bad; a class of citizens cannot be thus favored nor can damages be thus limited. Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731. But a like statute has been upheld in Minnesota. Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936.

[2] Rex *v.* Lord Abington, 2 Esp. 226.

[3] Rex *v.* Creevey, 1 M. & S. 273, 278.

published it in the regular course of his duty, in compliance with such order. All the power of the house was not sufficient to protect its printer in obeying the order to make this publication; and a statute was therefore passed to protect in the future persons publishing parliamentary reports, votes, or other proceedings, by order of either house.[1]

It has been intimated, however, that what a representative is privileged to address to the house of which he is a member, he is also privileged to address to his constituents; and that the *bona fide* publication for that purpose of his speech in the house is protected.[2] And the practice in this country appears to proceed on this idea; the speeches and proceedings in Congress being fully reported by the press, and the exemption of the member from

[1] Stat. 3 and 4 Victoria, c. 9. The case was that of Stockdale *v.* Hansard, very fully reported in 9 Ad. & El. 1. See also 11 Ad. & El. 253. The Messrs. Hansard were printers to the House of Commons, and had printed by order of that house the report of the inspectors of prisons, in which a book, published by Stockdale, and found among the prisoners in Newgate, was described as obscene and indecent. Stockdale brought an action against the printers for libel, and recovered judgment. Lord *Denman*, presiding on the trial, said that "the fact of the House of Commons having directed Messrs. Hansard to publish all their parliamentary reports is no justification for them, or for any bookseller who publishes any parliamentary report containing a libel against any man." The house resented this opinion and resolved, "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially of this house as the representative portion of it." They also resolved that for any person to institute a suit in order to call its privileges in question, or for any court to decide upon matters of privilege inconsistent with the determination of either house, was a breach of privilege. Stockdale, however, brought other actions, and again recovered. When he sought to enforce these judgments by executions, his solicitor and himself were proceeded against for contempt of the house, and imprisoned. While in prison Stockdale commenced a further suit. The sheriffs, who had been ordered by the House of Commons to restore the money which they had collected, were, on the other hand, compelled by attachments from the Queen's Bench to pay it over to Stockdale. In this complicated state of affairs, the proper and dignified mode of relieving the difficulty by the passage of a statute making such publications privileged for the future was adopted. For an account of this controversy, in addition to what appears in the law reports, see May, Law and Practice of Parliament, 156-159, 2d ed.; May, Constitutional History, c. 7. A case in some respects similar to that of Stockdale *v.* Hansard is that of Popham *v.* Pickburn, 7 Hurl. & Nor. 891. The defendant, the proprietor of a newspaper, was sued for publishing a report made by a medical officer of health to a vestry board, in pursuance of the statute, and which reflected severely upon the conduct of the plaintiff. The publication was made without any comment, and as a part of the proceedings of the vestry board. It was held not to be privileged, notwithstanding the statute provided for the publication of the report by the vestry board, — which, however, had not yet been made. A substantially correct report of an open meeting of a town council is privileged. Wallis *v.* Bazet, 34 La. Ann. 131.

[2] Lives of Chief Justices, by Lord Campbell, Vol. III. p. 167; Davison *v.* Duncan, 7 El. & Bl. 220, 233.

being called to account for his speech being apparently supposed to extend to its publication also. When complete publicity is thus practised, perhaps every speech published should be regarded as addressed *bona fide* by the representative, not only to the house, but also to his constituents. But whether that view be taken or not, if publication is provided for by law, as in the case of Congressional debates, the publishing must be considered as privileged.

The Jury as Judges of the Law.

In a considerable number of the State constitutions it is provided that, in prosecutions for libel, the jury shall have a right to determine the law and the fact. In some it is added, "as in other cases;" in others, "under the direction of the court." For the necessity of these provisions we must recur to the rulings of the English judges in the latter half of the last century, and the memorable contests in the courts and in Parliament, resulting at last in the passage of Mr. Fox's Libel Act, declaratory of the rights of juries in prosecutions for libel.

In the year 1770, Woodfall, the printer of the "Morning Advertiser," was tried before Lord *Mansfield* for having published in his paper what was alleged to be a libel on the king; and his lordship told the jury that all they had to consider was, whether the defendant had published the paper set out in the information, and whether the innuendoes, imputing a particular meaning to particular words, were true, as that "the K——" meant his Majesty King George III.; but that they were not to consider whether the publication was, as alleged in the information, false and malicious, those being mere formal words; and that whether the letter was libellous or innocent was a pure question of law, upon which the opinion of the court might be taken by a demurrer, or a motion in arrest of judgment. His charge obviously required the jury, if satisfied the publication was made, and had the meaning attributed to it, to render a verdict of guilty, whether they believed the publication false and malicious or not; in other words, to convict the party of guilt, notwithstanding they might believe the essential element of criminality to be wanting. The jury, dissatisfied with these instructions, and unwilling to make their verdict cover matters upon which they were not at liberty to exercise their judgment, returned a verdict of "guilty of printing and publishing *only*;" but this the court afterwards rejected as ambiguous, and ordered a new trial.[1]

In Miller's case, which was tried the same year, Lord *Mansfield*

[1] 20 State Trials, 895.

instructed the jury as follows: "The direction I am going to give you is with a full conviction and confidence that it is the language of the law." "If you by your verdict find the defendant not guilty, the fact established by that verdict is, he did not publish a paper of that meaning; that fact is established, and there is an end of the prosecution. You are to try that fact, because your verdict establishes that fact, that he did not publish it. If you find that, according to your judgment, your verdict is final, and if you find it otherwise it is between God and your consciences, for that is the basis upon which all verdicts ought to be founded; then the fact finally established by your verdict, if you find him guilty, is, that he printed and published a paper of the tenor and of the meaning set forth in the information; that is the only fact finally established by your verdict; and whatever fact is finally established never can be controverted in any shape whatsoever. But you do not by that verdict give an opinion, or establish whether it is or not lawful to print or publish a paper of the tenor and meaning in the information; for, supposing the defendant is found guilty, and the paper is such a paper as by the law of the land may be printed and published, the defendant has a right to have judgment respited, and to have it carried to the highest court of judicature."[1]

Whether these instructions were really in accordance with the law of England, it would be of little importance now to inquire. They were assailed as not only destructive to the liberty of the press, but as taking from the jury that right to cover by their verdict all the matter charged and constituting the alleged offence, as it was conceded was their right in all other cases. In no other case could the jury be required to find a criminal intent which they did not believe to exist. In the House of Lords they were assailed by Lord *Chatham;* and Lord *Camden*, the Chief Justice of the Common Pleas, in direct contradiction to Lord *Mansfield*, declared his instructions not to be the law of England. Nevertheless, with the judges generally, the view of Lord *Mansfield* prevailed, and it continued to be enforced for more than twenty years, so far as juries would suffer themselves to be controlled by the directions of the courts.

The act known as Mr. Fox's Libel Act was passed in 1792, against the protest of Lord *Thurlow* and five other lords, who predicted from it "the confusion and destruction of the law of England." It was entitled "An act to remove doubts respect-

[1] 20 State Trials, 870, 891. For an account of the raising of the same question in Pennsylvania, so early as 1692, see The Forum, by David Paul Brown, Vol. I. p. 280.

ing the functions of juries in cases of libel," and it declared and enacted that the jury might give a general verdict of guilty or not guilty, upon the whole matter put in issue upon the indictment or information, and should not be required or directed by the court or judge before whom it should be tried to find the defendant guilty, merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information: *Provided*, that on every such trial the court or judge before whom it should be tried should, according to their discretion, give their opinion and direction to the jury on the matter in issue, in like manner as in other criminal cases: *Provided also*, that nothing therein contained should prevent the jury from finding a special verdict in their discretion, as in other criminal cases: *Provided also*, that in case the jury should find the defendant guilty, he might move in arrest of judgment on such ground and in such manner as by law he might have done before the passing of the act.

Whether this statute made the jury the rightful judges of the law as well as of the facts in libel cases, or whether, on the other hand, it only placed these cases on the same footing as other criminal prosecutions, leaving it the duty of the jury to accept and follow the instructions of the judge upon the criminal character of the publication, are questions upon which there are still differences of opinion. Its friends have placed the former construction upon it, while others adopt the opposite view.[1]

In the United States the disposition of the early judges was to adopt the view of Lord *Mansfield* as a correct exposition of the respective functions of court and jury in cases of libel; and on the memorable trial of Callendar, which lead to the impeachment of Judge *Chase*, of the United States Supreme Court, the right of the jury to judge of the law was the point in dispute upon which that judge first delivered his opinion, and afterwards invited argument. The charge there was of libel upon President Adams, and it was prosecuted under the Sedition Law, so called, which expressly provided that the jury should have the right to determine the law and the fact, under the direction of the court, as in other cases. The defence insisted that the Sedition Law was unconstitutional and void, and proposed to argue that question to the jury, but were stopped by the court. The question of the constitutionality of a statute, it was said by Judge *Chase*, was a judicial question, and could only be passed upon by the court; the jury might determine the law applicable to the case under

[1] Compare Forsyth on Trial by Jury, c. 12, with May's Constitutional History of England, c. 9.

the statute, but they could not inquire into the validity of the statute by which that right was given.[1]

Whatever may be the true import of Mr. Fox's Libel Act, it would seem clear that a constitutional provision which allows the jury to determine the law, refers the questions of law to them for their rightful decision. Wherever such provisions exist, the jury, we think, are the judges of the law; and the argument of counsel upon it is rightfully addressed to both the court and the jury. Nor can the distinction be maintained which was taken by Judge *Chase*, and which forbids the jury considering questions affecting the constitutional validity of statutes. When the question before them is, what is the law of the case, the highest and paramount law of the case cannot be shut from view. Nevertheless, we conceive it to be proper, and indeed the duty of the judge, to instruct the jury upon the law in these cases, and it is to be expected that they will generally adopt and follow his opinion.

Where, however, the constitution provides that they shall be judges of the law "as in other cases," or may determine the law and the fact "under the direction of the court," we must perhaps conclude that the intention has been simply to put libel cases on the same footing with any other criminal prosecutions,[2] and that the jury will be expected to receive the law from the court.

[1] Wharton's State Trials, 688.

[2] "By the last clause of the sixth section of the eighth article of the Constitution of this State, it is declared that 'in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of the court, as in other cases.' It would seem from this that the framers of our Bill of Rights did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the directions of courts. Their right to judge of the law is a right to be exercised only under the direction of the court; and if they go aside from that direction and determine the law incorrectly, they depart from their duty, and commit a public wrong; and this in criminal as well as in civil cases." Montgomery *v.* State, 11 Ohio, 421, 427. See also, State *v.* Allen, 1 McCord, 525; State *v.* Jay, 34 N. J. 368, 370.

The Constitution of Pennsylvania declares that "in all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." In Pittock *v.* O'Neill, 63 Pa. St. 256, 3 Am. Rep. 544, *Sharswood*, J., says: "There can be no doubt that both in criminal and civil cases the court may express to the jury their opinion as to whether the publication is libellous. The difference is that in criminal cases they are not bound to do so, and if they do, their opinion is not binding on the jury, who may give a general verdict in opposition to it; and if that verdict is for the defendant, a new trial cannot be granted against his consent. As our declaration of rights succinctly expresses it, the jury have the right to determine the law and the facts in indictments for libel, as in other cases. But in civil cases the judge is bound to instruct the jury as to whether the publication is libellous, supposing the innuendoes to be true; and if that instruction is disregarded, the verdict will be set aside as contrary to law. In England, the courts have recently disregarded, to some extent, this plain distinction between criminal and civil proceedings. It appears to be put upon the ground that Mr. Fox's act, though limited in terms to indictments and informations, was declara-

"*Good Motives and Justifiable Ends.*"

In civil suits to recover damages for slander or libel, the truth is generally a complete defence, if pleaded and established.[1] In criminal prosecutions it was formerly not so. The basis of the prosecution being that the libel was likely to disturb the peace and order of society, that liability was supposed to be all the greater if the injurious charges were true, as a man would be more likely to commit a breach of the peace when the matters alleged against him were true than if they were false, in which latter case he might, perhaps, afford to treat them with contempt.[2] Hence arose the common maxim, "The greater the truth, the greater the libel," which subjected the law on this subject to a great deal of ridicule and contempt. The constitutional provisions we have quoted generally make the truth a defence if published with good motives and for justifiable ends. Precisely what showing shall establish good motives and justifiable occasion must be settled by future decisions. In one case the suggestion was thrown out that proof of the truth of the charge alone might be sufficient,[3] but this was not an authoritative decision, and it could

tory of the law in all cases of libel; upon what principle of construction, however, it is not very easy to understand. It is there the approved practice for the judge in civil actions, after explaining to the jury the legal definition of a libel, to leave to them the question whether the publication upon which the action is founded falls within that definition. Folkard's Stark. 202; Baylis *v.* Lawrence, 11 A. & E. 920; Parmiter *v.* Coupland, 6 M. & W. 105; Campbell *v.* Spottiswoode, 3 B. & S. 781; Cox *v.* Lee, L. R. 4 Exch. 284. These cases were followed in Shattuck *v.* Allen, 4 Gray, 540. Yet it is clearly held that a verdict for the defendant upon that issue will be set aside, and a new trial granted. Hakewell *v.* Ingram, 28 Eng. Law & Eq. 413. 'Though in criminal proceedings for libel,' says *Jarvis*, Ch. J., 'there may be no review, in civil matters there are cases in which verdicts for the defendant are set aside upon the ground that the matter was a libel, though the jury found it was not.' This must be conceded to be an anomaly; and it will be best to avoid a practice which leads to such a result. The law, indeed, may be considered as settled in this State by long practice, never questioned, but incidentally confirmed in McConkle *v.* Binns, 5 Binn. 340; and Hays *v.* Brierly, 4 Watts, 392. It was held in the case last cited that where words of a dubious import are used, the plaintiff has a right to aver their meaning by *innuendo*, and the truth of such *innuendo* is for the jury. In New York, since the recent English cases, the question has been ably discussed and fully considered in Snyder *v.* Andrews, 6 Barb. 43; Green *v.* Telfair, 20 Barb. 11; Hunt *v.* Bennett, 19 N. Y. 173; and the law established on its old foundations." Under like provisions in Tennessee, it is held no error to charge that, if the jury finds certain things true, the publication is *prima facie* libellous. Banner Pub. Co. *v.* State, 16 Lea. 176. Although the jury are judges of the law and facts, it is held that the court should declare the law, as in other cases. State *v.* Syphrett, 27 S. C. 20, 2 S. E. 624.

[1] Foss *v.* Hildreth, 10 Allen, 76. See *ante*, pp. 607, 608.

[2] State *v.* Lehre, 2 Brev. 446, 4 Am. Dec. 596.

[3] Charge of Judge *Betts* to the jury in King *v.* Root, 4 Wend. 121: "Should the scope of proofs and circumstances lead you to believe the defendants had no

not be true in any case where the matter published was not fit to be spread before the public, whether true or false. It must be held, we think, that where the defendant justifies in a criminal prosecution, the burden is upon him to prove, not only the truth of the charge, but also the "good motives and justifiable ends" of the publication. These might appear from the very character of the publication itself, if it was true; as where it exhibited the misconduct or unfitness of a candidate for public office; but where it related to a person in private life, and who was himself taking no such action as should put his character in issue before the public, some further showing would generally be requisite after the truth had been proved.[1]

good end in contemplation, that they were instigated to these charges solely to avenge personal and political resentments against the plaintiff, still, if they have satisfactorily shown the charges to be true, they must be acquitted of all liability to damages in a private action on account of the publication. Indeed, if good motives and justifiable ends must be shown, they might well be implied from the establishment of the truth of a charge, for the like reason that malice is inferred from its falsity." Malice, it is said by *Abbott*, Ch. J., is alleged in the declaration "rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose." Duncan *v.* Thwaites, 3 B. & C. 556, 585. See Moore *v.* Stephenson, 27 Conn. 14.

[1] In Commonwealth *v.* Bonner, 9 Met. 410, the defendant was indicted for a libel on one Oliver Brown, in the following words: "However, there were a few who, according to the old toper's dictionary, were drunk; yea, in all conscience, drunk as a drunken man; and who and which of you desperadoes of the town got them so? Was it you whose groggery was open, and the rat soup measured out at your bar to drunkards, while a daughter lay a corpse in your house, and even on the day she was laid in her cold and silent grave, a victim of God's chastening rod upon your guilty drunkard-manufacturing head? Was it you who refused to close your drunkery on the day that your aged father was laid in the narrow house appointed for all the living, and which must ere long receive your recreant carcass? We ask again, Was it you? Was it you?" On the trial the defendant introduced evidence to prove, and contended that he did prove, all the facts alleged in his publication. The court charged the jury that the burden was upon the defendant to show that the matter charged to be libellous was published with good motives and for justifiable ends; that malice is the wilful doing of an unlawful act, and does not necessarily imply personal ill-will towards the person libelled. The defendant excepted to the ruling of the court as applied to the facts proved, contending that, having proved the truth of all the facts alleged in the libel, and the publication being in reference to an illegal traffic, a public nuisance, the jury should have been instructed that it was incumbent on the government to show that defendant's motives were malicious, in the popular sense of the word, as respects said Brown. By the court, *Shaw*, Ch. J.: "The court are of opinion that the charge of the judge of the Common Pleas was strictly correct. If the publication be libellous, that is, be such as to bring the person libelled into hatred, contempt, and ridicule amongst the people, malice is presumed from the injurious act. But by Rev. Stat. c. 133, § 6, 'in every prosecution for writing or publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication charged as libellous: provided, that such evidence shall not be deemed a sufficient justification, unless it shall be further made to appear, on the trial, that the matter charged to be libellous was published with good mo-

tives and for justifiable ends.' Nothing can be more explicit. The judge, therefore, was right in directing the jury that, after the publication had been shown to have been made by the defendant, and to be libellous and malicious, the burden was on the defendant, not only to prove the truth of the matter charged as libellous, but likewise that it was published with good motives and for justifiable ends. We are also satisfied that the judge was right in his description or definition of legal malice, that it is not malice in its popular sense; viz., that of hatred and ill-will to the party libelled, but an act done wilfully, unlawfully, and in violation of the just rights of another." And yet it would seem as if, conceding the facts published to be true, the jury ought to have found the occasion a proper one for correcting such indecent conduct by public exposure. See further on this subject, Regina *v.* Newman, 1 El. & Bl. 268 and 558; s. c. 18 Eng. L. & Eq. 113; Barthelemy *v.* People, 2 Hill, 248; State *v.* White, 7 Ired. 180; State *v.* Burnham, 9 N. H. 34; Cole *v.* Wilson, 18 B. Monr. 212; Hagan *v.* Hendry, 18 Md. 177; Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418; Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 614; Commonwealth *v.* Snelling, 15 Pick. 337. The fact that the publication is copied from another source is clearly no protection, if it is not true in fact. Regina *v.* Newman, *ubi sup.* Compare Saunders *v.* Mills, 6 Bing. 213; Creevy *v.* Carr, 7 C. & P. 64; Sullings *v.* Shakespeare, 46 Mich. 408, 9 N. W. 451. Neither are the motives or good character of the defendant, if he has published libellous matter which is false. Barthelemy *v.* People, 2 Hill, 248; Commonwealth *v.* Snelling, 15 Pick. 337; Wilson *v.* Noonan, 27 Wis. 598. Where the truth is relied upon as a defence, the charge should appear to be true as made. Whittemore *v.* Weiss, 33 Mich. 348; Palmer *v.* Smith, 21 Minn. 419. [For an article on this general subject of Liberty of the Press, see 34 Am. L. Rev. 321.]

CHAPTER XIII.

OF RELIGIOUS LIBERTY.

A CAREFUL examination of the American constitutions will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens, which shall have for its basis only their differences of religious belief. The American people came to the work of framing their fundamental laws, after centuries of religious oppression and persecution, sometimes by one party or sect and sometimes by another, had taught them the utter futility of all attempts to propagate religious opinions by the rewards, penalties, or terrors of human laws. They could not fail to perceive, also, that a union of Church and State, like that which existed in England, if not wholly impracticable in America, was certainly opposed to the spirit of our institutions, and that any domineering of one sect over another was repressing to the energies of the people, and must necessarily tend to discontent and disorder. Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the State assuming supervision and control of religious affairs under other circumstances, the general voice has been, that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions human tribunals, so long as the public order is not disturbed, are not to take cognizance, except as the individual, by his voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters.[1]

[1] The religious societies which exist in America are mere voluntary societies, having little resemblance to those which constitute a part of the machinery of government in England. They are for the most part formed under general laws, which permit the voluntary incorporation of attendants upon religious worship, with power in the corporation to hold real and personal estate for the purposes of their organization, but not for other purposes. Such a society is "a voluntary association of individuals or families, united for the purpose of having a com-

These constitutions, therefore, have not established religious toleration merely, but religious equality; in that particular being

mon place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, &c. Although a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purposes of divine worship. Over the church, as such, the legal or temporal tribunals of the State do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have voluntarily subjected themselves. But, as a general principle, those ecclesiastical judicatories cannot interfere with the temporal concerns of the congregation or society with which the church or the members thereof are connected." *Walworth*, Chancellor, in Baptist Church *v.* Wetherell, 3 Paige, 296, 301, 24 Am. Dec. 223. See Ferraria *v.* Vasconcellos, 31 Ill. 25; Lawyer *v.* Cipperly, 7 Paige, 281; Shannon *v.* Frost, 3 B. Monr. 253; German, &c. Cong. *v.* Pressler, 17 La. Ann. 127; Solier *v.* Trinity Church, 109 Mass. 1; Calkins *v.* Cheney, 92 Ill. 463. Equity will not determine questions of faith, doctrine, and schism unless necessarily involved in the enforcement of ascertained trusts. Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84. Such a corporation is not an ecclesiastical, but merely a private civil corporation, the members of the society being the corporators, and the trustees the managing officers, with such powers as the statute confers, and the ordinary discretionary powers of officers in civil corporations. Robertson *v.* Bullions, 11 N. Y. 243; Miller *v.* Gable, 2 Denio, 492. Compare Watson *v.* Jones, 13 Wall. 679. The church connected with the society, if any there be, is not recognized in the law as a distinct entity; the corporators in the society are not necessarily members thereof, and the society may change its government, faith, form of worship, discipline, and ecclesiastical relations at will, subject only to the restraint imposed by their articles of association, and to the general laws of the State. Keyser *v.* Stansifer, 6 Ohio, 363; Robertson *v.* Bullions, 11 N. Y. 243; Parish of Bellport *v.* Tooker, 29 Barb. 256, 21 N. Y. 267; Burrel *v.* Associated Reform Church, 44 Barb. 282; O'Hara *v.* Stack, 90 Pa. St. 477; Warner *v.* Bowdoin Sq. Bapt. Soc.; 148 Mass. 400, 19 N. E. 403. In New Hampshire the signers of the articles of association and not the pew-owners are the corporators. Trinitarian Cong. Soc. *v.* Union Cong. Soc., 61 N. H. 384. See also Holt *v.* Downs, 58 N. H. 170. An action will not lie against an incorporated ecclesiastical society for the wrongful expulsion of a member by the church, Hardin *v.* Baptist Church, 51 Mich. 137, 16 N. W. 403; Sale *v.* First Baptist Ch., 62 Iowa, 26, 17 N. W. 143. The courts of the State have no general jurisdiction and control over the officers of such corporations in respect to the performance of their official duties; but as in respect to the property which they hold for the corporation they stand in position of trustees, the courts may exercise the same supervision as in other cases of trust. Ferraria *v.* Vasconcellos, 31 Ill. 25; Smith *v.* Nelson, 18 Vt. 511; Watson *v.* Avery, 2 Bush, 332; Watson *v.* Jones, 13 Wall. 679; Hale *v.* Everett, 53 N. H. 9; Boxwell *v.* Affleck, 79 Va. 402; First Ref. Pres. Ch. *v.* Bowden, 14 Abb. N. C. 356. Where a bishop holds property in trust, upon his insolvency, courts will prevent the diversion of the property to his creditors. Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572. But the courts will interfere where abuse of trust is alleged, only in clear cases, especially if the abuse alleged be a departure from the tenets of the founders of a charity. Happy *v.* Morton, 33 Ill. 398. See Hale *v.* Everett, 53 N. H. 9. It is competent to form such societies on the basis of a community of property. Scribner *v.* Rapp, 5 Watts, 311, 30 Am. Dec. 327; Gass *v.* Wilhite, 2 Dana, 170, 26 Am. Dec. 446; Waite *v.* Merrill, 4 Me. 102, 16 Am. Dec. 238. The articles of association will determine who may

far in advance not only of the mother country, but also of much of the colonial legislation, which, though more liberal than that

vote when the State law does not prescribe qualifications. State *v.* Crowell, 9 N. J. 391. Should there be a disruption of the society, the title to the property will remain with that part of it which is acting in harmony with its own law; seceders will be entitled to no part of it. McGinnis *v.* Watson, 41 Pa. St. 9; M. E. Church *v.* Wood, 5 Ohio, 283; Keyser *v.* Stansifer, 6 Ohio, 363; Shannon *v.* Frost, 3 B. Monr. 253; Gibson *v.* Armstrong, 7 B. Monr. 481; Hadden *v.* Chorn, 8 B. Monr. 70; Ferraria *v.* Vasconcellos, 23 Ill. 456; Fernstler *v.* Siebert, 114 Pa. St. 196, 6 Atl. 165; Dressen *v.* Brameier, 66 Iowa, 756, 9 N. W. 193. And this even though there may have been a change in doctrine on the part of the controlling majority. Keyser *v.* Stansifer, 6 Ohio, 363. See Petty *v.* Tooker, 21 N. Y. 267; Horton *v.* Baptist Church, 34 Vt. 309; Eggleston *v.* Doolittle, 33 Conn. 396; Miller *v.* English, 21 N. J. 317; Niccolls *v.* Rugg, 47 Ill. 47; Kinkead *v.* McKee, 9 Bush, 535; Baker *v.* Ducker, 79 Cal. 365, 21 Pac. 764. Whichever body the ecclesiastical authorities recognize as the church, whether it contains a majority of members or not, is entitled to the property. Gaff *v.* Greer, 88 Ind. 122; White Lick Meeting *v.* White Lick Meeting, 89 Ind. 136. Peculiar rights sometimes arise on a division of a society; as to which we can only refer to Reformed Church *v.* Schooleraft, 65 N. Y. 134; Kinkead *v.* McKee, 9 Bush, 535; Niccolls *v.* Rugg, 47 Ill. 47; Smith *v.* Swormstedt, 16 How. 288; Henry *v.* Deitrich, 84 Pa. St. 286. The administration of church rules or discipline the courts of the State do not interfere with, unless civil rights become involved, and then only for the protection of such rights. Hendrickson *v.* Decow, 1 N. J. Eq. 577; Harmon *v.* Dreher, Speers Eq. 87; Dieffendorf *v.* Ref. Cal. Church, 20 Johns. 12; Wilson *v.* Johns Island Church, 2 Rich Eq. 192; Den *v.* Bolton, 12 N. J. 206; Baptist Church *v.* Wetherell, 3 Paige, 301; German Reformed Church *v.* Seibert, 3 Pa. St. 282; State *v.* Farris, 45 Mo. 183; McGinnis *v.* Watson, 41 Pa. St. 9; Watson *v.* Jones, 13 Wall. 679; Chase *v.* Cheney, 58 Ill. 509; Calkins *v.* Cheney, 92 Ill. 463; Gartin *v.* Penick, 5 Bush, 110; Lucas *v.* Case, 9 Bush, 297; People *v.* German, &c. Church, 53 N. Y. 103; Grosvenor *v.* United Society, 118 Mass. 78; State *v.* Hebrew Congregation, 30 La. Ann. 205. 33 Am. Rep. 217; State *v.* Bibb St. Ch., 84 Ala. 23, 4 So. 40; Livingston *v.* Rector, &c., 45 N. J. L. 230; Richardson *v.* Union Cong. Soc., 58 N. H. 187; Matter of First Pres. Soc., 106 N. Y. 251, 12 N. E. 626; Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84. Decision of church tribunal as to the election of a deacon is conclusive. Atty.-Gen. *v.* Geerlings, 55 Mich. 562, 22 N. W. 89. But trustees may be prevented by the courts from continuing to employ a minister who has been deposed: Isham *v.* Fullager, 14 Abb. N. C. 363; see Hatchett *v.* Mt. Pleasant Ch., 46 Ark. 291; from closing a church building: Isham *v.* Trustees, 63 How. Pr. 465; and may be compelled to open it to a regularly assigned pastor. People *v.* Conley, 42 Hun, 98; Whitecar *v.* Michenor, 37 N. J. Eq. 6. In a congregationally governed church a minority of officers may be enjoined from putting in an organ against the wish of the majority of the officers and members: Hackney *v.* Vawter, 39 Kan. 615, 18 Pac. 699; and a minority of members from excluding the majority from using the church. Bates *v.* Houston, 66 Ga. 198. But an excommunication will not be allowed to affect civil rights. Fitzgerald *v.* Robinson, 112 Mass. 371. As to the nature and effect of the contract between the society and the minister, see Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105, and note; Perry *v.* Wheeler, 12 Bush, 541; East Norway Lake Ch. *v.* Froislie, 37 Minn. 447, 35 N. W. 260; Downs *v.* Bowdoin Sq. Bapt. Soc., 149 Mass. 135, 21 N. E. 294; West *v.* First Pres. Ch., 41 Minn. 94, 42 N. W. 922. Under New York statute unless a minister's salary is fixed in a certain way, the church is not liable. Landers *v.* Frank St. M. E. Ch., 97 N. Y. 119. The civil courts may intervene as to a breach of contract for salary. Bird *v.* St. Mark's Church, 62 Iowa, 567, 17 N. W. 747. As to what is *extra vires* for such a society, see Harriman *v.* Baptist Church, 63 Ga. 186, 36 Am. Rep. 117.

of other civilized countries, nevertheless exhibited features of discrimination based upon religious beliefs or professions.[1]

Considerable differences will appear in the provisions in the State constitutions on the general subject of the present chapter; some of them being confined to declarations and prohibitions whose purpose is to secure the most perfect equality before the law of all shades of religious belief, while some exhibit a jealousy of ecclesiastical authority by making persons who exercise the functions of clergyman, priest, or teacher of any religious persuasion, society, or sect, ineligible to civil office;[2] and still others show some traces of the old notion, that truth and a sense of duty do not consort with scepticism in religion.[3] There are excep-

[1] For the distinction between religious toleration and religious equality, see Bloom *v.* Richards, 2 Ohio St. 389; Hale *v.* Everett, 53 N. H. 1. And see Madison's views, in his Life by Rives, Vol. 1, p. 140. It was not easy, two centuries ago, to make men educated in the ideas of those days understand how there could be complete religious liberty, and at the same time order and due subordination to authority in the State. "Coleridge said that toleration was impossible until indifference made it worthless." Lowell, "Among my Books," 336. Roger Williams explained and defended his own views, and illustrated the subject thus: "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination or society. It hath fallen out sometimes that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm that all the liberty of conscience I ever pleaded for turns upon these two hinges: that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship if they practise any. I further add that I never denied that, notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace, and sobriety be kept and practised, both among the seamen and all the passengers. If any of the seamen refuse to perform their service, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace and preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers, because all are equal in Christ, therefore no masters nor officers, no laws nor orders, no corrections nor punishments; I say I never denied but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel, and punish such transgressors according to their deserts and merits." Arnold's History of Rhode Island, Vol. I. p. 254, citing Knowles, 279, 280. There is nothing in the first amendment to the federal Constitution which can give protection to those who practise what is forbidden by the statute as criminal, *e. g.* bigamy, — on the pretence that their religion requires or sanctions it. Reynolds *v.* United States, 98 U. S. 145.

[2] There are provisions to this effect, more or less broad, in the Constitutions of Tennessee, Delaware, Maryland, and Kentucky.

[3] The Constitution of Pennsylvania provides "that no person who acknowledges the being of God, and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." Art. 1, § 4. — The Constitution of North Carolina: "The following classes of persons shall be disqualified for office: First: All persons who shall deny the existence of Almighty God," &c. Art. 6, § 5 — The Constitutions of Mississippi and South Carolina: "No person who denies

tional clauses, however, though not many in number; and it is believed that, wher they exist, they are not often made use of to deprive any person the civil or political rights or privileges which are placed by law within the reach of his fellows.

Those things which are not lawful under any of the American constitutions may be stated thus: —

1. Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects.[1] Whatever estab-

the existence of the Supreme Being shall hold any office under this Constitution." — The Constitution of Tennessee: "No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State." — On the other hand, the Constitutions of Georgia, Kansas, Virginia, West Virginia, Maine, Delaware, Indiana, Iowa, Oregon, Ohio, New Jersey, Nebraska, Minnesota, Arkansas, Texas, Alabama, Missouri, Rhode Island, Nevada, and Wisconsin expressly forbid religious tests as a qualification for office or public trust. Very inconsistently the Constitutions of Mississippi and Tennessee contain a similar prohibition. In the Constitutions of Alabama, Colorado, Georgia, Illinois, Iowa, Kentucky, Michigan, New Jersey, Rhode Island, and West Virginia, it is provided that no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions. — The Constitution of Maryland provides "that no religious test ought ever to be required as a qualification for any office of trust or profit in this State, other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this constitution." Declaration of Rights, Art. 37. — The Constitution of Illinois provides that "the free exercise and enjoyment of religious profession and worship without discrimination shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall preference be given by law to any gious denomination or mode of worship." Art. 2, § 3. — The Constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada, New York, and South Carolina contain provisions that liberty of conscience is not to justify licentiousness or practices inconsistent with the peace and moral safety of society.

[1] A city ordinance is void which gives to one sect a privilege denied to others. Shreveport *v.* Levy, 26 La. Ann. 671. It is not unconstitutional to permit a school-house to be made use of for religious purposes when it is not wanted for schools. Nichols *v.* School Directors, 93 Ill. 61, 34 Am. Rep. 160; Davis *v.* Boget, 50 Iowa, 11. But in Missouri it seems the school directors have no authority to permit such use. Dorlin *v.* Shearer, 67 Mo. 301. Under the Illinois Constitution of 1848 the legislature had no authority to take a private school-house, erected under the provisions of a will as a school-house and place of worship, and constitute it a school district, and provide for the election of trustees, and invest them with taxing power for the support of a school therein. People *v.* McAdams, 82 Ill. 356. But the basement of a church may be used for a school and teachers of one sect employed. And if religious instruction is given daily, though not required by

lishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.

2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it.[1]

3. Compulsory attendance upon religious worship. Whoever is not lead by choice or a sense of duty to attend upon the ordinances of religion is not to be compelled to do so by the State. It is the province of the State to enforce, so far as it may be found practicable, the obligations and duties which the citizen may be under or may owe to his fellow-citizens or to society; but those which spring from the relations between himself and his Maker are to be enforced by the admonitions of the conscience, and not by the penalties of human laws. Indeed, as all real worship must essentially and necessarily consist in the free-will offering of adoration and gratitude by the creature to the Creator, human laws are obviously inadequate to incite or compel those internal and voluntary emotions which shall induce it, and human penalties at most could only enforce the observance of idle ceremonies, which, when unwillingly performed, are alike valueless to the participants and devoid of all the elements of true worship.

the authorities, a taxpayer cannot have equitable relief. Millard *v.* Board of Education, 121 Ill. 297, 10 N. E. 669. [A municipal corporation cannot hold as trustee real estate devoted to religious uses. Maysville *v.* Wood, 102 Ky. 263, 43 S. W. 403, 39 L. R. A. 93.]

[1] We must exempt from this the State of New Hampshire, whose constitution permits the legislature to authorize "the several towns, parishes, bodies corporate, or religious societies within this State to make adequate provisions, at their own expense, for the support and maintenance of public Protestant teachers of piety, religion, and morality;" but not to tax those of other sects or denominations for their support. Part 1, Art. 6. As to meaning of Protestant, see Hale *v.* Everett, 53, N. H. 1. The attempt to amend the above provision by striking out the word "Protestant" was made in 1876, but failed, though at the same time the acceptance of the Protestant religion as a test for office was abolished, and the application of moneys raised by taxation to the support of denominational schools was prohibited. [But to appropriate moneys to a hospital in payment for treatment and cure of poor persons under a contract for such treatment is not to appropriate moneys in support of a religious society, even though all the incorporators of the hospital are of one faith, the hospital corporation being entirely independent of all church or religious organizations, and being open to persons of all faiths or no faith. Bradfield *v.* Roberts, 175 U. S. 291, 20 Sup. Ct. Rep. 121. Subventions cannot be made to sectarian schools to aid them in even purely secular instruction. Synod of Dakota *v.* State, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418, and note.]

4. Restraints upon the free exercise of religion according to the dictates of the conscience. No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due, and in a mode which commends itself to his conscience and judgment as being suitable for him to render, and acceptable to its object.[1]

5. Restraints upon the expression of religious belief. An earnest believer usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation.

These are the prohibitions which in some form of words are to be found in the American constitutions, and which secure freedom of conscience and of religious worship.[2] No man in religious

[1] This guaranty does not prevent the parents of all sects and opinions, in adopting reasonable rules for the use of streets, and forbidding playing therein on an instrument, though it be done as an act of worship. Com. *v.* Plaisted, 148 Mass. 374, 19 N. E. 224; State *v.* White, 64 N. H. 48, 5 Atl. 828.

[2] This whole subject was considered very largely in the case of Minor *v.* The Board of Education, in the Superior Court of Cincinnati, involving the right of the school board of that city to exclude the reading of the Bible from the public schools. The case was reported and published by Robert Clarke & Co., Cincinnati, under the title, "The Bible in the Public Schools," 1870. The point of the case may be briefly stated. The constitution of the State, after various provisions for the protection of religious liberty, contained this clause: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." There being no legislation on the subject, except such as conferred large discretionary power on the Board of Education in the management of schools, that body passed a resolution, "that religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the Common Schools of Cincinnati; it being the true object and intent of this rule to allow the children of matters of faith and worship, to enjoy alike the benefit of the Common School fund." Certain taxpayers and citizens of said city, on the pretence that this action was against public policy and morality, and in violation of the spirit and intent of the provision in the constitution which has been quoted, filed their complaint in the Superior Court, praying that the board be enjoined from enforcing said resolution. The Superior Court made an order granting the prayer of the complaint; but the Supreme Court, on appeal, reversed it, holding that the provision in the constitution requiring the passage of suitable laws to encourage morality and religion was one addressed solely to the judgment and discretion of the legislative department; and that, in the absence of any legislation on the subject, the Board of Education could not be compelled to permit the reading of the Bible in the schools. Board of Education *v.* Minor, 23 Ohio St. 211. On the other hand, it has been decided that the school authorities, in their discretion, may compel the reading of the Bible in schools by pupils, even though it be against the objection and protest of their parents. Donahoe *v* Richards, 38 Me. 376; Spiller *v.* Woburn, 12 Allen, 127. [The Constitution of Iowa, Article 1, Sec. 3, bill of rights, provides: "The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship,

matters is to be subjected to the censorship of the State or of any

pay tithes, taxes, or other rates for building or repairing places of worship or the maintenance of any minister or ministry."

A statute of the State provided, "The Bible shall not be excluded from any school or institution in this State, nor shall any pupil be required to read it, contrary to the wishes of his parent or guardian."

In Moore *v.* Monroe, 64 Iowa 367, 20 N. W. 475, the State Supreme Court was called upon to pass upon the constitutionality of the statute, and of the practice on the part of a teacher of occupying a few minutes each morning in reading selections from the Bible, in repeating the Lord's Prayer, and singing religious songs. The court, adopting the view of the complainant, that such practice was "worship," within the meaning of that term as used in the constitution, yet that such practice did not constitute the schoolroom a "place of worship," and the logic of the opinion would require the conclusion that the teacher was not a "minister" within the meaning of that term as used in the constitution. The view of the court being that the object of the provision was accomplished by a construction which would prevent the burdening of the taxpayer, for the building or repairing of "any place designed to be used distinctively as a place of worship," and that the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, was not within the prohibition of the constitution.

This case in Iowa was followed, six years later, 1899, by State *v.* District Board, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 339, 20 Am. St. 41. The Constitution of Wisconsin contained these provisions: "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship; . . . nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship," Const. Art. 1, Sec. 18; and, "The legislature shall provide by law for the establishments of district schools, which shall be as nearly uniform as practicable: and such schools shall be free and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein." Const. Art. x. Sec. 3. These provisions were construed in a case in which it appeared that the teacher of one of the district schools in the State was in the habit, daily, of reading in the school some portion of the King James version of the Bible, without comment and without requiring pupils who did not care to be present to attend while it was being done. It was held that the stated reading of the Bible constituted the schoolroom for the time a place of worship, and against this the taxpayer had a right to object. Also that the use of any version of the Bible as a text-book, and the stated readings thereof in the public schools, though unaccompanied by any comment, "was sectarian instruction" within the meaning of that phrase as used in the constitution.

In 1898 the Supreme Court of Michigan was called upon to consider the effect of the constitutional provisions of that State in a case in which it appeared that a teacher practised reading, during fifteen minutes preceding the close of school each day, from a book entitled "Readings from the Bible," largely made up of extracts from the Bible. No comments were made on the matter read, and pupils not desiring to attend were excused. The constitutional provisions considered were: "The legislature shall pass no law . . . to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion." Const. Art. 4, Sec. 39; and, "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes." Const. Art. 4, Sec. 40; and, "The legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion." Const. Art. 4, Sec. 41. It was held, such use of such a book did not violate any of the provisions referred to; that it did not constitute the school-

public authority; and the State is not to inquire into or take

room a "place of religious worship," nor was the teacher, a "teacher of religion"; that it did not violate any "civil or political rights," nor did it involve the "appropriation" of any money, or property of the State "for the benefit of any religious sect, society or theological, or religious seminary." Pfeiffer *v.* Bd. of Education, 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536.

In 1902, in the case of State *v.* Scheve, — Neb. —, 91 N. W. 846, the provisions of the Constitution of Nebraska were construed. Sec. 4 of Art. 1 provides, among other things, that, "No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted." Sec. 11 of Art. 8 provides that "no sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes." Held, that exercises by a teacher in a public school, in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Diety in accordance with the doctrines, beliefs, customs, or usages of sectarian churches or religious organizations is forbidden by the constitution. On rehearing, the court uses the following language: "The decision (referring to the one just noted) does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. The pith of the opinion is in the syllabus, which declares that 'exercises by a teacher in a public school in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs, or usages of sectarian churches or religious organizations, are forbidden by the constitution of this State.' Certainly the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without teaching the Moslem faith. Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequalled in purity and elegance. Its style has never been surpassed. Among the classics of our literature it stands preeminent. It has been suggested that the English Bible is, in a special and limited sense, a sectarian book. To be sure, there are, according to the Catholic claim, vital points of difference with respect to faith and morals between it and the Douay version. In a Pennsylvania case cited by counsel for respondents, the author of the opinion says that he noted over 50 points of difference between the two versions, — some of them important, and others trivial. These differences constitute the basis of some of the peculiarities of faith and practice that distinguish Catholicism from Protestantism, and make the adherents of each a distinct Christian sect. But the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools. It is not proscribed either by the constitution or the statutes, and the courts have no right to declare its use to be unlawful, because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse, — where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist. That sectarian instruction may be given by the frequent reading, without note or comment, of judiciously selected passages, is, of course, obvious. A modern philosopher — perhaps the greatest — has said that persistent iteration is the most effective means of forcing alien conceptions upon reluctant minds. Whether it is prudent or politic

notice of religious belief, when the citizen performs his duty to the State and to his fellows, and is guilty of no breach of public morals or public decorum.[1]

But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions

to permit Bible reading in the public schools is a question for the school authorities to determine, but whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts to determine upon evidence. It cannot be presumed that the law has been violated. The alleged violation must in every instance be established by competent proof. The value of the common schools as disseminators of knowledge and social levelers is well understood and justly appreciated, and there is little likelihood that the people will ever permit their usefulness to be impaired by sectarian controversies. When we consider that this is the first case of its kind ever presented to this court for decision, we feel assured that neither teachers nor school boards have been much inclined to bring discord into the schools for the chance of securing by indirection a slight sectarian advantage. But if the fact were otherwise, it could not in any way affect our conclusion. The section of the constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by public funds set apart for educational purposes,' cannot, under any canon of instruction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the State. We do not wish to be understood as either countenancing or discountenancing the reading of the Bible in the public schools. Even where it is an irritant element, the question whether its legitimate use shall be continued or discontinued is an administrative, and not a judicial question. It belongs to the school authorities, not to the courts."]

[1] Congress is forbidden, by the first amendment to the Constitution of the United States, from making any law respecting an establishment of religion, or prohibiting the free exercise thereof. Mr. Story says of this provision: "It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject. The situation, too, of the different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers; and in others again there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and Protestant, the Calvinist and the Arminian, the Jew and the infidel, may sit down at the common table of the national councils, without any inquisition into their faith or mode of worship." Story on the Constitution, § 1879; 1 Tuck. Bl. Com. App. 296. For an examination of this amendment, see Reynolds *v.* United States, 98 U. S. 145.

and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse.[1] This public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction, will incline it also to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants in the preservation of the public order.

Nor, while recognizing a superintending Providence, are we always precluded from recognizing also, in the rules prescribed for the conduct of the citizen, the notorious fact that the prevailing religion in the States is Christian. Some acts would be offensive to public sentiment in a Christian community, and would tend to public disorder, which in a Mahometan or Pagan country might be passed by without notice, or even be regarded as meritorious; just as some things would be considered indecent, and worthy of reprobation and punishment as such, in one state of society, which in another would be in accord with the prevailing customs, and therefore defended and protected by the laws. The criminal laws of every country are shaped in greater or less degree by the prevailing public sentiment as to what is right, proper, and decorous, or the reverse; and they punish those acts as crimes which disturb the peace and order, or tend to shock the moral sense or sense of propriety and decency, of the community. The moral sense is largely regulated and controlled by the religious belief;

[1] See Trustees First M. E. Ch. v. Atlanta, 76 Ga. 181.

and therefore it is that those things which, estimated by a Christian standard, are profane and blasphemous, are properly punished as crimes against society, since they are offensive in the highest degree to the general public sense, and have a direct tendency to undermine the moral support of the laws, and to corrupt the community.

It is frequently said that Christianity is a part of the law of the land. In a certain sense and for certain purposes this is true. The best features of the common law, and especially those which regard the family and social relations; which compel the parent to support the child, the husband to support the wife; which make the marriage-tie permanent and forbid polygamy, — if not derived from, have at least been improved and strengthened by the prevailing religion and the teachings of its sacred Book. But the law does not attempt to enforce the precepts of Christianity on the ground of their sacred character or divine origin. Some of those precepts, though we may admit their continual and universal obligation, we must nevertheless recognize as being incapable of enforcement by human laws. That standard of morality which requires one to love his neighbor as himself we must admit is too elevated to be accepted by human tribunals as the proper test by which to judge the conduct of the citizen; and one could hardly be held responsible to the criminal laws if in goodness of heart and spontaneous charity he fell something short of the Good Samaritan. The precepts of Christianity, moreover, affect the heart, and address themselves to the conscience: while the laws of the State can regard the outward conduct only; and for these several reasons Christianity is not a part of the law of the land in any sense which entitles the courts to take notice of and base their judgments upon it, except so far as they can find that its precepts and principles have been incorporated in and made a component part of the positive law of the State.[1]

Mr. Justice *Story* has said in the Girard Will case that, although Christianity is a part of the common law of the State, it is only so in this qualified sense, that *its divine origin and truth are admitted*, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or to the injury of the public.[2] It may be doubted, however, if the

[1] Andrews *v.* Bible Society, 4 Sandf. 156, 182; Ayres *v.* Methodist Church, 3 Sandf. 351; State *v.* Chandler, 2 Harr. 553; Bloom *v.* Richards, 2 Ohio St. 387; Board of Education *v.* Minor, 23 Ohio St. 210. The subject is largely considered in Hale *v.* Everett, 53 N. H. 1, 204 *et seq.*, and also by Dr. S. T. Spear in his book entitled "Religion and the State."

[2] Vidal *v.* Girard's Ex'rs, 2 How. 127, 198. Mr. Webster's argument that Christianity is a part of the law of Pennsylvania is given in 6 Webster's Works, p. 175. [An indictment for blasphemy and profane

punishment of blasphemy is based necessarily upon an admission of the divine origin or truth of the Christian religion, or incapable of being otherwise justified.

Blasphemy has been defined as consisting in speaking evil of the Deity, with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning the Supreme Being calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent Creator, Governor, and Judge of the world. It embraces the idea of detraction as regards the character and attributes of God, as calumny usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God, by denying his existence or his attributes as an intelligent Creator, Governor, and Judge of men, and to prevent their having confidence in him as such.[1] Contumelious reproaches and profane ridicule of Christ or of the Holy Scriptures have the same evil effect in sapping the foundations of society and of public order, and are classed under the same head.[2]

In an early case where a prosecution for blasphemy came before Lord *Hale*, he is reported to have said: "Such kind of wicked, blasphemous words are not only an offence to God and religion, but a crime against the laws, State, and government, and therefore punishable in the Court of King's Bench. For to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is a part of the laws of England, and to reproach the Christian religion is to speak in subversion of the law."[3] Eminent judges in this country have adopted this language, and applied it to prosecutions for blasphemy, where the charge consisted in malicious ridicule of the Author and Founder of the Christian religion. The early cases in New York and Massachusetts[4] are particularly marked by

swearing is defective unless it charges that the words were uttered in the presence of other persons and in their hearing. Com. *v.* Linn, 158 Pa. St. 22, 27 Atl. 843, 22 L. R. A. 353, and note on blasphemy and profanity as crimes.]

[1] *Shaw*, Ch. J., in Commonwealth *v.* Kneeland, 20 Pick. 206, 213.

[2] People *v.* Ruggles, 8 Johns. 289, 5 Am. Dec. 335; Commonwealth *v.* Kneeland, 20 Pick. 206; Updegraph *v.* Commonwealth, 11 S. & R. 394; State *v.* Chandler, 2 Harr. 553; Rex *v.* Waddington, 1 B. & C. 26; Rex *v.* Carlile, 3 B. & Ald. 161; Cowan *v.* Milbourn, Law R. 2 Exch. 230.

[3] The King *v.* Taylor, 3 Keb. 607, Vent. 293. See also The King *v.* Woolston, 2 Stra. 834, Fitzg. 64, Raym. 162, in which the defendant was convicted of publishing libels, ridiculing the miracles of Christ, his life and conversation. Lord Ch. J. *Raymond* in that case says: "I would have it taken notice of, that we do not meddle with the difference of opinion, and that we interfere only where the root of Christianity is struck at."

[4] People *v.* Ruggles, 8 Johns. 289, 5

clearness and precision on this point, and Mr. Justice *Clayton*, of Delaware, has also adopted and followed the ruling of Lord Chief Justice *Hale*, with such explanations of the true basis and justification of these prosecutions as to give us a clear understanding of the maxim that Christianity is a part of the law of the land, as understood and applied by the courts in these cases.[1] Taken with the explanation given, there is nothing in the maxim of which the believer in any creed, or the disbeliever of all, can justly complain. The language which the Christian regards as blasphemous, no man in sound mind can feel under a sense of duty to make use of under any circumstances, and no person is therefore deprived of a right when he is prohibited, under penalties, from uttering it.

But it does not follow, because blasphemy is punishable as a crime, that therefore one is not at liberty to dispute and argue against the truth of the Christian religion, or of any accepted dogma. Its "divine origin and truth" are not so far admitted in the law as to preclude their being controverted. To forbid discussion on this subject, except by the various sects of believers, would be to abridge the liberty of speech and of the press in a point which, with many, would be regarded as most important of all. Blasphemy implies something more than a denial of any of the truths of religion, even of the highest and most vital. A bad motive must exist; there must be a wilful and malicious attempt to lessen men's reverence for the Deity, or for the accepted religion. But outside of such wilful and malicious attempt, there is a broad field for candid investigation and discussion, which is as much open to the Jew and the Mahometan as to the professors of

Am. Dec. 335; Commonwealth *v.* Kneeland, 20 Pick. 206. See also Zeisweiss *v.* James, 63 Pa. St. 465, 471; McGinnis *v.* Watson, 41 Pa. St. 9, 14.

[1] State *v.* Chandler, 2 Harr. 553. The case is very full, clear, and instructive, and cites all the English and American authorities. The conclusion at which it arrives is, that "Christianity was never considered a part of the common law, so far as that for a violation of its injunctions independent of the established laws of man, and without the sanction of any positive act of Parliament made to enforce those injunctions, any man could be drawn to answer in a common-law court. It was a part of the common law, 'so far that any person reviling, subverting, or ridiculing it, might be prosecuted at common law,' as Lord *Mansfield* has declared; because, in the judgment of our English ancestors and their judicial tribunals, he who reviled, subverted, or ridiculed Christianity, did an act which struck at the foundation of our civil society, and tended by its necessary consequences to disturb that common peace of the land of which (as Lord *Coke* had reported) the common law was the preserver. The common law . . . adapted itself to the religion of the country just so far as was necessary for the peace and safety of civil institutions; but it took cognizance of offences against God only, when, by their inevitable effects, they became offences against man, and his temporal security." See also what is said on this subject by *Duer*, J., in American Bible Society, 4 Sandf. 156, 182.

the Christian faith. "No author or printer who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious."[1] Legal blasphemy implies that the words were uttered in a wanton manner, "with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion."[2] The courts have always been careful, in administering the law, to say that they did not intend to include in blasphemy disputes between learned men upon particular controverted points.[3] The constitutional provisions for the protection of religious liberty not only include within their protecting power all sentiments and professions concerning or upon the subject of religion, but they guarantee to every one a perfect right to form and to promulgate such opinions and doctrines upon religious matters, and in relation to the existence, power, attributes, and providence of a Supreme Being as to himself shall seem reasonable and correct. In doing this he acts under an awful responsibility, but it is not to any human tribunal.[4]

[1] Updegraph *v.* Commonwealth, 11 S. & R. 394. In Ayres *v.* Methodist Church, 3 Sandf. 351, 377, *Duer*, J., in speaking of "pious uses," says: "If the Presbyterian and the Baptist, the Methodist and the Protestant Episcopalian, must each be allowed to devote the entire income of his real and personal estate, forever, to the support of missions, or the spreading of the Bible, so must the Roman Catholic his to the endowment of a monastery, or the founding of a perpetual mass for the safety of his soul; the Jew his to the translation and publication of the Mishna or the Talmud, and the Mahometan (if in that *collucies gentium* to which this city [New York], like ancient Rome, seems to be doomed, such shall be among us), the Mahometan his to the assistance or relief of the annual pilgrims to Mecca."

[2] People *v.* Ruggles, 8 Johns. 289, 293, 5 Am. Dec. 335, per *Kent*, Ch. J.

[3] Rex *v.* Woolston, Stra. 834, Fitzg. 61; People *v.* Ruggles, 8 Johns. 289, 5 Am. Dec. 335, per *Kent*, Ch. J.

[4] Per *Shaw*, Ch. J., in Commonwealth *v.* Kneeland, 20 Pick. 206, 234. The language of the courts has perhaps not always been as guarded as it should have been on this subject. In The King *v.* Waddington, 1 B. & C. 26, the defendant was on trial for blasphemous libel, in saying that Jesus Christ was an impostor, and a murderer in principle. One of the jurors asked the Lord Chief Justice (*Abbott*) whether a work which denied the divinity of the Saviour was a libel. The Lord Chief Justice replied that "a work speaking of Jesus Christ in the language used in the publication in question was a libel, Christianity being a part of the law of the land." This was doubtless true, as the wrong motive was apparent; but it did not answer the juror's question. On motion for a new trial, the remarks of *Best*, J., are open to a construction which answers the question in the affirmative: "My Lord Chief Justice reports to us that he told the jury that it was an indictable offence to speak of Jesus Christ in the manner that he is spoken of in the publication for which this defendant is indicted. It cannot admit of the least doubt that this direction was correct. The 53 Geo. III. c. 160, has made no alteration in the common law relative to libel.

Other forms of profanity, besides that of blasphemy, are also made punishable by statutes in the several States. The cases these statutes take notice of are of a character no one can justify, and their punishment involves no question of religious liberty. The right to use profane and indecent language is recognized by no religious creed, and the practice is reprobated by right-thinking men of every nation and every religious belief. The statutes for the punishment of public profanity require no further justification than the natural impulses of every man who believes in a Supreme Being and recognizes his right to the reverence of his creatures.

The laws against the desecration of the Christian Sabbath by labor or sports are not so readily defensible by arguments the

If, previous to the passing of that statute, it would have been a libel to deny, in any printed book, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. III. c. 160, as its title expresses, is an act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 W. & M. Sess. 1, c. 18, exempted all Protestant dissenters, except such as denied the Trinity, and the penalties or disabilities which the 9 & 10 W. III. imposed on those who denied the Trinity. The 1 W. & M. Sess. 1, c. 18, is, as it has been usually called, an act of toleration, or one which allows dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the Established Church and non-conformity to its rites. The legislature, in passing that act, only thought of easing the consciences of dissenters, and not of allowing them to attempt to weaken the faith of the members of the church. The 9 & 10 W. III. was to give security to the government by rendering men incapable of office, who entertained opinions hostile to the established religion. The only penalty imposed by that statute is exclusion from office, and that penalty is incurred by any manifestations of the dangerous opinion, without proof of intention in the person entertaining it, either to induce others to be of that opinion, or in any manner to disturb persons of a different persuasion. This statute rested on the principle of the test laws, and did not interfere with the common law relative to blasphemous libels. It is not necessary for me to say whether it be libellous to argue from the Scriptures against the divinity of Christ; that is not what the defendant professes to do; he argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments, published maliciously (which the jury in this case have found), is by the common law a libel, and the legislature has never altered this law, nor can it ever do so while the Christian religion is considered the basis of that law." It is a little difficult, perhaps, to determine precisely how far this opinion was designed to go in holding that the law forbids the public denial of the truth of the Scriptures. That arguments against it, made in good faith by those who do not accept it, are legitimate and rightful, we think there is no doubt; and the learned judge doubtless meant to admit as much when he required a malicious publication as an ingredient in the offence. However, when we are considering what is the common law of England and of this country as regards offences against God and religion, the existence of a State Church in that country and the effect of its recognition upon the law are circumstances to be kept constantly in view.

In People *v.* Porter, 2 Park. Cr. R. 14, the defence of *drunkenness* was made to a prosecution for a blasphemous libel. *Walworth*, Circuit Judge, presiding at the trial, declared the intoxication of defendant, at the time of uttering the words, to be an aggravation of the offence rather than an excuse.

force of which will be felt and admitted by all. It is no hardship to any one to compel him to abstain from public blasphemy or other profanity, and none can complain that his rights of conscience are invaded by this forced respect to a prevailing religious sentiment. But the Jew who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief.

The laws which prohibit ordinary employments on Sunday are to be defended, either on the same grounds which justify the punishment of profanity, or as establishing sanitary regulations, based upon the demonstration of experience that one day's rest in seven is needful to recuperate the exhausted energies of body and mind. If sustained on the first ground, the view must be that such laws only require the proper deference and regard which those not accepting the common belief may justly be required to pay to the public conscience. The Supreme Court of Pennsylvania have preferred to defend such legislation on the second ground rather than the first;[1] but it appears to us that if the benefit to the individual is alone to be considered, the argument against the

[1] "It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry against his consent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the State; it enforces no unwilling attendance upon the celebration of divine worship. It says not to Jew or Sabbatarian, 'You shall desecrate the day you esteem as holy, and keep sacred to religion that *we* deem to be so.' It enters upon no discussion of rival claims of the first and seventh days of the week, nor pretends to bind upon the conscience of any man any conclusion upon a subject which each must decide for himself. It intrudes not into the domestic circle to dictate when, where, or to what god its inmates shall address their orisons; nor does it presume to enter the synagogue of the Israelite, or the church of the Seventh-day Christian, to command or even persuade their attendance in the temples of those who especially approach the altar on Sunday. It does not in the slightest degree infringe upon the Sabbath of any sect, or curtail their freedom of worship. It detracts not one hour from any period of time they may feel bound to devote to this object, nor does it add a moment beyond what they may choose to employ. Its sole mission is to inculcate a temporary weekly cessation from labor, but it adds not to this requirement any religious obligation." Specht *v.* Commonwealth, 8 Pa. St. 312, 325. See also Charleston *v.* Benjamin, 2 Strob. 508; Bloom *v.* Richards, 2 Ohio St. 387; McGatrick *v.* Wason, 4 Ohio St. 566; Hudson *v.* Geary, 4 R. I. 485; Bohl *v.* State, 3 Tex. App. 683; Johnston *v.* Commonwealth, 22 Pa. St. 102; Commonwealth *v.* Nesbit, 34 Pa. St. 398; Commonwealth *v.* Has, 122 Mass. 40; Commonwealth *v.* Starr, 144 Mass. 359, 11 N. E. 533; State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224; State *v.* Judge, 39 La. Ann. 132, 1 So. 437; State *v.* Balt. & O. R. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

law which he may make who has already observed the seventh day of the week, is unanswerable. But on the other ground it is clear that these laws are supportable on authority, notwithstanding the inconvenience which they occasion to those whose religious sentiments do not recognize the sacred character of the first day of the week.[1]

Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is, to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. Even in the important matter of bearing arms for the public defence, those who cannot in conscience take part are excused, and their proportion of this great and sometimes imperative burden is borne by the rest of the community.[2]

Some of the State constitutions have also done away with the distinction which existed at the common law regarding the admissibility of testimony in some cases. All religions were recognized by the law to the extent of allowing all persons to be sworn and to give evidence who believed in a superintending Providence, who rewards and punishes, and that an oath was binding on their conscience.[3] But the want of such belief rendered the person

[1] Commonwealth *v.* Wolf, 3 S. & R. 48; Commonwealth *v.* Fisher, 17 S. & R. 160; Shover *v.* State, 7 Ark. 529; Scales *v.* State, 47 Ark. 476, 1 S. W. 769; Voglesong *v.* State, 9 Ind. 112; State *v.* Ambs, 20 Mo. 214; Cincinnati *v.* Rice, 15 Ohio, 225; *Ex parte* Koser, 60 Cal. 177; Parker *v.* State, 16 Lea, 478. A proviso in a Sunday law for the benefit of observers of Saturday is valid. Johns *v.* State, 78 Ind. 332. In Simonds's Ex'rs *v.* Gratz, 2 Pen. & Watts, 412, it was held that the conscientious scruples of a Jew to appear and attend a trial of his cause on Saturday were not sufficient cause for a continuance. But *quære* of this. In Frolickstein *v.* Mayor of Mobile, 40 Ala. 725, it was held that a statute or municipal ordinance prohibiting the sale of goods by merchants on Sunday, in its application to religious Jews "who believe that it is their religious duty to abstain from work on Saturdays, and to work on all the other six days of the week," was not violative of the article in the State constitution which declares that no person shall, "upon any pretence whatsoever, be hurt, molested, or restrained in his religious sentiments or persuasions." For decisions sustaining the prohibition of liquor sales on Sunday, see State *v.* Common Pleas, 36 N. J. 72, 13 Am. Rep. 422; State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224; State *v.* Gregory, 47 Conn. 276; Blalnt *v.* State, 34 Ark. 447; and of dramatic entertainments, see Menserdorff *v.* Dwyer, 69 N. Y. 557.

[2] There are constitutional provisions to this effect more or less broad in Alabama, Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Missouri, New Hampshire, New York, North Carolina, Oregon, and South Carolina, and statutory provisions in some other States. In Tennessee "no citizen shall be compelled to bear arms, provided he will pay an equivalent to be ascertained by law." Art. 1, § 28.

[3] See upon this point the leading case of Ormichund *v.* Barker, Willes, 538, and 1 Smith's Leading Cases, 535, where will be found a full discussion of this subject. Some of the earlier American cases required of a witness that he should believe in the existence of God, and of a state of rewards and punishments after

incompetent. Wherever the common law remains unchanged, it must, we suppose, be held no violation of religious liberty to recognize and enforce its distinctions; but the tendency is to do away with them entirely, or to allow one's unbelief to go to his credibility only, if taken into account at all.[1]

the present life. See especially Atwood *v.* Welton, 7 Conn. 66. But this rule did not generally obtain; belief in a Supreme Being who would punish false swearing, whether in this world or in the world to come, being regarded sufficient. Cubbison *v.* McCreary, 7 W. & S. 262; Blocker *v.* Burness, 2 Ala. 354; Jones *v.* Harris, 1 Strob. 160; Shaw *v.* Moore, 4 Jones (N. C.), 25; Hunscom *v.* Hunscom, 15 Mass. 184; Brock *v.* Milligan, 10 Ohio, 121; Bennett *v.* State, 1 Swan, 411; Central R. R. Co. *v.* Rockafellow, 17 Ill. 541; Arnold *v.* Arnold, 13 Vt. 362; Butts *v.* Swartwood, 2 Cow. 431; Free *v.* Buckingham, 50 N. H. 219. But one who lacked this belief was not sworn, because there was no mode known to the law by which it was supposed an oath could be made binding upon his conscience. Arnold *v.* Arnold, 13 Vt. 362; Scott *v.* Hooper, 14 Vt. 535; Norton *v.* Ladd, 4 N. H. 444; Cent. R. R. Co. *v.* Rockafellow, 17 Ill. 541.

[1] The States of Iowa, Minnesota, Michigan, Oregon, Wisconsin, Arkansas, Florida, Missouri, California, Indiana, Kansas, Nebraska, Nevada, Ohio, and New York have constitutional provisions expressly doing away with incompetency from want of religious belief. Perhaps the general provisions in some of the other constitutions, declaring complete equality of civil rights, privileges, and capacities are sufficiently broad to accomplish the same purpose. Perry's Case, 3 Gratt. 632. In Michigan and Oregon a witness is not to be questioned concerning his religious belief. See People *v.* Jenness, 5 Mich. 305. In Georgia, the code provides that religious belief shall only go to the credit of a witness, and it has been held inadmissible to inquire of a witness whether he believed in Christ as the Saviour. Donkle *v.* Kohn, 44 Ga. 266. In Maryland, no one is incompetent as a witness or juror "provided he believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come." Const. Dec. of Rights, § 36. In Missouri, an atheist is competent. Londener *v.* Lichtenheim, 11 Mo. App. 385.

CHAPTER XIV.

THE POWER OF TAXATION.

THE power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it.

Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes.[1] The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it or not. No constitutional government can exist without it, and no arbitrary government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of government from such persons or objects as the men in power might select as victims. Chief Justice *Marshall* has said of this power: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to

[1] Blackwell on Tax Titles, 1. A tax is a contribution imposed by government on individuals for the service of the State. It is distinguished from a subsidy as being certain and orderly, which is shown in its derivation from Greek, τάξις, *ordo*, order or arrangement. Jacob, Law Dic.; Bouvier, Law Dic. "The revenues of a State are a portion that each subject gives of his property in order to secure, or to have, the agreeable enjoyment of the remainder." Montesquieu, Spirit of the Laws, b. 12, c. 30. In its most enlarged sense the word "taxes" embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. See Perry *v.* Washburn, 20 Cal. 318, 350; Loan Association *v.* Topeka, 20 Wall. 655, 664; Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246; [*Re* Page, 30 Kan. 842, 58 Pac. 478, 47 L. R. A. 68. See also note to 13 L. R. A. 533.]

which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."[1]

The same eminent judge has said in another case: "The power of legislation, and consequently of taxation, operates on all persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."[2] And again, the same judge says, it is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power."[3] The like general views have been frequently expressed in other cases.[4]

The Constitution of the United States declares that "the Congress shall have power to levy and collect taxes, duties, imposts, and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts,

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 428.

[2] Providence Bank *v.* Billings, 4 Pet. 514, 561.

[3] McCulloch *v.* Maryland, 4 Wheat. 316, 430. See Kirtland *v.* Hotchkiss, 100 U. S. 491; Board of Education *v.* McLandsborough, 36 Ohio St. 227; State *v.* Board of Education, 38 Ohio St. 3.

[4] Kirby *v.* Shaw, 19 Pa. St. 258; Sharpless *v.* Mayor, &c., 21 Pa. St. 147; Weister *v.* Hade, 52 Pa. St. 474; Wingate *v.* Sluder, 6 Jones (N. C.), 552; Herrick *v.* Randolph, 13 Vt. 525; Armington *v.* Barnet, 15 Vt. 745; Thomas *v.* Leland, 24 Wend. 65; People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Portland Bank *v.* Apthorp, 12 Mass. 252; Western Union Telegraph Co. *v.* Mayer, 28 Ohio St. 521.

and excises shall be uniform throughout the United States."[1] The duties, imposts, and excises here specified are merely different kinds of taxes; the first two terms being commonly applied to the levies made by governments on the importation and exportation of commodities, while the term "excises" is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges. "No tax or duty shall be laid on articles exported from any State;"[2] but this provision of the Constitution is not violated by a requirement that an article intended for exportation shall be stamped, as a protection against fraud.[3] Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population.[4] The term "direct taxes," as employed in the Constitution, has a technical meaning, and embraces capitation and land taxes only.[5] These are express limitations, imposed by the Constitution upon the federal power to tax; but there are some others which are implied, (*a*) and which under the complex system of American government have the effect to exempt some subjects otherwise taxable from the scope and reach, according to circumstances, of either the federal power to tax or the power of the several States. One of the implied limitations is that which precludes the States from taxing the agencies whereby the general government performs its functions. The reason is that, if they

[1] Const. U. S. Art. 1, § 8, cl. 1.
[2] Const. U. S. Art. 1, § 9, cl. 5.
[3] Pace *v.* Burgess, 92 U. S. 372.
[4] Const. U. S. Art. 1, § 2; Art. 1, § 9, cl. 4.
[5] Hylton *v.* United States, 3 Dall. 171; Pacific Ins. Co. *v.* Soule, 7 Wall. 433; Veazie Bank *v.* Fenno, 8 Wall. 533; Springer *v.* United States, 102 U. S. 586. [Pollock *v.* Farmers' Loan & T. Co., 158 U. S. 601, 15 Sup. Ct. Rep. 912, would seem to modify the statement of the text by declaring capitation taxes and those levied upon general property, whether real or personal or both, and the income derived therefrom, direct taxes.]

(*a*) [It is held that the States are restricted from taxing patent rights. People *v.* Brooklyn Bd. of Assessors, 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290; Com. *v.* Edison Electric Light Co., 157 Pa. 529, 27 Atl. 379, 37 Am. St. 747; Com. *v.* Philadelphia Co., 157 Pa. 527, 27 Atl. 378; Com. *v.* Westinghouse El. & Mfg. Co., 151 Pa. 265, 24 Atl. 1107, 1111; Com. *v.* Westinghouse Air Brake Co., 151 Pa. 276, 24 Atl. 1111, 1113. See other cases upon State taxation of patent rights in note to 44 L. ed. U. S. 374. A State under a general law taxing legacies may tax a bequest to the United States, since the tax is levied on the bequest before it reaches the United States. United States *v.* Perkins, 163 U. S. 625, 16 Sup. Ct. Rep. 1073; aff. 141 N. Y. 479, 36 N. E. 505. And the fact that a corporation possesses a franchise from the federal government, and is engaged in inter-state commerce, will not prevent the State's taxing it upon a franchise from the State. Central Pac. R. Co. *v.* California, 162 U. S. 91, 16 Sup. Ct. Rep 766, aff. 105 Cal. 576, 38 Pac. 905. Copyrights not taxable by States, People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126. As to what lands of tribal Indians cannot be taxed by State, see Allen County Com'rs *v.* Simons, 129 Ind. 193, 28 N. E. 420, 13 L. R. A. 512.]

possessed this authority, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operations of the national authority within its proper and constitutional sphere of action. "That the power to tax," says Chief Justice *Marshall*, "involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control,—are propositions not to be denied." And referring to the argument that confidence in the good faith of the State governments must forbid our indulging the anticipation of such consequences, he adds: "But all inconsistencies are to be reconciled by the magic of the word, —confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government. But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why then should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence."[1]

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 431. The case involved the right of the State of Maryland to impose taxes upon the operations, within its limits, of the Bank of the United States, created by authority of Congress. "If," says the Chief Justice, "we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy in fact to the States. If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States." In Veazie Bank *v.* Fenno, 8 Wall. 533, followed and approved in National Bank *v.* United States, 101 U. S. 1, it was held competent for Congress, in aid of the circulation of the national banks, to impose restraints upon the cir-

It follows as a logical result from this doctrine that if the Congress of the Union may constitutionally create a Bank of the United States, as an agency of the national government in the accomplishment of its constitutional purposes, any power of the States to tax such bank, or its property, or the means of performing its functions, unless with the consent of the United States, is precluded by necessary implication.[1] For the like reasons a State is prohibited from taxing an officer of the general government for his office or its emoluments; since such a tax, having the effect to reduce the compensation for the services provided by the act of Congress, would to that extent conflict with such act, and tend to neutralize its purpose.[2] So the States may not impose taxes upon the obligations or evidences of debt issued by the general government upon the loans made to it, unless such taxation is permitted by law of Congress, and then only in the manner such law shall prescribe, — any such tax being an impediment to the operations of the government in negotiating loans, and, in greater or less degree in proportion to its magnitude, tending to cripple and embarrass the national power.[3] The tax upon

culation of the State banks in the form of taxation. Perhaps no other case goes so far as this, in holding that taxation may be imposed for other purposes than the raising of revenue, though the levy of duties upon imports with a view to incidental protection to domestic manufactures is upon a similar principle. [The Federal tax system is not subject to State registration laws, nor to State statutes of limitation. United States *v.* Snyder, 149 U. S. 210, 13 Sup. Ct. Rep. 846.]

[1] McCulloch *v.* Maryland, 4 Wheat. 316; Osborn *v.* United States Bank, 9 Wheat. 738; Dobbins *v.* Commissioners of Erie Co., 16 Pet. 435. [The States are prohibited from taxing the franchises and intangible property of national banks. Owensboro Nat'l Bk. *v.* Owensboro, 173 U. S. 664, 19 Sup. Ct. Rep. 537; Third Nat'l Bk. of Louisville *v.* Stone, 174 U. S. 432, 19 Sup. Ct. Rep. 759. Upon taxing shares of national banks in hands of stockholders, see First Nat'l Bk. of Wellington *v.* Chapman, 173 U. S. 205, 19 Sup. Ct. Rep. 407; Merchants' & M. Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 17 Sup. Ct. Rep. 829; note to 7 L. ed. U. S. 939; also McHenry *v.* Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737, and note thereto in L. R. A. Omission by official assessors to assess moneys of individual citizens invested in interest-bearing loans and securities, and in stocks and bonds, is not invalid as a discrimination against national banks whose shares are assessed, where the money invested in the non-assessed property does not compete with the national banks. First Nat. Bk., &c. *v.* Chehalis Co., 166 U. S. 440, 17 Sup. Ct. Rep. 629, aff. 6 Wash. 64, 32 Pac. 1051; First Nat. Bank *v.* Ayers, 160 U. S. 660, 16 Sup. Ct. Rep. 412, aff. 53 Kan. 440, 463, 36 Pac. 724.] But the doctrine which exempts the instrumentalities of the general government from the influence of State taxation, being founded on the implied necessity for the use of such instruments by the government, such legislation as does not impair the usefulness or capability of such instruments to serve the government is not within the rule of prohibition. National Bank *v.* Commonwealth, 9 Wall. 353; Thompson *v.* Pacific R. R. Co., 9 Wall. 579.

[2] Dobbins *v.* Commissioners of Erie Co., 16 Pet. 435. On similar grounds it is held in Canada that a provincial legislature has no power to impose a tax on the official income of an officer of the Dominion government. Leprohon *v.* Ottawa, 40 U. C. Rep. 486; s. c. on appeal, 2 Ont. App. Rep. 552.

[3] Weston *v.* Charleston, 2 Pet. 449;

the national securities is a tax upon the exercise of the power of Congress "to borrow money on the credit of the United States." The exercise of this power is interfered with to the extent of the tax imposed under State authority; and the liability of the certificates of stock or other securities to taxation by a State, in the hands of individuals, would necessarily affect their value in market, and therefore affect the free and unrestrained exercise of the power. "If the right to impose a tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe." [1]

If the States cannot tax the means by which the national government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments. "The same supreme power which established the departments of the general government determined that the local governments should also exist for their own purposes, and made

Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Van Allen *v.* Assessors, 3 Wall. 573; People *v.* Commissioners, 4 Wall. 244; Bradley *v.* People, 4 Wall. 459; The Banks *v.* The Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26; State *v.* Rogers, 79 Mo. 283. For a kindred doctrine, see State *v.* Jackson, 33 N. J. 450.

[1] Weston *v.* Charleston, 2 Pet. 449, 466; Bank of Commerce *v.* New York City, 2 Black, 620; Bank Tax Case, 2 Wall. 200; Society for Savings *v.* Coite, 6 Wall. 594. Revenue stamps are not taxable. Palfrey *v.* Boston, 101 Mass. 329. Nor United States treasury notes. Montgomery County *v.* Elston, 32 Ind. 27. Nor the premium on United States bonds. People *v.* Com'rs of Taxes, 90 N. Y. 63. [But an inheritance or succession tax may be imposed upon a legacy consisting of United States bonds. Plummer *v.* Coler, 178 U. S. 115, 20 Sup. Ct. Rep. 829, aff. 30 Misc. 19, 62 N. Y. Supp. 1024.] In People *v.* United States, 93 Ill. 30, 34 Am. Rep. 155, it was decided that property of the United States, held for any purpose whatever, was not subject to State taxation. Citing McGoon *v.* Scales, 9 Wall. 23; Railway Co. *v.* Prescott, 16 Wall. 603. Lands within a State belonging to the United States by purchase or failure of owner to pay direct taxes are exempt from State taxation while so owned. Van Brocklin *v.* Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670. [Hussman *v.* Durham, 165 U. S. 144, 17 Sup. Ct. Rep. 253.] The Central Pacific & Southern Pacific Railroad Companies derive many of their franchises from the United States. These cannot be taxed by a State without the consent of Congress. California *v.* Central Pacific R. R. Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073. But land is taxable though the title is still in the United States, if the real owner is entitled to a patent. Wis. Centr. Ry. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843. [So, too, though his right to patent is not yet confirmed, owing to dispute as to mineral or non-mineral character of lands concerned. Northern Pac. R. Co. *v.* Myers, 172 U. S. 589, 19 Sup. Ct. Rep. 276.] The property of the Western Union Telegraph Co., a New York corporation, lying in Massachusetts, cannot escape taxation there as an agency of the federal government, although it has the right to use post roads. Western U. Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961. That taxation cannot be evaded by turning funds temporarily into United States notes just before the time for assessment, see Shotwell *v.* Moore, 129 U. S. 590, 9 Sup. Ct. Rep. 362.

it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the Constitution [of the United States] which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the national legislature as if the interference were direct and extreme."[1] It has therefore been held that the law of Congress requiring judicial process to be stamped could not constitutionally be applied to the process of the State courts; since otherwise Congress might impose such restrictions upon the State courts as would put an end to their effective action, and be equivalent practically to abolishing them altogether.[2] And a similar ruling has been made in other analogous cases.

[1] Fifield *v.* Close, 15 Mich. 505. "In respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" Per *Nelson*, J., in Collector *v.* Day, 11 Wall. 113, 124. See also Ward *v.* Maryland, 12 Wall. 418, 427; Railroad Co. *v.* Peniston, 18 Wall. 5; Freedman *v.* Sigel, 10 Blatch. 327. [A tax levied by the United States upon legacies and distributive shares of personal property is a tax upon the transmission or receipt of property and not upon the right of the State to regulate the devolution of property upon death of owner. Knowlton *v.* Moore, 178 U. S. 41, 20 Sup. Ct. Rep. 747; Murdock *v.* Ward, 178 U. S. 139, 20 Sup. Ct. Rep. 775; Orr *v.* Gilman, 183 U. S. 278, 22 Sup. Ct. Rep. 213; Magoun *v.* Illinois Trust Co., 170 U. S. 283, 18 Sup. Ct. Rep. 594. See United States *v.* Owens, 100 Fed. Rep. 70, upon right of Federal government to tax bonds of saloon-keepers. Held that act purporting to authorize such tax is void for violation of the principle against taxation of the agencies of the State.

The taxation of the capital stock of a corporation owning patents is a taxation of such patents and invalid. So held in People *v.* Board of Assessors, 156 N. Y. 417, 51 N. E. 269. Not so as to tax levied on the *shares* of stock as property of the individual. Crown Cork & Seal Co. *v.* State, 87 Md. 687, 40 Atl. 1074, 67 Am. St. 371.]

[2] Warren *v.* Paul, 22 Ind. 276; Jones *v.* Estate of Keep, 19 Wis. 369; Fifield *v.* Close, 15 Mich. 505; Union Bank *v.* Hill, 3 Cold. 325; Smith *v.* Short, 40 Ala. 385; Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499.

It has been repeatedly decided that the act of Congress which provided that

Strong as is the language employed to characterize the taxing power in some of the cases which have considered this subject, subsequent events have demonstrated that it was by no means extravagant. An enormous national debt has not only made imposts necessary which in some cases reach several hundred per cent of the original cost of the articles upon which they are imposed, but the systems of State banking which were in force when the necessity for contracting that debt first arose, have been literally taxed out of existence by burdens avowedly imposed for that very purpose.[1] If taxation is thus unlimited in its operation upon the objects within its reach, it cannot be extravagant to say that the agencies of government are necessarily excepted from it, since otherwise its exercise might altogether destroy the government through the destruction of its agencies. That which was predicted as a possible event has been demonstrated by actual facts to be within the compass of the power; and if considerations of

certain papers not stamped should not be received in evidence must be limited in its operation to the federal courts. Carpenter *v.* Snelling, 97 Mass. 452; Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Clemens *v.* Conrad, 19 Mich. 170; Haight *v.* Grist, 64 N. C. 739; Griffin *v.* Ranney, 35 Conn. 239; People *v.* Gates, 43 N. Y. 40; Bowen *v.* Byrne, 55 Ill. 467; Hale *v.* Wilkinson, 21 Gratt. 75; Atkins *v.* Plympton, 41 Vt. 21; Bumpass *v.* Taggart, 26 Ark. 398, 7 Am. Rep. 623; Sammons *v.* Holloway, 21 Mich. 162, 4 Am. Rep. 465; Duffy *v.* Hobson, 40 Cal. 240; Sporrer *v.* Eitler, 1 Heisk. 633; McElvain *v.* Mudd, 44 Ala. 48, 4 Am. Rep. 106; Burson *v.* Huntington, 21 Mich. 415, 4 Am. Rep. 497; Davis *v.* Richardson, 45 Miss. 499, 7 Am. Rep. 732; Hunter *v.* Cobb, 1 Bush, 239; Craig *v.* Dimock, 47 Ill. 308; Moore *v.* Moore, 47 N. Y. 467, 7 Am. Rep. 466. [Knox *v.* Rossi, 25 Nev. 96, 57 Pac. 179, 48 L. R. A. 305. Upon effect of omission to stamp an instrument or cancel the stamp thereon, see note to this case in L. R. A. A check may be forged and the forger punished criminally, even though the instrument was not stamped in compliance with the law of Congress relating to checks, and was therefore invalid. Thomas *v.* State, 40 Tex. Crim. App. 562, 51 S. W. 242, 46 L. R. A. 454, and see note to this case in L. R. A. upon omission of stamp as affecting criminal prosecution.] Several of these cases have gone still farther, and declared that Congress cannot preclude parties from entering into contracts permitted by the State laws, and that to declare them void was not a proper penalty for the enforcement of tax laws. Congress cannot make void a tax deed issued by a State. Sayles *v.* Davis, 22 Wis. 225. Nor require a stamp upon the official bonds of State officers. State *v.* Garton, 32 Ind 1. Nor tax the salary of a State officer. Collector *v.* Day, 11 Wall. 113; Freeman *v.* Sigel, 10 Blatch. 327. Nor forbid the recording of an unstamped instrument under the State laws. Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499. "Power to tax for State purposes is as much an exclusive power in the States, as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress." *Clifford*, J., Ward *v.* Maryland, 12 Wall. 418, 427. In United States *v.* Railroad Co., 17 Wall. 322, it was decided that a municipal corporation of a State, being a portion of the sovereign power, was not subject to taxation by Congress upon its shares of stock in a railroad company. [Nor can the United States tax the income derived from bonds issued by the municipal corporations of the States. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 Sup. Ct. Rep. 373.]

[1] The constitutionality of this taxation was sustained by a divided court in Veazie Bank *v.* Fenno, 8 Wall. 533.

policy were important, it might be added that, if the States possessed the authority to tax the agencies of the national government, they would hold within their hands a constitutional weapon which factious and disappointed parties would be able to wield with terrible effect when the policy of the national government did not accord with their views; while, on the other hand, if the national government possessed a corresponding power over the agencies of the State governments, there would not be wanting men who, in times of strong party excitement, would be willing and eager to resort to this power as a means of coercing the States in their legislation upon the subjects remaining under their control.

There are other subjects which are or may be removed from the sphere of State taxation by force of the Constitution of the United States, or of the legislation of Congress under it. That instrument declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."[1] This prohibition has led to some difficulty in its practical application. Imports, as such, are not to be taxed generally; but it was not the purpose of the Constitution to exclude permanently from the sphere of State taxation all property brought into the country from abroad; and the difficulty encountered has been met with in endeavoring to indicate with sufficient accuracy for practical purposes the point of time at which articles imported cease to be regarded as imports within the meaning of the prohibition. In general terms it has been said that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but that while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.[2] And in the application of this rule

[1] Const. U. S. art. 1, § 10, cl. 2. The provision has no application to articles transported merely from one State to another. Brown *v.* Houston, 33 La. Ann. 843, 39 Am. Rep. 284; aff. 114 U. S. 622, 5 Sup. Ct. Rep. 1091. See State *v.* Pittsburg, &c. Co., 41 La. Ann. 465, 6 So. 220; [Am. Fertilizing Co. *v.* Bd. of Agriculture, 43 Fed. Rep. 609, 11 L. R. A. 179, and note; State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.] But an inspection law applicable only to lime manufactured in Maine, is held a regulation of commerce. Higgins *v.* Lime, 130 Mass. 1. A State tax on alien passengers is a tax on commerce though levied in aid of an inspection law. People *v.* Compagnie, &c., 107 U. S. 50, 2 Sup. Ct. Rep. 87. But a like impost under federal law is valid. Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247.

[2] Brown *v.* Maryland, 12 Wheat. 419, 441, per *Marshall*, Ch. J. [May & Co. *v.* New Orleans, 178 U. S. 496, 20 Sup. Ct.

it was declared that a State law which, for revenue purposes, required an importer to take a license and pay fifty dollars before he should be permitted to sell a package of imported goods, was equivalent to laying a duty upon imports. It has also been held in another case, that a stamp duty imposed by the legislature of California upon bills of lading for gold or silver, transported from that State to any port or place out of the State, was in effect a tax upon exports, and the law was consequently void.[1]

Congress is also vested with power to regulate commerce. (*a*) This power is not so far exclusive as to preclude State legislation on matters either local in their nature or operation, or intended

Rep. 976, aff. 51 La. Ann. 1064, 25 So. 959. And as to original packages, see Postal Tel. & Cable Co. *v.* Adams, 155 U. S. 688, 15 Sup. Ct. Rep. 268, 360, and note 39 L. ed. U. S. 311; *Re* Wilson, 8 Mackey, 341 (D. C.), 12 L. R. A. 624, and note; and State *v.* Winters, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616, and note; tax on imports, see note to 11 L. R. A. 179. See also Austin *v.* Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132; *Re* Wilson, 10 N. M. 32, 60 Pac. 73, 48 L. R. A. 417. State cannot tax imported tea in original packages. Siegfried *v.* Raymond, 190 Ill. 224, 60 N. E. 868.]

[1] Almy *v.* California, 24 How. 169. See what is said of this case in Woodruff *v.* Parham, 8 Wall. 123, 137. And compare Jackson Iron Co. *v.* Auditor-General, 32 Mich. 488. See also Brumagim *v.* Tillinghast, 18 Cal. 265; Garrison *v.* Tillinghast, 18 Cal. 404; *Ex parte* Martin, 7 Nev. 140; Turner *v.* State, 55 Md. 240; Turner *v.* Maryland, 107 U. S. 38, 2 Sup. Ct. Rep. 44. In the last two cases a law requiring an inspection of tobacco going out of the State is sustained. The States cannot discriminate in taxation between the productions of different States. Welton *v.* Missouri, 91 U. S. 275; Tiernan *v.* Rinker, 102 U. S. 123.

(*a*) [The business of life insurance is not inter-state commerce. N. Y. Life Ins. Co. *v.* Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962. Nor is marine insurance, Hooper *v.* California, 155 U. S. 648, 15 Sup. Ct. Rep. 207, 5 Inters. Com. Rep. 610. Nor is fire insurance. Phila. Fire Asso. *v.* New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108; Liverpool & L. L. & Ins. Co. *v.* Massachusetts, 10 Wall. 566; Paul *v.* Virginia, 8 Wall. 168; State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. 152. Upon State taxation and Federal commerce power, see note to 39 L. ed. U. S. 538, and another to 38 L. ed. U. S. 1041, also one to 37 L. ed. U. S. 216. Hiring laborers to be employed outside the limits of the State where hired is not commerce. Williams *v.* Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128, aff. 110 Ga. 584, 35 S. E. 699. Nor is sending goods outside the State to have services performed upon them and the goods thereafter returned. Smith *v.* Jackson, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416. Nor is making contracts for buying and selling "futures" in another State. Alexander *v.* State, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859. A State statute requiring the payment of a license tax by a non-resident soliciting orders for merchandise is invalid, Brennan *v.* City of Titusville, 153 U. S. 289, 14 Sup. Ct. Rep. 829. But an agent of a foreign corporation engaged in the purchase of wool to be shipped to that corporation in another State is engaged in inter-state commerce. MacNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 38 L. R. A. 367, 63 Am. St. 610. Transportation of lottery tickets from one State to another by an express company is inter-state commerce. Champion *v.* Ames, — U. S. —, 23 Sup. Ct. Rep. 321. For other cases upon what constitutes "commerce," see Gibbons *v.* Ogden, 9 Wheat. 1, and cases cited in the opinion in Champion *v.* Ames, *supra*. For cases sustaining the anti-trust act of 1890 under the commerce clause, see United States *v.* Joint-Traffic Assn., 171 U. S. 505; Addyston Pipe & S. Co. *v.* United States, 175 U. S. 211; United States *v.* Northern Securities Co., 120 Fed. Rep. 721.]

to be mere aids to commerce, for which special regulations can more effectually provide; such as harbor pilotage, beacons, buoys, the improvement of navigable waters within the State, and the examination as to their fitness of railroad employees, provided such legislation does not conflict with the regulations made by federal law.[1] Except as to such matters the power of Congress over commerce with foreign nations and among the several States is exclusive. If Congress has made no express regulations with regard to such commerce, its inaction is equivalent to a declaration that it shall be free.[2] The States, therefore, can enforce no regulations which make foreign or inter-state commerce subject to the payment of tribute to them.[3] Duties of tonnage the States

[1] Cooley *v.* Board of Wardens, 12 How. 299; Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Gilman *v.* Philadelphia, 3 Wall. 713; *Ex parte* McNiel, 13 Wall. 236; Henderson *v.* New York, 92 U. S. 259; Wilson *v.* McNamee, 102 U. S. 572; Mobile *v.* Kimball, 102 U. S. 691; Escanaba Co. *v.* Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Huse *v.* Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313; Willamette Iron B. Co. *v.* Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811; Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. Ry. Co. *v.* State, 128 U. S. 96, 9 Sup. Ct. Rep. 28. A statute discriminating as to pilotage in favor of vessels from certain States is bad. Sprague *v.* Thompson, 118 U. S. 90, 6 Sup. Ct. Rep. 988. Until Congress acts, State quarantine regulations are valid, and an examination fee may be charged graded by the kind of vessel. Morgan's S. S. Co. *v.* Louisiana, 118 U. S. 455, 6 Sup. Ct. Rep. 1114. See Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929. [But a State or municipal license tax levied upon tugs engaged in towing vessels engaged in inter-state commerce in the river and harbor of Chicago is bad. Harmon *v.* Chicago, 147 U. S. 396, 13 Sup. Ct. Rep. 306; and see in this connection note to this case in 37 L. ed. U. S. 216, on State statutes and regulation of inter-state commerce; also St. Louis *v.* Cons. Coal Co., 158 Mo. 342, 59 S. W. 103, 51 L. R. A. 850.]

[2] Welton *v.* Missouri, 91 U. S. 275; Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Walling *v.* Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454; Robbins *v.* Shelby Taxing Dist., 120 U. S. 489, 7 Sup. Ct. Rep. 592; Phil. S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118.

[3] In Brown *v.* Maryland, 12 Wheat. 419, 441, it was held that a license fee of fifty dollars, required by the State of an importer before he should be permitted to sell imported goods, was unconstitutional, as coming directly in conflict with the regulations of Congress over commerce. So a tax on the amount of an auctioneer's sales was held inoperative so far as it applied to sales of imported goods made by him in the original packages for the importer. Cook *v.* Pennsylvania, 97 U. S. 566. So is any tax which discriminates against imported goods. Tiernan *v.* Rinker, 102 U. S. 123. After property brought from another State has become part of the property in a State, it may be taxed like other property there: Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; [Pittsburg & S. Coal Co. *v.* Bates, 156 U. S. 577, 15 Sup. Ct. Rep. 415; Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497:] but not, if it is taxed by reason of its being so brought. Welton *v.* Missouri, 91 U. S. 275. See Phila. S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118. A tax upon receipts from the transportation of goods from one State to another by rail is bad. Case of State Freight Tax, 15 Wall. 232; Fargo *v.* Michigan, 121 U. S. 230, 7 Sup. Ct. Rep. 857. So is one upon the gross receipts from transportation by sea between different States, or to and from foreign countries: Phila. S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118; im-

are also forbidden to lay.[1] The meaning of this seems to be that

pairing the force of Case of Tax on Railway Gross Receipts, 15 Wall. 284, one upon gross receipts of car companies derived from inter-state business; State v. Woodruff, &c. Co., 114 Ind. 155, 15 N. E. 814. See Central R. R. Co. v. Board of Assessors, 49 N. J. L. 1, 7 Atl. 306. So is a privilege tax upon cars used as instruments of inter-state commerce. Pickard v. Pullman, &c. Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635. So is the tax upon the capital stock of a foreign ferry corporation engaged in such commerce, which lands and receives passengers and freight within the State. Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826. So is one on all telegraph messages sent out of a State. Telegraph Co. v. Texas, 105 U. S. 460. See Ratterman v. W. U. Tel. Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127. A State may not exact, as a condition of doing business, a license from a company, a large part of whose business is the transmission of inter-state telegrams. Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380. [But it may exact a license fee from an express company engaged in inter-state commerce before permitting it to do local business. Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. Rep. 214, aff. 33 Fla. 162, 14 So. 588, 25 L. R. A. 120, 39 Am. St. 99, 4 Inters. Com. Rep. 731. And may tax such company upon its gross receipts from business done entirely within the State. Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250. Likewise with telegraph companies. Postal Tel. Cable Co. v. City Council of Charleston, 153 U. S. 692, 14 Sup. Ct. Rep. 1094; Western Un. Tel. Co. v. Freemont, 39 Neb. 692, 58 N. W. 415, 43 Neb. 499, 61 N. W. 724, 26 L. R. A. 698, 706. See, in this connection, Postal Tel. Cable Co. v. Richmond, 99 Va. 102, 37 S. E. 789. And a charge of five dollars per annum for each pole planted by an inter-state telegraph company in a city's streets is not a tax on inter-state commerce, but a rental charged for use of the streets, and is valid. St. Louis v. W. U. Tel. Co., 148 U. S. 92, 13 Sup. Ct. Rep. 485; s. c. aff. 149 U. S. 465, 13 Sup. Ct. Rep. 990. Taking orders by sample and sending them to principal in another State by whom they are filled, is inter-state commerce. *Re* Spain, 47 Fed. Rep. 208, 14 L. R. B. 97, and note; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. Rep. 829, 4 Inters. Com. R. 658; and see, in this connection, *Re* Houston, 47 Fed. Rep. 539, 14 L. R. A. 719; *Re* White, 43 Fed. Rep. 913, 11 L. R. A. 284; McLaughlin v. South Bend, 126 Ind. 471, 26 N. E. 185, 10 L. R. A. 357; French v. State, — Tex. Cr. Ap. —, 58 S. W. 1015, 52 L. R. A. 160; State v. Willingham, 9 Wyo. 290, 62 Pac. 797, 52 L. R. A. 198. Stockard v. Morgan, 105 Tenn. 412, 58 S. W. 1061, holds that a *merchandise* broker representing only non-resident principals is subject to a State tax on occupation and is not engaged in inter-state commerce, but this case was afterward reversed in the Supreme Court of the United States, see Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. Rep. 576. But where the agent carries the goods with him and sells them, he is subject to the State law. Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367, aff. 103 Mo. 241, 15 S. W. 81, 3 Inters. Com. Rep. 527, 11 L. R. A. 219, 23 Am. St. 874; Rash v. Farley, 91 Ky. 344, 15 S. W. 862. Also where he forwards the orders, and the goods are shipped to him in bulk, and he breaks bulk and distributes them. Racine I. Co. v. McCommons, 111 Ga. 630, 36 S. E. 866, 51 L. R. A. 134; Camp v. State, — Tex. Cr. Ap. —, 61 S. W. 401 (Feb. 13, 1901); Croy v. Epperson, 104 Tenn. 525, 58 S. W. 235; State v. Caldwell, 127 N. C. 521, 37 S. E. 138. State may tax the corporate franchise of a company organized under its laws, although that company is engaged in inter-state commerce. People v. Wemple, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303, and note.] That is not domestic commerce which in going between ports of the same State passes more than a marine league from shore. Pacific Coast S. S. Co. v. Board R. R. Com'rs, 18 Fed. Rep. 10. Compare Com. v. Lehigh Valley R. R. Co., 129 Pa. St. 308, 18 Atl. 125. [Aff. in Lehigh V. R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. Rep. 806, holding that the domestic character of the com-

[1] Const. of U. S. art. 1, § 10, cl. 2.

vessels must not be taxed as vehicles of commerce, according

merce between termini in the same State is not destroyed by the fact that in the carriage of the passengers and the goods, a portion of the route traversed lies in another State, thus reversing the rule of 18 Fed. Rep. 10, above. In L. V. R. Co. *v.* Pa., above, the tax was levied upon receipts, and an apportionment upon a mileage basis of receipts from domestic commerce, a portion of whose route lay without the State, was sustained.] For further discussion of this subject, see New York *v.* Miln, 11 Pet. 102; License Cases, 5 How. 504; Lin Sing *v.* Washburn, 20 Cal. 534; Erie Railway Co. *v.* New Jersey, 31 N. J. 531, rev. 30 N. J. 473; Pennsylvania R. R. Co. *v.* Commonwealth, 3 Grant, 128; Hinson *v.* Lott, 40 Ala. 123; Commonwealth *v.* Erie R. R., 62 Pa. St. 286; Osborne *v.* Mobile, 44 Ala. 493; s. c. in error, 16 Wall. 479; State *v.* Philadelphia, &c. R. R. Co., 45 Md. 361; Walcott *v.* People, 17 Mich. 68. In Crandall *v.* Nevada, 6 Wall. 35, it was held that a State law imposing a tax of one dollar on each person leaving the State by public conveyance was not void as coming in conflict with the control of Congress over commerce, though set aside on other grounds. Logs belonging to a non-resident are liable to be taxed though intended for transportation to another State, and partially prepared for it by being deposited at the place of shipment. Coe *v.* Errol, 116 U. S. 517, 6 Sup. Ct. Rep. 475. See Com'rs Brown Co. *v.* Standard Oil Co., 103 Ind. 302, 2 N. E. 758. On the subject of inter-state commerce, see further, pp. 846, 851–859, 873, *post*. Cooley on Taxation, 61–64. [Upon power of States over inter-state telegraph and telephone companies, see Postal Tel. Cable Co. *v* Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161, and note; and *In re* Pennsylvania Telephone Co., 48 N. J. Eq. 91, 20 Atl. 816. Municipal license tax levied upon tugs engaged in towing boats engaged in inter-state commerce is void. Harmon *v.* Chicago, 147 U. S 396, 13 Sup. Ct. Rep. 306, and see also note to this case in 37 L. ed. U. S. 216, upon State statutes and inter-state commerce. Railroad corporation engaged in inter-state commerce may send its agent into any State there to secure such commerce to his principal, and the State cannot exact of him a license fee for the transaction of such business. McCall *v.* California, 136 U. S. 104, 10 Sup. Ct. Rep. 881; Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114, 394, 10 Sup. Ct. Rep. 958. Sheep driven through a State for purpose of grazing, as well as to reach another State, are taxable in first State, even though they remain but a short time. Kelley *v.* Rhodes, 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594; s. c. 9 Wyo. 352, 63 Pac. 935. License tax upon those engaged in packing oysters for sale or transportation is valid, even though oysters are intended to be shipped out of the State. State *v.* Applegarth, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812. State may tax corporate franchise of a domestic corporation, even though the corporation is organized to carry on inter-state commerce. State *v.* Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134. One selling merchandise that is in a foreign State is engaged in inter-state commerce and cannot be compelled to pay a license. Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967. In Western Union T. Co. *v.* New Hope, — U. S. —, 23 Sup. Ct. Rep. 204, an ordinance requiring a license fee of $1.00 per pole, and $2.50 per mile of wire, was sustained though imposed upon poles and wires used in inter-state business. For other cases upon inter-state commerce and State's power of taxation, see Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Commonwealth *v.* Myers, 92 Va. 809, 23 S. E. 915, 31 L. R. A. 379; Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; San Bernardino *v.* Southern Pac. Co., 107 Cal. 524, 40 Pac. 796, 29 L. R. A. 327; South Bend *v.* Martin, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531; Commonwealth *v.* Harmel, 166 Pa. 89, 30 Atl. 1036, 27 L. R. A. 388; Wind *v.* Iler & Co., 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219; Leavell *v.* Western U. Tel. Co., 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843; State *v.* Bd. of Assessors, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684; State *v.* Gorham, 115 N. C. 721, 20 S. E. 179, 25 L. R. A. 810; Coit *v.* Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819; Georgia Packing Co. *v.* Macon, 60 Fed. Rep. 774, 4 Inters. Com. Rep. 508, 22 L. R. A. 775; San

to capacity;[1] but it is admitted they may be taxed like other property.[2]

Francisco *v.* Western U. Tel. Co., 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; Rothermel *v.* Meyerle, 136 Pa. 250, 20 Atl. 583, 9 L. R. A. 366, and note; State *v.* Zophy, 14 S. D. 110, 84 N. W. 391, State *v.* Omaha & C. B. R. & B. Co., 113 Iowa, 30, 84 N. W. 983.]

[1] Cannon *v.* New Orleans, 20 Wall. 577; Huse *v.* Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313. See Steamship Co. *v.* Port Wardens, 6 Wall. 31; State Tonnage Tax Cases, 12 Wall. 204; Inman Steamship Co. *v.* Tinker, 94 U. S. 238; Lott *v.* Morgan, 41 Ala. 246; Johnson *v.* Drummond, 20 Gratt. 419; State *v.* Charleston, 4 Rich. 286; Johnson *v.* Loper, 46 N. J. L. 321. A license tax upon the business of running a ferry between two States is not a tonnage tax. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257. But such tax upon running towboats between New Orleans and the Gulf is a regulation of commerce. Moran *v.* New Orleans, 112 U. S. 69, 5 Sup. Ct. Rep. 38. Tolls based on tonnage may be charged for the use of improved waterways. Huse *v.* Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313. Port dues may not be laid unless services are rendered. Harbor Com'rs *v.* Pashley, 19 S. C. 315; Webb *v.* Dunn, 18 Fla. 721.

[2] See above cases. Also Peete *v.* Morgan, 19 Wall. 581; Transportation Co. *v.* Wheeling, 99 U. S. 273; [N. W. Lumber Co. *v.* Chehalis County, 24 Wash. 626, 64 Pac. 009.] Wharfage charges are not forbidden by the above clause of the Constitution: Marshall *v.* Vicksburg, 15 Wall. 146; Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* St. Louis, 100 U. S. 423; Vicksburg *v.* Tobin, 100 U. S. 430; and they may be measured by tonnage. Packet Co. *v.* Catlettsburg, 105 U. S. 559; Transportation Co. *v.* Parkersburg, 107 U. S. 691, 2 Sup. Ct. Rep. 732. [As to inter-state bridges, see Keokuk & H. Bridge Co. *v.* Illinois, 175 U. S. 626, 20 Sup. Ct. Rep. 205. The State may tax the average number of refrigerator cars used within its borders, even though they are owned outside the State and are engaged in inter-state commerce. Union Ref. Transit Co. *v.* Lynch, 177 U. S. 149, 20 Sup. Ct. Rep. 631; aff. 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790; Am. Refr. Transit Co. *v.* Hall, 174 U. S. 70, 19 Sup. Ct. Rep. 599. Upon State taxes and commerce, see notes to 39 L. ed. U. S. 538, 24 C. C. A. 21, 8 C. C. A. 492, 13 L. R. A. 686, 11 L. R. A. 179, and 9 L. R. A. 366. State may tax capital employed within its limits, even though part of the business conducted is inter-state commerce. People *v.* Roberts, 171 U. S. 658, 19 Sup. Ct. Rep. 58; aff. 91 Hun, 158, 149 N. Y. 608, 44 N. E. 1127. Although the control of navigable waters used for inter-state commerce is in Congress, yet the State that owns the soil underneath is not thereby prohibited from taxing structures erected thereon; it may also delegate this power of taxation to a municipality. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 Sup. Ct. Rep. 877; aff. 99 Ky. 623, 36 S. W. 561. Upon relation between State power of taxation and Federal control of commerce, note to 37 L. ed. U. S. 216. In the taxation of companies engaged in inter-state commerce, such as railway, telegraph, telephone, and express companies, and the like, a State is not restricted to the tangible property of such companies within its borders, but may tax in addition an equitable proportion of the intangible property of such companies used in such business, even though the companies are chartered by other States or countries, and have their principal office outside the taxing State. Exactly what rules shall be followed in the valuation of such intangible property, and its apportionment among the various States in which such companies operate, is not very well settled. See the whole subject exhaustively discussed in Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. Rep. 305; s. c. in 61 Fed. Rep. 449, 470, 51 Ohio St. 492, 37 N. E. 945, 64 Fed. Rep. 9, 37 U. S. Ap. 378, 399, 69 Fed. Rep. 546, 557. See also Western U. Tel. Co. *v.* Taggart, 163 U. S. 1, 16 Sup. Ct. Rep. 1054; aff. 141 Ind. 281, 40 N. E. 1051; Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439, 14 Sup. Ct. Rep. 1122; 4 Int. St. Com. R. 671; Pittsburg, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114; Massachusetts *v.* W. U. Tel. Co., 141 U. S. 40, 11 Sup. Ct.

It is also believed that that provision in the Constitution of the United States, which declares that "the citizens of each State

Rep. 889; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 3 Int. St. Com. R. 595; Western U. Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961; Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 Sup. Ct. Rep. 532; Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 Sup. Ct. Rep. 527; and in particular, see Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. Rep. 604, in which Mr. Justice *Brewer*, in delivering the opinion of the court denying a petition for a rehearing of 165 U. S. 194, lays down the very sensible proposition that "it is a cardinal rule which should never be forgotten, that whatever property is worth for the purposes of income and sale, it is worth for the purposes of taxation." See also State, Guilbert *v.* Halliday, 58 Ohio St. 728, 51 N. E. 1102, 49 L. R. A. 427. The principle regulating the relation between the taxing power of the States and the commerce power of Congress, is stated by Mr. Chief Justice *Fuller* in Postal Telegraph Co. *v.* Adams, 155 U. S. 688, 15 Sup. Ct. Rep. 268, 360; aff. 71 Miss. 555, 14 So. 36, 4 Inter. Com. R. 416, 42 Am. St. 476, as follows: "Property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or inter-state commerce, may be taxed, or a tax imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction therefor not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes." This is reaffirmed in New York, L. E & W. R. Co. *v.* Pennsylvania, 158 U. S. 431, 15 Sup. Ct. Rep. 896, which sustained a tax upon tolls received by a lessor of a railroad from a lessee engaged in inter-state commerce. See note upon State tax laws and inter-state commerce, in 39 L. ed. U. S. 311, and another to 38 L. ed. U. S. 1041. Two other very important cases upon the "unit rule" in taxation of properties lying in two or more States, are Pittsburg, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 421, 14 Sup. Ct. Rep. 1114, and Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439, 1041, 14 Sup. Ct. Rep. 1122. The intangible property taxable within the State may be apportioned by the State, for purposes of county taxation, among the counties into or through which the railway extends. Columbus S. R. Co. *v.* Wright, 151 U. S. 470, 14 Sup. Ct. Rep. 396, aff. 89 Ga. 574, 15 S. E. 293. See also Pullman's P. C. Co. *v.* Hayward, 141 U. S. 36, 11 Sup. Ct. Rep. 883. Where the tangible property in the State consists entirely of railway coaches running into or through the State, the property in the State may be valued by taking such fraction of the total capital stock of the company as the miles of road over which it runs its coaches in the State are of the total number of miles of road over which it runs his coaches. Pullman's P. C. Co. *v.* Pennsylvania, 141 U. S. 18, 11 Sup. Ct. Rep. 876. And a State may levy an excise tax upon a railroad operating within its borders, and such excise may be proportioned upon a graduated scale to the gross receipts of such road derived within the State, such gross receipts being determined from the total gross receipts for the entire system, within and without the State, from local, inter-state, and foreign commerce, by the application of a track mileage ratio. Maine *v.* Grand Trunk R. Co. of Canada, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163; Cumberland & P. R. Co. *v.* State, 92 Md. 668, 48 Atl. 503. And the State may enforce the payment of all such taxes by the imposition of whatever penalties it may see fit to prescribe by general law. A penalty of 50 % and attorneys' fees was sustained in Western U. Tel. Co. *v.* Indiana, 165 U. S. 304, 17 Sup. Ct. Rep. 345, aff. 146 Ind. 54, 44 N. E. 793. State cannot require a foreign corporation to pay a license before engaging in inter-state commerce within its borders. Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851. Nor can it make mandatory and conclusive any arithmetical rule for

shall be entitled to all the privileges and immunities of the citizens of the several States,"[1] will preclude any State from imposing upon the property which citizens of other States may own, or the business which they may carry on within its limits, any higher burdens by way of taxation than are imposed upon corresponding property or business of its own citizens. This is the express decision of the Supreme Court of Alabama,[2] following in this particular the *dictum* of an eminent federal judge at an early day,[3] and the same doctrine has been recently affirmed by the federal Supreme Court.[4] As the States are forbidden to pass any laws

the determination of that portion of the intangible property of an inter-state business to be assessed as being within the State. Such rule is to be considered merely directory and presumptive. Wells, F. & Co.'s Express *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371. Business of a foreign railroad company having only terminal facilities in the State cannot be taxed by the State. People *v.* Wemple, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694. The intangible capital of steamship companies may be distributed among the States in proportion to their tangible propriety. Beaufort Co. Com'rs *v.* Old Dominion S. S. Co., 128 N. C. 558, 39 S. E. 18. Cost of construction, cost of replacement, connections with other roads, and other commercial advantages, rental value, net earnings, and market value of stocks and bonds should all be considered in assessing railroad property. Oregon & C. R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369. For other cases upon assessment of railroad property, see State *v.* Virginia & T. R. Co., 23 Nev. 283, 46 Pac. 723, 35 L. R. A. 759; Detroit City St. R. Co. *v.* Common Council, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.]

[1] Art. 4, § 2. A license tax may not be imposed upon one who contracts with or induces laborers to leave a State. Joseph *v.* Randolph, 71 Ala. 499. [*Contra*, Williams *v.* Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128, aff. 110 Ga. 320, 35 S. E. 693. A license tax upon buyers who come into a certain county to buy produce therein for shipment to markets outside the county is not repugnant to the equal privileges clause. Rothermel *v.* Meyerle, 136 Pa. 250, 20 Atl. 583, 9 L. R. A. 366.]

[2] Wiley *v.* Parmer, 14 Ala. 627.

[3] *Washington*, J., in Corfield *v.* Coryell, 4 Wash. C. C. 371, 380. And see Campbell *v.* Morris, 3 H. & McH. 554; Ward *v.* Morris, 4 H. & McH. 340; and other cases cited, *ante*, p. 37, note. See also Oliver *v.* Washington Mills, 11 Allen, 268.

[4] Ward *v.* Maryland, 12 Wall. 419, 430; Case of State Tax on Foreign Held Bonds, 15 Wall. 300. Compare Machine Co. *v.* Gage, 100 U. S. 676. A State cannot impose, for the privilege of doing business within its limits, a license tax upon travelling agents from other States, offering for sale or selling merchandise, when none is imposed upon its own people. McGuire *v.* Parker, 32 La. Ann. 882. Or a heavier license tax upon non-residents than upon residents carrying on the same business. Ward *v.* Maryland, 12 Wall. 418; State *v.* Wiggin, 64 N. H. 508, 15 Atl. 128. Nor a license tax upon those dealing in goods, wares, and merchandise not the product of the State, while imposing none on similar traders selling the products of the State. Welton *v.* Missouri, 91 U. S. 275; Walling *v.* Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *Ex parte* Thomas, 71 Cal. 204. See Grafty *v.* Rushville, 107 Ind. 502, 8 N. E. 609; Marshallstown *v.* Blum, 58 Iowa, 184, 12 N. W. 266; Pacific Junction *v.* Dyer, 64 Iowa, 38, 19 N. W. 862; State *v.* Pratt, 59 Vt. 502, 9 Atl. 552. Compare People *v.* Lyng, 74 Mich. 579, 42 N. W. 139; rev. in 135 U. S. 161, 10 Sup. Ct. Rep. 725. [But it may impose upon such traders a license tax, when it imposes upon those dealing in its own similar products an equal tax. Emert *v.* Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367, aff. 103 Mo. 241, 15 S. W. 81, 3 Inters. Com. R. 527, 11 L. R. A. 219, 23 Am. St. 874; *contra*, McGraw *v.* Marion, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 563. That a license tax levied upon itinerant

impairing the obligation of contracts, they are of course precluded from levying any taxes which would have that effect. Therefore, as was shown in a previous chapter, if the State by any valid contract has obligated itself not to tax particular property, or not to tax beyond a certain rate, a tax in disregard of the obligation is void.[1] It is also held that to tax in one State contracts owned in another impairs their obligation, even though they are made and are payable in the State imposing the tax, and are secured by mortgage in that State.[2]

venders may be bad as against non-residents, is no reason for holding it void as to residents. Brownback *v.* North Wales, 194 Pa. 609, 45 Atl. 660, 49 L. R. A. 446.] Nor charge vessels loaded with the products of other States larger fees for the use of the public wharves than are charged vessels loaded with products of the same State. Guy *v.* Baltimore, 100 U. S. 434. See further Woodruff *v.* Parham, 8 Wall. 123; Cook *v.* Pennsylvania, 97 U. S. 566. "The negotiation of sales of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made is inter-state commerce," and a statute imposing a privilege license upon all persons selling by sample within a Tennessee taxing district is void as applied to the drummer for an Ohio house, as interfering with such commerce, and this although Tennessee and foreign drummers are put on the same footing. Robbins *v.* Shelby Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592; Corson *v.* Maryland, 120 U. S. 502, 7 Sup. Ct. Rep. 655; Asher *v.* Texas, 128 U. S. 129, 9 Sup. Ct. Rep. 1; State *v.* Agee, 83 Ala. 110, 3 So. 856; State *v.* Bracco, 103 N. C. 349, 9 S. E. 404; Simmons Hardware Co. *v.* McGuire, 39 La. Ann. 848, 2 So. 592; Fort Scott *v.* Pelton, 39 Kan. 764, 18 Pac. 954; *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. 298. [Brennan *v.* Titusville, 153 U. S. 289, 14 Sup. Ct. Rep. 829; Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583; Laurens *v.* Elmore, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249.] A license tax can be demanded only in respect of the business of an express company carried on entirely within the State. Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 rev. Crutcher *v.* Com., 89 Ky. 6, 12 S. W. 141.] See also State *v.* Richards, 32 W. Va. 348, 9 S. E. 245. [And a State may tax resident commission merchants upon their commissions, even though those commissions are earned entirely upon inter-state commerce. Ficklen *v.* Shelby Taxing District, 145 U. S. 1, 12 Sup. Ct. Rep. 810. And it may tax sellers of alcoholic liquors, and may exempt from such tax manufacturers who sell at the place of manufacture in quantities above a given amount. Such exemption does not discriminate against non-resident manufacturers. Reymann Brewing Co. *v.* Brister, 179 U. S. 445, 21 Sup. Ct. Rep. 201.]

[1] See *ante*, p. 395, and cases cited in note.

[2] State Tax on Foreign Held Bonds, 15 Wall. 300; Street Railroad Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348. See also Mayor of Baltimore *v.* Hussey, 67 Md. 112, 9 Atl. 19; Railroad Co. *v.* Com'rs, 91 N. C. 454; Railroad Co. *v.* Jackson, 7 Wall. 262; Oliver *v.* Washington Mills, 11 Allen, 268. The stock of a foreign corporation is not taxable, though its property is used within the State by its licensees. Com. *v.* Amer. Bell Tel. Co., 129 Pa. St. 217, 18 Atl. 122; People *v.* Amer. Bell Tel. Co., 117 N. Y. 241, 22 N. E. 1057. Compare Catlin *v.* Hull, 21 Vt. 152; Jenkins *v.* Charleston, 5 S. C. 393; Mumford *v.* Sewall, 11 Oreg. 67, 4 Pac. 585. A State may tax its citizen upon the public debt of another State held by him, though exempt from taxes in such State. Bonaparte *v.* Tax Court, 104 U. S. 592. A foreign corporation having a railroad and doing business in a State, may, as a condition of doing business, be required, like a domestic corporation, to collect a tax upon its loans held by residents of the State. Com. *v.* New York, L. E. & W. R. R. Co., 129 Pa. St. 463, 8 Atl. 412. [The estate of a bankrupt in the hands of his assignee may be taxed by the State and county till distribution.

Having thus indicated the extent of the taxing power,[1] it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government.

Re Sims, 118 Fed. Rep. 356. But where moneys are loaned by a creditor residing in one State to a debtor residing in another, the loan being effected through the intervention of an agent resident in the latter, the creditor is taxable in the latter State in respect of moneys so loaned, particularly if the moneys, as they fall due and are paid, are reloaned in that State. Bristol *v.* Washington Co., 177 U. S. 133, 20 Sup. Ct. Rep. 585. To substantially the same effect is New Orleans *v.* Stempel, 175 U. S. 309, 20 Sup. Ct. Rep. 110, although here the notes and other evidences of debt were left in the hands of the agent in Louisiana. See many cases cited in a note on "Situs for taxation of debts evidenced by notes or mortgages held by agent residing in different State from principal" appended to the Stempel Case in 44 L. ed. U. S. 174. These cases, taken in connnection with King *v.* Cross, 175 U. S. 396, 20 Sup. Ct. Rep. 131, and Chicago, R. I. & P. R. Co. *v.* Sturm, 174 U. S. 710, 19 Sup. Ct. Rep. 797, show a decided tendency to disregard the rule *mobilia personam sequuntur*, so far at least as taxation and attachment are concerned. And see in this connection Savings and Loan Society *v.* Multnomah County, 169 U. S. 421, 18 Sup. Ct. Rep. 392, where the right of a State to tax the interest of a non-resident mortgagee in lands within its boundaries is upheld, and the case of State Tax on Foreign Held Bonds, 15 Wall. 300, distinguished, and sundry dicta in it disapproved.]

[1] A State may, if it see fit, tax the property owned, held, and used by itself or its municipalities for public purposes; but this would so obviously be unwise and impolitic that the intent to do so is never assumed, but public property is always, by implication of law, exempt from the operation of the general terms of tax laws. People *v.* Salomon, 51 Ill. 37; Trustees of Industrial University *v.* Champaign Co., 70 Ill. 184; Directors of Poor *v.* School Directors, 42 Pa. St. 21; People *v.* Austin, 47 Cal. 353; People *v.* Doe, 36 Cal. 220; Wayland *v.* County Com'rs, 4 Gray, 500; Worcester Co. *v.* Worcester, 116 Mass. 193; State *v.* Gaffney, 34 N. J. 133; Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Erie Co. *v.* Erie, 113 Pa. St. 360, 6 Atl. 269. But city water-works may be taxed for county purposes. Erie Co. *v.* Com'rs Water-Works, 113 Pa. St. 368, 6 Atl. 138. The same rule applies to special city assessments. Green *v.* Hotaling, 44 N. J. L. 347; Polk Co. Savings Bank *v.* State, 69 Iowa, 24, 28 N. W. 416; Harris Co. *v.* Boyd, 70 Tex. 237, 7 S. W. 713. But see *contra*, Adams Co. *v.* Quincy, 130 Ill. 566, 22 N. E. 624. And the exemption extends to lands acquired by a city outside its limits to supply itself with water. West Hartford *v.* Water Com'rs, 44 Conn. 360; Rochester *v.* Rush, 80 N. Y. 302. So of a ferry landing in Brooklyn owned by New York City, to which the ferry privilege belongs. People *v.* Assessors, 111 N. Y. 505, 19 N. E. 90. See Black *v.* Sherwood, 84 Va. 906, 6 S. E. 484. But not so of land taken by a city in payment of the defalcation of an officer. People *v.* Chicago, 124 Ill. 636, 17 N. E. 56. [Public property is in Louisiana liable to special assessments for public improvements. New Orleans *v.* Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44. Upon liability of public property to assessment for public improvements, see many cases cited and discussed in note to 44 L. ed. U. S. 96.]

In the first place, taxation having for its only legitimate object the raising of money for public purposes (*a*) and the proper needs

(*a*) [Appropriation of money for the expenses of a school controlled by a private corporation in consideration of the gratuitous instruction of common school-teachers is for a public purpose, and it is not an assumption of debts of a private corporation or a loan to it. Boehm *v.* Hertz, 182 Ill. 154, 54 N. E. 973, 48 L. R. A. 575. Purchase of rights necessary to the beautification of public parks is a public purpose. Knowlton *v.* Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314. So is erection of a bridge for highway and railway purposes, even though bridge is property of a private corporation authorized to collect tolls for its use. Pritchard *v.* Magoun, 109 Iowa, 364, 80 N. W. 512, 46 L. R. A. 381. To aid in the building of a railroad is a public purpose. Folsom *v.* Township Ninety Six, 159 U. S. 611, 16 Sup. Ct. Rep. 174, and cases therein cited. *Contra*, People *v.* Tp. Bd. of Salem, 20 Mich. 452. So, possibly, to pension those dependent upon an officer dying in office. Opinion of Justices, 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564. An enterprise may be public, even though it is controlled by a private corporation for profit. Ryan *v.* L. & N. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303. See also Phœnix Fire As. Co. *v.* Montgomery Fire Dept., 117 Ala. 631, 23 So. 843, 42 L. R. A. 468. Maintenance of a State university established by constitutional authority is a public purpose, but the creation of free scholarships and allowances for needy students, even though appointments to them are made upon public competitive examinations, is not. State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. 653. To make a county exhibit at the Omaha exposition in 1898, was held a public purpose in State *v.* Cornell, 53 Neb. 556, 74 N. W. 59, 39 L. R. A. 513. Erection of electric-lighting plant to furnish light to citizens as well as to municipality is. Mitchell *v.* Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. 468; Jacksonville El. L. Co. *v.* Jacksonville, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. 24; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487, and note; Middleton *v.* St. Augustine, 42 Fla. 287, 39 So. 421 (Nov. 3, 1900); *contra*, Mauldin *v.* Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291. Construction of an underground street railway is. Sun P. & P. Assn. *v.* New York, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788. Treatment of habitual drunkards at a private institution is not. Wis. Keeley Inst. Co. *v.* Milwaukee County, 95 Wis. 153, 70 N. W. 68, 36 L. R. A. 55; *contra*, *Re* House, 23 Col. 87, 46 Pac. 117, 33 L. R. A. 832; Baltimore *v.* Keeley Institute, 81 Md. 106, 31 Atl. 437, 27 L. R. A. 646. To make an exhibit of county resources at an exposition is. Shelby County *v.* Tennessee C. Exp. Co., 96 Tenn. 653, 36 S. W. 694, 33 L. R. A. 717. So to construct a subway beneath city streets, which when completed is to be leased to a street railway company. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610. To provide bounties for killing coyotes. Ingram *v.* Colgan, 106 Cal. 113, 120, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187, 46 Am. St. 221. Moneys for benefit of an insolvent railroad company with provision that resident creditors shall first be paid out of proceeds cannot be raised by taxation. Baltimore & E. S. R. Co. *v.* Spring, 80 Md. 510, 31 Atl. 208, 27 L. R. A. 72. But medical treatment and care of poor persons may be provided at public expense in time of epidemic. Thomas *v.* Mason, 39 W. Va. 526, 20 S. E. 580, 26 L. R. A. 727, and note. A municipal electric plant to supply electricity for municipal purposes, even though electricity is to be supplied also to private consumers, provided reasonable rates be charged, may be erected at public cost. Linn *v.* Chambersburg, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Crawfordsville *v.* Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, and note, 30 Am. St. 214. To make State exhibit at World's Columbian Exposition is. Norman *v.* Kentucky Bd. of Managers, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556; Daggett *v.* Colgan, 92 Cal. 53, 28 Pac. 51, 14 L. R. A. 474, and note on public purposes, 27 Am. St. 95. Purchase of fuel and distribution and sale thereof to inhabitants is not a public service. Opinion of Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809; *In re* Municipal Fuel Plants, — Mass. —, 66 N. E. 25 (1903). Public moneys cannot be applied toward part payment of tuition of pupils attending private academies. Underwood *v.* Wood, 93 Ky. 177, 19 S. W.

of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized. In this place, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall overstep the legitimate bounds of their authority, the case will be such that the courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the ballot-box; and there are other cases where the line of distinction between that which is allowable and that which is not is so faint and shadowy that the decision of the legislature must be accepted as final, even though the judicial opinion might be different. But there are still other cases where it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the right of the courts to interfere and check what can only be looked upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief. An unlimited power to make any and every thing lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen.[1]

[1] Tyson *v.* School Directors, 51 Pa. St. 9; Morford *v.* Unger, 8 Iowa, 82; Talbot *v.* Hudson, 16 Gray, 417; Hansen *v.* Landram, 5 Bush, 230; People *v.* Vernon, 27 Iowa, 28; Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; Ferguson *v.* Landram, 5 Bush, 230; People *v.*

405, 15 L. R. A. 825, and note. To provide bounties for planting forest trees is not a public purpose. Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622. But enlargement of a private millrace may be if it extends river and canal navigation to a public street. Waterloo W. Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358, 14 L. R. A. 481. Disposal of sewage is. *Re* Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417, and note. So is supplying natural gas to the corporation and to its citizens. State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. Erection of a memorial hall is, but maintenance and support of a G. A. R. post is not. Kingman *v.* Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123, and note. Distributing water power to private consumers is not. *Re* Barre Water Co., 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195. Where the Constitution authorizes counties to loan their aid for the "necessary support of the poor," a statute "authorizing counties to issue bonds to procure seed-grain for needy farmers resident therein" is valid. State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, and note, 26 Am. St. 609. Keeping private fords clear of driftwood is a private purpose. Hutton *v.* Webb 126 N. C. 897, 36 S. E. 341. To raise money to pay to men drafted and serving in Union Armies in Civil War, or to their heirs, specified sums is a private purpose. Bush *v.* Bd. of Supervrs. of Orange Co., 159 N. Y. 212, 53 N. E. 1121, 45 L. R. A. 556, 70 Am. St. 538. An act providing for the raising of money to pay a bounty to private producers of beet sugar is invalid. Michigan Sugar Co. *v.* Auditor General, 124 Mich. 674, 83 N. W. 625, 83 Am. St. 354. A grant of land by the city of Minneapolis to a private corporation for use for an Industrial Exhibition was held valid upon the theory that though it involved taxation, the purpose was "public" within the requirement of the rule. Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312. For other cases on public purposes, see Skinner *v.* Henderson, 26 Fla. 121, 7 So. 464, 8 L. R. A. 55.]

It must always be conceded that the proper authority to determine what should and what should not constitute a public burden is the legislative department of the State. This is not only true for the State at large, but it is true also in respect to each municipality or political division of the State; these inferior corporate existences having only such authority in this regard as the legislature shall confer upon them.[1] And in determining this question, the legislature cannot be held to any narrow or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. The officers of government must be paid, the laws printed, roads constructed, and public buildings erected; but with a view to the general well-being of society, it may also be important that the children of the State should be educated, the poor kept from starvation,[2] losses in the public service indemnified, and incentives held out to faithful and fearless discharge of duty in the future, by the payment of pensions to those who have been faithful public servants in the past. There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and, in regard to the one as much as to the other, the decision of that department to which alone questions of State policy are addressed must be accepted as conclusive.

Township Board of Salem, 20 Mich. 452; rather than in the interest of the individual. Deering & Co. *v.* Peterson, 75 Minn. 118, 77 N. W. 568.]

[1] Litchfield *v.* Vernon, 41 N. Y. 123. A law may determine absolutely the amount of tax to be raised for a local improvement, and the property upon which it is to be apportioned. Spencer *v.* Merchant, 100 N. Y. 585, 3 N. E. 682; aff. 125 U. S. 345, 8 Sup. Ct. Rep. 921. See *ante*, p. 335, and cases cited in note 1, p. 609.

[2] Taxes cannot be levied to donate to benevolent and charitable societies, which are controlled by private individuals, and over which the public authorities have no supervision or control. So held in an able opinion in St. Mary's Industrial School *v.* Brown, 45 Md. 310. But a city may be allowed to pay a part of the expense of an orphanage to which its magistrates may commit poor children. Shepherd's Fold *v.* Mayor, &c. New York, 96 N. Y. 137.

Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255. "It is the clear right of every citizen to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation. If any such illegal encroachment is attempted, he can always invoke the aid of the judicial tribunals for his protection, and prevent his money or other property from being taken and appropriated for a purpose and in a manner not authorized by the Constitution and laws." Per *Bigelow*, Ch. J., in Freeland *v.* Hastings, 10 Allen, 570, 575. See Hooper *v.* Emery, 14 Me. 375; People *v.* Sup'rs of Saginaw, 26 Mich. 22; Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586. [A statute authorizing the State to loan its money to individuals for the buying of seeds in cases where crops have failed, is invalid for violating the principle that the functions of the State are to be exercised primarily in the interest of the public

Very strong language has been used by the courts in some of the cases on this subject. In a case where was questioned the validity of the State law confirming township action which granted gratuities to persons enlisting in the military service of the United States, the Supreme Court of Connecticut assigned the following reasons in its support:—

"In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary; and this is not that case.

"Second. If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementos for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned.

"Third. The government of the United States was constituted by the people of the State, although acting in concert with the people of other States, and the general good of the people of this State is involved in the maintenance of that general government. In many conceivable ways the action of the town might not only mitigate the burdens imposed upon a class, but render the service of that class more efficient to the general government, and therefore it must be presumed that the legislature found that the public good was in fact thereby promoted.

"And fourth. It is obviously possible, and therefore to be intended, that the General Assembly found a clear equity to justify their action." [1]

And the Supreme Court of Wisconsin has said: "To justify

[1] Booth *v.* Woodbury, 32 Conn. 118, 128. See to the same effect Speer *v.* School Directors of Blairville, 50 Pa. St. 150. The legislature is not obliged to consult the will of the people concerned in ordering the levy of local assessments for the public purposes of the local government. Cheaney *v.* Hooser, 9 B. Monr. 330; Slack *v.* Maysville, &c. R. R. Co., 13 B. Monr. 1; Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350; Spencer *v.* Merchant, 100 N. Y. 585, 3 N. E. 682; aff. 125 U. S. 345, 8 Sup. Ct. Rep. 921. Compare People *v.* Common Council of Detroit, 28 Mich. 228. The legislature cannot delegate to parties concerned the authority to levy taxes for the benefit of their own estates, and of those of others interested with them but not consenting. Scuffletown Fence Co. *v.* McAllister, 12 Bush, 312.

the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable; so clear and palpable as to be perceptible by every mind at the first blush. . . . It is not denied that claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities."[1]

But we think it is plain, as has been said by the Supreme Court of Wisconsin, that "the legislature cannot . . . in the form of a tax, take the money of the citizens and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute."[2] Or, as stated by the Supreme Court of Pennsylvania, "the legislature has no constitutional right to . . . lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of the legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for

[1] Brodhead *v.* City of Milwaukee, 19 Wis. 624, 652. See Mills *v.* Charleton, 29 Wis. 411, 9 Am. Rep. 578; Spring *v.* Russell, 7 Me. 273; Williams *v.* School District, 33 Vt. 271. Taxation to supply natural gas to a city valid. Fellows *v.* Walker, 39 Fed. Rep. 651. It is not competent for a city to levy taxes to loan to persons who have suffered from a fire. Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39, and note, p. 56; Feldman *v.* City Council of Charleston, 23 S. C. 57. Or to supply farmers, whose crops have been destroyed, with provisions, and grain for seed and feed. State *v.* Osawkee, 14 Kan. 418. Or to aid manufacturing enterprises: Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; Commercial Bank *v.* Iola, 2 Dill. 353; Loan Association *v.* Topeka, 20 Wall. 655; Opinions of Judges, 58 Me. 590; Coates *v.* Campbell, 37 Minn. 498, 35 N. W. 366; Mather *v.* Ottawa, 114 Ill. 659, 3 N. E. 216; Parkersburg *v.* Brown, 106 U. S. 487, 1 Sup. Ct. Rep. 442; Cole *v.* La Grange, 113 U. S. 1, 5 Sup. Ct. Rep. 416; though it be under pretence of sanitary improvements. Clee *v.* Sanders, 74 Mich. 692, 42 N. W. 154. Power to tax in aid of a water grist mill, recognized in Nebraska: Traver *v.* Merrick Co., 14 Neb. 327, 15 N. W. 690; *contra*, in aid of steam mill, Osborn *v.* Adams Co., 109 U. S. 1, 3 Sup. Ct. Rep. 150. Taxation to pay a subscription to a private corporation is not for a public purpose. Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586. A city cannot be empowered to erect a dam, with the privilege afterwards at discretion to devote it to either a public or private purpose; but the public purpose must appear. Attorney-General *v.* Eau Claire, 37 Wis. 400.

[2] Per *Dixon*, Ch. J., in Brodhead *v.* Milwaukee, 19 Wis. 624, 652. See also Lunsden *v.* Cross, 10 Wis. 282; Opinions of Judges, 58 Me. 590; Moulton *v* Raymond, 60 Me. 121; *post*, p. 704, and note.

all the reasons which forbid the legislature to usurp any other power not granted to them."[1] And by the same court, in a still later case, where the question was whether the legislature could lawfully require a municipality to refund to a bounty association the sums which they had advanced to relieve themselves from an impending military conscription, "such an enactment would not be legislation at all. It would be in the nature of judicial action, it is true, but wanting the justice of notice to parties to be affected by the hearing, trial, and all that gives sanction and force to regular judicial proceedings; it would much more resemble an imperial rescript than constitutional legislation: first, in declaring an obligation where none was created or previously existed; and next, in decreeing payment, by directing the money or property of the people to be sequestered to make the payment. The legislature can exercise no such despotic functions."[2]

[1] Per *Black*, Ch. J., in Sharpless *v.* Mayor, &c., 21 Pa. St. 147, 168. See Opinions of Judges, 58 Me. 590.

[2] Tyson *v.* School Directors of Halifax, 51 Pa. St. 922. See also Grim *v.* Weisenburg School District, 57 Pa. St. 433. The decisions in Miller *v.* Grandy, 13 Mich. 540; Crowell *v.* Hopkinton, 45 N. H. 9; and Shackford *v.* Newington, 46 N. H. 415, so far as they hold that a bounty law is not to be held to cover moneys before advanced by an individual without any pledge of the public credit, must be held referable, we think, to the same principle. And see cases, *ante*, p. 332, note 3. Compensation for money voluntarily contributed for levee purposes by allowing such sums as a credit on future levee taxes is not allowable. Those incidentally benefited cannot be compelled to refund money thus spent. Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184. We are aware that there are some cases the doctrine of which seems opposed to those we have cited, but perhaps a careful examination will enable us to harmonize them all. One of these is Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143. The facts in that case were as follows: Cornell and Clark were formerly commissioners of highways of the town of Guilford, and as such, by direction of the voters of the town, had sued the Butternut and Oxford Turnpike Road Company. They were unsuccessful in the action, and were, after a long litigation, obliged to pay costs. The town then refused to reimburse them these costs. Cornell and Clark sued the town, and, after prosecuting the action to the court of last resort, ascertained that they had no legal remedy. They then applied to the legislature, and procured an act authorizing the question of payment or not by the town to be submitted to the voters at the succeeding town meeting. The voters decided that they would not tax themselves for any such purpose. Another application was then made to the legislature, which resulted in a law authorizing the county judge of Chenango County to appoint three commissioners, whose duty it should be to hear and determine the amount of costs and expenses incurred by Cornell and Clark in the prosecution and defence of the suits mentioned. It authorized the commissioners to make an award, which was to be filed with the county clerk, and the board of supervisors were then required, at their next annual meeting, to apportion the amount of the award upon the taxable property of the town of Guilford, and provide for its collection in the same manner as other taxes are collected. The validity of this act was affirmed. It was regarded as one of those of which *Denio, J.*, says, "The statute book is full, perhaps too full, of laws awarding damages and compensation of various kinds to be paid by the public to individuals who had failed to obtain what they considered equitably due to them by the decision of administrative officers acting under the provi-

A like doctrine has been asserted by the Supreme Court of Michigan in a recent case. That State is forbidden by its consti-

sions of former laws. The courts have no power to supervise or review the doings of the legislature in such cases." It is apparent that there was a strong equitable claim upon the township in this case for the reimbursement of moneys expended by public officers under the direction of their constituents, and perhaps no principle of constitutional law was violated by the legislature thus changing it into a legal demand and compelling its satisfaction. Mr. Sedgwick criticises this act, and says of it that it "may be called taxation, but in truth it is the reversal of a judicial decision." Sedg. on Stat. and Const. Law, 414. There are very many claims, however, resting in equity, which the courts would be compelled to reject, but which it would be very proper for the legislature to recognize, and provide for by taxation. Brewster *v.* City of Syracuse, 19 N. Y. 116. Another case, perhaps still stronger than that of Guilford *v.* The Supervisors, is Thomas *v.* Leland, 24 Wend. 65. Persons at Utica had given bond to pay the extraordinary expense that would be caused to the State by changing the junction of the Chenango Canal from Whitesborough to Utica, and the legislature afterwards passed an act requiring the amount to be levied by a tax on the real property of the city of Utica. The theory of this act may be stated thus: The canal was a public way. The expense of constructing all public ways may be properly charged on the community especially or peculiarly benefited by it. The city of Utica was specially and peculiarly benefited by having the canal terminate there; and as the expense of construction was thereby increased, it was proper and equitable that the property to be benefited should pay this difference, instead of the State at large. The act was sustained by the courts, and it was well remarked that the fact that a bond had been before given securing the same money could not detract from its validity. Whether this case can stand with some others, and especially with that of Hampshire *v.* Franklin, 16 Mass. 76, we have elsewhere expressed a doubt, and it must be conceded that, for the legislature in any case to compel a municipality to assume a burden, on the ground of local benefit or local obligation, against the will of the citizens, is the exercise of an arbitrary power little in harmony with the general features of our republican system, and only to be justified, if at all, in extreme cases. The general idea of our tax system is, that those shall vote the burdens who are to pay them; and it would be intolerable that a central authority should have power, not only to tax localities, for local purposes of a public character which they did not approve, but also, if it so pleased, to compel them to assume and discharge private claims not equitably chargeable upon them. See the New York cases above referred to criticised in State *v.* Tappan, 29 Wis. 664, 680, 9 Am. Rep. 622. The legislature may require a county to pay for a road: Wilcox *v.* Deer Lodge Co., 2 Mont. 574; and may apportion to a township such part of the cost as the length of it in the township bears to its total length. Mahoney *v.* Comry, 103 Pa. St. 362. See also Shaw *v.* Dennis, 10 Ill. 405. The cases of Cheaney *v.* Hooser, 9 B. Monr. 330; Sharp's Ex. *v.* Dunavan, 17 B. Monr. 223; Maltus *v.* Shields, 2 Met. (Ky.) 553, will throw some light on this general subject. The case of Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350, is also instructive. The Cypress Pond Draining Company was incorporated to drain and keep drained the lands within a specified boundary, at the cost of the owners, and was authorized by the act to collect a tax on each acre, not exceeding twenty-five cents per acre, for that purpose, for ten years, to be collected by the sheriff. With the money thus collected, the board of managers, six in number, named in the act, was required to drain certain creeks and ponds within said boundary. The members of the board owned in the aggregate 3,840 acres, the larger portion of which was low land, subject to inundation, and of little or no value in its then condition, but which would be rendered very valuable by the contemplated draining. The corporate boundary contained 14,621 acres, owned by sixty-eight persons. Thirty-four of these, owning 5,975 acres, had no agency

tution to engage in works of public improvement, except in the expenditure of grants of land or other property made to it for this purpose. The State, with this prohibition in force, entered into a contract with a private party for the construction by such party of an improvement in the Muskegon River, for which the State was to pay the contractor fifty thousand dollars, from the Internal Improvement Fund. The improvement was made, but the State officers declined to draw warrants for the amount, on the ground that the fund from which payment was to have been made was exhausted. The State then passed an act for the levying of tolls upon the property passing through the improvement sufficient to pay the contract price within five years. The court held this act void. As the State had no power to construct or pay for such a work from its general fund, and could not constitutionally have agreed to pay the contractors from tolls, there was no theory on which the act could be supported, except it was that the State had misappropriated the Internal Improvement Fund, and therefore ought to provide payment from some other source. But if the State had misappropriated the fund, the burden of reimbursement would fall upon the State at large; it could not lawfully be imposed upon a single town or district, or upon the commerce of a single town or district. The burden must be borne by those upon whom it justly rests, and to recognize in the State a power to compel some single district to assume and discharge a State debt would be to recognize its power to make an obnoxious district or an obnoxious class bear the whole burden of the State government. An act to that effect would not be taxation, nor would it be the exercise of any legitimate legislative authority.[1] And it

in the passage of the act, and no notice of the application therefor, gave no assent to its provisions, and a very small portion of their land, if any, would be benefited or improved in value by the proposed draining; and they resisted the collection of the tax. As to these owners the act of incorporation was held unconstitutional and inoperative. See also the City of Covington *v.* Southgate, 15 B. Monr. 491; Lovingston *v.* Wider, 53 Ill. 302; Curtis *v.* Whipple, 24 Wis. 350; People *v.* Flagg, 46 N. Y. 401; People *v.* Batchellor, 53 N. Y. 128, 13 Am. Rep. 480; People *v.* Common Council of Detroit, 28 Mich. 228. The author has considered the subject of this note at some length in his treatise on taxation, c. 21.

[1] Ryerson *v.* Utley, 16 Mich. 269. See also People *v.* Springwells, 25 Mich. 153; Anderson *v.* Hill, 54 Mich. 477, 20 N. W. 549. "Uniformity in taxation implies equality in the burden of taxation." Bank *v.* Hines, 3 Ohio St. 1, 15. "This equality in the burden constitutes the very substance designed to be secured by the rule." Weeks *v.* City of Milwaukee, 10 Wis. 242, 258. See also Sanborn *v.* Rice, 9 Minn. 273; State *v.* Haben, 22 Wis. 660. The reasoning of these cases seems not to have been satisfactory to the New York Court of Appeals. See Gordon *v.* Cornes, 47 N. Y. 608, in which an act was sustained which authorized "and required" the village of Brockport to levy a tax for the erection of a State Normal School building at that place. No recent case, we think, has gone so far as this. Compare State *v.* Tappan, 29 Wis. 664, 9 Am. Rep. 622; Mayor of

may be said of such an act, that, so far as it would operate to make those who would pay the tolls pay more than their proportion of the State obligation, it was in effect taking their property for the private benefit of other citizens of the State, and was obnoxious to all the objections against the appropriation of private property for private purposes which could exist in any other case.

And the Supreme Court of Iowa has said: "If there be such a flagrant and palpable departure from equity in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are therefore not bound to contribute, it is no matter in what form the power is exercised, — whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, — it must be regarded as coming within the prohibition of the constitution designed to protect private rights against aggression however made, and whether under color of recognized power or not."[1]

When, therefore, the legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised: First, whether the purpose of such burden may properly be considered public on any of the grounds above indicated;[2] and second, if public, then whether the burden is

Mobile *v.* Dargan, 45 Ala. 310; Livingston County *v.* Weider, 64 Ill. 427; Burr *v.* Carbondale, 76 Ill. 455. "There can be no doubt that, as a general rule, where an expenditure is to be made for a public object, the execution of which will be substantially beneficial to every portion of the Commonwealth alike, and in the benefits and advantages of which all the people will equally participate, if the money is to be raised by taxation, the assessment would be deemed to come within that class which is laid to defray one of the general charges of government, and ought therefore to be imposed as nearly as possible with equality upon all persons resident and estates lying within the Commonwealth. . . . An assessment for such a purpose, if laid in any other manner, could not in any just or proper sense be regarded as 'proportional' within the meaning of the Constitution." Merrick *v.* Inhabitants of Amherst, 12 Allen, 500, 504, per *Bigelow*, Ch. J. This case holds that local taxation for a State purpose may be permitted in consideration of local benefits, and only differs in principle from Gordon *v.* Cornes, in that the one *permitted* what the other *required*. The case of Marks *v.* Trustees of Purdue University, 37 Ind. 155, follows Merrick *v.* Amherst, and Burr *v.* Carbondale, 76 Ill. 455; Hensley Township *v.* People, 84 Ill. 544, and Livingston County *v.* Darlington, 101 U. S. 407, are to the same effect. Taxation not levied according to the principles upon which the right to tax is based is an unlawful appropriation of private property to public uses. City of Covington *v.* Southgate, 15 B. Monr. 491; People *v.* Township Board of Salem, 20 Mich. 452; Tide Water Co. *v.* Costar, 18 N. J. Eq. 518; Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

[1] Morford *v.* Unger, 8 Iowa, 82, 92. See Durant *v.* Kauffman, 34 Iowa, 194.

[2] Though the legislature first decides that the use is public, the decision is not conclusive. They cannot make that a public purpose which is not so in fact. Gove *v.* Epping, 41 N. H. 539; Crowell *v.* Hopkinton, 45 N. H. 9; Freeland *v.* Hastings, 10 Allen, 570; Hooper *v.* Emery, 14

one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is therefore unconstitutional and void. "The power of taxation," says an eminent writer, "is a great governmental attribute, with which the courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations."[1] In the case of burdens thus assumed by the legislature on behalf of the State, it is not always that a speedy and safe remedy can properly be afforded in the courts. It would certainly be a very dangerous exercise of power for a court to attempt to stay the collection of State taxes because an illegal demand was included in the levy; and indeed, as State taxes are not usually levied for the purpose of satisfying specific demands, but a gross sum is raised which it is calculated will be sufficient for the wants of the year, the question is not usually one of the unconstitutionality of taxation, but of the misappropriation of moneys which have been raised by taxation. But if the State should order a city, township, or village to raise money by taxation to establish one of its citizens in business, or for any other object equally removed from the proper sphere of government, or should undertake to impose the whole burden of the government upon a fraction of the State, the usurpation of authority would not only be plain and palpable, but the proper remedy would also be plain, and no court of competent jurisdiction could feel at liberty to decline to enforce the paramount law.[2]

In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to this end, that there should be some system of apportionment.[3] Where the burden is

Me. 375; Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; Tyler *v.* Beacher, 44 Vt. 651, 8 Am. Rep. 398; Ferguson *v.* Landram, 5 Bush, 230; Kelly *v.* Marshall, 69 Pa. St. 319; People *v.* Flagg, 46 N. Y. 401; Curtis *v.* Whipple, 24 Wis. 350; Loan Association *v.* Topeka, 20 Wall. 655; [*Re* Page, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68.]

[1] Sedgwick on Const. and Stat. Law, 414.

[2] Loan Association *v.* Topeka, 20 Wall. 655. [See also Chicago & G. T. R. Co. *v.* Chappell, 124 Mich. 72, 82 N. W. 809.]

[3] [In State *v.* Traveller's Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481, it is held that, in the absence of any provision to that effect in the federal or State constitution, the taxing power of the legislature is not restricted by any implied rule of fundamental law that taxes must be equal and uniform. The court is unanimous upon three propositions as expressed by *Baldwin*, J., (1) "There is nothing in the constitution of Connecticut, nor in the 14th amendment to that of the United States, which, either expressly or by implication, requires that all taxation by this State shall be uniform or equal; (2) there is no fundamental principal of free government or natural justice that all taxation shall be uniform or equal; (3) a citizen of another State

common, there should be common contribution to discharge it.[1]

who participates as a shareholder in a corporation in the enjoyment of a special franchise granted by this State with a reservation of the power of amendment or repeal at pleasure, is not deprived of any privilege or immunity coming within the meaning of § 2, Art. 4, of the Constitution of the United States, by a statute imposing a State tax of 1½ per cent on the market value of his shares without any provision for deduction of capital invested in real estate," though such deduction is provided for in taxation of market value of shares of resident stockholders. The majority opinion seems to assert that the judicial power would be incompetent to declare a statute to be no law, though there were a fundamental principle of free government and natural justice, that all taxation should be uniform and equal which was violated by the statute. The judgment in this case was affirmed in the Supreme Court of the United States in Traveller's Ins. Co., *v.* Connecticut, 185 U. S. 364, 22 Sup. Ct. Rep. 673, upon the peculiar provisions of the Connecticut tax laws.] The legislature cannot itself make an assessment directly or by placing a value on certain property. *In re* House Bill, 9 Col. 635, 21 Pac. 476; Slaughter *v.* Louisville, 89 Ky. 112, 8 S. W. 917; *Ex parte* Low, 24 W. Va. 620. [Nor can it classify the counties, and arbitrarily value the lands in each class. Hawkins *v.* Mangum, 78 Miss. 97, 28 So. 872.] That it is not essential to provide for the taxation of all property, see Mississippi Mills *v.* Cook, 56 Miss. 40; that it is competent to provide for taxing railroad corporations in a different way from individuals: State Railroad Tax Cases, 92 U. S. 575; State Board *v.* Central R. R. Co., 48 N. J. L. 146, 4 Atl. 578; Cincinnati, N. O. & T. Ry. Co. *v.* Com., 81 Ky. 492; Franklin Co. *v.* Railroad, 12 Lea, 521; Central Ia. Ry. Co. *v.* Board, 67 Iowa, 199, 25 N. W. 128. [McHenry *v.* Alford, 168 U. S. 651, 18 Sup. Ct. Rep. 242. Upon taxation of railroads, see Cass County *v.* Chicago, B. & Q. R. Co., 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188, and note. A tax against a railway company whose lines are partly without the State levied under a statute providing for an assessment upon gross receipts in such proportion as its mileage within the State bears to its total mileage, is valid. State Treas. *v.* Auditor General, 46 Mich. 224, 9 N. W. 258. Cumberland & P. Ry. Co. *v.* State, 92 Md. 668, 48 Atl. 503, 52 L. R. A. 764.] But some railroads may not be taxed on gross receipts, while others are taxed on capital. Worth *v.* Wilmington, &c. R. R. Co., 89 N. C. 291; nor may they alone be taxed to raise a fund to pay railroad commissioners: Atchison, T. & S. F. R. R. Co. *v.* Howe, 32 Kan. 737, 5 Pac. 397; nor may the *assessed* value of other real property be made the standard of value of railroad property. Williams *v.* State Board, 51 N. J. L. 512, 18 Atl. 750. See California *v.* Central Pac. R. R. Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073; Santa Clara Co. *v.* South. Pac. R. R. Co., 118 U. S. 394, 6 Sup. Ct. Rep. 1132. [Nor may telegraph and telephone lines be taxed at a rate determined by taking the average rate of taxes, general, municipal, and local, levied throughout the State during the previous year, and applying it to the entire property of the company in the State for the present year, Pingree *v.* Dix, 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679.] That property may be classified for taxation, Coal Run Co. *v.* Finlen, 124 Ill. 666, 17 N. E. 11; People *v.* Henderson, 12 Col. 369, 21 Pac. 144; Fahey *v.* State, 27 Tex. App. 146, 11 S. W. 108. Corporate and individual obligations may be put in different classes. Com. *v.* Del. Div. Canal Co., 123 Pa. St. 594, 16 Atl. 584. That the rule of uniformity must be applied to all subjects of taxation within the district and class: Marsh *v.* Supervisors, 42 Wis. 502; Phillco *v.* Hiles, 42 Wis. 527; Bureau

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[1] 2 Kent, 231; Sanborn *v.* Rice, 9 Minn. 273; Ryerson *v.* Utley, 16 Mich. 269; Oliver *v.* Washington Mills, 11 Allen, 268; Tidewater Co. *v.* Costar, 18 N. J. Eq. 518. [A poll tax cannot be levied in such wise that those actually voting shall be exempt therefrom. Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295, 35 L. R. A. 747, 58 Am. St. 657.]

Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as

Co. *v.* Railroad Co., 44 Ill. 229; Cummings *v.* National Bank, 101 U. S. 153; that it is not competent to add a percentage to the list for refusal or neglect to make oath to the tax list: McCormick *v.* Fitch, 14 Minn. 252; but see *Ex parte* Lynch, 16 S. C. 32; that it is competent to permit a deduction for debts from the assessment: Wetmore *v.* Multnomah Co., 6 Oreg. 463; *contra*, Exchange Bank *v.* Hines, 3 Ohio St. 1; that where property is required to be taxed by value, it is not competent to tax a corporation on its property and also on its capital stock: State *v.* Cumberland, &c. R. R. Co., 40 Md. 22; that a statute making a portion only of a certain kind of property taxable is unconstitutional: Pike *v.* State, 5 Ark. 204; that occupation taxes are no violation of the rule of uniformity: Youngblood *v.* Sexton, 32 Mich. 406; *Ex parte* Robinson, 12 Nev. 263; Gatlin *v.* Tarboro, 78 N. C. 119; [Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205;] that foreign insurance companies may be required to pay different taxes from others: State *v.* Lathrop, 10 La. Ann. 398; Commonwealth *v.* Germania L. I. Co., 11 Phila. 553; *Ex parte* Cohn, 13 Nev. 424; see San Francisco *v.* Liverpool, &c. Co., 74 Cal. 113, 15 Pac. 380. They may be required to pay such taxes as companies of the taxing State are made to pay in the home States of such companies. Home Ins. Co. *v.* Swigert, 104 Ill. 653; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; People *v.* Fire Ass., 92 N. Y. 311; State *v.* Ins. Co., 115 Ind. 257, 17 N. E. 574. [But holders of contracts made with companies not doing business within this State cannot be subjected to higher taxation thereupon. *Re* Page, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68.] Taxation for roads upon the citizens only of a township is unequal. Marion, &c. Ry. Co. *v.* Champlin, 37 Kan. 682, 16 Pac. 222. So is the exemption from such taxes of all property in incorporated villages. Com'rs *v.* Owen, 7 Col. 467, 4 Pac. 795. But uniformity provisions do not apply to the distribution of a road fund. Holton *v.* Com'rs Mecklenburg Co., 93 N. C. 430. And see Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747; Louisville, &c. R. R. Co. *v.* State, 25 Ind. 177; Whitney *v.* Ragsdale, 33 Ind. 107; Francis *v.* Railroad Co., 19 Kan. 303; Primm *v.* Belleville, 59 Ill. 142; Wis. Cent. R. R. Co. *v.* Taylor Co., 52 Wis. 37, 8 N. W. 833; State *v.* Estabrook, 3 Neb. 173; Murray *v.* Lehman, 61 Miss. 283; Graham *v.* Com'rs Chautauqua Co., 31 Kan. 473, 2 Pac. 549; Dunham *v.* Cox, 44 N. J. Eq. 273, 14 Atl. 123.

The following are special cases: A tax on drays, &c., proportioned to the number of animals employed in drawing them, contravenes the constitutional requirement of uniformity in license taxes. State *v.* Endom, 23 La. Ann. 663. See New Orleans *v.* Home Ins. Co., 23 La. Ann. 449. A railroad company cannot be taxed according to the length of its road. State *v.* South Car. R. R. Co., 4 S. C. 376. A tax on cotton cannot be proportioned to the weight regardless of grades. Sims *v.* Jackson, 22 La. Ann. 440. Income is not property for the purposes of taxation. Waring *v.* Savannah, 60 Ga. 93. A collateral inheritance tax is not a property tax. Schoolfield's Exec. *v.* Lynchburg, 78 Va. 366. A tax on the franchises of a coal company may be proportioned to the coal mined. Kittanning Coal Co. *v.* Commonwealth, 79 Pa. St. 100. The keepers of private markets may be charged a license tax though none is imposed on those who sell in the public markets. New Orleans *v.* Dubarry, 33 La. Ann. 481, 39 Am. Rep. 273. [And taxes may be levied upon venders of merchandise, proportional to their annual gross receipts from sales, and such venders may be classified into retail and wholesale and dealers at boards of trade, and the rates for the several classes may differ. Knisely *v.* Cotterel, 196 Pa. 614, 46 Atl. 861, 50 L. R. A. 86. Where the Constitution requires uniformity of rate as well as of valuation, the legislature cannot provide that pupils outside of a high-school district shall be admitted to attend the high-school upon payment of specified rates. H. S. Dist. No. 137 *v.* Lancaster Co., 60 Neb. 147, 82 N. W. 380, 49 L. R. A. 343. A tax that is clearly discrimina-

all are alike protected, so all alike should bear the burden, in proportion to the interests secured. Taxes by the poll are justly regarded as odious and are seldom resorted to for the collection of revenue; and when taxes are levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions.[1] In this particular the State constitutions have been very specific, though in providing for equality and uniformity they have done little more than to state in concise language a principle of constitutional law which, whether declared or not, would inhere in the power to tax.

Taxes may assume the form of duties, imposts, and excises; (*a*)

tory in favor of particular classes of debtors is void. Hamilton *v.* Wilson, 61 Kan. 511, 59 Pac. 1069, 48 L. R. A. 288. The uniformity clause of the Montana Constitution does not apply to license taxes upon occupations. State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415. Requirement of uniformity does not prevent separate classification of railroad property and its assessment by special tribunal. St. Louis, I. M. & S. R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374. Holders of mortgages issued by individuals cannot be taxed while those holding mortgages issued by railroad and other quasi-public corporations are exempt. Russell *v.* Croy, 164 Mo. 69, 63 S. W. 849.]

[1] A tax on negro polls and negroes' property alone, to be applied to the education of negro children alone, is bad. Puitt *v.* Com'rs Gaston Co., 94 N. C. 709. [A tax on bicycles for the construction of bicycle paths, bicycles being within the classes of property subjected to general taxation, is void for inequality, and where such tax is assessed regardless of valuation, it is invalid for like reasons. Ellis *v.* Frazier, 38 Oreg. 462, 63 Pac. 642, 53 L. R. A. 454. See, on general question of uniformity in taxation, Florida C. Ry. Co. *v.* Reynolds, 183 U. S. 471, 22 Sup. Ct. Rep. 176.]

(*a*) [A tax upon legacies and distributive shares is not a tax upon property, but an excise upon the transmission or receipt of such legacies and distributive shares, and, in the absence of constitutional prohibition, the rate at which it is levied may be graduated with regard both to the value of the share, and to the remoteness of relationship between the deceased and the recipient of the property. Knowlton *v.* Moore, 178 U. S. 41, 20 Sup. Ct. Rep. 747; State *v.* Hamlin, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. 569; Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259. Upon taxes on succession and collateral inheritances, see note to Magoun *v.* Illinois Tr. & Sav. Bank, 42 L. ed. U. S. 1037; see also Orr *v.* Gilman, 183 U. S. 278, 22 Sup. Ct. Rep. 213; High *v.* Coyne, 93 Fed. Rep. 450. *Re* Romaine, 127 N. Y. 80, 27 N. E. 753, 12 L. R. A. 401; Com. *v.* Ferguson, 137 Pa. 595, 20 Atl. 870, 10 L. R. A. 240; Wallace *v.* Myers, 38 Fed. Rep. 184, 4 L. R. A. 171; *Re* Howe, 112 N. Y. 100, 19 N. E. 513, 2 L. R. A. 825, and notes to 4 L. R. A. 171, and 2 L. R. A. 825. Exemptions from a statute taxing legacies and inheritances, provided they apply equally to all persons in the same class, do not deny to any person the equal protection of the laws, and it rests with the legislature to determine the amounts of the exemptions and the basis of the classification, which basis, however, must not be clearly unreasonable. Magoun *v.* Illinois Tr. & Sav. Bank, 170 U. S. 283, 18 Sup. Ct. Rep. 594. Upon succession tax upon foreigners, see Rixner's Succession, 48 La. Ann. 552, 19 So. 597, 32 L. R. A. 177, and note. Graduated inheritance tax sustained. Kochersperger *v.* Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; *contra*, as violating rule of uniformity. State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 40 R. L. A. 280, 65 Am. St. 653. An arbitrary statutory exemption sustained in

and those collected by the national government are very largely of this character. They may also assume the form of license fees, for permission to carry on particular occupations, or to enjoy special franchises.[1] They may be specific; such as are often

[1] As to taxes on business and franchises, see Cooley on Taxation, c. 18. Offices, posts of profit, and occupations are proper subjects of taxation. Brown's App., 111 Pa. St. 72, 2 Atl. 77. That all occupations may be taxed when no restraints are imposed by the Constitution, see State *v.* Hayne, 4 Rich. 403; Ould *v.* Richmond, 23 Gratt. 464, 14 Am. Rep. 139; Commonwealth *v.* Moore, 25 Gratt. 951; Cousins *v.* State, 50 Ala. 113, 20 Am. Rep. 290; Stewart *v.* Potts, 49 Miss. 749; Morrill *v.* State, 38 Wis. 428, 20 Am. Rep. 12; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737; Young *v.* Thomas, 17 Fla. 169, 35 Am. Rep. 93; Richmond & D. R. R. Co. *v.* Reidsville, 101 N. C. 404, 8 S. E. 124. Such a tax may be based on the average amount of a merchant's stock. Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288. See Danville *v.* Shelton, 76 Va. 325. A city may be empowered to impose a license upon the business of a foreign insurance company, as well as a tax upon its net income: St. Joseph *v.* Ernst, 95 Mo. 360, 8 S. W. 558; or an occupation tax upon saloons, in addition to the license to sell. State *v.* Bennett, 19 Neb. 191, 26 N. W. 714. A privilege tax on private carriages in addition to an *ad valorem* tax is invalid. Livingston *v.* Paducah, 80 Ky. 656. An occupation tax must not be so unreasonable as to be prohibitory. Caldwell *v.* Lincoln, 19 Neb. 569, 27 N. W. 647. See Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361; Western U. Tel. Co. *v.* Philadelphia, 12 Atl. 144; Jackson *v.* Newman, 59 Miss. 385; People *v.* Russell, 49 Mich. 617, 14 N. W. 568; *Ex parte* Gregory, 20 Tex. App. 210; Kneeland *v.* Pittsburgh, — Pa. St. —, 11 Atl. 657, as to what is a reasonable license, tax, or fee. But revenue cannot be raised in the form of license fees under an authority to require licenses to be taken out for mere police purposes. *Ante*, 283, and note; Burlington *v.* Bumgardner, 42 Iowa, 673, and cases cited. As to when a power to license can be made use of as a means of raising revenue, see *Ex parte* Frank, 52 Cal. 606, 28 Am. Rep. 642; Pfeuler *v.* State, 11 Neb. 547, 10 N. W. 481; U. S. Dist. Co. *v.* Chicago, 112 Ill. 19; *In re* Guerrero, 69 Cal. 88, 10 Pac. 261; Flanagan *v.* Plainfield, 44 N. J. L. 118. [Where the business licensed is not one of common right, but one which may be entirely prohibited, there is no limit to the license fee which may be imposed. State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.] It is no valid objection to a tax on business that its operation will not be uniform. Youngblood *v.* Sexton, 32 Mich. 406; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672. But see Pullman P. C. Co. *v.* State, 64 Tex. 274; Banger's

State *v.* Furnell, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170; but an arbitrary exemption which is applied only to those estates not exceeding it in amount, while larger estates have no exemption whatever, is void, and invalidates the entire statute. State *v.* Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A, 218; *contra*, State *v.* Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178; Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259. Distinction in rates may be made between heirs and legatees in direct and collateral lines, and between these and strangers. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; State *v.* Hamlin, 86 Me. 495, 30 Atl. 70, 25 L. R. A. 632, 41 Am. St. 569. Contingent estates are not subject to the tax until they become vested. *Re* Estate of Roosevelt, 143 N. Y. 120, 38 N. E. 281, 25 L. R. A. 695. Real estate situated outside the State is not subject to inheritance tax, even after conversion into money in the hands of the executors. *Re* Swifts' Estate, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709. For other cases upon inheritance and succession taxes, see *Re* Rohan-Chabot's Estate, 167 N. Y. 280, 60 N. E. 598; *Re* Mahony's Estate, 133 Cal. 180, 65 Pac. 389; Union Trust Co. *v.* Durfee, 125 Mich. 487, 84 N. W. 1101; Ayers *v.* Chicago Title & T. Co., 187 Ill. 42, 58 N. E. 318; Billings *v.* People, 189 Ill. 472, 59 N. E. 798; Hooper *v.* Bradford, 178 Mass. 95, 59 N. E. 678.]

levied upon corporations, in reference to the amount of capital stock, or to the business done, or profits earned by them. Or they may be direct; upon property, in proportion to its value, (*a*) or upon some other basis of apportionment which the legislature shall regard as just, and which shall keep in view the general idea of uniformity. The taxes collected by the States are mostly of the latter class, and it is to them that the constitutional principles we shall have occasion to discuss will more particularly apply.

As to all taxation apportioned upon property, there must be

App., 109 Pa. St. 79. It should operate uniformly upon each class taxed. Smith *v.* Louisville, 9 Ky. L. 779, 6 S. W. 911; St. Louis *v.* Bowler, 94 Mo. 630, 7 S. W. 434; Braun *v.* Chicago, 110 Ill. 186. Further as to taxes on occupations, see Boye *v.* Girardey, 28 La. Ann. 717; Hodgson *v.* New Orleans, 21 La. Ann. 301; New Orleans *v.* Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; Texas B. & I. Co. *v.* State, 42 Tex. 636.

In the following cases license fees were held not to be taxes, but merely police regulations: Required of foreign corporations doing business in the State: People *v.* Thurber, 13 Ill. 554; Walker *v.* Springfield, 94 Ill. 364. Of dealers in intoxicating liquors: Burch *v.* Savannah, 42 Ga. 596; Durach's Appeal, 62 Pa. St. 491; East St. Louis *v.* Wehrung, 46 Ill. 392; Lovingston *v.* Trustees, 99 Ill. 564; Baker *v.* Panola Co., 30 Tex. 86; East St. Louis *v.* Trustees, 102 Ill. 489; Rochester *v.* Upman, 19 Minn. 108; State *v.* Cassidy, 22 Minn. 312, 21 Am. Rep. 765; State *v.* Klein, 22 Minn. 328; Pleuler *v.* State, 11 Neb. 547, 10 N. W. 481. Of auctioneers: Goshen *v.* Kern, 63 Ind. 468. Of a street railway company: Johnson *v.* Philadelphia, 60 Pa. St. 445. But see New York *v.* Railway Co., 32 N. Y. 261. Of insurance companies: Fire Department *v.* Helfenstein, 16 Wis. 136. Of gas companies for inspection: Cincinnati Gas Co. *v.* State, 18 Ohio St. 237. Of proprietors of theatres: Boston *v.* Schaffer, 9 Pick. 415. For building licenses: Welch *v.* Hotchkiss, 39 Conn. 140.

The fee exacted in granting a ferry license is not a tax, but is paid for the franchise. Chilvers *v.* People, 11 Mich. 43. See Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560.

The exaction of license fees under the police power is no violation of the constitutional requirement of uniform taxation. State *v.* Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Walters *v.* Duke, 31 La. Ann. 668. An act sustained which imposed a smaller license tax on proprietors of bars on steamboats than on those of bars on land. State *v.* Rolle, 30 La. Ann. 991. The exemption from taxation of the Louisiana Saving Bank held not to exclude a city license tax on the business. New Orleans *v.* Savings Bank, 31 La. Ann. 637. An exemption of all property in a town from parish taxes does not prevent the imposition of a license. Morehouse Parish *v.* Brigham, 41 La. Ann. 665, 6 So. 257. For instances of license fees held to be taxes and not warranted by statute, see *ante*, 283, note.

(*a*) [Upon mode of valuing telephones, &c., where the property has attached to it a monopoly, see State *v.* Halliday, 58 Ohio St. 728, 51 N. E. 1102, 49 L. R. A. 427. For a very full discussion of the subject of the taxation of corporate franchises with exhaustive citation of authorities, see 57 L. R. A. 33, in the note to Louisville T. W. Co. *v.* Com., 106 Ky. 165, 49 S. W. 1069. See also South Covington & C. S. Ry. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 57 L. R. A. 50; State *v.* Duluth G. & W. Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; Commercial E. L. & P. Co. *v.* Judson, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78. The taxation of the franchise or business of corporations doing business in the State, with an exemption of all corporations wholly engaged in the business of manufacturing within the State, is constitutional. New York *v.* Roberts, 171 U. S. 658, 19 Sup. Ct. Rep. 58.]

taxing districts, (*a*) and within these districts the rule of absolute uniformity must be applicable.[1] A State tax is to be apportioned through the State, a county tax through the county, a city tax through the city;[2] while in the case of local improvements, benefiting in a special and peculiar manner some portion of the State or of a county or city, it is competent to arrange a special taxing district, within which the expense shall be apportioned. School districts and road districts are also taxing districts for the peculiar purposes for which they exist, and villages may have special powers of taxation distinct from the townships of which they form a part. Whenever it is made a requirement of the State constitution that taxation shall be upon property according to value, such a requirement implies an assessment of valuation by public officers at such regular periods as shall be provided by law, and a taxation upon the basis of such assessment until the period arrives for making it anew.[3] Thus, the Constitutions of Maine

[1] If the proper rule of uniformity is established by the legislature, but the taxing officers purposely evade it and assess unequal taxes, the collection will be enjoined. Merrill *v.* Humphrey, 24 Mich. 170; Lefferts *v.* Supervisors, 21 Wis. 688; Mason *v.* Lancaster, 4 Bush, 406; Fuller *v.* Gould, 20 Vt. 643; Cummings *v.* National Bank, 101 U. S. 153, and cases cited.

The constitutional requirement that property shall be assessed for taxation by uniform rules, and according to true value, does not make it necessary to tax all property, and it is satisfied by such regulations as impose the same percentage of actual value upon such property as is made taxable, in the township for township purposes, in the county for county purposes, &c. Stratton *v.* Collins, 43 N. J. 563

[2] An act requiring a school-district tax when collected to be distributed between the district collecting it and others is void, as being in effect a local tax for a general purpose. Bromley *v.* Reynolds, 2 Utah, 525. See State *v.* Fuller, 39 N. J. 576; McBean *v.* Chandler, 9 Heisk. 349. A State tax must be apportioned uniformly through the State, a county tax through the county, a city tax through the city. East Portland *v.* Multnomah Co., 6 Oreg. 62; Exchange Bank *v.* Hines, 3 Ohio St. 1, 15; Pine Grove *v.* Talcott, 19 Wall. 666, 675; Fletcher *v.* Oliver, 25 Ark. 289; Chicago, &c. R. R. Co. *v.* Boone Co., 44 Ill. 240. For peculiar cases, see State *v.* New Orleans, 15 La. Ann. 354; Kent *v.* Kentland, 62 Ind. 291, 30 Am. Rep. 182; Com'rs of Ottawa Co. *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101; Cleveland *v.* Heisley, 41 Ohio St. 670. The whole burden of expense for fire protection, police, &c., cannot be imposed upon an area within a city. Morgan *v.* Elizabeth, 44 N. J. L. 571.

[3] Where a tax is to be assessed by the value of property, or in proportion to benefits, the right of the owner to be

(*a*) ["If the State Constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited. Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921; Parsons *v.* Dist. of Columbia, 170 U. S. 45, 18 Sup. Ct. Rep. 521." Per Mr. Justice *Brewer*, in Williams *v.* Eggleston, 170 U. S. 304, 18 Sup. Ct. Rep 617, aff. 68 Conn. 131, 35 Atl. 24, 421. See also Gilson *v.* Rush County, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835.]

and Massachusetts require that there shall be a valuation of estates within the Commonwealth to be made at least every ten years;[1] the Constitution of Michigan requires the annual assessments which are made by township officers to be equalized by a State board, which reviews them for that purpose every five years;[2] and the Constitution of Rhode Island requires the legislature "from time to time" to provide for new valuations of property for the assessment of taxes in such manner as they may deem best.[3] Some other constitutions contain no provisions upon this subject; but the necessity for valuation is nevertheless implied, though the mode of making it, and the periods at which it shall be made, are left to the legislative discretion.

There are some kinds of taxes, however, that are not usually assessed according to the value of property, and some which could not be thus assessed. And there is probably no State which does not levy other taxes than those which are imposed upon property.[4]

heard in some stage of the proceedings would seem to be clear; and it has been expressly affirmed in some cases. See Philadelphia *v.* Miller, 49 Pa. St. 440; Stewart *v.* Trevor, 56 Pa. St. 374; Butler *v.* Supervisors of Saginaw, 26 Mich. 22; Thomas *v.* Gain, 35 Mich. 155; Cleghorn *v.* Postlewaite, 43 Ill. 428; Darling *v.* Gunn, 50 Ill. 424; Kuntz *v.* Sumption, 117 Ind. 1, 19 N. E. 474; Redwood Co. *v.* Winona, &c. Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658; [Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. 825;] *post*, 722, note. The statutes generally provide for a hearing before some board, either on some day and at some place fixed by the statute, or after notice publicly given. That such statutes are mandatory, and an assessment made in disregard of them void, see Thames Manuf. Co. *v.* Lathrop, 7 Conn. 550; Philips *v.* Stevens Point, 25 Wis. 594; Walker *v.* Chapman, 22 Ala. 116; Sioux City, &c. R. R. Co. *v.* Washington Co., 3 Neb. 30; Leavenworth Co. *v.* Lang, 8 Kan. 284; Griswold *v.* School District, 24 Mich. 262. [Where the taxpayer is examined upon his return at the time it is made, he cannot claim a later hearing. McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.] On the general right to notice in tax cases, see the opinion of Mr. Justice *Field* in the case of San Mateo County *v.* So. Pac. R. R. Co., 13 Fed. Rep. 722; where the right is strongly affirmed. ["A notice to all property holders of the time and place at which the assessment is to be made is all that 'due process' requires in respect to the matter of notice in tax proceedings." Per Mr. Justice *Brewer* in Merchants' & M. Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 17 Sup. Ct. Rep. 829. See also Paulson *v.* Portland, 149 U. S. 30, 13 Sup. Ct. Rep. 750, aff. 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673. The action of the assessors after giving opportunity for a hearing is final in the absence of fraud or mistake. Albuquerque Nat. Bk. *v.* Perea, 147 U. S. 87, 13 Sup. Ct. Rep. 194. The assessment is void if the notice of opportunity for hearing fails to designate tribunal, place, and time, or any of them. Norfolk *v.* Young, 97 Va. 728, 34 S. E. 886, 47 L. R. A. 574. Statute, if definite, is sufficient notice, Streight *v.* Durham, 10 Okla. 361, 61 Pac. 1096. That assessed value of tangible replaceable property cannot exceed the cost of reproduction or replacement, see People *v.* Clapp, 152 N. Y. 490, 46 N. E. 842, 39 L. R. A. 237 (railroad real estate).]

[1] Constitution of Maine, art. 9, § 7; Constitution of Mass., Part 2, c. 1, § 1, art. 4.

[2] Constitution of Mich., art. 14, § 13.

[3] Constitution of Rhode Island, art. 4, § 15.

[4] See Bright *v.* McCulloch, 27 Ind. 223; Ould *v.* Richmond, 23 Gratt. 464, 14 Am. Rep. 139; Youngblood *v.* Sexton,

Every burden which the State imposes upon its citizens with a view to a revenue, either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of tax, or under some other designation. The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for purposes of revenue, taxes;[1] the tolls upon persons or property, for making use of the works of public improvement owned and controlled by the State, are a species of tax; stamp duties when imposed are taxes; and it is not uncommon, as we have already stated, to require that corporations shall pay a certain sum annually, assessed according to the amount or value of their capital stock, or some other standard; this mode being regarded by the State as most convenient and suitable for the taxation of such organizations. It is evident, therefore, that the express provisions, which are usual in State constitutions, that taxation upon property shall be according to value, do not include every species of taxation; and that all special cases like those we have here referred to are, by implication, excepted.

But in addition to these cases, there are others where taxes are levied directly upon property, which are nevertheless held not to be within the constitutional provisions. Assessments for the opening, making, improving, or repairing of streets, the draining of swamps, and the like local works,(*a*) have been generally

32 Mich. 406, 20 Am. Rep. 654; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737.

[1] See Ould *v.* Richmond, 23 Gratt, 464, 14 Am. Rep. 139; Wilmington *v.* Macks, 86 N. C. 88; Lightburne *v.* Taxing District, 4 Lea, 219. [Such taxes are not property taxes, and are not subject to the provisions requiring uniformity and equality. State *v.* Applegarth, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812.]

(*a*) [As to what are public improvements, see *Re* Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417, and note. Cost of *maintenance* of sewers may be met by special assessments, although cost of construction has already been levied and paid by parties assessed for maintenance. Carson *v.* Brockton Sewer Comm'rs, 182 U. S. 398, 21 Sup. Ct. Rep. 860, aff. 175 Mass. 212, 56 N. E. 1, 48 L. R. A. 277. That the construction of irrigation works in an arid region which will become fertile under irrigation is a public improvement, see Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56. Country highways are not "local improvements," and their cost cannot be levied upon adjacent lands alone. Sperry *v.* Flygare, 80 Minn. 325, 83 N. W. 177, 49 L. R. A. 757. Where the duty to repair rests upon the city, and it, in contracting for the paving of a street, incorporates in the contract a clause requiring the contractor to keep the street in repair for a stated period, the parties assessed to pay for paving can have the total cost abated by a reasonable sum for probable repairs. They are liable only for cost of construction. Robertson *v.* Omaha, 55 Neb. 718, 76 N. W. 442, 41 L. R. A. 531; State *v.* Trenton, 61 N. J. L. 599, 40 Atl. 575, 44 L. R. A. 540. Upon power of city to bind contractor to repair pavement which he makes, see Portland *v.* Portland Bit. Paving & I. Co.,

made upon property, with some reference to the supposed benefits which the property would receive therefrom. Instead, therefore, of making the assessment include all the property of the municipal organization in which the improvement is made, a new and special taxing district is created, whose bounds are confined to the limits within which property receives a special and peculiar benefit, in consequence of the improvement. Even within this district the assessment is sometimes made by some other standard than that of value; (*a*) and it is evident that if it be just to create the taxing district with reference to special benefits, it would

33 Oreg. 307, 52 Pac. 28, 44 L. R. A. 527, and note, 72 Am. St. 713. Expense of maintaining and repairing boulevards and pleasure ways cannot be met by special assessments, as the work is not a local improvement. Crane *v.* West Chicago P. Comm'rs, 153 Ill. 348, 38 N. E. 943, 26 L. R. A. 311. Nor is that of sprinkling streets. Chicago *v.* Blair, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412, and note, citing cases pro and con. But expense of sweeping streets may be specially assessed. Reinken *v.* Fuehring, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624, 30 Am. St. 247.]

(*a*) [The determination of this standard of assessment is a matter for the discretion of the legislature, and the judiciary will inquire into its fitness only when the action of the legislature is clearly unreasonable. Fallbrook Irri. Dist. *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56. See also Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187; in which case it is held that the cost of an improvement, which consisted in the condemnation of property for a street and the opening of the same, could not all be assessed against the person whose property was so taken, he being the sole abutter. This case has been used as authority for the doctrine that there must be an opportunity for particular inquiry for special benefits in each case, and an assessment made proportionate to such benefits so ascertained, rather than an assessment by general rule without an opportunity to urge special or peculiar benefits to particular abutting or adjacent property, but in French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625, aff. 158 Mo. 534, 58 S. W. 934, the court repudiates this construction of Norwood *v.* Baker, and holds that in that case at least such an assessment was lawful. Vigorous dissenting opinions were rendered in both these cases. French *v.* Barber Asphalt, &c. Co. was followed by Wight *v.* Davidson *et al.*, 181 U. S. 371, 21 Sup. Ct. Rep. 616, rev. 16 App. D. C. 371; Town of Tonawanda *et al. v.* Lyon, 181 U. S. 389, 21 Sup. Ct. Rep. 609, rev. the Circuit Court of United States for Northern Dist. of New York; Cass Farm Co. Ltd. *v.* Detroit, 181 U. S. 395, 21 Sup. Ct. Rep. 644, 645, aff. 124 Mich. 433, 83 N. W. 108; Detroit *v.* Parker, 181 U. S. 398, 21 Sup. Ct. Rep. 624, 645, rev. 103 Fed. Rep. 357; Farrell *v.* West Chicago Park Commissioners, 181 U. S. 403, 21 Sup. Ct. Rep. 609, 645, aff. 182 Ill. 250, 55 N. E. 325; Shumate *v.* Heman, 181 U. S. 402, 21 Sup. Ct. Rep. 615, aff. 156 Mo. 534, 57 S. W. 559; Wormley *v.* District of Columbia and Allen *v.* District of Columbia, reported together in 181 U. S. 402, 21 Sup. Ct. Rep. 609, and aff. 15 App. D. C. 58 and 70. The litigation in these cases seems to have been founded on the opinion in Norwood *v.* Baker before it was construed in French *v.* Barber, &c. Co. See also Smith *v.* Worcester, — Mass. —, 65 N. E. 40. A sewer assessment cannot be made in proportion to frontage, regardless of benefits. Dexter *v.* Boston, 176 Mass. 247, 57 N. E. 379, 79 Am. St. 306. An assessment for public improvements is limited to the value of the improvements to the property assessed. Walsh *v.* Barron, 61 Ohio St. 15, 55 N. E. 164; State *v.* Newark, 37 N. J. L. 415. The question of the basis upon which such assessments shall be laid is a legislative one, subject to review by the courts for unreasonableness only. Spencer *v.* Merchant, 100 N. Y. 585, 3 N. E. 682. See this case in 125 U. S. 345, 8 Sup. Ct. Rep. 921.]

be equally just and proper to make the taxation within the district have reference to the benefit each parcel of property receives, rather than to its relative value. The opening or paving of a street may increase the value of all property upon or near it; and it may be just that all such property should contribute to the expense of the improvement: but it by no means follows that each parcel of the property will receive from the improvement a benefit in proportion to the previous value. One lot upon the street may be greatly increased in value, another at a little distance may be but slightly benefited; and if no constitutional provision interferes, there is consequently abundant reason why the tax levied within the taxing district should have reference, not to value, but to benefit. (*a*)

It has been objected, however, to taxation upon this basis, that inasmuch as the district upon which the burden is imposed is compelled to make the improvement for the benefit of the general public, it is, to the extent of the tax levied, an appropriation of private property for the public use; and as the persons taxed, as a part of the public, would be entitled of right to the enjoyment of the improvement when made, such right of enjoyment could not be treated as compensation for the exaction which is made of them exclusively, and such exaction would therefore be opposed to those constitutional principles which declare the inviolability of private property. But those principles have no reference to the taking of property under legitimate taxation. When the Constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain. Taxation and eminent domain indeed rest substantially on the same foundation, as each implies the taking of private property for the public use on compensation made; but the compensation is different in the two cases. When taxation takes money for the public use, the taxpayer receives, or is supposed

(*a*) [That an elevated railway operating above a street and having stairways leading from the street to its stations may be benefited by paving the street, see Lake St. El. R. Co. *v.* Chicago, 183 Ill. 75, 55 N. E. 721, 47 L. R. A. 624. But a right of way of a surface railroad cannot. Detroit G. H. & M. R. Co. *v.* Grand Rapids, 106 Mich. 13, 63 N. W. 1007, 28 L. R. A. 793, 58 Am. St 466; Chicago, M. & S. P. R. Co. *v.* Milwaukee, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249, and see note pro and con in L. R. A.; Chicago, R. I. & P. R. Co. *v.* Ottumwa, 112 Iowa, 300, 83 N. W. 1074, 51 L. R A. 763; *contra*, Kuehner *v.* Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774. But in California it was held that local improvement districts for the construction of irrigation works might be created at will by the legislature, that assessments to pay for such works might be levied upon property according to its value, and that the question of benefit was immaterial. *Re* Bonds Madera Irrigation District, 92 Cal. 296, 341, 28 Pac. 272, 675, 14 L. R. A. 755, and note.]

to receive, his just compensation in the protection which government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax;[1] and these benefits amply support the individual burden.

But if these special local levies are *taxation*, do they come under the general provisions on the subject of taxation to be found in our State constitutions? The Constitution of Michigan directs that "the legislature shall provide an uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied upon such property as shall be prescribed by law;"[2] and again: "All assessments hereafter authorized shall be on property at its cash value."[3] In the construction of these provisions the first has been regarded as confiding to the discretion of the legislature the establishment of the rule of uniformity by which taxation was to be imposed; and the second as having reference to the annual valuation of property for the purposes of taxation, which it is customary to make in that State, and not to the actual levy of a tax. A local tax, therefore, levied in the city of Detroit, to meet the expense of paving a public street, and which was levied, not in proportion to the value of property, but according to an arbitrary scale of supposed benefit, has been held not invalid under the constitutional provision.[4]

So the Constitution of Illinois declares that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise,"[5] &c. The charter of the city of Peoria provided that, when a public street was opened or improved, commissioners should be appointed by the county court to assess upon the property benefited the expense of the improvement in proportion to the benefit. This provision was held to be constitutional, on the ground that assessments of this character were not such taxation as was contemplated by

[1] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560; Scovill *v.* Cleveland, 1 Ohio St. 126; Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159; Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255; White *v.* People, 94 Ill. 604.

[2] Art. 14, § 11.

[3] Art. 14, § 12.

[4] Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560. And see Woodbridge *v.* Detroit, 8 Mich. 274; State *v.* Stout, 61 Ind. 143; Taylor *v.* Boyd, 63 Tex. 533; [Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. Rep. 966.]

[5] Art. 9, § 2.

the general terms which the constitution employed.[1] Like decisions have been made in other States in regard to similar assessments.[2]

[1] City of Peoria *v.* Kidder, 26 Ill. 351. Northern Liberties *v.* St. John's Church, 13 Pa. St. 103; McGehee *v.* Mathis, 21 Ark. 40; Goodrich *v.* Winchester, &c. Turnpike Co., 26 Ind. 119; Emery *v.* Gas Co., 28 Cal. 345; Palmer *v.* Stumph, 29 Ind. 329; Dorgan *v.* Boston, 12 Allen, 223; Anderson *v.* Kerns Draining Co., 14 Ind. 199; Macon *v.* Patty, 57 Miss. 378, 34 Am. Rep. 451; Cain *v.* Commissioners, 86 N. C. 8; Norfolk *v.* Ellis, 26 Gratt. 224; Wilkins *v.* Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427; Vasser *v.* George, 47 Miss. 713; Roundtree *v.* Galveston, 42 Tex. 612; Richmond & A. R. R. Co. *v.* Lynchburg, 81 Va. 473. For a special case, see Cincinnati Gas, &c. Co. *v.* State, 18 Ohio St. 237. In Alabama a decision has been made the other way. The constitution provides that "all taxes levied on property in this State shall be assessed in exact proportion to the value of such property; *provided*, *however*, that the General Assembly may levy a poll-tax not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public-school fund." This, it was decided, would preclude the levy of a local assessment for the improvement of a street by the foot front. Mayor of Mobile *v.* Dargan, 45 Ala. 310. In Colorado only improvements within the domain of the police power can be paid for by special assessment. Expense of sewers may be, but not that of gutters and curbs. Pueblo *v.* Robinson, 12 Col. 593, 21 Pac. 899; Wilson *v.* Chilcott, 12 Col. 600, 21 Pac. 901. [New sidewalks and drains necessitated by a change in the established grade are for a public or municipal purpose, and the cost must be paid out of the general fund. It cannot be assessed upon owners of abutting property. Mauldin *v.* Greenville, 53 S. C. 285, 31 S. E. 252, 43 L. R. A. 101, mod. s. c. 42 S. C. 293, 20 S. E. 842, 27 L. R. A. 284. But the cost of watering a street may be. Sears *v.* Board of Aldermen, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834.] The cases of Weeks Milwaukee, 10 Wis. 242, and Lunsden *v.* Cross, 10 Wis. 282, recognize the fact that these local burdens are generally imposed under the name of *assessments* instead of

[2] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Matter of Mayor, &c. of New York, 11 Johns. 77; Sharp *v.* Spier, 4 Hill, 76; Livingston *v.* Mayor, &c. of New York, 8 Wend 85; Matter of Furman St., 17 Wend. 649; Louisville *v.* Hyatt, 2 B. Monr. 177, 36 Am. Dec. 594; Nichols *v.* Bridgeport, 23 Conn. 189; Schenley *v.* City of Alleghany, 25 Pa. St. 128; Wray *v.* Pittsburg, 46 Pa. St. 365; Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615; Washington Avenue, 69 Pa. St. 353, 8 Am. Rep. 255; McBride *v.* Chicago, 22 Ill. 574; Chicago *v.* Larned, 34 Ill. 203; Murphy *v.* People, 120 Ill. 234, 11 N. E. 20[illegible]; Springfield *v.* Green, 120 Ill. 269, 11 N. E. 261; City of Lexington *v.* McQuillan's Heirs, 9 Dana, 513; Barnes *v.* Atchison, 2 Kan. 454; Hines *v.* Leavenworth, 3 Kan. 186; St. Joseph *v.* O'Donoghue, 31 Mo. 345; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; St. Joseph *v.* Anthony, 30 Mo. 537; Farrar *v.* St. Louis, 80 Mo. 379; Burnet *v.* Sacramento, 12 Cal. 76; Yeatman *v.* Crandell, 11 La. Ann. 220; Wallace *v.* Shelton, 14 La. Ann. 498; Richardson *v.* Morgan, 16 La. Ann. 429; Hill *v.* Higdon, 5 Ohio St. 243; Marian *v.* Epler, 5 Ohio St. 250; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Northern Ind. R. R. Co. *v.* Connelly, 10 Ohio St. 159; Baker *v.* Cincinnati, 11 Ohio St. 534; Maloy *v.* Marietta, 11 Ohio St. 636; State *v.* Dean, 23 N. J. 335; State *v.* Mayor, &c. of Jersey City, 24 N. J. 662; Bon[illegible] *v.* Kenosha, 17 Wis. 284; City of Fairfield *v.* Rateliff, 20 Iowa, 396; Municipality No. 2 *v.* White, 9 La. Ann. 447; Cumming *v.* Police Jury, 9 La. Ann. 503;

But whatever may be the basis of the taxation, the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes. The difference is only in the character of the uniformity, and in the basis on which it is established.[1] But to render taxation uniform in any case, two things are essential. The first of these

taxes, and that therefore they are not covered by the general provisions in the constitution of the State on the subject of taxation. And see Bond *v.* Kenosha, 17 Wis. 284; Hale *v.* Kenosha, 29 Wis. 599. [And the cost of a local improvement may not only be assessed in proportion to benefits, but the cost of maintenance may also be so assessed. Carson *v.* Sewerage Comm'rs of Brockton, 175 Mass. 242, 56 N. E. 1, 48 L. R. A. 277, aff. in 182 U. S. 398, 21 Sup. Ct. Rep. 860. But where lands abutting upon a portion of street amounting to a cul-de-sac have been assessed for its construction in proportion to benefits, they cannot be again assessed for the extension of the portion first constructed. *Re* Orkney Street, 194 Pa. 425, 45 Atl. 314, 48 L. R. A. 274. In Tennessee, levee improvements must be assessed upon property in proportion to its value. Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.] An exemption of church property from taxation will not preclude its being assessed for improving streets in front of it. See *post*, p. 740, note. [That exemptions from taxation do not exempt from special assessment for local improvements, see Bd. of Improvement *v.* School Dist., 56 Ark. 354, 19 S. W. 969, 16 L. R. A. 418; Zabel *v.* Louisville B. O. Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668; Atlanta *v.* First P. Church, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852, and note; Home, &c. *v.* Wilkinsburg, 131 Pa. 109, 18 Atl. 937, 6 L. R. A. 531; Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155, and note; note to 4 L. R. A. 171.]

[1] In the case of assessments which are to be made on the basis of benefits, provision is usually made for a hearing. As to the right to this, see p. 617, note. [Requirement that tax upon personal property be paid at time of assessment with provision made for hearing concerning value, &c., and refund of excess, does not violate uniformity requirement. Tax upon real estate is secured by lien, and collection may safely be deferred longer than in case of personal property. Rode *v.* Siebe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342. Uniformity clause does not apply to license taxes. State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415; Denver City R. Co. *v.* Denver, 21 Col. 350, 41 Pac. 826, 29 L. R. A. 608. Nor does it require that the *mode* of assessment be uniform. Commonwealth *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110. But where property is to be assessed at its "cash value," and property taxes are required to be uniform and equal, an ordinance levying an ad valorem tax upon realty and a license tax upon personalty is bad in respect to the license tax. Levi *v.* Louisville, 97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480. Uniformity is not violated by a statute allowing deduction of debts from credits. Florer *v.* Sheridan, 137 Ind. 28, 36 N. E. 365, 23 L. R. A. 278, and note. But it is violated by a statute giving a State revenue agent power to assess at discretion and without notice, property which has escaped assessment in prior years, the owner being permitted to be heard only in defence of suit to collect taxes upon such assessment. Adams *v.* Tonella, 70 Miss. 701, 14 So. 17, 22 L. R. A. 346. That lack of uniformity may arise from administration in a partial and oppressive way, see Hoefling *v.* San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608. An arbitrary tax of $1 per mile upon railroads is bad. Pittsburgh, C. & St. L. R. Co. *v.* State, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380. Where taxation is required to be "ad valorem on all property subject to be taxed," the rate must be uniform. Savannah *v.* Weed, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270, and note. For other cases on question of uniformity, see Wasson *v.* Wayne Co. Comm'rs, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795.]

is that each taxing district should confine itself to the objects of taxation within its limits. Otherwise there is, or may be, duplicate taxation, and of course inequality. Assessments upon real estate not lying within the taxing districts would be void,[1] and assessments for personal property made against persons not residing in the district would also be void, unless made with reference to the actual presence of the property in such district.[2]

[1] But sometimes when a parcel of real estate lies partly in two districts, authority is given by law to assess the whole in one of these districts, and the whole parcel may then be considered as having been embraced within the district where taxed, by an enlargement of the district bounds to include it. Saunders *v.* Springstein, 4 Wend. 429. It is as competent to provide for the repairing of a street by special assessment on adjoining land, as for the original paving. See Willard *v.* Presbury, 14 Wall. 676; Gurnee *v.* Chicago, 40 Ill. 165; Bradley *v.* McAtee, 7 Bush, 667; Sheley *v.* Detroit, 45 Mich. 431, 8 N. W. 52; Blount *v.* Janesville, 31 Wis. 648; Municipality *v.* Dunn, 10 La. Ann. 57; Jeliff *v.* Newark, 49 N. J. L. 239, 12 Atl. 770; Estes *v.* Owen, 90 Mo. 113, 2 S. W. 133. *Contra*, Hammett *v.* Philadelphia, 65 Pa. St. 146; Orphan Asylum's Appeal, 111 Pa. St. 135, 3 Atl. 217; Williamsport *v.* Beck, 128 Pa. St. 147, 18 Atl. 329. The expense of sewer repairs properly payable by a city cannot be imposed on adjoining owners by calling the work street improvement. Clay *v.* Grand Rapids, 60 Mich. 451, 27 N. W. 596. [Power to impose licenses upon occupations authorizes a license tax upon a non-resident who carries on his occupation in the city. Petersburg *v.* Cocke, 94 Va. 244, 26 S. E. 576, 36 L. R. A. 432. Real estate mortgages may be made taxable at the situs of the realty covered by them. Detroit Com. Council *v.* Rentz, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59, and note upon taxation of mortgages. Assessment is wholly void if it covers property partly within and partly without the district, unless the parts can be distinguished. Sioux City B. Co. *v.* Dakota County, 61 Neb. 75, 84 N. W. 607.]

[2] People *v.* Supervisors of Chenango, 11 N. Y. 563; Mygatt *v.* Washburn, 15 N. Y. 316; Brown *v.* Smith, 24 Barb. 419; Hartland *v.* Church, 47 Me. 169; Lessee of Hughey *v.* Horrell, 2 Ohio, 231. [Held that under this principle credits cannot be taxed to the creditor at the residence of the debtor. Liverpool & L. & G. Ins. Co. *v.* Bd. of Assessors, 51 La. Ann. 1028, 25 So. 970, 45 L. R. A. 524; but see in this connection cases cited in note a, p. 696. Moneys and securities held in the State for investment, reinvestment, and sale are taxable against the owners where so held. Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 37 L. R. A. 384. And so are unpaid legacies and distributive shares taxable within the State, even though the beneficiaries are non-resident. Schmidt *v.* Failey, 148 Ind. 150, 47 N. E. 326, 37 L. R. A. 442. A vessel engaged in commerce is taxable only at her home port if she is duly registered there, even though she is used practically all of the time within the limits of another State than that of her home port. Johnson *v.* De Bary-Baya M. Line, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518; upon situs of ships for purpose of taxation, see note to this case in L. R. A. Water-power is deemed for purposes of taxation to have its situs where it is used. Union W. P. Co. *v.* Auburn, 90 Me. 60, 37 Atl. 331, 37 L. R. A. 651; but see Amoskeag M'f'g Co. *v.* Concord, 66 N. H. 592, 31 Atl. 241, 32 L. R. A. 621, holding that water power is appurtenant to lands upon which it may be used. Ice may be taxed where stored, though it is to be used elsewhere. Winkley *v.* Newton, 67 N. H. 59, 36 Atl. 610, 35 L. R. A. 756. Average amount of livestock in the hands of cattle-dealers may be taxed, although brought from other States and usually retained by dealers for only one day. Myers *v.* Baltimore Co. Comm'rs, 83 Md. 385, 35 Atl. 144, 34 L. R. A. 309. So with bonds of

In Wells *v.* City of Weston,[1] the Supreme Court of Missouri deny the right of the legislature to subject property located in one taxing district to assessment in another, upon the express ground that it is in substance the arbitrary taxation of the property of one class of citizens for the benefit of another class. The case was one where the legislature sought to subject real estate lying outside the limits of a city to taxation for city purposes, on the theory that it received some benefit from the city government, and ought to contribute to its support. In Kentucky[2] and Iowa[3] decisions have been made which, while affirming the same principle as the case above cited, go still further, and declare that it is not competent for the legislature to increase the limits of a city, in order to include therein farming lands, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, where the purpose is merely to increase the city revenue by taxation. The courts admit that

foreign corporation when kept in safe deposit vault within the State. *Re* Whiting's Estate, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232. And with moneys of non-resident. *Re* Houdayer's Estate, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235. So with stock of domestic corporation held outside of State by a non-resident, but not with bonds. *Re* Bronson's Estate, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238. So with credits in hands of resident trustee holding legal title. Detroit *v.* Lewis, 109 Mich. 155, 66 N. W. 958, 32 L. R. A. 439. Real estate mortgages owned and controlled by non-resident cannot be taxed. Hoiland *v.* Comm'rs of Silver Bow Co., 15 Mont. 460, 39 Pac. 575, 27 L. R. A. 797. Stock in trade of a partnership is located for purposes of taxation in the city where it actually is for purpose of sale, without regard to residence of owners. Hopkins *v.* Baker Bros., 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477, and note on partnership property tax. In Maine, water pipes are considered real-estate taxable in the district in which they are actually situated. Paris *v.* Norway Water Co., 85 Me. 330, 27 Atl. 143, 21 L. R. A. 525; but in Illinois, Iowa, and Wisconsin it is otherwise, see note to 21 L. R. A. 525, and see also Shelbyville Water Co. *v.* People, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505; Oskaloosa Water Co. *v.* Bd. of Equalization, 84 Iowa, 407, 51 N. W. 18, 15 L. R. A. 296, and note; Fond du Lac Water Co. *v.* Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581. On situs of trust property, see Trustees of Richmond Co. Academy *v.* Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151, and note. As to where franchise is taxable, see Spring Valley Water-works *v.* Barber, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416; Yellow R. Imp. Co. *v.* Wood County, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92, and note. Negotiable promissory notes have situs with creditor. Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 720, and note on situs of notes and mortgages; Liverpool & L. & G. Ins. Co. *v.* Bd. of Assessors, 44 La. Ann. 760, 11 So. 91, 16 L. R. A. 56.]

[1] 22 Mo. 384. To the same effect is *In re* Flatbush, 60 N. Y. 398. Compare case of State Tax on Foreign Held Bonds, 17 Wall. 300; St. Charles *v.* Nolle, 51 Mo. 122, 11 Am. Rep. 440; People *v.* Townsend, 56 Cal. 633; State Treasurer *v.* Auditor-General, 46 Mich. 224, 9 N. W. 258. The case of Langhorne *v.* Robinson, 20 Gratt. 661, is *contra*.

[2] City of Covington *v.* Southgate, 15 B. Monr. 491; Arbegust *v.* Louisville, 2 Bush, 271; Swift *v.* Newport, 7 Bush, 37. [But the mere fact that the land is not yet plotted is not sufficient to exempt it. Briggs *v.* Russelville, 99 Ky. 515, 36 S. W. 558, 34 L. R. A. 193.]

[3] Morford *v.* Unger, 8 Iowa, 82.

the extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of the taxing power, but they declare that an indefinite or unreasonable extension, so as to embrace lands or farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate as well as a difficult duty for the judiciary to interpose, the court had no doubt but strictly there are limits beyond which the legislative discretion cannot go. "It is not every case of injustice or oppression which may be reached; and it is not every case which will authorize a judicial tribunal to inquire into the minute operation of laws imposing taxes, or defining the boundaries of local jurisdictions. The extension of the limits of the local authority may in some cases be greater than is necessary to include the adjacent population, or territory laid out into city lots, without a case being presented in which the courts would be called upon to apply a nice and exact scrutiny as to its practical operation. It must be a case of flagrant injustice and palpable wrong, amounting to the taking of private property without such compensation in return as the taxpayer is at liberty to consider a fair equivalent for the tax." This decision has been subsequently recognized and followed as authority, in the last-named State.[1]

[1] Langworthy *v.* Dubuque, 13 Iowa, 86; Fulton *v.* Davenport, 17 Iowa, 404; Buell *v.* Ball, 20 Iowa, 282. These cases were cited and followed in Bradshaw *v.* Omaha, 1 Neb. 16. These cases, however, do not hold the legislative act which enlarges the city limits to be absolutely void, but only hold that they will limit the exercise of the taxing power as nearly as practicable to the line where the extension of the boundaries ceases to be beneficial to the proprietor in a municipal point of view. For this purpose they enter into an inquiry of fact, whether the lands in question, in view of their relative position to the growing and improved parts of the town, and partaking more or less of the benefits of municipal government, are proper subjects of municipal taxation; and if not, they enjoin the collection of such taxes. It would seem as if there must be great practical difficulties — if not some of principle — in making this disposition of such a case. They have nevertheless been followed repeatedly in Iowa. Davis *v.* Dubuque, 20 Iowa, 458; Deeds *v.* Sanborn, 26 Iowa, 419; Durant *v.* Kauffman, 34 Iowa, 194. [But such exemption does not cover lands held for speculative purposes and only incidentally or temporarily used for agriculture. Farwell *v.* Des Moines Brick Mfg. Co., 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63. Where the statute permits the annexation of plotted sections and "land adjacent thereto," the adjacent land must be somewhat suburban in character. State *v.* Minnetonka, 57 Minn. 526, 59 N. W. 972, 25 L. R. A. 755, and note. But some allowance may be made for prospective growth. Ferguson *v.* Snohomish, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795. See also Vestal *v.* Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778.] There are decisions adverse to these. See Stiltz *v.* Indianapolis, 55 Ind. 515; Martin *v.* Dix, 52 Miss. 53, 24 Am. Rep. 661; Giboney *v.* Cape Girardeau, 58 Mo. 141; New Orleans *v.* Cazelear, 27 La. Ann. 156; [Kimball *v.* Grantsville City, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628, overr. Kaysville

The second essential is that there should be uniformity in the manner of the assessment, and approximate equality in the amount of exactions within the district;[1] and to this end that all the objects of taxation within the district should be embraced. The correctness of this principle will be conceded, but whether in practice it has been applied or not, it may not always be easy to determine.

"With the single exception of specific taxes," says *Christiancy*, J., in Woodbridge *v.* Detroit,[2] "the terms 'tax' and 'assessment' both, I think, when applied to property, and especially to lands, always include the idea of some ratio or rule of apportionment, so that, of the whole sum to be raised, the part paid by one

City *v.* Ellison, 18 Utah, 163, 55 Pac. 386; 43 L. R. A. 81.] Compare Weeks *v.* Milwaukee, 10 Wis. 242; Kelly *v.* Pittsburgh, 85 Pa. St. 170; Hewitt's Appeal, 88 Pa. St. 55; Stoner *v.* Flournoy, 28 La. Ann. 850; Norris *v.* Waco, 57 Tex. 635; Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364; [State *v.* Eidson, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.] That the legislature cannot annex to a village, territory not contiguous for the purpose of increasing its revenues, see Smith *v.* Sherry, 50 Wis. 210, 6 N. W. 561. [The Federal courts will not intervene to correct any purely arbitrary action of the State authorities in respect to the annexation of territory to municipalities. Forsyth *v.* Hammond, 166 U. S. 506, 17 Sup. Ct. Rep. 665. Upon municipal taxation of rural lands, see Briggs *v.* Russellville, 99 Ky. 515, 36 S. W. 558, 34 L. R. A. 193, and note. Legislature cannot annex non-contiguous lands. Denver *v.* Coulehan, 20 Col. 471, 39 Pac. 425, 27 L. R. A. 751. Upon power of legislature to annex territory to municipalities, see State *v.* Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737, and notes; also a valuable case, Vestal *v.* Little Rock, 51 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778, and note.]

[1] See Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184; State *v.* Dist. Court, 33 Minn. 235, 22 N. W. 625; Warren *v.* Chicago, 118 Ill. 329, 11 N. E. 218. Where an assessment is to be made by benefits, property owners have an absolute right to be heard, and a law for making it without provision for a hearing is void. Stuart *v.* Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Baltimore *v.* Scharf, 54 Md. 499; Davidson *v.* New Orleans, 96 U. S. 97; Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921; Campbell *v.* Dwiggins, 83 Ind. 473; Gilmore *v.* Hentig, 33 Kan. 156, 5 Pac. 781; Brown *v.* Denver, 7 Col. 305, 3 Pac. 455; Boorman *v.* Santa Barbara, 65 Cal. 313, 4 Pac. 31; Gatch *v.* Des Moines, 63 Iowa, 718, 18 N. W. 310; Trustees *v.* Davenport, 65 Iowa, 633, 22 N. W. 904; [Paulsen *v.* Portland, 149 U. S. 30, 13 Sup. Ct. Rep. 750.] See Waples, Proceedings in Rem, 64; *ante*, 711, note. *Contra*, Baltimore *v.* Johns Hopkins Hosp., 56 Md. 1; Cleveland *v.* Tripp, 13 R. I. 50; Davis *v.* Lynchburg, 84 Va. 861, 6 S. E. 230. Notice is unnecessary if only a mathematical calculation is involved. Amery *v.* Keokuk, 72 Iowa, 701, 30 N. W. 780; [and for the fixing of the rate of charge per 1000 gallons of sewerage discharged into the city sewer, no hearing is necessary. Carson *v.* Sewerage Comm'rs of Brockton, 175 Mass. 242, 56 N. E. 1, 48 L. R. A. 277, aff. 182 U. S. 398, 21 Sup. Ct. Rep. 860.] If an opportunity for a hearing is given at some step of the proceedings it is enough; as in judicial proceedings to enforce the assessment Hagar *v.* Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. Rep. 663; [Paulsen *v.* Portland, 149 U. S. 30, 13 Sup. Ct. Rep. 750, aff. 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673. Unless expressly authorized, a municipality cannot make exemptions from taxation. McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.]

[2] 8 Mich. 274, 301. See also Chicago *v.* Lerned, 34 Ill. 203; Creote *v.* Chicago, 56 Ill. 422.

piece of property shall bear some known relation to, or be affected by, that paid by another. Thus, if one hundred dollars are to be raised from tracts A, B, and C, the amount paid by A will reduce by so much that to be paid by B and C; and so of the others. In the case of specific taxes, as well as duties and imposts, though the amount paid by one is not affected by that paid by another, yet there is a known and fixed relation of one to the other, a uniform rate by which it is imposed upon the whole species or class of property or persons to which the specific tax applies; and this is so of duties and imposts, whether specific or *ad valorem*. To compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to lay a forced contribution, not a tax, duty, or impost, within the sense of these terms, as applied to the exercise of powers by any enlightened or responsible government."

In the case of Knowlton *v.* Supervisors of Rock County,[1] an important and interesting question arose, involving the very point now under discussion. The Constitution of Wisconsin provides that "the rule of taxation shall be uniform," which, if we are correct in what we have already stated, is no more than an affirmance of a settled principle of constitutional law. The city of Janesville included within its territorial limits, not only the land embraced within the recorded plat of the village of Janesville and its additions, but also a large quantity of the adjacent farming or agricultural lands. Conceiving the owners of these lands to be greatly and unequally burdened by taxation for the support of the city government, the legislature passed an act declaring that

[1] 9 Wis. 410. A tax case of much more than ordinary interest and importance is that of San Mateo County *v.* The Southern Pacific R. R. Co., 13 Fed. Rep. 722, Justice *Field* delivering an elaborate opinion, in the conclusions of which Judge *Sawyer* concurred. The suit was brought for the recovery of a tax assessed upon the franchises, roadway, road-bed, rails, and rolling-stock of the defendant. By the Constitution of the State the real estate of private individuals is valued for taxation, with a deduction of all mortgages and other liens, but the value of the property of railroads is to be assessed without any such deduction. It was held by these eminent judges that this discrimination in taxation between the property of natural persons and railroad corporations was an unwarrantable departure from the rule of equality and uniformity in taxation; that the provision which establishes the discrimination is not due process of law, and is therefore opposed to the fourteenth amendment to the Constitution of the United States, which is equally effectual to protect against an unwarranted exercise of the taxing power as against any other unlawful deprivation of property. It was also affirmed that the State has no power, by its constitution or otherwise, to withdraw corporations from the guaranties of the Federal Constitution.

"in no case shall the real and personal property within the territorial limits of said city, and not included within the territorial limits of the recorded plat of the village of Janesville, or of any additions to said village, which may be used, occupied, or reserved for agricultural or horticultural purposes, be subject to an annual tax to defray the current expenses of said city, exceeding one-half of one per cent; nor for the repair and building of roads and bridges, and the support of the poor, more than one-half as much on each dollar's valuation shall be levied for such purposes as on the property within such recorded plats, nor shall the same be subject to any tax for any of the purposes mentioned in § 3 of c. 5 of [the city charter]; nor shall the said farming or gardening land be subject to any tax, other than before mentioned, for any city purpose whatsoever." Under the charter the property of the city was liable to an annual tax of one per centum to defray the current expenses of the city; and also an additional tax of such sum as the common council might deem necessary for the repair and building of roads and bridges, and for the support of the poor. Thus it will be perceived that the legislature within the same taxing district, — if the whole city is to be considered one district only, — undertook to provide that a portion of the property should be taxed at one rate in proportion to value, and another portion at a much lower rate; while from taxation for certain proper local purposes the latter class was exempted altogether.

"It was contended in argument," say the court, "that as those provisions fixed one uniform rate without the recorded plats, and another within them, thus taxing all the property without alike, and all within alike, they do not infringe the constitution. In other words, that for the purpose of taxation, the legislature have the right arbitrarily to divide up and classify the property of the citizens, and, having done so, they do not violate the constitutional rule of uniformity, provided all the property within a given class is rated alike.

"The answer to this argument is, that it creates different *rules* of taxation, to the number of which there is no limit, except that fixed by legislative discretion, while the constitution establishes but one fixed, unbending, uniform rule upon the subject. It is believed that if the legislature can, by classification, thus arbitrarily, and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without a recorded plat, they can also by the same means discriminate between lands used for one purpose and those used for another, such as lands used for

growing wheat and those used for growing corn, or any other crop; meadow-lands and pasture-lands, cultivated and uncultivated lands; or they can classify by the description, such as odd-numbered lots and blocks and even-numbered ones, or odd and even-numbered sections. Personal property can be classified by its character, use, or description, or, as in the present case, by its location, and thus the rules of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions, and locations of real and personal property. We do not see why the system may not be carried further, and the classification be made by the character, trade, profession, or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature, 'You shall not discriminate between single individuals or corporations; but you may divide the citizens up into different classes, as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class, and against another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere, at least outside of those who are the recipients of its favor. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it." [1]

The principle to be deduced from the Iowa and Wisconsin cases, assuming that they do not in any degree conflict, seems to

[1] Per *Dixon*, Ch. J., 9 Wis. 410, 421. Besides the other cases referred to, see, on this same general subject, Lin Sing *v.* Washburn, 20 Cal. 534; State *v.* Merchants' Ins. Co., 12 La. Ann. 802; Adams *v.* Somerville, 2 Head, 363; McComb *v.* Bell, 2 Minn. 295; Attorney-General *v.* Winnebago Lake & Fox River P. R. Co., 11 Wis. 35; Weeks *v.* Milwaukee, 10 Wis. 242; O'Kane *v.* Treat, 25 Ill. 557; Philadelphia Association, &c. *v.* Wood, 39 Pa. 73; Sacramento *v.* Crocker, 16 Cal. 119. There was a provision in the charter of Covington that a street might be paved with the Nicholson pavement at the expense of the adjoining owners, when the owners of the larger part of the frontage should petition therefor. An amendatory act authorized it as to a portion of a certain street without such a petition; thus permitting a special improvement on that street, at the expense of the owners of adjoining lots, on a different principle from that adopted for the city generally. In Howell *v.* Bristol, 8 Bush, 493, this amendment was held inconsistent with the fundamental principles of taxation, and consequently void.

be this: The legislature cannot arbitrarily include within the limits of a village, borough, or city, property and persons not properly chargeable with its burdens, and for the sole purpose of increasing the corporate revenues by the exaction of the taxes. But whenever the corporate boundaries are established, it is to be understood that whatever property is included within those limits has been thus included by the legislature, because it justly belongs there, as being within the circuit which is benefited by the local government, and which ought consequently to contribute to its burdens. The legislature cannot, therefore, after having already, by including the property within the corporation, declared its opinion that such property should contribute to the local government, immediately turn about and establish a basis of taxation which assumes that the property is not in fact urban property at all, but is agricultural lands, and should be assessed accordingly. The rule of apportionment must be uniform throughout the taxing district, applicable to all alike; but the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation, that the burden must be borne by those upon whom it justly rests. The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all. It must be manifest, however, that the effect of the decisions in the States last referred to is to establish judicially two or more districts within a municipality where the legislature has established one only; and as this is plainly a legislative function, it would seem that the legislature must be at least as competent to establish them directly as any court can be to do the same thing indirectly. And in Missouri, Kentucky, and Pennsylvania, no difficulty has been found in sustaining legislation which discriminated in taxation between "rural" lands and others within the same city.[1]

This rule of uniformity has perhaps been found most difficult of

[1] Benoist *v.* St. Louis, 19 Mo. 179; Henderson *v.* Lambert, 8 Bush, 607; Parkland *v.* Gains, 88 Ky. 562, 11 S. W. 649; Serrill *v.* Philadelphia, 38 Pa. St. 355. And see Gillette *v.* Hartford, 31 Conn. 351. In Missouri such land, though taxed at a different rate, must be valued like other land. State *v.* O'Brien, 89 Mo. 631, 1 S. W. 763. In Utah it is denied that such land within the limits, but outside the city as built, can be subjected to city taxes. Terr. *v.* Daniels, 6 Utah, 288, 22 Pac. 159. Agricultural land in tracts of ten acres or more brought within a city may be exempted from city taxes: Leicht *v.* Burlington, 73 Iowa, 29, 34 N. W. 494; if brought in after the passage of an act allowing it. Perkins *v.* Burlington, 77 Iowa, 553, 42 N. W. 441. Under Indiana statutes such land may not be taxed for general purposes above township rates, but is liable for special assessments. Dickerson *v.* Franklin, 112 Ind. 178, 13 N. E. 579.

application in regard to those cases of taxation which are commonly known under the head of assessments, and which are made either for local improvement and repair, or to prevent local causes resulting in the destruction of health or property. In those cases where it has been held that such assessments were not covered by the constitutional provision that taxation should be laid upon property in proportion to value, it has, nevertheless, been decided that the authority to make them must be referred to the taxing power, and not to the police power of the State, under which sidewalks have sometimes been ordered to be constructed. Apportionment of the burden was therefore essential, though it need not be made upon property in proportion to its value. But the question then arises: What shall be the rule of apportionment? Can a street be ordered graded and paved, and the expense assessed exclusively upon the property which, in the opinion of the assessors, shall be peculiarly benefited thereby, in proportion to such benefit? Or may a taxing district be created for the purpose, and the expense assessed in proportion to the area of the lots? Or may the street be made a taxing district, and the cost levied in proportion to the frontage? Or may each lot-owner be required to grade and pave in front of his lot? These are grave questions, and they have not been found of easy solution.

The case of The People *v.* The Mayor, &c. of Brooklyn,[1] is a leading case, holding that a statute authorizing a municipal corporation to grade and improve streets, and to assess the expense among the owners and occupants of lands benefited by the improvement, in proportion to the amount of such benefit, is a constitutional and valid law. The court in that case concede that taxation cannot be laid without apportionment, but hold that the basis of apportionment in these cases is left by the constitution with the legislature. The application of any one rule or principle of apportionment to all cases would be manifestly oppressive and unjust. Taxation is sometimes regulated by one principle, and sometimes by another; and very often it has been apportioned without reference to locality, or to the taxpayer's ability to contribute, or to any proportion between the burden and the benefit. "The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent of

[1] 4 N. Y. 419, 427; reversing same case, 6 Barb. 209.

its value, while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay, as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article, thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this State to the federal government there could have been no pretence for declaring them to be unconstitutional in State legislation.

"A property tax for the general purposes of the government, either of the State at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more. But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted, instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of this matter, being within the scope of its lawful power, is conclusive."

The reasoning of this case has been generally accepted as satisfactory, and followed in subsequent cases.[1]

[1] Scoville *v.* Cleveland, 1 Ohio St. 126; Hill *v.* Higdon, 5 Ohio St. 243; Marion *v.* Epler, 5 Ohio St. 250; Maloy *v.* Marietta, 11 Ohio St. 636; City of Peoria *v.* Kidder, 26 Ill. 351; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Garrett *v.* St. Louis, 25 Mo. 505; Ulrig *v.* St. Louis, 44 Mo. 458; Bradley *v.* McAtee, 7 Bush, 667, 3 Am. Rep. 309; Jones *v.* Boston, 104 Mass. 461; Sessions *v.* Crunkilton, 20 Ohio St. 349; State *v.* Fuller, 34 N. J. 227; Holton *v.* Milwaukee, 31 Wis. 27; McMasters *v.* Commonwealth, 3 Watts, 292; Allentown *v.* Henry, 73 Pa. St. 404; Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747; Livingston *v.* New York, 8 Wend. 85, 22 Am. Dec. 622; Wright *v.* Boston, 9 Cush. 233; Jones *v.* Boston, 104 Mass. 461; Nichols *v.* Bridgeport, 23 Conn. 189; Cone *v.* Hartford, 28 Conn. 363; Alexander *v.* Baltimore, 5 Gill, 383; Howard *v.* The Church, 18 Md. 451; Hoyt *v.* East Saginaw, 19 Mich. 39; Sheley *v.* Detroit, 45 Mich. 431, 8 N. W. 52; Burnett *v.* Sacramento, 12 Cal. 76; La Fayette *v.* Fowler, 34 Ind. 140. The right to assess by benefits has been denied in South Carolina. State *v.* Charleston, 12 Rich. 702. The legislation in Ohio on the subject has authorized the cities and villages, in opening and improving streets, to assess the expense either upon the lots abutting on

On the other hand, and on the like reasoning, it has been held equally competent to make the street a taxing district, and assess the expense of the improvement upon the lots in proportion to the frontage.[1] Here also is apportionment by a rule

the street in proportion to the street front, or upon the lands in proportion to their assessed value. In a case where the former mode was resorted to, and an assessment made upon property owned by the Northern Indiana Railroad Company for its corporate purposes, *Peck*, J., thus states and answers an objection to the validity of the tax: "But it is said that assessments, as distinguished from general taxation, rest solely upon the idea of *equivalents*,—a compensation proportioned to the special benefits derived from the improvement, and that, in the case at bar, the railroad company is not, and in the nature of things cannot be, in any degree benefited by the improvement. It is quite true that the right to impose such special taxes is based upon a presumed equivalent; but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot, or a percentage upon the assessed valuation, must be *uniform*, affecting all the owners and all the property abutting on the street alike. One rule cannot be applied to one owner, and a different rule to another owner. One could not be assessed ten per cent, another five, another three, and another left altogether unassessed because he was not in fact benefited. It is manifest that the actual benefits resulting from the improvement may be as various almost as the number of the owners, and the uses to which the property may be applied. No general rule, therefore, could be laid down which would do equal and exact justice to all. The legislature have not attempted so vain a thing, but have prescribed two different modes in which the assessment may be made, and left the city authorities free to adopt either. The mode adopted by the council becomes the statutory equivalent for the benefits conferred, although in fact the burden imposed may greatly preponderate. In such case, if no fraud intervene, and the assessment does not substantially exhaust the owner's interest in the land, his remedy would seem to be to procure, by a timely appeal to the city authorities, a reduction of the special assessment, and its imposition, in whole or in part, upon the public at large." Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159, 165. And see Howell *v.* Bristol, 8 Bush, 493; [Webster *v.* Fargo, 181 U. S. 394, 21 Sup. Ct. Rep. 623, aff. 9 N. D. 208, 82 N. W. 732; Ramsey County *v.* Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 53 L. R. A. 421.] It is competent to provide for assessing benefits upon the owner instead of the land. *In re* Centre St., 115 Pa. St. 217, 8 Atl. 56. [*Contra*, Ivanhoe *v.* Enterprise, 29 Oreg. 245, 45 Pac. 771, 35 L. R. A. 58, and see also note to this case in L. R. A.] As to repaving, see *ante*, 719, note. The legislative determination that certain land is benefited is conclusive. Only the question of apportionment remains open. Spencer *v.* Merchant, 125 U. S. 345, 8 Sup. Ct. Rep. 921; Pacific Bridge Co. *v.* Kirkham, 64 Cal. 519, 2 Pac. 409. The finding of benefits by a common council is conclusive unless palpably unjust. Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673; Little Rock *v.* Katzenstein, 52 Ark. 107, 12 S. W. 198: Pueblo *v.* Robinson, 12 Col. 593, 21 Pac. Rep. 899. In ordering a local assessment the common council may determine that the benefits to property within the district will equal the cost of the improvement. Cook *v.* Slocum, 27 Minn. 509, 8 N. W. 755. If a council has made an assessment district, a jury in apportioning benefits must impose some on each parcel in it. Rentz *v.* Detroit, 48 Mich. 544, 12 N. W. 694, 911. *Contra*, Kansas City *v.* Baird, 98 Mo. 215, 11 S. W. 243, 562. But a wholly arbitrary apportionment that could not possibly be just would be void. Thomas *v.* Gain, 35 Mich. 155. A council cannot be impowered to impose expense as it may "deem equitable and just." Barnes *v.* Dyer, 56 Vt. 419.

[1] Williams *v.* Detroit, 2 Mich. 560; Northern Indiana R. R. Co. *v.* Connelly,

which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute

10 Ohio St. 159; Lumsden *v.* Cross, 10 Wis. 282. And see St. Joseph *v.* O'Donoghue, 31 Mo. 345; Burnett *v.* Sacramento, 12 Cal. 76; Scoville *v.* Cleveland, 1 Ohio St. 126; Hill *v.* Higdon, 5 Ohio St. 243; Ernst *v.* Kunkle, 5 Ohio St. 520; Hines *v.* Leavenworth, 3 Kan. 186; Magee *v.* Commonwealth, 46 Pa. St. 358; Wray *v.* Pittsburg, 46 Pa. St. 365; Palmer *v.* Stumph, 29 Ind. 329; White *v.* People, 94 Ill. 604; Wilbur *v.* Springfield, 123 Ill. 395, 14 N. E. 871; Davis *v.* Lynchburg, 84 Va. 861, 6 S. E. 230; Farrar *v.* St. Louis, 80 Mo. 379; Taylor *v.* Boyd, 63 Tex. 533; O'Reilley *v.* Kingston, 114 N. Y. 439, 21 N. E. 1004; [Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, and note on constitutionality of frontage rule. Frontage rule will not be sustained where provision has not been made for a hearing in which property owners may appear and show that such assessment is not proportional to benefits. Ulman *v.* Baltimore, 72 Md. 587, 597, 609, 20 Atl. 141, 21 Atl. 709, 21 Atl. 711, 11 L. R. A. 224, and note;] although the assessment exceeds the value of a long, shallow strip assessed. McCormick's Est. *v.* Harrisburg, 129 Pa. St. 213, 18 Atl. 126. In Hammett *v.* Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615, while the cases here cited are approved, it is denied that a street already laid out and in good condition can be taken and improved for a public drive or carriageway at the expense of the adjacent owners; this not being an improvement for local but for general purposes. See Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255; Orphan Asylum's Appeal, 111 Pa. St. 135, 3 Atl. 217; Williamsport *v.* Beck, 128 Pa. St. 147, 18 Atl. 329. But a borough may cause a sidewalk to be relaid at the cost of an abutter. Smith *v.* Kingston, 120 Pa. St. 357, 14 Atl. 170. [An ordinance requiring abutting property-owners to remove snow and ice is unconstitutional. State *v.* Tuckman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438; Gridley *v.* Bloomington, 88 Ill. 554; Chicago *v.* O'Brien, 111 Ill. 532.] Compare Allen *v.* Drew, 44 Vt. 174 (case of water-rents); Willard *v.* Presbury, 14 Wall. 676; Hoyt *v.* East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; La Fayette *v.* Fowler, 34 Ind. 140; Chambers *v.* Satterlee, 40 Cal. 497; Bradley *v.* McAtee, 7 Bush, 667, 3 Am. Rep. 309. In Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255, it is denied that this principle can be applied to the country and to farming lands. *Agnew*, J., says: "To apply it to the country, or to farm lands, would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush every one would pronounce it palpably unreasonable and unjust." The able opinion in this case is a very satisfactory and very thorough examination of the principles on which local assessments are supported. The cases of Seely *v.* Pittsburg, 82 Pa. St. 360; Craig *v.* Philadelphia, 89 Pa. St. 265; Philadelphia *v.* Rule, 93 Pa. St. 15, and Scranton *v.* Penn Coal Co., 105 Pa. St. 445, are in principle similar. The rule of assessment by frontage is not sanctioned in Arkansas: Peay *v.* Little Rock, 32 Ark. 31; Monticello *v.* Banks, 48 Ark. 251, 2 S. W. 852; nor in Tennessee. McBean *v.* Chandler, 9 Heisk. 349. [Nor will the frontage rule be sustained where it results in an apportionment varying substantially from the value of benefits conferred and in excess thereof. In Norwood *v.* Baker, a peculiar state of facts showed the frontage rule in a most unfavorable light. B. owned a parcel of land on W. Ave. I. Ave. intersected W. Ave. at right angles, but was interrupted for a space of 300 ft. by B.'s land, through which the street had not yet been opened. It had, however, been opened beyond B.'s land, so that by the opening of the street for this distance of 300 ft. across B.'s land, the street would be open throughout its length. The village council of N. by ordinance provided for the appropriation of this strip through B.'s land, and the value thereof was duly assessed and paid to B. Thereupon the council, following the frontage rule, assessed upon B., whose land was the only land fronting upon the new portion of the street, the entire cost of the land appropriated, and in addition all the ex-

equality. But if, in the opinion of the legislature, it is the proper rule to apply to any particular case, the courts must enforce it.

penses connected with such appropriation. As a matter of fact the land of B. was probably not at all benefited by the opening of the street through it, since all parts of it had had substantially equally good street facilities before. The United States Supreme Court sustained an injunction against the assessment on the ground that it amounted to a taking without due process. Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. Rep. 187. But under a statute authorizing the entire expense of a street pavement to be apportioned on abutting lots according to the frontage rule, and without any preliminary hearing as to benefits, the assessment cannot, in the absence of allegation and proofs that the resulting assessment is substantially in excess of benefits, be set aside where the lots are of equal depth, and are substantially similarly related to the improvement. The statute is good to the extent at least of furnishing a *prima facie* rule of apportionment. French *v.* Barber A. Paving Co., 181 U. S. 324, 21 Sup. Ct. Rep. 625, aff. 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492. To same effect see Farrell *v.* W. Chicago Park Comm'rs, 182 Ill. 250, 55 N. E. 325; Cass Farm Co. *v.* Detroit, 124 Mich. 433, 7 Det. L. N. 283, 83 N. W. 103; Heman *v.* Allen, 156 Mo. 534, 57 S. W. 559, all of which are sustained in 181 U. S. 402, 21 Sup. Ct. Rep. 645, the Missouri case *sub nom.* Shumate *v.* Heman; see the vigorous dissenting opinion of Mr. Justice *Harlan* in 181 U. S. 402, 21 Sup. Ct. Rep. 633. See also Banaz *v.* Smith, 133 Cal. 102, 65 Pac. 309, sustaining the frontage rule as a *prima facie* rule; also Ramsey County *v.* Lewis Co., 82 Minn. 402, 86 N. W. 611 (June 18, 1901), rev. same case, 82 Minn. 390, 85 N. W. 207; Indianapolis *v.* Holt, 155 Ind. 222, 57 N. E. 966, 988, 1100; Baltimore *v.* Stewart, 92 Md. 535, 48 Atl. 165; Barfield *v.* Gleason, 23 Ky. L. 128, 63 S. W. 964, (sustaining assessment proportional to area). Notice by publication is sufficient in street improvement proceedings. Wight *v.* Davidson, 181 U. S. 371, 21 Sup. Ct. Rep. 616. And such notice may be by a minute in the publication of the council's proceedings. State *v.* Pillsbury, 82 Minn. 359, 85 N. W. 175. Upon constitutionality of frontage rule, see Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330, and note; upon necessity of special benefit, see *Re* Bonds of Madera Irrig. Dist., 92 Cal. 296, 341, 28 Pac. 272, 675, 14 L. R. A. 755, and note; upon distinction between taxes and special assessments, see Adams Co. *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155, and note. Upon practically unlimited power of Congress over special assessments in District of Columbia, see Parsons *v.* District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521; Wight *v.* Davidson, 181 U. S. 371, 21 Sup. Ct. Rep. 616. The frontage rule is no longer valid in Indiana, and no special assessment can exceed the benefit. If the cost of the improvement exceeds the amount of the special benefits, the excess must be paid out of the general fund raised by taxation. Adams *v.* Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797. "Compensation paid to a landowner for lands taken by appropriation proceedings to open a street cannot be assessed back upon the lands of the owner remaining after such taking. Neither can costs and expenses incurred in such proceeding be so assessed." Cincinnati, L. & N. R. Co. *v.* Cincinnati, 62 Ohio St. 465, 57 N. E. 229, 49 L. R. A. 566; Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487. Assessment by the frontage rule rejected. Assessments must be proportioned to benefits and not in excess thereof. Kersten *v.* Milwaukee, 106 Wis. 200, 81 N. W. 948, 1103, 48 L. R. A. 851; Hutcheson *v.* Storrie, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289. For other cases on special assessments, see Asberry *v.* Roanoke, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636; Weed *v.* Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; Rolph *v.* Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646 (sustaining frontage rule); Detroit *v.* Chapin, 112 Mich. 588, 71 N. W. 149, 42 L. R. A. 638; Ramsey County *v.* Lewis Company, 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639; Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382; Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213; Denver *v.* Knowles, 17 Col. 204, 30 Pac. 1041, 17 L. R. A.

But a very different case is presented when the legislature undertakes to provide that each lot upon a street shall pay the whole expense of grading and paving the street along its front. (*a*) For while in such a case there would be something having the outward appearance of apportionment, it requires but slight examination to discover that it is a deceptive semblance only, and that the measure of equality which the constitution requires is entirely wanting. If every lot-owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessment upon his neighbors; nothing is divided or apportioned between him and them; and each particular lot is in fact arbitrarily made a taxing district, and charged with the whole expenditure therein and thus apportionment avoided. If the tax were for grading the street simply, those lots which were already at the established grade would escape altogether, while those on either side, which chanced to be above and below, must bear the whole burden, though no more benefited by the improvement than the others.[1] It is evident, therefore, that a law for making assessments on this basis could not have in view such distribution of burdens in proportion to benefits as ought to be a cardinal idea in every tax-law.[2] It would be nakedly an arbitrary command of the law to each lot-owner to construct the street in front of his lot at his own expense, according to a prescribed standard; and a power to issue such command could never be exercised by a constitutional government, unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalk free from obstruction and fit for passage. But any such idea is clearly inadmissible.[3]

135 (sustaining frontage rule in absence of any showing of unfairness); Speer *v.* Athens, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402; Graham *v.* Chicago, 187 Ill. 411, 58 N. E. 393; King *v.* City of Portland, 38 Oreg. 402, 63 Pac. 2, 55 L. R. A. 812. Where a street is widened upon one side only, the lands on both sides of the street abut on the improvement. Cincinnati *v.* Batsche, 52 Ohio St. 324, 40 N. E. 21, 27 L. R. A. 536.]

[1] In fact, lots above and below an established grade are usually less benefited by the grading than the others; because the improvement subjects them to new burdens, in order to bring the general surface to the grade of the street, which the others escape.

[2] The case of Warren *v.* Henley, 31 Iowa, 31, is opposed to the reasoning of the text; but the learned judge who delivers the opinion concedes that he is unable to support his conclusions on the authorities within his reach.

[3] All lots in the district must be assessed, not simply those in front of which work has been done. Diggins *v.* Brown, 76 Cal. 318, 18 Pac. 373. See City of Lexington *v.* McQuillan's Heirs, 9 Dana, 513, and opinions of *Campbell* and *Christiancy*, JJ., in Woodbridge *v.* Detroit, 8 Mich. 274. The case of Weeks *v.* Mil-

(*a*) [Such assessment held clearly arbitrary and void in Davis *v.* Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563, and note upon such assessments.]

In many other cases, besides the construction, improvement, and repair of streets, may special taxing districts be created, with

waukee, 10 Wis. 258, seems to be *contra*. We quote from the opinion of the court by *Paine*, J. After stating the rule that uniformity in taxation implies equality in the burden, he proceeds: "The principle upon which these assessments rest is clearly destructive of this equality. It requires every lot-owner to build whatever improvements the public may require on the street in front of his lot, without reference to inequalities in the value of the lots, in the expense of constructing the improvements, or to the question whether the lot is injured or benefited by their construction. Corner lots are required to construct and keep in repair three times as much as other lots; and yet it is well known that the difference in value bears no proportion to this difference in burden. In front of one lot the expense of building the street may exceed the value of the lot; and its construction may impose on the owner additional expense, to render his lot accessible. In front of another lot of even much greater value, the expense is comparatively slight. These inequalities are obvious; and I have always thought that the principle of such assessments was radically wrong. They have been very extensively discussed, and sustained upon the ground that the lot should pay because it receives the benefit. But if this be true, that the improvements in front of a lot are made for the benefit of the lot only, then the right of the public to tax the owner at all for that purpose fails; because the public has no right to tax the citizen to make him build improvements for his own benefit merely. It must be for a public purpose; and it being once established that the construction of streets is a public purpose that will justify taxation, I think it follows, if the matter is to be settled on principle, that the taxation should be equal and uniform, and that to make it so the whole taxable property of the political division in which the improvement is made should be taxed by a uniform rule for the purpose of its construction.

"But in sustaining these assessments when private property was wanted for a street, it has been said the State could take it, because the use of a street was a public use; in order to justify a resort to the power of taxation, it is said the building of a street is a public purpose. But then, having got the land to built it on, and the power to tax by holding it a public purpose, they immediately abandon that idea, and say that it is a private benefit, and make the owner of the lot build the whole of it. I think this is the same in principle as it would be to say that the town in which the county seat is located should build the county buildings, or that the county where the capital is should construct the public edifices of the State, upon the ground that, by being located nearer, they derived a greater benefit than others. If the question, therefore, was, whether the system of assessment could be sustained upon principle, I should have no hesitation in deciding it in the negative. I fully agree with the reasoning of the Supreme Court of Louisiana in the case of Municipality No. 2 *v.* White, 9 La. Ann. 447, upon this point.

"But the question is not whether this system is established upon sound principles, but whether the legislature has power, under the constitution, to establish such a system. As already stated, if the provision requiring the rule of taxation to be uniform was the only one bearing upon the question, I should answer this also in the negative. But there is another provision which seems to me so important, that it has changed the result to which I should otherwise have arrived. That provision is § 3 of art. 11, and is as follows: 'It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

"It cannot well be denied that if the word 'assessment,' as used in this section, had reference to this established system of special taxation for municipal improvements, that then it is a clear recog-

a view to local improvements. The cases of drains to relieve swamps, marshes, and other low lands of their stagnant water, and of levees to prevent lands being overflowed by rivers, will at once suggest themselves. In providing for such cases, however, the legislature exercises another power besides the power of taxation. On the theory that the drainage is for the sole purpose of benefiting the lands of individuals, it might be difficult to defend such legislation. But if the stagnant water causes or threatens disease, it may be a nuisance, which, under its power of police, the State would have authority to abate. The laws for this purpose, so far as they have fallen under our observation, have proceeded upon this theory. Nevertheless, when the State incurs expense in the exercise of its police power for this purpose, it may be proper to assess that expense upon the portion of the community specially and peculiarly benefited. The assessment is usually made with reference to the benefit to property; and it is difficult to frame or

nition of the existence and legality of the power." And the court, having reached the conclusion that the word *did* have reference to such an established system, sustained the assessment, adding: "The same effect was given to the same clause in the Constitution of Ohio, by the Supreme Court of that State, in a recent decision in the case of Hill *v.* Higdon, 5 Ohio, N. S. 243. And the reasoning of Chief Justice *Ranney* on the question I think it impossible to answer."

If the State of Wisconsin had any settled and known practice, designated as assessments, under which each lot-owner was compelled to construct the streets in front of his lot, then the constitution as quoted may well be held to recognize such practice. In this view, however, it is still difficult to discover any "restriction" in a law which perpetuates the arbitrary and unjust custom, and which still permits the whole expense of making the street in front of each lot to be imposed upon it. The only restriction which the law imposes is, that its terms exclude uniformity, equality, and justice, which surely could not be the restriction the constitution designed. Certainly the learned judge shows very clearly that such a law is unwarranted as a legitimate exercise of the taxing power; and as it cannot be warranted under any other power known to constitutional government, the authority to adopt it should not be found in doubtful words. The case of Hill *v.* Higdon, referred to, is different. There the expense of improving the street was assessed upon the property abutting on the street, in proportion to the foot front. The decision there was, that the constitutional provision that "laws shall be passed taxing by a uniform rule all moneys, &c., and also all real and personal property, according to the true value in money," had no reference to these local assessments, which might still be made, as they were before the constitution was adopted, with reference to the benefits conferred. The case, therefore, showed a rule of apportionment which was made applicable throughout the taxing district, to wit, along the street so far as the improvement extended. The case of State *v.* City of Portage, 12 Wis. 562, holds that a law authorizing the expense of an improvement to be assessed upon the abutting lots, in proportion to their front or size, would not justify and sustain city action which required the owner of each lot to bear the expense of the improvement in front of it.

It has been often contended that taxation by frontage was in effect a taking of property for the public use, but the courts have held otherwise. People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Allen *v.* Drew, 44 Vt. 174; Warren *v.* Henley, 31 Iowa, 31; Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255; White *v.* People, 94 Ill. 604.

to conceive of any other rule of apportionment that would operate so justly and so equally in these cases. There may be difficulty in the detail; difficulty in securing just and impartial assessments; but the principle of such a law would not depend for its soundness upon such considerations.[1]

[1] See Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Sessions *v.* Crunklinton, 20 Ohio St. 349; French *v.* Kirkland, 1 Paige, 117; Phillips *v.* Wickham, 1 Paige, 590; Anderson *v.* Kerns Co., 14 Ind. 199; O'Reiley *v.* Kankakee Co., 32 Ind. 169; Draining Co. Case, 11 La. Ann. 338; Hagar *v.* Supervisors of Yolo, 47 Cal. 222; Davidson *v.* New Orleans, 96 U. S. 97. [*Re* Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781.] In Woodruff *v.* Fisher, 17 Barb. 224, *Hand*, J., speaking of one of these drainage laws, says: "If the object to be accomplished by this statute may be considered a public improvement, the power of taxation seems to have been sustained upon analogous principles. [Citing People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Thomas *v.* Leland, 24 Wend. 65; and Livingston *v.* Mayor, &c. of New York, 8 Wend. 85, 22 Am. Dec. 622.] But if the object was merely to improve the property of individuals, I think the statute would be void, although it provided for compensation. The water privileges on Indian River cannot be taken or affected in any way solely for the private advantage of others, however numerous the beneficiaries. Several statutes have been passed for draining swamps, but it seems to me that the principle above advanced rests upon natural and constitutional law. The professed object of this statute is to promote public health. And one question that arises is, whether the owners of large tracts of land in a state of nature can be taxed to pay the expense of draining them, by destroying the dams, &c., of other persons away from the drowned lands, and for the purposes of public health. This law proposes to destroy the water power of certain persons against their will, to drain the lands of others, also, for all that appears, against their will; and all at the expense of the latter, for this public good. If this taxation is illegal, no mode of compensation is provided, and all is illegal." "The owners of these lands could not be convicted of they did not drain them; even though they were the owners of the lands upon which the obstructions are situated. It does not appear by the act or the complaint that the sickness to be prevented prevails among inhabitants on the wet lands, nor whether these lands will be benefited or injured by draining; and certainly, unless they will be benefited, it would seem to be partial legislation to tax a certain tract of land, for the expense of doing to it what did not improve it, merely because, in a state of nature, it may be productive of sickness. Street assessments are put upon the ground that the land assessed is improved, and its value greatly enhanced." The remarks of *Green*, J., in Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560, 567, may be here quoted: "Every species of taxation, in every mode, is in theory and principle based upon an idea of compensation, benefit, or advantage to the person or property taxed, either directly or indirectly. If the tax is levied for the support of the government and general police of the State, for the education and moral instruction of the citizens, or the construction of works of internal improvement, he is supposed to receive a just compensation in the security which the government affords to his person and property, the means of enjoying his possessions, and their enhanced capacity to contribute to his comfort and gratification, which constitute their value."

It has been held incompetent, however, for a city which has itself created a nuisance on the property of a citizen, to tax him for the expense of removing or abating it. Weeks *v.* Milwaukee, 10 Wis. 258.

In Egyptian Levee Co *v.* Hardin, 27 Mo. 495, it was held that a special assessment for the purpose of reclaiming a district from inundation might properly be laid upon land in proportion to its area, and that the constitutional provision that taxation should be levied on property in

Sewers in cities and populous districts are a necessity, not only that the streets may be kept clean and in repair, but to prevent the premises of individuals from becoming nuisances. The expense of these is variously assessed. It may unquestionably be made by benefits and by frontage under proper legislation.[1] In certain classes of cases, it has been customary to call upon the citizen to appear in person and perform service for the State, in the nature of police duties. The burden of improving and repairing the common highways of the country, except in the urban districts, is generally laid upon the people in the form of an assessment of labor. The assessment may be upon each citizen, in proportion to his property; or, in addition to the property assessment, there may be one also by the poll. But though the public burden assumes the form of labor, it is still taxation, and must therefore be levied on some principle of uniformity. But it is a peculiar species of taxation; and the general terms "tax" or "taxation," as employed in the State constitutions, would not generally be understood to include it. It has been decided that the clause in the Constitution of Illinois, that "the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession," did not prevent the levy of poll-taxes in highway labor. "The framers of the constitution intended to direct a uniform mode of taxation on property, and not to pro-

proportion to its valuation did not preclude this mode of assessment. The same ruling was made in Louisiana cases. Crowley *v.* Copley, 2 La. Ann. 329; Yeatman *v.* Crandall, 11 La. Ann. 220; Wallace *v.* Shelton, 14 La. Ann. 498; Bishop *v.* Marks, 15 La. Ann. 147; Richardson *v.* Morgan, 16 La. Ann. 429. So with reference to assessments for irrigating arid lands. Turlock Irrig. Dist. *v.* Williams, 76 Cal. 360, 18 Pac. 379. And see McGehee *v.* Mathis, 21 Ark. 40; Jones *v.* Boston, 101 Mass. 461; Daily *v.* Swope, 47 Miss. 367; Alcorn *v.* Hamer, 38 Miss. 652; Boro *v.* Phillips Co., 4 Dill. 216. [Expense of street sprinkling may be met by special assessments on the benefit rule. Phillips Academy *v.* Andover, 175 Mass. 118, 55 N. E. 811, 48 L. R. A. 550.]

[1] In England it is made by benefits. In this country different methods are adopted. See Wright *v.* Boston, 9 Cush. 233; Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690; Cone *v.* Hartford, 28 Conn. 363; St. Louis *v.* Oeters, 36 Mo. 456; Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249; Stroud *v.* Philadelphia, 61 Pa. St. 255; Philadelphia *v.* Tyron, 35 Pa. St. 401; Warner *v.* Grand Haven, 30 Mich. 24. It may be made according to the value of the lots: Mason *v.* Spencer, 35 Kan. 512, 11 Pac. 402; Snow *v.* Fitchburg, 136 Mass. 183; or by area. Keese *v.* Denver, 10 Col. 112, 15 Pac. 825. It would not be competent, however, to make the assessment for a city sewer by the area upon both in and out lots, as this, from the nature of the case, could not possibly be equal. Thomas *v.* Gain, 35 Mich. 155. Street sprinkling may be paid for according to the frontage upon the street sprinkled. State *v.* Reis, 38 Minn. 371, 38 N. W. 97. [Expense of *maintenance* of sewers, as well as of construction, may be met by special assessments according to benefits. Carson *v.* Brockton Sewer Comm'rs, 182 U. S. 398, 21 Sup. Ct. Rep. 860, aff. 175 Mass. 212, 56 N. E. 1, 48 L. R. A. 277.]

hibit any other species of taxation, but to leave the legislature the power to impose such other taxes as would be consonant to public justice, and as the circumstances of the country might require. They probably intended to prevent the imposition of an arbitrary tax on property, according to kind and quantity, and without reference to value. The inequality of that mode of taxation was the object to be avoided. We cannot believe they intended that all the public burdens should be borne by those having property in possession, wholly exempting the rest of the community, who, by the same constitution, were made secure in the exercise of the rights of suffrage, and all the immunities of the citizen." [1] And in another case, where an assessment of highway labor is compared with one upon adjacent property for widening a street, — which had been held not to be taxation, as that term was understood in the constitution, — it is said: "An assessment of labor for the repair of roads and streets is less like a tax than is such an assessment. The former is not based upon, nor has it any reference to, property or values owned by the person of whom it is required, whilst the latter is based alone upon the property designated by the law imposing it. Nor is an assessment a capitation tax, as that is a sum of money levied upon each poll. This rate, on the contrary, is a requisition for so many days' labor, which may be commuted in money. No doubt, the number of days levied, and the sum which may be received by commutation, must be uniform within the limits of the district or body imposing the same. This requisition for labor to repair roads is not a tax, and hence this exemption is not repugnant to the constitution." [2]

It will be apparent from what has already been said, that it is not essential to the validity of taxation that it be levied according to the rules of abstract justice.[3] It is only essential that the legislature keep within its proper sphere of action, and do not impose burdens under the name of taxation which are not taxes in fact; and its decision as to what is proper, just, and politic,

[1] Sawyer *v.* City of Alton, 4 Ill. 127, 130; State *v.* Halifax, 4 Dev. 345; Amenia *v.* Stamford, 6 Johns. 92; Draining Co. Case, 11 La. Ann. 338, 372.

[2] Town of Pleasant *v.* Kost, 29 Ill. 490, 494.

[3] Frellsen *v.* Mahan, 21 La. Ann. 79; People *v.* Whyler, 41 Cal. 351; Warren *v.* Henley, 31 Iowa, 31. In this last case, *Beck*, J., criticises the position taken *ante*, pp. 730–732, that the cost of a local improvement cannot be imposed on the adjoining premises irrespective of any apportionment, and appears to suppose our views rest upon the injustice of such a proceeding. This is not strictly correct; it may or may not be just in any particular case; but taxation necessarily implies apportionment, and even a just burden cannot be imposed as a tax without it. [See a peculiar case in Baldwin *v.* Douglas County, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850, declaring a doubtful rule.]

must then be final and conclusive. Absolute equality and strict justice are unattainable in tax proceedings. The legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. It must happen under any tax law that some property will be taxed twice, while other property will escape taxation altogether.[1] Instances will also occur where persons will be taxed as owners of property which has ceased to exist. Any system adopted for taking valuations of property must fix upon a certain time for that purpose, and a party becomes liable to be taxed upon what he possesses at the time the valuing officer calls upon him. Yet changes of property from person to person are occurring while the valuation is going on, and the same parcel of property may be found by the assessor in the hands of two different persons, and be twice assessed, while another parcel in the transfer from hand to hand fails to be assessed at all. So the man who owns property when the assessment is taken may have been deprived of it by accident or other misfortune before the tax becomes payable; but the tax is nevertheless a charge against him. And when the valuation is made but once in a series of years, the occasional hardships and inequalities in consequence of relative changes in the value of property from various causes, becomes sometimes very glaring. Nevertheless, no question of constitutional law is raised by these inequalities and hardships, and the legislative control is complete.[2]

[1] Duplicate taxation must occasionally take place, however carefully the law may have been framed to avoid it. A tax cannot be set aside on that ground merely. Augusta Bank *v.* Augusta, 36 Me. 255. It is customary to tax corporations on their capital stock, or on their property, and also the corporators on their shares; and this is entirely admissible. Farrington *v.* Tennessee, 95 U. S. 679; Sturges *v.* Carter, 114 U. S. 511, 5 Sup. Ct. Rep. 1014; Belo *v.* Commissioners, 82 N. C. 415, 33 Am. Rep. 688; Bradley *v.* Bander, 36 Ohio St. 28, 38 Am. Rep. 547; Cook *v.* Burlington, 59 Iowa, 251, 13 N. W. 113; Lee *v.* Sturges, 46 Ohio St. 153, 19 N. E. 560. The tax on the shares may be collected from the corporation out of dividends. Street Railroad Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348. But it is said the intent to tax both stock and shares must be clear. Penn. Co. *v.* Com., — Pa. St. —, 15 Atl. 456. [And see Farrington *v.* Tennessee, 95 U. S. 679, and Bk. of Commerce *v.* Tennessee, 161 U. S. 134, 16 Sup. Ct. Rep. 456, s. c. 163 U. S. 416, 16 Sup. Ct. Rep. 1113, where it is held that the language "Said institution . . . shall pay to the State an annual tax of ½ of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes" makes the shares in the hands of the stockholders non-taxable. But the bank may be taxed upon its capital stock under that provision. Shelby Co. *v.* Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. Rep. 558.] So land may be taxed at its full value, and also the mortgage upon it. People *v.* Board of Supervisors, 71 Mich. 16, 38 N. W. 639. [But not in California. Germania Trust Co. *v.* San Francisco, 128 Cal. 589, 61 Pac. 178.]

[2] In Shaw *v.* Dennis, 10 Ill. 405, objection was taken to an assessment made for a local improvement under a special statute, that the commissioners, in determining who should be liable to pay the tax, and the amount each should pay,

The legislature must also, except when an unbending rule has been prescribed for it by the constitution, have power to select in its discretion the subjects of taxation.[1] The rule of uniformity requires an apportionment among all the subjects of taxation within the districts; but it does not require that everything which the legislature might make taxable shall be made so in fact. Many exemptions are usually made from taxation from reasons the cogency of which is at once apparent. The agencies of the national government, we have seen, are not taxable by the States; and the agencies and property of States, counties, cities, boroughs, towns, and villages are also exempted by law, (*a*) be-

were to be governed by the last assessment of taxable property in the county. It was insisted that this was an unjust criterion, for a man might have disposed of all the taxable property assessed to him in the last assessment before this tax was actually declared by the commissioners. The court, however, regarded the objection as more refined than practical, and one that, if allowed, would at once annihilate the power of taxation. "In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it, we might have to divide a single year's tax upon a given article of property among a dozen different individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is Utopian. The legislature must adopt some practical system; and there is no more danger of oppression or injustice in taking a former valuation than in relying upon one to be made subsequently." And see People *v.* Worthington, 21 Ill. 171.

[1] Wisconsin Cent. R. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833; Stratton *v.* Collins, 43 N. J. 563; New Orleans *v.* People's Bank, 32 La. Ann. 82; New Orleans *v.* Fourchy, 30 La. Ann. pt. 1, 910; Gibbons *v.* Dist. Columbia, 116 U. S. 404, 6 Sup. Ct. Rep. 427; University *v.* Skidmore, 87 Tenn. 155, 9 S. W. 892. But if provision for certain exemptions is made by the constitution, no others are valid. Le Duc *v.* Hastings, 39 Minn. 110, 38 N. W. 803. [But it seems that the legislature may exempt lands received from the Federal government in trust to aid in the building of railways without regard to the constitutional provisions concerning exemptions. See Stearns *v.* Minnesota, 179 U. S. 223, 21 Sup. Ct. Rep. 73, and Duluth & I. R. R. Co. *v.* St. Louis Co., 179 U. S. 302, 21 Sup. Ct. Rep. 124. Held, that an exemption of $5,000 in each estate from the operation of the inheritance tax law is void, as being repugnant to the requirement of uniformity. *Re* Cope, 191 Pa. 1, 43 Atl. 79, 45 L. R. A. 316. Where the Constitution requires that the legislature "shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation," failure on the part of the legislature to prescribe such rules for any class of property (*e. g.* paid-up and partly paid-up life insurance policies) exempts that class. State Board of Tax Commissioners *v.* Holliday, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826. In Maryland the legislature cannot exempt personal property and improvements upon lands, leaving the bare land values to be assessed. Wells *v.* Hyattsville Comm'rs, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89. Oregon legislature cannot exempt railroad property upon condition that State troops and munitions of war be carried free. Hogg *v.* Mackay, 23 Oreg. 339, 31 Pac. 779, 19 L. R. A. 77, and note upon power of exemption. No exemptions allowed in North Carolina. Redmond *v.* Tarboro, 106 N. C. 122, 10 S. E. 845, 7 L. R. A. 530.]

(*a*) [But in Kentucky, a municipal corporation may be taxed upon its franchise to operate water-works. Newport *v.* Com., 106 Ky. 434, 50 S. W. 845, 45 L. R. A. 518. Public parks and the property used by the fire department are public prop-

cause, if any portion of the public expenses was imposed upon them, it must in some form be collected from the citizens before it can be paid. No beneficial object could therefore be accomplished by any such assessment. The property of educational and religious institutions is also generally exempted from taxation by law upon very similar considerations, and from a prevailing belief that it is the policy and the interest of the State to encourage them.[1] If

[1] As in the case of other special privileges, exemptions from taxation are to be strictly construed. Trustees of M. E. Church *v.* Ellis, 38 Ind. 3; State *v.* Mills, 34 N. J. 177; Nashville, &c. R. R. Co. *v.* Hodges, 7 Lea, 663; Railway Co. *v.* Philadelphia, 101 U. S. 528; Morris *v.* Royal Arch Masons, 68 Tex. 698, 5 S. W. 519; Yazoo & M. V. R. R. Co. *v.* Thomas, 65 Miss. 553, 5 So. 108; People *v.* Davenport, 91 N. Y. 574; Commonwealth's Appeal, 127 Pa. St. 435, 17 Atl. 1094; Third Cong. Soc. *v.* Springfield, 147 Mass. 396, 18 N. E. 68; *ante*, 396; and many other cases cited in Cooley on Taxation, 146. [Exemption of the capital of a bank does not include property bought in on foreclosure of its stock and stock-loan mortgages. Louisiana *v.* Bd. of Assessors, 167 U. S. 407, 17 Sup. Ct. Rep. 1030; Bk. of Commerce *v.* Tennessee, 161 U. S. 134, 16 Sup. Ct. Rep. 456; Shelby Co. *v.* Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. Rep. 558. Whether exemption is contract or not, see Tucker *v.* Ferguson, 22 L. ed. U. S. 805, and note. Exemptions narrowly construed. Ford *v.* Delta & Pine Land Co., 164 U. S. 662, 17 Sup. Ct. Rep 230; Byram *v.* Marion Co. Comm'rs, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476; Montana Catholic Mission *v.* L. & C. County, 13 Mont. 559, 35 Pac. 2, 22 L. R. A. 684; Wells *v.* Savannah, 181 U. S. 531, 21 Sup. Ct. Rep. 697, aff. 107 Ga. 1, 32 S. E. 669. Exemption from taxation of lands granted by Congress until such lands are sold by railroad, extends only to time when equitable title is conveyed, although legal title may not be given until long after. Winona & St. Peter Land Company *v.* Minnesota, 159 U. S. 526, 16 Sup. Ct. Rep 83. Exemptions not so strictly construed as to defeat their purpose. Brown University *v.* Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847. Exemption of shares of stock from taxation exempts the company unless the contrary expressly appears. State *v.* Heppenheimer, 58 N. J. L. 633, 34 Atl. 1051, 32 L. R. A. 643. For other cases on exemptions, see Commonwealth *v.* Juniata Coke Co., 157 Pa. 507, 27 Atl. 373, 22 L. R. A. 232; Com. *v.* Pottsville Iron & S. Co., 157 Pa. 500, 27 Atl. 371, 22 L. R. A. 228; Ramsey County *v.* MacAlester College, 51 Minn. 437, 53 N. W. 704, 18 L. R. A. 278; *Re* Prime's Estate, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; State *v.* Kookuk & W. R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222.] The local authorities cannot be authorized by the legislature to make exemptions. Farnsworth Co. *v.* Lisbon, 62 Me. 451; Wilson *v.* Supervisors of Sutter, 47 Cal. 91; State *v.* Hannibal, &c. R. R. Co., 75 Mo. 208; Austin *v.* Gas Co., 69 Tex. 180, 7 S. W. 203. See Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395; State *v.* Hudson, &c. Com'rs, 37 N. J. 12; Augusta Factory *v.* Augusta, 83 Ga. 734, 10 S. E. 359. Compare Danville *v.* Shelton, 76 Va. 325. But they may doubtless be authorized to decide upon the facts what persons or property come within the rules of exemption prescribed by the legislature. It has

erty and are exempt. Owensboro *v.* Com., 105 Ky. 344, 49 S. W. 320, 44 L. R. A. 202. But property not used for public purposes is not within the rule. San Diego *v.* Linda Vista Irrigation Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33. Nor is public property in private hands, even though used for public purposes. State *v.* Cooley, 62 Minn. 183, 64 N. W. 379, 29 L. R. A. 777. Where the State cannot be sued, State property is necessarily exempt from special assessments. Mt. Vernon *v.* People, 147 Ill. 359, 35 N. E. 533, 23 L. R. A. 807, and note on municipal assessment of State property. State university with appurtenant property is exempt. Auditor General *v.* University, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376, and note.]

the State may cause taxes to be levied from motives of charity or gratitude, so for the like reasons it may exempt the objects of charity and gratitude from taxation.[1] Property is sometimes released from taxation by contract between the State and corporations, (*a*) and specified occupations are sometimes charged with

been generally held that an exemption from taxation would not exempt the property from being assessed for a local improvement. Matter of Mayor, &c., 11 Johns. 77; Baltimore *v.* Cemetery Co., 7 Md. 517; La Fayette *v.* Orphan Asylum, 4 La. Ann. 1; Fray *v.* Northern Liberties, 31 Pa. St. 69; Le Fever *v.* Detroit, 2 Mich. 586; Lockwood *v.* St. Louis, 24 Mo. 20; Broadway Baptist Church *v.* McAtee, 8 Bush, 503, 8 Am. Rep. 480; Universalist Society *v.* Providence, 6 R. I. 235; Patterson *v.* Society, &c., 24 N. J. 385; Cincinnati College *v.* State, 19 Ohio, 110; Brewster *v.* Hough, 10 N. H. 138; Seymour *v.* Hartford, 21 Conn. 481; Palmer *v.* Stumph, 29 Ind. 329; Peoria *v.* Kidder, 26 Ill. 351; Hale *v.* Kenosha, 29 Wis. 599; Seamen's Friend Society *v.* Boston, 116 Mass. 181; Orange, &c. R. R. Co. *v.* Alexandria, 17 Gratt. 176; Lima *v.* Cemetery Ass., 42 Ohio St. 128; State *v.* Kansas City, 89 Mo. 34, 14 S. W. 515; Chicago *v.* Baptist Union, 115 Ill. 245, 2 N. E. 254; [Lake Shore & M. S. R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195; Board of Improvement *v.* School Dist., 56 Ark. 354, 19 S. W. 969, 16 L. R. A. 418; Zabel *v.* Louisville B. O. Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668; Atlanta *v.* First Pr. Church, 86 Ga. 730, 13 S. E. 252, 12 L. R. A. 852, and note; Home, &c. *v.* Wilkinsburg, 131 Pa. 109, 18 Atl. 937, 6 L. R. A. 531; Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155, and note; note to 4 L. R. A. 171.] *Contra*, Trustees M. E. Ch. *v.* Atlanta, 76 Ga. 181, and see Swan Point Cem. *v.* Tripp, 14 R. I. 199. [Upon exemptions and special assessments, see Ill. Cent. R. Co. *v.* Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613, and note, s. c. 147 U. S. 190, 13 Sup. Ct. Rep. 293, sustaining the rule that "exemption from all taxation of every kind" does not exempt from special assessments for street improvements. See also San Diego *v.* Linda Vista Irrigation Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33, and note. Upon what are public improvements, see *Re* Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417, and note. Upon whether exemption is a contract or not, see note to 22 L. ed. U. S. 805; exemption of church property, note to 29 L. ed. U. S. 680. And in an exemption a reservation of limited taxing power to "municipal corporations" extends to municipalities subsequently incorporated. Central R. & Bkg. Co. *v.* Wright, 164 U. S. 327, 17 Sup. Ct. Rep. 80.] Land held in trust for the State is exempt. People *v.* Trustees of Schools, 118 Ill. 52, 7 N. E. 262. The customary constitutional inhibition of any law respecting an establishment of religion, &c., is not violated by an exemption of church property from taxation. Trustees of Griswold College *v.* State, 46 Iowa, 275, 26 Am. Rep. 138. [Where a school admits pupils of all creeds, races, colors, and conditions without discrimination, it is a public charity, even though owned by a private corporation, and it may lawfully be exempted from taxation. White *v.* Smith, 189 Pa. 222, 43 L. R. A. 498, 42 Atl. 125. So with college buildings used exclusively as dormitories and boarding halls for the accommodation of students. Yale University *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490. Exemption will cover income-producing property if income is devoted solely to charitable purposes, and free education of female orphan children is such purpose. Trustees of Kentucky F. O. School *v.* Louisville, 100 Ky. 470, 36 S. W. 921, 40 L. R. A. 119; *contra*, on first proposition, Portland H. Benev. Society *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 30 L. R. A. 167; American S. S. Union *v.* Taylor, 161 Pa. 307, 29 Atl. 26, 23 L. R. A. 655.]

[1] But it is not competent to grant exemptions from taxation based on sex or age, — *e. g.*, widows, maids, and female minors, — and an act attempting to make such exemptions is void. State *v.* Indianapolis, 69 Ind. 275, 35 Am. Rep. 223.

(*a*) [Upon exemption from taxation, see note to 22 L. ed. U. S. 805.]

specific taxes in lieu of all taxation of their property. A broad field is here opened to legislative discretion. As matter of State policy it might also be deemed proper to make general exemption of sufficient of the tools of trade or other means of support, to enable the poor man, not yet a pauper, to escape becoming a public burden. There is still ample room for apportionment after all such exemptions have been made. The constitutional requirement of equality and uniformity only extends to such objects of taxation as the legislature shall determine to be properly subject to the burden.[1] The power to determine the persons and the objects to be taxed is trusted exclusively to the legislative department;[2] but over all those objects the burden must be spread or it will be unequal and unlawful as to such as are selected to make the payment.[3]

[1] State *v.* North, 27 Mo. 464; People *v.* Colman, 3 Cal. 46; Durach's Appeal, 62 Pa. St. 491; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395. [Crafts *v.* Ray, — R. I. —, 46 Atl. 1043, 49 L. R. A. 604. See also Maine Water Co. *v.* Waterville, 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294.]

[2] Wilson *v.* Mayor, &c. of New York, 4 E. D. Smith, 675; Hill *v.* Higdon, 5 Ohio St. 243; State *v.* Parker, 33 N. J. 313; State *v.* County Court, 19 Ark. 360. Classes of property as well as classes of persons may be exempted. Butler's Appeal, 73 Pa. St. 448; Sioux City *v.* School District, 55 Iowa, 150, 7 N. W. 488. Notwithstanding a requirement that "the rule of taxation shall be uniform," the legislature may levy specific State taxes on corporations, and exempt them from municipal taxation. So held on the ground of *stare decisis*. Kneeland *v.* Milwaukee, 15 Wis. 454. See Ill. Cent. R. R. Co. *v.* McLean Co., 17 Ill. 291; New Orleans *v.* Savings Bank, 31 La. Ann. 826; Hunsaker *v.* Wright, 30 Ill. 146; Portland *v.* Water Co., 67 Me. 135.

[3] In the case of Weeks *v.* Milwaukee, 10 Wis. 242, a somewhat peculiar exemption was made. It appears that several lots in the city upon which a new hotel was being constructed, of the value of from $150,000 to $200,000, were purposely omitted to be taxed, under the direction of the Common Council, "in view of the great public benefit which the construction of the hotel would be to the city." *Paine*, J., in delivering the opinion of the court, says: "I have no doubt this exemption originated in motives of generosity and public spirit. And perhaps the same motives should induce the taxpayers of the city to submit to the slight increase of the tax thereby imposed on each, without questioning its strict legality. But they cannot be compelled to. No man is obliged to be more generous than the law requires, but each may stand strictly upon his legal rights. That this exemption was illegal, was scarcely contested. I shall therefore make no effort to show that the Common Council had no authority to suspend or repeal the general law of the State, declaring what property shall be taxable and what exempt. But the important question presented is, whether, conceding it to have been entirely unauthorized, it vitiates the tax assessed upon other property. And upon this question I think the following rule is established, both by reason and authority. Omissions of this character, arising from mistakes of fact, erroneous computations, or errors of judgment on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes on those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily entrusted to men, and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors, on the part of those who

In some of the States it has been decided that the particular provisions inserted in their constitutions to insure uniformity are so worded as to forbid exemptions. Thus the late Constitution of Illinois provided that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property."[1] Under this it was held that exemption by the legislature of persons residing in a city from a tax levied to repair roads beyond the city limits, by township authority, — the city being embraced within the township which, for that purpose, was the taxing district, — was void.[2] It is to be observed of these cases, however, that they would have fallen within the general principle laid down in Knowlton *v.* Supervisors of Rock Co.,[3] and the legislative acts under consideration might, if that case were followed, have been declared void on general principles, irrespective of the peculiar wording of the constitution. These cases, notwithstanding, as well as others in Illinois, recognize the power in the legis-

are attempting in good faith to perform their duties, should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided is absolutely essential to a continuance of government. But it seems to me clear that the other part is equally essential to the just protection of the citizen. If those executing these laws may deliberately disregard them, and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers, who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control. I know of no considerations of public policy or necessity that can justify carrying the rule to that extent. And the fact that in this instance the disregard of the law proceeded from good motives ought not to affect the decision of the question. It is a rule of law that is to be established; and, if established here because the motives were good, it would serve as a precedent where the motives were bad, and the power usurped for purposes of oppression," pp. 312–315. See also Henry *v.* Chester, 15 Vt. 460; State *v.* Collector of Jersey City, 24 N. J. 108; Insurance Co. *v.* Yard, 17 Pa. St. 331; Williams *v.* School District, 21 Pick. 75; Hersey *v.* Supervisors of Milwaukee, 16 Wis. 185; Crosby *v.* Lyon, 37 Cal. 242; Primm *v.* Belleville, 59 Ill. 142; Adams *v.* Beman, 10 Kan. 37; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395. But it seems that an omission of property from the tax-roll by the assessor, unintentionally, through want of judgment and lack of diligence and business habits, will not invalidate the roll. Dean *v.* Gleason, 16 Wis. 1; Ricketts *v.* Spraker, 77 Ind. 371. In Scofield *v.* Watkins, 22 Ill. 66, and Merritt *v.* Farris, 22 Ill. 303, it appears to be decided that even in the case of intentional omissions the tax-roll would not be invalidated, but the parties injured would be left to their remedy against the assessor. See also Dunham *v.* Chicago, 55 Ill. 359; State *v.* Maxwell, 27 La. Ann. 722; New Orleans *v.* Fourchy, 30 La. Ann. pt. 1, 919. Compare Francis *v.* Railroad Co., 19 Kan. 303.

[1] Art. 9, § 2, of the old Constitution.

[2] O'Kane *v.* Treat, 25 Ill. 557; Hunsaker *v.* Wright, 30 Ill. 146. See also Trustees *v.* McConnell, 12 Ill. 138; Madison County *v.* People, 58 Ill. 456; Dunham *v.* Chicago, 55 Ill. 357; Louisville, &c. R. R. Co. *v.* State, 8 Heisk. 663, 744. [People's Loan & H. Assn. *v.* Keith, 153 Ill. 609, 39 N. E. 1077, 28 L. R. A. 65.]

[3] 9 Wis. 410. See *ante*, p. 723.

lature to *commute* for a tax, or to contract for its release for a consideration. The Constitution of Ohio provides[1] that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money." Under this section it was held not competent for the legislature to provide that lands within the limits of a city should not be taxed for any city purpose, except roads, unless the same were laid off into town lots and recorded as such, or into out-lots not exceeding five acres each.[2] Upon this case we should make the same remark as upon the Illinois cases above referred to. The Constitution of California provides that "all property in the State shall be taxed in proportion to its value;" and this is held to preclude all exemptions of private property when taxes are laid for either general or local purposes.[3]

It is, moreover, essential to valid taxation that the taxing officers be able to show legislative authority for the burden they assume to impose in every instance. Taxes can only be voted by the people's representatives. They are in every instance an appropriation by the people to the government, which the latter is to expend in furnishing the people protection, security, and such facilities for enjoyment as it properly pertains to government to provide. This principle is a chief corner-stone of Anglo-Saxon liberty; and it has operated not only as an important check on government, in preventing extravagant expenditures, as well as unjust and tyrannical action, but it has been an important guaranty of the right of private property. Property is secure from the lawless grasp of the government, if the means of existence of the government depend upon the voluntary grants of those who own the property. Our ancestors coupled their grants with demands for the redress of grievances: but in modern times the surest protection against grievances has been found to be to vote specific taxes for the specific purposes to which the people's representatives are willing they shall be devoted;[4] and the persons exercising the functions of government must then become petitioners if they desire money for other objects. And then these grants are only made periodically. Only a few things, such as the salaries of officers, the interest upon the public debt, the support of schools, and the like, are provided for by permanent

[1] Art. 12, § 2.

[2] Zanesville *v.* Auditor of Muskingum County, 5 Ohio St. 589. See also Fields *v.* Com'rs of Highland Co., 36 Ohio St. 476.

[3] People *v.* McCreery, 34 Cal. 432; Crosby *v.* Lyon, 37 Cal. 242; People *v.* Eddy, 43 Cal. 331, 13 Am. Rep. 143.

[4] Hoboken *v.* Phinney, 29 N. J. 65.

laws; and not always is this done. The government is dependent from year to year on the periodical vote of supplies. And this vote will come from representatives who are newly chosen by the people, and who will be expected to reflect their views regarding the public expenditures. State taxation, therefore, is not likely to be excessive or onerous, except when the people, in times of financial ease, excitement, and inflation, have allowed the incurring of extravagant debts, the burden of which remains after the excitement has passed away.

But it is as true of the political divisions of the State as it is of the State at large, that legislative authority must be shown for every levy of taxes.[1] The power to levy taxes by these divisions comes from the State. The State confers it, and at the same time exercises a parental supervision by circumscribing it. Indeed, on general principles, the power is circumscribed by the rule that the taxation by the local authorities can only be for local purposes.[2] Neither the State nor the local body can authorize the imposition of a tax on the people of a county or town for an object in which the people of the county or town are not concerned. And by some of the State constitutions it is expressly required that the State, in creating municipal corporations, shall restrict their power of taxation over the subjects within their control. These requirements, however, impose an obligation upon the legislature which only its sense of duty can compel it to perform.[3] It is evident that if the legislature fail to enact the restrictive legislation, the courts have no power to compel such action.

[1] State *v.* Charleston, 2 Speers, 623; Columbia *v.* Guest, 3 Head, 413; Bangs *v.* Snow, 1 Mass. 181; Clark *v.* Davenport, 14 Iowa, 494; Burlington *v.* Kellar, 18 Iowa, 59; Mays *v.* Cincinnati, 1 Ohio St. 268; Richmond *v.* Daniel, 14 Gratt. 385; Simmons *v.* Wilson, 66 N. C. 336; Lott *v.* Ross, 38 Ala. 156; Lisbon *v.* Bath, 21 N. H. 319; Daily *v.* Swope, 47 Miss. 367. The same rule applies to laying special assessments. Augusta *v.* Murphey, 79 Ga. 101, 3 S. E. 326; Vaughn *v.* Ashland, 71 Wis. 502, 37 N. W. 809. [And all conditions precedent which may have been prescribed by law for the levy of special assessments must be strictly complied with. They are jurisdictional, and their omission makes the levy void. Ogden City *v.* Armstrong, 168 U. S. 224, 18 Sup. Ct. Rep. 98, aff. 12 Utah, 476, 43 Pac. 119. As to equitable relief against illegal taxation, see note to this case in 42 L. ed. U. S. 445.] Without express authority a city cannot tax its own bonds. Macon *v.* Jones, 67 Ga. 489. Where a city has power to issue securities, it has implied power to tax to meet them, unless there is a clear limitation upon its power so to do. Quincy *v.* Jackson, 113 U. S. 332, 5 Sup. Ct. Rep. 514. And, if a city is dissolved, the legislature may tax for like purpose, although thus it lays a higher tax than it has the right, under ordinary circumstances, to impose. Hare *v.* Kennerly, 83 Ala. 608, 3 So. 683.

[2] Foster *v.* Kenosha, 12 Wis. 616. See *ante*, p. 312.

[3] In Hill *v.* Higdon, 5 Ohio St. 243, 248, *Ranney*, J., says of this provision: "A failure to perform this duty may be of very serious import, but lays no foundation for judicial correction." And see Maloy *v.* Marietta, 11 Ohio St. 636.

Whether in any case a charter of incorporation could be held void on the ground that it conferred unlimited powers of taxation, is a question that could not well arise, as a charter is probably never granted which does not impose some restrictions; and where that is the case, it must be inferred that those were all the restrictions the legislature deemed important, and that therefore the constitutional duty of the legislature has been performed.[1]

When, however, it is said to be essential to valid taxation that

[1] The Constitution of Ohio requires the legislature to provide by general laws for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, &c. The general law authorizing the expense of grading and paving streets to be assessed on the grounds bounding and abutting on the street, in proportion to the street front, was regarded as being passed in attempted fulfilment of the constitutional duty, and therefore valid. The chief restriction in the case was, that it did not authorize assessment in any other or different mode from what had been customary. Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159. The statute also provided that no improvement or repair of a street or highway, the cost of which was to be assessed upon the owners, should be directed without the concurrence of two-thirds of the members elected to the municipal council, or unless two-thirds of the owners to be charged should petition in writing therefor. In Maloy *v.* Marietta, 11 Ohio St. 636, 639, *Peck*, J., says: "This may be said to be a very imperfect protection; and in some cases will doubtless prove to be so; but it is calculated and designed, by the unanimity or the publicity it requires, to prevent any flagrant abuses of the power. Such is plainly its object; and we know of no rights conferred upon courts thus to interfere with the exercise of a legislative discretion which the constitution has delegated to the law-making power." And see Weeks *v.* Milwaukee, 10 Wis. 242. The Constitution of Michigan requires the legislature, in providing for the incorporation of cities and villages, to "restrict their power of taxation," &c. The Detroit Metropolitan Police Law made it the duty of the Board of Police to prepare and submit to the city controller, on or before the first day of May in each year, an estimate in detail of the cost and expense of maintaining the police department, and the Common Council was required to raise the same by general tax. These provisions, it was claimed, were in conflict with the constitution, because no limit was fixed by them to the estimate that might be made. In People *v.* Mahaney, 13 Mich. 481, 498, the court say: "Whether this provision of the constitution can be regarded as mandatory in a sense that would make all charters of municipal corporation and acts relating thereto which are wanting in this limitation invalid, we do not feel called upon to decide in this case, since it is clear that a limitation upon taxation is fixed by the act before us. The constitution has not prescribed the character of the restriction which shall be imposed, and from the nature of the case it was impossible to do more than to make it the duty of the legislature to set some bounds to a power so liable to abuse. A provision which, like the one complained of, limits the power of taxation to the actual expenses as estimated by the governing board, after first limiting the power of the board to incur expense within narrow limits, is as much a *restriction* as if it confined the power to a certain percentage upon taxable property, or to a sum proportioned to the number of inhabitants in the city. Whether the restriction fixed upon would as effectually guard the citizen against abuse as any other which might have been established was a question for the legislative department of the government, and does not concern us on this inquiry." [Where townships are mere adjuncts or branches of county governments, as in Missouri, the township tax rate is a part of the rate to which the county is limited. State *v.* Mo. P. R. Co., 123 Mo. 72, 27 S. W. 367, 26 L. R. A. 36.]

there be legislative authority for every tax that is laid, it is not meant that the legislative department of the State must have passed upon the necessity and propriety of every particular tax; but those who assume to seize the property of the citizen for the satisfaction of the tax must be able to show that that particular tax is authorized, either by general or special law. The power inherent in the government to tax lies dormant until a constitutional law has been passed calling it into action, and is then vitalized only to the extent provided by the law. Those, therefore, who act under such a law should be careful to keep within its limits, lest they remove from their acts the shield of its protection. While we do not propose to enter upon any attempt to point out the various cases in which a failure to obey strictly the requirements of the law will render the proceedings void, — in regard to which a diversity of decision would be met with, — we think we shall be safe in saying that, in cases of this description, which propose to dispossess the citizen of his property against his will, not only will any excess of taxation beyond what the law allows render the proceedings void, but any failure to comply with such requirements of the law as are made for the protection of the owner's interest will also render them void. (*a*)

There are several reported cases in which the taxes levied were slightly in excess of legislative power, and in which it was urged in support of the proceedings, that the law ought not to take notice of such unimportant matters; but the courts have held that an excess of jurisdiction is never unimportant. In one case in Maine, the excess was eighty-seven cents only in a tax of $225.75, but it was deemed sufficient to render the proceedings void. Said *Mellen*, Ch. J., delivering the opinion of the court: "It is contended that the sum of eighty-seven cents is such a trifle as to fall within the range of the maxim *de minimis*, &c.; but if not, that still this small excess does not vitiate the assessment. The maxim is so vague in itself as to form a very unsafe ground of proceeding or judging; and it may be almost as difficulty to apply it as a rule in pecuniary concerns as to the interest which a witness has in the event of a cause; and in such case it cannot apply. Any interest excludes him. The assessment was therefore unauthorized and void. If the line which the legislature has established be once passed, we know of no boundary to

(*a*) [Ogden City *v.* Armstrong, 168 U. S. 224, 18 Sup. Ct. Rep. 98, aff. 12 Utah, 476, 43 Pac. 119; and see many cases cited in note in 42 L. ed. U. S. 445. See Farnsworth Lumber Co., *v.* Fairley, — Miss. —, 28 So. 569, (April 30, 1900) for an assessment held void for lack of opportunity to taxpayers to object to it, right to object being secured by statute.]

the discretion of the assessors."[1] The same view has been taken by the Supreme Court of Michigan, by which the opinion is expressed that the maxim *de minimis lex non curat* should be applied with great caution to proceedings of this character, and that the excess could not be held unimportant and overlooked where, as in that case, each dollar of legal tax was perceptibly increased thereby.[2] Perhaps, however, a slight excess, not the result of intention, but of erroneous calculations, may be overlooked, in view of the great difficulty in making all such calculations mathematically correct, and the consequent impolicy of requiring entire freedom from all errors.[3]

What method shall be devised for the collection of a tax, the legislature must determine, subject only to such rules, limitations, and restraints as the constitution of the State may have imposed.[4] Very summary methods are sanctioned by practice and precedent.[5]

[1] Huse *v.* Merriam, 2 Me. 375. See to: Suit at law; arrest of the person taxed, distress of goods, and sale if necessary; detention of goods, in the case of imports, until payment is made; sale or leasing of land taxed; imposition of penalties for non-payment; forfeiture of property; making payment a condition precedent to the exercise of some legal right, such the institution of a suit, or voting at elections, or to the carrying on of a business; requiring stamps on papers, documents, manufactured articles, &c. In Prentice *v.* Weston, 111 N. Y. 460, 18 N. E. 720; it is held not an unwarrantable interference with private property to forbid cutting of timber on land on which a tax remains unpaid, when the chief value of the land lay in the timber A village occupation tax cannot be enforced by fine and imprisonment. State *v.* Green, 27 Neb. 61, 42 N. W. 913. [In case of gross under-assessment, the assessment may be corrected in manner prescribed by law, and the taxes based on such correction collected from the present owner of the property. Weyerhauser *v.* Minnesota, 176 U. S. 550, 20 Sup. Ct. Rep. 485, aff. 72 Minn. 519, 75 N. W. 718. Upon reassessment of taxes, see note to 6 L. R. A. 802. Lands may be forfeited to State for non return to assessor, if statute so provides. State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.]

[2] Case *v.* Dean, 16 Mich. 12. And see Commonwealth *v.* Savings Bank, 5 Allen, 428; Bucknall *v.* Story, 36 Cal. 67; Drew *v.* Davis, 10 Vt. 506; Wells *v.* Burbank, 17 N H. 393; Axtell *v.* Gerlach, 67 Cal. 483, 8 Pac. 31.

[3] This was the view taken by the Supreme Court of Wisconsin in Kelley *v.* Corson, 8 Wis. 182, where an excess of $8.61 in a tax of $6,654.57 was held not to be fatal; it appearing not to be the result of intention, and the court thinking that an accidental error no greater than this ought to be disregarded. See also O'Grady *v.* Barnhisel, 23 Cal. 287; State *v.* Newark, 25 N. J. 399; Harvard *v.* Day, 62 Miss. 748. In Iowa the statute requires a sale to be upheld if any portion of the tax was legal. See Parker *v.* Sexton, 29 Iowa, 421. If a part of a tax only is illegal, the balance will be sustained if capable of being distinguished. O'Kane *v.* Treat, 25 Ill. 557; People *v.* Nichols, 49 Ill. 517. See State *v.* Plainfield, 38 N. J. L. 93. [That unintentional error arising from making an exemption mistakenly believed to be authorized by law will not vitiate, see McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526.]

[4] The following methods are resorted

[5] See Henderson's Distilled Spirits, 14 Wall. 44; Weimer *v.* Bunbury, 38 Mich. 201; Lydecker *v.* Palisade Land Co., 33 N. J. Eq. 415; Springer *v.* United States,

Wherever a tax is invalid because of excess of authority, or because the requisites in tax proceedings which the law has provided for the protection of the taxpayer are not complied with, any sale of property based upon it will be void also. The owner is not deprived of his property by "the law of the land," if it is taken to satisfy an illegal tax. And if property is sold for the satisfaction of several taxes, any one of which is unauthorized, or for any reason illegal, the sale is altogether void.[1] And the

102 U. S. 586; *In re* Hackett, 53 Vt. 354; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; *ante*, 505, note. [Weyerhauser *v.* Minnesota, 176 U. S. 550, 20 Sup. Ct. Rep. 485; King *v.* Mullins, 171 U. S. 404, 18 Sup. Ct. Rep. 925. See notes on power of State to tax, 10 L. ed. U. S. 1022; sale of land for taxes, 4 L. ed. U. S. 518.]

[1] This has been repeatedly held. Elwell *v.* Shaw, 1 Me. 339; Lacy *v.* Davis, 4 Mich. 140; Bangs *v.* Snow, 1 Mass. 180; Thurston *v.* Little, 3 Mass. 429; Dillingham *v.* Snow, 5 Mass 547; Stetson *v.* Kempton, 13 Mass. 283; Libby *v.* Burnham, 15 Mass. 144; Hayden *v.* Foster, 13 Pick. 492; Torrey *v.* Millbury, 21 Pick. 64; Alvord *v.* Collin, 20 Pick. 418; Drew *v.* Davis, 10 Vt. 506; Doe *v.* McQuilkin, 8 Blackf. 335; Kemper *v.* McClelland, 19 Ohio, 308; Peterson *v.* Kittredge, 65 Miss. 33, 3 So. 65, 5 So. 824; [Dever *v.* Cornwell, 10 N. D. 123, 86 N. W. 227; Sheets *v.* Paine, 10 N. D. 103, 86 N. W. 117; Nehasane Park Assn. *v.* Lloyd, 167 N. Y. 431, 60 N. E. 741.] This is upon the ground that, the sale being based upon both the legal and the illegal tax, it is manifestly impossible afterwards to make the distinction, so that the act shall be partly a trespass and partly innocent. [But see Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118.] But when a party asks relief in equity before a sale against the collection of taxes, a part of which are legal, he will be required first to pay that part, or at least to so distinguish it from the rest that process of injunction can be so framed as to leave the legal taxes to be enforced; and failing in this, his bill will be dismissed. Conway *v.* Waverley, 15 Mich. 257; Palmer *v.* Napoleon, 16 Mich. 176; Hersey *v.* Supervisors of Milwaukee, 16 Wis. 185; Bond *v.* Kenosha, 17 Wis. 284; Myrick *v.* La Crosse, 17 Wis. 442; Roseberry *v.* Huff, 27 Ind. 12; Montgomery *v.* Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184; Com'rs Allegany Co. *v.* Union Min. Co., 61 Md. 545; Brown *v.* School Dist., 12 Oreg. 345, 7 Pac. 357; Gage *v.* Caraher, 125 Ill. 417, 17 N. E. 777. Compare Solomon *v.* Oscoda, 77 Mich. 365, 43 N. W. 990; [Albuquerque Nat. Bank *v.* Perea, 147 U. S. 87, 13 Sup. Ct. Rep. 194; Altgeld *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.]

As to the character and extent of the irregularities which should defeat the proceedings for the collection of taxes, we could not undertake to speak here. We think the statement in the text, that a failure to comply with any such requirements of the law as are made for the protection of the owner's interest will prove fatal to a tax sale, will be found abundantly sustained by the authorities, while many of the cases go still further in making irregularities fatal. It appears to us that where the requirement of the law which has failed of observance was one which had regard simply to the due and orderly conduct of the proceedings, or to the protection of the public interest, as against the officer, so that to the taxpayer it is immaterial whether it was complied with or not, a failure to comply ought not to be recognized as a foundation for complaint by him. But those safeguards which the legislature has thrown around the estates of citizens to protect them against unequal, unjust, and extortionate taxation, the courts are not at liberty to do away with by declaring them non-essential. To hold the requirement of the law in regard to them directory only, and not mandatory, is in effect to exercise a dispensing power over the laws. Mr. Blackwell, in his treatise on Tax Titles, has collected the cases on this subject industriously, and perhaps we shall be pardoned for saying also with

general rule is applicable here, that where property is taken under statutory authority in derogation of common right, every requisite of the statute having a semblance of benefit to the owner must be complied with, or the proceeding will be ineffectual.[1]

a perceptible leaning against that species of conveyance. As illustrating how far the courts will go, in some cases, to sustain irregular taxation, where officers have acted in good faith, reference is made to Kelley *v.* Corson, 11 Wis. 1; Hersey *v.* Supervisors of Milwaukee, 16 Wis. 185. See also Mills *v.* Gleason, 11 Wis. 470, where the court endeavors to lay down a general rule as to the illegalities which should render a tax roll invalid. A party bound to pay a tax, or any portion thereof, cannot get title to the land by neglecting payment and allowing a sale to be made at which he becomes the purchaser. McMinn *v.* Whelan, 27 Cal. 300. See Butler *v.* Porter, 13 Mich. 292; Cooley on Taxation, 500 *et seq.* [See on sale of land for taxes, note to 4 L. ed. U. S. 518; injunction to restrain collection of tax, when granted, note to 20 L. ed. U. S. 65, and one to 22 L. R. A. 699; recovery of taxes illegally assessed, note to 21 L. ed. U. S. 63; tax as cloud on title, Odlin *v.* Woodruff, 31 Fla. 160, 12 So. 227, 22 L. R. A. 699, and note.. Upon when taxes illegally assessed can be recovered back, see note to 21 L. ed. U. S. 63. Upon sale of land for taxes, note to 4 L. ed. U. S. 518. Where lands are forfeited to the State for non-payment of taxes, and are thereafter assessed for taxation in the name of an assumed or non-existent owner, and then sold for non-payment of taxes based upon such assessment, the purchaser gets no valid title. Rich *v.* Braxton, 158 U. S. 375, 15 Sup. Ct. Rep. 1006. Assessment in name of a dead man is void. Ty. *v.* Perea, 10 N. M. 362, 62 Pac. 1094; Millaudon *v.* Gallagher, 104 La. 713, 29 So. 307. But since 1890 assessment may be in name of registered owner, whether alive or dead. Owner must see that proper change in registration is made when he comes into the title. Geddes *v.* Cunningham, 104 La. 306, 29 So. 138. Where land is assessed to holder of legal title and also to holder of equitable title, and latter pays tax assessed, sale for non-payment of tax assessed against former is void. Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661. And where a new map has been made, and the landowner in ignorance thereof reports his lands for assessment under the descriptions of the old map, giving the quantities correctly, and the assessor assumes that the lot-numbers are according to the new map, and modifies the quantities reported to make them conform to the new map, and the owner in ignorance of such modification pays all taxes assessed against him, the sale of the plots not covered by the assessor's list is invalid for mistake. Lewis *v.* Monson, 151 U. S. 545, 14 Sup. Ct. Rep. 424. Sale for unpaid taxes is void if at time tax was due owner appeared before proper officer and offered to pay his tax and did pay all that the officer stated as the amount of tax, although he erroneously understated it. Gould *v.* Sullivan, 84 Wis. 659, 54 N. W. 1013, 20 L. R. A. 487, and note. And redemption is valid if the person redeeming pays all that the proper officer states is due, although the officer erroneously states the sum too small. Hintrager *v.* Mahony, 78 Iowa, 537, 43 N. W. 522, 6 L. R. A. 50, and note. State cannot tax lands belonging to United States, and a sale based upon tax levied upon such lands is void. Young *v.* Charnquist, 114 Iowa, 116, 86 N. W. 205.]

[1] See *ante*, pp. 109–114. Also Newell *v.* Wheeler, 48 N. Y. 486; Westfall *v.* Preston, 40 N. Y. 349, 353; Stratton *v.* Collins, 43 N. J. 563; Cooley on Taxation, c. 15. [See also Ogden City *v.* Armstrong, 168 U. S. 224, 18 Sup. Ct. Rep. 98, aff. 12 Utah, 476, 43 Pac. 119; also extensive note upon equitable relief against illegal taxation, 42 L. ed. U. S. 445. Thirty days' publication of notice of sale of lands for taxes is not insufficient to constitute due process of law. Castillo *v.* McConnico, 168 U. S. 674, 18 Sup. Ct. Rep. 229; s. c. 47 La. Ann. 1473, 17 So. 868. Necessity of strict compliance, both in assessment and in subsequent proceedings. Marx *v.* Hanthorn, 148 U. S. 172, 13 Sup. Ct. Rep. 508, and note to 4 L.

ed. U. S. 518; Gage *v.* Bani, 141 U. S. 344, 12 Sup. Ct. Rep. 22; Stout *v.* Mastin, 139 U. S. 151, 11 Sup. Ct. Rep. 519; Martin *v.* Barbour, 140 U. S. 634, 11 Sup. Ct. Rep. 944; Bird *v.* Benlisa, 142 U. S. 664, 12 Sup. Ct. Rep. 323; Smith *v.* Callanan, 103 Iowa, 218, 72 N. W. 513, 42 L. R. A. 482; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328; Budge *v.* Grand Forks, 1 N. D. 309, 47 N. W. 390, 10 L. R. A. 165; Dever *v.* Cornwell, 10 N. D. 123, 86 N. W. 227; Thweatt *v.* Howard, 68 Ark. 426, 59 S. W. 764; State *v.* Dugan, 105 Tenn. 245, 58 S. W. 259; Condon *v.* Galbraith, 106 Tenn. 14, 58 S. W. 916; Olson *v.* Phillips, 80 Minn. 339, 83 N. W. 189. Absence of "$" before number intended to show amount of tax is fatal. Russell *v.* Chittenden, 123 Mich. 546, 82 N. W. 204; Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832.]

It should be stated that in Iowa, under legislation favorable to tax titles, the courts go further in sustaining them than in perhaps any other State. Reference is made to the following cases: Eldridge *v.* Keuhl, 27 Iowa, 160; McCready *v.* Sexton, 29 Iowa, 356; Hurley *v.* Powell, 31 Iowa, 64; Rima *v.* Cowan, 31 Iowa, 125; Thomas *v.* Stickle, 32 Iowa, 71; Henderson *v.* Oliver, 32 Iowa, 512; Bulkley *v.* Callanan, 32 Iowa, 461; Ware *v.* Little, 35 Iowa, 234; Jeffrey *v.* Brokaw, 35 Iowa, 505; Genther *v.* Fuller, 36 Iowa, 604; Leavitt *v.* Watson, 37 Iowa, 93; Phelps *v.* Meade, 41 Iowa, 470. It may be useful to compare these cases with Kimball *v.* Rosendale, 42 Wis. 407, and Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367.

CHAPTER XV.

THE EMINENT DOMAIN.

EVERY sovereignty possesses buildings, lands, and other property, which it holds for the use of its officers and agents, to enable them to perform their public functions. It may also have property from the rents, issues, and profits, or perhaps the sale, of which it is expected the State will derive a revenue. Such property constitutes the ordinary domain of the State. In respect to its use, enjoyment, and alienation, the same principles apply which govern the management and control of like property of individuals; and the State is in fact but an individual proprietor, whose title and rights are to be tested, regulated, and governed by the same rules that would have pertained to the ownership of the same property by any of its citizens. There are also cases in which property is peculiarly devoted to the general use and enjoyment of the individual citizens who compose the organized society, but the regulation and control of which are vested in the State by virtue of its sovereignty. The State may be the proprietor of this property, and retain it for the common use, as a means of contributing to the general health, comfort, or happiness of the people; but generally it is not strictly the owner, but rather the governing and supervisory trustee of the public rights in such property, vested with the power and charged with the duty of so regulating, protecting, and controlling them, as to secure to each citizen the privilege to make them available for his purposes, so far as may be consistent with an equal enjoyment by every other citizen of the same privilege.[1] In some instances these rights are

[1] In The Company of Free Fishers, &c. *v.* Gann, 20 C. B. N. S. 1, it was held that the ownership of the Crown in the bed of navigable waters is for the benefit of the subject, and cannot be used in any such manner as to derogate from or interfere with the right of navigation, which belongs by law to all the subjects of the realm. And that consequently the grantees of a particular portion, who occupied it for a fishery, could not be lawfully authorized to charge and collect anchorage dues from vessels anchoring therein. As regards public and exclusive rights of fishery in this country, see Carson *v.* Blazer, 2 Binn. 475, 4 Am. Dec. 463; Commonwealth *v.* Chapin, 5 Pick. 199, 16 Am. Dec. 386; Parker *v.* Milldam Co., 20 Me. 353, 37 Am. Dec 56; Parsons *v.* Clark, 76 Me. 476; Commonwealth *v.* Look, 108 Mass. 452; Cole *v.* Eastham, 133 Mass. 65; Packard *v.* Ryder, 144 Mass. 440, 11 N. E. 578; Sloan *v.* Biemiller, 34 Ohio St. 472; Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103; Angell on Watercourses, § 55 *a*, and cases cited; Cooley on Torts, 388–390.

of such a nature, or the circumstances are such, that the most feasible mode of enabling every citizen to participate therein may seem to be for the State to transfer its control, wholly or partially, to individuals, either receiving by way of augmentation of the public revenues a compensation therefor, or securing in return a release to the citizens generally from some tax or charge which would have rested upon them in respect to such rights, had the State retained the usual control in its own hands, and borne the incidental burdens.

The rights of which we here speak are considered as pertaining to the State by virtue of an authority existing in every sovereignty, and which is called the *eminent domain*. Some of these are complete without any action on the part of the State; as is the case with the rights of navigation in its seas, lakes, and public rivers, the rights of fishery in public waters, and the right of the State to the precious metals which may be mined within its limits.[1] Others only become complete and are rendered effectual through the State displacing, either partially or wholly, the rights of private ownership and control; and this it accomplishes either by contract with the owner, by accepting his gift, or by appropriating his property against his will through an exercise of its superior authority. Of these, the common highway furnishes an example; the public rights therein being acquired either by the grant or dedication of the owner of the land over which they run, or by a species of forcible dispossession when the public necessity demands the way, and the private owner will neither give nor sell it. All these rights rest upon a principle which in every sovereignty is essential to its existence and perpetuity, and which, so far as when called into action it excludes pre-existing individual rights, is sometimes spoken of as being based upon an implied reservation by the government when its citizens acquire property from it or under its protection. (*a*) And as there is not often occasion to speak of the eminent domain except in reference to those cases in which the government is called upon to appropriate property against the will of the owners, the right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for

[1] 1 Bl. Com. 294; 3 Kent. 378, note. In California, it has been decided that a grant of public lands by the government carries with it to the grantee the title to all mines. Boggs *v.* Merced, &c. Co., 14 Cal. 279; Moore *v.* Smaw, 17 Cal. 199.

(*a*) [The right of eminent domain does not depend upon the Constitution, but exists independent of it, it is inherent in sovereignty. Steames *v.* Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. 721.]

the public benefit without regard to the wishes of its owners. More accurately, it is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand.[1]

When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power by the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or

[1] Vattel, c. 20, § 34; Bynkershoek, lib. 2, c. 15; Ang. on Watercourses, § 457; 2 Kent, 338–340; Redf. on Railw. c. 11, § 1; Waples, Pro. in Rem, § 242. "The right which belongs to the society or to the sovereign of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain." *McKinley*, J., in Pollard's Lessee *v.* Hagan, 3 How. 212, 223. "Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency of the State is concerned; as where the land of the individual is wanted for a road, canal, or other public improvement." *Walworth*, Chancellor, in Beekman *v.* Saratoga & Schenectady R. R. Co., 3 Paige, 45, 73, 22 Am. Dec. 679. The right is inherent in all governments, and requires no constitutional provision to give it force. Brown *v.* Beatty, 34 Miss. 227; Taylor *v.* Porter, 4 Hill, 140; Lake Shore, &c. R. R. Co. *v.* Chicago, &c., R. R. Co., 97 Ill. 506, 2 Am. & Eng. R. R. Cas. 440; United States *v.* Jones, 109 U. S. 513, 3 Sup. Ct. Rep. 346. "Title to property is always held upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evidenced according to the established forms of law, demand." *Hogeboom*, J., in People *v.* Mayor, &c. of New York, 32 Barb. 102, 112. And see Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314; Water Works Co. *v.* Burkhart, 41 Ind. 364; Weir *v.* St. Paul, &c. R. R. Co., 18 Minn. 155. That one exercise of the power of appropriation will not preclude others for the same purpose, see Central Branch U. P. R. R. Co. *v.* Atchison, &c., R. R. Co., 26 Kan. 669, 5 A. & E. R. R. Cas. 397, and cases in note; Peck *v.* Louisville, &c. Ry. Co., 101 Ind. 366; Dietrichs *v.* Lincoln, &c. R. R. Co., 13 Neb. 361, 13 N. W. 621. But when a bridge company has once located its line of approach and begins work, it cannot change it without legislative authority. Matter of Poughkeepsie Bridge Co., 108 N. Y. 483, 15 N. E. 601. The constitutional prohibition against the taking of private property for public use without compensation is self-enforcing, and equity may enjoin the damaging of such property though the legislature has provided no method of determining compensation. Kansas City, St. J. & C. B. Ry. Co. *v.* Terminal Ry. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 22 L. R. A. 658, 41 Am. St. 684; Searle *v.* Lead, 10 S. D. 312, 73 N. W. 101, 39 L. R. A. 345. A taking under the police power is not in exercise of the power of eminent domain. State *v.* Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L. R. A. 135. See Ruch *v.* City of New Orleans, 43 La. Ann. 275, 9 So 473; Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490; Sweet *v.* Rechel, 37 Fed. Rep. 323; *Id.* 159 U. S. 380, 16 Sup. Ct. Rep 43; State *v.* Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177. So in case of destruction of mill and mill dam to avoid damage to highway and other property. Aitken *v.* Wells River, 70 Vt. 308, 40 Atl. 829, 67 Am. St. 672, 41 L. R. A. 566.]

to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require. For if this were otherwise, the authority to make laws for the government and welfare of the State might be so exercised, in strict conformity with its constitution, as at length to preclude the State performing its ordinary and essential functions, and the agent chosen to govern the State might put an end to the State itself. It must follow that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the Constitution of the United States which forbids the States violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority. (*a*) Upon this subject we shall content ourselves with referring in this place to what has been said in another connection.[1]

As under the peculiar American system the protection and regulation of private rights, privileges, and immunities in general belong to the State governments, and those governments are expected to make provision for the conveniences and necessities which are usually provided for their citizens through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the government of the nation; and such has been the conclusion of the authorities. In the new Territories, however, where the government of the United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the territorial governments; but this right passes from the nation to the newly formed State whenever the latter is admitted into the Union.[2] So far, however,

[1] See *ante*, p. 396.

[2] Pollard's Lessee *v.* Hagan, 3 How. 212; Goodtitle *v.* Kibbee, 9 How. 471; Doe *v.* Beebe, 13 How. 25; United States *v.* The Railroad Bridge Co., 6 McLean, 517; Weber *v.* Harbor Commissioners, 18 Wall. 57; Swan *v.* Williams, 2 Mich. 427; Warren *v.* St. Paul, &c. R. R. Co., 18 Minn. 384. [Article V. of the amendments to the Federal constitution providing among other things that private property shall not be taken for public use without just compensation is not applicable to a taking by a State or its authority, but is a limitation on the Federal Government only. Withers *v.* Buckley, 20 How. 84.] Although it has been held in some cases that the States have authority, under the eminent domain, to appropriate the property of individuals in order to donate it to the general government for national purposes: Reddall *v.* Bryan, 14 Md. 444; Gilmer *v.* Lime Point, 18 Cal. 229; Burt *v.* Merchants' Ins. Co., 106 Mass. 356, and Cummings *v.* Ash, 50 N. H. 591; [Lancey *v.* King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817,] the contrary is now determined. See Trombley *v.* Auditor-General, 23 Mich. 471; Kohl *v.* United

(*a*) [Woodmere Cemetery *v.* Roulo, 104 Mich. 595 [599], 62 N. W. 1010; Lock Haven Bridge Co. *v.* Clinton County, 157 Pa. St. 379, 27 Atl. 726.]

as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions,— as must sometimes be necessary in the case of forts, light-houses, military posts or roads, and other conveniences and necessities of government, — the general government may still exercise the authority, as well within the States as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority.[1]

What Property is subject to the Right.

Every species of property which the public needs may require and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain.[2] Lands for the public ways; timber, stone, and gravel with which to make or improve the public ways;[3] buildings standing in the way of contemplated improve-

States, 91 U. S. 367. Such an authority in the States is needless, for the power of the general government is ample for all needs. But a statute is valid which grants to the United States the right to institute condemnation proceedings. Matter of Petition of United States, 96 N. Y. 227. [General government may exercise the eminent domain either in the territories or in the States for the execution of powers granted to it. Cherokee Nation *v.* South Kansas Ry. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 965, 33 Fed. Rep. 900. The United States may exercise the right of eminent domain in the interest of inter-state commerce. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 13 Sup. Ct. Rep. 622; in the District of Columbia, Shoemaker *v.* United States, 147 U. S. 282, 13 Sup. Ct. Rep 361; for the preservation of the battlefield of Gettysburg, U. S. *v.* Gettysburg Elec. Ry. Co, 160 U. S. 668, 16 Sup. Ct Rep. 427; see also Luxton *v.* North River Bridge Co, 153 U. S. 525, 14 Sup. Ct. Rep. 891.]

[1] Kohl *v.* United States, 91 U. S. 367; Trombley *v* Auditor-General, 23 Mich. 471. Darlington *v.* United States, 82 Pa. St. 382. The United States may delegate to a State tribunal the power to ascertain the compensation to be paid. United States *v.* Jones, 109 U. S. 513, 3 Sup. Ct. Rep. 346.

[2] People *v.* Mayor, &c. of New York, 32 Barb. 102; Bailey *v.* Miltenberger, 31 Pa. St. 37. [Authority to condemn does not authorize condemnation of lands of State unless so expressed. Seattle & M. Ry. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217.] Land belonging to, but not in actual use by a State university, may be condemned. *In re* St. Paul & N. P. Ry. Co., 34 Minn. 227, 25 N. W. 345. [Water from natural watercourse for irrigation: McGhee Irr. Ditch Co. *v.* Hudson, 85 Tex. 587, 22 S. W. 308, 967; property of church: Macon and A. Ry. Co. *v.* Riggs, 87 Ga. 158, 13 S. E. 312; homestead: Jockheck *v.* Shawnee Co. Comrs., 53 Kan. 780, 37 Pac. 621; works and franchise of a water company: Brooklyn *v.* Long Island Water Supply Co., 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; aff. 166 U. S. 685, 17 Sup. Ct. Rep. 718.]

[3] Wheelock *v.* Young, 4 Wend. 647; Lyon *v.* Jerome 15 Wend. 569; Jerome *v.* Ross, 7 Johns. Ch. 315, 11 Am. Dec.

ments, or ich for any other reason it becomes necessary to take, remove, or d stroy for the public good;[1] streams of water;[2] corporate franchises;[3] and generally, it may be said, legal and equi-

484; Bliss *v.* Hosmer, 15 Ohio, 44; Watkins *v.* Walker Co., 18 Tex. 585. In Eldridge *v.* Smith, 34 Vt. 484, it was held competent for a railroad company to appropriate lands for piling the wood and lumber used on the road, and brought to it to be transported thereon.

[1] Wells *v.* Somerset, &c. R. R. Co., 47 Me. 345. So of a pier. Matter of Union Ferry Co., 98 N. Y. 139. But the destruction of a private house during a fire to prevent the spreading of a conflagration has been held not to be an appropriation under the right of eminent domain, but an exercise of the police power. "The destruction of this proper'' was authorized by the law of o ling necessity; it was the exercise of a atural right belonging to every individual, not conferred by law, but tacitly accepted from all human codes." Per *Sherman*, Senator, in Russell *v.* Mayor, &c. of New York, 2 Denio, 461, 473. See also Sorocco *v.* Geary, 3 Cal. 69; Conwell *v.* Emrie, 2 Ind. 35; American Print Works *v.* Lawrence, 21 N. J. 248; Same *v.* Same, 23 N. J. 9, 590; McDonald *v.* Redwing, 13 Minn. 38; Field *v.* Des Moines, 39 Iowa, 575. The municipal corporation whose officers order the destruction is not liable for the damages unless expressly made so by statute. White *v.* Charleston, 2 Hill (S. C.), 571; Dunbar *v.* San Francisco, 1 Cal. 355; Stone *v.* Mayor, &c., of New York, 25 Wend. 157; Taylor *v.* Plymouth, 8 Met. 462; Ruggles *v.* Nantucket, 11 Cush. 433; Keller *v.* Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613. [In the exercise of police power the State cannot authorize the taking of private property without compensation, when it can be condemned and paid for under the power of eminent domain. People *v.* Elk River, &c. Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. 121.]

[2] Gardner *v.* Mewburg, 2 Johns. Ch. 162, 7 Am. Dec. 526. In this case a stream was appropriated in order to supply a town with water. The appropriation might, of course, be made for any other object of public utility; and a stream may even be diverted from its course to remove it out of the way of a public improvement when not appropriated. See Johnson *v.* Atlantic, &c. R. R. Co., 35 N. H. 569; Baltimore, &c. R. R. Co. *v.* Magruder, 34 Md. 79, 6 Am. Rep. 310; Reusch *v.* Chicago, &c. R. R. Co., 57 Iowa, 687, 11 N. W. 647. But in general, in constructing a public work, it is the duty of those concerned to avoid diverting streams, and to construct the necessary culverts, bridges, &c., for that purpose. March *v.* Portsmouth &c., R. R. Co., 19 N. H. 372; Boughton *v.* Carter, 18 Johns. 405; Rowe *v.* Addison, 34 N. H. 306; Proprietors, &c. *v.* Nashua & Lowell R. R. Co., 10 Cush. 388; Haynes *v.* Burlington, 38 Vt. 350. And see Pettigrew *v.* Evansville, 25 Wis. 223; Arimond *v.* Green Bay Co., 31 Wis. 316; Stein *v.* Burden, 24 Ala. 130; Diamond Match Co. *v.* New Haven, 55 Conn. 510, 13 Atl. 409. As to the obligation of a railroad company to compensate parties whose lands are flooded by excavations or embankments of the company, see Brown *v.* Cayuga, &c. R. R. Co., 12 N. Y. 486; Norris *v.* Vt. Cent. R. R. Co., 28 Vt. 99. Compare Eaton *v.* Boston C. & M. R. R. Co., 51 N. H. 504, where it was decided that a corporation which flooded a man's land by removing a natural protection in the construction of its road was liable for the injury, even though its road was constructed with due care, with Bellenger *v.* N. Y. Central R. R. Co., 23 N. Y. 42; Abbott *v.* Kansas City, &c. Co., 83 Mo. 271; Moss *v.* St. Louis, &c. Ry. Co., 85 Mo. 86; Bell *v.* Norfolk, &c. R. R. Co., 101 N. C. 21, 7 S. E. 467; and other cases cited, *post*, pp. 782, 826.

[3] Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Crosby *v.* Hanover, 36 N. H. 401; Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42, 36 Am. Dec. 374; Boston Water Power Co. *v.* Boston & Worcester R. R. Co., 23 Pick. 360; Central Bridge Corporation *v.* Lowell, 4 Gray, 474; West River Bridge *v.* Dix, 6 How. 507; Richmond R. R. Co. *v.* Louisa R. R. Co., 13 How. 71, per *Grier*, J.; Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio R. R. Co., 4 Gill & J. 5; State *v.* Noyes, 47 Me. 189; Red River Bridge Co. *v.* Clarksville, 1 Sneed, 176; Armington *v.* Barnet, 15 Vt. 745; White

table rights of every description are liable to be thus appropri-

River Turnpike Co. *v.* Vermont Central R. R. Co., 21 Vt. 590; Newcastle, &c. R. R. Co. *v.* Peru & Indiana R. R. Co., 3 Ind. 464; Springfield *v.* Connecticut River R. R. Co., 4 Cush. 63; Forward *v.* Hampshire, &c. Canal Co., 22 Pick. 462; Commonwealth *v.* Pittsburg, &c. R. R. Co., 58 Pa. St. 26; *Re* Towanda Bridge Co., 91 Pa. St. 216; *In re* Twenty-Second St., 102 Pa. St. 108. "The only true rule of policy as well as of law is, that a grant for one public purpose must yield to another more urgent and important, and this can be effected without any infringement on the constitutional rights of the subject. If in such cases suitable and adequate provision is made by the legislature for the compensation of those whose property or franchise is injured or taken away, there is no violation of public faith or private right. The obligation of the contract created by the original charter is thereby recognized." Per *Bigelow*, J., in Central Bridge Corporation *v.* Lowell, 4 Gray, 474, 482. This subject receives a very full and satisfactory examination by Judges *Pearson* and *Sharswood*, in Commonwealth *v.* Pennsylvania Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329. In Central City Horse Railway Co. *v.* Fort Clark Horse Railway Co., 87 Ill. 523, this subject is somewhat considered. The question involved is thus stated by the court: "Can a competing horse railway company in an incorporated city acquire by compulsion a title to or the joint use of [a part of] the track and superstructure of another like corporation, and for the express purpose of making the tracks so compulsorily taken a portion of its own line?" This question is answered in the negative, though at the same time it is intimated that "proceedings might be instituted, *perhaps*, to condemn the entire road and franchise, and thus pass it over as an entirety to the competing road." But as to this, see Lake Shore, &c. R. R. Co. *v.* Chicago, &c. R. R. Co., 97 Ill. 506; *Re* Rochester Water Commissioners, 66 N. Y. 413; Little Miami, &c. R. R. Co. *v.* Dayton, 23 Ohio St. 510. [A turnpike way may be condemned for an electric street railway. The legislature may determine when one grant must yield to another. Baltimore & F. T. R. *v.* Baltimore C. &c. R. Co., 81 Md. 247, 31 Atl. 854. If the second use will better serve the public, the first franchise may be condemned. *Re* City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; aff. 166 U. S. 685, 17 Sup. Ct. Rep. 718; Trustees of Atlanta University *v.* City of Atlanta, 93 Ga. 468, 21 S. E. 74; United States *v.* Gettysburg E. R. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427. Land condemned for one use cannot be taken for a similar use without specific authority where the second use is inconsistent, or materially interferes with the first: Lake Erie & W. R. Co. *v.* Com'rs of Seneca Co., 57 Fed. Rep. 945; St. Louis, H. & K. C. R. Co. *v.* Hannibal, U. D. Co., 125 Mo. 82, 28 S. W. 483; Suburban R. T. Co. *v.* City of New York, 128 N. Y. 510, 28 N. E. 525, rev. 60 Hun, 577; *Re* City of New York, 135 N. Y. 253, 31 N. E. 1043. Land of one railway company for another line of railway: Butte, A. & P. R. Co. *v.* Montana U. R. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. 508. So, though the second use is not a similar use, if it is inconsistent with the first use. Boston & A. R. Co. *v.* Cambridge, 166 Mass. 224, 44 N. E. 140; Cincinnati, W. & M. R. Co. *v.* Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. 285; Louisville & N. R. Co. *v.* Whitely, 95 Ky. 215, 24 S. W. 604, 44 Am. St. 220, and note; Minn. & St. L. R. Co. *v.* Minn. W. R. Co., 61 Minn. 502, 63 N. W. 1035; Seattle & M. R. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217. Land of a railway company for a grain elevator: *Re* Stewart's Application, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427; a toll bridge for an electric street railway: Pittsburg & W. E. P. R. Co. *v.* Point Bridge Co., 166 Pa. St. 35, 30 Atl. 511, 26 L. R. A. 323. The yards and tracks of a railway company may be condemned for a public street if properly authorized, Terra Haute *v.* Evansville & T. H. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Chicago, &c. R. Co. *v.* Starkweather, 97 Iowa, 159, 66 N. W. 87, 59 Am. St. 404.] Land appropriated by one railroad company under the eminent domain, but not required for the exercise of its franchises or the discharge of its duties, is liable to be taken for the corporate use of another railroad company. North Carolina, &c. R. R. Co. *v.* Carolina Central, &c. R. R.

ated.[1] From this statement, however, must be excepted money, or that which in ordinary use passes as such, and which the government may reach by taxation, and also rights in action, which can only be available when made to produce money; neither of which can it be needful to take under this power.[2]

Legislative Authority Requisite.

The right to appropriate private property to public uses lies dormant in the State, until legislative action is had, pointing out

Co., 83 N. C. 489. See Chicago, &c. R. R. Co. *v.* Lake, 71 Ill. 333. A contract ceding to a telegraph company the exclusive right of operating and maintaining its lines over the right of way of a railroad company cannot preclude the State from authorizing the establishment of another telegraph line over the same right of way. New Orleans, &c. R. R Co. *v.* Southern, &c. Telegraph Co., 53 Ala. 211. The bridge of a corporation may be taken under this power and made a free bridge. *Re* Towanda Bridge Co., 91 Pa. St. 216. So of the right of a railroad company given under peculiar circumstances to take toll on a highway. Phila. &c. Ry. Co.'s Appeal, 120 Pa. St. 90, 13 Atl. 708.

[1] The appurtenant right of an abutter to have a street open may be taken: Rensselaer *v.* Leopold, 106 Ind. 29, 5 N. E. 761; the right to pass over a private way: Buffalo, N. Y. & P. R. R. Co. *v.* Overton, 35 Hun, 157; the right to have a farm-crossing at a particular place. Matter of N. Y. L. &c. R. R. Co., 44 Hun, 194. [Private cemetery for public park, *In re* Board of Street Openings, &c., 133 N. Y. 329, 31 N. E. 102, 28 Am. St. 640; homestead for court house: Jockheck *v.* Shawnee Co. Com'rs, 53 Kan. 780, 37 Pac. 621; leasehold interest in lands: Corrigan *et al. v.* City of Chicago, 144 Ill, 537, 33 N. E. 746, 21 L. R. A. 212. In such case the exercise of the right terminates the obligation to pay rent. *Id.*]

[2] Property of individuals cannot be appropriated by the State under this power for the mere purpose of adding to the revenues of the State. Thus it has been held in Ohio, that in appropriating the water of streams for the purposes of a canal, more could not be taken than was needed for that object, with a view to raising a revenue by selling or leasing it. "The State, notwithstanding the sovereignty of her character, can take only sufficient water from private streams for the purposes of the canal. So far the law authorizes the commissioners to invade private right as to take what may be necessary for canal navigation, and to this extent authority is conferred by the constitution, provided a compensation be paid to the owner. The principle is founded on the superior claims of a whole community over an individual citizen; but then in those cases only where private property is wanted for *public use*, or demanded by the *public welfare*. We know of no instances in which it has or can be taken, even by State authority, for the mere purpose of raising a revenue by sale or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum* and *tuum*, and annihilate them forever at the pleasure of the State." *Wood*, J., in Buckingham *v.* Smith, 10 Ohio, 288, 297. To the same effect is Cooper *v.* Williams, 5 Ohio, 392, 22 Am. Dec. 745.

Taking money under the right of eminent domain, when it must be compensated in money afterwards, could be nothing more or less than a forced loan, only to be justified as a last resort in a time of extreme peril, where neither the credit of the government nor the power of taxation could be made available. It is impossible to lay down rules for such a case, except such as the law of overruling necessity, which for the time being sets aside all the rules and protections of private right, shall then prescribe. [Kaysville *v.* Ellison, 18 Utah, 163, 55 Pac. 386, 72 Am. St. 772, 43 L. R. A. 81.] See *post*, p. 764, note.

the occasions, the modes, conditions, and agencies for its appropriations.[1] Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held to be for this purpose "the law of the land," and no further finding or adjudication can be essential, unless the constitution of the State has expressly required it.[2] When, however, action is had for this purpose, there must be kept in view that general as well as reasonable and just rule, that, whenever in pursuance of law the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual.[3] Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the

[1] Barrow *v.* Page, 5 Hayw. 97; Railroad Co. *v.* Lake, 71 Ill. 333; Allen *v.* Jones, 47 Ind. 438. [But see Easthampton *v.* Hampshire County Com'rs, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157, where it is held that express authority is not necessary to the taking of part of a schoolhouse lot for a town way.] It cannot be presumed that any corporation has authority to exercise the right of eminent domain until the grant be shown. Phillips *v.* Dunkirk, &c. R. R. Co., 78 Pa. St. 177; Allen *v.* Jones, 47 Ind. 438. A foreign corporation, it is held in Nebraska, which may not acquire real estate, cannot condemn land indirectly through a domestic corporation. State *v.* Scott, 22 Neb. 628, 36 N. W. 121; Koenig *v.* Chicago, &c. R. R. Co., 27 Neb. 699, 43 N. W. 423.

[2] "Whatever may be the theoretical foundation for the right of eminent domain, it is certain that it attaches as an incident to every sovereignty, and constitutes a condition upon which all property is holden. When the public necessity requires it, private rights to property must yield to this paramount right of the sovereign power. We have repeatedly held that the character of the work for which the property is taken, and not the means or agencies employed for its construction, determines the question of power in the exercise of this right. It requires no judicial condemnation to subject private property to public uses. Like the power to tax, it resides with the legislative department to whom the delegation is made. It may be exercised directly or indirectly by that body; and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted." Kramer *v.* Cleveland & Pittsburg R. R. Co., 5 Ohio St. 140, 146. The mode of exercise is left to the legislative discretion, when not restrained by the constitution. Secombe *v.* Railroad Co., 23 Wall. 108. An owner is not entitled to notice of meeting of commissioners to determine the necessity of an improvement. Zimmerman *v.* Canfield, 42 Ohio St. 463.

[3] Gillinwater *v.* Mississippi, &c. R. R. Co., 13 Ill. 1; Stanford *v.* Worn, 27 Cal. 171; Dalton *v.* Water Commissioners, 49 Cal. 223; Stockton *v.* Whitmore, 50 Cal. 554; Supervisors of Doddridge *v.* Stout, 9 W. Va. 703; Mitchell *v.* Illinois, &c. Coal Co., 68 Ill. 286; Chicago, &c. R. R. Co. *v.* Smith, 78 Ill. 96; Springfield, &c. R. R. Co. *v.* Hall, 67 Ill. 99; Powers's Appeal, 29 Mich. 504; Kroop *v.* Forman, 31 Mich. 144; Arnold *v.* Decatur, 29 Mich. 77; Lund *v.* New Bedford, 121 Mass. 286; Wamesit Power Co. *v.* Allen, 120 Mass. 352; Bohlman *v.* Green Bay, &c. R. R. Co., 40 Wis. 157; Moore *v.* Railway Co., 34 Wis. 173; United States *v.* Reed, 56 Mo. 565; Decatur County *v.* Humphreys, 47 Ga. 565; Commissioners *v.* Beckwith, 10 Kan. 603.

adverse proceeding must show affirmatively such compliance. For example, if by a statute prescribing the mode of exercising the right of eminent domain, the damages to be assessed in favor of the property owner for the taking of his land are to be so assessed by disinterested freeholders of the municipality, the proceedings will be ineffectual unless they show on their face that the appraisers were such freeholders and inhabitants.[1] So if a statute only authorizes proceedings *in invitum* after an effort shall have been made to agree with the owner on the compensation to be paid, the fact of such effort and its failure must appear.[2] So if the statute vests the title to lands appropriated in the State or in a corporation on payment therefor being made, it is evident that, under the rule stated, the payment is a condition precedent to the passing of the title.[3] And where a general railroad law

[1] Nichols *v.* Bridgeport, 23 Conn. 189; Judson *v.* Bridgeport, 25 Conn. 426; People *v.* Brighton, 20 Mich. 57; Moore *v.* Railway Co., 34 Wis. 173.

[2] Reitenbaugh *v.* Chester Valley R. R. Co., 21 Pa. St. 100; Ellis *v.* Pacific R. R. Co., 51 Mo. 200; United States *v.* Reed, 56 Mo. 565; Burt *v.* Brigham, 117 Mass. 307; Oregon Ry. & Nav. Co. *v.* Oregon, &c. Co., 10 Oreg. 444; Howland *v.* School Dist., 16 R. I. 257, 15 Atl. 74; Reed *v.* Ohio, &c. Ry. Co., 126 Ill. 48, 17 N. E. 807; Grand Rapids & I. R. R. Co. *v.* Weiden, 70 Mich. 390, 38 N. W. 294; West Va. Transportation Co. *v.* Volcanic Oil & Coal Co., 5 W. Va. 382, it was held that if the owner appears in proceedings taken for the assessment of damages, and contests the amount without objecting the want of any such attempt, the court must presume it to have been made.

[3] Stacy *v.* Vermont Central R. R. Co., 27 Vt. 39. By the section of the statute under which the land was appropriated, it was provided that when land or other real estate was taken by the corporation, for the use of their road, and the parties were unable to agree upon the price of the land, the same should be ascertained and determined by the commissioners, together with the costs and charges accruing thereon, *and upon the payment of the same, or by depositing the amount in a bank, as should be ordered by the commissioners, the corporation should be deemed to be seized and possessed of the lands.* Held, that, until the payment was made, the company had no right to enter upon the land to construct the road, or to exercise any act of ownership over it; and that a court of equity would enjoin them from exercising any such right, or they might be prosecuted in trespass at law. This case follows Baltimore & Susquehanna R. R. Co. *v.* Nesbit, 10 How. 395, and Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 9, where the statutory provisions were similar. In Kentucky, payment in money must be made before entry. Covington Ry. Co. *v.* Piel, 87 Ky. 267, 8 S. W. 449. See further State *v.* Seymour, 35 N. J. 47; Cameron *v.* Supervisors, 47 Miss. 264; St. Joseph, &c. R. R. Co. *v.* Callender, 13 Kan. 496; Paris *v.* Mason, 37 Tex. 447; People *v.* McRoberts, 62 Ill. 38; St. Louis, &c. R. R. Co. *v.* Teters, 68 Ill. 144; Sherman *v.* Milwaukee, &c. R. R. Co., 40 Wis. 645; Bohlman *v.* Green Bay, &c. R. R. Co., 40 Wis. 157; Brady *v.* Bronson, 45 Cal. 640; Delphi *v.* Evans, 36 Ind. 90; Eidemiller *v.* Wyandotte, 2 Dill. 376. In the case in Howard it is said: "It can hardly be questioned that without acceptance by the acts and in the mode prescribed [*i. e.*, by payment of the damages assessed], the company were not bound; that if they had been dissatisfied with the estimate placed on the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption." *Daniel*, J., 10 How. 395, 399.

authorized routes to be surveyed by associated persons desirous of constructing roads, and provided that if the legislature, on being petitioned for the purpose, should decide by law that a proposed road would be of sufficient utility to justify its construction, then the company, when organized, might proceed to take land for the way, it was held that, until the route was approved by the legislature, no authority could be claimed under the law to appropriate land for the purpose.[1] These cases must suffice as illustrations of a general rule, which indeed would seem to be too plain and obvious to require either illustration or discussion.[2]

So the powers granted by such statutes are not to be enlarged by intendment, especially where they are being exercised by a corporation by way of appropriation of land for its corporate purposes. "There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously and often vexatiously with the ordinary rights of property.[3] It has ac-

[1] Gillinwater *v.* Mississippi, &c. R. R. Co., 13 Ill. 1. "The statute says, that after a certain other act shall have been passed, the company may then proceed to take private property for the use of its road: that is equivalent to saying that that right shall not be exercised without such subsequent act. The right to take private property for public use is one of the highest prerogatives of the sovereign power; and here the legislature has, in language not to be mistaken, expressed its intention to reserve that power until it could judge for itself whether the proposed road would be of sufficient public utility to justify the use of this high prerogative. It did not intend to cast this power away, to be gathered up and used by any who might chose to exercise it." *Ibid.* p. 4.

[2] See further the cases of Atlantic & Ohio R. R. Co. *v.* Sullivant, 5 Ohio St. 276; Parsons *v.* Howe, 41 Me. 218; Atkinson *v.* Marietta & Cincinnati R. R. Co., 15 Ohio St. 21.

[3] Currier *v.* Marietta & Cincinnati R. R. Co., 11 Ohio St. 228, 231; Miami Coal Co. *v.* Wigton, 19 Ohio St. 560. See *ante*, pp. 564, 565. [Authority to construct is not authority to condemn: City of Madison *v.* Daley, 58 Fed. Rep. 751; City of Tacoma *v.* State, 4 Wash. 64, 29 Pac. 847; Brunswick & W. Ry. Co. *v.* City of Waycross, 94 Ga. 102, 21 S. E. 145; Chicago & N. W. Ry. Co. *v.* Town of Cicero, 154 Ill. 656, 39 N. E. 574. Authority to construct waterworks for fire protection and domestic use is not authority to furnish water for motive power for light manufacturing, though grant of power contained words "and other purposes:" *Re* Barre Water Co., 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195. The words "any railway" in a statute authorizing condemnation proceedings, held not to include street railways operated by horse power or electricity. Thomson-Houston Elec. Co. *v.* Simon, 20 Oreg. 60, 25 Pac. 147, 10 L. R. A. 251. Authority to condemn for telegraph line, held to authorize condemnation for telephone line under New Jersey statute. State *v.* Central New Jersey Telegraph Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 661; San Antonio & A. P. Ry. Co. *v.* S. W. Telph. & Telne. Co., 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459. Other illustrations of this rule of strict construction may be found in the following cases: *In re* Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288; Bigler's Executors *v.* Penna. Canal Co., 177 Pa. St. 28, 35 Atl. 112; Trustees Atlanta University *v.* City

cordingly been held that where a railroad company was authorized by law to "enter upon any land to survey, lay down, and construct its road," "to locate and construct branch roads," &c., to appropriate land "for necessary side tracks," and "a right of way over adjacent lands sufficient to enable such company to construct and repair its road," and the company had located, and was engaged in the construction of its main road along the north side of a town, it was not authorized under this grant of power to appropriate a temporary right of way for a term of years along the south side of the town, to be used as a substitute for the main track whilst the latter was in process of construction.[1] And substantially the same strict rule is applied when the State itself seeks to appropriate private property; for it is not unreasonable that the property owner should have the right to insist that the State, which selects the occasion, and prescribes the conditions for the appropriation of his property, should confine its action strictly within the limits which it has marked out as sufficient. So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.(*a*)

The Purpose.

The definition given of the right of eminent domain implies that the purpose for which it may be exercised must not be a

of Atlanta, 93 Ga. 468, 21 S. E. 74; Wilder *v.* Boston & A. Ry. Co., 161 Mass. 387, 37 N. E. 380; Kansas City, &c. Ry. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884; Providence & W. Ry. Co., Petitioner, 17 R. I. 324, 21 Atl. 965; Kyle *v.* Texas and N. O. Ry. Co., 3 Willson, § 436; Kettle River Ry. Co *v.* Eastern Ry. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; Payne *v.* Kansas, &c. Ry. Co., 46 Fed. Rep. 546; Chicago & N. W. Ry. Co. *v.* Galt, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; Dennis, Long & Co. *v.* City of Louisville, 98 Ky. 67, 32 S. W. 271; Ewing *v.* Alabama, &c. Ry. Co., 68 Miss. 551, 9 So. 295; Cheney *v.* Atlantic City Water Works Co., 55 N. J. L. 235, 26 Atl. 95; Illinois Central Ry. Co. *v.* City of Chicago, 138 Ill. 453, 28 N. E. 740; Louisville & N. Ry. Co. *v.* Whitely County Court, 95 Ky. 215, 24 S. W. 604, 44 Am. St. 220; Beaver *v.* City of Harrisburg, 156 Pa St. 547, 27 Atl. 4; Chicago & G. W. Ry. Co. *v.* First Methodist Church, 42 C. C. A. 178, 102 Fed. Rep. 85.]

[1] Currier *v.* Marietta & Cincinnati R. R. Co., 11 Ohio St. 228. And see Gilmer *v.* Lime Point, 19 Cal. 47; Bensley *v.* Mountain Lake, &c. Co., 13 Cal. 306; Bruning *v.* N. O. Canal & Banking Co., 12 La. Ann. 541; West Virginia Transportation Co. *v.* Volcanic Oil & Coal Co., 5 W. Va. 382.

(*a*) [Authority to condemn cannot be delegated to a foreign corporation: St. Louis & S. F. Ry. Co. *v.* Foltz, 52 Fed. Rep. 627; Koenig *v.* Chicago, B. & Q. R. Co., 27 Neb. 699, 43 N. W. 423; Trester *v.* Missouri P. R. Co., 33 Neb. 171, 49 N. W. 1110; *contra*, New York, N. H. & H. R. Co. *v.* Welsh, 143 N. Y. 411, 38 N. E. 378. A Railway company cannot pass authority to condemn to a manufacturing corporation: Appeal of Hartman Steel Co., 129 Pa. St. 551, 18 Atl. 553.]

mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit.[1] "The right of eminent domain," it has been said, "does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer."[2] It seems not to be allowable, therefore, to authorize private roads

[1] [The constitutional prohibition against taking private property for public use, operates by implication to prohibit the taking of property for private use. Richards *v.* Wolf, 82 Iowa, 358, 47 N. W. 1044, 31 Am. St. 501; Welton *v.* Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. 771, 22 L. R. A. 456. For a discussion of the meaning of the term "public" as used in this connection, see 51 Cent L. Jour. 323.] In a work of this character, we have no occasion to consider the right of the government to seize and appropriate to its own use the property of individuals in time of war, through its military authorities. That is a right which depends on the existence of hostilities, and the suspension, partially or wholly, of the civil laws. For recent cases in which it has been considered, see Mitchell *v.* Harmony, 13 How. 115; Wilson *v.* Crockett, 43 Mo. 216; Wellman *v.* Wickerman, 44 Mo. 484; Yost *v.* Stout, 4 Cold. 205; Sutton *v.* Tiller, 6 Cold. 593; Taylor *v.* Nashville, &c. R. R. Co, 6 Cold. 646; Coolidge *v.* Guthrie, 8 Am. Law Reg. N. S. 22; Echols *v.* Staunton, 3 W. Va. 574; Wilson *v.* Franklin, 63 N. C. 259.

[2] Beekman *v.* Saratoga & Schenectady R. R. Co., 3 Paige, 73, 22 Am. Dec. 679; Teneyck *v.* Canal Co., 18 N. J. 200, 37 Am. Dec. 233; Hepburn's Case, 3 Bland, 95; Sadler *v.* Langham, 34 Ala. 311; Pittsburg *v.* Scott, 1 Pa. St. 309; Matter of Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Matter of John & Cherry Streets, 19 Wend. 659; Cooper *v.* Williams, 5 Ohio, 391, 24 Am. Dec. 299; Buckingham *v.* Smith, 10 Ohio, 288; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333. See this subject considered on principle and authority by Senator *Tracy* in Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 955 *et seq.* See also Embury *v.* Conner, 3 N. Y. 511; Kramer *v.* Cleveland & Pittsburgh R. R. Co., 5 Ohio St. 140; Pratt *v.* Brown, 3 Wis. 603; Concord R. R. *v.* Greeley, 17 N. H. 47; N. Y. & Harlaem R. R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385. [The closing of part of a public alley whereby the lands within the alley revert to the adjoining owner, held not to be for public use. Van Witsen *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403. An act giving one street railway the right to use the tracks of another is not due process, when it is apparent that it was not a public benefit, but a benefit to the company, to whom the grant is made. Philadelphia, M. & S. S. R. Co., Petition of, — Pa. St. —, 53 Atl. 191.] The power can only be exercised to supply some existing public need or to gain some present public advantage; not with a view to contingent results dependent on a projected speculation. Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257. Nor for a mere public convenience; such as a company for loading and unloading freight on and from steamboats and other craft touching at a river port. Memphis Freight Co. *v.* Memphis, 4 Cold. 419. But land not needed at once may be condemned for extra tracks of a railroad. Matter of Staten Island Transit Co., 103 N. Y. 251, 8 N. E. 548. [Under the internal improvement clause of the Constitution of South Carolina, a statute authorizing condemnation for railway connecting a private manufacturing plant with a public railway is valid. *Ex parte* Bacot, 36 S. C. 125, 15 S. E. 201, 16 L. R. A. 586. A private way cannot be authorized on a public highway against an adjoining proprietor who has a fee in the street. Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647

to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established; and although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would in greater or less degree be interfered with. Nor would it be material to inquire what *quantum* of interest would pass from him: it would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his exclusive possession as owner, had been taken against his will; and if taken for a purely private purpose, it would be unlawful.[1] Nor

[1] Taylor *v.* Porter, 4 Hill, 140, per *Bronson*, J.; Clark *v.* White, 2 Swan, 540; White *v.* White, 5 Barb. 474; Sadler *v.* Langham, 34 Ala. 311; Pittsburg *v.* Scott, 1 Pa. St. 309; Nesbitt *v.* Trumbo, 39 Ill. 110; Osborn *v.* Hart, 24 Wis. 89, 1 Am. Rep. 161; Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398; Bankhead *v.* Brown, 25 Iowa, 540; Witham *v.* Osburn, 4 Oreg. 318, 18 Am. Rep. 287; Stewart *v.* Hartman, 46 Ind. 331; Wild *v.* Deig, 43 Ind. 455, 13 Am. Rep. 399; Blackman *v.* Halves, 72 Ind. 515; White *v.* Clark, 2 Swan, 230; Hickman's Case, 4 Harr. 580; Robinson *v.* Swope, 12 Bush, 21; Varner *v.* Martin, 21 W. Va. 534. A neighborhood road is only a private road, and taking land for it would not be for a public use. Dickey *v.* Tennison, 27 Mo. 373. [Welton *v.* Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. 771, 22 L. R. A. 496; Logan *v.* Stogdale, 123 Ind. 372, 24 N. E. 135, 8 L. R. A. 58, and note. Way laid out on application of single private person, to be paid for and kept in repair by him, but to be used by all who desire to use it, is a public way for which lands may be condemned. Latah County *v.* Peterson, 2 Idaho, 1118, 29 Pac. 1089, 16 L. R. A. 81.] But see, as to this, Ferris *v.* Bramble, 5 Ohio St. 109; Brock *v.* Barnet, 57 Vt. 172; Bell *v.* Prouty, 43 Vt. 279; Whittingham *v.* Bowen, 22 Vt. 317; Proctor *v.* Andover, 42 N. H. 348. [It seems that a way essentially private may be given a public character by act of the legislature because of incidental public benefits. Los Angeles Co. *v.* Reyes, — Cal. —, 32 Pac. 233; Welton *v.* Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. 771, 22 L. R. A. 496; Monterey Co. *v.* Cushing, 83 Cal. 511, 23 Pac. 700. And see Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 54 N. W. 1003, 39 Am. St. 813, and note; Latah Co. *v.* Peterson, 2 Idaho, 1118, 29 Pac. 1089, 16 L. R. A. 81; Butte, Anaconda, & P. Ry. Co. *v.* Montana U. Ry. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298. See Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. 618.] To avoid this difficulty, it is provided by the constitutions of some of the States that private roads may be laid out under proceedings corresponding to those for the establishment of highways. There are provisions to that effect in the Constitutions of New York, Georgia, and Michigan. It is allowable under the Alabama Constitution also. Steele *v.* County Com'rs, 83 Ala. 304, 3 So. 761. But in Harvey *v.* Thomas, 10 Watts, 63, it was held that the right might be exercised in order to the establishment of private ways from coal fields to connect them with the public improvements, there being nothing in the constitution forbidding it. See also the Pocopson Road, 16 Pa. St. 15; Sherman *v.* Buick, 32 Cal. 241; Brewer *v.* Bowman, 9 Ga. 37; Robinson *v.* Swope, 12 Bush, 21. But in Illinois it is held expressly that such a road cannot be condemned. Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199, and the doctrine of the cases just cited is directly opposed to Young *v.* McKenzie, 3 Ga. 31; Taylor *v.* Porter, 4 Hill, 140; Buffalo & N. Y. R. R. Co. *v.* Brainard, 9 N. Y. 100; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333, and many other cases; though possibly convenient access to the great coal fields of the State might be held to

could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: the *public use* implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies;[1] and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.

We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what consti-

be so far a matter of general concern as to support an exercise of the power on the ground of the public benefit. So held as to a subterranean mining railway. De Camp *v.* Hibernia R. R. Co., 47 N. J. L. 43. In Iowa a statute authorizing condemnation of public ways in such cases was upheld though only the mine-owners may have occasion to use them. Phillips *v.* Watson, 63 Iowa, 28, 18 N. W. 659. [A spur track to serve private concern only is not for public purpose. Kyle *v.* Tex. & N. O. Ry. Co., 3 Willson (Tex. Civ. App.), § 436; St. Louis, I. M. & S. Ry. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884.] In Eldridge *v.* Smith, 34 Vt. 484, it was held that the manufacture of railroad cars was not so legitimately and necessarily connected with the management of a railroad that the company would be authorized to appropriate lands therefor. So, also, of land for the erection of dwelling-houses to rent by railroad companies to their employees. But under authority to a railroad company to take land for constructing and operating its road, it may take what is needful for depot grounds. N. Y. & Harlaem R. R. Co. *v.* Kip, 46 N. Y. 546, 7 Am. Rep. 385. Spur tracks in a city to reach mills and warehouses may be condemned: Toledo S. & M. R. R. Co. *v.* East Saginaw, &c. Co., 72 Mich. 206, 40 N. W. 436; if necessary to the operation of the road. South Chicago R. R. Co. *v.* Dix, 109 Ill. 237. Not if merely to increase its business. Then the use is not public. Chicago & E. I. R. R. Co. *v.* Wiltse, 116 Ill. 449, 6 N. E. 49; Pittsburg, W. & K. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. 453.

In the text we have stated what is unquestionably the result of the authorities; though if the question were an open one it might well be debated whether the right to authorize the appropriation of the property of individuals did not rest rather upon grounds of general public policy than upon the public purpose to which it was proposed to devote it. There are many cases in which individuals or private corporations have been empowered to appropriate the property of others when the general good demanded it, though the purpose was no more *public* than it is in any case where benefits are to flow to the community generally from a private enterprise. The case of appropriations for mill-dams, railroads, and drains to improve lands are familiar examples. These appropriations have been sanctioned under an application of the term "public purpose," which might also justify the laying out of private roads, when private property could not otherwise be made available. Upon this general subject the reader is referred to an article by Hon. J. V. Campbell, in the "Bench and Bar," for July, 1871.

[1] Per *Tracy*, Senator, in Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 9, 60. A use is private so long as structures to be put on the land "are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public." Matter of Eureka Bason, &c. Co., 96 N. Y. 42. See Belcher Sugar Refining Co. *v.* St. Louis Elev. Co., 82 Mo. 121. The use must be by the general public of a locality, and not by particular individuals or estates. McQuillen *v.* Hatton, 42 Ohio St. 202; Ross *v.* Davis, 97 Ind. 79.

tutes a public use. It has been said by a learned jurist that, "if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose.[1] It is upon this principle that the legislatures of several of the States have authorized the condemnation of the lands of individuals for mill sites, where from the nature of the country such mill sites could not be obtained for the accommodation of the inhabitants without overflowing the lands thus condemned. Upon the same principle of public benefit, not only the agents of the government, but also individuals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals; of erecting and constructing wharves and basins; of establishing ferries; of draining swamps and marshes; and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies or of individual enterprise."[2]

[1] 2 Kent, Com. 340. [Statute authorizing lands to be flowed by raising a pond for the culture of useful fishes, though the object of the owner is to secure his own pleasure and profit, is constitutional. Turner *v.* Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487, an extreme case.]

[2] *Walworth*, Chancellor, in Beekman *v.* Saratoga & Schnectady R. R. Co., 3 Paige, 45, 73, 22 Am. Dec. 679. And see Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. 245. [As to what is a public use, see Latah County *v.* Peterson, 2 Idaho, 1118, 29 Pac. 1089, 16 L. R. A. 81, and note. Also note to Pittsburgh W. & Ky. Ry. Co. *v.* Benwood Iron Wks., 2 L. R. A. 680. For a railway is not for a public use under all circumstances. Its use will determine whether it is. Kettle River Ry. Co. *v.* Eastern Ry. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; Colorado E. Ry. Co. *v.* Union Pac. Ry. Co., 41 Fed. Rep. 293; Weidenfield *v.* Sugar Run Ry. Co., 48 Fed. Rep. 615; Farnsworth *v.* Lime Rock Ry. Co., 83 Me. 440, 22 Atl. 373; Chicago B. & N. Ry. Co. *v.* Porter, 43 Minn. 527, 46 N. W. 75; *In re* Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. 506, aff. 58 Hun, 351. It is the *right* to use, rather than *extent* of use, should determine its character, Butte A. & P. Ry. Co. *v.* Montana N. Ry. Co., 16 Mont. 504, 41 Pac. 282, 31 L. R. A. 298. Incidental benefit to private enterprise not destroy public character (side track to coal mine). St. Louis, I. M. & S. Ry. Co. *v.* Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434, and note; Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 799, 65 Am. St. 818, 34 L. R. A. 368. For water works to serve the public. State *v.* City of Newark, 54 N. J. L. 62, 23 Atl. 123; Kountze *v.* Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252. Not necessary that works are to serve all inhabitants of the municipality if they are to serve all in a particular district. Pocantico Water Wks. Co. *v.* Bird, 130 N. Y. 249, 29 N. E. 246. So as to condemnation for purposes of irrigation. Board of Directors of Alfalfa Irr. Dist. *v.* Collins, 46 Neb. 41, 64

It would not be entirely safe, however, to apply with much liberality the language above quoted, that "where the public interest can be in any way promoted by the taking of private property," the taking can be considered for a public use. It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some further element must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard

N. W. 1086; Paxton & H. Irr. C. & L. Co. *v.* Farmer's & M. Irr. & L. Co., 45 Neb. 884, 61 N. W. 343. Not public purpose where water is to be furnished to landowners only. Bradley *v.* Fall Brook Irr. Dist., 68 Fed. Rep. 948; rev. Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56. Drainage: Poundstone *v.* Baldwin, 145 Ind. 130, 44 N. E. 101. Public Parks: United States *v.* Cooper, 20 D. C. 104. Lands for lighthouse: Chappel *v.* United States, 160 U. S. 499, 16 Sup. Ct. Rep. 397. Lands for militia encampment: State *v.* Heppenheimer, 51 N. J. L. 268, 23 Atl. 661. Lands for cemetery though to be owned by private persons, if right of burial common to public. Stannard's Corners Rural Cem. Assn., *v.* Brandes, 11 Misc. (N. Y.) 270; Farneman *v.* Mt. Pleasant Cem. Assn., 135 Ind. 314, 35 N. E. 271; Matter of Board of Street Opening, 133 N. Y. 329, 31 N. E. 316, 28 Am. St. 640. Condemnation in interest of public health is for public purpose. Van Reipen *v.* City of Jersey City, 58 N. J. L. 262, 33 Atl. 740. To preserve view of bridge is not public purpose: Farist Steel Co. *v.* City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. Use of lands for public park is public use. Shoemaker *v.* United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361. Grain elevator and warehouse for public convenience is. *In re* Stewart's Application, 65 Minn. 515, 68 N. W. 208, 33 L. R. A. 427. Lands for union terminal station. Ryan *v.* Louisville & N. T. Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303. Cannot condemn lands for supply pipe line to convey water to city until city has authorized owners of pipe line to supply public with water. Wisconsin Water Co. *v.* Winans, 85 Wis. 26, 54 N. W. 1003, 20 L. R. A. 662. Draining of agricultural lands across the lands of others, under the provisions of New York statutes and constitution is a taking of private property for private use and in violation of the fourteenth amendment to the federal constitution. Petition of Tuthill, 163 N. Y. 133, 57 N. E. 303, 49 L. R. A. 781.]

to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty — perhaps impossibility — of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide.

Every government is expected to make provision for the public ways, and for this purpose it may seize and appropriate lands. And as the wants of traffic and travel require facilities beyond those afforded by the common highway, over which any one may pass with his own vehicles, the government may establish the higher grade of highways, upon some of which only its own vehicles can be allowed to run, while others, differently constructed, shall be open to use by all on payment of toll. The common highway is kept in repair by assessments of labor and money; the tolls paid upon turnpikes, or the fares on railways, are the equivalents to these assessments; and when these improved ways are required by law to be kept open for use by the public impartially, they also may properly be called highways, and the use to which land for their construction is put be denominated a public use. The government also provides court-houses for the administration of justice; buildings for its seminaries of instruction;[1] aqueducts to convey pure and wholesome water into large towns;[2] it builds levees to prevent the country being overflowed by the rising streams;[3] it may cause drains to be

[1] Williams *v.* School District, 33 Vt. 271. See Hooper *v.* Bridgewater, 102 Mass. 512; Long *v.* Fuller, 68 Pa. 170.

[2] Reddall *v.* Bryan, 14 Md. 444; Kane *v.* Baltimore, 15 Md. 240; Gardner *v.* Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526; Ham *v.* Salem, 100 Mass. 350; Burden *v.* Stein, 27 Ala. 104; Riche *v.* Bar Harbor Water Co., 75 Me. 91; Olmsted *v.* Prop'rs Morris Aqueduct, 46 N. J. L. 495; Lake Pleasanton W. Co. *v.* Contra Costa W. Co., 67 Cal. 659, 8 Pac. 501. Where land was to be taken for a canal, and it was set forth that "the uses for which said water is intended and designed are mining, irrigation, manufacturing, and household and domestic purposes," it was held a sufficient statement of public uses. Cummings *v.* Peters, 56 Cal. 593. A canal to bring logs and water to a city is for a public purpose. Dalles Lumbering Co. *v.* Urquhart, 16 Oreg. 57, 19 Pac. 78. [A taking for the improvement of the navigation of a river is for a public use. Kaukauna Water Power Co. *v.* Green Bay and M. Canal Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173. State cannot condemn to create water power for sole purpose of leasing for manufacturing purposes though may lease surplus power where condemnation primarily for public use, *Id.* Obstruction to use of landing of riparian owner incidental to act of government in improving navigation without actual taking, contact with or flowing of the lands does not give right to compensation. Gibson *v.* United States, 166 U. S. 269, 17 Sup. Ct. Rep. 578. State may authorize condemnation of water supply system by a city for its use. Long Island Water Supply Co. *v.* City of Brooklyn, 166 U. S. 685, 17 Sup. Ct. Rep. 718. Fact that such company has a contract with the city to supply it water will not defeat such condemnation; a contract may be condemned like other property. *Id.*]

[3] Mithoff *v.* Carrollton, 12 La. Ann. 185; Cash *v.* Whitworth, 13 La. Ann. 401; Inge *v.* Police Jury, 14 La. Ann. 117.

constructed to relieve swamps and marshes of their stagnant water;[1] and other measures of general utility, in which the public at large are interested, and which require the appropriation of private property, are also within the power, where they fall within the reasons underlying the cases mentioned.[2]

[1] Anderson *v.* Kerns Draining Co., 14 App., 12 Atl. 427. Or by a boom company for the purposes of a boom. Patterson *v.* Mississippi, &c., Boom Co., 3 Dill. 465. Or for the purposes of a telegraph line. Turnpike Co. *v.* News Co., 43 N. J. 381; New Orleans R. R. Co. *v.* Southern Tel. Co., 53 Ala. 211; Pierce *v.* Drew, 136 Mass. 75. Or sewers in cities. Hildreth *v.* Lowell, 11 Gray, 345. Or for a market. *Re* Cooper, 28 Hun, 515. A city may be authorized to appropriate lands in order to fill them up, and thereby abate a nuisance upon them. Dingley *v.* Boston, 100 Mass. 544. But it may not appropriate a wharf to lease it to a private corporation. Belcher Sugar Refining Co. *v.* St. Louis Elev. Co., 82 Mo. 121. A private corporation may be empowered to exercise the right of eminent domain to obtain a way along which to lay pipe for the transportation of oil to a railroad or navigable water. West Va. Transportation Co. *v.* Volcanic Oil & Coal Co., 5 W. Va. 382. It is held in Evergreen Cemetery *v.* New Haven, 43 Conn. 234; Edgecombe *v.* Burlington, 46 Vt. 218, and Balch *v.* Commissioners, 103 Mass. 106; [Farneman *v.* Mt. Pleasant Cem. Assn., 135 Ind. 344, 35 N. E. 271; Westfield Cem. Assn. *v.* Danielson, 62 Conn. 319, 26 Atl. 345; Stannard's Corners Rural Cem. Assn. *v.* Brandes, 14 Misc. (N. Y.) 270.] that lands may be appropriated under this power for a cemetery; but in Matter of Deansville Cemetery Association, 66 N. Y. 569, it is decided that this cannot be done for the exclusive use of a private corporation. [Board of Health *v.* Van Hoesen, 87 Mich. 533, 49 N. W. 894, and cases cited. These cases seem to proceed upon the theory that the right of burial is not common, but only at the will of the corporation owning.] Land may not be taken for a private warehouse and dock company: Matter of Eureka Basin, &c. Co., 96 N. Y. 42; nor for a railroad along the bottom of the Niagara Cliffs. Matter of Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429.

The development of mines has been

constructed to relieve swamps and marshes of their stagnant water; and other measures of general utility, in which the public at large are interested, and which require the appropriation of private property, are also within the power, where they fall within the reasons underlying the cases mentioned.

Ind. 109; Reeves *v.* Treasurer of Wood County, 8 Ohio St. 333. See a clear statement of the general principle and its necessity in the last mentioned case. The drains, however, which can be authorized to be cut across the land of unwilling parties, or for which individuals can be taxed, must not be mere private drains, but must have reference to the public health, convenience, or welfare. Reeves *v.* Treasurer, &c., *supra*. And see People *v.* Nearing, 27 N. Y. 306. [May condemn for drainage to abate nuisance. Sweet *v.* Rechel, 159 U. S. 380, 16 Sup. Ct. Rep. 43. Term "sanitary" does not indicate public purpose. *In re* Theresa Drainage District, 90 Wis. 301, 63 N. W. 288; and see Poundstone *v.* Baldwin, 145 Ind. 139, 44 N. E. 191.] It is said in a New Jersey case that an act for the drainage of a large quantity of land, which in its present condition is not only worthless for cultivation but unfit for residence, and for an assessment of the cost by benefits, is for a purpose sufficiently public to justify an exercise of the right of eminent domain. Matter of Drainage of Lands, 35 N. J. 497. It is competent under the eminent domain to appropriate and remove a dam owned by private parties, in order to reclaim a considerable body of lands flowed by means of it, paying the owner of the dam its value. Talbot *v.* Hudson, 16 Gray, 417. See the valuable note to Beekman *v.* Railroad Co., 22 Am. Dec. 686, where the authorities as to what is a public use are collated.

[2] Such, for instance, as the construction of a public park, which in large cities is as much a matter of public utility as a railway, or a supply of pure water. See Matter of Central Park Extension, 16 Abb. Pr. Rep. 56; Owners of Ground *v.* Mayor, &c., of Albany, 15 Wend. 374; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; County Court *v.* Griswold, 58 Mo. 175. The legislature may authorize land to be taken by an exposition company. Rees'

Whether the power of eminent domain can rightfully be exercised in the condemnation of lands for manufacturing purposes where the manufactories are to be owned, and occupied by individuals is a question upon which the authorities are at variance. Saw-mills, grist-mills, and various other manufactories are certainly a public necessity; and while the country is new, and capital not easily attainable for their erection, it sometimes seems to be essential that government should offer large inducements to parties who will supply this necessity. Before steam came into use, water was almost the sole reliance for motive power; and as reservoirs were generally necessary for this purpose, it would sometimes happen that the owner of a valuable mill site was unable to render it available, because the owners of lands which must be flowed to obtain a reservoir would neither consent to the construction of a dam, nor sell their lands except at extravagant and inadmissible prices. The legislatures in some of the States have taken the matter in hand, and have surmounted the difficulty, sometimes by authorizing the land to be appropriated, and at other times by permitting the erection of the dam, but requiring the mill-owner to pay annually to the proprietor of the land the damages caused by the flowing, to be assessed in some impartial mode.[1] The reasons for such statutes have been growing weaker with the introduction of steam power and the progress of improvement, but their validity has repeatedly been recognized in some of the States, and probably the same courts would continue still to recognize it, notwithstanding the public necessity may no longer appear to demand such laws.[2] The rights granted by these laws to mill-owners are said by Chief Justice *Shaw*, of Massachusetts, to be "granted for the better use of the water power, upon considerations of public policy and the general good;"[3] and in this view, and in order to render available a valuable property which might otherwise be made of little use by narrow, selfish, and unfriendly conduct on the part of individuals, such laws may perhaps be sustained on the same grounds which support an exercise of the right of eminent

held such a matter of public interest as would justify an exercise of the eminent domain. Hand Gold Mining Co. *v.* Packer, 59 Ga. 419; Dayton Mining Co. *v.* Seawell, 11 Nev. 394. But see Salt Company *v.* Brown, 7 W. Va. 191; Consolidated Channel Co. *v.* Railroad Co., 51 Cal. 261; Edgewood R. R. Co.'s Appeal, 79 Pa. St. 257.

[1] See Angell on Watercourses, c. 12, for references to the statutes on this subject.

[2] "The encouragement of mills has always been a favorite object with the legislature; and though the reasons for it may have ceased, the favor of the legislature continues." Wolcott Woollen Manufacturing Co. *v.* Upham, 5 Pick. 292, 294. The practice in Michigan has been different. See Ryerson *v.* Brown, 35 Mich. 333, 24 Am. Rep. 564.

[3] French *v.* Braintree Manufacturing Co., 23 Pick. 216, 220.

domain to protect, drain, and render valuable the lands which, by the overflow of a river, might otherwise be an extensive and worthless swamp.[1]

[1] Action on the case for raising a dam across the Merrimac River, by which a mill stream emptying into that river, above the site of said dam, was set back and overflowed, and a mill of the plaintiff situated thereon, and the mill privilege, were damaged and destroyed. Demurrer to the declaration. The defendant company were chartered for the purpose of constructing a dam across the Merrimac River, and constructing one or more locks and canals, in connection with said dam, to remove obstructions in said river by falls and rapids, and to create a water power to be used for mechanical and manufacturing purposes. The defendants claimed that they were justified in what they had done, by an act of the legislature exercising the sovereign power of the State, in the right of eminent domain; that the plaintiff's property in the mill and mill privilege was taken and appropriated under this right; and that his remedy was by a claim of damages under the act, and not by action at common law as for a wrongful and unwarrantable encroachment upon his right of property. *Shaw*, Ch. J.: "It is then contended that if this act was intended to authorize the defendant company to take the mill power and mill of the plaintiff, it was void because it was not taken for public use, and it was not within the power of the government in the exercise of the right of eminent domain. This is the main question. In determining it we must look to the declared purposes of the act; and if a public use is declared, it will be so held, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use. The declared purposes are to improve the navigation of the Merrimac River, and to create a large mill power for mechanical and manufacturing purposes. In general, whether a particular structure, as a bridge, or a lock, or canal, or road, is for the public use, is a question for the legislature, and which may be presumed to have been correctly decided by them. Commonwealth *v.* Breed, 4 Pick. 460. That the improvement of the navigation of a river is done for the public use has been too frequently decided and acted upon to require authorities. And so to create a wholly artificial navigation by canals. The establishment of a great mill power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the Commonwealth, seems to have been regarded by the legislature, and sanctioned by the jurisprudence of the Commonwealth, and in our judgment rightly so, in determining what is a public use, justifying the exercise of right of eminent domain. See St. 1825, c. 148, incorporating the Salem Mill Dam Corporation; Boston & Roxbury Mill Dam Corporation *v.* Newman, 12 Pick. 467. The acts since passed, and the cases since decided on this ground, are very numerous. That the erection of this dam would have a strong and direct tendency to advance both these public objects, there is no doubt. We are therefore of opinion that the powers conferred on the corporation by this act were so done within the scope of the authority of the legislature, and were not in violation of the Constitution of the Commonwealth." Hazen *v.* Essex Company, 12 Cush. 475, 477. See also Boston & Roxbury Mill Corporation *v.* Newman, 12 Pick. 467; Fiske *v.* Framingham Manufacturing Co., 12 Pick. 67; Harding *v.* Goodlett, 3 Yerg. 41, 24 Am. Dec. 546. The courts of Wisconsin have sustained such laws. Newcome *v.* Smith, 1 Chand. 71; Thien *v.* Voegtlander, 3 Wis. 461; Pratt *v.* Brown, 3 Wis. 603. But with some hesitation in later cases. See Fisher *v.* Horicon Co., 10 Wis. 351; Curtis *v.* Whipple, 24 Wis. 350. And see the note of Judge *Redfield* to Allen *v.* Inhabitants of Jay, Law Reg., Aug. 1873, p. 493. And those of Connecticut. Olmstead *v.* Camp, 33 Conn. 532. And of Maine. Jordan *v.* Woodward, 40 Me. 317. And of Minnesota. Miller *v.* Troost, 14 Minn. 365. And of Kansas. Venard *v.* Cross, 8 Kan. 248; Harding *v.* Funk, 8 Kan. 315. And of Indiana. Hankins *v.* Lawrence, 8 Blackf. 266. And they have been enforced elsewhere without question.

On the other hand, it is said that the legislature of New York has never exercised the right of eminent domain in favor of mills of any kind, and that "sites for steam-engines, hotels, churches, and other public conveniences might as well be taken by the exercise of this extraordinary power."[1] Similar views have been taken by the Supreme Courts of Alabama and Michigan.[2] It is quite possible that, in any State in which this question would be entirely a new one, and where it would not be embarrassed by long acquiescence, or by either judicial or legislative precedents, it might be held that these laws are not sound in principle, and that there is no such necessity, and consequently no such imperative reasons of public policy, as would be essential to support an exercise of the right of eminent domain.[3] But accepting as correct the decisions which have been made, it must be conceded that the term "public use," as employed in the law of eminent domain, has a meaning much controlled by the necessity, and somewhat different from that which it bears generally.[4]

Burgess *v.* Clark, 13 Ired. 109; McAfee's Heirs *v.* Kennedy, 1 Lit. 92; Smith *v.* Connelly, 1 T. B. Monr. 58; Shackleford *v.* Coffey, 4 J. J. Marsh. 40; Crenshaw *v.* Slate River Co., 6 Rand. 245; Gammel *v.* Potter, 6 Iowa, 548. The whole subject was very fully considered, and the validity of such legislation affirmed, in Great Falls Manuf. Co. *v.* Fernald, 47 N. H. 444. And see Ash *v.* Cummings, 50 N. H. 591. In Head *v.* Amoskeag Co., 113 U. S. 9, 5 Sup. Ct. Rep. 441, such an act was upheld as a regulation of the manner in which the rights of proprietors adjacent to a stream may be enjoyed. In Loughbridge *v.* Harris, 42 Ga. 500, an act for the condemnation of land for a grist-mill was held unconstitutional, though the tolls were regulated, and discrimination forbidden. In Newell *v.* Smith, 15 Wis. 101, it was held not constitutional to authorize the appropriation of the property, and leave the owner no remedy except to subsequently recover its value in an action of trespass.

[1] Hay *v.* Cohoes Company, 3 Barb. 47.

[2] Ryerson *v.* Brown, 35 Mich. 333, 24 Am. Rep. 564; Saddler *v.* Langham, 34 Ala. 311. In this last case, however, it was assumed that lands for the purposes of grist-mills *which grind for toll*, and were required to serve the public impartially, might, under proper legislation, be taken under the right of eminent domain. The case of Loughbridge *v.* Harris, 42 Ga. 500, is *contra*. In Tyler *v.* Beacher, 44 Vt. 648, 8 Am. Rep. 398, it was held not competent, where the mills were subject to no such requirement. See the case, 8 Am. Rep. 398. And see note by *Redfield*, Am. Law Reg., Aug., 1873, p. 493.

[3] See this subject in general discussed in a review of Angell on Watercourses, 2 Am. Jurist, p. 25.

[4] In People *v.* Township Board of Salem, 20 Mich. 452, the court consider the question whether a use which is regarded as *public* for the purposes of an exercise of the right of eminent domain, is necessarily so for the purposes of taxation. They say: "Reasoning by analogy from one of the sovereign powers of government to another is exceedingly liable to deceive and mislead. An object may be *public* in one sense and for one purpose, when in a general sense and for other purposes it would be idle or misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessarily to be exercised under the same conditions of public interest. The sovereign police power which the State possesses is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the Commonwealth. The conduct of every individual, and the

The question what is a public use is always one of law. (*a*) Deference will be paid to the legislative judgment, as expressed in

use of all property and of all rights is regulated by it, to any extent found necessary for the preservation of the public order, and also for the protection of the private rights of one individual against encroachment by others. The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles could suffer it to be resorted to; but each of these has its own peculiar and appropriate sphere, and the object which is *public* for the demands of the one is not necessarily of a character to permit the exercise of the other."

"If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable; and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step farther, and that step is in the same direction. Every man has an abstract right to the exclusive use of his own property for his own enjoyment in such manner as he shall choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the centre of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property in his own way is compelled to yield to the general comfort and protection of the community, and to a proper regard to relative rights in others. The situation of his property may even be such that he is compelled to dispose of it because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity that it cannot be tolerated in a densely settled neighborhood, and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher in the vicinity of whose premises a village has grown up finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property, because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood. Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needful industry has a right to exist, and the community has a right to demand that it be permitted to exist; and if for that purpose a peculiar locality already in possession of an individual is essential, the owner's right to undisturbed occupancy must yield to the superior interest of the public. A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare, could never have existed if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him. The law interferes in these cases, and regulates the relative rights of the owner and of the community with as strict regard to justice and equity as the circumstances will permit. It does not deprive the owner of his property, but it compels him to dispose of so much of it as is essential on equitable terms. While,

(*a*) [The question of whether the use is a public one may become a "federal question" under the "due process of law" clause of the federal constitution. Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56; Missouri Pacific Ry. Co. *v.* Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130.]

enactments providing for an appropriation of property, but it will not be conclusive.[1]

The Taking of Property.

Although property can only be taken for a public use, and the legislature must determine in what cases, it has been long settled that it is not essential the taking should be to or by the State itself, if by any other agency, in the opinion of the legislature, the use can be made equally effectual for the public benefit. There are many cases in which the appropriation consists simply in throwing the property open to use by such persons as may see fit to avail themselves of it; as in the case of common highways and public parks. In these cases the title of the owner is not disturbed, except as it is charged with this burden; and the State defends the easement, not by virtue of any title in the property, but by means of criminal proceedings when the general right is disturbed. But in other cases it seems important to take the title;[2] and in many of these it is convenient, if not necessary, that the taking be, not by the State, but by the municipality for which the use is specially designed, and to whose care and government it will be confided. When property is needed for a district school-house, it is proper that the district appropriate it;

therefore, eminent domain establishes no industry, it so regulates the relative rights of all that no individual shall have it in his power to preclude its establishment." On this general subject see Olmstead *v.* Camp, 33 Conn. 532, in which it was very fully and carefully considered.

[1] Harding *v.* Goodlett, 3 Yerg. 40, 24 Am. Dec. 546; Bankhead *v.* Brown, 25 Iowa, 540; Chicago, &c. R. R. Co. *v.* Lake, 71 Ill. 333; Olmstead *v.* Camp, 33 Conn. 551; Tyler *v.* Beacher, 44 Vt. 648; Matter of Deansville Cemetery Association, 66 N. Y. 569, 23 Am. Rep. 86; Matter of Union Ferry Co., 98 N. Y. 139; Matter of Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429; Loughbridge *v.* Harris, 42 Ga. 500; Water Works Co. *v.* Burkhart, 41 Ind. 364; Scudder *v.* Trenton, &c. Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Ryerson *v.* Brown, 35 Mich. 333, 24 Am. Rep. 564; Beekman *v.* Railroad Co., 3 Paige, 45, 22 Am. Dec. 679, and note; McQuillen *v.* Hatton, 42 Ohio St. 202; Savannah *v.* Hancock, 91 Mo. 54, 3 S. W. 215; *In re* St. Paul & N. P. Ry. Co., 34 Minn. 227, 25 N. W. 315; [State *ex rel.* City of Cape Girardeau *v.* Engleman, 106 Mo. 628, 17 S. W. 759; Shoemaker *v.* U. S., 147 U. S. 282, 13 Sup. Ct. Rep. 361; Welton *v.* Dickson, 38 Neb. 767, 57 N. W. 559, 41 Am. St. 771, 22 L. R. A. 496; Call *v.* Town of Wilkesboro, 115 N. C. 337, 20 S. E. 468; Wulzen *v.* Board of Supervisors, 101 Cal. 15, 35 Pac. 353, 40 Am. St. 17, and note; Van Witson *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 463; Moore *v.* Sanford, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151; Waterloo, &c. Mfg. Co. *v.* Shanahan, 128 N. Y. 345, 28 N. E. 358; Bridal Veil Lumbering Co. *v.* Johnson, 30 Oreg. 205, 46 Pac. 790, 60 Am. St. 818. But see, *contra*, City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604. See extended note, 89 Am. St. 926.]

[2] The fee is not to be taken unless the purpose requires it. New Orleans, &c. R. R. Co. *v.* Gay, 32 La. Ann. 471; New Jersey Zinc Co. *v.* Morris Canal, &c. Co., 44 N. J. Eq. 398, 15 Atl. 227. See Hibernia R. R. Co. *v.* Camp, 47 N. J. L. 518. There are constitutional provisions in some States which limit the taking for railroads to a mere easement.

and it is strictly in accordance with the general theory as well as with the practice of our government for the State to delegate to the district the exercise of the power of eminent domain for this special purpose. So a county may be authorized to take lands for its court-house or jail; a city, for its town hall, its reservoirs of water, its sewers, and other public works of like importance. In these cases no question of power arises; the taking is by the public; the use is by the public; and the benefit to accrue therefrom is shared in greater or less degree by the whole public.

If, however, it be constitutional to appropriate lands for mill dams or mill sites, it ought also to be constitutional that the taking be by individuals instead of by the State or any of its organized political divisions; since it is no part of the business of the government to engage in manufacturing operations which come in competition with private enterprise; and the cases must be very peculiar and very rare where a State or municipal corporation could be justified in any such undertaking. And although the practice is not entirely uniform on the subject, the general sentiment is adverse to the construction of railways by the State, and the opinion is quite prevalent, if not general, that they can be better managed, controlled, and operated for the public benefit in the hands of individuals than by State or municipal officers or agencies.

And while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that *to them* the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the legislature, reflecting the public sentiment, decide that the general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest. Accordingly, on the principle of public benefit, not only the State and its political divisions, but also individuals and corporate bodies, have been authorized to take private property for the construction of works of public utility, and when duly empowered by the legislature so to do, their private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished.[1]

[1] Beekman *v.* Saratoga & Schenectady R. R. Co., 3 Paige, 73, 22 Am. Dec. 679; Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. 245; Buonaparte *v.* Camden &

The Necessity for the Taking.

The authority to determine in any case whether it is needful to permit the exercise of this power must rest with the State itself; and the question is always one of strictly political character, not requiring any hearing upon the facts or any judicial determination.[1] Nevertheless, when a work or improvement of local importance only is contemplated, the need of which must be determined upon a view of the facts which the people of the vicinity may be supposed best to understand, the question of necessity is generally referred to some local tribunal, and it may even be submitted to a jury to decide upon evidence.[2] But parties interested have no constitutional right to be heard upon the question, unless the State constitution clearly and expressly recognizes and provides for it. On general principles, the final decision rests with the legislative department of the State;[3] and if the question is

Amboy R. R. Co., 1 Bald. 205; Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 9; Lebanon *v.* Olcott, 1 N. H. 339; Petition of Mount Washington Road Co., 35 N. H. 134; Pratt *v.* Brown, 3 Wis. 603; Swan *v.* Williams, 2 Mich. 427; Stevens *v.* Middlesex Canal, 12 Mass. 466; Boston Mill Dam *v.* Newman, 12 Pick. 467; Gilmer *v.* Lime Point, 18 Cal. 229; Armington *v.* Barnet, 15 Vt. 745; White River Turnpike *v.* Central Railroad, 21 Vt. 590; Raleigh, &c. R. R. Co. *v.* Davis, 2 Dev. & Bat. 451; Whiteman's Ex'r *v.* Wilmington, &c. R. R. Co., 2 Harr. 514; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Olmstead *v.* Camp, 33 Conn. 532; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504; Moran *v.* Ross, 79 Cal. 159, 21 Pac. 547.

[1] Varick *v.* Smith, 5 Paige Ch. 137, 28 Am. Dec. 417; Aldridge *v.* Railroad Co., 2 Stew. & Port. 199, 23 Am. Dec. 307; [St. Louis, I. M. & S. Ry. Co. *v.* Petty, 57 Ark. 339, 21 S. W. 881, 20 L. R. A. 434; Van Witson *v.* Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; Moore *v.* Sanford, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151; Wisconsin Water Co. *v.* Winans, 39 Am. St. 813, 85 Wis. 26, 54 N. W. 1003; Paxton & Hershey Irrigating C. & L. Co. *v.* Farmer's & M. I. & L. Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. 585, and note.]

[2] Iron R. R. Co. *v.* Ironton, 19 Ohio St 299. The constitutions of some of the States require the question of the necessity of any specific appropriation to be submitted to a jury; and this requirement cannot be dispensed with. Mansfield, &c. R. R. Co. *v.* Clarke, 23 Mich. 519; Arnold *v.* Decatur, 29 Mich. 77; [Saginaw, &c. Ry. Co. *v.* Bordner, 108 Mich. 236, 66 N. W. 62. As to what is "necessity," see City of Pasadena *v.* Stimson, 91 Cal. 238, 27 Pac. 604; City of Santa Cruz *v.* Enright, 95 Cal. 105, 30 Pac. 197; Detroit & S. P. Ry. Co. *v.* City of Detroit, 81 Mich. 562, 46 N. W. 12. Future as well as present needs to be considered. St. Louis & S. F. Ry. Co. *v.* Faltz, 52 Fed. Rep. 627; Kountze *v.* Prep. Morris Aqueduct, 58 N. J. L. 303, 33 Atl. 252, 58 N. J. L. 695, 34 Atl. 1099. Is a practical question; Butte A. & P. Ry. Co. *v.* Montana U. Ry. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298.]

[3] United States *v.* Harris, 1 Sum. 21, 42; Ford *v.* Chicago, &c. R. R. Co., 14 Wis. 609; People *v.* Smith, 21 N. Y. 595; Water Works Co. *v.* Burkhart, 41 Ind. 364; Tait's Exec. *v.* Centr. Lunatic Asylum, 84 Va. 271, 4 S. E. 697. If the use is public, the legislative determination of necessity is conclusive. Sholl *v.* German Coal Co., 118 Ill. 427, 10 N. E. 199; Matter of Union Ferry Co., 98 N. Y. 139; [O'Hare *v.* Chicago, M. & N. Ry. Co., 139 Ill. 151, 28 N. E. 923; Barrett *v.* Kemp, 91 Iowa. 296, 59 N. W. 76; Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. 402, and extended note; City of Cape Girardeau *v.* Houck, 129 Mo. 607, 31

referred to any tribunal for trial, the reference and the opportunity for being heard are matters of favor and not of right. The State is not under any obligation to make provision for a judicial contest upon that question. And where the case is such that it is proper to delegate to individuals or to a corporation (*a*) the power to appropriate property, it is also competent to delegate the authority to decide upon the necessity for the taking.[1]

S. W. 933; City of Philadelphia *v.* Ward, 174 Pa. St. 45, 34 Atl. 458; Douglas *v.* Byrnes, 59 Fed. Rep. 29; Joplin Consol. Mining Co. *v.* City of Joplin, 124 Mo. 129, 27 S. W. 406; Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 13 Sup. Ct. Rep. 622; but see *contra* Stearnes *v.* Barre, 73 Vt. 281, 50 Atl. 1080, 87 Am. St. 721. See also note, 87 Am. St. 734. The extent of taking is a legislative question. Shoemaker *v.* United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361; United States *v.* Gettysburgh Elec. Ry. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427, rev. United States *v.* Tract of Land, &c., 67 Fed. Rep. 869. Courts will relieve against abuse of power to determine necessity. Colorado E. Ry. Co. *v.* W. Pac. Ry. Co., 41 Fed. Rep. 293; St. Louis, I. M. & S. Ry. Co. *v.* Petty, 57 Ark. 350, 21 S. W. 884, 20 L. R. A. 434; Creston Water Wks. Co. *v.* McGrath, 89 Iowa, 502, 56 N. W. 680; Robinson *v.* Pa. Ry. Co., 161 Pa. St. 561, 29 Atl. 268.]

[1] People *v.* Smith, 21 N. Y. 595; Ford *v.* Chicago & N. W. R. R. Co., 14 Wis. 617; Matter of Albany St., 11 Wend. 152, 25 Am. Dec. 619; Lyon *v.* Jerome, 26 Wend. 484; Hays *v.* Risher, 32 Pa. St. 169; North Missouri R. R. Co. *v.* Lackland, 25 Mo. 515; Same *v.* Gott, 25 Mo. 540; Bankhead *v.* Brown, 25 Iowa, 540; Contra Costa R. R. *v.* Moss, 23 Cal. 323; Matter of Fowler, 53 N. Y. 60; N. Y. Central, &c. R. R. Co. *v.* Met. Gas Co., 63 N. Y. 326; Chicago, &c. R. R. Co. *v.* Lake, 71 Ill. 333; Warren *v.* St. Paul, &c. R. R. Co., 18 Minn. 384; Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403; State *v.* Stewart, 74 Wis. 620, 43 N. W. 947. But where a general power to condemn is given, for example, to a railroad company, the necessity for its exercise in the taking of particular property is a judicial question. Matter of New York Central R. R. Co., 66 N. Y. 407; *In re* St. Paul, & N. P. Ry. Co., 34 Minn. 227, 25 N. W. 345; Olmsted *v.* Prop'rs Morris Aqueduct, 46 N. J. L. 495; Tracy *v.* Elizabethtown, &c. R. R Co., 80 Ky. 259; Spring Valley Water Works *v.* San Mateo Water Works, 64 Cal. 123, 28 Pac. 447. In the case first above cited, *Denio*, J., says: "The question then is, whether the State, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether, under the circumstances of a particular case, the property required for the purpose shall be taken or not; and I am of opinion that the State is not under any obligation to make provisions for a judicial contest upon that question. The only part of the constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to

(*a*) [Private corporation cannot be authorized to condemn for the use of a municipality or *vice versa*. Seattle & Montana Ry. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217.]

How much Property may be taken.

The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.[1] If, however, the statute providing for such

be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legislative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority. The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax, or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use. It follows from these views that it is not necessary for the legislature, in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceedings with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power is given of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature in its discretion prescribes."

The fact that a road company has purchased a right of way across a man's land and bargained with him to build it, will not preclude its appropriating a right of way over the same land on another line. Cape Girardeau, &c. Road *v.* Dennis, 67 Mo. 438; [Baltimore, &c. Ry. Co. *v.* P. W. & K. Ry. Co., 17 W. Va. 812, 843; Railroad Co. *v.* Blake, 9 Rich. 228. See Lynch *v.* Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. 402.]

[1] By a statute of New York it was enacted that whenever a part only of a lot or parcel of land should be required for the purposes of a city street, if the commissioners for assessing compensation should deem it expedient to include the whole lot in the assessment, they should have power so to do; and the part not wanted for the particular street or improvement should, upon the confirmation of the report, become vested in the

appropriation is acted upon, and the property owner accepts the compensation awarded to him under it, he will be precluded by this implied assent from afterwards objecting to the excessive appropriation.[1] And where land is taken for a public work, there is nothing in the principle we have stated which will preclude the appropriation of whatever might be necessary for incidental conveniences: such as the workshops or depot buildings of a railway company,[2] or materials to be used in the construction of their road, and so on. (*a*) Express legislative power, however, is needed for these purposes; it will not follow that, because such things are convenient to the accomplishment of the general object, the public may appropriate them without express authority of law; but the power to appropriate must be expressly con-

corporation, and might be appropriated to public uses, or sold in case of no such appropriation. Of this statute it was said by the Supreme Court of New York: "If this provision was intended merely to give to the corporation capacity to take property under such circumstances with the consent of the owner, and then to dispose of the same, there can be no objection to it; but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power which, with all respect, the legislature did not possess. The constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another. It is in violation of natural right; and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient when the greater part of a lot is taken, and only a small part left, not required for public use, and that small part of but little value in the hands of the owner. In such case the corporation has been supposed best qualified to take and dispose of such parcels, or gores, as they have sometimes been called; and probably this assumption of power has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of this court. Suppose a case where only a few feet, or even inches, are wanted, from one end of a lot to widen a street, and a valuable building stands upon the other end of such lot; would the power be conceded to exist to take the whole lot, whether the owner consented or not? The *quantity* of the residue of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature thus to dispose of private property, whether feet or acres are the subject of this assumed power." Matter of Albany St., 11 Wend. 151, 25 Am. Dec. 618, per *Savage*, Ch. J. To the same effect is Dunn *v.* City Council, Harper, 129. And see Paul *v.* Detroit, 32 Mich. 108; Baltimore, &c. R. R. Co. *v.* Pittsburgh, &c. R. R. Co., 17 W. Va. 812.

[1] Embury *v.* Conner, 3 N. Y. 511. There is clearly nothing in constitutional principles which would preclude the legislature from providing that a man's property might be taken with his assent, whether the assent was evidenced by deed or not; and if he accepts payment, he must be deemed to assent. See Haskell *v.* New Bedford, 108 Mass. 208.

[2] Chicago, B. & Q. R. R. Co. *v.* Wilson, 17 Ill. 123; Low *v.* Galena & C. U. R. R. Co., 18 Ill. 324; Giesy *v.* Cincinnati, W. & Z. R. R. Co., 4 Ohio St. 308. Or extra track room. Matter of Staten Island Transit Co., 103 N. Y. 251, 8 N. E. 548.

(*a*) [A question as to the amount to be taken is a legislative not a judicial one. U. S. *v.* Gettysburgh Elec. Ry. Co., 160 U. S. 668, 16 Sup. Ct. Rep. 427.]

ferred, and the public agencies seeking to exercise this high prerogative must be careful to keep within the authority delegated, since the public necessity cannot be held to extend beyond what has been plainly declared on the face of the legislative enactment.

What constitutes a Taking of Property.

Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action.[1] If, for instance, the State, under its power to provide and regulate the public highways, should authorize the construction of a bridge across a navigable river, it is quite possible that all proprietary interests in land upon the river might be injuriously affected; but such

[1] Zimmerman *v.* Union Canal Co., 1 *pro* and *con* cited in notes to Selden W. & S. 846; Shrunk *v.* Schuylkill Navigation Co., 14 S. & R. 71; Monongahela Navigation Co. *v.* Coons, 6 W. & S. 101; Davidson *v.* Boston & Maine R. R. Co., 3 Cush. 91; Gould *v.* Hudson River R. R. Co., 12 Barb. 616, and 6 N. Y. 522; Radcliff *v.* Mayor, &c. of Brooklyn, 4 N. Y. 195; Murray *v.* Menefee, 20 Ark. 561; Hooker *v.* New Haven & Northampton Co., 14 Conn. 146; People *v.* Kerr, 27 N. Y. 188; Fuller *v.* Edings, 11 Rich. Law, 239; Eddings *v.* Seabrook, 12 Rich. Law, 504; Richardson *v.* Vermont Central R. R. Co., 25 Vt. 465; Kennett's Petition, 24 N. H. 139; Alexander *v.* Milwaukee, 16 Wis. 247; Richmond, &c. Co. *v.* Rogers, 1 Duvall, 135; Harvey *v.* Lackawanna, &c. R. R. Co., 47 Pa. St. 428; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21; Railroad Co. *v.* Richmond, 96 U. S. 521. The discontinuance of a highway does not entitle parties incommoded thereby to compensation. Fearing *v.* Irwin, 55 N. Y. 486; [Levee District No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388. This is particularly true if such persons are not abutting owners. Stanwood *v.* City of Malden, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; Glasgow *v.* City of St. Louis, 107 Mo. 198, 17 S. W. 743. To the effect that vacation of a street is a taking, see Cullen *v.* N. Y., N. H. & H. R. Ry. Co., 66 Conn. 211, 33 Atl. 910; Pearsall *v.* Eaton County Supervisors, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193. See cases *v.* Jacksonville, 14 L. R. A. 370, and 29 Am. St. 278. Many of which depend upon particular statutes; and Bahl *v.* Fort Street Union Depot Co., 98 Mich. 596, 57 N. W. 829, 23 L. R. A. 392; Dantzer *v.* Indianapolis Union Ry. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769.] Incidental injury to adjoining lot-owners from constructing a tunnel in a street to pass under a river will give no right of action. Transportation Co. *v.* Chicago, 99 U. S. 635. See the case in the Circuit Court, 7 Biss. 45. But a railroad company cannot be required at its own expense to construct and maintain across its right of way every new highway which may be laid out over it. That would be a taking without just compensation. People *v.* Lake Shore, &c. Ry. Co., 52 Mich. 277, 17 N. W. 841; Chicago & G. T. Ry. Co. *v.* Hough, 61 Mich. 507, 28 N. W. 532. [Statute requiring existing railway companies to build farm crossings, their roads having been built when the statute did not require it, is unconstitutional. If such crossings are considered as for public use, it is taking without compensation. People *v.* D. G. H. & M. Ry. Co., 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717. The State or its grantees may construct wharves upon its lands under navigable waters without compensation to riparian owners for injuries resulting. Eisenbach *v.* Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.]

injury could no more give a valid claim against the State for damages, than could any change in the general laws of the State, which, while keeping in view the general good, might injuriously affect particular interests.[1] So if by the erection of a dam in order to improve navigation the owner of a fishery finds it diminished in value,[2] or if by deepening the channel of a river to im-

[1] Davidson *v.* Boston & Maine R. R. Co., 3 Cush. 91; Transportation Co. *v.* Chicago, 99 U. S. 635.

[2] Shrunk *v.* Schuylkill Navigation Co., 14 S. & R. 71. In Green *v.* Swift, 47 Cal. 536, and Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610, it is held that where one finds his land injured in consequence of a change in the current of a river, caused by straightening it, he cannot claim compensation as of right. [A riparian proprietor is entitled to compensation for land taken for public dam, for overflow of his lands, and diversion of water by reason thereof. Kaukauna W. P. Co. *v.* Green Bay & M. C. Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173. But not, it seems, for injury from washing away soil of banks through reasonable increase of flow of water at times, caused by a dam authorized by the legislature. Brooks *v.* Cedar Brook & S. C. R. I. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460; nor for injuries to rice fields by construction of harbor improvements in a navigable stream. Mills *v.* United States, 46 Fed. Rep. 738, 12 L. R. A. 673; Farist Steel Co. *v.* City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590; Rumsey *v.* N. Y. &c. Ry. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. 600. The construction by the United States of a pier in a navigable river under authority of Congress for the improvement of navigation gives an owner of lands bordering on the river no right to compensation though his access to navigable water be cut off. Scranton *v.* Wheeler, 113 Mich. 565, 71 N. W. 1091, aff. 179 U. S. 141, 21 Sup. Ct. Rep. 48. Same doctrine, Sage *v.* New York, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. 592, 38 L. R. A. 606. A riparian owner on navigable water owns to high-water mark, which is that line below which the lands are so frequently flowed that they are not productive as agricultural lands, and the State cannot, even in aid of public navigation, by artificial means maintain such waters above high-water mark to the injury of riparian owners. *In re* Minnetonka Lake Improvement, 56 Minn. 513, 58 N. W. 295, 45 Am. St. 494. Below high-water mark the State has full authority and right on navigable waters to do whatsoever it pleases in aid of public navigation, and any injury resulting incidentally to the riparian owner is *damnum absque injuria*. *In re* Minnetonka Lake Improvement, *supra*. Right in lands flowed under exercise of right of eminent domain is more than a mere easement. It includes the right of exclusive occupation, and carries right to cut ice which forms on the water. Wright *v.* Woodcock, 86 Me. 113, 29 Atl. 953, 24 L. R. A. 499. See also, on general subject of taking riparian interests in lands, Patten Paper Co. Ltd. *v.* Kaukauna Water Power Co., 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019, 28 L. R. A. 443; Priew *v.* Wisconsin State Land & Imp. Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; Carlson *v.* St. Louis River D. & I. Co., 73 Minn. 128, 75 N. W. 1044, 72 Am. St. 610, 41 L. R. A. 371; Platt Bros. & Co. *v.* Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691; Valparaiso *v.* Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707. These last two cases are opposed to each other on the question of whether a riparian owner is entitled to compensation for the casting of the sewage of a city upon his lands to their injury. The Connecticut case finds support in Smith *v.* Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711, and in Grey *ex rel.* Simmons *v.* Paterson, — N. J. —, 45 Atl. 995. The retention of surface water on lot in city, caused by change of grade in street, is not a taking in violation of constitution. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. 859, 36 L. R. A. 519. In Maine and Massachusetts where the "great ponds" belong to the State, the taking of a reasonable quantity of water by authority of the State is not a "taking" as against a mill owner with a water power on the outlet. Auburn *v.*

prove the navigation a spring is destroyed,[1] or by a change in the grade of a city street the value of adjacent lots is diminished,[2] —

Union Water Power Co., 90 Me. 576, 38 Atl. 561, 38 L. R. A. 188. The diversion of water from its natural course in which it serves as motive power for a mill is in Michigan unlawful, and will be enjoined where such diversion is for drainage purposes only. Stock *v.* Jefferson, 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355.]

[1] Commonwealth *v.* Richter, 1 Pa. St. 467. But in Winklemans *v.* Des Moines, &c. Ry. Co., 62 Iowa, 11, 17 N. W. 82, the value of a spring destroyed in railroad construction is held recoverable. [Incidental draining of a well through construction of a public work is a "direct injuring" of property within the meaning of that term in a statute authorizing the construction. United States *v.* Alexander, 148 U. S. 186, 13 Sup. Ct. Rep. 529.] It is justly said by Mr. Justice *Miller*, in Pumpelly *v.* The Green Bay, &c. Co., 13 Wall. 166, 180, that the decisions "that for the consequential injury to the property of an individual from the prosecution of improvement of roads, streets, rivers, and other highways for the public good, there is no redress," "have gone to the extreme and limit of sound judicial construction in favor of this principle, and in some cases beyond it; and it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as effectually to destroy or impair its usefulness, it is a taking within the meaning of the Constitution." See also Arimond *v.* Green Bay, &c. Co., 31 Wis. 316; Aurora *v.* Reed, 57 Ill. 29, 11 Am. Rep. 1. This whole subject is most elaborately considered by *Smith*, J., in Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504. It was decided in that case that, notwithstanding a party had received compensation for the taking of his land for a railroad, he was entitled to a further remedy at the common law for the flooding of his land in consequence of the road being cut through a ridge on the land of another; and that this flooding was a taking of his property within the meaning of the constitution. The cases to the contrary are all considered by the learned judge, who is able to adduce very forcible reasons for his conclusions. [A change in the plan of construction of a railway after condemnation may entitle the owner of lands condemned to additional compensation. Wabash, St. L. & P. R. Co. *v.* McDougall, 126 Ill. 111, 18 N. E. 291, 1 L. R. A. 207. The conversion of a public way into a pleasure driveway, and excluding loaded vehicles from it, is not, as against persons desiring to use it with such vehicles, a taking of their property for public use without compensation. Cicero Lumber Co. *v.* Cicero, 176 Ill. 9, 51 N. E. 758, 68 Am. St. 155, 42 L. R. A. 696.] Compare Aldrich *v.* Cheshire R. R. Co., 21 N. H. 359; West Branch, &c. Canal Co. *v.* Mulliner, 68 Pa. St. 357; Bellinger *v.* N. Y. Central R. R. Co., 23 N. Y. 42; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49; and cases, *ante*, p. 757.

[2] British Plate Manufacturing Co. *v.* Meredith, 4 T. R. 794; Matter of Furman Street, 17 Wend. 649; Radcliff's Ex'rs *v.* Mayor, &c. of Brooklyn, 4 N. Y. 195; Graves *v.* Otis, 2 Hill, 466; Wilson *v.* Mayor, &c. of New York, 1 Denio, 595; Murphy *v.* Chicago, 29 Ill. 279; Roberts *v.* Chicago, 26 Ill. 249; Charlton *v.* Allegheny City, 1 Grant, 208; La Fayette *v.* Bush, 19 Ind. 326; Macy *v.* Indianapolis, 17 Ind. 267; Vincennes *v.* Richards, 23 Ind. 381; Green *v.* Reading, 9 Watts, 382; O'Conner *v.* Pittsburg, 18 Pa. St. 187; *In re* Ridge Street, 29 Pa. St. 391; Callendar *v.* Marsh, 1 Pick. 418; Creal *v.* Keokuk, 4 Greene (Iowa), 47; Smith *v.* Washington, 20 How. 135; Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Benden *v.* Nashua, 17 N. H. 477; Pontiac *v.* Carter, 32 Mich. 164; Goszler *v.* Georgetown, 6 Wheat. 593; Stewart *v.* Clinton, 79 Mo. 603; Kehrer *v.* Richmond, 81 Va. 745; Meth. Epis. Church *v.* Wyandotte, 31 Kan. 721, 3 Pac. 527. See cases, *ante*, p. 296, and Conklin *v.* New York, &c. Ry. Co., 102 N. Y. 107, 6 N. E. 663; Uline *v.* New York, &c. R. R. Co., 101 N. Y. 98, 4 N E. 536; Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322; [Selden *v.* City of Jacksonville, 28 Fla. 558, 10 So. 457, 29 Am. St. 278 and note, 14 L. R. A. 370. It seems that where the constitution contains a provision requiring com-

in these and similar cases the law affords no redress for the injury. So if in consequence of the construction of a public work an injury occurs, but the work was constructed on proper plan and without negligence, and the injury is caused by accidental and extraordinary circumstances, the injured party cannot demand compensation.[1]

pensation for property "damaged" for public use, that a change of grade, resulting in damage, gives an action. Rauenstein *v.* N. Y. L. & W. Ry. Co., 136 N. Y. 528, 32 N. E. 1074, 18 L. R. A. 768; O'Brien *v.* Philadelphia, 150 Pa. 589, 24 Atl. 1047, 30 Am. St. 832, and note, pp. 835 *et seq.*; Henderson *v.* McClain, 102 Ky. 402, 43 S. W. 700, 39 L. R. A. 349; Searle *v.* City of Lead, 10 S. D. 312, 405, 73 N. W. 101, 913, 39 L. R. A. 345; Pueblo *v.* Strait, 20 Col. 13, 36 Pac. 789, 46 Am. St. 273, 24 L. R. A. 392; Dickerman *v.* Duluth, — Minn. —, 92 N. W. 1119; Brown *v.* City of Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161. Though property does not abut on the street but on an alley opening into it. *Id.* There is no taking as against abutting owner where a railway company constructs in a public way a stone abutment nine feet high which reduces the width in front of his premises to ten feet, interfering with access of light and air, and almost destroying access to the abutting property. Garrett *v.* Lake Roland Elevated R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396. Similar cases are Willis *v.* Winona, 50 Minn. 27, 60 N. W. 814, 26 L. R. A. 142; Home Building & C. Co. *v.* City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551. But see Field *v.* Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, where it is held that an overhead bridge across an alley which obstructs access of light and air to abutting property is such an injury as must be compensated for though the city owns the alley and authorized the bridge. A similar conclusion was reached in Willamette Iron Works *v.* Oregon R. & N. Co., 26 Oreg. 224, 37 Pac. 1016, 29 L. R. A. 88, which involved a railway bridge approach in a public street. It is a taking against the constitutional inhibition to require abutting owners in New Hampshire to keep sidewalks free from snow and ice. State *v.* Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438.] Compare cases, *post*, p. 812, note. The cases of McComb *v.* Akron, 15 Ohio, 474, 18 Ohio, 229, and Crawford *v.* Delaware, 7 Ohio St. 459, are *contra*. Those cases, however, admit that a party whose interests are injured by the original establishment of a street grade can have no claim to compensation; but they hold that when the grade is once established, and lots are improved in reference to it, the corporation has no right to change the grade afterwards, except on payment of the damages. And see Johnson *v.* Parkersburg, 16 W. Va. 402, 37 Am. Rep. 779. That if the lateral support to his land is removed by grading a street the owner is entitled to compensation, see O'Brien *v.* St. Paul, 25 Minn. 331; Buskirk *v.* Strickland, 47 Mich. 389, 11 N. W. 210. [Parke *v.* City of Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68]

[1] As in Sprague *v.* Worcester, 13 Gray, 193, where, in consequence of the erection of a bridge over a stream on which a mill was situated, the mill was injured by an extraordinary rise in the stream; the bridge, however, being in all respects properly constructed. [The destruction of oysters by turning the sewage of a city upon their beds is a taking, requiring compensation. Huffmire *v.* Brooklyn, 162 N. Y. 584, 57 N. E. 176, 48 L. R. A. 421.] In Hamilton *v.* Vicksburg, &c. R. R. Co., 119 U. S. 280, 7 Sup. Ct. Rep. 206, the obstruction of a navigable stream by unavoidable delay in rebuilding a lawful bridge was held not actionable. And see Brown *v.* Cayuga, &c. R. R. Co., 12 N. Y. 486, where bridge proprietors were held liable for similar injuries on the ground of negligence. And compare Norris *v.* Vt. Central R. R. Co., 28 Vt. 99, with Mellen *v.* Western R. R. Corp., 4 Gray, 301. And see note on preceding page. The inconvenience from smoke and jar caused by the careful construction and operation of a railroad near property is not actionable. Carroll *v.* Wis. Cent. R. R. Co., 40 Minn. 168, 41

This principle is peculiarly applicable to those cases where property is appropriated under the right of eminent domain. It must frequently occur that a party will find his rights seriously affected, though no property to which he has lawful claim is actually appropriated. As where a road is laid out along the line of a man's land without taking any portion of it, in consequence of which he is compelled to keep up the whole of what before was a partition fence, one half of which his neighbor was required to support.[1] No property being taken in this case, the party has no relief unless the statute shall give it. The loss is *damnum absque injuria*. So a turnpike company, whose profits will be diminished by the construction of a railroad along the same general line of travel, is not entitled to compensation.[2] So where a railroad company, in constructing their road in a proper manner on their own land, raised a high embankment near to and in front of the plaintiff's house, so as to prevent his passing to and from the same with the same convenience as before, this consequential inquiry was held to give no claim to compensation.[3] So

N. W. 661; Beseman *v.* Pa. R. R. Co., 50 N. J. L. 235, 13 Atl. 164. Compare Baltimore & O. R. R. Co. *v.* Fifth Bapt. Ch., 108 U. S. 317, 2 Sup. Ct. Rep. 719; Cogswell *v.* New York, &c. R. R. Co., 103 N. Y. 10, 8 N. E. 537.

[1] Kennett's Petition, 4 Fost. 139. See Eddings *v.* Seabrook, 12 Rich. Law, 504; Slatten *v.* Des Moines Valley R. R. Co., 29 Iowa, 148; Hong *v.* Switzer, 61 Ill. 294. [If construction of railway along opposite side of highway causes depreciation of lands, the owner is entitled to compensation for such depreciation as is occasioned by causes not affecting the public generally. Lake Erie & Western Ry. Co. *v.* Scott, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330.] Merely crossing a railroad by another track is not a taking of property. Lehigh V. R. R. Co. *v.* Dover, &c. R. R. Co., 43 N. J. 528. But this cannot be universally true. See Lake Shore, &c. R. R. Co. *v.* Chicago, &c. R. R. Co., 100 Ill. 21. Damage for the resulting inconvenience may be allowed as well as for maintaining the crossing. Chicago & W. I. R. R. Co. *v.* Englewood, &c. Ry. Co., 115 Ill. 375, 4 N. E. 246.

[2] Troy & Boston R. R. Co. *v.* Northern Turnpike Co., 16 Barb. 100. See La Fayette Plank Road Co. *v.* New Albany & Salem R. R. Co., 13 Ind. 90; Richmond, &c. Co. *v.* Rogers, 1 Duvall, 135. So an increased competition with a party's business caused by the construction or extension of a road is not a ground of claim. Harvey *v.* Lackawanna, &c. R. R. Co., 47 Pa. St. 428. "Every great public improvement must, almost of necessity, more or less affect individual convenience and property; and where the injury sustained is remote and consequential, it is *damnum absque injuria*, and is to be borne as a part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience." Lansing *v.* Smith, 8 Cow. 146, 149.

[3] Richardson *v.* Vermont Central R. R. Co., 25 Vt. 465. But *quære* if this could be so, if the effect were to prevent access from the lot to the highway. In certain Indiana cases it is said that the right of the owner of adjoining land to the use of the highway is as much property as the land itself; that it is appurtenant to the land, and is protected by the constitution. Haynes *v.* Thomas, 7 Ind. 38; Protzman *v.* Indianapolis, &c. R. R Co., 9 Ind. 467; New Albany & Salem R. R. Co. *v.* O'Daily, 13 Ind. 453. The same doctrine is recognized in Crawford *v.* Delaware, 7 Ohio St. 459; Street Railway *v.* Cumminsville, 14 Ohio St. 523; Schneider *v.* Detroit, 72 Mich. 240, 40 N. W. 329;

the owner of dams erected by legislative authority is without remedy, if they are afterwards rendered valueless by the construction of a canal.[1] And in New York it has been held that, as the land where the tide ebbs and flows, between high and low water mark, belongs to the public, the State may lawfully authorize a railroad company to construct their road along the water front below high-water mark, and the owner of the adjacent bank can claim no compensation for the consequential injury to his interests.[2] So the granting of a ferry right with a landing on private

Columbus & W. Ry. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23; Shealy *v.* Chicago, &c. Ry. Co., 72 Wis. 471, 40 N. W. 145. See also Indianapolis R. R. Co. *v.* Smith, 52 Ind. 428; Terre Haute & L. R. R. Co. *v.* Bissell, 108 Ind. 113, 9 N. E 144; Indiana, B. & W. Ry. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467; Pekin *v.* Brereton, 67 Ill. 477; Pekin *v.* Winkel, 77 Ill. 56; Grand Rapids, &c. R. R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306. In the Vermont case above cited it was held that an excavation by the company on their own land, so near the line of the plaintiff's that his land, without any artificial weight thereon, slid into the excavation, would render the company liable for the injury; the plaintiff being entitled to the lateral support for his land. But if to bridge a cut made by a railroad in crossing a street the grade in front of a lot is raised, it is held not a taking for a new use, though access to the lot is cut off. Henderson *v.* Minneapolis, 32 Minn. 319, 20 N. W. 322; Conklin *v.* New York, &c. Ry. Co., 102 N. Y. 107, 6 N. E. 663. The same principle is followed in Uline *v.* New York, &c. R. R. Co., 101 N. Y. 98, 4 N. E. 536.

[1] Susquehanna Canal Co. *v.* Wright, 9 W. & S. 9; Monongahela Navigation Co. *v.* Coons, 6 W. & S. 101. [But see Lee *v.* Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Trenton Water Power Co. *v.* Roff, 36 N. J. L. 343; Red River Bridge Co. *v.* Clarksville, 1 Sneed, 176, 60 Am. Dec. 143.] In any case, if parties exercising the right of eminent domain shall cause injury to others by a negligent or improper construction of their work, they may be liable in damages. Rowe *v.* Granite Bridge Corporation, 21 Pick. 348; Sprague *v.* Worcester, 13 Gray, 193. And if a public work is of a character to necessarily disturb the occupation and enjoyment of his estate by one whose land is not taken, he may have an action on the case for the injury, notwithstanding the statute makes no provision for compensation. As where the necessary, and not simply the accidental, consequence was to flood a man's premises with water, thereby greatly diminishing their value. Hooker *v.* New Haven & Northampton Co., 14 Conn. 146, 15 Conn. 312; Evansville, &c. R. R. Co. *v.* Dick, 9 Ind. 433; Robinson *v.* N. Y. & Erie R. R. Co., 27 Barb. 512; Trustees of Wabash & Erie Canal *v.* Spears, 16 Ind. 441; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504; Ashley *v.* Port Huron, 35 Mich. 296. So, where, by blasting rock in making an excavation, the fragments are thrown upon adjacent buildings so as to render their occupation unsafe. Hay *v.* Cohoes Co., 2 N. Y. 159; Tremain *v.* Same, 2 N. Y. 163; Carman *v.* Steubenville & Indiana R. R. Co., 4 Ohio St. 399; Sunbury & Erie R. R. Co. *v.* Hummel, 27 Pa. St. 99; Georgetown, &c. R. R. Co. *v.* Eagles, 9 Col. 544, 13 Pac. 696. See Mairs *v.* Manhattan, &c. Ass., 89 N. Y. 498. There has been some disposition to hold private corporations liable for all incidental damages caused by their exercise of the right of eminent domain. See Tinsman *v.* Belvidere & Delaware R. R. Co., 26 N. J. 148; Alexander *v.* Milwaukee, 16 Wis. 247. [Opening of street adjacent to one's property, thus bounding it by streets on three sides and diminishing its value by rendering it unsightly to the public and destroying its privacy, is not a "taking" or "damaging" under the constitution. Peel *v.* City of Atlanta, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787.]

[2] Gould *v.* Hudson River R. R. Co., 6 N. Y. 522. And see Stevens *v.* Paterson, &c. R. R. Co., 34 N. J. 532; Tomlin *v.* Dubuque, &c. R. R. Co., 32 Iowa, 106,

property within a highway terminating on a private stream is not an appropriation of property,[1] the ferry being a mere continuation of the highway, and the landing place upon the private property having previously been appropriated to public uses.

These cases must suffice as illustrations of the principle stated, though many others might be referred to. On the other hand, any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation.[2] Water front on a stream where

7 Am. Rep. 176; [Scranton *v.* Wheeler, 113 Mich. 565, 71 N. W. 1091, aff. 179 U. S. 141, 21 Sup. Ct. Rep. 48; Sage *v.* New York City, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. 592, 38 L. R. A. 606.] So far as these cases hold it competent to cut off a riparian proprietor from access to the navigable water, they seem to us to justify an appropriation of his property without compensation; for even those courts which hold the fee in the soil under navigable waters to be in the State admit valuable riparian rights in the adjacent proprietor. See Yates *v.* Milwaukee, 10 Wall. 497; Chicago, &c. R. R. Co. *v.* Stein, 75 Ill. 41. Compare Pennsylvania R. R. Co. *v.* New York, &c. R. R. Co., 23 N. J. Eq. 157. In the case of Railway Co. *v.* Renwick, 102 U. S. 180, it is decided expressly that the land under the water in front of a riparian proprietor and beyond the line of private ownership, cannot be taken and appropriated to a public purpose without making compensation to the riparian proprietor. This is a very sensible and just decision. See, in the same line, Langdon *v.* Mayor, 93 N. Y. 129; Kingsland *v.* Mayor, 110 N. Y. 569, 18 N. E. 435.

[1] Murray *v.* Menefee, 20 Ark. 561. Compare Prosser *v.* Wapello County, 18 Iowa, 327.

[2] Hooker *v.* New Haven & Northampton Co., 14 Conn. 146; Pumpelly *v.* Green Bay, &c. Co., 13 Wall. 166; Arimond *v.* Green Bay, &c. Co., 31 Wis. 316; Ashley *v.* Port Huron, 35 Mich. 296. [Any restriction or interruption of the common or necessary use of property that destroys its value, or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of a constitutional provision forbidding the taking of private property for public use without compensation. City of Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. 123.] The flowing of private lands by the operations of a booming company is a taking of property. Grand Rapids Booming Co. *v.* Jarvis, 30 Mich. 308; Weaver *v.* Mississippi, &c. Co., 28 Minn. 534, 11 N. W. 114. And see cases, p. 786, note 1. The legislature cannot authorize a telegraph company to erect its poles on the lands of a railroad company without compensation. Atlantic, &c. Telegraph Co. *v.* Chicago, &c. R. R. Co., 6 Biss. 158. [A railway company cannot give authority to a telegraph or telephone company to construct a line of telegraph or telephone along its right of way as against the adjoining proprietor whose lands have been condemned for railway purposes only. American T. & T. Co. *v.* Smith, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. *Contra*, if constructed in good faith for the use and benefit of the railway in the carrying on of its railway business. *Id.*] The erection of telephone, telegraph, and electric wire poles on a highway is a new use of it. Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507; Metr. Tel. &c., Co. *v.* Colwell Lead Co., 67 How. Pr. 365; Tiffany *v.* U. S. Illum. Co., *Id.* 73; [Western Union Telegraph Co. *v.* Williams, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429.] *Contra*, Pierce *v.* Drew, 136 Mass. 75; Julia B'ld'g Ass. *v.* Bell Tel. Co., 88 Mo. 258. A statute cannot compel a railroad company to allow any one upon payment of one dollar to erect a grain elevator upon its station grounds. State *v.* Chicago, &c. Ry. Co., 36 Minn. 402, 31 N. W. 365. If under an ordinance an abutter on rebuilding is required to put his house back five feet from the street line, property is taken. *In re* Chestnut St., 118 Pa. St. 593, 12 Atl. 485; [City of St. Louis *v.* Hill, 116 Mo. 527, 22 S. W.

the tide does not ebb and flow is property, and, if taken, must be paid for as such.[1] So with an exclusive right of wharfage upon tide water.[2] So with the right of the owner of land to use an adjoining street, whether he is owner of the land over which the street is laid out or not.[3] So with the right of pasturage in streets, which belongs to the owners of the soil.[4] So a partial destruction or diminution of value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation.[5]

It sometimes becomes important, where a highway has been laid out and opened, to establish a different and higher grade of way upon the same line, with a view to accommodate an increased public demand. The State may be willing to surrender the control of the streets in these cases, and authorize turnpike, plank-road, or railroad corporations to occupy them for their purposes; and if it shall give such consent, the control, so far as is neces-

861, 21 L. R. A. 226.] So, if under a statute a road officer cuts a drain on property to draw surface water from a highway. Ward *v.* Peck, 49 N. J. L. 42, 6 Atl. 805. So, if in grading a street an embankment is placed so as to take up part of an abutting lot, and injure a house on it. Vanderlip *v.* Grand Rapids, 73 Mich. 522, 16 Am. St. 597, and note, 3 L. R. A. 247, 41 N. W. 677; Broadwell *v.* Kansas City, 75 Mo. 213. [Use of artificial means to increase the flow of natural gas to the injury of others supplied from some common reservoir, is a taking entitling to compensation. Manufacturer's G. & O. Co. *v.* Indiana N. G. & O. Co., 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768.

[1] Varick *v.* Smith, 9 Paige, 547. See Yates *v.* Milwaukee, 10 Wall. 497.

[2] Murray *v.* Sharp, 1 Bosw. 539.

[3] Lackland *v.* North Missouri R. R. Co., 31 Mo. 180. See *supra*, p. 785, note 3. Abutters, as members of the public who have not bought by a plat, have no right of action for the obstruction of a street under State authority. Gerhard *v.* Seekonk, &c. Com., 15 R. I. 334, 5 Atl. 199.

[4] Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255; Woodruff *v.* Neal, 28 Conn. 165. In the first case it was held that a by-law of a town giving liberty to the inhabitants to depasture their cows in the public highways under certain regulations, passed under the authority of a general statute empowering towns to pass such by-laws, was of no validity, because it appropriated the pasturage, which was private property, to the public use, without making compensation. The contrary has been held in New York as to all highways laid out while such a statute was in existence; the owner being held to be compensated for the pasturage, as well as for the use of the land for other purposes, at the time the highway was laid out. Griffin *v.* Martin, 7 Barb. 297; Hardenburgh *v.* Lockwood, 25 Barb. 9. See also Kerwhacker *v.* Cleveland, C. & C. R. R. Co., 3 Ohio St. 172, where it was held that by ancient custom in that State there was a right of pasturage by the public in the highways.

[5] See Glover *v.* Powell, 10 N. J. Eq. 211; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504. Even a temporary right to the possession of lands cannot be given by the legislature without provision for compensation. San Mateo Water Works *v.* Sharpstein, 50 Cal. 284. A provision in the charter of a corporation that it shall not be liable for diverting water is void. Harding *v.* Stamford Water Co., 41 Conn. 87. [Destruction of crops planted after the location of a railway, but before condemnation or compensation, entitles the tenant planting them to compensation. Lafferty *v.* Schuylkill River E. S. Ry. Co., 124 Pa. St. 297, 16 Atl. 869, 3 L. R. A. 124.]

sary to the purposes of the turnpike, plank-road, or railway, is thereby passed over to the corporation, and their structure in what was before a common highway cannot be regarded as a public nuisance.[1] But the municipal organizations in the State have no power to give such consent without express legislative permission; the general control of their streets which is commonly given by municipal charters not being sufficient authority for this purpose.[2] When, however, the public authorities have thus assented, it may be found that the owners of the adjacent lots, who are also owners of the fee in the highway subject to the public easement, may be unwilling to assent to the change, and may believe their interests to be seriously and injuriously affected thereby. The question may then arise, Is the owner of the land, who has been once compensated for the injury he has sustained in the appropriation of his land as a highway, entitled to a new assessment for any further injury he may sustain in consequence of the street being subjected to a change in the use not contemplated at the time of the original taking, but nevertheless in furtherance of the same general purpose?

When a common highway is made a turnpike or a plank-road, upon which tolls are collected, there is much reason for holding that the owner of the soil is not entitled to any further compensa-

[1] See Commonwealth *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339; Tennessee, &c. R. R. Co. *v.* Adams, 3 Head, 596; New Orleans, &c. R. R. Co. *v.* New Orleans, 26 La. Ann. 517; Chicago, &c. R. R. Co. *v.* Joliet, 79 Ill. 25; Donnaher's Case, 16 Miss. 649.

[2] Lackland *v.* North Missouri R. R. Co., 31 Mo. 180; New York & Harlem R. R. Co. *v.* Mayor, &c. of New York, 1 Hilt. 562; Milhau *v.* Sharp, 27 N. Y. 611; State *v.* Cincinnati, &c. Gas Co., 18 Ohio St. 262; State *v.* Trenton, 36 N. J. 79; Chamberlain *v.* Elizabethport, &c. Co., 41 N. J. Eq. 43; Garnett *v.* Jacksonville, &c. Co., 20 Fla. 889. In Inhabitants of Springfield *v.* Connecticut River R. R. Co, 4 Cush. 63, it was held that legislative authority to construct a railroad between certain *termini*, without prescribing its precise course and direction, would not *prima facie* confer power to lay out the road on and along an existing public highway. Per *Shaw*, C. J.: "The whole course of legislation on the subject of railroads is opposed to such a construction. The crossing of public highways by railroads is obviously necessary, and of course warranted; and numerous provisions are industriously made to regulate such crossings, by determining when they shall be on the same and when on different levels, in order to avoid collision; and, when on the same level, what gates, fences, and barriers shall be made, and what guards shall be kept to insure safety. Had it been intended that railroad companies, under a general grant, should have power to lay a railroad over a highway longitudinally, which ordinarily is not necessary, we think that would have been done in express terms, accompanied with full legislative provisions for maintaining such barriers and modes of separation as would tend to make the use of the same road, for both modes of travel, consistent with the safety of travellers on both. The absence of any such provision affords a strong inference that, under general terms, it was not intended that such a power should be given." See also Commonwealth *v.* Erie & N. E. R. R. Co., 17 Pa. St. 339; Attorney-General *v.* Morris & Essex R. R. Co., 19 N. J. Eq. 386.

tion. The turnpike or the plank-road is still an avenue for public travel, subject to be used in the same manner as the ordinary highway was before, and, if properly constructed, is generally expected to increase rather than diminish the value of property along its line; and though the adjoining proprietors are required to pay toll, they are supposed to be, and generally are, fully compensated for this burden by the increased excellence of the road, and by their exemption from highway labor upon it.[1] But it is different when a highway is appropriated for the purposes of a railroad. "It is quite apparent that the use by the public of a highway, and the use thereof by a railroad company, is essentially different. In the one case every person is at liberty to travel over the highway in any place or part thereof, but he has no exclusive right of occupation of any part thereof except while he is temporarily passing over it. It would be trespass for him to occupy any part of the highway exclusively for any longer period of time than was necessary for that purpose, and the stoppages incident thereto. But a railroad company takes exclusive and permanent possession of a portion of the street or highway. It lays down its rails upon, or imbeds them in, the soil, and thus appropriates a portion of the street to its exclusive use, and for its own particular mode of conveyance. In the one case, all persons may travel on the street or highway in their own common modes of conveyance. In the other no one can travel on or over the rails laid down, except the railroad company and with their cars specially adapted to the tracks. In one case the use is general and open alike to all. In the other it is peculiar and exclusive.

"It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With a single track, and particularly if the cars used upon it were propelled by horse-power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property, or of the increase of the burden upon the soil. It would present simply a

[1] See Commonwealth *v.* Wilkinson, 16 Pick. 175, 24 Am. Dec. 624; Benedict *v.* Goit, 3 Barb. 459; Wright *v.* Carter, 27 N. J. 76; State *v.* Laverack, 34 N. J. 201; Chagrin Falls & Cleveland Plank Road Co. *v.* Cane, 2 Ohio St. 419; Douglass *v* Turnpike Co., 22 Md. 219. But see Williams *v.* Natural Bridge Plank Road Co., 21 Mo. 580. A third-class road cannot be changed to one of the second class without compensation, as the burden on the owner is increased. Bounds *v.* Kirven, 63 Tex. 159. In Murray *v.* County Commissioners of Berkshire, 12 Met. 455, it was held that owners of lands adjoining a turnpike were not entitled to compensation when a turnpike was changed to a common highway.

question of degree in respect to the enlargement of the easement, and would not affect the principle, that the use of a street for the purposes of a railroad imposed upon it a new burden."[1]

The case from which we here quote is approved in cases in Wisconsin, where importance is attached to the different effect the common highway and the railroad will have upon the value of adjacent property. "The dedication to the public as a highway," it is said, "enhances the value of the lot, and renders it more convenient and useful to the owner. The use by the railroad company diminishes its value, and renders it inconvenient and comparatively useless. It would be a most unjust and oppressive rule which would deny the owner compensation under such circumstances."[2]

[1] Wager *v.* Troy Union R. R. Co., 25 N. Y. 526, 532, approving Williams *v.* New York Central R. R. Co., 16 N. Y. 97; Carpenter *v.* Oswego & Syracuse R. R. Co., 24 N. Y. 655; Mahon *v.* New York Central R. R. Co., 24 N. Y. 658; Starr *v.* Camden & Atlantic R. R. Co., 24 N. J. 592; Donnaher's Case, 16 Miss. 649; Theobold *v.* Louisville, &c. Ry. Co., 66 Miss. 279, 6 So. 230; Adams *v.* Chicago, &c. R. R. Co., 39 Minn. 286, 39 N. W. 629; Phipps *v.* West Md. R. R. Co., 66 Md. 319; Cox *v.* Louisville, &c. R. R. Co., 48 Ind. 178. In Inhabitants of Springfield *v.* Connecticut River R. R. Co., 4 Cush. 71, where, however, the precise question here discussed was not involved, Chief Justice *Shaw*, in comparing railroads with common highways, says: "The two uses are almost, if not wholly, inconsistent with each other, so that taking the highway for a railroad will nearly supersede the former use to which it had been legally appropriated." See also Presbyterian Society of Waterloo *v.* Auburn & Rochester R. R. Co., 3 Hill, 567; Craig *v.* Rochester, &c. R. R. Co., 39 Barb. 494; Schurmeier *v.* St. Paul, &c. R. R. Co., 10 Minn. 82; Gray *v.* First Division, &c., 13 Minn. 315; Central R. R. Co. *v.* Hetfield, 29 N. J. 206; South Carolina R. R. Co. *v.* Steiner, 44 Ga. 546. Under the California Constitution the owner of the fee must be compensated. Weyl *v.* Sonoma R. R. Co., 69 Cal. 202, 10 Pac. 510. Compare cases, p. 810, note, *post*. The cases of Philadelphia & Trenton R. R. Co., 6 Whart. 25, 35 Am. Dec. 202; Struthers *v.* Railroad Co., 87 Pa. St. 282; Lexington, &c. R. R. Co. *v.* Applegate, 8 Dana, 289, 33 Am. Dec. 497; Elizabethtown & P. R. R. Co. *v.* Thompson, 79 Ky. 52; and Morris & Essex R. R. Co. *v.* Newark, 10 N. J. Eq. 352, are opposed to the New York cases. And see Wolfe *v.* Covington, &c. R. R. Co., 15 B. Monr. 404; Com. *v.* Erie & N. E. R. R. Co., 27 Pa. St. 339; Snyder *v.* Pennsylvania R. R. Co., 55 Pa. St. 340; Peddicord *v.* Baltimore, &c. R. R. Co., 34 Md. 463; Houston, &c. R. R. Co. *v* Odum, 53 Tex. 343, 2 Am. & Eng. R. R. Cas. 503; West Jersey R. R. Co. *v.* Cape May, &c. Co., 34 N. J. Eq. 164; Terre Haute & L. R. R. Co. *v.* Bissell, 108 Ind. 113, 9 N. E. 144; Indianapolis, B. & W. Ry. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467; [Reichert *v.* St. Louis & S. Ry. Co., 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183.] A gas-light company cannot be authorized to lay its pipes in a country highway without consent of or compensation to the owners of the fee. Bloomfield, &c. Co. *v.* Calkins, 62 N. Y. 386. Nor may a pipe line for natural gas be laid. Sterling's Appeal, 111 Pa. St. 35, 2 Atl. 105; [Kincaid *v.* Indianapolis N. G. Co., 121 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602.]

[2] Ford *v.* Chicago & Northwestern R. R. Co., 14 Wis. 609, 616; followed in Pomeroy *v.* Chicago & M. R. R. Co., 16 Wis. 640. The later cases allow compensation only when the fee of the street is in the owner and there is an actual physical interference with the property in the strict sense: Heiss *v.* Milwaukee, &c. R. R. Co., 69 Wis. 555, 34 N. W. 916; Hanlin *v.* Chicago, &c. Ry. Co., 61 Wis. 515, 21 N. W. 623; where there was no such interference, distinguishing Buchner

It is not always the case, however, that the value of a lot of land will be enhanced by the laying out of a common highway across it, or diminished by the construction of a railway over the same line afterwards. The constitutional question cannot depend upon the accidental circumstance that the new road will or will not have an injurious effect; though that circumstance is properly referred to, since it is difficult to perceive how a change of use which may possibly have an injurious effect not contemplated in the original appropriation can be considered anything else than the imposition of a new burden upon the owner's estate. In Connecticut, where the authority of the legislature to authorize a railroad to be constructed in a common highway without compensation to land-owners is also denied, importance is attached to the terms of the statute under which the original appropriation was made, and which are regarded as permitting the taking for the purposes of a common highway, and for no other. The reasoning of the court appears to us sound; and it is applicable to the statutes of the States generally.[1]

v. Chicago, &c. R. R. Co., 56 Wis. 403, 14 N. W. 273, 60 Wis. 264, 19 N. W. 56, where part of the property was actually taken. In many of the cases noted in the preceding note the right to compensation is based upon the ownership of the fee. In Pennsylvania it is held competent for the legislature, though not necessary, to provide compensation to land-owners when a highway is taken for a railroad. Mifflin *v.* Railroad Co., 16 Pa. St. 182.

[1] Imlay *v.* Union Branch R. R. Co., 26 Conn. 249, 255. "When land is condemned for a special purpose," say the court, "on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby convertible into a common. As the property is not taken, but the use only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion. But it is contended that land once taken and still held for highway purposes may be used for a railway without exceeding the limits of the easement already acquired by the public. If this is true, if the new use of the land is within the scope of the original sequestration or dedication, it would follow that the railway privileges are not an encroachment on the estate remaining in the owner of the soil, and that the new mode of enjoying the public easement will not enable him rightfully to assert a claim to damages therefor. On the contrary, if the true intent and efficacy of the original condemnation was not to subject the land to such a burden as will be imposed upon it when it is confiscated to the uses and control of a railroad corporation, it cannot be denied that in the latter case the estate of the owner of the soil is injuriously affected by the supervening servitude; that his rights are abridged, and that in a legal sense his land is again taken for public uses. Thus it appears that the court have simply to decide whether there is such an identity between a highway and a railway, that statutes conferring a right to establish the former include an authority to construct the latter.

"The term 'public highway,' as employed in such of our statutes as convey the right of eminent domain, has certainly a limited import. Although, as suggested at the bar, a navigable river or a canal is, in some sense, a public highway, yet an easement assumed under the name of a highway would not enable the public to convert a street into a canal. The highway, in the true meaning of

It would appear from the cases cited that the weight of judicial authority is against the power of the legislature to appropriate

the word, would be destroyed. But as no such destruction of the highway is necessarily involved in the location of a railway track upon it, we are pressed to establish the legal proposition that a highway, such as is referred to in these statutes, means or at least comprehends a railroad. Such a construction is possible only when it is made to appear that there is a substantial practical or technical identity between the uses of land for highway and for railway purposes.

"No one can fail to see that the terms 'railway' and 'highway' are not convertible, or that the two uses, practically considered, although analogous, are not identical. Land as ordinarily appropriated by a railroad company is inconvenient, and even impassable, to those who would use it as a common highway. Such a corporation does not hold itself bound to make or to keep its embankments and bridges in a condition which will facilitate the *transitus* of such vehicles as ply over an ordinary road. A practical dissimilarity obviously exists between a railway and a common highway, and is recognized as the basis of a legal distinction between them. It is so recognized on a large scale when railway privileges are sought from legislative bodies, and granted by them. If the terms 'highway' and 'railway' are synonymous, or if one of them includes the other by legal implication, no act could be more superfluous than to require or to grant authority to construct railways over localities already occupied as highways.

"If a legal identity does not subsist between a highway and a railway, it is illogical to argue that, because a railway may be so constructed as not to interfere with the ordinary uses of a highway, and so as to be consistent with the highway right already existing, therefore such a new use is included within the old use. It might as well be urged, that if a common, or a canal, laid out over the route of a public road, could be so arranged as to leave an ample roadway for vehicles and passengers on foot, the land should be held to be originally condemned for a canal or a common, as properly incident to the highway use.

"There is an important practical reason why courts should be slow to recognize a legal identity between the two uses referred to. They are by no means the same thing to the proprietor whose land is taken; on the contrary, they suggest widely different standards of compensation One can readily conceive of cases where the value of real estate would be directly enhanced by the opening of a highway through it; while its confiscation for a railway at the same or a subsequent time would be a gross injury to the estate, and a total subversion of the mode of enjoyment expected by the owner when he yielded his private rights to the public exigency.

"But essential distinctions also exist between highway and railway powers, as conferred by statute, — distinctions which are founded in the very nature of the powers themselves. In the case of the highway, the statute provides that, after the observance of certain legal forms, the locality in question shall be forever subservient to the right of every individual in the community to pass over the thoroughfare so created at all times. This right involves the important implication that he shall so use the privilege as to leave the privilege of all others as unobstructed as his own; and that he is therefore to use the road in the manner in which such roads are ordinarily used, with such vehicles as will not obstruct, or require the destruction of the ordinary modes of travel thereon. He is not authorized to lay down a railway track, and run his own locomotive and car upon it. No one ever thought of regarding highway acts as conferring railway privileges, involving a right in every individual, not only to break up ordinary travel, but also to exact tolls from the public for the privilege of using the peculiar conveyances adapted to a railroad. If a right of this description is not conferred when a highway is authorized by law, it is idle to pretend that any proprietor is divested of such a right. It would seem that, under such circumstances, the true construction of highway laws could hardly be debatable, and that the absence of legal identity

a common highway to the purposes of a railroad, unless at the same time provision is made for compensation to the owners of the fee. These cases, however, have had reference to the common railroad operated by steam. In one of the New York cases [1] it is intimated, and in another case in the same State it was directly decided, that the ruling should be the same in the case of the street railway operated by horse power.[2] There is generally, however, a very great difference in the two cases, and some of the considerations to which the courts have attached importance could have no application in many cases of common horse railways. A horse railway, as a general thing, will interfere very little with the ordinary use of the way by the public, even upon the very line of the road; and in many cases it would be a relief to an overburdened way, rather than an impediment to the previous use. In Connecticut, after it had been decided, as above shown, that the owner of the fee subject to a perpetual highway was entitled to compensation when the highway was appropriated for an ordinary railroad, it was also held that the authority to lay and use a horse-railway track in a public street was not a new servitude imposed upon the land, for which the owner of the fee would be entitled to damages, but that it was a part of the public use to which the land was originally subjected when taken for a street.[3] The same distinction between horse railways and those operated by steam is also taken in recent New York cases.[4]

between the two uses of which we speak was patent and entire.

"Again, no argument or illustration can strengthen the self-evident proposition that, when a railway is authorized over a public highway, a right is created against the proprietor of the fee, in favor of a person, an artificial person, to whom he before bore no legal relation whatever. It is understood that when such an easement is sought or bestowed, a new and independent right will accrue to the railroad corporation as against the owner of the soil, and that, without any reference to the existence of the highway, his land will forever stand charged with the accruing servitude. Accordingly, if such a highway were to be discontinued according to the legal forms prescribed for that purpose, the railroad corporation would still insist upon the express and independent grant of an easement to itself, enabling it to maintain its own road on the site of the abandoned highway. We are of opinion, therefore, as was distinctly intimated by this court in a former case (see opinion of *Hinman*, J., in Nicholson *v.* N. Y. & N. H. R. R. Co., 22 Conn. 74, 85), that to subject the owner of the soil of a highway to a further appropriation of his land to railway uses is the imposition of a new servitude upon his estate, and is an act demanding the compensation which the law awards when land is taken for public purposes." And see South Carolina R. R. Co. *v.* Steiner, 44 Ga. 546.

[1] Wager *v.* Troy Union R. R. Co., 25 N. Y. 526.

[2] Craig *v.* Rochester City & Brighton R. R. Co., 39 Barb. 449.

[3] Elliott *v.* Fair Haven & Westville R. R. Co., 32 Conn. 579, 586.

[4] Brooklyn Central, &c. R. R. Co. *v.* Brooklyn City R. R. Co., 33 Barb. 420; People *v.* Kerr, 37 Barb. 357, 27 N. Y. 188. See Kellinger *v.* Railroad Co., 50 N. Y. 206. A horse railroad in a street is not an additional servitude. Hodges *v.* Balt. Pass. Ry. Co., 58 Md. 603; Texas

But whether the mere difference in the motive power will make different principles applicable is a question which the courts will probably have occasion to consider further. Conceding that the interests of individual owners will not generally suffer, or their use of the highway be incommoded by the laying down and use of the track of a horse railway upon it, there are nevertheless cases where it might seriously impede, if not altogether exclude, the general travel and use by the ordinary modes, and very greatly reduce the value of all the property along the line. Suppose, for instance, a narrow street in a city, occupied altogether by wholesale houses, which require constantly the use of the whole street in connection with their business, and suppose this to be turned over to a street-railway company, whose line is such as to make the road a principal avenue of travel, and to require such constant passage of cars as to drive all drayage from the street. The corporation, under these circumstances, will substantially have a monopoly in the use of the street; their vehicles will drive the business from it, and the business property will become comparatively worthless. And if property owners are without remedy in such case, it is certainly a very great hardship upon them, and a very striking and forcible instance and illustration of damage without legal injury.

When property is appropriated for a public way, and the proprietor is paid for the public easement, the compensation is generally estimated, in practice, at the value of the land itself.[1] If, therefore, no other circumstances were to be taken into the account in these cases, the owner, who has been paid the value of his land, could not reasonably complain of any use to which it might afterwards be put by the public. But, as was pointed out in the Connecticut case,[2] the compensation is always liable either to exceed or to fall below the value of the land taken, in consequence of incidental injuries or benefits to the owner as proprietor of the land which remains. These injuries or benefits will be estimated with reference to the identical use to which the property is appropriated; and if it is afterwards put to another use, which causes greater incidental injury, and the owner is not allowed further compensation, it is very evident that he has suffered by the change a wrong which could not have been foreseen and pro-

& P. Ry. Co. *v.* Rosedale St. Ry. Co., 64 Tex. 80; Randall *v.* Jacksonville, &c. Co., 19 Fla. 409; Eichels *v.* Evansville St. Ry. Co., 78 Ind. 261; and this though the company is authorized to use steam as a motor. Briggs *v.* Lewiston, &c. Co., 79 Me. 363, 10 Atl. 47. See Campbell *v.* Metrop. St. Ry. Co., 82 Ga. 320, 9 S. E. 1078.

[1] Murray *v.* County Commissioners, 12 Met. 455, per *Shaw*, Ch. J.

[2] Imlay *v.* Union Branch R. R. Co., 26 Conn. 249.

vided against. And if, on the other hand, he is entitled in any case to an assessment of damages, in consequence of such an appropriation of the street affecting his rights injuriously, then he must be entitled to such an assessment in every case, and the question involved will be, not as to the right, but only of the *quantum* of damages. The horse railway either is or is not the imposition of a new burden upon the estate. If it is not, the owner of the fee is entitled to compensation in no case; if it is, he is entitled to have an assessment of damages in every case.

In New York, where, by law, when a public street is laid out or dedicated, the fee in the soil becomes vested in the city, it has been held that the legislature might authorize the construction of a horse railway in a street, and that neither the city nor the owners of lots were entitled to compensation, notwithstanding it was found as a fact that the lot-owners would suffer injury from the construction of the road. The city was not entitled, because, though it held the fee, it held it in trust for the use of all the people of the State, and not as corporate or municipal property; and the land having been originally acquired under the right of eminent domain, and the trust being *publici juris*, it was under the unqualified control of the legislature, and any appropriation of it to public use by legislative authority could not be regarded as an appropriation of the private property of the city. And so far as the adjacent lot-owners were concerned, their interest in the streets, distinct from that of other citizens, was only as having a possibility of reverter after the public use of the land should cease; and the value of this, if anything, was inappreciable, and could not entitle them to compensation.[1]

So in Indiana, in cases where the title in fee to streets in cities and villages is vested in the public, it is held that the adjacent land-owners are not entitled to the statutory remedy for an as-

[1] People *v.* Kerr, 37 Barb. 357, 27 N. Y. 188. The same ruling as to the right of the city to compensation was had in Savannah, &c. R. R. Co. *v.* Mayor, &c. of Savannah, 45 Ga. 602. And see Brooklyn Central, &c. R. R. Co. *v.* Brooklyn City R. R. Co., 33 Barb. 420; Brooklyn & Newtown R. R. Co. *v.* Coney Island R. R. Co., 35 Barb. 364; People *v.* Kerr, 37 Barb. 357; Chapman *v.* Albany & Schenectady R. R. Co., 10 Barb. 360. And as to the title reverting to the original owner, compare Water Works Co. *v.* Burkhart, 41 Ind. 364; Gebhardt *v.* Reeves, 75 Ill. 301; Heard *v.* Brooklyn, 60 N. Y. 242. Although, in the case of People *v.* Kerr, the several judges seem generally to have agreed on the principle as stated in the text, it is not very clear how much importance was attached to the fact that the fee to the street was in the city, nor that the decision would have been different if that had not been the case. Where land has been dedicated to a city as a levee, the legislature may authorize its use by a railroad without compensation to the city, but the one who has dedicated it must be compensated for the injury to his ultimate fee. Portland & W. V. R. R. Co. *v.* Portland, 14 Oreg. 188, 12 Pac. 265.

sessment of damages in consequence of the street being appropriated to the use of a railroad; and this without regard to the motive power by which the road is operated. At the same time it is also held that the lot-owners may maintain an action at law if, in consequence of the railroad, they are cut off from the ordinary use of the street.[1] In Iowa it is held that where the title to city streets is in the corporation in trust for the public, the legislature may authorize the construction of an ordinary railroad through the same, with the consent of the city, and without awarding compensation to lot-owners;[2] or even without the consent of the municipal authorities, and without entitling the city to compensation.[3] But the city, without legislative permission, has no power to grant such a privilege, and it will be responsible for all damages to individuals using the street if it shall assume to do so.[4] In Illinois, in a case where a lot-owner had filed a bill in equity to restrain the laying down of the track of a railroad, by consent of the common council, to be operated by steam in one of the streets of Chicago, it was held that the bill could not be maintained; the title to the street being in the city, which might appropriate it to any proper city purpose.[5] In Michigan it has

[1] Protzman *v.* Indianapolis & Cincinnati R. R. Co., 9 Ind. 467; New Albany & Salem R. R. Co. *v.* O'Daily, 13 Ind. 353; Same *v.* Same, 12 Ind. 551. Unless the railroad causes a physical disturbance of a right, as where the abutter owns the fee of the street or where his access is cut off, he is not entitled to compensation. Dwenger *v.* Chicago, &c. Ry. Co., 98 Ind. 153; Terre Haute & L. R. R. Co. *v.* Bissell, 108 Ind. 113, 9 N. E. 144; Indianapolis, B. & W. Ry. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467. See also Street Railway *v.* Cumminsville, 14 Ohio St. 523; State *v.* Cincinnati Gas, &c. Co., 18 Ohio St. 262. In Nebraska although the fee is in the city, the right of access, which is property, may not be cut off without compensation. Burlington & M. R. R. R. Co. *v.* Reinhackle, 15 Neb. 279, 18 N. W. 69; Omaha V. R. R. Co. *v.* Rogers, 16 Neb. 117, 19 N. W. 603. If egress and ingress are not disturbed, no action lies in such case in Tennessee. Iron Mt. R. R. Co. *v.* Bingham, 87 Tenn. 522, 11 S. W. 705. The rule in Kansas is similar. Ottawa, &c. R. R. Co. *v.* Larson, 40 Kan. 301, 19 Pac. 661; Kansas, N. & D. Ry. Co. *v.* Cuykendall, 42 Kan. 234, 21 Pac. 1051; Central B. U. P. R. R. Co. *v.* Andrews, 30 Kan. 590, 2 Pac. 677.

[2] Millburn *v.* Cedar Rapids, &c. R. R. Co., 12 Iowa, 246; Franz *v.* Railroad Co., 55 Iowa, 107. See Rinard *v.* Burlington, &c. Ry. Co., 66 Iowa, 440, 23 N. W. 914. Under a statute providing for compensation for laying a track in the street a mere right-angle crossing is not included: Morgan *v.* Des Moines, &c. Ry. Co., 64 Iowa, 589, 21 N. W. 96; a diagonal crossing is. Enos *v.* Chicago, &c. Ry. Co., 78 Iowa, 28, 42 N. W. 575.

[3] Clinton *v.* Cedar Rapids, &c. R. R. Co., 24 Iowa, 455.

[4] Stanley *v.* Davenport, 54 Iowa, 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

[5] Moses *v.* Pittsburgh, Fort Wayne, & Chicago R. R. Co., 21 Ill. 516, 522. We quote from the opinion of *Caton*, Ch. J.: "By the city charter, the common council is vested with the exclusive control and regulation of the streets of the city, the fee-simple title to which we have already decided is vested in the municipal corporation. The city charter also empowers the common council to direct and control the location of railroad tracks within the city. In granting this permission to locate the track in Beach Street, the common council acted under an express power granted by the legislature.

been decided that an abutting lot-owner who does not own the soil of a city street cannot recover for any injury to his freehold

So that the defendant has all the right which both the legislature and the common council could give it, to occupy the street with its track. But the complainant assumes higher ground, and claims that any use of the street, even under the authority of the legislature and the common council, which tends to deteriorate the value of his property on the street, is a violation of that fundamental law which forbids private property to be taken for public use without just compensation. This is manifestly an erroneous view of the constitutional guaranty thus invoked. It must necessarily happen that streets will be used for various legitimate purposes, which will, to a greater or less extent, discommode persons residing or doing business upon them, and just to that extent damage their property; and yet such damage is incident to all city property, and for it a party can claim no remedy. The common council may appoint certain localities where hacks and drays shall stand waiting for employment, or where wagons loaded with hay or wood, or other commodities, shall stand waiting for purchasers. This may drive customers away from shops or stores in the vicinity, and yet there is no remedy for the damage. A street is made for the passage of persons and property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone shall it be expelled the streets? For the same reason camels must be kept out, although they might be profitably employed. Some fancy horse or timid lady might be frightened by such uncouth objects. Or is the objection not in the motive power used, but because the carriages are larger than were formerly used, and run upon iron, and are confined to a given track in the street. Then street railroads must not be admitted; they have large carriages which run on iron rails, and are confined to a given track. Their momentum is great, and may do damage to ordinary vehicles or foot passengers. Indeed we may suppose or assume that streets occupied by them are not so pleasant for other carriages, or so desirable for residences or business stands, as if not thus occupied. But for this reason the property owners along the street cannot expect to stop such improvements. The convenience of those who live at a greater distance from the centre of a city requires the use of such improvements, and for their benefit the owners of property upon the street must submit to the burden, when the common council determine that the public good requires it. Cars upon street railroads are now generally, if not universally, propelled by horses, but who can say how long it will be before it will be found safe and profitable to propel them with steam or some other power besides horses? Should we say that this road should be enjoined, we could advance no reason for it which would not apply with equal force to street railroads, so that consistency would require that we should stop all. Nor would the evil which would result from the rule we must lay down stop here. We must prohibit every use of a street which discommodes those who reside or do business upon it, because their property will else be damaged. This question has been presented in other States, and in some instances, where the public have only an easement of the street, and the owner of the adjoining property still holds the fee in the street, it has been sustained: but the weight of authority, and certainly, in our apprehension, all sound reasoning, is the other way." See also Chicago, &c. R. R. Co. *v.* Joliet, 79 Ill. 25; and Harrison *v.* New Orleans, &c. Ry. Co., 31 La. Ann. 462, where a like ruling is made.

All the cases from which we have

resulting from the construction of a steam railway in the street under legislative authority, but that he may have an action for any injury consequent on mismanagement amounting to a private nuisance; such as leaving cars standing in the street an unreasonable time, making unnecessary noises, &c.[1] In New York it is held not competent for a city to authorize the construction of an elevated railroad in its streets without making compensation to abutting owners who had bought their lots of the city with a covenant that the streets should be kept open forever.[2] This

quoted assume that the use of the street by the railroad company is still a public use; and an appropriation of a street, or of any part of it, by an individual or company, for his or their own private use, unconnected with any accommodation of the public, would not be consistent with the purpose for which it was originally acquired. Mikesell *v.* Durkee, 34 Kan. 509, 9 Pac. 278. See Brown *v.* Duplessis, 14 La. Ann. 842; Green *v.* Portland, 32 Me. 431.

[1] Grand Rapids, &c. R. R. Co. *v.* Heisel, 38 Mich. 62, 31 Am. Rep. 306; Same *v.* Same, 47 Mich. 393, 11 N. W. 212. [The rule seems to have been settled in New York by the case of Fobes *v.* Rome, W. & O. R. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453, that, as against abutting owners, having no title in the bed of the street, the legislature might authorize a steam surface railway therein without compensation to the abutting owner. This broad statement of the rule is subject to the limitation, however, that where the construction rendered ingress and egress seriously difficult or dangerous, the owner is entitled to compensation. Reining *v.* N. Y., L. E. & W. R. Co., 128 N. Y. 157, 28 N. E. 640, 14 L. R. A. 133. This case reviews prior cases.]

[2] Story *v.* New York Elevated Railway Co., 90 N. Y. 122. In Lahr *v.* Metr. Elev. R. R. Co., 104 N. Y. 268, 10 N. E. 528, the doctrine was extended to a case where there was no such covenant and the plaintiff whose lot only went to the street line held under *mesne* conveyances, from one whose land had been condemned for use as a public street forever. [Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461, 11 L. R. A. 634, one of the so-called "Elevated Railway Cases" presented the question of compensation of an abutting owner for an injury claimed to result from the erection of an elevated railway in the street. There was no claim that the abutter, or any predecessor in title, at the time of the injury complained of, or at any prior time, owned any interest or right in the street, except such as was appurtenant to ownership of lands abutting, which were never, so far as was made to appear, a part of the lands in the street. It was held in the case that an abutting owner had such property rights in the street as might be "taken" against the prohibition of the constitution, and this though that which results in the injury is done under legislative sanction. *Andrews*, J., says: "The judgments for damages which have been recovered and sustained against the elevated roads do not, and cannot, rest upon the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides a public nuisance does not create a private cause of action unless a private right exists and is injured by it specially. The only remaining ground upon which they may and do stand is that by the common law the plaintiffs had private rights in the streets before the railways were built or authorized to be built. It is clear, we think, that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads; nor do they exist by virtue of the judgment in Story's Case (90 N. Y. 122); but they existed anterior to the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations. . . . It then becomes material to inquire whether rights of action are cut off because the road was constructed pursuant to legislative authority. The constitution of this State provides 'Nor shall

last decision settles a long-pending controversy, and is in harmony with the cases in Indiana and Michigan above referred to. (*a*)

It is not easy, as is very evident, to trace a clear line of authority running through the various decisions bearing upon the appropriation of the ordinary highways and streets to the use of railroads of any grade or species; but a strong inclination is apparent to hold that, when the fee in the public way is taken from the former owner, it is taken *for any public use whatever* to which the public authorities, with the legislative assent, may see fit afterwards to devote it, in furtherance of the general purpose of the original appropriation;[1] and if this is so, the owner must be

private property be taken for public use without just compensation.' Art. 1, sec. 6. It is settled by Story's Case and Lahr's Case (104 N. Y. 268, 10 N. E. 528), that such rights as plaintiff has in Pearl Street are 'private property' within the meaning of the constitutional provision quoted; and these cases also hold that by the construction and operation of an elevated road in the street in front of an owner's premises, his rights are 'taken for public use' within the meaning of the constitution. It follows that the authority conferred by the legislature to construct the road is not a defence to the action." It is to be noticed that this interpretation of the terms "taking of private property" does not necessarily involve an actual physical invasion of lands of the claimant in order to entitle him to compensation under the constitution, and that it is not necessary that the constitution should provide that compensation shall be made for "injury" or "damage" in order that compensation can be coerced by an abutting owner, though he have no interest in the fee of the street, for injury to his right to ingress and egress, to access of light and air, or for depreciation in value of the abutting property, by reason of the construction and operation of the improvement in the public street. But see these Elevated Railway Cases distinguished from the cases growing out of the so-called "Park Avenue Improvement" Cases in the same court: Fries *v.* New York & H. R. Co., 169 N. Y. 270, 62 N. E. 358; Muhlker *v.* N. Y. & H. R. Co., 173 N. Y. 549, 66 N. E. 558. *O'Brien*, J., in the Fries Case, says: The law is well settled in this State that where the property of an abutting owner is damaged, or even its easements interfered with in consequence of the work of an improvement in a public street conducted under lawful authority, he is without remedy or redress, even though no provision for compensation is made in the statute. Whatever detriment the improvement may be to the abutter in such cases is held to be *damnum absque injuria*." The Elevated Railway Cases are distinguished in this language: They "proceed upon the principle, that, as against abutting owners, the railroad was unlawfully in the street, as they had not consented to the construction or conveyed the right to interfere with their easements. But in the case at bar, we have an express finding that the defendant had acquired the right as against the plaintiff to use the street for the operation of the railroad. Hence the principles upon which that mass of litigation proceeded have no application to this case." Citing Conabeer *v.* N. Y. C. & H. R. R. Co., 156 N. Y. 474, 51 N. E. 402. See Lewis *v.* New York & H. R. Co., 162 N. Y. 202, 56 N. E. 540.]

[1] On this subject see, in addition to the other cases cited, West *v.* Bancroft, 32 Vt. 367; Kelsey *v.* King, 32 Barb. 410; Ohio & Lexington R. R. Co. *v.* Applegate, 8 Dana, 289; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75; Covington St. R. Co. *v.* Covington, &c. R. Co. (Ky.), 19 Am. Law Reg. n. s. 765. When, however, land is taken or dedicated specifically for a street, it would seem, although the fee is taken, it is taken for the restricted use only; that is to say, for such uses as streets in cities are commonly put to. See State *v.* Laverack, 31 N. J. 201;

(*a*) See reference to later cases in preceding note

held to be compensated at the time of the original taking for any such possible use; and he takes his chances of that use, or any change in it, proving beneficial or deleterious to any remaining property he may own, or business he may be engaged in; and it must also be held that the possibility that the land may, at some future time, revert to him, by the public use ceasing, is too remote and contingent to be considered as property at all.[1] At the same time it must be confessed that it is difficult to determine precisely how far some of the decisions made have been governed by the circumstance that the fee was, or was not in the public, or, on the other hand, have proceeded on the theory that a railway was only in furtherance of the original purpose of the appropriation, and not to be regarded as the imposition of any new burden, even where an easement only was originally taken.[2]

Railroad Co. *v.* Shurmeir, 7 Wall. 272. [The weight of judicial opinion is that an ordinary surface street railway is not an additional servitude, whether operated by horses or electricity. See Fobes *v.* Rome, W. & O. Ry. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453. *Contra*, as to electric railway in a public highway: Zehren *v.* Milwaukee El. Ry. Co., 99 Wis. 83, 74 N. W. 538.]

[1] As to whether there is such possibility of reverter, see Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314; People *v.* Kerr, 27 N. Y. 188, 211, per *Wright*, J.; Plitt *v.* Cox, 43 Pa. St. 486.

[2] [The following case illustrates that view of the courts which makes ownership in the fee of the street essential to the right to compensation for the new or added use of the street. O'Brien *v.* Baltimore Belt Ry. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126. The following illustrate the view that ownership of the fee is not essential to the right to compensation. Abendroth *v.* Manhattan Ry. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461, 11 L. R. A. 634 (elevated railway, injury to easement of light, air, and access); Kane *v.* N. Y. E. Ry. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 610; Stowers *v.* Postal Telegraph Co., 68 Miss. 559, 9 So. 356, 12 L. R. A. 864, 24 Am. St. 290; telegraph line in street: Egerer *v.* N. Y. C. & H. R. Ry. Co., 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381, and note. Can be no damages for injury to easement of light and air if property worth more after than before the improvement: Somers *v.* Met. El. Ry. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344.] There is great difficulty, as it seems to us, in supporting important distinctions upon the fact that the *fee* was originally taken for the use of the public instead of a mere easement. If the fee is appropriated or dedicated, it is for a particular use only; and it is a *conditional fee*, — a fee on condition that the land continue to be occupied for that use. The practical difference in the cases is, that when the fee is taken, the possession of the original owner is excluded; and in the case of city streets, where there is occasion to devote them to many other purposes besides those of passage, but nevertheless not inconsistent, such as for the laying of water and gas pipes, and the construction of sewers, this exclusion of any private right of occupation is important, and will sometimes save controversies and litigation. But to say that when a man has declared a dedication for a particular use, under a statute which makes a dedication the gift of a fee, he thereby makes it liable to be appropriated to other purposes, when the same could not be done if a perpetual easement had been dedicated, seems to be basing important distinctions upon a difference which after all is more technical than real, and which in any view does not affect the distinction made. The same reasoning which has sustained the legislature in authorizing a railroad track to be laid down in a city street would support its action in authorizing it to be made

Perhaps the true distinction in these cases is not to be found in the motive power of the railway, or in the question whether the fee-simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience. When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving.[1] The appropriation of a country highway for the purposes of a railway, on the other hand, is neither usual nor often impor-

into a canal; and the purpose of the original dedication or appropriation would thereby be entirely defeated. Is it not more consistent with established rules to hold that a dedication or appropriation to one purpose confines the use to that purpose; and when it is taken for any other, the original owner has not been compensated for the injury he may sustain in consequence, and is therefore entitled to it now? Notwithstanding a dedication which vests the title in the public, it must be conceded that the interest of the adjacent lot-owners is still property. "They have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appendant to the lots, unlike any right of one lot-owner in the lot of another, is as much property as the lot itself." Crawford *v.* Delaware, 7 Ohio St. 459, 469. See some very pertinent and sensible remarks on the same subject by *Ranney*, J., in Street Railway *v.* Cumminsville, 14 Ohio St. 541. See also Railroad Co. *v.* Hambleton, 40 Ohio St. 496. It makes no difference that the fee is not in the abutter. Railway Co. *v.* Lawrence, 38 Ohio St. 41. He has, independent of the ownership of the soil, an interest in the street appurtenant to his lot, for the admission of light and air. Adams *v.* Chicago, &c. R. R. Co., 39 Minn. 286, 39 N. W. 629. Whether the fee is in him or the public, he is to be paid if a steam railroad is laid in the street, as the use is not for an ordinary street purpose. Theobold *v.* Louisville, &c. Ry. Co., 66 Miss. 279, 6 So. 230. See Columbus & W. Ry. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23, and cases p. 797, note 1, *supra*. [But see *contra*, Fobes *v.* Rome, W. & O. Ry. Co., 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453.]

[1] Attorney-General *v.* Railway Co., 125 Mass. 515, 28 Am. Rep. 264; Hiss *v.* Railway Co., 52 Md. 242, 36 Am. Rep. 371; Covington St. R. Co. *v.* Covington, &c. R. Co. (Ky.), 19 Am. Law Reg. N. S. 765. See cases p. 794, note 4, *supra*. If a street railroad is used for passing from place to place on the street, a change in the motive power from horses to steam is not a change in the use. Not the motor but the use of the street is the criterion. Briggs *v.* Lewiston, &c. R. R. Co., 79 Me. 363, 10 Atl. 47. So where cars were run in trains by steam motors, but the use was no substantial infringement upon the common public right of passage. Newell *v.* Minneapolis, &c. Ry. Co., 35 Minn. 112, 27 N. W. 839.

tant; and it cannot with any justice be regarded as within the contemplation of the parties when the highway is first established.[1] And if this is so, it is clear that the owner cannot be considered as compensated for the new use at the time of the original appropriation. (*a*)

[1] A steam railroad in such road is a new servitude. Hastings & G. I. R. R. Co. *v.* Ingalls, 15 Neb. 123, 16 N. W. 762.

(*a*) [What will constitute such a new use or additional servitude as will entitle an owner whose rights are subject to a prior use or servitude to compensation?

Steam railway in a public street or highway is: East End St. Ry. Co. *v.* Doyle, 88 Tenn. 747, 13 S. W. 930, 9 L. R. A. 100; Am. Bank Note Co. *v.* N. Y. El. Ry. Co., 129 N. Y. 252, 29 N. E. 302; Nichols *v.* A. A. & Y. Ry. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; Kauffman *v.* Tacoma, O. & G. H. Ry. Co., 11 Wash. 632, 40 Pac. 137; Jones *v.* Erie & W. V. Ry. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. 722, and note, 18 L. R. A. 339; Finch *v.* Riverside & A. Ry. Co., 87 Cal. 597; Freiday *v.* Sioux City Rap. Tran. Co., 92 Iowa, 191, 60 N. W. 656, 26 L. R. A. 246; Western Ry. Co. *v.* Ala. G. T. Ry. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; White *v.* N. W. N. C. Ry. Co., 113 N. C. 610, 18 S. E. 330, 37 Am. St. 639, 22 L. R. A. 627; Schaaf *v.* Cleveland M. & S. Ry. Co., 66 Ohio, 215, 64 N. E. 145. *Contra*, Henry Gans & Sons Mfg. Co. *v.* St. L. K. & N. W. Ry. Co., 113 Mo. 308, 20 S. W. 658, 18 L. R. A. 339, 35 Am. St. 506; also in Pennsylvania, unless excavation or embankment injures adjoining property or access is cut off, or light and air excluded: Jones *v.* Erie & W. V. Ry. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. 722; Montgomery *v.* Santa Ana & W. Ry. Co., 104 Cal. 186, 37 Pac. 786, 24 L. R. A. 654; use of lines of one railway company by another is not: Miller *v.* G. B. W. & St. P. Ry. Co., 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443; grant by one railway company to another of part of its right of way for construction of tracks; such new line is: Fort Worth & R. G. Ry. Co. *v.* Jennings, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180.

Surface *street* railway propelled by horses, cable, or electricity is not in a city street. Dean *v.* Ann Arbor St. Ry. Co., 93 Mich. 330, 53 N. W. 396; State *v.* Jacksonville St. Ry. Co., 29 Fla. 590, 10 So. 590; Penn. Ry. Co. *v.* Montgomery Co., &c., 167 Pa. St. 62, 31 Atl. 468, 46 Am. St. 659, 27 L. R. A. 766; (*contra*, in country highway, *Id.*) Cumberland Tel. & Telph. Co. *v.* United El. Ry. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; Green *v.* City & Suburban Ry. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. 288; Ashland & C. S. Ry. Co. *v.* Faulkner, — Ky. —, 45 S. W. 235, 43 L. R. A. 554; Finch *v.* Riverside & A. Ry. Co., 87 Cal. 597, 25 Pac. 765; Rafferty *v.* Central Traction Co., 147 Pa. St. 579, 23 Atl. 884; Chicago & C. Terminal Ry. Co. *v.* Whiting, H. & E. C. St. Ry. Co., 139 Ind. 297, 38 N. E. 604, 47 Am. St. 264, 26 L. R. A. 337; New Jersey *ex rel.* Kennelly *v.* Jersey City, 57 N. J. L. 293, 30 Atl. 531, 26 L. R. A. 281; Chicago, B. & Q. Ry. Co. *v.* West Chicago S. Ry. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485. Unless constructed in disregard of convenience of abutting owners on a city street, a trolley railway is not: Snyder *v.* Fort Madison St. Ry. Co., 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345; Birmingham T. Co. *v.* Birmingham R. & E. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233. Electric railway in village street is an additional servitude: Chicago & N. W. Ry. Co. *v.* Milwaukee R. & K. El. Ry., 95 Wis. 561, 70 N. W. 678, 60 Am. St. 136, 37 L. R. A. 856. So held in case of city street, in Jaynes *v.* Omaha S. Ry. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751. Such railway in public country highway is: Zehren *v.* Milwaukee El. Ry. & L. Co., 99 Wis. 83, 74 N. W. 538, 67 Am. St. 844, 41 L. R. A. 575. Elevated street railway is: Williams *v.* Brooklyn El. Ry. Co., 126 N. Y. 96, 26 N. E. 1048, (rev. 57 Hun, 591.) *Contra*, Doane *v.* Lake Street El. Ry. Co., 165 Ill. 510, 46 N. E. 520, 56 Am. St. 265, 36 L. R. A. 97. See Jaynes *v.* Omaha St. Ry. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751. Substitution of electric motors with trolley system on street railway operated by horses is not: State *v.* Trenton Pass. Ry. Co., 58

The cases thus far considered are those in which the original use is not entirely foreign to the purpose of the new appropriation; and it is the similarity that admits of the question which has been discussed. Were the uses totally different, there could be no question whatever that a new assessment of compensation must be made before the appropriation could be lawful.[1] And in any

[1] Where lands were appropriated by a railroad company for its purposes, and afterwards leased out for private occupation, it was held that the owner of the fee was entitled to maintain a writ of entry to establish his title and recover damages for the wrongful use. Proprietors of Locks, &c. *v.* Nashua & Lowell R. R. Co., 104 Mass. 1, 6 Am. Rep. 181. [Use of vacant portion of railway depot grounds for place of business by customer of the railway company is an additional servitude: Lyon *v.* McDonald, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295. The legislature cannot authorize a commission to compel a railway company to grant the use of its lands to private persons for elevator purposes. Missouri Pacific Ry. Co. *v.* Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130, rev. 29 Neb. 550, 45 N. W. 785. As to the use of streets by telegraph and telephone companies and the effect upon the rights of abutting owners, see 52 Cent. Law Jour. 205; Callen *v.* Columbus M. & S. Ry. Co., 66 Ohio, 166, 64 N. E. 141.] So a city may not condemn a pier to let it to a private corporation. Belcher Sugar Refining Co. *v.* St. Louis Elev. Co., 82 Mo. 121. As to what use may be made of land in which an easement has been condemned for a railroad station, see Pierce *v.* Boston, &c. R. R. Corp., 141 Mass. 481, 6 N. E. 96; Hoggatt *v.* Vicksburg, &c. R. R. Co., 34 La. Ann. 624. Where land has been taken for a street, it cannot be appropriated as a house to confine tramps: Winchester *v.* Capron, 63 N. H. 605, 4 Atl. 795; nor for the erection of a market building without making compensation: State *v.* Mayor, &c. of Mobile, 5 Porter, 279, 30 Am. Dec. 564; State *v.* Laverack, N. J. L. 666, 34 Atl. 1090, 33 L. R. A. 129; Reid *v.* Norfolk City Ry. Co., 94 Va. 117, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. 708.

Telegraph or telephone line in public highway or street is: Pac. Postal Telph. Cable Co. *v.* Irvine, 49 Fed. Rep. 113; Callen *v.* Columbus E. E. L. Co., 66 Ohio, 166, 64 N. E. 141; Stowers *v.* Postal Telph. Cable Co., 68 Miss. 559, 9 So. 356, 24 Am. St. 290, 12 L. R. A. 564; Nicholl *v.* New York & N. J. Tel. Co., 62 N. J. L. 733, 42 Atl. 583; West. Union Telph. Co. *v.* Williams, 86 Va. 696, 11 S. E. 106, 19 Am. St. 908, 8 L. R. A. 429; Postal Telegraph Cable Co. *v.* Eaton, 170 Ill. 513, 49 N. E. 365, 62 Am. St. 330, 39 L. R. A. 722; Krueger *v.* Wisconsin Telne. Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298. *Contra:* Cater *v.* N. W. Telephone Exchange Co., 60 Minn. 539, 63 N. W. 111, 27 L. R. A. 310, 51 Am. St. 543; People *v.* Eaton, 100 Mich. 208, 59 N. W. 145, 24 L. R. A. 721; Irwin *v.* Great Southern Telph. Co, 37 La. Ann. 63; Magee *v.* Overshiner, 150 Ind. 127, 40 N. E. 951, 65 Am. St. 358, 40 L. R. A. 370; State *ex rel.* National Subway Co. *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113. Telegraph line on railway line, if for use of railway is not: Am. Telph. & Telne. Co. *v.* Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200. *Contra*, if not for use of railway: *Id.* Poles for electric light wires in country highway are not: Palmer *v.* Larchmont E. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672. Pipe line for natural gas in public highway is: Kincaid *v.* Indianapolis N. G. Co., 124 Ind. 577, 24 N. E. 1066, 19 Am. St. 113, 8 L. R. A. 602. When pipe is laid under walk in city street, it is not: McDevitt *v.* Peoples N. G. Co., 160 Pa. St. 367, 28 Atl. 948.

Sewer system in a town road is not in Massachusetts: Lincoln *v.* Comm., 164 Mass. 1. Change of country road to city street is not to create a new servitude: Huddleston Admx. *v.* City of Eugene, 34 Oreg. 343, 55 Pac. 868, 43 L. R. A. 414. Construction of grain elevator on lands condemned for railway by the railway company or its lessee is not misuse of easement condemned: Gurney *v.* Minneapolis Union Elevator Co., 68 Minn. 70, 65 N. W. 136, 30 L. R. A. 534.]

case, to authorize lands already taken for one public use to be

34 N. J. 201. The opinion of *Beasley*, Ch. J., in the New Jersey case, will justify liberal quotations. He says (p. 204): "I think it undeniable that the appropriation of this land to the purposes of a market was an additional burthen upon it. Clearly it was not using it as a street. So far from that, what the act authorized to be done was incongruous with such use; for the market was an obstruction to it, considered merely as a highway. . . . When, therefore, the legislature declared that these streets in the city of Paterson might be used for market purposes, the power which was conferred in substance was an authority to place obstructions in these public highways. The consequence is that there is no force in the argument, which was the principal one pressed upon our attention, that the use of these streets for the purpose now claimed is as legitimate as the use of a public highway by a horse railroad, which latter use has been repeatedly sanctioned by the courts of the State. The two cases, so far as related to principle, stand precisely opposite. I have said that a market is an obstruction to a street, that it is not a use of it as a street, but, if unauthorized, is a nuisance. To the contrary of this, a horse railroad is a new mode of using a street as such, and it is precisely upon this ground that it has been held to be legal. The cases rest upon this foundation. That a horse railway was a legitimate use of a highway was decided in Hinchman *v.* Paterson Horse Railroad Co., 17 N. J. Eq. 76; and, in his opinion, Chancellor *Greene* assigns the following as the reasons of his judgment: 'The use of the road is nearly identical with that of the ordinary highway. The motive power is the same. The noise and jarring of the street by the cars is not greater, and ordinary less, than that produced by omnibuses and other vehicles in ordinary use. Admit that the nature of the use, as respects the travelling public, is somewhat variant, how does it prejudice the land-owner? Is his property taken? Are his rights as a land-owner affected? Does it interfere with the use of his property any more than the ordinary highway?' It is clear that this reasoning can have no appropriate application to a case in which it appears that the use of the street is so far from being nearly identical with that of the ordinary highway that in law it has always been regarded as an injury to such public easement, and on that account an indictable offence.

"I regard, then, a right to hold a market in a street as an easement additional to, and in a measure inconsistent with, its ordinary use as a highway. The question therefore is presented, Can such easement be conferred by the legislature on the public without compensation to the land-owner? I have already said that from the first it has appeared to me this question must be answered in the negative. I think the true rule is, that land taken by the public for a particular use cannot be applied under such a sequestration to any other use to the detriment of the land-owner. This is the only rule which will adequately protect the constitutional right of the citizen. To permit land taken for one purpose, and for which the land-owner has been compensated, to be applied to another and additional purpose, for which he has received no compensation, would be a mere evasion of the spirit of the fundamental law of the State. Land taken and applied for the ordinary purpose of a street would often be an improvement of the adjacent property; an appropriation of it to the uses of a market would, perhaps, as often be destructive of one-half the value of such property. Compensation for land, therefore, to be used as a highway, might, and many times would be, totally inadequate compensation if such land is to be used as a public market place. Few things would be more unjust than, when compensation has been made for land in view of one of these purposes, to allow it to be used without compensation for the other. The right of the public in a highway consists in the privilege of passage, and such privileges as are annexed as incidents by usage or custom, as the right to make sewers and drains, and to lay gas and water pipes. These subordinate privileges are entirely consistent with the primary use of the highway, and are no detriment to the land-owner. But I am not aware of any case in which it has been held that the public has any right in a highway which is incongruous with the

appropriated to another, there must be distinct and express legislative authority.[1]

purpose for which it was originally created, and which at the same time is injurious to the proprietor of the soil. Such certainly has not been the course of judicial decision in our own courts. Indeed the cases appear to be all ranged on the opposite side. I have shown that the legalization of the use of a street by a horse railroad has been carefully placed on the ground that such an appropriation of the street was merely a new mode of its legitimate and ordinary use. The *rationale* adopted excludes by necessary implication the hypothesis that the dedication of a street to a new purpose, inconsistent with its original nature, would be legal with respect to the uncompensated land-owner. But beyond this it has been expressly declared that such superadded use would be illegal. In the opinion of Mr. Justice *Haines*, in Starr *v.* Camden & Atlantic R. R. Co., 24 N. J. 592, it is very explicitly held that the constitution of this State would prevent the legislature from granting to a railroad company a right to use a public highway as a bed for their road without first making compensation to the owner of the soil. And in the case of Hinchman *v.* The Paterson Horse Railroad Co., already cited, Chancellor *Greene* quotes these views, and gives the doctrine the high sanction of his own approval. See also the Central R. R. Co. *v.* Hetfield, 29 N. J. 206."

The learned judge then distinguishes Wright *v.* Carter, 27 N. J. 76, and quotes, as sustaining his own views, State *v.* Mayor, &c. of Mobile, 5 Porter, 279, 30 Am. Dec. 561; Trustees of Presbyterian Society *v.* Auburn & Rochester R. R. Co., 3 Hill, 567; Williams *v.* N. Y. C. R. R. Co., 16 N. Y. 97; Angell on Highways, § 243 *et seq.*, and cases cited. [A public park may be taken for rapid transit railway: Suburban Rapid Transit Co. *v.* City of New York, 128 N. Y. 510, 28 N. E. 525, rev. 60 Hun, 577. Highway for railway: Louisville & W. Ry. Co. *v.* Whitley Co. Court, 95 Ky. 215, 24 S. W. 604, 44 Am. St. Rep. 220, note; Chicago & Northwestern Ry. Co. *v.* Chicago, 151 Ill. 318, 37 N. E. 842; City of Valparaiso *v.* Chicago & Grand Trunk Ry. Co., 123 Ind. 467, 24 N. E. 249; modified in Lake Erie & Western Ry. Co. *v.* City of Kokomo, 130 Ind. 224, 29 N. E. 780; Minneapolis Western Ry. Co. *v.* Minneapolis & St. Louis Ry. Co., 61 Minn. 502, 63 N. W. 1035. Part of school house site may be taken for a public way, though such taking to some extent diminishes its usefulness: Easthampton *v.* Hampshire County, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157.]

[1] *In re* Boston, &c. R. R. Co., 53 N. Y. 457; State *v.* Montclair R. Co., 35 N. J. 328; Railroad Co. *v.* Dayton, 23 Ohio St. 510; Stanley *v.* Davenport, 54 Iowa, 463, 2 N. W. 1054, 6 N. W. 706, 37 Am. Rep. 216; [Suburban Rap. Trans. Co. *v.* City of N. Y., 128 N. Y. 510, 28 N. E. 525, rev. 60 Hun, 577. Wharves of railway company, for public wharves, authority for may be implied, if implication is clear. *In re* Mayor of City of New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. 825. Railway lands for street crossing with viaduct rather than at grade, not under general authority to cross. Ill. Cent. Ry. Co. *v.* City of Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 630. Railway depot grounds for street: Cin., Wab. & M. Ry. Co. *v.* City of Anderson, 130 Ind. 490, 38 N. E. 107, 47 Am. St. 285, citing previous Indiana cases and others. Colorado E. Ry. Co. *v.* Union Pac. Ry. Co., 41 Fed. Rep. 293.] In a case where a steamboat company's dock was suffered to be taken by a railroad, it was said that the test of whether land is thus held for public use "appears to be not what the owner does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it." Matter of New York, L. & W. R. R. Co., 99 N. Y. 12, 1 N. E. 27. One railroad may condemn an easement to cross another. East St. Lou[illegible]omn. Ry. Co. *v.* East St. Louis, &c. [illegible]o., 108 Ill. 265; Toledo A. A. &c. Ry. Co. *v.* Detroit, &c. R. R. Co., 62 Mich. 564, 29 N. W. 500; [Minn. & St. Louis Ry. Co. *v.* Minn. West. Ry. Co., 61 Minn. 502, 63 N. W. 1035; United N. J. Ry. & Canal Co. *v.* Nat'l Docks & N. J. J. C. Ry. Co., 52 N. J. L. 90, 18 Atl. 574; Nat'l Docks & N. J. J. C. Ry. Co. *v.* State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. 421; Mem-

Although the regulation of a navigable stream will give to the persons incidentally affected no right to compensation, yet if the stream is diverted from its natural course, so that those entitled to its benefits are prevented from making use of it as before, the deprivation of this right is a taking which entitles them to compensation, notwithstanding the taking may be for the purpose of creating another and more valuable channel of navigation.[1] The owners of land over which such a stream flows, although they do not own the flowing water itself, yet have a property in the use

phis & C. Ry. Co. *v.* Birmingham S. & T. R. Ry. Co., 96 Ala. 571, 11 So. 642, 18 L. R. A. 166.] When by agreement it already has a crossing, a further one may be condemned. Chicago & W. I. R. R. Co. *v.* Ill. Centr. R. R. Co., 113 Ill. 156. One railroad may not condemn a strip lengthwise of another without express legislative authority. Alexandria & F. Ry. Co. *v.* Alexandria, &c. R. R. Co., 75 Va. 780; Barre R. R. Co. *v.* Montpelier, &c. R. R. Co., 61 Vt. 1, 17 Atl. 923, 4 L. R. A. 785; [Seattle & M. Ry. Co. *v.* State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; Minn. & St. Louis Ry. Co. *v.* Minn. West. Ry. Co., 61 Minn. 502, 63 N. W. 1035; *In re* Providence & W. Ry. Co., 17 R. I. 324, 21 Atl. 965.] Nor may it take a considerable portion of another's yard unless absolutely necessary. Appeal of Sharon Ry., 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133, and note, 137. But see Chicago & N. W. Ry. Co. *v.* Chicago, &c. R. R. Co., 112 Ill. 589. As to the right of condemnation where a track is already laid in a narrow pass, see Anniston, &c. R. R Co. *v.* Jacksonville, &c. R. R. Co., 82 Ala. 297, 2 So. 710; Montana Centr. Ry. Co. *v.* Helena, &c. Co., 6 Mont. 416, 12 Pac. 916; Denver & R. G. Ry. Co. *v.* Denver, &c. Co., 17 Fed. Rep. 867; Ill. Centr. R. R. Co. *v.* Chicago, &c. R. R. Co., 122 Ill. 473, 13 N. E. 140. If by necessary implication under the circumstances such power is intended to be granted, a lengthwise condemnation is valid. Providence, &c. R. R. Co. *v.* Norwich, &c. R. R. Co., 138 Mass. 277. Streets may be opened across tracks; St. Paul, M. & M. Ry. Co. *v.* Minneapolis, 35 Minn 141, 27 N. W. 500; Pres't &c. D. & H. C. Co. *v.* Whitehall, 90 N. Y 21; but not, without express authority, across necessary depot grounds acquired by condemnation. Prospect Park, &c. R. R. Co. *v.* Williamson, 91 N. Y. 552, or by purchase: St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359, 15 N. W. 684. Compare New York & L. B. R. R. Co. *v.* Drummond, 46 N. J. L. 644. Nor may a ditch be located lengthwise of a railroad right of way. Baltimore & O. &c. R. R. Co. *v.* North, 103 Ind. 486, 3 N. E. 144. Without such authority a railroad may not condemn land dedicated as a levee: Oregon Ry. Co. *v.* Portland, 9 Oreg 231; nor a school district, a poor farm for school site. Appeal of Tyrone School Dist., 15 Atl. 667. The existing use must be actual and in good faith. Rochester, H. & L. R. R. Co. *v.* New York, &c. Co., 110 N. Y. 128, 17 N. E. 680; Matter of Rochester H. & L. R. R. Co., *Id.* 119, 17 N. E. 678; New York & A. R. R. Co. *v.* New York, &c. R. R. Co., 11 Abb. N. C. 386. See also cases, p. 757, note 3, *ante*. When for a way land already used for that purpose is taken, everything upon it is also taken; such as flagstones, bridges, culverts, &c.; and the assessment of damages should cover the whole: Ford *v.* County Commissioners, 64 Me. 408; also any buildings which it may be necessary to destroy. Lafayette, &c. R. R. Co. *v.* Winslow, 66 Ill. 219. [Legislature cannot authorize the taking by one from another of property held for a public use to be held by that other for the same use. Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765.]

[1] People *v.* Canal Appraisers, 13 Wend. 355. And see Hatch *v.* Vermont Central R. R. Co., 25 Vt. 49; Bellinger *v.* New York Central R. R. Co., 23 N. Y. 42; Gardner *v.* Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526; Thunder Bay, &c. Co. *v.* Speechly, 31 Mich. 336; Emporia *v.* Soden, 25 Kan. 588, 37 Am. Rep. 265.

of that water as it flows past them, for the purpose of producing mechanical power, or for any of the other purposes for which they can make it available, without depriving those below them of the like use, or encroaching upon the rights of those above; and this property is equally protected with any of a more tangible character.[1]

What Interest in Land can be taken under the Right of Eminent Domain.

Where land is appropriated to the public use under the right of eminent domain, and against the will of the owner, we have seen how careful the law is to limit the public authorities to their precise needs, and not to allow the dispossession of the owner from any portion of his freehold which the public use does not require. This must be so on the general principle that the right, being based on necessity, cannot be any broader than the necessity which supports it. For the same reason, it would seem that, in respect to the land actually taken, if there can be any conjoint occupation of the owner and the public, the former should not be altogether excluded, but should be allowed to occupy for his private purposes to any extent not inconsistent with the public use. As a general rule, the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner. In the common highways, the public have a perpetual easement, but the soil is the property of the adjacent owner, and he may make any use of it which does not interfere with the public right of passage, and the public can use it only for the purposes usual with such ways.[2] And when the land ceases to be used by the public as a way, the owner will again become restored to his complete and exclusive possession, and the fee will cease to be encumbered with the easement.[3]

[1] Morgan *v.* King, 18 Barb. 284, 35 N. Y. 454; Gardner *v.* Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526; Emporia *v.* Soden, 25 Kan. 588, 37 Am. Rep. 265.

[2] In Adams *v.* Rivers, 11 Barb. 390, a person who stood in the public way and abused the occupant of an adjoining lot was held liable in trespass as being unlawfully there, because not using the highway for the purpose to which it was appropriated. See, as to what is a proper use of highway by land, Bliss *v.* South Hadley, 145 Mass. 91, 13 N. E. 352; Gulline *v.* Lowell, 144 Mass. 491, 11 N. E. 723; by water, Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845. Hay standing on land which has been condemned for right of way belongs to the land-owner. Bailey *v.* Sweeney, 64 N. H. 296, 9 Atl. 543. So of ice. Julien *v.* Woodsmall, 82 Ind. 568. Where in the course of a sewer improvement the fee of an island is not taken, the gravel taken from it may be used elsewhere in the sewer work. Titus *v.* Boston, 149 Mass. 164, 21 N. E. 310.

[3] Dean *v.* Sullivan R. R. Co., 22 N. H. 316; Blake *v.* Rich, 34 N. H. 282; Henry *v.* Dubuque & Pacific R. R. Co., 2 Iowa, 288; Weston *v.* Foster, 7 Met. 297; Quimby *v.* Vermont Central R. R. Co., 23

It seems, however, to be competent for the State to appropriate the title to the land in fee, and so to altogether exclude any use by the former owner, except that which every individual citizen is entitled to make, if in the opinion of the legislature it is needful that the fee be taken.[1] The judicial decisions to this effect proceed upon the idea that, in some cases, the public purposes cannot be fully accomplished without appropriating the complete title; and where this is so in the opinion of the legislature, the same reasons which support the legislature in their right to decide absolutely and finally upon the necessity of the taking will also support their decision as to the estate to be taken. The power, it is said in one case, "must of necessity rest in the legislature, in order to secure the useful exercise and enjoyment of the right in question. A case might arise where a temporary use would be all that the public interest required. Another case might require the permanent and apparently the perpetual occupation and enjoyment of the property by the public, and the right to take it must be coextensive with the necessity of the case, and the measure of compensation should of course be graduated by the nature and the duration of the estate or interest of which the owner is deprived."[2] And it was therefore held, where the statute provided that lands might be compulsorily taken in fee-simple for the purposes of an almshouse extension, and they were taken accordingly, that the title of the original owner was thereby entirely divested, so that when the land ceased to be used for the public purpose, the title remained in the municipality which had appropriated it, and did not revert to the former owner or his heirs.[3] And it does not seem to be uncommon to provide that,

Vt. 387; Giesy *v.* Cincinnati, &c. R. R. Co., 4 Ohio St. 308. See Skillman *v.* Chicago, &c. Ry. Co., 78 Iowa, 401, 43 N. W. 275, *ante*. p. 796, note 1.

[1] Roanoke City *v.* Berkowitz, 80 Va. 616. See Matter of Amsterdam Water Commissioners, 96 N. Y. 351. This, however, is forbidden by the Constitution of Illinois of 1870, in the case of land taken for railroad tracks. Art. 2, § 13. And we think it would be difficult to demonstrate the necessity for appropriating the fee in case of any thoroughfare; and if never needful, it ought to be held incompetent. See New Orleans, &c. R. R. Co. *v.* Gay, 32 La. Ann 471. [Any easement or right connected with land may be taken as well as the absolute fee. Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. 594, 49 Am. St. 800.]

[2] Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314, 325. See also Dingley *v.* Boston, 100 Mass. 544; Brooklyn Park Com'rs *v.* Armstrong, 2 Lans. 429; s. c. on appeal, 45 N. Y. 234, and 6 Am. Rep. 70.

[3] Heyward *v.* Mayor, &c. of New York, 7 N. Y. 314. And see Baker *v.* Johnson, 2 Hill, 342; Wheeler *v.* Rochester, &c. R. R. Co., 12 Barb. 227; Munger *v.* Tonawanda R. R. Co., 4 N. Y. 349; Rexford *v.* Knight, 11 N. Y. 308; Commonwealth *v.* Fisher 1 Pen. & Watts, 462; De Varaigne *v.* Fox, 2 Blatch. 95; Coster *v.* N. J. R. R. Co., 23 N. J. 227; Plitt *v.* Cox, 43 Pa. St. 486; Brooklyn Park Com'rs *v.* Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Water Works Co. *v.* Burkhart, 41 Ind. 364. Compare Gebhardt *v.* Reeves, 75 Ill. 301.

in the case of some classes of public ways, and especially of city and village streets, the dedication or appropriation to the public use shall vest the title to the land in the State, county, or city; the purposes for which the land may be required by the public being so numerous and varied, and so impossible of complete specification in advance, that nothing short of a complete ownership in the public is deemed sufficient to provide for them. In any case, however, an easement only would be taken, unless the statute plainly contemplated and provided for the appropriation of a larger interest.[1]

The Damaging of Property.

In addition to providing for compensation for the taking of property for public use, several States since 1869 have embodied in their constitutions provisions that property shall not be "damaged" or "injured" in the course of public improvements without compensation.[2] The construction of these provisions has not been uniform. In some cases they are held to require compensation only where like acts done by an individual would warrant the recovery of damages at common law.[3] In others a

[1] Barclay *v.* Howell's Lessee, 6 Pet. 498; Rust *v.* Lowe, 6 Mass. 90; Jackson *v.* Rutland & B. R. R. Co., 25 Vt. 150; Jackson *v.* Hathaway, 15 Johns. 447.

[2] Constitution of Alabama, Art. XIII., § 7; Arkansas, Art. II. § 22; California, Art. I. § 14; Colorado, Art. II. § 14; Georgia, Bill of Rights, I. § 3; Illinois, Art. II. § 13; Louisiana, Art. 156; Missouri, Art. I. § 20; Nebraska, Art. I. § 21; Pennsylvania, Art. I. § 8; Texas, Art. I. § 17; West Virginia, Art. III. § 9.

[3] The purpose was to impose on corporations "having the right of eminent domain a liability for consequential damages from which they had been previously exempt," when for doing the same act an individual would have been liable. Edmundson *v.* Pittsburgh, &c. R. R. Co., 111 Pa. St. 316, 2 Atl. 404. "Injured" means such legal wrong as would have been the subject of an action for damages at common law. Pennsylvania R. R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690; Pa. S. V. R. R. Co. *v.* Walsh, 124 Pa. St. 544, 17 Atl. 186. "In all cases, to warrant a recovery it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where but for some legislative enactment an action would lie at the common law." *Mulkey*, J., in Rigney *v.* Chicago, 102 Ill. 64; followed in Chicago *v.* Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820; Rude *v.* St. Louis, 93 Mo. 408, 6 S. W. 257. To the same effect is Trinity & S. Ry. Co. *v.* Meadows, 73 Tex. 32, 3 L. R. A. 565, 11 S. W. 145; [Austin *v.* Augusta T. Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755. To "damage" property within the meaning of that term as used in the Georgia constitution there must be some physical interference with property or with a right or use appurtenant to property. A railway company is not liable, therefore, to the owner of real property for diminution in the market value resulting from the making of noise or

broader scope has been given to them.[1] Compensation has been awarded under them for the laying of a railroad track in the street, the fee of which the abutter does not own;[2] for a change in the grade of the street;[3] for cutting off egress by it;[4] and for

sending forth of smoke and cinders causing personal inconvenience and discomfort only to the occupants. Austin *v.* Terminal Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755. Under constitution providing for compensation where property is "injured," one whose property is depreciated, in common with others of the general public, by reason of noise, smoke, etc., resulting from the ordinary operation of a railway, and suffered by the public generally, is not entitled to compensation. But if by reason of the near location of a turn-table this depreciation is unusual he is entitled to compensation. Louisville Ry. Co. *v.* Foster, 22 Ky. L. 458, 57 S. W. 480, 50 L. R. A. 813.] In Alabama the provision in case of a change of grade is held to cover only such alterations as could not have been anticipated at the time of the first taking. City Council of Montgomery *v.* Townsend, 80 Ala. 489. The English statute covering the same ground as these provisions receives substantially the same construction as that put upon them in the Pennsylvania cases noted above. Caledonian Ry. Co. *v.* Walker's Trustees, L. R. 7 App. Cas. 259.

[1] The word "damaged" embraces more than physical invasions of property. It is not restricted to cases where the owner is entitled to recover as for a tort at common law. Reardon *v.* San Francisco, 66 Cal. 492, 6 Pac. 317. The language is intended to cover "all cases in which even in the proper prosecution of a public work or purpose the right or property of any person in a pecuniary way may be injuriously affected." Gulf C. & S. F. Ry. Co. *v.* Fuller, 63 Tex. 467. See Gottschalk *v.* Chicago, &c. R. R. Co., 14 Neb. 550, 16 N. W. 475, 17 N. W. 120; Hot Springs R. R. Co. *v.* Williamson, 45 Ark. 429; Atlanta *v.* Green, 67 Ga. 386; Denver *v.* Bayer, 7 Col. 113, 2 Pac. 6; Denver Circle R. R. Co. *v.* Nestor, 10 Col. 403, 15 Pac. 714. The damages are not restricted to such as could reasonably have been anticipated when the structure was built. Omaha & R. V. R. R. Co. *v.* Standen, 22 Neb. 343, 35 N. W. 183. [Depreciation in value by reason of noise, smoke, and vibration incident to the operation of a railway near by, but entirely on lands of private persons, is "damage" within meaning of the term in the constitution, though no land taken. Gainesville, H. & W. Ry. Co. *v.* Hall, 78 Tex. 169, 14 S. W. 259, 9 L. R. A. 208.]

[2] Hot Springs R. R. Co. *v.* Williamson, 45 Ark. 429; Columbus & W. Ry. Co. *v.* Witherow, 82 Ala. 190, 3 So. 23; Denver *v.* Bayer, 7 Col. 113, 2 Pac. 6; Denver & R. G. Ry. Co. *v.* Bourne, 11 Col. 59, 16 Pac. 839; McMahon *v.* St. Louis, &c. Ry. Co., 41 La. Ann. 827, 6 So. 640; Gulf C. & S. F. Ry. Co. *v.* Fuller, 63 Tex. 467; Gottschalk *v.* Chicago, &c. R. R. Co., 14 Neb. 550, 16 N. W. 475, 17 N. W. 120. [Reining *v.* N. Y. L. & W. Ry. Co., 128 N. Y. 157, 623, 28 N. E. 640, 14 L. R. A. 133; Jones *v.* Erie & W. V. Ry. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. 722, 17 L. R. A. 758. So damages have been awarded under such circumstances though no such specific constitutional provision. Kansas N. & D. Ry. Co. *v.* Cuykendall, 42 Kan. 234, 21 Pac. 1051, 16 Am. St. 479.] So of a street railroad. Campbell *v.* Metrop. St. Ry. Co., 82 Ga. 620, 9 S. E. 1078. In Illinois it is so held as to a track in a road; Chicago & W. I. R. R. Co. *v.* Ayres, 106 Ill. 511; but not as to one laid in the street of a city by its permission under legislative authority. Olney *v.* Wharf, 115 Ill. 519, 5 N. E. 366. Nor can a railroad which crosses a street complain that another crosses it in the street. Kansas City, St. J., &c. R. R. Co. *v.* St. Joseph, &c. Co., 97 Mo. 457, 10 S. W. 826.

[3] Reardon *v.* San Francisco, 66 Cal.

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[4] Rigney *v.* Chicago, 102 Ill. 64; Chicago *v.* Taylor, 125 U. S. 161, 8 Sup. Ct. Rep. 820; Chicago, K. & N. Ry. Co. *v.* Hazels, 26 Neb. 364, 42 N. W. 93. So if access is rendered dangerous where not cut off. Pa. S. V. R. R. Co. *v.* Walsh, 124 Pa. St. 544, 17 Atl. 186, 10 Am. St. 611. See also Quigley *v.* Pa. S. V. R. R. Co., 121 Pa. St. 35, 15 Atl. 478.

other damage from the construction of public works.[1] It has been denied, however, where a railway viaduct has been built on the other side of a narrow street from the plaintiff's lot,[2] and where the street has been rendered impassable at some distance from the property of the complaining party,[3] and where the damage results from the operation and not the construction of the work.[4]

Compensation for Property Taken.

It is a primary requisite, in the appropriation of lands for public purposes, that compensation shall be made therefor. Eminent domain differs from taxation in that, in the former case, the citizen is compelled to surrender to the public something beyond his due proportion for the public benefit. The public seize and appropriate his particular estate, because of a special need for it, and not because it is right, as between him and the government, that he should surrender it.[5] To him, therefore, the benefit and protection he receives from the government are not sufficient compensation; for those advantages are the equivalent for the taxes he pays, and the other public burdens he assumes in common with the community at large. And this compensation must be

492, 6 Pac. 317; Atlanta *v.* Green, 67 Ga. 386; Moon *v.* Atlanta, 70 Ga. 611; Sheehy *v.* Kansas City, &c. Co., 94 Mo. 574, 7 S. W. 579; New Brighton *v.* Peirsol, 107 Pa. St. 280; Hutchinson *v.* Parkersburg, 25 W. Va. 226. So as to the establishment of the grade. Harmon *v.* Omaha, 17 Neb. 548, 23 N. W. 503. But if after a grade is established one buys and the walk is then cut down to grade, there is no damage. Denver *v.* Vernia, 8 Col. 399, 8 Pac. 656. In Alabama there is none, if the change might have been anticipated. City Council of Montgomery *v.* Townsend, 80 Ala. 489.

[1] In Omaha Horse Ry. Co. *v.* Cable Tramway Co., 32 Fed. Rep 727, the laying of a cable road by the side of a horse railroad was held a damaging. So of the erection of a bridge near a ferry. Mason *v.* Harper's Ferry B. Co, 17 W. Va. 396. But the clogging of a stream caused by the removal of timber incidental to proper railroad construction is not a ground for damages. Trinity & S. R. Ry. Co. *v.* Meadows, 73 Tex. 32, 11 S. W. 145.

[2] Pennsylvania R. R. Co. *v.* Lippincott, 116 Pa. St. 472, 9 Atl. 871; Pennsylvania R. R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659. [See Pennsylvania, &c. Ry. *v.* Walsh, 124 Pa. St. 544, 17 Atl. 186, 10 Am. St. 611, where these cases are interpreted as holding that the constitutional provision was not intended to apply to injuries which are the result of the operation of the railway, as distinguished from such as result from its construction. It is here held that where access to abutting property is cut off or rendered dangerous, the provision is applicable.]

[3] Rude *v.* St. Louis, 93 Mo. 408, 6 S. W. 257; East St. Louis *v.* O'Flynn, 119 Ill. 200, 10 N. E. 395.

[4] Pennsylvania R. R. Co. *v.* Marchant, 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659. See Caledonian Ry. Co. *v.* Walker's Trustees, L. R. 7 App. Cas. 259. Nor may damages be given for negligence in the construction. Edmundson *v.* Pittsburgh, &c. R. R. Co., 111 Pa. St. 316, 2 Atl. 404; Atlanta *v.* Word, 78 Ga. 276. *Contra*, Omaha & R. V. R. R. Co. *v.* Standen, 22 Neb. 343, 35 N. W. 183.

[5] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Woodbridge *v.* Detroit, 8 Mich. 274; Booth *v.* Woodbury, 32 Conn. 118.

pecuniary in its character, because it is in the nature of a payment for a compulsory purchase.[1]

The *time* when the compensation must be made may depend upon the peculiar constitutional provisions of the State. In some of the States, by express constitutional direction, compensation must be made before the property is taken. No constitutional principle, however, is violated by a statute which allows private property to be entered upon and temporarily occupied for the purpose of a survey and other incipient proceedings, with a view to judging and determining whether or not the public needs require the appropriation, and, if they do, what the proper location shall be; and the party acting under this statutory authority would neither be bound to make compensation for the temporary possession, nor be liable to action of trespass.[2] When, however, the land has been viewed, and a determination arrived at to appropriate it, the question of compensation is to be considered; and in the absence of any express constitutional provision fixing the time and the manner of making it, the question who is to take the property — whether the State, or one of its political divisions or municipalities, or, on the other hand, some private corporation — may be an important consideration.

When the property is taken directly by the State, or by any municipal corporation by State authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain, that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it.[3] The decisions upon this point assume that, when the

[1] The effect of the right of eminent domain against the individual "amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it." *Johnson*, J., in Fletcher *v.* Peck, 6 Cranch, 87, 145. And see Bradshaw *v.* Rogers, 20 Johns. 103, per *Spencer*, Ch. J.; People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Carson *v.* Coleman, 11 N. J. Eq. 106; Young *v.* Harrison, 6 Ga. 130; United States *v.* Minnesota, &c. R. R. Co., 1 Minn. 127; Railroad Co. *v.* Ferris, 26 Tex. 588; Curran *v.* Shattuck, 24 Cal. 427; State *v.* Graves, 19 Md. 351; Weckler *v.* Chicago, 61 Ill. 142, 147. [Constitutional requirement of compensation is not satisfied by taxing back on portion of lands not taken, the value of that taken and the amount of damages for injury to that not taken. This results in a taking without compensation. City of Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487.] The power of a treaty is such that it may take private property without compensation. Cornet *v.* Winton, 2 Yerg. 143.

[2] Bloodgood *v.* Mohawk & Hudson R. R. Co., 14 Wend. 51, and 18 Wend. 9; Cushman *v.* Smith, 34 Me. 247; Nichols *v.* Somerset, &c. R. R. Co., 43 Me. 356; Mercer *v.* McWilliams, Wright (Ohio), 132; Walther *v.* Warner, 25 Mo. 277; Fox *v.* W. P. R. R. Co., 31 Cal. 538; State *v.* Seymour, 35 N. J. 47, 53.

[3] Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 9; Rogers *v.* Brad-

State has provided a remedy by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction; since the property of the municipality, or of the State, is a fund to which he can resort without risk of loss.[1] It is thus taken, it is, I apprehend, the settled doctrine, even as respects the State itself, that at least certain and ample provision must first be made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay; otherwise the law making the appropriation is no better than blank paper. Bloodgood *v.* Mohawk & Hudson R. R. Co., 18 Wend. 9. The provisions of the statute prescribing the mode of compensation in cases like the present, when properly understood and administered, come fully up to this great fundamental principle; and even if any doubt could be entertained about their true construction, it should be made to lean in favor of the one that is found to be most in conformity with the constitutional requisite." People *v.* Hayden, 6 Hill, 359, 361; [Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355; Old Colony Ry. Co. *v.* Framingham Water Co., 153 Mass. 561, 27 N. E. 662, 13 L. R. A. 332; Sweet *v.* Rechel, 159 U. S. 380, 16 Sup. Ct. Rep. 43.] "A provision for compensation is an indispensable attendant upon the due and constitutional exercise of the power of depriving an individual of his property." Gardner *v.* Newburg, 2 Johns. Ch. 162, 168, 7 Am. Dec. 526; Buffalo, &c. R. R. Co. *v.* Ferris, 26 Tex. 588; Ash *v.* Cummings, 50 N. H. 591, 613; Haverhill Bridge Proprietors *v.* County Com'rs, 103 Mass. 120, 4 Am. Rep. 518; Langford *v.* Com'rs of Ramsay Co., 16 Minn. 375; Southwestern R. R. Co. *v.* Telegraph Co., 46 Ga. 43. [Statute making no provision for measuring compensation is void. Mulligan *v.* City of Perth-Amboy, 52 N. J. L. 132, 18 Atl. 670. See also Tuttle *v.* Justice of Knox County, 89 Tenn. 157, 14 S. W. 486; Cherokee Nation *v.* Southern K. Ry. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 965; Sweet *v.* Rechel, 159 U. S. 380, 16 Sup. Ct. Rep. 43.]

[1] In Commissioners, &c. *v.* Bowie, 34 Ala. 461, it was held that a provision by

shaw, 20 Johns. 744; Calking *v.* Baldwin, 4 Wend. 667, 21 Am. Dec. 168; Case *v.* Thompson, 6 Wend. 634; Fletcher *v.* Auburn & Syracuse R. R. Co., 25 Wend. 462; Rexford *v.* Knight, 11 N. Y. 308; Taylor *v.* Marcy, 25 Ill. 518; Callison *v.* Hedrick, 15 Gratt. 244; Jackson *v.* Winn's Heirs, 4 Lit. 323; People *v.* Green, 3 Mich. 496; Lyon *v.* Jerome, 26 Wend. 485, 497, per *Verplanck*, Senator; Gardner *v.* Newburg, 2 Johns. Ch. 162, 7 Am. Dec. 526; Charlestown Branch R. R. Co. *v.* Middlesex, 7 Met. 78; Harper *v.* Richardson, 22 Cal. 251; Baker *v.* Johnson, 2 Hill, 342; People *v.* Hayden, 6 Hill, 359; Orr *v.* Quimby, 54 N. H. 500; Ash *v.* Cummings, 50 N. H. 591; White *v.* Nashville, &c. R. R. Co., 7 Heisk. 518; Simms *v.* Railroad Co., 12 Heisk. 621; State *v.* Messenger, 27 Minn. 119, 6 N. W. 457; Chapman *v.* Gates, 54 N. Y. 132; Hamersley *v.* New York, 56 N. Y. 533; Loweree *v.* Newark, 38 N. J. 151; Brock *v.* Hishen, 40 Wis. 674; Long *v.* Fuller, 68 Pa. St. 170 (case of a school district); Smeaton *v.* Martin, 57 Wis. 364, 15 N. W. 403; Com'rs of State Park *v.* Henry, 38 Minn. 266, 36 N. H. 874. [Provision requiring payment into court in case of an appeal from assessment, of double the amount of the assessment is adequate. Cherokee Nation *v.* Southern Kansas Ry. Co., 135 U. S. 641, 10 Sup. Ct. Rep. 965; Sweet *v.* Rechel, 159 U. S. 380, 40 L. ed. U. S. 188, and note, 16 Sup. Ct. Rep. 43; Backus *v.* Fort St. Union Depot Co., 169 U. S. 557, 42 L. ed. U. S. 853, and note, 18 Sup. Ct. Rep. 445; Consumer's Gas Trust Co. *v.* Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505. But provision for payment into court of only the amount awarded is not sufficient. Harrisburg C. & C. T. R. Co. *v.* Harrisburg & M. E. Ry. Co., 177 Pa. St. 585, 35 Atl. 850, 34 L. R. A. 439.] The same rule applies to the United States. Great Falls M'f'g Co. *v.* Garland, 25 Fed. Rep. 521: "Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property

is essential, however, that the remedy be one to which the party can resort on his own motion; (*a*) if the provision be such that only the public authorities appropriating the land are authorized to take proceedings for the assessment, it must be held to be void.[1] But if the remedy is adequate, and the party is allowed to pursue it, it is not unconstitutional to limit the period in which he shall resort to it, and to provide that, unless he shall take proceedings for the assessment of damages within a specified time, all right thereto shall be barred.[2] The right to compensation, when property is appropriated by the public, may always be waived;[3] and

law that compensation, when assessed, should be paid to the owner by the county treasurer, sufficiently secured its payment. And see Zimmerman *v.* Canfield, 42 Ohio St. 463; Talbot *v.* Hudson, 16 Gray, 417; Chapman *v.* Gates, 54 N. Y. 132. But it is not competent to leave compensation to be made from the earnings of a railroad company. Conn. Riv. R. R. Co. *v.* Commissioners, 127 Mass. 50, 34 Am. Dec 338. [As to whether sufficient where provision is for payment out of special fund of municipality, see *In re* Lincoln Park, 44 Minn. 299, 46 N. W. 355.]

[1] Shepardson *v.* Milwaukee & Beloit R. R. Co., 6 Wis. 605; Powers *v.* Bears, 12 Wis. 213. See McCann *v.* Sierra Co., 7 Cal. 121; Colton *v.* Rossi, 9 Cal. 595; Ragatz *v.* Dubuque, 4 Iowa, 343. An impartial tribunal for the ascertainment of the damage must exist when the land is taken. State *v.* Perth Amboy, 52 N. J. L. 132, 18 Atl. 670. But in People *v.* Hayden, 6 Hill, 359, where the statute provided for appraisers who were to proceed to appraise the land as soon as it was appropriated, the proper remedy of the owner, if they failed to perform this duty, was held to be to apply for a *mandamus*. If land is taken without provision for compensation, the owner has a common-law remedy. Hooker *v.* New Haven, &c. Co., 16 Conn. 146, 36 Am. Dec. 477. The party making an appropriation may abandon it if the terms, when ascertained, are not satisfactory. Lamb *v.* Schotter, 54 Cal. 319. But not after judgment: Drath *v.* Burlington, &c. R. R. Co., 15 Neb. 367, 18 N. W. 717; nor after verdict when an appeal has been taken and entry made. Witt *v.* St. Paul, &c. R. R. Co., 35 Minn. 404, 29 N. W. 161. But see Denver & N. O. R. R. Co. *v.* Lamborn, 8 Col. 380, 8 Pac. 582, *contra*.

[2] People *v.* Green, 3 Mich. 496; Charlestown Branch R. R. Co. *v.* Middlesex, 7 Met. 78; Rexford *v.* Knight, 11 N. Y. 308; Taylor *v.* Marcy, 25 Ill. 518; Callison *v.* Hedrick, 15 Grat. 244; Gilmer *v.* Lime Point, 18 Cal. 229; Harper *v.* Richardson, 22 Cal. 251; Cupp *v.* Commissioners of Seneca, 19 Ohio St. 173; Cage *v.* Trager, 60 Miss. 563. [See Snohomish County *v.* Haywood, 11 Wash. 429, 39 Pac. 652, to the effect that compensation must not be dependent upon application for it. *Contra*, Branson *v.* Gee, 25 Oreg. 462, 36 Pac. 527, 24 L. R. A. 355.]

[3] Matter of Albany St., 11 Wend. 149, 25 Am. Dec. 618; Brown *v.* Worcester, 13 Gray, 31; *ante*, p. 250. [Unconditional consent in writing to construction is waiver of compensation. White *v.* Manhattan Ry. Co., 139 N. Y. 19, 34 N. E. 887. Knowledge of construction without objection is not a waiver. Maysville & B. S. Ry. Co. *v.* Ingraham, 16 Ky. L. 853, 30 S. W. 8. See further upon this question of waiver, Abendroth *v.* Manhattan Ry. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461, 11 L. R. A. 634; Pennsylvania Co. *v.* Platt, 47 Ohio, 366, 25 N. E. 1033;

(*a*) [Hickman *v.* City of Kansas, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658. The constitutional guarantee is for the protection of a right and not for the redress of a wrong, and a rule which permits land to be taken without proof of the right to do so, and casts upon the owner the burden of instituting proceedings to save his property, does not meet the constitutional requirement. Stearns *v.* Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. 781.]

a failure to apply for and have the compensation assessed, when reasonable time and opportunity and a proper tribunal are afforded for the purpose, may well be considered a waiver.

Where, however, the property is not taken by the State, or by a municipality, but by a private corporation which, though for this purpose to be regarded as a public agent, appropriates it for the benefit and profit of its members, and which may or may not be sufficiently responsible to make secure and certain the payment, in all cases, of the compensation which shall be assessed, it is certainly proper, and it has sometimes been questioned whether it was not absolutely essential, that payment be actually made before the owner could be divested of his freehold.[1] Chancellor *Kent* has expressed the opinion that compensation and appropriation should be concurrent. "The settled and fundamental doctrine is, that government has no right to take private property for public purposes without giving just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time with the actual exercise of the right of eminent domain."[2] And while this is not an inflexible rule unless in terms established by the constitution, it is so just and reasonable that statutory provisions for taking private property very generally make payment precede or accompany the appropriation, and by several of the State constitutions this is expressly required.[3] And on general principles it is essential that an adequate fund be provided from which the owner of

Quackenbush *v.* District of Columbia, 20 D. C. 300. Acquiescence in construction is waiver: Merchant, Union Barb-wire Co. *v.* C. R. I. & P. Ry. Co., 79 Iowa, 613, 44 N. W. 900.]

[1] This is the intimation in Shepardson *v.* Milwaukee & Beloit R. R. Co., 6 Wis. 605; Powers *v.* Bears, 12 Wis. 213; State *v.* Graves, 19 Md. 351; Dronberger *v.* Reed, 11 Ind. 420; Lowerce *v.* Newark, 38 N. J. 151. [Brown *v.* Chicago, R. I. & P. Ry. Co., — Neb. —, 92 N. W. 128.] But see Calking *v.* Baldwin, 4 Wend. 667, 21 Am. Dec. 103.

[2] 2 Kent, 339, note.

[3] The Constitution of Florida provides "that private property shall not be taken or applied to public use, unless just compensation be first made therefor." Art. 1, § 14. See also, to the same effect, Constitution of Colorado, art. 1, § 15; Constitution of Georgia, art. 1, § 17; Constitution of Iowa, art. 1, § 18; Constitution of Kansas, art. 12, § 4; Constitution of Kentucky, art. 13, § 14; Constitution of Maryland, art. 1, § 40; Constitution of Minnesota, art. 1, § 13; Constitution of Mississippi, art. 1, § 13; Constitution of Missouri, art. 2, § 21; Constitution of Nevada, art. 1, § 8; Constitution of Ohio, art. 1, § 19; Constitution of Pennsylvania, art. 1, § 10. The Constitution of Indiana, art. 1, § 21, and that of Oregon, art. 1, § 19, require compensation to be first made, except when the property is appropriated by the State. The Constitution of Alabama, art. 1, § 24, and of South Carolina, art. 1, § 23, are in legal effect not very different. A construction requiring payment before appropriation is given to the Constitution of Illinois. Cook *v.* South Park Com'rs, 61 Ill. 115, and cases cited; Phillips *v.* South Park Com'rs, 119 Ill. 626, 10 N. E. 230.

the property can certainly obtain compensation; it is not competent to deprive him of his property, and turn him over to an action at law against a corporation which may or may not prove responsible, and to a judgment of uncertain efficacy.[1] For the consequence would be, in some cases, that the party might lose his estate without redress, in violation of the inflexible maxim upon which the right is based.

What the tribunal shall be which is to assess the compensation must be determined either by the constitution or by the statute which provides for the appropriation. The case is not one where, as a matter of right, the party is entitled to a trial by jury, unless the constitution has provided that tribunal for the purpose.[2] Nevertheless, the proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal, and the usual rights and privileges which attend judicial investigations.[3] It is not competent for the State itself to fix the compensation through the legislature, for this would make it the judge in its own cause.[4] And, if a jury is provided, the party must have the ordinary opportunity to appear when it is to be impanelled, that he may make any legal objections.[5] And he has the same

[1] Shepardson *v.* Milwaukee & Beloit R. R. Co., 6 Wis. 605; Walther *v.* Warner, 25 Mo. 277; Gilmer *v.* Lime Point, 18 Cal. 229; Curran *v.* Shattuck, 24 Cal. 427; Memphis & Charleston R. R. Co. *v.* Payne, 37 Miss. 700; Henry *v.* Dubuque & Pacific R. R. Co., 10 Iowa, 540; Ash *v.* Cummings, 50 N. H. 591; Carr *v.* Georgia R. R. Co., 1 Ga. 524; Southwestern R. R. Co. *v.* Telegraph Co., 46 Ga. 43; Yazoo Delta Levee Board *v.* Dancy, 65 Miss. 335, 3 So. 568; State *v.* McIver, 88 N. C. 686. Statutory provisions for a deposit under an order of court pending a contest about compensation, in order that the work may not be delayed, are valid. *Ex parte* Reynolds, 52 Ark. 330, 12 S. W. 570, citing St. Louis & S. F. R. R. Co. *v.* Evans, &c. Brick Co., 85 Mo. 307; Centr. B. U. P. R. R. Co. *v.* Atchison, &c. Co., 28 Kan. 453; Wagner *v.* Railway Co., 38 Ohio St. 32. See also McClain *v.* People, 9 Col. 190, 11 Pac. 85. [Upon question of whether provision for payment out of a special fund of a municipality is sufficient, see *In re* Lincoln Park, 44 Minn. 299, 46 N. W. 355.]

[2] Petition of Mount Washington Co., 35 N. H. 134; Ligat *v.* Commonwealth, 19 Pa. St. 456, 460; Rich *v.* Chicago, 59 Ill. 286; Ames *v.* Lake Superior, &c. R. R. Co., 21 Minn. 241; United States *v.* Jones, 109 U. S. 513, 3 Sup. Ct. Rep. 346; Oliver *v.* Union, &c. R. R. Co., 83 Ga. 257, 9 S. E. 1086.

[3] Rich *v.* Chicago, 59 Ill. 286; Cook *v.* South Park Com'rs, 61 Ill. 115; Ames *v.* Lake Superior, &c. R. R. Co., 21 Minn. 241. [Question of compensation is a judicial one and not for the legislature. Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 13 Sup. Ct. Rep. 622.] Whatever notices, &c., the law requires, must be given. People *v.* Kniskern, 54 N. Y. 52; Powers's Appeal, 29 Mich. 504. A judgment for damages where a railroad has entered without paying is enforceable against a purchaser of the road upon foreclosure. Buffalo, N. Y. & P. R. R. Co. *v.* Harvey, 107 Pa. St. 319.

[4] Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, 11 Pet. 420, 571, per *McLean*, J. And see Rhine *v.* McKinney, 53 Tex. 354; Tripp *v.* Overocker, 7 Col. 72, 1 Pac. 695.

[5] People *v.* Tallman, 36 Barb. 222; Booneville *v.* Ormrod, 26 Mo. 193. That it is essential to any valid proceedings for the appropriation of land to public uses that the owner have notice and an

right to notice of the time and place of assessment that he would have in any other case of judicial proceedings, and the assessment will be invalid if no such notice is given.[1] These are just, as well as familiar rules, and they are perhaps invariably recognized in legislation.

It is not our purpose to follow these proceedings, and to attempt to point out the course of practice to be observed, and which is so different under the statutes of different States. An inflexible rule should govern them all, that the interest and exclusive right of the owner is to be regarded and protected so far as may be consistent with a recognition of the public necessity. While the owner is not to be disseised until compensation is provided, neither, on the other hand, when the public authorities have taken such steps as finally to settle upon the appropriation, ought he to be left in a state of uncertainty, and compelled to wait for compensation until some future time, when they may see fit to use his land. The land should either be his or he should be paid for it. Whenever, therefore, the necessary steps have been taken on the part of the public to select the property to be taken, locate the public work, and declare the appropriation, the owner becomes absolutely entitled to the compensation, whether the public proceed at once to occupy the property or not. If a street is legally established over the land of an individual, he is entitled to demand payment of his damages, without waiting for the street to be opened.[2] And if a railway line is located across his land, and the

opportunity to be heard, see Baltimore, &c., R. R. Co. *v.* Pittsburg, &c. R. R. Co., 17 W. Va. 812. A jury, without further explanation in the law, must be understood as one of twelve persons. Lamb *v.* Lane, 4 Ohio St. 167. See *ante*, p. 455. Where a jury is the constitutional tribunal, it is not waived by failure to demand it. Port Huron, &c. Ry. Co. *v.* Callanan, 61 Mich. 12, 27 N. W. 717. Nor can a court of chancery usurp its functions. Clark *v.* Drain Com'r, 50 Mich. 628, 16 N. W. 167. It must act even where an officer only takes material from an individual's land to repair roads. Hendershot *v.* State, 44 Ohio St. 208, 6 N. E. 245. It need not, where the amount of a deposit is to be fixed, pending a final determination of compensation. *Ex parte* Reynolds, 52 Ark. 330, 12 S. W. 570. But see Wagner *v.* Railway Co., 38 Ohio St. 32. The jury may not disregard testimony and determine compensation solely upon its view of the land. Grand Rapids *v.* Perkins, 78 Mich. 93, 43 N. W. 1037.

[1] Hood *v.* Finch, 8 Wis. 381; Dickey *v.* Tennison, 27 Mo. 373; Powers's Appeal, 29 Mich. 504. Notice by publication may be sufficient. Huling *v.* Kaw Valley Ry. Co., 130 U. S. 559, 9 Sup. Ct. Rep. 603; Missouri Pac. Ry. Co. *v.* Houseman, 41 Kan. 300, 304, 21 Pac. 284. As to the right to order reassessments, see Clark *v.* Miller, 54 N. Y. 528.

[2] Philadelphia *v.* Dickson, 38 Pa. St. 247; Philadelphia *v.* Dyer, 41 Pa. St. 463; Hallock *v.* Franklin County, 2 Met. 558; Harrington *v.* County Commissioners, 22 Pick. 263; Blake *v.* Dubuque, 13 Iowa, 66; Higgins *v.* Chicago, 18 Ill. 276; County of Peoria *v.* Harvey, 18 Ill. 364; Shaw *v.* Charlestown, 3 Allen, 538; Hampton *v.* Coffin, 4 N. H. 517; Clough *v.* Unity, 18 N. H. 75. And where a city thus appropriates land for a street, it would not be allowed to set up, in defence

damages are appraised, his right to payment is complete, and he cannot be required to wait until the railway company shall actually occupy his premises, or enter upon the construction of the road at that point. It is not to be forgotten, however, that the proceedings for the assessment and collection of damages are statutory, and displace the usual remedies; that the public agents who keep within the statute are not liable to common-law action;[1] that it is only where they fail to follow the statute that they render themselves liable as trespassers;[2] though if they construct their work in a careless, negligent, and improper manner, by means of which carelessness, negligence, or improper construction a party is injured in his rights, he may have an action at the common law as in other cases of injurious negligence.[3]

The principle upon which the damages are to be assessed is always an important consideration in these cases; and the circumstances of different appropriations are sometimes so peculiar that it has been found somewhat difficult to establish a rule that shall always be just and equitable. If the whole of a man's estate is taken, there can generally be little difficulty in fixing upon the measure of compensation; for it is apparent that, in such a case, he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight. It may be that, in such a case, the market value may not seem to the owner an adequate compensation; for he may have reasons peculiar to himself, springing from association, or other cause, which make him unwilling to part with the property on the estimate of his neighbors; but such reasons are incapable of being taken into account in legal proceedings, where the question is one of compensation in money, inasmuch as it is manifestly impossible to measure them by any standard of pecuniary value. Concede to the government a right to appropriate the property on paying for it, and we are at once remitted to the same standards for estimating values which are applied in

to a demand for compensation, its own irregularities in the proceedings taken to condemn the land. Higgins *v.* Chicago, 18 Ill. 276; Chicago *v.* Wheeler, 25 Ill. 478.

[1] East & West India Dock, &c. Co. *v.* Gattke, 15 Jur. 31; Kimble *v.* White Water Valley Canal, 1 Ind. 285; Mason *v.* Kennebec, &c. R. R. Co., 31 Me. 215; Aldrich *v.* Cheshire R. R. Co., 21 N. H. 359; Brown *v.* Beatty, 34 Miss. 227; Pettibone *v.* La Crosse & Milwaukee R. R. Co., 14 Wis. 443; Vilas *v.* Milwaukee & Mississippi R. R. Co., 15 Wis. 233.

[2] Dean *v.* Sullivan R. R. Co., 22 N. H. 316; Furniss *v.* Hudson River R. R. Co., 5 Sandf. 551.

[3] Lawrence *v.* Great Northern R. Co., 20 L. J. Q. B. 293; Bagnall *v.* London & N. W. R., 7 H. & N. 423; Brown *v.* Cayuga & Susquehanna R. R. Co., 12 N. Y. 486.

other cases, and which necessarily measure the worth of property by its value as an article of sale, or as a means of producing pecuniary returns.

When, however, only a portion of a parcel of land is appropriated, just compensation may perhaps depend upon the effect which the appropriation may have on the owner's interest in the remainder, to increase or diminish its value, in consequence of the use to which that taken is to be devoted, or in consequence of the condition in which it may leave the remainder in respect to convenience of use. If, for instance, a public way is laid out through a tract of land which before was not accessible, and if in consequence it is given a front, or two fronts, upon the street, which furnish valuable and marketable sites for building lots, it may be that the value of that which remains is made, in consequence of taking a part, vastly greater than the whole was before, and that the owner is benefited instead of damnified by the appropriation. Indeed, the great majority of streets in cities and villages are dedicated to the public use by the owners of lands, without any other compensation or expectation of compensation than the increase in market value which is expected to be given to such lands thereby; and this is very often the case with land for other public improvements, which are supposed to be of peculiar value to the locality in which they are made. But where, on the other hand, a railroad is laid out across a man's premises, running between his house and his out-buildings, necessitating, perhaps, the removal of some of them, or upon such a grade as to render deep cuttings or high embankments necessary, and thereby greatly increasing the inconveniences attending the management and use of the land, as well as the risks of accidental injuries, it will often happen that the pecuniary loss which he would suffer by the appropriation of the right of way would greatly exceed the value of the land taken, and to pay him that value only would be to make very inadequate compensation.

It seems clear that, in these cases, it is proper and just that the injuries suffered and the benefits received by the proprietor, as owner of the remaining portion of the land, should be taken into account in measuring the compensation. This, indeed, is generally conceded; but what injuries shall be allowed for, or what benefits estimated, is not always so apparent. The question, as we find it considered by the authorities, seems to be, not so much what the value is of that which is taken, but whether what remains is reduced in value by the appropriation, and if so, to what extent; in other words, what pecuniary injury the owner sustains by a part of his land being appropriated. But, in estimating

either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken.[1]

[1] In Somerville & Easton R. R. Co. *ads.* Doughty, 22 N. J. 495, a motion was made for a new trial on an assessment of compensation for land taken by a railroad company, on the ground that the judge in his charge to the jury informed them "that they were authorized by law to ascertain and assess the damages sustained by the plaintiff to his other lands not taken and occupied by the defendants; to his dwelling-house, and other buildings and improvements, by reducing their value, changing their character, obstructing their free use; by subjecting his buildings to the hazards of fire, his family and stock to injury and obstruction in their necessary passage across the road; the inconvenience caused by embankments or excavations, and, in general, the effect of the railroad upon his adjacent lands, in deteriorating their value in the condition they were found, whether adapted for agricultural purposes only, or for dwellings, stores, shops, or other like purposes."

"On a careful review of this charge," says the judge, delivering the opinion of the court, "I cannot see that any legal principle was violated, or any unsound doctrine advanced. The charter provides that the jury shall assess the value of the land and materials taken by the company, and the damages. The damages here contemplated are not damages to the land actually occupied or covered by the road, but such damages as the owner may sustain in his other and adjacent lands not occupied by the company's road. His buildings may be reduced in value by the contiguity of the road and the use of engines upon it. His lands and buildings, before adapted and used for particular purposes, may, from the same cause, become utterly unfitted for such purposes. The owner may be incommoded by high embankments or deep excavations on the line of the road, his buildings subjected to greater hazard from fire, his household and stock to injury and destruction, unless guarded with more than ordinary care. It requires no special experience or sagacity to perceive that such are the usual and natural effects of railroads upon the adjoining lands, and which necessarily deteriorate not only their marketable but their intrinsic value. The judge, therefore, did not exceed his duty in instructing the jury that these were proper subjects for their consideration in estimating the damages which the plaintiff might sustain by reason of the location of this road upon and across his lands." And in the same case it was held that the jury, in assessing compensation, were to adopt as the standard of value for the lands taken, not such a price as they would bring at a forced sale in the market for money, but such a price as they could be purchased at, provided they were for sale, and the owner asked such prices as, in the opinion of the community, they were reasonably worth; that it was matter of universal experience that land would not always bring at a forced sale what it was reasonably worth, and the owner, not desiring to sell, could not reasonably be required to take less. In Sater *v.* Burlington & Mount Pleasant Plank Road Co., 1 Iowa, 386, 393, *Isbell*, J., says: "The terms used in the constitution, 'just compensation,' are not ambiguous. They undoubtedly mean a fair equivalent; that the person whose property is taken shall be made whole. But while the end to be attained is plain, the mode of arriving at it is not without its difficulty. On due consideration, we see no more practical rule than to first ascertain the fair marketable value of the premises over which the proposed improvement is to pass, irrespective of such improvement, and also a like value of the same, in the condition

The question, then, in these cases, relates first to the value of the land appropriated; which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it.[1] Second, if less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation.[2]

in which they will be immediately after the land for the improvement has been taken, irrespective of the benefit which will result from the improvement, and the difference in value to constitute the measure of compensation. But in ascertaining the depreciated value of the premises after that part which has been taken for public use has been appropriated, regard must be had only to the immediate, and not remote, consequence of the appropriation; that is to say, the value of the remaining premises is not to be depreciated by heaping consequence on consequence. While we see no more practical mode of ascertainment than this, yet it must still be borne in mind that this is but a mode of ascertainment; that, after all, the true criterion is the one provided by the constitution, namely, just compensation for the property taken." See this rule illustrated and applied in Henry *v.* Dubuque & Pacific R. R. Co., 2 Iowa, 300, where it is said: "That the language of the constitution means that the person whose property is taken for public use shall have a fair equivalent in money for the injury done him by such taking; in other words, that he shall be made whole so far as money is a measure of compensation, we are equally clear. This just compensation should be precisely commensurate with the injury sustained by having the property taken; neither more nor less." And see Richmond, &c. Co. *v.* Rogers, 1 Duvall, 135; Robinson *v.* Robinson, 1 Duvall, 162; Holton *v.* Milwaukee, 31 Wis. 27; Root's Case, 77 Pa. St. 276; East Brandywine, &c. R. R. Co. *v.* Ranck, 78 Pa. St. 454. [The compensation to which owner is entitled for land taken for a street includes in addition to the value of land taken such expenses as are naturally incident to the taking, like cost of moving fence and the like. City of Detroit *v.* Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813; but not future and contingent expenses like assessments for improvements, nor for removing snow from sidewalks, for grading or paving. *Id.*]

[1] Matter of Furman Street, 17 Wend. 649; Tidewater Canal Co. *v.* Archer, 9 Gill & J. 479; Sater *v.* Burlington, &c. R. R. Co., 1 Iowa, 386; Parks *v.* Boston, 15 Pick. 206; First Parish, &c. *v.* Middlesex, 7 Gray, 106; Dickenson *v.* Inhabitants of Fitchburg, 13 Gray, 546; Lexington *v.* Long, 31 Mo. 369; Moulton *v.* Newburyport Water Co., 137 Mass. 163. The compensation should be the fair cash market value of the land taken: Brown *v.* Calumet R. Ry. Co., 125 Ill. 600, 18 N. E. 283; including that of appurtenances used in connection with it: Chicago, S. F. & C. Ry. Co. *v.* Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562; but not the value of an illegal use: Kingsland *v.* Mayor, 110 N. Y. 569, 18 N. E. 435. While its value as mineral land may be considered: Doud *v.* Mason City, &c. Ry. Co., 76 Iowa, 438, 41 N. W. 65; the estimated specific value of minerals in it may not. Reading & P. R. R. Co. *v.* Balthaser, 119 Pa. St. 472, 13 Atl. 294. Where railroad land is taken, the reasonable expectation of future use is to be considered. Portland & R. R. R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670. The availability of land for a bridge site or ferry landing may be considered: Little Rock Junc. Ry. Co. *v.* Woodruff, 49 Ark. 381, 5 S. W. 792; Little Rock & F. S. Ry. Co. *v.* McGehee, 41 Ark. 202; but not the enhanced value due to the proposed improvement. Shenandoah V. R. R. Co. *v.* Shepherd, 26 W. Va. 672. Nor can the damage to the ferry privilege by building a bridge be compensated for. Moses *v.* Sanford, 11 Lea, 731. Compare Mason *v.* Harper's Ferry B. Co., 17 W. Va. 396.

[2] Deaton *v.* Polk, 9 Iowa, 594; Parks

But, in making this estimate, there must be excluded from consideration those benefits which the owner receives only in common

v. Boston, 15 Pick. 198; Dickenson v. Fitchburg, 13 Gray, 546; Harvey v. Lackawanna, &c. R. R. Co., 47 Pa. St. 428; Newby v. Platte County, 25 Mo. 258; Pacific R. R. Co. v. Chrystal, 25 Mo. 544; Somerville & Easton R. R. Co. *ads.* Doughty, 22 N. J. 495; Carpenter v. Landaff, 42 N. H. 218; Troy & Boston R. R. Co. v. Lee, 13 Barb. 169; Tidewater Canal Co. v. Archer, 9 Gill & J. 479; Winona & St. Paul R. R. Co. v. Waldron, 11 Minn. 515; Nicholson v. N. Y. & N. H. R. R. Co., 22 Conn. 74; Nichols v. Bridgeport, 23 Conn. 189; Harding v. Funk, 8 Kan. 315; Holton v. Milwaukee, 31 Wis. 27. If the whole tract is not taken, the value of the part taken as part of the whole should be allowed. Chicago, B. & N. R. R. Co. v. Bowman, 122 Ill. 595, 13 N. E. 814; Balfour v. Louisville, &c. R. R. Co., 62 Miss. 508; Asher v. Louisville, &c. R. R. Co., 87 Ky. 391, 8 S. W. 854. As to how far different lots or subdivisions used as one tract are to be held one parcel within this rule, see Port Huron, &c. Ry. Co. v. Voorheis, 50 Mich. 506, 15 N. W. 882; Wilcox v. St. Paul, &c. Ry. Co., 35 Minn. 439, 29 N. W. 148; Cox v. Mason City, &c. R. Co., 77 Iowa, 20, 41 N. W. 475; Ham v. Wisconsin, &c. Ry. Co., 61 Iowa, 716, 17 N. W. 157; Northeastern Neb. Ry. Co. v. Frazier, 25 Neb. 42, 53, 40 N. W. 604, 609; Cameron v. Chicago, &c. Ry. Co., 42 Minn. 75, 43 N. W. 785; Potts v. Penn. S. V. R. R. Co., 119 Pa. St. 278, 13 Atl. 291. "Compensation is an equivalent for property taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken, and of the injury done to the residue of the property by the use of that part which is taken. The benefit is, in part, an equivalent to the loss and damage. The loss and damage of the defendant is the value of the land the company has taken, and the injury which the location and use of the road through his tract may cause to the remainder. The amount which may be assessed for these particulars the company admits that it is bound to pay. But, as a set-off, it claims credit for the benefit the defendant has received from the construction of the road. That benefit may consist in the enhanced value of the residue of his tract. When the company has paid the defendant the excess of his loss or damage over and above the benefit and advantage he has derived from the road, he will have received a just compensation. It is objected that the enhanced salable value of the land should not be assessed as a benefit to the defendant, because it is precarious and uncertain. The argument admits that the enhanced value, if permanent, should be assessed. But whether the appreciation is permanent and substantial, or transient and illusory, is a subject about which the court is not competent to determine. It must be submitted to a jury, who will give credit to the company according to the circumstances. The argument is not tenable, that an increased salable value is no benefit to the owner of land unless he sells it. This is true if it be assumed that the price will decline. The chance of this is estimated by the jury, in the amount which they may assess for that benefit. The sum assessed is therefore (so far as human foresight can anticipate the future) the exponent of the substantial increase of the value of the land. This is a benefit to the owner, by enlarging his credit and his ability to pay his debts or provide for his family, in the same manner and to the same extent as if his fortune was increased by an acquisition of property." Greenville & Columbia R. R. Co. v. Partlow, 5, Rich. 428. And see Pennsylvania R. R. Co. v. Heister, 8 Pa. St. 445; Matter of Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Upton v. South Reading Branch R. R., 8 Cush. 600; Proprietors, &c. v. Nashua & Lowell R. R. Co., 10 Cush. 385; Mayor, &c. of Lexington v. Long, 31 Mo. 369; St. Louis, &c. R. R. Co. v. Richardson, 45 Mo. 466; Little Miami R. R. Co. v. Collett, 6 Ohio St. 182; Bigelow v. West Wisconsin R. R. Co., 27 Wis. 478. In Newby v. Platte County, 25 Mo. 258, the right to assess benefits was referred to the taxing power; but this seems not necessary, and indeed somewhat difficult on principle. See Sutton's Heirs v. Louis-

with the community at large in consequence of his ownership of other property,[1] and also those incidental injuries to other property,

ville, 5 Dana, 28. [In measuring compensation for a taking it is not competent to increase compensation by any amount as the increase of value caused by the projected improvement. Shoemaker *v.* United States, 147 U. S. 282, 13 Sup. Ct. Rep. 361.]

[1] Dickenson *v.* Inhabitants of Fitchburg, 13 Gray, 546; Childs *v.* New Haven, &c. R. R. Co., 133 Mass. 253; Newby *v.* Platte County, 25 Mo. 258; Pacific R. R. Co. *v.* Chrystal, 25 Mo. 544; Carpenter *v.* Landaff, 42 N. H. 218; Mount Washington Co.'s Petition, 35 N. H. 134; Penrice *v.* Wallis, 37 Miss. 172; Haislip *v.* Wilmington, &c. R. R. Co., 102 N. C. 376, 8 S. E. 926; Omaha *v.* Schaller, 26 Neb. 522, 42 N. W. 721; Railroad Co. *v.* Foreman, 24 W. Va. 662; Palmer Co. *v.* Ferrill, 17 Pick. 58; Meacham *v.* Fitchburg R. R. Co., 4 Cush. 291, where the jury were instructed that, if they were satisfied that the laying out and constructing of the railroad had occasioned any benefit or advantage to the lands of the petitioner through which the road passed, or lands immediately adjoining or connected therewith, rendering the part not taken for the railroad more convenient or useful to the petitioner, or giving it some peculiar increase in value compared with other lands generally in the vicinity, it would be the duty of the jury to allow for such benefit, or increase of value, by way of set-off, in favor of the railroad company; but, on the other hand, if the construction of the railroad, by increasing the convenience of the people of the town generally as a place for residence, and by its anticipated and probable effect in increasing the population, business, and general prosperity of the place, had been the occasion of an increase in the salable value of real estate generally near the station, including the petitioner's land, and thereby occasioning a benefit or advantage to him, in common with other owners of real estate in the vicinity, this benefit was too contingent, indirect, and remote to be brought into consideration in settling the question of damages to the petitioner for taking his particular parcel of land. Upton *v.* South Reading Branch R. R. Co., 8 Cush. 600. See Pittsburgh, &c. R. R. Co. *v.* Reich, 101 Ill. 157; Chicago, B. & N. R. R. Co. *v.* Bowman, 122 Ill. 595, 13 N. E. 814. [This rule is applicable as well where the claim is for a "damaging" of property where such constitutional provisions exist as where it is for a "taking." Hickman *v.* Kansas City, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658; Randolph *v.* Board of Freeholders, 63 N. J. L. 155, 41 Atl. 960. See Wagner *v.* Cage County, 3 Neb. 237.] Remote and speculative benefits are not allowed. Whitely *v.* Miss., &c. Co., 38 Minn. 523, 38 N. W. 753. Locating a depot near a lot is not a special benefit. Washburn *v.* Milwaukee, &c. R. R. Co., 59 Wis. 364, 18 N. W. 328. It has sometimes been objected, with great force, that it was unjust and oppressive to set off benefits against the loss and damage which the owner of the property sustains, because thereby he is taxed for such benefits, while his neighbors, no part of whose land is taken, enjoy the same benefits without the loss; and the courts of Kentucky have held it to be unconstitutional, and that full compensation for the land taken must be made in money. Sutton *v.* Louisville, 5 Dana, 28; Rice *v.* Turnpike Co., 7 Dana, 81; Jacob *v.* Louisville, 9 Dana, 114. So in Mississippi. Natchez, J. & C. R. R. Co. *v.* Currie, 62 Miss. 506. And some other States have established, by their constitutions, the rule that benefits shall not be deducted. See cases, note 4, 825. That the damage and benefits must be separately assessed and returned by the jury where part only of the land is taken, see Detroit *v.* Daly, 68 Mich. 503, 37 N. W. 11. But the cases generally adopt the doctrine stated in the text; and if the owner is paid his actual damages, he has no occasion to complain because his neighbors are fortunate enough to receive a benefit. Greenville & Columbia R. R. Co. *v.* Partlow, 5 Rich. 428; Mayor, &c. of Lexington *v.* Long, 31 Mo. 369. Benefits to the adjacent property owned in severalty may be deducted from damage to property owned jointly. Wilcox *v.* Meriden, 57 Conn. 120, 17 Atl. 366.

such as would not give to other persons a right to compensation;[1] while allowing those which directly affect the value of the remainder of the land not taken, such as the necessity for increased fencing, and the like.[2] And if an assessment on these principles makes the benefits equal the damages, and awards the owner nothing, he is nevertheless to be considered as having received full compensation, and consequently as not being in position to complain.[3] But in some States, by constitutional provision or by statute, the party whose property is taken is entitled to have the value assessed to him without any deduction for benefits.[4]

The statutory assessment of compensation will cover all consequential damages which the owner of the land sustains by means

[1] Somerville, &c. R. R. Co. *ads.* Doughty, 22 N. J. 495; Dorlan *v.* East Brandywine, &c. R. R. Co., 46 Pa. St. 520; Proprietors, &c. *v.* Nashua & Lowell R. R. Co., 10 Cush. 385; Louisville & Nashville R. R. Co. *v.* Thompson, 13 B. Monr. 735; Winona & St. Peter's R. R. Co. *v.* Denman, 10 Minn. 267; Shenandoah V. R. R. Co. *v.* Shepherd, 26 W. Va. 672; Stone *v.* Inh. of Heath, 135 Mass. 562; Com'rs Dickinson Co. *v.* Hogan, 39 Kan. 606, 18 Pac. 611. So of increased danger from fire in case a railroad is laid out. Texas & St. L. Ry. Co. *v.* Cella, 42 Ark. 528; Setzler *v.* Pa. &c. R. R. Co., 112 Pa. St. 56, 4 Atl. 370.

[2] Pennsylvania R. R. Co. *v.* Heister, 8 Pa. St. 445; Greenville & Columbia R. R. Co. *v.* Partlow, 5 Rich. 428; Dearborn *v.* Railroad Co., 24 N. H. 179; Carpenter *v.* Landaff, 42 N. H. 218; Dorlan *v.* East Brandywine, &c. R. R. Co., 46 Pa St. 520; Winona & St. Peter's R. R. Co. *v.* Denman, 10 Minn. 267; Mount Washington Co.'s Petition, 35 N. H. 134. Where a part of a meeting-house lot was taken for a highway, it was held that the anticipated annoyance to worshippers by the use of the way by noisy and dissolute persons on the Sabbath, could form no basis for any assessment of damages. First Parish in Woburn *v.* Middlesex County, 7 Gray, 106.

[3] White *v.* County Commissioners of Norfolk, 2 Cush. 361; Whitman *v.* Boston & Maine R. R. Co., 3 Allen, 133; Nichols *v.* Bridgeport, 23 Conn. 189; State *v.* Kansas City, 89 Mo. 34, 14 S. W. 515; Ross *v.* Davis, 97 Ind. 79. The benefits upon the owner's property not taken, but in the assessment district, may exceed the damages. Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777. But it is not competent for the commissioners who assess the compensation to require that which is to be made to be wholly or in part in anything else than money. An award of "one hundred and fifty dollars, with a wagon-way and stop for cattle," is void, as undertaking to pay the owner in part in conveniences to be furnished him, and which he may not want, and certainly cannot be compelled to take instead of money. Central Ohio R. R. Co. *v.* Holler, 7 Ohio St. 220. See Rockford, &c. R. R. Co. *v.* Coppinger, 66 Ill. 510; Toledo, A. A. & N. Ry. Co. *v.* Munson, 57 Mich. 42, 23 N. W. 455. [Compensation cannot be made by charging the owner with the amount of it, as a special tax on that portion of his lands not taken: Bloomington *v.* Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487.]

[4] Wilson *v.* Rockford, &c. R. R. Co., 59 Ill. 273; Carpenter *v.* Jennings, 77 Ill. 250; Todd *v.* Kankakee, &c. R. R. Co., 78 Ill. 530; Atlanta *v.* Central R. R. Co., 53 Ga. 120; Koestenbader *v.* Peirce, 41 Iowa, 204; Britton *v.* Des Moines, &c. R. R. Co., 59 Iowa, 540, 13 N. W. 710; Pacific Coast Ry. Co. *v.* Porter, 74 Cal. 261, 15 Pac. 774; Leroy & W. R. R. Co. *v.* Ross, 40 Kan. 598, 20 Pac. 197; Giesy *v.* Cincinnati, &c. R. R. Co., 4 Ohio St. 308; Woodfolk *v.* Nashville R. R. Co., 2 Swan, 422; Memphis *v.* Bolton, 9 Heisk. 508. In Illinois benefits may not be set off against the value of the land taken, but may be against damage to land not taken. Harwood *v.* Bloomington, 124 Ill. 48, 16 N. E. 91.

of the construction of the work, except such as may result from negligence or improper construction,[1] and for which an action at the common law will lie, as already stated. (*a*)

[1] Philadelphia & Reading R. R. Co. *v.* Yeiser, 8 Pa. St. 366; O'Connor *v.* Pittsburgh, 18 Pa. St. 187; Aldrich *v.* Cheshire R. R. Co., 21 N. H. 359; Dearborn *v.* Boston, Concord, & Montreal R. R. Co., 24 N. H. 179; Eaton *v.* Boston C. & M. R. R. Co., 51 N. H. 504; Dodge *v.* County Commissioners, 3 Met. 380; Brown *v.* Providence, W. & B. R. R. Co., 5 Gray, 35; Mason *v.* Kennebec & Portland R. R. Co., 31 Me. 215; Bellinger *v.* N. Y. Central R. R. Co., 23 N. Y. 42; Hatch *v.* Vt. Central R. R. Co., 25 Vt. 49; Slatten *v.* Des Moines Valley R. R. Co., 29 Iowa, 148; Whitehouse *v.* Androscoggin R. R. Co., 52 Me. 208; Denver City Irrig. Co. *v.* Middaugh, 12 Col. 434, 21 Pac. 565; [Stork *v.* Philadelphia, 195 Pa. St. 101, 45 Atl. 678, 49 L. R. A. 600, Hunt *v.* Iowa Cent. Ry. Co., 86 Iowa, 15, 52 N. W. 668, 41 Am. St. 473; Gainesville, &c. Ry. Co. *v.* Hall, 78 Tex. 169, 14 S. W. 259, 22 Am. St. 42, and note.] But see Roushlange *v.* Chicago, &c. Ry. Co., 115 Ind. 106, 17 N. E. 198. The rule applies to cases of purchase instead of condemnation. North & W. B. Ry. Co. *v.* Swank, 105 Pa. St. 555; Cassidy *v.* Old Colony R. R. Co., 141 Mass. 174, 5 N. E. 142; Houston & E. T. Ry. Co. *v.* Adams, 58 Tex. 476. The rule covers a case where a right of action existed for a former invalid condemnation. Dunlap *v.* Toledo, &c. Ry. Co., 50 Mich. 470, 15 N. W. 555. A corporation appropriating property under the right of eminent domain is always liable for any abuse of the privilege or neglect of duty under the law under which they proceed. Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Eaton *v.* Boston, C. & M. R. R. Co., 51 N. H. 504; Terre Haute, &c. R. R. Co. *v.* McKinley, 33 Ind. 274; Neilson *v.* Chicago, &c. Ry. Co., 58 Wis. 516, 17 N. W. 310.

(*a*) [*Compensation.* — The question of compensation may arise in one of three classes of cases: —

A. *Where the whole interest of a particular owner is taken in a particular tract.* — Here, as stated in the text, the amount of compensation is generally held to be the market value of that interest at the time of the taking. Chicago, K. & W. Ry. Co. *v.* Parsons, 51 Kan. 408, 32 Pac. 1083; Texas, W. Ry. Co. *v.* Cave, 80 Tex. 137, 15 S. W. 786. When taken by municipality, at time of determination to take: Shanahan *v.* City of Waterbury, 63 Conn. 420, 28 Atl. 611; *In re* Condemnation of Land for a State House, 19 R. I. 382, 33 Atl. 523. In some jurisdictions compensation is assessed at market value at time of assessment: Leeds *v.* Camden & A. Ry. Co., 53 N. J. L. 229, 233, 23 Atl. 168, 169. Where the compensation is fixed in an appellate proceeding, assessment is as of the time of the assessment appealed from: Ellsworth *v.* Chicago & I. W. Ry. Co., 91 Iowa, 380, 59 N. W. 78; Forsyth Boulevard *v.* Forsyth, 127 Mo. 417, 30 S. W. 188. At time of filing of petition for appraisal: Fremont, E. & M. V. Ry. Co. *v.* Bates, 40 Neb. 381, 58 N. W. 959. The assessment must be irrespective of prospective general, as distinguished from special, benefits, resulting from the improvement: Shoemaker *v.* U. S., 147 U. S. 282, 13 Sup. Ct. Rep. 361; Bauman *v.* Ross, 167 U. S. 548, 17 Sup. Ct. Rep. 966, 42 L. ed. U. S. 270, and note; Louisville and N. Ry. Co. *v.* Ingram, 12 Ky. L. 466, 14 S. W. 534; West Va., P. & T. Ry. Co. *v.* Gibson, 94 Ky. 234, 21 S. W. 1055; Benton *v.* Town of Brookline, 151 Mass. 250, 23 N. E. 846; May *v.* City of Boston, 158 Mass. 21, 32 N. E. 902; (by virtue of statute in Massachusetts); Harris *v.* Schuylkill River E. S. Ry. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. Rep. 278. *Contra*, Sanitary District of Chicago *v.* Loughran, 160 Ill. 362, 43 N. E. 359. May consider effect of improvements previously made. *In re* Condemnation of Land for State House, 19 R. I. 382, 33 Atl. 523; Bowditch *v.* City of Boston, 164 Mass. 107, 41 N. E. 132. See further De Benneville *v.* Philadelphia, — Pa. St. —, 53 Atl. 521. It is market value for any legitimate use: Muller *v.* So. Pac. B. Ry. Co., 83 Cal. 240, 23 Pac. 265; Seattle and M. Ry. Co. *v.* Murphine, 4 Wash. 448, 30 Pac. 720; North. Pac. & M. Ry. Co. *v.* Forbis, 15 Mont. 452, 39 Pac. 571, 48 Am. St. 692; Alloway *v.* City of Nashville, 88

Tenn. 510, 13 S. W. 123, 8 L. R. A. 123. Value for special use, only competent as assisting to fix market value: Miss. & R. R. Boom Co. *v.* Patterson, 98 U. S. 403; Denver & R. G. Ry. Co. *v.* Griffith, 17 Col. 508, 31 Pac. 171; Fales *v.* Town of E. Hampton, 162 Mass. 422, 38 N. E. 1129; N. Pacif. & M. Ry. Co. *v.* Forbis, *supra*; Currie *v.* Waverly & N. Y. B. Ry. Co., 52 N. J. L. 381, 20 Atl. 56, 19 Am. St. 452; Harris *v.* Schuylkill Riv. E. S. Ry. Co., 141 Pa. St. 242, 21 Atl. 590, 23 Am. St. 278; San Diego Land & Town Co. *v.* Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604. Not prospective, but present value: Omaha Bell Ry. Co. *v.* McDermott, 25 Neb. 714, 41 N. W. 648; Lee *v.* Springfield Water Power Co., 176 Pa. St. 223, 35 Atl. 184; Penn. S. V. Ry. Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, 11 Am. St. 913. Not what its value may be to any particular person: City of Santa Ana *v.* Harlan, 99 Cal. 538, 34 Pac. 224. If, in addition to material property, a franchise is destroyed, compensation should cover value of material thing and also of the franchise: Clarion Turnpike & Bridge Co. *v.* Clarion Co., 172 Pa. St. 243, 33 Atl. 580.

B. *Where part only of a single tract is taken.* — In this case the rule is variously stated as follows: (1) Difference between the value of the whole tract just before and just after the improvement is made: Chicago, P. & St. L. Ry. Co. *v.* Eaton, 136 Ill. 9, 26 N. E. 575; Evansville & R. Ry. Co. *v.* Swift, 128 Ind. 34, 27 N. E. 420; Struthers *v.* Phila. & D. C. Ry. Co., 174 Pa. St. 291, 34 Atl. 443; West Va., P. & T. Ry. Co. *v.* Gibson, 94 Ky. 234, 21 S. W. 1055; Driscoll *v.* City of Taunton, 160 Mass. 486, 36 N. E. 495; Richmond & M. Ry. Co. *v.* Humphreys, 90 Va. 425, 18 S. E. 901; St. Louis, A. & T. Ry. Co. *v.* Henderson, — Tex. Civ. App. —, 32 S. W. 143; Mo. Pac. Ry. Co. *v.* Porter, 112 Mo. 361, 20 S. W. 568. This allows consideration of benefits and injuries common to whole community. (2) Value of part taken as a portion of whole and damage to remainder: Omaha So. Ry. Co. *v.* Todd, 39 Neb. 818, 58 N. W. 289; Liverman *v.* Roanoke & T. Ry. Co., 114 N. C. 692, 19 S. E. 64; Greeley S. L. Ry. Co. *v.* Yount, 7 Col. App. 189, 42 Pac. 1023; L. S. & M. S. Ry. Co. *v.* City of Chicago, 151 Ill. 359, 37 N. E. 880; Orth *v.* City of Milwaukee, 92 Wis. 230, 65 N. W. 1029; Comstock *v.* Clearfield & M. Ry. Co., 169 Pa. St. 582, 32 Atl. 431, 17 L. R. A. 785; State *v.* Hudson County Board, &c., 55 N. J. L. 88, 25 Atl. 322. In State *v.* Sup. Ct. of King Co., — Wash. —, 70 Pac. 484, the measure of damages allowed was the value of that taken and depreciation of portion not taken, disregarding benefits. Upon principle, damages common to all in the community should not be compensated for. See citations, *post*. Benefits accruing to owner by reason of the construction of the improvement and not common to general public, which enhance the value of lands not taken, but which were part of the same parcel, a portion of which was taken, should be considered in determining compensation. Butchers Slaughtering & Melting Ass'n *v.* Commonwealth, 163 Mass. 386, 40 N. E. 176; Goodwine *v.* Evans, 134 Ind. 252, 33 N. E. 1031. Benefits common to all in the community should not be considered in fixing damages. Spencer *v.* Metropolitan Street Ry. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; Beveridge *v.* Lewis, — Cal. —, 70 Pac. 1083. Injury to business by reason of taking of lands for right of way is held not recoverable. Bailey *v.* Boston & P. Ry. Co., — Mass. —, 66 N. E. 203; Sawyer *v.* Conn, — Mass. —, 65 N. E. 52; following Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 13 Sup. Ct. Rep. 622. If there is a grant of a portion of a tract of land for a public use, such grant will operate to prevent recovery of damages for injuries to portion not taken. Watts *v.* Norfolk & Western Ry. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674. Where lands have been subdivided into lots, but not separated in ownership, all belonging naturally to the particular tract are to be considered in determining compensation. Metropolitan W. S. El. Ry. *v.* Johnson, 159 Ill. 434, 42 N. E. 871; Cox *v.* Mason City & Ft. Dodge Ry. Co., 77 Iowa, 20, 41 N. W. 475; Atchinson & N. Ry. Co. *v.* Boerner, 34 Neb. 240, 51 N. W. 842, 33 Am. St. 637; Currie *v.* Waverly & N. Y. B. Ry. Co., 52 N. J. L. 381, 20 Atl. 56, 19 Am. St. 452; Lincoln *v.* Commonwealth, 164 Mass. 368, 41 N. E. 489; Bischoff *v.* N. Y. El. Ry. Co., 138 N. Y. 257, 33 N. E. 1073; Kremer *v.* C. M. & St. P. Ry. Co., 51 Minn. 15, 52 N. W. 977, 38 Am. St. 468. If lots not adjacent, though parts of same general tract, they cannot be considered. Wellington *v.* Boston & M. Ry. Co., 164 Mass. 380, 41 N. E. 652; Cameron *v.* Chicago, M. & St. Paul Ry. Co., 42 Minn. 75, 43 N. W. 785.

Though adjacent, if not used together, they should not be considered. Koerper *v.* St. P. & N. P. Ry. Co., 42 Minn. 340, 44 N. W. 195. Separation of parcels by highway, railway, canal, or the like, may defeat the consideration of all as one tract dependent upon, whether or not they are occupied and used as one tract. White *v.* Met. W. S. El. Ry. Co., 154 Ill. 620, 39 N. E. 270; Union El. Co. *v.* Kansas City Sub. Belt Ry. Co., — Mo. —, 33 S. W. 926; Cameron *v.* P. & L. E. Ry. Co., 157 Pa. St. 617, 27 Atl. 668, 22 L. R. A. 443; Duluth & W. Ry. Co. *v.* West, 51 Minn. 163, 53 N. W. 197. Upon the question as to what lands are to be regarded as a part of the parcel taken, see Sharpe *v.* United States, 50 C. C. A. 597, 112 Fed. Rep. 893, 57 L. R. A. 932, and extended note in 57 L. R. A. 932.

C. *Where there is no actual taking, but such interference as directly affects and injures some right of property.* — No new principle is involved in such cases, but compensation is assessed at the difference between the value of the property before and after the construction of the improvement. Nicks *v.* Chicago, St. P. & K. C. Ry. Co., 84 Iowa, 27, 50 N. W. 222; City of Bloomington *v.* Pollock, 141 Ill. 346, 31 N. E. 146; Beale *v.* City of Boston, 166 Mass. 53, 43 N. E. 1029. This condition arises most often in cases where there is a change in grade, or some new use granted of a public way, claimed, by an abutting owner who does not own the land under the street, to be injurious to him. The following cases illustrate the view of such courts as hold that such owner may be entitled to compensation. Adams *v.* Chicago, B. & Q. Ry. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493. Followed in Lamm *v.* Chicago, M. & St. P. Ry. Co., 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268; Ottawa, O. C. & C. G. Ry. Co. *v.* Larsen, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59. The so-called "Elevated Railway" Cases are of this class: Abendroth *v.* Manhattan Ry. Co., 122 N. Y. 1, 25 N. E. 496, 19 Am. St. 461; Arbenz *v.* Wheeling & Harrisburg Ry. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371. Much more is it true, where the adjoining proprieter owns the fee in the street. Reichert *v.* St. Louis & S. Ry. Co., 51 Ark. 491, 11 S. W. 696, 5 L. R. A. 183. Many of the cases holding that abutting proprietors may be entitled to compensation though no actual taking, are cases involving the construction of constitutional provisions providing for compensation where property is "damaged" for public use. Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, will illustrate. The injury must be peculiar as distinguished from such as is common to all in the neighborhood. Campbell *v.* Met. St. Ry. Co., 82 Ga. 320, 9 S. E. 1078; Ft. Worth & N. O. Ry. Co. *v.* Garoin, — Tex. —, 29 S. W. 794; Blair *v.* Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852. Generally it may be said that in assessing the amount of compensation the nature of the taking or injury should be considered. If permanent, the prospective as well as present injury is an element in the proper measure of such compensation. Joy *v.* Grindstone-Neck Water Co., 85 Me. 109, 26 Atl. 1052; City of Centralia *v.* Wright, 156 Ill. 561, 41 N. E. 217; Highland Avenue & B. R. Co. *v.* Matthews, 99 Ala. 24, 10 So. 267, 14 L. R. A. 462. See notes, *ante*, pp. 811, 822, *et seq.*, for other cases on these and similar propositions as to compensation. Where lands of railway company are condemned for street crossing, those expenses more properly the result of the exercise of the police power of the State are not assessable. Such are the expenses of erecting gates, planking the crossing, and maintaining a flagman: Chicago, B. & Q. Ry. Co. *v.* Chicago, 166 U. S. 226, 17 Sup. Ct. Rep. 581. Only nominal damages can be allowed as against a telegraph company for constructing telegraph line along and on lands of railway company through an agricultural country. Mobile & O. Ry. Co. *v.* Postal T. C. Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403. See case between same parties, 76 Miss. 731, 26 So. 370, 45 L. R. A. 223. Wife is not entitled to compensation for her inchoate right of dower in lands taken. Flynn *v.* Flynn, 171 Mass. 312, 50 N. E. 650, 68 Am. St. 427, 42 L. R. A. 98.]

CHAPTER XVI.

THE POLICE POWER OF THE STATES.

FREQUENTLY when questions of conflict between national and State authority are made, and also when it is claimed that government has exceeded its just powers in dealing with the property and controlling the actions of individuals, it becomes necessary to consider the extent and pass upon the proper bounds of another State power, which, like that of taxation, pervades every department of business and reaches to every interest and every subject of profit or enjoyment. We refer to what is known as the police power.

The police of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.[1]

[1] Blackstone defines the public police and economy as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Com. 162. Jeremy Bentham, in his General View of Public Offences, has this definition: "Police is in general a system of precaution, either for the prevention of crimes or of calamities. Its business may be distributed into eight distinct branches: 1. Police for the prevention of offences; 2. Police for the prevention of calamities; 3. Police for the prevention of endemic diseases; 4. Police of charity; 5. Police of interior communications; 6. Police of public amusements; 7. Police for recent intelligence; 8. Police for registration." Edinburgh ed. of Works, Part IX, p. 157. Under the head of police for charity may be classed the provision which it is now customary with all enlightened States to make for the custody and care, and if possible the cure, of insane persons. That the State, for the protection of others, may cause such persons to be restrained of their liberty is undoubted, and it has been common to provide that this may be done on the certificate of physicians to the diseased mental condition. But while confinement on such a certificate may be justified when no mistake is made as to the fact, it is certain that it cannot be if the person deprived of his liberty was not in truth at the time insane. No number of physicians can be given the power to take from a sane man his liberty, without a public investigation in which he may produce his witnesses; and any legislation assuming to confer such power would be void. On this general subject the following cases are of interest: Anderdon *v.* Burrows, 4 C. & P. 210; Fletcher *v.* Fletcher, 1 El. & El. 420; Colby *v.* Jackson, 12 N. H. 526; Look *v.* Dean,

In the present chapter we shall take occasion to speak of the police power principally as it affects the use and enjoyment of property; the object being to show the universality of its presence, and to indicate, so far as may be practicable, the limits which settled principles of constitutional law assign to its interference.

No definition of the power can be more complete and satisfactory than some which have been given by eminent jurists in deciding cases which have arisen from its exercise, and which have been so often approved and adopted, that to present them in any other than the language of the decisions would be unwise, if not inexcusable. Says Chief Justice *Shaw*, "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, — the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise."[1]

108 Mass. 116; Van Deusen *v.* Newcomer, 40 Mich. 90; Morton *v.* Sims, 64 Ga. 298; *In re* Gannon, 16 R. I. 537, 18 Atl. 159.

[1] Commonwealth *v.* Alger, 7 Cush. 53, 84. See also Commonwealth *v.* Tewksbury, 11 Met. 55; Hart *v.* Mayor, &c. of Albany, 9 Wend. 571; New Albany & Salem R. R. Co. *v.* Tilton, 12 Ind. 3; Indianapolis & Cincinnati R. R. Co. *v.* Kercheval, 16 Ind. 84; Ohio & Missis-

"This police power of the State," says another eminent judge, "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut alienum non lædas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." And again: [By this] "general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right in the legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."[1] And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the State.[2]

Where the Power is located. In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress.[3] Neither can the national government, through

sippi R. R. Co. *v.* McClelland, 25 Ill. 140; People *v.* Draper, 25 Barb. 344; Baltimore *v.* State, 15 Md. 376; Police Commissioners *v.* Louisville, 3 Bush, 597; Wynehamer *v.* People, 13 N. Y. 378; *Taney*, Ch. J., in License Cases, 5 How. 504, 583; *Waite*, Ch. J., in Munn *v.* Illinois, 94 U. S. 113, 124. [*Brown*, J., in Lawton *v.* Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, says of this power of the State, that "It is generally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the prohibition of wooden buildings in cities; the regulations of railways and other means of public conveyance, and of interments in burial grounds; the restrictions of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill-fame and the prohibition of gambling houses and places where intoxicating liquors are sold."

See article in 36 Am. L. Rev. 681, tracing in some measure the judicial development of the doctrine of the police power.]

[1] *Redfield*, Ch. J., in Thorpe *v.* Rutland & Burlington R. R. Co., 27 Vt. 140, 149. See the maxim, *Sic utere*, &c., — "Enjoy your own property in such manner as not to injure that of another," — in Broom, Legal Maxims, (5th Am. ed.) p. 327; Wharton, Legal Maxims, No. XC. See also Turberville *v.* Stampe, 1 Ld. Raym. 264; and 1 Salk. 13; Jeffries *v.* Williams, 5 Exch. 792; Humphries *v.* Brogden, 12 Q. B. 739; Pixley *v.* Clark, 35 N. Y. 520; Philadelphia *v.* Scott, 81 Pa. St. 80.

[2] Beer Company *v.* Massachusetts, 97 U. S. 25, 33, citing Boyd *v.* Alabama, 94 U. S. 645.

[3] So decided in United States *v.* De Witt, 9 Wall. 41, in which a section of the Internal Revenue Act of 1867 —

any of its departments or officers, assume any supervision of the police regulations of the States. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the federal Constitution.[1]

Conflict with Federal Authority. But while the general authority of the State is fully recognized, it is easy to see that the power might be so employed as to interfere with the jurisdiction of the general government; and some of the most serious questions regarding the police of the States concern the cases in which authority has been conferred upon Congress. In those cases it has sometimes been claimed that the ordinary police jurisdiction is by necessary implication excluded, and that, if it were not so, the State would be found operating within the sphere of the national powers, and establishing regulations which would either abridge the rights which the national Constitution undertakes to render absolute, or burden the privileges which are conferred by law of Congress, and which therefore cannot properly be subject to the interference or control of any other authority. But any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by

which undertook to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at a less temperature than 110° Fahrenheit — was held to be a mere police regulation, and as such void within the States. That the States may pass such laws, see Patterson *v.* Commonwealth, 11 Bush, 311. A license may be required for the peddling of patented articles. People *v.* Russell, 49 Mich. 617, 14 N. W. 568. On the general subject of the police power of the States, see also United States *v.* Reese, 92 U. S. 214; United States *v.* Cruikshank, 92 U. S. 542. But the States cannot, by police regulations, interfere with the control by Congress over inter-state commerce. *Post*, pp. 857, 858, 867, and notes.

[1] See this subject considered at large in the License Cases, 5 How. 504, the Passenger Cases, 7 How. 283, and the Slaughter-House Case, 16 Wall. 36; Peopie *v.* Compagnie Gén., 107 U. S. 59, 2 Sup. Ct. Rep. 87; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247. The Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised. Barbier *v.* Connolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357; Minneapolis & St. Louis Ry. Co. *v.* Beckwith, 129 U. S. 26, 9 Sup. Ct. Rep. 207, and cases cited. Congress has no power to authorize a business within a State which is prohibited by the State. License Tax Cases, 5 Wall. 462, per *Chase*, Ch. J. In Canada, power over sales of liquor is in the Dominion parliament, and, after license in pursuance of its authority, the provincial parliament cannot forbid. Severn *v.* The Queen, 2 Can. Sup. Ct. 71; Mayor, &c. *v.* The Queen, 3 Can. Sup. Ct. 505. [Action in the nature of police regulation is void if against the express provisions of the constitution though otherwise within the general power to make police regulations. State *v.* Fraehlich, 115 Wis. —, 91 N. W. 115. On the constitutional limitations of the police power, see 55 Cent. L. Jour. 225.]

the State cannot come in conflict with the provisions of the Constitution of the United States. If the power extends only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the State, and its exercise for the regulation of the property and actions of its citizens, cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities.

Obligation of Contracts. The occasions to consider this subject in its bearings upon the clause of the Constitution of the United States which forbids the States passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; (*a*) and not only may regula-

(*a*) [What shall be the public policy of a State is determined by itself, and is subject to no Federal control unless it contravenes the Federal Constitution or some treaty or congressional statute conformable thereto. Hartford Fire Insurance Co. *v.* Chicago, M. & St. P. R. Co., 175 U. S. 91, 20 Sup. Ct. Rep. 33. And the Federal courts will enforce the public policy of a State in regard to usurious contracts. Missouri, K. & T. Trust Co. *v.* Krumseig, 172 U. S. 351, 19 Sup. Ct. Rep. 179. But the public policy of a State cannot be extended to the infringement of rights acquired outside of the State, nor can the State penalize acts merely collateral to the enjoyment of such rights. In 1894 Louisiana enacted "that any person . . . who in any manner whatever does any act to effect for himself, or for another, insurance on property then in this State, in any marine insurance company which has not complied in all respects with the laws of this State, shall be subject to a fine of,"&c. This came under consideration in Allgeyer *v.* Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427. A. was a citizen of L., resident in New Orleans. He was an exporter of cotton from N. O. to the ports of Great Britain and of the Continent. As incidental to his business, he entered in N. Y. City into a contract of insurance with the Atl. M. Ins. Co. of that city, which contract was for an open policy of $200,000. This contract was to be performed entirely within the State of N. Y. and was there entirely valid. Under it, whenever A. made a shipment of cotton which he desired insured, he notified the insurance company by mail or by telegraph, and the insurance attached to the parcel specified at the instant of despatch of the letter or telegram. Upon receipt of the notification, the insurance company made out a special policy of insurance upon the parcel and delivered it to A.'s agent in N. Y., who thereupon paid the premium. The insurance company never complied with the conditions prescribed by Louisiana to be observed by all marine insurance companies doing business therein. A. mailed in N. O., in compliance with the conditions of the contract, a letter addressed to the insurance company, specifying a particular cargo of cotton then shipped upon which insurance was to attach, and for this L. filed its petition against him, praying judgment for the penalty, which was decreed. A. sued out a writ of error, alleging that the action of L. deprived him of his liberty and his prop-

tions which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity.[1]

[1] In the case of Thorpe *v.* Rutland & Burlington R. R. Co., 27 Vt. 140, a question arose under a provision in the Vermont General Railroad Law of 1849, which required each railroad corporation to erect and maintain fences on the line of its road, and also cattle-guards at all farm and road crossings, suitable and sufficient to prevent cattle and other animals from getting upon the railroad, and which made the corporation and its agents liable for all damages which should be done by its agents or engines to cattle, horses, or other animals thereon, if occasioned by the want of such fences and cattle-guards. It was not disputed that

erty without due process of law. The U. S. Supreme Court reversed the action of the L. court, and, in giving the opinion of the court, Mr. Justice *Peckham* said: "The act done within the limits of the State, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which defendants were at liberty to perform, and which the State legislature had no right to prevent, at least with reference to the Federal Constitution. . . . In the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property [which, earlier in the opinion, had been declared to be included in the liberty of the citizen] must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is to be insured may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it. Milliken *v.* Pratt, 125 Mass. 374, 28 Am. Rep. 241; Tildon *v.* Blair, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have liberty to do that act and to give that notification within the limits of the State, any prohibition of the State statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State." But in Hooper *v.* California, 155 U. S. 648, 15 Sup. Ct. Rep. 207, it was held that a State may in pursuance of its public policy penalize any act done within its borders, looking toward the *formation* of contract relations with foreign corporations which it has forbidden to do business within its borders. The State may regulate the formation of contracts of insurance within its borders, and the parties are powerless to waive the benefits of such regulation. Equitable Life A. S. *v.* Clements, 140 U. S. 226, 11 Sup. Ct. Rep. 822. See Nutting *v.* Massachusetts, 183 U. S. 553, 22 Sup. Ct. Rep. 238; aff. 175 Mass. 156, 55 N. E. 895, in which the cases of Hooper and Allgeyer are distinguished and reconciled.]

Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held

this provision would be valid as to such corporations as might be afterwards created within the State; but in respect to those previously in existence, and whose charters contained no such provision, it was claimed that this legislation was inoperative, since otherwise its effect would be to modify, and to that extent to violate, the obligation of the charter-contract. "The case," says the court, "resolves itself into the narrow question of the right of the legislature, by general statute, to require all railways, whether now in operation or hereafter to be chartered or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road crossings, under penalty of paying all damages caused by their neglect to comply with such requirements. . . . We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the bill of rights of this State, expressly declared to reside perpetually and inalienably in the legislature; which is, perhaps, no more than the enunciation of a general principle applicable to all free States, and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of if they would.

"So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all of their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reasoning may all railways be required so to conduct themselves as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

"There would be no end of illustrations upon this subject. . . . It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. Hegeman *v.* Western R. Co., 16 Barb. 353.

"2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right

that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and these only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment.

in the legislature to do which no question ever was or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question." And the court proceed to consider the various cases in which the right of the legislature to regulate matters of private concern with reference to the general public good has been acted upon as unquestioned, or sustained by judicial decisions; and quote, as pertinent to the general question of what laws are prohibited on the ground of impairing the obligation of contracts, the language of Chief Justice *Marshall* in Dartmouth College *v.* Woodward, 4 Wheat. 518, 629, that "the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." See, to the same effect, Suydam *v.* Moore, 8 Barb. 358; Waldron *v.* Rensselaer & Saratoga R. R. Co., 8 Barb. 390; Galena & Chicago U. R. R. Co. *v.* Loomis, 13 Ill. 548; Fitchburg R. R. *v.* Grand Junction R. R. Co., 1 Allen, 552; Veazie *v.* Mayo, 45 Me. 560; Peters *v.* Iron Mountain R. R. Co., 23 Mo. 107; Grannahan *v.* Hannibal, &c. R. R. Co., 30 Mo. 546; Indianapolis & Cincinnati R. R. Co. *v.* Kercheval, 16 Ind. 84; Galena & Chicago U. R. R. Co. *v.* Appleby, 28 Ill. 283; Blair *v.* Milwaukee, &c. R. R. Co., 20 Wis. 254; State *v.* Mathews, 44 Mo. 523; Commissioners, &c. *v.* Holyoke Water Power Co., 104 Mass. 446; Railroad Co. *v.* Fuller, 17 Wall. 560; Toledo, &c. R. R. Co. *v.* Deacon, 63 Ill. 91; Ames *v.* Lake Superior, &c. R. R. Co., 21 Minn. 241; N. W. Fertilizing Co. *v.* Hyde Park, 70 Ill. 634; State *v.* New Haven, &c. Co., 43 Conn. 351. [Missouri, K. & T. Trust Co. *v.* Krumseig, 172 U. S. 351, 19 Sup. Ct. Rep. 179; Matthews *v.* St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and note. Upon the proposition that police regulations are subject to change, from time to time, as the public welfare may demand, without impairing the obligation of contract, see Pingree *v.* Michigan Central Ry. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274, where the charter gave to the company the right to fix rates for passenger carriage within the maximum of three cents per mile, and it was held that any subsequent attempt to fix rates was unconstitutional as impairing the obligation of contract. See, also, Detroit *v.* Detroit Cit. St. Ry. Co., 184 U. S. 368, 22 Sup. Ct. Rep. 410.]

The limit to the exercise of the police power (*a*) in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with

(*a*) [Police regulations cannot be purely arbitrary nor purely for the promotion of private interests. A statute requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after its arrival is unconstitutional. State *v.* Chicago, M. & St. P. R. Co., 63 Minn. 381, 71 N. W. 400, 38 L. R. A. 672. A gift element carried on by a merchant in connection with his business and involving no element of chance cannot be prohibited. Long *v.* State, 73 Md. 527, 21 Atl. 683, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425. In State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 205, an act of the legislature which was aimed at department stores of any considerable magnitude was considered and held void. The act divided commodities into twenty-eight groups, and provided that in cities having fifty thousand inhabitants or more, any merchant who employed more than fifteen persons in the same establishment and sold more than one group of commodities should be subject to a certain license fee, not less than three hundred dollars per group. No provision for inspection or other regulation was made. The court held that the whole scheme was an unwarranted attempt at discrimination against large merchants. In discussing the limits of the police power, *Robinson*, J., in giving the opinion of the court, said: "In order to sustain legislation of the character of the act in question as a police measure, the courts must be able to see that its object [operation] to some degree tends towards the prevention of some offence or manifest evil, or has for its aim the preservation of the public health, morals, safety, or welfare. If no such object is discernible, but the mere guise and masquerade of public control, under the name of 'An Act to Regulate Business and Trade, &c.,' is adopted, that the liberty and property rights of the citizens may be invaded, the courts will strike down the act as unwarranted. Mere legislative assumption of the right to direct and indicate the channel and ecurse into which the private energies of the citizen shall flow, or the attempt to abridge or hamper his right to pursue any lawful calling or avocation which he may choose without unreasonable regulation or molestation, have ever been condemned in all free government." For an ordinance of similar purpose, similarly disposed of, see Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, and for cases on department stores and their regulation, see note to this case in L. R. A.; see also People *v.* Coolidge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493. Police regulations cannot be purely arbitrary; *e.g.*, barbers cannot be singled out from men of all trades and callings and alone deprived of right to work on Sunday. Eden *v.* People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659; *Ex parte* Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *contra*, People *v.* Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689. Mines shipping by rail or by water cannot be singled out and alone compelled to provide special facilities for coal weighing. Harding *v.* People, 160 Ill. 459, 43 N. E. 624, 32 L. R. A. 445. Upon extent of police power, see State *v.* Schlemmer, 42 La. Ann. 1166, 8 So. 307, 10 L. R. A. 135, and note. Restrictions upon the use of property by its owner cannot be purely arbitrary. They must be in some degree necessary to protect the legitimate interests of others. A riparian owner cannot be prevented from driving piles upon his own land and erecting buildings upon such piles, where they neither impede the flow materially nor interfere with navigation. Janesville *v.* Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, and note; State *v.* Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847; Northwestern Telephone & E. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175. But see Summerville *v.* Pressley, 33 S. C. 56, 11 S. E. 545, 8 L. R A. 854, and note. Non-performance of an impossibility cannot be made a crime. Port Huron *v.* Jenkinson, 77 Mich. 414, 43 N. W. 923, 6 L. R. A. 54. Nor can any other police regulation be purely arbitrary. Noel *v.* People, 187 Ill. 587, 58 N. E. 616. See also Aligeyer *v.* Louisiana, note a, p. 833, *ante*; also many of the cases in note 1, p. 568, and note a, p. 15, *ante*.]

any of the provisions of the charter; and they must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.[1]

The maxim, *Sic utere tuo ut alienum non lædas*, is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend. It has accordingly been held that where a corporation was chartered with the right to take toll from passengers over their road, a subsequent statute authorizing a certain class of persons to go toll free was void.[2] This was not a regulation of existing rights, but it took from the corporation that which they before possessed,

[1] Washington Bridge Co. *v.* State, 18 Conn. 53; Bailey *v.* Philadelphia, &c. R. R. Co., 4 Harr. 389; State *v.* Noyes, 47 Me. 180; Pingry *v.* Washburn, 1 Aiken, 264; Miller *v.* N. Y. & Erie R. R. Co., 21 Barb. 513; People *v.* Jackson & Michigan Plank Road Co., 9 Mich. 285, 307; Sloan *v.* Pacific R. R. Co., 61 Mo. 24; Attorney-General *v.* Chicago, &c. R. R. Co., 35 Wis. 425. In Benson *v.* Mayor, &c. of New York, 10 Barb. 223, 245, it is said, in considering a ferry right granted to a city: "Franchises of this description are partly of a public and partly of a private nature. So far as the accommodation of passengers is concerned, they are *publici juris*; so far as they require capital and produce revenue, they are *privati juris*. Certain duties and burdens are imposed upon the grantees, who are compensated therefor by the privilege of levying ferriage, and security from spoliation arising from the irrevocable nature of the grant. The State may legislate touching them, so far as they are *publici juris*. Thus, laws may be passed to punish neglect or misconduct in conducting the ferries, to secure the safety of passengers from danger and imposition, &c. But the State cannot take away the ferries themselves, nor deprive the city of their legitimate rents and profits." And see People *v.* Mayor, &c. of New York, 32 Barb. 102, 116; Commonwealth *v.* Pennsylvania Canal Co., 66 Pa. St. 41; Hegeman *v.* Western R. R., 13 N. Y. 9. [Powers granted to corporations are to be narrowly construed where their exercise is inimical to the public welfare, and a power granted by charter to one railroad "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company" does not authorize the consolidation of two parallel and competing lines, and a subsequently enacted constitutional prohibition of such consolidation does not impair the obligation of a contract, even if it could be held that the deprivation of a long granted but yet unused power were such impairment. Pearsall *v.* Great N. R. Co., 161 U. S. 646, 16 Sup. Ct. Rep. 705, and Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 16 Sup. Ct. Rep. 714, aff. 97 Ky. 675, 31 S. W. 476. State may compel insurance companies doing business within its borders to make full reports concerning their business and their financial condition. Eagle Ins. Co. *v.* Ohio, 153 U. S. 446, 14 Sup. Ct. Rep. 868.] After the organization of a company for electric communication, it may be required to obtain the approval of its plans by city commissioners before laying wires in the streets. People *v.* Squire, 107 N. Y. 593, 14 N. E. 820. A provision that an insurance policy referring to the application shall not be received in evidence unless such application is attached to it, is valid as to policies issued thereafter by an existing company. New Era Life Ins. Co. *v.* Musser, 120 Pa. St. 384, 14 Atl. 155.

[2] Pingry *v.* Washburn, 1 Aiken, 264. Of course the charter reserved no right to make such an amendment.

namely, the right to tolls, and conferred upon individuals that which before they had not, namely, the privilege to pass over the road free of toll. "Powers," it is said in another case, "which can only be justified on this specific ground [that they are police regulations], and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort, and well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."[1] And it was therefore held that an act subsequent to the charter of a plank-road company, and not assented to by the corporators, which subjected them to a total forfeiture of their franchises for that which by the charter was cause for partial forfeiture only, was void as impairing the obligation of contracts.[2] And even a provision in a corporate charter, empowering the legislature to alter, modify, or repeal it would not authorize a subsequent act which, on pretence of amendment, or of a police regulation, would have the effect to appropriate a portion of the corporate property to the public use.[3] And where by its charter the corporation was em-

[1] *Christiancy*, J., in People *v.* Jackson & Michigan Plank Road Co., 9 Mich. 285, 307. Compare Commonwealth *v.* Pennsylvania Canal Co., 66 Pa. St. 41. Where the corporation by its charter has the right to fix its own tolls for a specified period, the legislature is without the power to regulate them till that period has expired. Sloan *v.* Pacific R. R. Co., 61 Mo. 24, 21 Am. Rep. 397.

[2] *Ibid.* And see State *v.* Noyes, 47 Me. 189.

[3] Detroit *v.* Plank Road Co., 43 Mich. 140, 5 N. W. 275. It has been held that the reservation of a right to amend or repeal would not justify an act requiring a railroad company to cause a proposed new street or highway to be taken across their track, and to cause the necessary embankments, excavations, and other work to be done for that purpose at their own expense; thus not only appropriating a part of their property to another public use, but compelling them to fit it for such use: Miller *v.* N. Y. & Erie R. R. Co., 21 Barb. 513; People *v.* Lake Shore, &c. Ry. Co., 52 Mich. 277, 17 N. W. 841; Chicago & G. T. Ry. Co. *v.* Hough, 61 Mich. 507, 28 N. W. 532. *Contra*, Portland & R. R. R. Co. *v.* Deering, 78 Me. 61, 2 Atl. 670; even if there is no reservation in the charter of the right to alter, &c. Boston & M. R. R. Co. *v.* Com'rs, 79 Me. 386, 10 Atl. 113. Companies may be compelled to put in farm crossings at their own expense. Ill. Cent. R. R. Co. *v.* Willenborg, 117 Ill. 203, 7 N. E. 698. See also Montclair *v.* New York, &c. Ry. Co., 45 N. J. Eq. 436, 18 Atl. 242. This, however, can scarcely be a more severe exercise of the power than is the amendment to the charter of a railroad corporation which limits the rates of fare and freight which may be charged; for the exercise of this might be carried to an extent which would annihilate the whole value of railroad property. The power, however, is very fully sustained, where the right to amend is reserved in the charter. Attorney-General *v.* Chicago, &c. R. R. Co., 35 Wis. 425; Blake *v.* Winona, &c. R. R. Co., 19 Minn. 418, 18 Am. Rep. 345; Chicago, &c. R. R. Co. *v.* Iowa, 94 U. S. 155; Pick *v.* Chicago, &c. R. R. Co., 6 Biss. 177. See a like rule applied to a ferry company in Par-

powered to construct over a river a certain bridge, which must necessarily constitute an obstruction to the navigation of the river, a subsequent amendment making the corporation liable for such obstruction was held void, as in effect depriving the corporation of the very right which the charter assured to it.[1] So where the charter reserved to the legislature the right of modification after the corporators had been reimbursed their expenses in constructing the bridge, with twelve per cent interest thereon, an amendment before such reimbursement, requiring the construction of a fifty-foot draw for the passage of vessels, in place of one of thirty-two feet, was held unconstitutional and void.[2] So it has been held that a power to a municipal corporation to regulate the speed of railway carriages would not authorize such regulation, except in the streets and public grounds of the city; such being the fair construction of the power, and the necessity for this police regulation not extending further.[3] But there are decisions on this point which are the other way.[4]

On the other hand, the right to require existing railroad corporations to fence (*a*) their track, and to make them liable for all

ker *v.* Metropolitan R. R. Co., 109 Mass. 506. A requirement that rates of fare and freight shall be annually fixed and published is legitimate as an exercise of the police power. Railroad Co. *v.* Fuller, 17 Wall. 560. For discussion of the right of the State to fix rates, see *post*, pp. 871–875, notes. It is no impairment of the obligation of the charter of a railroad company to pass laws to prevent extortion and unjust discrimination. Illinois Cent. R. R. Co. *v.* People, 95 Ill. 313, 1 Am. & Eng. R. R. Cas. 188. That the issuing and taking up of tickets and coupons of tickets by common carriers may be regulated by statute, see Fry *v.* State, 63 Ind. 552.

[1] Bailey *v.* Philadelphia, &c. R. R. Co., 4 Harr. 389. Compare Commonwealth *v.* Pa. Canal Co., 66 Pa. St. 41, 5 Am. Rep. 329.

[2] Washington Bridge Co. *v.* State, 18 Conn. 53.

[3] State *v.* Jersey City, 29 N. J. 170.

[4] Crowley *v.* Burlington, &c. Ry. Co., 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918. See Merz *v.* Missouri P. Ry. Co., 88 Mo. 672. In Buffalo & Niagara Falls R. R. Co. *v.* Buffalo, 5 Hill, 209, it was held that a statutory power in a city to regulate the running of cars within the corporate limits would justify an ordinance entirely prohibiting the use of steam for propelling cars through any part of the city. And see Great Western R. R. Co. *v.* Decatur, 33 Ill. 381; Branson *v.* Philadelphia, 47 Pa. St. 329; Whitson *v.* Franklin, 34 Ind. 392. Affirming the general right to permit the municipalities to regulate the speed of trains, see Chicago, &c. R. R. Co. *v.* Haggerty, 67 Ill. 113; Pennsylvania R. R. Co. *v.* Lewis, 79 Pa. St. 33; Haas *v.* Chicago, &c. R. R. Co., 41 Wis. 44. That the legislature may compel railroad companies to carry impartially for all, see Chicago, &c. R. R. Co. *v.* People, 67 Ill. 11; Cincinnati, &c. R. R. Co. *v.* Cook (Ohio), 6 Am. & Eng. R. R. Cas. 317; Louisville, N. O. & T. Ry. Co. *v.* State, 66 Miss. 662, 6 So. 203; but an act abrogating the requirement of impartial carriage is void as to inter-state transportation. The Sue, 22 Fed. Rep. 843. But if the carriage is of persons from State to State, the State has no such control. Hall *v.* De Cuir, 95 U. S. 485. See Carton *v.* Illinois Cent. R. R. Co., 59 Iowa, 148, 13 N. W. 67, 6 Am. & Eng. R. R. Cas. 305. See cases, *post*, pp. 846, 873.

(*a*) [Other landowners may be required to fence their lands also, and may be denied the right to recover for trespasses by domestic animals unless their lands are

beasts killed by going upon it, has been sustained on two grounds: first, as regarding the division fence between adjoining proprietors, and in that view being but a reasonable provision for the protection of domestic animals; and second, and chiefly, as essential to the protection of persons being transported in the railway carriages.[1] Having this double purpose in view, the owner of

[1] Thorpe *v.* Rutland & Burlington R. R. Co., 27 Vt. 140; New Albany & Salem R. R. Co. *v.* Tilton, 12 Ind. 3; Same *v.* Maiden, 12 Ind. 10; Same *v.* McNamara, 11 Ind. 543; Ohio & Mississippi R. R. Co. *v.* McClelland, 25 Ill. 140; Madison & Indianapolis R. R. Co. *v.* Whiteneck, 8 Ind. 217; Indianapolis & Cincinnati R. R. Co. *v.* Townsend, 10 Ind. 38; Same *v.* Kercheval, 16 Ind. 84; Corwin *v.* N. Y. & Erie R. R. Co., 13 N. Y. 42; Horn *v.* Atlantic & St. Lawrence R. R. Co., 35 N. H. 169, and 36 N. H. 440; Fawcett *v.* York & North Midland R. R. Co., 15 Jur. 173; Smith *v.* Eastern R. R. Co., 35 N. H. 356; Bulkley *v.* N. Y. & N. H. R. R. Co., 27 Conn. 479; Jones *v.* Galena, &c. R. R. Co., 16 Iowa, 6; Winona, &c. R. R. Co. *v.* Waldron, 11 Minn. 515; Bradley *v.* Buffalo, &c. R. R. Co., 34 N. Y. 429; Sawyer *v.* Vermont, &c. R. R. Co., 105 Mass. 196; Pennsylvania R. R. Co. *v.* Riblet, 66 Pa. St. 164, 5 Am. Rep. 360; Kansas Pacific R. R. Co. *v.* Mower, 16 Kan. 573; Wilder *v.* Maine Central R. R. Co., 65 Me. 332; Blewette *v.* Wyandotte, &c. R. R. Co, 72 Mo. 583. [State may enforce such regulations by making railroad companies liable for all damages that may be suffered by any individual through their non-compliance. Minneapolis & St. L. R. Co. *v.* Emmons, 149 U. S. 364, 13 Sup. Ct. Rep. 870.] The Minnesota statute imposes no duty toward children. Fitzgerald *v.* St. Paul, &c. Ry. Co., 29 Minn. 336, 13 N. W. 168. As to the degree of care required of railroad companies in keeping up their fences, compare Antisdel *v.* Chicago, &c. R. R. Co., 26 Wis. 145; Lemmon *v.* Chicago, &c. R. R. Co., 32 Iowa, 151; Carey *v.* Chicago, &c. Ry. Co., 61 Wis. 71, 20 N. W. 648; Chicago, &c. R. R. *v.* Barrie, 55 Ill. 226, and cases cited therein. It is competent to make the company liable for double the value of stock killed in consequence of the neglect to fence. Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110; Barnett *v.* Railroad Co., 68 Mo. 56, 30 Am. Rep. 773; Spealman *v.* Railroad Co., 71 Mo. 434; Tredway *v.* Railroad Co., 43 Iowa, 527; Little Rock, &c. R. R. Co. *v.* Payne, 33 Ark. 816, 34 Am. Rep. 55; Cairo, &c. R. R. Co. *v.* People, 92 Ill. 97, 34 Am. Rep. 112. *Contra*, Atchison, &c. R. R. Co. *v.* Baty, 6 Nev. 37, 29 Am. Rep. 386. A much higher attorney fee than is allowed in other cases cannot be imposed by law in actions against a railroad for stock killing. Wilder *v.* Chicago & W. M. Ry. Co., 70 Mich. 382, 38 N. W. 289. Compare Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. A statute making railroad companies liable for injuries by fire communicated by their locomotive engines was sustained, as to companies previously in existence, in Lyman *v.* Boston & Worcester R. R. Co., 4 Cush. 288; Rodemacher *v.* Milwaukee, &c. R. R. Co., 41 Iowa, 297, 20 Am. Rep. 592; Gorman *v.* Pacific Railroad, 20 Mo. 411, [regardless of the question of negligence. Matthews *v.* St. Louis & S. F. R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and note; aff. 165 U. S. 1, 17 Sup. Ct. Rep. 243; Grissell *v.* Housatonic Ry. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. 138. A statute authorizing full recovery by a passenger against a public carrier of passengers for injuries resulting from the carriage is constitutional though negligence of the carrier is not made an element of the course of action. Clark *v.* Russell, 97 Fed. Rep. 900; St. Louis, &c. Ry. Co. *v.* Matthews, 165 U. S. 1, 17 Sup. Ct. Rep. 243.] But a statute making a

fenced as required. Poindexter *v.* May, 98 Va. 143, 34 S. E. 971, 47 L. R. A. 588. And a law permitting half of a party wall to be placed upon the land of an adjoining proprietor, even against his will, is good. Swift *v.* Calnan, 102 Iowa, 206, 71 N. W. 233, 37 L. R. A. 462.]

beasts killed or injured may maintain an action for the damage suffered, notwithstanding he may not himself be free from negligence.[1] But it would, perhaps, require an express legislative declaration that the corporation should be liable for the beasts thus destroyed to create so great an innovation in the common law. The general rule, where a corporation has failed to obey the police regulations established for its government, would not make the corporation liable to the party injured, if his own negligence contributed with that of the corporation in producing the injury.[2]

The State may also regulate the grade of railways, and prescribe how, and upon what grade, railway tracks shall cross each other: and it may apportion the expense of making the necessary crossings between the corporations owning the roads.[3] And

railroad liable for cattle killed irrespective of negligence is bad. Jensen *v.* Union Pac. Ry. Co., 6 Utah, 253, 21 Pac. 994, 4 L. R. A. 724; Bielenberg *v.* Montana, &c. Ry. Co., 8 Mont. 271, 20 Pac. 314. And it is not competent to make railroad companies liable for injuries for which they are in no way responsible. It is therefore held that an act imposing upon railroad companies the expense of coroners' inquests, burial, &c., of persons who may die on its cars, or be killed by collision, &c., is invalid as applied to cases where the company is not in fault. Ohio, &c. R. R. Co. *v.* Lackey, 78 Ill. 55. That it is as competent to lessen the common-law liabilities of railroad companies as to increase them, see Kirby *v.* Pennsylvania R. R. Co., 76 Pa. St. 506. And see Camden & Amboy R. R. Co. *v.* Briggs, 22 N. J. 623; Trice *v.* Hannibal, &c. R. R. Co., 49 Mo. 438.

[1] Corwin *v.* N. Y. & Erie R. R. Co., 13 N. Y. 42; Indianapolis & Cincinnati R. R. Co. *v.* Townsend, 10 Ind. 38; Jeffersonville, &c. R. R. Co. *v.* Nichols, 30 Ind. 321; Same *v.* Parkhurst, 34 Ind. 501; Suydam *v.* Moore, 8 Barb. 358; Fawcett *v.* York & North Midland R. Co., 15 Jur. 173; Waldron *v.* Rensselaer & Schenectady R. R. Co., 8 Barb. 390; Horn *v.* Atlantic & St. Lawrence R. R. Co., 35 N. H. 169; O'Bannon *v.* Louisville, &c. R. R. Co., 8 Bush, 348; Illinois Cent. R. R. Co. *v.* Arnold, 47 Ill. 173; Hinman *v.* Chicago, &c. R. R. Co., 28 Iowa, 491; Quackenbush *v.* Wisconsin, &c. R. R. Co., 62 Wis. 411, 22 N. W. 519; Burlington & M. R. R. Co. *v.* Webb, 18 Neb. 215, 24 N. W. 706. [And a State may make a railroad company liable for all property lost through fires arising from its locomotives, whether through its negligence or not. St. Louis & S. F. R. Co. *v.* Matthews, 165 U. S. 1, 17 Sup. Ct. Rep. 243, aff. 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.]

[2] Jackson *v.* Rutland & Burlington R. R. Co., 25 Vt. 150. And see Marsh *v.* N. Y. & Erie R. R. Co., 14 Barb. 364; Joliet & N. I. R. R. Co. *v.* Jones, 20 Ill. 221; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255, and 4 N. Y. 349; Price *v.* New Jersey R. R. Co., 31 N. J. 229; Drake *v.* Philadelphia, &c. R. R. Co., 51 Pa. St. 240. In Indianapolis & Cincinnati R. R. Co. *v.* Kercheval, 10 Ind. 84, it was held that a clause in the charter of a railroad corporation which declared that when the corporators should have procured a right of way as therein provided, they should be seised in fee-simple of the right to the land, and should have the sole use and occupation of the same, and no person, body corporate or politic, should in any way interfere therewith, molest, disturb, or injure any of the rights and privileges thereby granted, &c., would not take from the State the power to establish a police regulation making the corporation liable for cattle killed by their cars. [Jensen *v.* Union P. R. Co., 6 Utah, 253, 21 Pac. 994, 4 L. R. A. 724, holds that railroad cannot in the absence of negligence on its part be made liable for stock killed by it.]

[3] Fitchburg R. R. Co. *v.* Grand Junction R. R. Co., 1 Allen, 552, and 4 Allen, 198; Pittsburgh, &c. R. R. Co. *v.* S. W. Pa. R. R. Co., 77 Pa. St. 173. They may

it may establish regulations requiring existing railways to ring the bell or blow the whistle of their engines immediately before passing highways at grade, or other places where their approach might be dangerous to travel,[1] or to station flagmen at such or any other dangerous places.[2] And it has even been intimated that it might be competent for the State to make railway corporations liable as insurers for the safety of all persons carried by them, in the same manner that they are by law liable as carriers of goods; though this would seem to be pushing the police power to an extreme.[3] But those statutes which have recently become

be required to put up depots at railroad junctions. State *v.* Wabash, &c. Ry. Co., 83 Mo. 144. Part of the expense of changing grade to overhead crossings may be laid upon a town. Appeal of Westbrook, 57 Conn. 95, 17 Atl. 368. The legislature may regulate the speed at highway and other crossings. Rockford, &c. R. R. Co. *v.* Hillmer, 72 Ill. 235. "While the franchise of a railroad company licenses generally unlimited speed, power is reserved to the legislature to regulate the exercise of the franchise for public security." *Ryan*, Ch. J., in Horn *v.* Chicago, &c. R. R. Co., 38 Wis. 463. The regulation is *in favorem vitæ*. Haas *v.* Chicago, &c. R. R. Co., 41 Wis. 44. But running at unlawful speed does not impose an absolute liability. Louisville, N. O. & T. Ry. Co. *v.* Caster, — Miss. —, 5 So. 388. [The State, acting directly or through a city council, may compel the railway companies over whose tracks a viaduct extends to repair the same, and may apportion among them the expense of such repair, although the viaduct was built at the joint expense of the railway companies and the city, acting under agreement. Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 57, 18 Sup. Ct. Rep. 513, aff. 47 Neb. 519, 66 N. W. 624. A railway company may be required to pay the whole expense of change of grade at a crossing. New York & N. E. R. Co. *v.* Town of Bristol, 151 U. S. 556, 14 Sup. Ct. Rep. 437, aff. 62 Conn. 527, 26 Atl. 122.]

[1] "The legislature has the power, by general laws, from time to time, as the public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety. The provision in question is a mere police regulation, enacted for the protection and safety of the public, and in no manner interferes with or impairs the powers conferred on the defendants in their act of incorporation." Galena & Chicago U. R. R. Co. *v.* Loomis, 13 Ill. 548. And see Stuyvesant *v.* Mayor, &c. of New York, 7 Cow. 588; Benson *v.* Mayor, &c. of New York, 10 Barb. 223; Bulkley *v.* N. Y. & N. H. R. R. Co., 27 Conn. 486; Venzie *v.* Mayo, 45 Me. 560; 49 Me. 156; Galena & Chicago U. R. R. Co. *v.* Dill, 22 Ill. 264; Same *v.* Appleby, 28 Ill. 283; Ohio & Mississippi R. R. Co. *v.* McClelland, 25 Ill. 140; Clark's Adm'r *v.* Hannibal & St. Jo. R. R. Co., 36 Mo. 202; Chicago, &c. R. R. Co. *v.* Triplett, 38 Ill. 482; Commonwealth *v.* Eastern R. R. Co., 103 Mass. 254, 4 Am. Rep. 555; Kaminitsky *v.* R. R. Co., 25 S. C. 53.

[2] Toledo, &c. R. R. Co. *v.* Jacksonville, 67 Ill. 37; Western & A. R. R. Co. *v.* Young, 81 Ga. 397, 7 S. E. 912. In many States now there are railroad commissioners appointed by law, with certain powers of supervision, more or less extensive. Respecting these it has been said in Maine: "Our whole system of legislative supervision through the railroad commissioners acting as a State police over railroads is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and therefore liable to be thus enforced." Railroad Commissioners *v.* Portland, &c. R. R. Co., 63 Me. 269, 18 Am. Rep. 208.

[3] Thorpe *v.* Rutland & Burlington R. R. Co., 27 Vt. 140. Carriers of goods are liable as insurers, notwithstanding they may have been guiltless of negligence, because such is their contract with the shipper when they receive his goods for transportation; but carriers of persons assume no such obligations at the

common, and which give an action to the representatives of persons killed by the wrongful act, neglect, or default of another, may unquestionably be made applicable to corporations previously chartered, and may be sustained as only giving a remedy for a wrong for which the common law had failed to make provision.[1] And it cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition.[2]

common law, and where a company of individuals receive from the State a charter which makes them carriers of persons, and chargeable as such for their own default or negligence only, it may well be doubted if it be competent for the legislature afterwards to impose upon their contracts new burdens, and make them respond in damages where they have been guilty of no default. In other words, whether that could be a proper police regulation which did not assume to regulate the business of the carrier with a view to the just protection of the rights and interests of others, but which imposed a new obligation, for the benefit of others, upon a party guilty of no neglect of duty. But perhaps such a regulation would not go further than that in Stanley *v.* Stanley, 26 Me. 191, where it was held competent for the legislature to pass an act making the stockholders of existing banks liable for all corporate debts thereafter created; or in Peters *v.* Iron Mountain R. R. Co., 23 Mo. 107, and Grannahan *v.* Hannibal, &c. R. R. Co., 30 Mo. 546, where an act was sustained which made companies previously chartered liable for the debts of contractors to the workmen whom they had employed. [That a statute creating such absolute liability is valid, is held in Chicago, R. I. & P. Ry. Co. *v.* Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610.]

[1] Southwestern R. R. Co. *v.* Paulk, 24 Ga. 356; Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120. In Boston, Concord, and Montreal R. R. *v.* State, 32 N. H. 215, a statute making railroad corporations liable to indictment and fine, in case of the loss of life by the negligence or carelessness of the proprietors or their servants, was adjudged constitutional, as applicable to corporations previously in existence. To an indictment or action under a like Massachusetts act contributory negligence is no defence. Com. *v.* Boston, &c. R. R., 134 Mass. 211; Merrill *v.* Eastern R. R., 139 Mass. 238, 1 N. E. 548, 139 Mass. 252, 29 N. E. 666.

[2] Railroad employees may be required to be examined to test their fitness, and for color-blindness. Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564; McDonald *v.* State, 81 Ala. 279; Nashville, C. & St. L. Ry. Co. *v.* State, 83 Ala. 71, 3 So. 702, 128 U. S. 96, 9 Sup. Ct. Rep. 28. [The entire expenses of the State railroad commission, including salaries of commissioners, may be assessed upon the railroad companies operating within the State in proportion to their operated track mileage. Charlotte, C. & A. R. Co. *v.* Gibbes, 142 U. S. 386, 12 Sup. Ct. Rep. 255, aff. 27 S. C. 385, 4 S. E. 49; Louisville & N. R. Co. *v.* Baldwin, 85 Ala. 619, 5 So. 311, 7 L. R. A. 266, *contra*.] On this subject in general, see Redf. on Railw. c. 32, sec. 2; Louisville, &c. R. R. Co. *v.* Burke, 6 Cold. 45; New Albany & Salem R. R. Co. *v.* Tilton, 12 Ind. 3; Buckley *v.* N. Y. & N. H. R. R. Co., 27 Conn. 479; Ohio & Mississippi R. R. Co. *v.* McClelland, 25 Ill. 140; Bradley *v.* Buffalo, &c. R. R. Co., 34 N. Y. 427; Boston, C. & M. R. R. Co. *v.* State, 32 N. H. 215; Pennsylvania R. R. Co. *v.* Riblet, 66 Pa. St. 164, 5 Am. Rep. 360. And see other cases cited, *ante*, pp. 839, 840, notes. [That telephone companies are common carriers and must render their services impartially to all who may apply for them, see Nebraska Telephone Co. *v.* State, 55 Neb. 627, 76 N. W. 171, 45

Restraints on Sale of Liquors. Those statutes which regulate or altogether prohibit the sale of intoxicating drinks as a beverage have also been, by some persons, supposed to conflict with the federal Constitution. Such of them, however, as assume to regulate merely, and to prohibit sales by other persons than those who are licensed by the public authorities, have not suggested any serious question of constitutional power. They are but the ordinary police regulations, such as the State may make in respect to all classes of trade or employment.[1] But those which undertake altogether to prohibit the manufacture and sale of intoxicating drinks as a beverage have been assailed as violating express provisions of the national Constitution, and also as subversive of fundamental rights, and therefore not within the grant of legislative power.

That legislation of this character was void, so far as it affected imported liquors or such as might be introduced from one State into another, because in conflict with the power of Congress over commerce, was strongly urged in the License Cases before the Supreme Court of the United States; but that view did not obtain the assent of the court. Opinions were expressed by a majority

L. R. A. 113. Upon power to regulate the consolidation of competing railroads, see State *v.* Montana Ry. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271, and note thereto in L. R. A. Upon duty of a railroad company to furnish cars to shippers, see Houston, E. & W. T. R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, and note. Carriers of goods may be compelled to forward within a certain time after receiving them. Bagg *v.* Wilmington, C. & A. R. Co., 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596. Street railways may be required to provide screens for protection of motormen. State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068; State *v.* Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317; State *v.* Hoskins, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, and note.]

[1] Bode *v.* State, 7 Gill, 326; Bancroft *v.* Dumas, 21 Vt. 456; Thomasson *v.* State, 15 Ind. 449; License Cases, 5 How. 504; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; Goddard *v.* Jacksonville, 15 Ill. 588; Kettering *v.* Jacksonville, 50 Ill. 39; State *v.* Allmond, 2 Houst. 612. [Plumb *v.* Christie, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181.] That a territory may make such laws: Terr. *v.* Connell, — Ariz. —, 16 Pac. 209. That such laws may be applied to corporations chartered to manufacture liquors, as well as to others, see Commonwealth *v.* Intoxicating Liquors, 115 Mass. 153; Beer Company *v.* Massachusetts, 97 U. S. 25. That, when the prohibition is total, even a druggist cannot sell as medicine on a physician's prescription, see Woods *v.* State, 36 Ark. 36, 38 Am. Rep. 22. [And a licensed pharmacist may be required to take out a special liquor license before he shall be permitted to use spirituous liquors in the preparation of pharmacist's compounds. Gray *v.* Connecticut, 159 U. S. 74, 15 Sup. Ct. Rep. 985; Com. *v.* Fowler, 96 Ky. 166, 28 S. W. 786, 33 L. R. A. 839. Upon constitutionality of laws regulating sale of liquors, see note to, 28 L. ed. U. S. 696. Sale of other commodities in rooms where sale of liquors is authorized may be prohibited. State *v.* Gerhardt, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.] Sales within certain hours may be forbidden. Hedderich *v.* State, 101 Ind. 564. A farmer may be forbidden to give cider on Sunday to an intoxicated person. Altenburg *v.* Com., 126 Pa. St. 602, 17 Atl. 799.

of the court that the introduction of imported liquors into a State, and their sale in the original packages as imported, could not be forbidden, because to do so would be to forbid what Congress, in its regulation of commerce, and in the levy of imposts, had permitted;[1] but it was conceded by all, that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be under Congressional protection as an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State like any other property.[2] It was also decided, in these cases, that the power of Congress to regulate commerce between the States did not exclude regulations by the States, except so far as they might come in conflict with those established by Congress; and that, consequently, as Congress had not undertaken to regulate commerce in liquors between the States, a law of New Hampshire could not be held void which punished the sale, in that State, of gin purchased in Boston and sold in New Hampshire, notwithstanding the sale was in the cask in which it was imported, but by one not licensed by the selectmen.[3] The authority of the License Cases is, however, seriously impaired by late decisions of the same court. Upon the principle, now well settled,[4] that the failure of Congress to act as to matters directly affecting interstate commerce is equivalent to a declaration that it shall be free, it is held a State has no power to prevent the bringing of liquor into it from another

[1] *Taney*, Ch. J., 5 How. 504, 574; *McLean*, J., 5 How. 589; *Catron*, J., 5 How. 608. And see Brown *v.* Maryland, 12 Wheat. 419; License Tax Cases, 5 Wall. 462; Cook *v.* Pennsylvania, 97 U. S. 566; Tiernan *v.* Rinker, 102 U. S. 123; Lincoln *v.* Smith, 27 Vt. 328, 335; Bradford *v.* Stevens, 10 Gray, 379; State *v.* Robinson, 49 Me. 285.

[2] *Daniel*, J., held that the right to regulate was not excluded, even while the packages remained in the hands of the importer unbroken (p. 612). See also the views of *Grier*, J. (p. 631). [See, in this connection, *Re* Wilson, 8 Mackey (D. C.), 341, 12 L. R. A. 624. While the liquor is yet in the original package, the State may prohibit and punish its sale to a person of known intemperate habits. Com. *v.* Zelt, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602.]

[3] This rule has lately been followed in Iowa. Collins *v.* Hills, 77 Iowa, 181, 41 N. W. 571; Leisy *v.* Hardin, 78 Iowa, 286, 43 N. W. 188. [Same case, 135 U. S. 100, 10 Sup. Ct. Rep. 681.] See Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 604; People *v.* Lyng, 74 Mich. 579, 42 N. W. 139, rev. in 135 U. S. 161, 10 Sup. Ct. Rep. 725. See also Bode *v.* State, 7 Gill, 320; Jones *v.* People, 14 Ill. 196; State *v.* Wheeler, 25 Conn. 290; Santo *v.* State, 2 Iowa, 165, 202; Commonwealth *v.* Clapp, 5 Gray, 97; Metropolitan Board *v.* Barrie, 34 N. Y. 657; Beer Company *v.* Massachusetts, 97 U. S. 25; Jones *v.* Surprise, 64 N. H. 243, 9 Atl. 381; Lang *v.* Lynch, 38 Fed. Rep. 489; State *v.* Cobaugh, 78 Me. 401, 6 Atl. 4. In Iowa it is held competent to except from the general prohibition of the sale of wines all those made from fruit grown in the State. State *v.* Stucker, 58 Iowa, 496, 12 N. W. 483. But this seems not in harmony with Tiernan *v.* Rinker, 102 U. S. 123.

[4] See p. 688, note 2.

State, and that it cannot prohibit the sale within it of liquor in the original package by a non-resident.[1] But the manufacture of

[1] Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062; Leisy *v.* Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681. In the former case a majority of the court held that the statute could not be upheld as an inspection law nor as a sanitary law; that it was a regulation of commerce, although its purpose was to perfect the policy of the State as to intemperance; and left undecided the question of the right of the State to forbid the sale of the liquor when imported. In the latter case this point is distinctly ruled, so far as the case of the sale by a foreigner or non-resident in the original package is concerned, [the court holding that the State is powerless to prohibit or regulate the sale by the importer in the original package, fol. Brown *v.* Maryland, 12 Wheat. 419.] For the State rulings upon it, see cases p. 846, note 3, *supra*. [Directly after the decision of Leisy *v.* Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681, Congress enacted the so-called Wilson Bill, providing that "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or territory be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or territory, and shall not be exempt therefrom by being introduced therein in original packages or otherwise." 26 Stat. at Large, 313, chap. 728. *In re* Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep 865, it was held that this enactment permitted the law of Kansas, prohibiting and penalizing the manufacture, sale, or barter of "any spirituous, malt, vinous, fermented, or other intoxicating liquors" to extend to all such liquors imported into the State. In Scott *v.* Donald, 165 U. S. 58, 17 Sup. Ct. Rep. 265, was considered the validity of the State Dispensary Law of South Carolina, which, as it then stood, required that "no wines or liquors, except domestic wines, should be manufactured or sold, except through the agency of a State board of control, a commissioner and certain county dispensers, and after an inspection by a State chemist. Packages of wines and liquors made in other States and imported by a resident of the State for his own use, and in the possession of railroad companies which, as common carriers, had brought the packages within the State, were seized and confiscated as contraband by constables of the State." The court held "that when a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce, and an unjust preference of the products of the enacting State as against similar products of the other States," and that therefore "as respected residents of the State of South Carolina desiring to import foreign wines and liquors for their own use, the act in question in that case was void." The statute was thereupon modified in such manner as to permit the importation, but to require that before any such importation the intending importer should "first certify to the [official] chemist . . . the quantity and kind of liquor proposed to be imported, together with the name and place of business of the person, firm, or corporation from whom it is desired to purchase, accompanying such certificate with the statement that the proposed consignor has been requested to forward a sample of such liquor to the said chemist. . . . Upon the receipt of said sample, the said chemist shall immediately proceed to test the same, and . . . [upon finding it pure, &c.] shall issue a certificate to that effect," which should be attached to the consignment. Any package imported without such certificate was to be confiscated and destroyed. This provision was considered in Vance *v.* Vandercook Co., 170 U. S. 438, 18 Sup. Ct. Rep. 674, and held invalid as an unlawful interference with interstate commerce. In Rhodes *v.* Iowa, 170 U. S. 412, 18 Sup. Ct. Rep. 664, it was held that the importation was not completed until the goods had been delivered to the consignee, or at any rate

intoxicating liquor within the State may be forbidden although intended solely for exportation.[1]

until the carrier ceased to hold them as carrier. The Iowa law forbidding transportation from place to place within the State did not apply to the station agent who unloaded a box containing whiskey from a freight car and wheeled it into the railway company's freight warehouse, there to await delivery to the consignee. And in State *v.* Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, it was held that, despite the Dispensary Law, a person might purchase liquors outside the State and himself transport them from the place of purchase to his home, and there keep them for his own use, because such act was interstate commerce, and the Wilson Law did not permit the State law to attach until the liquors had reached their destination. For other cases on South Carolina Dispensary Law, see State *v.* Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345; McCullough *v.* Brown, 41 S. C. 220, 19 S. E. 458, 23 L. R. A. 410. For a construction of the Alabama Dispensary Law, see Sheppard *v.* Dowling, 127 Ala. 1, 28 So. 791, 85 Am. St. 68. Upon interstate sales of intoxicating liquors and State regulation thereof, see a valuable note to 42 L. ed. U. S. 1089. Upon liquor legislation generally, see Foster *v.* Kansas, 112 U. S., 205, 5 Sup. Ct. Rep. 8, 97; *Re* Caswell, 18 R. I. 835, 29 Atl. 259, 27 L. R. A. 82, 85, and note; State *v.* Creeden, 78 Iowa, 556, 43 N. W. 673, 7 L. R. A. 295; Lemly *v.* State, 70 Miss. 241, 12 So. 22, 20 L. R. A. 645, and note; Tragesser *v.* Gray, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, and note; and Veon *v.* Creaton, 138 Pa. 48, 20 Atl. 865, 9 L. R. A. 814, and note. Upon what is an original package, see Austin *v.* Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132, in which it was held that a cigarette package three inches long, and an inch and a half wide, containing ten cigarettes, was not an original package where many such were deposited by the shipper in a basket owned by the express company and by that company carried to consignee in the same basket and poured out on consignee's counter; whether, if each small package had been addressed to consignee, the holding would have been otherwise, *quære*; see concurring opinion by Mr. Justice *White*. For a similar holding with regard to cigarette packages, see McGregor *v.* Cone, 104 Iowa, 465, 73 N. W. 1041, 39 L. R. A. 484. See also State *v.* Chapman, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432; Keith *v.* State, 91 Ala. 2, 8 So. 353, 10 L. R. A. 430. Upon the Constitutional protection of the "original package," see 55 Cent. L. Jour. 342, and 35 Am. L. Rev. 669. For further cases upon interstate commerce, see Fuqua *v.* Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; Ohio & M. R. Co. *v.* Taber, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685; Houston Direct Navigation Co. *v.* Ins. Co. of N. A., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713; State *v.* Wheelock, 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429; Hopkins *v.* Lewis, 84 Iowa, 690, 51 N. W. 255, 15 L. R. A. 397 (original package); Lang *v.* Lynch, 38 Fed. Rep. 489, 4 L. R. A. 831.] After a railroad has stored such liquor in its warehouse for several days, it ceases to be a carrier and becomes amenable to the law. State *v.* Creeden, 78 Iowa, 556, 43 N. W. 673. See also State *v.* O'Neil, 58 Vt. 140, 2 Atl. 580; [aff. 144 U. S. 323, 12 Sup. Ct. Rep. 693. A State may not prohibit the sale within its borders of oleomargarine manufactured in another State, so long as such substance is recognized by Congress as a legitimate article of commerce. Schollenberger *v.* Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757. On oleomargarine in original packages, see *Re* Gooch, 44 Fed. Rep. 276, 10 L. R. A. 830. Nor is it permitted to indirectly accomplish such prohibition by requiring all oleomargarine sold within its borders to be colored pink or otherwise adulterated. Collins *v.* New Hampshire, 171 U. S. 30, 18 Sup. Ct. Rep. 768. Upon prohibition of sale of oleomargarine,

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[1] Kidd *v.* Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6. "The manufacture of intoxicating liquors in a State is none the less a business within that State, because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States." *Lamar*, J., p. 24.

These State laws, known as Prohibitory Liquor Laws, the purpose of which is to prevent altogether the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish that object, cannot be held void as in conflict with the fourteenth amendment.[1] And in several cases it has been held that the fact that such laws may tend to prevent or may absolutely preclude the fulfilment of contracts previously made is no objection to their validity.[2] Any change in the police laws, or indeed in any other laws, might have a like consequence.

The same laws have also been sustained, when the question of conflict with State constitutions, or with general fundamental principles, has been raised. They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances.[3] It has also been held competent to declare the liquor

see Com. v. Miller, 131 Pa. 118, 18 Atl. 938, 6 L. R. A. 633, and note. State may prohibit the sale within its borders of adulterated articles designed to defraud the consumer, *e. g.* oleomargarine colored to imitate butter. Plumley *v.* Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, aff. 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; see also State *v.* Capital Cy. Dairy Co., 62 Ohio, 350, 57 N. E. 62, McCann *v.* Com., 198 Pa. 509, 48 Atl. 470, State *v.* Rogers, 95 Me. 94, 49 Atl. 564. Use of oleomargarine in a soldiers' home which is under the exclusive jurisdiction of Congress is not subject to control by the State. Ohio *v.* Thomas, 173 U. S. 276, 19 Sup. Ct. Rep. 453.]

[1] If the State so determines, it may forbid the manufacture, sale, and use of liquor as prejudicial to public health, safety, and morals, even though thereby existing property is depreciated in value without compensation. Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Kidd *v.* Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6. See also Bartemeyer *v.* Iowa, 18 Wall. 129; Foster *v.* Kansas, 112 U. S. 201, 5 Sup. Ct. Rep. 8, 97; Prohibitory Am. Cases, 24 Kan. 700; *Re* Intox. Liquors, 25 Kan. 751, 37 Am. Rep. 284. Nor is permission for sale by druggists, and no others, class legislation. *Id.* See Beer Co. *v.* Massachusetts, 97 U. S. 25. [In Noel *v.* State, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, it is held that a law restricting the sale of patent medicines by others than registered pharmacists was void.]

[2] People *v.* Hawley, 3 Mich. 330; Reynolds *v.* Geary, 26 Conn. 179. Contracts cannot hamper or impede the State power of police. Beer Company *v.* Massachusetts, 97 U. S. 25.

[3] Commonwealth *v.* Kendall, 12 Cush. 414; Commonwealth *v.* Clapp, 5 Gray, 97; Commonwealth *v.* Howe, 13 Gray, 26; Santo *v.* State, 2 Iowa, 202; Our House *v.* State, 4 Greene (Iowa), 172; Zumhoff *v.* State, 4 Greene (Iowa), 526; State *v.* Donehey, 8 Iowa, 396; State *v.* Wheeler, 25 Conn. 290; Reynolds *v.* Geary, 26 Conn. 179; Oviatt *v.* Pond, 29 Conn. 479; People *v.* Hawley, 3 Mich. 330; People *v.* Gallagher, 4 Mich. 244; Jones *v.* People, 14 Ill. 196; State *v.* Prescott, 27 Vt. 194; Lincoln *v.* Smith, 27 Vt. 328; Gill *v.* Parker, 31 Vt. 610. Compare Beebe *v.* State, 6 Ind. 501; Meshmeier *v.* State, 11 Ind. 464; Wynehamer *v.* People, 13 N. Y. 378. See State *v.* Kennedy, 16 R. I. 409, 17 Atl. 51. So of local prohibitory laws. Whitney *v.* Township Board, 71 Mich. 234, 39 N. W. 40; State *v.* Berlin, 21 S. C. 292; Burnside *v.* Lincoln Co. Ct., 86 Ky. 423, 6 S. W. 276; *Ex parte* Campbell, 74 Cal. 20, 15 Pac. 318. The territories may pass such laws. Terr. *v.* O'Connor, 5 Dak. 397, 41 N. W. 746; Terr. *v.* Guyot, 9 Mont. 46, 22 Pac. 134. But the mere keeping of liquor for another cannot be made a crime. State *v.* Gilman, 33 W. Va. 146, 10 S. E. 283. In Reynolds *v.* Geary, 26 Conn. 179; Jones *v.* Surprise, 64 N. H. 243, 9 Atl. 384; Lang *v.* Lynch, 38 Fed. Rep. 489, the State law forbidding suits for the price of liquors sold out

kept for sale a nuisance, and to provide legal process for its condemnation and destruction, and to seize and condemn the building occupied as a dram-shop on the same ground.[1] And it is only where, in framing such legislation, care has not been taken to observe those principles of protection which surround the persons and dwellings of individuals, securing them against unreasonable searches and seizures, and giving them a right to trial before condemnation, that the courts have felt at liberty to declare that it exceeded the proper province of police regulation.[2] Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offence; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture.[3] A statute which can do this must be

of the State to evade the State law, was N. W. 606. A statute providing for the appointment of guardians for drunkards is competent under the police power, and its operation would not be an unlawful deprivation of property. Devin *v.* Scott, 34 Ind. 67. [Possession of opium without having license therefor may be made a crime. Mon Luck *v.* Sears, 29 Oreg. 421, 44 Pac. 693, 32 L. R. A. 738.]

sustained and applied notwithstanding the contract was valid where made. The general rule is, however, that if the contract is valid where made, it is valid everywhere. See Sortwell *v.* Hughes, 1 Curtis, 214; Adams *v.* Coulliard, 102 Mass. 167; Hill *v.* Spear, 50 N. H. 253; Kling *v.* Fries, 33 Mich. 275; Roehike *v.* Philip Best Brewing Co., 33 Mich. 340; Webber *v.* Donnelly, 33 Mich. 469; [Miller *v.* Ammon, 145 U. S. 421, 12 Sup. Ct. Rep. 884.]

[1] American Fur Co. *v.* United States, 2 Pet. 358; Our House *v.* State, 4 Greene (Iowa), 172; Lincoln *v.* Smith, 27 Vt. 328; State *v.* Wheeler, 25 Conn. 290; Oviatt *v.* Pond, 29 Conn. 479; State *v.* Robinson, 33 Maine, 568; License Cases, 5 How. 504; State *v.* Barrels of Liquor, 47 N. H. 369; Commonwealth *v.* Intoxicating Liquors, 107 Mass. 396; Pearson *v.* Distill. Co., 72 Iowa, 348, 34 N. W. 1; Craig *v.* Werthmueller, 78 Iowa, 598, 43

[2] Hibbard *v.* People, 4 Mich. 125; Fisher *v.* McGirr, 1 Gray, 1; State *v.* O'Neil, 58 Vt. 140, 2 Atl. 586; *ante*, 431, note. Compare Meshmeier *v.* State, 11 Ind. 484; Wynehamer *v.* People, 13 N. Y. 378.

[3] See Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Kaufman *v.* Dostal, 73 Iowa, 691, 36 N. W. 643; Whitney *v.* Township Board, 71 Mich. 234, 39 N. W. 40; Tanner *v.* Alliance, 29 Fed. Rep. 196; Menken *v.* Atlanta, 78 Ga. 658, 2 S. E. 559. In a number of the States, statutes have recently been passed to make the owners of premises on which traffic in in-

justified upon the highest reasons of public benefit; but, whether satisfactory or not, the reasons address themselves exclusively to the legislative wisdom.

Taxing Forbidden Occupations. Questions have arisen in regard to these laws, and other State regulations, arising out of the imposition of burdens on various occupations by Congress, with a view to raising revenue for the national government. These burdens are imposed in the form of what are called license fees; and it has been claimed that, when the party paid the fee, he was thereby licensed to carry on the business, despite the regulations which the State government might make upon the subject. This view, however, has not been taken by the courts, who have regarded the congressional legislation imposing a license fee as only a species of taxation, without the payment of which the business could not lawfully be carried on, but which, nevertheless, did not propose to make any business lawful which was not lawful before, or to relieve from any burdens or restrictions imposed by the regulations of the State. The licenses give no authority, and are mere receipts for taxes.[1]

Other Regulations affecting Commerce. Numerous other illustrations might be given of the power in the States to make regulations affecting commerce, which are sustainable as regulations of police.[2] Among these, quarantine regulations and health laws

toxicating liquors is carried on responsible for all damages occasioned by such traffic. It is believed to be entirely competent for the legislature to pass such statutes. Bertholf *v.* O'Reilly, 74 N. Y. 509. But whether they can apply in cases where leases have previously been made must be a serious question.

[1] License Tax Cases, 5 Wall. 462; Purvear *v.* Commonwealth, 5 Wall. 475; Commonwealth *v.* Holbrook, 10 Allen, 200; Block *v.* Jacksonville, 36 Ill. 301; Terr. *v.* O'Connor, 5 Dak. 397, 41 N. W. 746; They are not contracts. Martin *v.* State, 23 Neb. 371, 36 N. W. 554. Nor does their payment preclude enforcement of penalties for selling in the Indian country. United States *v.* Forty-three Gallons of Whiskey, 108 U. S. 491, 2 Sup. Ct. Rep. 906. A State may tax a business notwithstanding the State constitution forbids its being licensed. Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654. As to when license fees are taxes, see *ante*, p. 283, and note. State taxation does not forbid further municipal taxation for regulation. Wolf *v.* Lansing, 53 Mich. 367, 19 N. W. 38; Frankfort *v.* Aughe, 114 Ind. 77, 15 N. E. 802.

See remarks of *Grier*, J., in License Cases, 5 How. 504, 632; Meeker *v.* Van Rennselaer, 15 Wend. 397. A liquor law may annul a previous license, and not be invalid on that ground. See *ante*, p. 400, note. Under the police power, the dealing in liquors even for lawful purposes may be restricted to persons approved for moral character. *In re* Ruth, 32 Iowa, 250. Compare People *v.* Haug, 68 Mich. 549, 37 N. W. 21.

[2] As to the right to fix rates for railroad transportation, see cases, pp. 873–875, *post*. [But it is not open to a State to compel "through trains" carrying interstate commerce to stop at every county-seat through which they pass, provided "local trains" furnish ample accommodation for the traffic of such places. C. C. C. & St. L. Ry. Co. *v.* Illinois, 177 U. S. 514, 20 Sup. Ct. Rep. 722, rev. 175 Ill. 359, 51 N. E. 842; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 16 Sup. Ct. Rep. 1096, rev. 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119. See, in this

of every description will readily suggest themselves, and these are or may be sometimes carried to the extent of ordering the

connection, State *v.* Gladson, 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502; aff. 166 U. S. 427, 17 Sup. Ct. Rep. 627. Upon regulations of commerce by State laws, see notes to 39 L. ed. U. S. 311, 38 L. ed. U. S. 1041, 37 L. ed. U. S. 216, 32 L. ed. U. S. 229, 24 C. C. A. 13, and 13 L. R. A. 107. A State may compel a railroad operating within its limits and engaged in interstate commerce to stop at least three trains each way (if so many run) each day at each town of three thousand or more inhabitants on its line long enough to take on and let off passengers. Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S. 285, 19 Sup. Ct. Rep. 465. And it may compel every passenger train whose route lies entirely within the State to stop at every county-seat, even though the train carries mail and its road is a land grant road. Gladson *v.* Minnesota, 166 U. S. 427, 17 Sup. Ct. Rep. 627, aff. 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502. A State may make a common carrier contracting to carry property between any two points, whether within or without the State, liable for any injury to such property that may arise through its negligence or that of any connecting carrier to whom it may deliver such property in order to complete the performance of the contract. Missouri, K. & T. R. Co. *v.* McCann & Smizer, 174 U. S 580, 19 Sup. Ct. Rep. 755, aff. 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110. And when the loss or injury occurs beyond the carrier's own line, he may still be made liable "unless within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge." Richmond & A. R. Co. *v.* Patterson Tobacco Co., 169 U. S. 311, 18 Sup. Ct. Rep. 335. Upon State taxes and penalties as affecting commerce, see Bangor *v.* Smith, 83 Me. 422, 22 Atl. 379, 13 L. R. A. 686, and note. A State may regulate the extent to which a common carrier may by contract relieve himself from his common-law liabilities. Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S. 133, 18 Sup. Ct. Rep. 289. Upon such contracts, see note to 42 L. ed. U. S. 688, in which the cases are collected. Upon interstate and foreign transportation, see Mo. P. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, and note; and as to whether shipments between two points within the same State can ever be interstate commerce, see Houston D. Nav. Co. *v.* Ins. Co. of N. A., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713. In the absence of Congressional regulation, a State may prohibit the running of all freight-trains (including interstate) on Sunday. Hennington *v.* Georgia, 163 U. S. 299, 16 Sup. Ct. Rep. 1086, aff. 90 Ga. 396, 17 S. E. 1009. State may prohibit the consolidation of parallel and competing lines. Pearsall *v.* Grt. N. R. Co., 161 U. S. 646, 16 Sup. Ct. Rep. 705, and Louisville & N. R. Co. *v.* Kentucky, 161 U. S. 677, 16 Sup. Ct. Rep. 714, aff. 97 Ky. 675, 31 S. W. 470. May by penalty in the absence of Congressional regulation enforce the delivery of telegrams to addresses within its borders. W. U. Tel. Co. *v.* James, 162 U. S. 650, 16 Sup. Ct. Rep. 934, aff. 90 Ga. 254, 17 S. E. 83; but not beyond its borders. W. U. Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 Sup. Ct. Rep. 1126, 1 Inters. Com. R. 306. State may make it an offence to have in one's possession game intended to be shipped beyond the borders of the State, such game having been killed within the State, even though within the open season. Geer *v.* Connecticut, 161 U. S. 519, 16 Sup. Ct. Rep. 600, aff. 61 Ct. 144, 22 Atl. 1012, 13 L. R. A. 804, 3 Inters. Com. R. 732. Upon relation between State police power and Federal commerce power, see note to 38 L. ed. U. S. 1041. State may regulate the fisheries within a marine league of its shores. Manchester *v.* Massachusetts, 139 U. S. 240, 11 Sup. Ct. Rep. 559. In the absence of Congressional regulation, a State may make it an offence to solicit a seaman to desert from any vessel within its jurisdiction. *Re* Young, 36 Oreg. 247, 59 Pac. 707, 48 L. R. A. 153; Handel *v.* Chaplin, 111 Ga. 800, 36 S. E. 979, 51 L. R. A. 720. State may absolutely prohibit sale within its borders of specified kinds of game and fish during specified seasons of year. People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696. May make it a criminal offence to send money outside

destruction of private property when infected with disease or otherwise dangerous.[1] These regulations have generally passed

the State to be wagered upon a horse-race. *Ex parte* Lacy, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822. May make interstate telegraph company responsible for negligence within the State in transmission of interstate message. W. U. Tel. Co. *v.* Howell, 95 Ga. 194, 22 S. E. 285, 30 L. R. A. 158. Where corporation derives its franchise from the State it is subject to State law in regard to exempting itself by contract from liabilities of common carrier, even though the contract relates to interstate commerce. St. Jos. & G. Id. R. Co. *v.* Palmer, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335. State may regulate pressure of natural gas transported through pipes to other States. Jamieson *v.* Indiana N. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652. But cannot forbid its exportation. State *v.* Indiana & O. Oil G. & M. Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579, and note. For other cases upon State laws and interstate commerce, see Burrows *v.* Delta Transportation Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468; State *v.* W. U. Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; State *v.* Indiana & I. S. R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *Re* Sanders, 52 Fed. Rep. 802, 18 L. R. A. 549; Mo. Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643, and note; Dwyer *v.* Gulf, C. & S. F. R. Co., 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, and cases cited note 1, *post*, 854. Agent of non-resident organ company who travels with an organ, selling it when he can or taking orders for others and delivering them when received, is engaged in interstate commerce and not liable to State peddler's tax. French *v.* State, — Tex. Crim. App. —, 58 S. W. 1015, 52 L. R. A. 160. Goods manufactured in another State to fill orders taken by travelling salesman, and shipped into the State, consigned to the maker, and delivered by the agent to the person ordering, are the subject of interstate commerce, and the agent cannot be subjected to a State license tax in the State where delivered. Wyoming *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 52 L. R. A. 198. See also Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967, 81 Am. St. 705, 47 L. R. A. 583.]

[1] It is usual, either by general law or by municipal charters, to confer very extensive powers upon local boards of health, under which, when acting in good faith, they may justify themselves in taking possession of, purifying, or even destroying the buildings or other property of the citizen, when the public health or comfort demands such strong measures. See Harrison *v.* Baltimore, 1 Gill, 264; Van Wormer *v.* Albany, 15 Wend. 262; Coe *v.* Shultz, 47 Barb. 64; Raymond *v.* Fish, 51 Conn. 80. [Hurst *v.* Warner, 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484, and see also note in L. R. A. upon quarantine regulations by health authorities. See also Rasmussen *v.* Idaho, 181 U. S. 198, 21 Sup. Ct. Rep. 594, aff. — Idaho, —, 59 Pac. 933, 52 L. R. A. 78. State may regulate the heating apparatus used in passenger cars, and may exempt from such regulations railroad lines less than fifty miles long. N. Y., N. H. & H. R. Co. *v.* New York, 165 U. S. 628, 17 Sup. Ct. Rep. 418. But a State cannot compel a railroad company to furnish double-decked cars for sheep shipped in interstate commerce, nor can it regulate the transportation charges on such shipments. Stanley *v.* Wabash, St. L. & P. R. Co., 100 Mo. 435, 13 S. W. 709, 8 L. R. A. 549. A statute of Louisiana empowered the State Board of Health to exclude healthy persons from entering localities where disease was prevalent, whether coming from within or without the State. The question was raised by the Board refusing emigrants from France a landing. The authority was upheld. Compagnie Française *v.* Louisiana St. Bd. of Health, 186 U. S. 380, 22 Sup. Ct. Rep. 811. See 34 Am. L. Rev. 722.]

They may forbid offensive trades being carried on in populous districts. *Ex parte* Shrader, 33 Cal. 279; Metropolitan Board *v.* Heister, 37 N. Y. 661; Live Stock, &c. Association *v.* Crescent City, &c. Co., 16 Wall. 36; Wynehamer *v.* People, 13 N. Y. 378; Coe *v.* Shultz, 47 Barb. 64; Ashbrook *v.* Commonwealth, 1 Bush, 139; Taunton *v.* Taylor, 116 Mass. 254; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Dillon, Mun. Corp. § 95; Potter's Dwarris on Stat. 458. See State *v.* Board of Health, 16 Mo. App. 8. The disinfec-

unchallenged. The right to pass inspection laws, and to levy duties so far as may be necessary to render them effectual, is also undoubted, and is expressly recognized by the Constitution.[1]

tion of all imported rags at the expense of the shipper may be required. Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929. [State may prohibit the bringing in of cattle affected with contagious disease (Texas fever), and may make shipper and carrier liable for all loss arising from importation of such cattle. Missouri, K. & T. R. Co. *v.* Haber, 169 U. S. 613, 18 Sup. Ct. Rep. 488, 878, aff. 56 Kan. 694, 44 Pac. 632. See, upon Texas cattle acts, Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, and note. See also Idaho *v.* Rasmussen, — Idaho, —, 59 Pac. 933, 52 L. R. A. 78, aff. 181 U. S. 198, 21 Sup. Ct. Rep. 594, and Smith *v.* St. Louis & S. W. Ry. Co., 181 U. S. 248, 21 Sup. Ct. Rep. 603, aff. 20 Tex. Civ. App. 451, 49 S. W. 627. This last case is authority for the general doctrine that reasonable quarantine regulations of the State do not conflict with the power of the federal government to regulate commerce.] That the business is lawful in itself, and proper to be carried on somewhere, is no objection to the regulation. Watertown *v.* Mayo, 109 Mass. 315; Beer Co. *v.* Massachusetts, 97 U. S. 25.

If they forbid the keeping of swine in certain parts of a city, their regulations will be presumed reasonable and needful. Commonwealth *v.* Patch, 97 Mass. 221, citing with approval Pierce *v.* Bartrum, Cowp. 269. And though they cannot be vested with authority to decide finally upon one's right to property when they proceed to interfere with it as constituting a danger to health, yet they are vested with *quasi* judicial power in deciding upon what constitutes a nuisance, and all presumptions favor their actions. See Van Wormer *v.* Albany, 15 Wend. 262; Kennedy *v.* Phelps, 10 La. Ann. 227; Metropolitan Board *v.* Heister, 37 N. Y. 661; Raymond *v.* Fish, 51 Conn. 80. And they may unquestionably be vested with very large power to establish pest-houses, and make very stringent regulations to prevent the spread of contagious diseases. As to the power of the public authorities to establish a public slaughter-house, or to require all slaughtering of beasts to be done at one establishment, see Milwaukee *v.* Gross, 21 Wis. 241; Live Stock, &c. Association *v.* Crescent City, &c. Co., 16 Wall. 36. Compare, as to right to establish monopolies, Gale *v.* Kalamazoo, 23 Mich. 344. [A State cannot require all sheep to be dipped before being brought within its borders, without regard to whether they are diseased or not. State *v.* Duckworth, — Idaho, —, 51 Pac. 456, 39 L. R. A. 865.] The license of a board of health is not a defence to an indictment for a nuisance. Garrett *v.* State, 49 N. J. L. 94, 7 Atl. 29.

A regulation forbidding the growing of rice within a city, on the ground of injurious effect upon health, was held valid in Green *v* Savannah, 6 Ga. 1. [Blowers may be required to be furnished upon dry emery wheels. People *v.* Smith, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853, and upon power to protect health of employees, see note hereto in L. R. A. Orders of boards of health must be reasonable, and an order prohibiting all persons until further order from getting off any train or boat within the State is void, though made as a quarantine regulation against yellow fever prevalent in some places, because applicable as well to persons from non-infected as from infected districts. Wilson *v.* Alabama G. S. Ry. Co., 77 Miss. 714, 28 So. 567, 52 L. R. A. 357. See on compulsory vaccination, 4 Law Notes, 224, 54 Cent. L. Jour. 361.]

[1] Art. 1, § 10, clause 2. See Turner *v.* Maryland, 107 U. S. 38, 2 Sup. Ct. Rep. 44; Hospes *v.* O'Brien, 24 Fed. Rep. 145. A prohibition of the sale of meat unless inspected by State officers twenty-four hours before the slaughter of the animal is void as excluding dressed beef brought from other States. Minnesota *v.* Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862; Swift *v.* Sutphin, 39 Fed. Rep. 630; *In re* Christian, *Id.* 636; *Ex parte* Kieffer, 40 Fed. Rep. 390. [A State may prohibit the sale within its borders of fertilizers and fertilizing materials that have not been officially inspected, and may collect a reasonable charge for inspection by its official inspector. A charge of 25 cents

But certain powers which still more directly affect commerce may sometimes be exercised where the purpose is not to interfere with congressional legislation, but merely to regulate the times and manner of transacting business with a view to facilitate trade, secure order, and prevent confusion.

An act of the State of New York declared that the harbor-masters appointed under the State laws should have authority to regulate and station all ships and vessels in the stream of the East and North rivers, within the limits of the city of New York, and the wharves thereof, and to remove from time to time such vessels as were not employed in receiving and discharging their cargoes to make room for such others as required to be more immediately accommodated, for the purpose of receiving and discharging theirs; and that the harbor-masters or either of them should have authority to determine how far and in what instances it was the duty of the masters and others, having charge of ships or vessels, to accommodate each other in their respective situations; and it imposed a penalty for refusing or neglecting to obey the directions of the harbor-masters or either of them. In a suit brought against the master of a steam vessel, who had refused to move his vessel a certain distance as directed by one of the harbor-masters, in order to accommodate a new arrival, it was insisted on the defence that the act was an unconstitutional invasion of the power of Congress over commerce, but it was sustained as being merely a regulation prescribing the manner of exercising individual rights over property employed in commerce.[1]

a ton for such inspection is not unreasonable. Patapsco Guano Co. *v.* Board of Agr. of N. C., 171 U. S. 345, 18 Sup. Ct. Rep. 862. Upon State inspection laws, see note to 11 L. R. A. 179. But power of inspection cannot be made a pretext for discrimination against products of other States. Voight *v.* Wright, 141 U. S. 62, 11 Sup. Ct. Rep. 855; Brimmer *v.* Rebman, 138 U. S. 78, 11 Sup. Ct. Rep. 213. Nor can it embarrass interstate commerce by its police regulations and inspection laws, even though such are expressly applicable to its domestic commerce also. Minnesota *v.* Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862. A State cannot require convict-made goods brought from other States to be so marked. People *v.* Hawkins, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490.]

[1] Vanderbilt *v.* Adams, 7 Cow. 349, 351. *Woodworth*, J., in this case, states very clearly the principle on which police regulations, in such cases, are sustainable: "It seems to me the power exercised in this case is essentially necessary for the purpose of protecting the rights of all concerned. It is not, in the legitimate sense of the term, a violation of any right, but the exercise of a power indispensably necessary, where an extensive commerce is carried on. If the harbor is crowded with vessels arriving daily from foreign parts, the power is incident to such a state of things. Disorder and confusion would be the consequence, if there was no control. . . . The right assumed under the law would not be upheld, if exerted beyond what may be considered a necessary police regulation. The line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all, must be distinctly marked. . . . Police regulations are legal and binding, because for

The line of distinction between that which constitutes an interference with commerce, and that which is a mere police regulation, is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish, and to descend to the most minute directions, if it shall be deemed advisable;[1] and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations, as well as the States; confining their operation to the subject over which it is given control by the Constitution.[2] But as the general police power can better be exercised

the general benefit, and do not proceed to the length of impairing any right, in the proper sense of that term. The sovereign power in a community, therefore, may and ought to prescribe the manner of exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. The power rests on the implied right and duty of the supreme power to protect all by statutory regulations; so that, on the whole, the benefit of all is promoted. Every public regulation in a city may, and does in some sense, limit and restrict the absolute right that existed previously. But this is not considered as an injury. So far from it, the individual, as well as others, is supposed to be benefited. It may, then, be said that such a power is incident to every well-regulated society, and without which it could not well exist." See Cooley *v.* Board of Wardens, 12 How. 299; Owners of the James Gray *v.* Owners of the John Frazer, 21 How. 184; Benedict *v.* Vanderbilt, 1 Robertson, 194; Steamship Co. *v.* Joliffe, 2 Wall. 450; Wilson *v.* McNamee, 102 U. S. 572; Port Wardens *v.* The Ward, 14 La. Ann. 289; Gilman *v.* Philadelphia, 3 Wall. 713, 731; Cisco *v.* Roberts, 36 N. Y. 292. [State may require all coal-boats and barges to be gauged, and may appoint official gaugers and prescribe their fees. Pittsburg & S. Coal Co. *v.* Louisiana, 156 U. S. 590, 15 Sup. Ct. Rep. 459.]

[1] Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 215, 5 Sup. Ct. Rep. 826.

[2] See, for the distinction between the general regulation of commerce, which is under the exclusive control of Congress, and the local regulations which are mere aide to commerce, and are generally left to the States, Mobile *v.* Kimball, 102 U. S. 691, per *Field*, J., and cases, pp. 688–691, *ante*. [And see Harmon *v.* Chicago, 147 U. S. 396, 13 Sup. Ct. Rep. 306, and note thereto in 37 L. ed. U. S. 216. State may require intersecting railroads to establish facilities for interchange of traffic at junction points, and to establish joint rates via such points, even though interstate commerce be thereby affected. Wisconsin M. & P. R. Co. *v.* Jacobson, 179 U. S. 287, 21 Sup. Ct. Rep. 115, aff. 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389. A statute of the State of Kentucky with a long and short haul provision was held to apply to commerce within the State and not to contravene the commerce clause of the Federal Constitution, though the enforcement of the statute might in some measure affect commerce generally. But this effect is incidental, not direct. "Interference with the commercial power of the general government to be unlawful must be direct and not merely the incidental effect of the enforcement of the police power of the State." Louisville & N. Ry. Co. *v.* Kentucky, 183 U. S. 503, 22 Sup. Ct. Rep. 95, and cases cited in the opinion. The statute construed in Louisville & N. Ry. Co. *v.* Kentucky, just cited, was before the Federal Supreme Court again in Louisville & N. Ry. Co. *v.* Eubank, 184 U. S. 27, 22 Sup. Ct. Rep. 277, in which it is held that as applied to inter-state commerce the statute is invalid.] A State

under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars. Moreover, the regulations of commerce are usually, and in some cases must be, general and uniform for the whole country; while in some localities, State and local policy will demand peculiar regulations with reference to special and peculiar circumstances.

The State of Maryland passed an act requiring all importers of foreign goods, by the bale or package, &c., to take out a license, for which they should pay fifty dollars, and, in case of neglect or refusal to take out such license, subjected them to certain forfeitures and penalties. License laws are of two kinds: those which require the payment of a license fee by way of raising a revenue, and are therefore the exercise of the power of taxation; and those which are mere police regulations, and require the payment only of such license fee as will cover the expense of the license and of enforcing the regulation.[1] The Maryland act seems to fall properly within the former of these classes, and it was held void as in conflict with that provision of the Constitution which prohibits a State from laying any impost, &c., and also with the clause which declares that Congress shall have the power to regulate commerce. The reasoning of the court was this: Sale is the object of all importation of goods, and the power to allow importation must therefore imply the power to authorize the sale of the thing imported; that consequently a penalty inflicted for selling an article in the character of importer was in opposition to the act of Congress, which authorized importation; that a power to tax an article in the hands of the importer the instant it was landed was the same in effect as a power to tax it whilst entering the port; that consequently the law of Maryland was obnoxious to the

law may require all locomotive engineers to be examined and licensed, even those engaged in inter-state transportation. Such a law imposes no burden upon inter-state commerce, and is valid in the absence of Congressional regulation. Smith *v.* Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564. The same principle applies to an act requiring an examination of railroad employees for color blindness, to be paid for by the railroad company. Nashville, C. & St. L. Ry. Co. *v.* Alabama, 128 U. S. 96, 9 Sup. Ct. Rep. 28. *Contra*, as to payment by the company. Louisville & N. R. R. Co. *v.* Baldwin, 85 Ala. 619, 5 So. 311. Sunday trains may be forbidden by a State. State *v.* Railroad Co., 24 W. Va. 783. See also W. U. Tel. Co. *v.* Mayor, 38 Fed. Rep. 552. [A bridge spanning the Ohio river at Cincinnati and Covington is an instrument of inter-state commerce, and neither Ohio nor Kentucky has power to fix the tolls to be demanded for passage over it. Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 Sup. Ct. Rep. 1087.

[1] Ash *v.* People, 11 Mich. 347. See *ante*, p. 283. Also Dillon, Mun. Corp. §§ 291–294, and notes.

charge of unconstitutionalty, on the ground of its violating the two provisions referred to.[1] And a State law which required the master of every vessel engaged in foreign commerce to pay a certain sum to a State officer, on account of every passenger brought from a foreign country into the State, or before landing any alien passenger, was held void for similar reasons.[2] Nor can a State forbid the conduction from it of natural gas in pipes.[3]

On the other hand, a law of the State of New York was sustained which required, under a penalty, that the master of every vessel arriving from a foreign port should report to the mayor or recorder of the city of New York an account of his passengers; the object being to prevent New York from being burdened by an influx of persons brought thither in ships from foreign countries and the other States, and to that end to require a report of the names, places of birth, &c., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers.[4] And a State regulation of pilots and pilotage was held unobjectionable, though it was conceded that Congress had full power to make regulations on the same subject, which, however, it had not exercised.[5] These several

[1] Brown *v.* Maryland, 12 Wheat. 419. See Tiernan *v.* Rinker, 102 U. S. 123, and cases pp. 688–691, 846, *ante*. A State cannot enforce a penalty upon a telegraph company for failure to deliver a message sent from it to another State. Western U. Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 Sup. Ct. Rep. 1126. That a penalty may be imposed upon one selling from the original package oleomargarine colored to deceive, though brought from another State, such sale being prohibited by local law, see Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 604; [Plumley *v.* Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, and see French *v.* State, — Tex. Cr. App. —, 58 S. W. 1015, 52 L. R. A. 160; State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 52 L. R. A. 198.]

[2] Passenger Cases, 7 How. 283; People *v.* Compagnie Gén., 107 U. S. 59, 2 Sup. Ct. Rep. 87; Head Money Cases, 112 U. S. 580, 5 Sup. Ct. Rep. 247. See also Lin Sing *v.* Washburn, 20 Cal. 534, where a State law imposing a special tax on every Chinese person over eighteen years of age for each month of his residence in the State was held unconstitutional, as in conflict with the power of Congress over commerce. In Canada, provincial legislation on commerce is void; the authority being with the Dominion Parliament. Severn *v.* The Queen, 2 Sup. Ct. Rep. (Ont.) 70.

[3] State *v.* Indiana & O. G. & M. Co., 120 Ind. 575, 22 N. E. 778; [Manufacturer's Gas & Oil Co. *v.* Indiana Natural Gas & O. Co., 156 Ind. 679, 59 N. E. 169, 60 N. E. 1080, 53 L. R. A. 134.]

[4] City of New York *v.* Miln, 11 Pet. 192. See also State *v.* The Constitution, 42 Cal. 578. [But an act which requires a carrier who brings into the State a non-resident, who within one year thereafter becomes a pauper, to remove him if so requested by the State officers, or to pay for his support, is void. Bangor *v.* Smith, 83 Me. 422, 22 Atl. 379, 13 L. R. A. 686, and note.]

[5] Cooley *v.* Board of Wardens, 12 How. 299. See Barnaby *v.* State, 21 Ind. 450; Steamship Co. *v.* Joliffe, 2 Wall. 450; Cisco *v.* Roberts, 36 N. Y. 292; Wilson *v.* McNamee, 102 U. S. 572. As to State control of harbors, see Mobile *v.* Kimball, 102 U. S. 691. [Until Congress acts in the matter, there is no Federal objection to a city's regulation of the speed of railway trains (even when they are engaged in inter-state commerce) within the city

cases, and the elaborate discussions with which the decisions in each were accompanied, together with the leading case of Gibbons *v.* Ogden,[1] may be almost said to exhaust the reasoning upon the subject, and to leave little to be done by those who follow beyond the application of such rules for classification as they have indicated.

Sunday Laws. We have elsewhere referred to cases in which laws requiring all persons to refrain from their ordinary callings on the first day of the week have been held not to encroach upon the religious liberty of those citizens who do not observe that day as sacred. Neither are they unconstitutional as a restraint upon trade and commerce, or because they have the effect to destroy the value of a lease of property to be used on that day, or to make void a contract for Sunday services.[2] There can no longer be any question, if any there ever was, that such laws may be supported as regulations of police.[3]

limits. Erb *v.* Morasch, 177 U. S. 584, 20 Sup. Ct. Rep. 819. But a city cannot levy a license tax upon tugs engaged in towing vessels engaged in inter-state commerce. Harmon *v.* Chicago, 147 U. S. 396, 13 Sup. Ct. 306; and see note to this case in 37 L. ed. U. S. 216, upon State control of inter-state commerce.]

[1] 9 Wheat. 1. And see Gilman *v.* Philadelphia, 3 Wall. 713.

[2] Lindenmuller *v.* People, 33 Barb. 548. Forbidding Sunday transportation of freight is not void though incidentally affecting inter-state traffic. State *v.* Railroad Co., 24 W. Va. 783. [This in the absence of Congressional regulation. Hennington *v.* Georgia, 163 U. S. 209, 16 Sup. Ct. Rep. 1086, aff. 90 Ga. 396, 17 S. E. 1009. See also Norfolk & W. R. Co. *v.* Com., 93 Va. 749, 24 S. E. 837, 34 L. R. A. 105; Dugan *v.* State, 125 Ind. 130, 25 N. E. 171, 9 L. R. A. 321.] And see *Ex parte* Andrews, 18 Cal. 678; *Ex parte* Bird, 19 Cal. 130; *ante*, p. 688, and notes.

[3] Specht *v.* Commonwealth, 8 Pa. St. 312; Commonwealth *v.* Jeandelle, 2 Grant, 506; City Council *v.* Benjamin, 2 Strob. 508; State *v.* Ambs, 20 Mo. 214; St. Louis *v.* Cafferata, 24 Mo. 94; Kurtz *v.* People, 33 Mich. 279; Vogelesong *v.* State, 9 Ind. 112; Schlict *v.* State, 31 Ind. 246; Foltz *v.* State, 33 Ind. 215; Shover *v.* State, 10 Ark. 259; Bloom *v.* Richards, 2 Ohio St. 387; Lindenmuller *v.* People, 33 Barb. 548; *Ex parte* Andrews; 18 Cal. 678; *Ex parte* Bird, 19 Cal. 130; Hudson *v.* Geary, 4 R. I. 485; Frolickstein *v.* Mobile, 40 Ala. 725; State *v.* Barker, 18 Vt. 195; Commonwealth *v.* Colton, 8 Gray, 488; Commonwealth *v.* Hyneman, 101 Mass. 30; Commonwealth *v.* Has, 122 Mass. 40; Augusta, &c. R. R. Co. *v.* Renz, 55 Ga. 126; [State *v.* Hogriever, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504 (prohibiting playing baseball where fee is charged); State *v.* Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854 (prohibiting playing baseball).] The statutes forbidding ordinary employments on Sunday make exceptions for cases of necessity and charity. The execution of a will is not "work, labor, or business," and therefore not forbidden by the Sunday laws. Bennet *v.* Brooks, 9 Allen, 118; George *v.* George, 47 N. H. 27. As to what are works of necessity or charity, see Stanton *v.* Metropolitan R. R. Co., 14 Allen, 485; McClary *v.* Lowell, 44 Vt. 116; Logan *v.* Matthews, 6 Pa. St. 417; Connolly *v.* Boston, 117 Mass. 64, 19 Am. Rep. 396; Yonoski *v.* State (Ind.), 5 Am. & Eng. R. R. Cas. 40, and note, p. 42, where the authorities are collected; Commonwealth *v.* Louisville, &c. R. R. Co., 80 Ky. 291; Stone *v.* Graves, 145 Mass. 353, 13 N. E. 906; Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228; Ungericht *v.* State, 119 Ind. 319, 21 N. E. 1082; Hennersdorf *v.* State, 25 Tex. App 597, 8 S. W. 926; Nelson *v.* State, 25 Tex. App. 599, 8 S. W. 927;

Law of the Road. The highways within and through a State are constructed by the State itself, which has full power to provide all proper regulations of police to govern the action of persons using them, and to make from time to time such alterations in these ways as the proper authorities shall deem proper.[1] A very common regulation is that parties meeting shall turn to the right; the propriety of which none will question. So the speed of travel may be regulated with a view to safe use and general protection, and to prevent a public nuisance.[2] So beasts may be prohibited from running at large, under the penalty of being seized and sold.[3] And it has been held competent under the same power to require the owners of urban property to construct and keep in repair and free from obstructions the sidewalks in front of it, and in case of their failure to do so to authorize the public authorities to do it at the expense of the property,[4] the courts distinguishing this from

Handy *v.* St. Paul, &c. Pub. Co., 41 Minn. 188, 42 N. W. 872; Splane *v.* Com., — Pa. St. —, 12 Atl. 431; [Petit *v.* Minnesota, 177 U. S. 164, 20 Sup. Ct. Rep. 666, and note on "Constitutionality of statutes making it unlawful for barbers to carry on thei business on Sunday," in 44 L. ed. U. S. 716. See also People *v.* Bellet, 99 Mich. 151, 57 N. W. 1094, 22 L. R. A. 696; Judefind *v.* State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721, and note; Quarles *v.* State, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192, and note; Com. *v.* Waldman, 140 Pa. 89, 21 Atl. 248, 11 L. R. A. 563; *Ex parte* Kennedy, — Tex. Cr. —, 56 S. W. 921, 51 L. R. A. 270.]

[1] As to the right to change the grade of a street from time to time without liability to parties incidentally injured, see *ante*, p. 295.

[2] Commonwealth *v.* Worcester, 3 Pick. 462; Commonwealth *v.* Stodder, 2 Cush. 562; Day *v.* Green, 4 Cush. 433; People *v.* Jenkins, 1 Hill, 469; People *v.* Roe, 1 Hill, 470; Washington *v.* Nashville, 1 Swan, 177; State *v.* Foley, 31 Iowa, 527; [State may regulate the placing of electric wires in streets and subways. New York *v.* Squire, 145 U. S. 175, 12 Sup. Ct. Rep. 880, aff. 107 N. Y. 593, 14 N. E. 820, 14 Daly, 154, 166.]

[3] McKee *v.* McKee, 8 B. Monr. 433; Municipality *v.* Blanc, 1 La. Ann. 385; Whitfield *v.* Longest, 6 Ired. 268; Gosselink *v.* Campbell, 4 Iowa, 296; Roberts *v.* Ogle, 30 Ill. 459; Commonwealth *v.* Curtis, 9 Allen, 266; Brophy *v.* Hyatt, 10 Col. 223, 15 Pac. 399; [Haigh *v.* Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131.] This applies to beasts of non-residents. Mayor of Cartersville *v.* Lanham, 67 Ga. 753; Rose *v.* Hardie, 98 N. C. 44, 4 S. E. 41. The payment of a fine by the owner cannot be required as a condition of their release, under general charter power of this kind. Wilcox *v.* Hemming, 58 Wis. 144, 15 N. W. 435.

[4] Godard, Petitioner, 16 Pick. 504; Bonsall *v.* Mayor of Lebanon, 19 Ohio, 418; Paxson *v.* Sweet, 1 Green (N. J.), 196; Lowell *v.* Hadley, 8 Met. 180; Washington *v.* Mayor, &c. of Nashville, 1 Swan, 177; Mayor, &c. *v.* Maberry, 6 Humph. 368; Woodbridge *v.* Detroit, 8 Mich. 274, 309, per *Christiancy*, J.; Matter of Dorrance St., 4 R. I. 230; Deblois *v.* Barker, 4 R. I. 445; Hart *v.* Brooklyn, 36 Barb. 226; Sands *v.* Richmond, 31 Gratt. 571, 31 Am. Rep. 742; Palmer *v.* Way, 6 Col. 106. And see Macon *v.* Patty, 57 Miss. 378, 34 Am. Rep. 451; Smith *v.* Kingston, 120 Pa. St. 357, 14 Atl. 170. In Minnesota this right is exercised under the taxing power. Hennepin Co. *v.* Bartleson, 37 Minn. 343, 34 N. W. 222. In Arkansas the duty may be enforced by a fine. James *v.* Pine Bluff, 49 Ark. 199, 4 S. W. 760. Compare Port Huron *v.* Jenkinson, 77 Mich. 414, 43 N. W. 923. In Pennsylvania it has been held competent to require the owners of city lots, in front of which sewers are constructed, to pay the expense thereof in proportion to the street front. Philadelphia *v.* Tryon, 35

taxation, on the ground of the peculiar interest which those upon whom the duty is imposed have in its performance, and their peculiar power and ability to perform it with the promptness which the good of the community requires.[1]

Navigable Waters. Navigable waters are also a species of public highway, and as such come under the control of the States. The term "navigable," at the common law, was only applied to those waters where the tide ebbed and flowed, but all streams which were of sufficient capacity for useful navigation, though not called navigable, were public, and subject to the same general rights which the public exercised in highways by land.[2] In this country there has been a very general disposition to consider all streams public which are useful as channels for commerce wherever they are found of sufficient capacity to float to market the products of the mines, of the forests, or of the tillage of the country through which they flow.[3] And if a stream is of sufficient capacity for the floating of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too dry and shallow for the purpose. "The capacity of a stream, which generally appears by the nature, amount, importance, and necessity of the business

Pa. St. 401; Stroud *v.* Philadelphia, 61 Pa. St. 255. And see Boston *v.* Shaw, 1 Met. 130; Hildreth *v.* Lowell, 11 Gray, 345; Cone *v.* Hartford, 28 Conn. 363; State *v.* Jersey City, 5 Dutch. 441. [And a street-railway company may be required to pave the street for a reasonable width along its tracks, even though the power to make such requirement was not reserved when the company was authorized to occupy the streets with its tracks. Sioux City St. R. Co. *v.* Sioux City, 138 U. S. 98, 11 Sup. Ct. Rep. 226; Storrie *v.* Houston City St. R. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716. Upon liability of street-railways for paving assessments, see note to 46 L. R. A. 193.]

[1] See especially the case of Godard, Petitioner, 16 Pick. 504, for a clear and strong statement of the grounds on which such legislation can be supported. Also Dillon, Mun. Corp. § 637; Cooley on Taxation, 398. In Illinois it seems not to be competent to compel the building of sidewalks or the keeping of them free of snow by the owners of abutting lots under the police power. Ottawa *v.* Spencer, 40 Ill. 211; Gridley *v.* Bloomington, 88 Ill. 554, 30 Am. Rep. 566. [Likewise in New Hampshire. State *v.* Jackman, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438.]

[2] Lorman *v.* Benson, 8 Mich. 18; Morgan *v.* King, 18 Barb. 277.

[3] Brown *v.* Chadbourne, 31 Me. 9; Knox *v.* Chaloner, 42 Me. 150; Lancey *v.* Clifford, 54 Me. 487; Gerrish *v.* Brown, 51 Me. 256; Scott *v.* Willson, 3 N. H. 321; Shaw *v.* Crawford, 10 Johns. 236; Munson *v.* Hungerford, 6 Barb. 265; Browne *v.* Scofield, 8 Barb. 239; Morgan *v.* King, 18 Barb. 284, 30 Barb. 9, and 35 N. Y. 454; Cates *v.* Wadlington, 1 McCord, 580; Commonwealth *v.* Chapin, 5 Pick. 199; Moore *v.* Sanborne, 2 Mich. 519; Lorman *v.* Benson, 8 Mich. 18; Depew *v.* Board of Commissioners, &c., 5 Ind. 8; Board of Commissioners *v.* Pidge, 5 Ind. 13; Stuart *v.* Clark, 2 Swan, 9; Elder *v.* Barnes, 6 Humph. 358; Dalrymple *v.* Mead, 1 Grant's Cases, 197; Commissioners of Homochitto River *v.* Withers, 29 Miss. 21; Rhodes *v.* Otis, 33 Ala. 578; Walker *v.* Allen, 72 Ala. 456; Little Rock, M. &c. Ry. Co. *v.* Brooks, 39 Ark. 403; McManus *v.* Carmichael, 3 Iowa, 1; Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621.

done upon it, must be the criterion. A brook, although it might carry down saw-logs for a few days, during a freshet, is not therefore a public highway. But a stream upon which and its tributaries saw-logs to an unlimited amount can be floated every spring, and for the period of from four to eight weeks, and for the distance of one hundred and fifty miles, and upon which unquestionably many thousands will be annually transported for many years to come, if it be legal so to do, has the character of a public stream *for that purpose.* So far the purpose is useful for trade and commerce, and to the interests of the community. The floating of logs is not mentioned by Lord Hale [in De Jure Maris], and probably no river in Great Britain was, in his day, or ever will be, put to that use. But here it is common, necessary, and profitable, especially while the country is new; and if it be considered a lawful mode of using the river, it is easy to adapt well-settled principles of law to the case. And they are not the less applicable because this particular business may not always continue; though if it can of necessity last but a short time, and the river can be used for no other purpose, that circumstance would have weight in the consideration of the question."[1] But if the stream was not thus useful in its natural condition, but has been rendered susceptible of use by the labors of the owner of the soil, the right of passage will be in the nature of a private way, and the public do not acquire a right to the benefit of the owner's labor, unless he sees fit to dedicate it to their use.[2]

All navigable waters are for the use of all the citizens; and there cannot lawfully be any exclusive private appropriation of any portion of them.[3] The question what is a navigable stream

[1] Morgan *v.* King, 18 Barb. 288; Moore *v.* Sanborne, 2 Mich. 519; Brown *v.* Chadbourne, 31 Me. 9; Treat *v.* Lord, 42 Me. 552; Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621; Bucki *v.* Cone, 25 Fla. 1, 6 So. 160; Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60. Compare Hubbard *v.* Bell, 54 Ill. 110; Haines *v.* Hall, 17 Oreg. 165, 20 Pac. 831. [That a State may create boom companies, authorize them to improve waterways and to take tolls for floating logs through them in booms, even though such regulations indirectly affect inter-state commerce (there being no Congressional regulations hereon), and compel such companies to submit to official inspection of their booms and to pay for such inspection, see Lindsay & P. Co. *v.* Mullen, 176 U. S. 126, 20 Sup. Ct. Rep. 325. Whether a log boom corresponds to the requirements of a State statute authorizing log booms, and is thus exempt from the general prohibition of obstructions "not affirmatively authorized by law," as contained in the river and harbor act of 1890, is a Federal question. United States *v.* Bellingham Bay Boom Co., 176 U. S. 211, 20 Sup. Ct. Rep. 343. Upon obstruction of navigable streams by log booms, see note attached to this case in 44 L. ed. U. S. 437.]

[2] Wadsworth's Adm'r *v.* Smith, 11 Me. 278; Ward *v.* Warner, 8 Mich. 508.

[3] Commonwealth *v.* Charlestown, 1 Pick. 180; Kean *v.* Stetson, 5 Pick. 492; Arnold *v.* Mundy, 6 N. J. 1; Bird *v.* Smith, 8 Watts, 434. One cannot acquire a prescriptive right to impede floatage. Collins *v.* Howard, 65 N. H. 190, 18 Atl. 794. They are equally for the use of the pub-

would seem to be a mixed question of law and fact;[1] and though it is said that the legislature of the State may determine whether a stream shall be considered a public highway or not,[2] yet if in fact it is not one, the legislature cannot make it so by simple declaration, since, if it is private property, the legislature cannot appropriate it to a public use without providing for compensation.[3]

The general right to control and regulate the public use of navigable waters is unquestionably in the State; but there are certain restrictions upon this right growing out of the power of Congress over commerce. Congress is empowered to regulate commerce with foreign nations and among the several States; and wherever a river forms a highway upon which commerce is conducted with foreign nations or between States, it must fall under the control of Congress, under this power over commerce.(*a*) The circumstance, however, that a stream is navigable, and capable of being used for foreign or inter-state commerce, does not exclude regulation by the State, if in fact Congress has not exercised its power in regard to it;[4] or having exercised it, the State law does

lie in the winter when covered with ice; and one who cuts a hole in the ice in an accustomed way, by means of which one passing upon the ice is injured, has been held liable to an action for the injury. French *v.* Camp, 18 Me. 433. But this rule is now modified, at least as to the Penobscot at Bangor, upon the ground that the right of ice harvesting is at such a place superior to that of travel. Woodman *v.* Pitman, 79 Me. 456, 10 Atl. 321. An obstruction to a navigable stream is a nuisance which any one having occasion to use it may abate. Inhabitants of Arundel *v.* McCulloch, 10 Mass. 70; State *v.* Moffett, 1 Greene (Iowa), 247; Selman *v.* Wolfe, 27 Tex. 68; Larson *v.* Furlong, 63 Wis. 323, 23 N. W. 584.

[1] See Treat *v.* Lord, 42 Me. 552; Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621; Olive *v.* State, 86 Ala. 88, 5 So. 653.

[2] Glover *v.* Powell, 10 N. J. Eq. 211; American River Water Co. *v.* Amsden, 6 Cal. 443; Baker *v.* Lewis, 33 Pa. St. 301.

[3] Morgan *v.* King, 18 Barb. 284, 35 N. Y. 454.

[4] Willson *v.* Black Bird Creek Marsh Co., 2 Pet. 245. In this case it was held that a State law permitting a creek navigable from the sea to be dammed so as to exclude vessels altogether, was not opposed to the Constitution of the United States, there being no legislation by Congress with which it would come in conflict. And see Wheeling Bridge Case, 13 How. 518, and 18 How. 421. By the ordinance of 1787 and the enabling acts passed at the admission of several States, it was provided that navigable waters within them should be "common highways and forever free." This has been

(*a*) [Permission granted by Congress to use waters for irrigation of arid lands and in aid of mining industry, does not include right to use waters above point of navigability to such an extent as seriously to interfere with navigability below that point. United States *v.* Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. Rep. 770, rev. 9 N. M. 292, 51 Pac. 674. But subject to such qualification, the rights of riparian owners are determined by the State law. St. Anthony Falls Water Power Co. *v.* Bd. of Water Comm'rs, 168 U. S. 349, 18 Sup. Ct. Rep. 157. Where the waters are capable of navigation only between points within the State, the State control is complete. Com. *v.* King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536. State may compel construction of fishways in dams. State *v.* Meek, 112 Iowa, 338, 84 N. W. 3, 51 L. R. A. 414.]

not come in conflict with the congressional regulations, or interfere with the rights which are permitted by them.

The decisions of the federal judiciary in regard to navigable waters seem to have settled the following points: —

1. That no State can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of Congress,[1] since such a grant would come directly in conflict with the power which Congress has exercised. But a State law granting to an individual an exclusive right to navigate the upper waters of a river, lying wholly within the limits of the State, separated from tide water by falls impassable for purposes of navigation, and not forming a part of any continuous track of commerce between two or more States, or with a foreign country, does not come within the reason of this decision, and cannot be declared void as opposed to the Constitution of the United States.[2]

repeatedly held to refer not to physical obstructions but to the imposition of duties for the right to navigate them, that is, to political regulations hampering the freedom of commerce. Cardwell *v.* Amer. Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423; Hamilton *v.* Vicksburg, &c. R. R. Co., 119 U. S. 280, 7 Sup. Ct. Rep. 206; Huse *v.* Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313; Sands *v.* Manistee R. Imp. Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113; Willamette Iron B. Co. *v.* Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811. In the last case, *Bradley, J.*, says: "The clause in question cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the federal courts the right to hear and determine, according to federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and inter-state commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet when Congress chooses to act, it is not concluded by anything that the States have done from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made except in conformity with such regulations as it may impose." [States may improve the navigability of waters accessible to inter-state commerce in the absence of repugnant Congressional legislation. Stockton *v.* Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.]

[1] Gibbons *v.* Ogden, 9 Wheat. 1. The case was the well-known historical one, involving the validity of the grant by the State of New York to Robert Fulton and his associates of the exclusive right to navigate the waters of that State with vessels propelled by steam. This subject is further considered in Gilman *v.* Philadelphia, 3 Wall. 713; and in The Daniel Ball, 10 Wall. 557, in which the meaning of the term "navigable waters of the United States" is defined. And see Craig *v.* Kline, 65 Pa. St. 399, 3 Am. Rep. 636.

[2] Veazie *v.* Moor, 14 How. 568. The exclusive right granted in this case was to the navigation of the Penobscot River above Old Town, which was to continue for twenty years, in consideration of improvements in the navigation to be made by the grantees. Below Old Town there were a fall and several dams on the river, rendering navigation from the sea impossible. And see McReynolds *v.* Smallhouse, 8 Bush, 447. It is no infraction of the public right for a city to permit individuals to put up sheds upon its piers, thereby excluding the general public, in

2. The States have the same power to improve navigable waters which they possess over other highways;[1] and where money has been expended in making such improvement, it is competent for the State to impose tolls on the commerce which passes through and has the benefit of the improvement, even where the stream is one over which the regulations of commerce extend.[2]

3. The States may authorize the construction of bridges over navigable waters, for railroads as well as for every other species of highway, notwithstanding they may to some extent interfere with the right of navigation.[3] If the stream is not one which is subject to the control of Congress, the State law permitting the erection cannot be questioned on any ground of public inconvenience. The legislature must always have power to determine what public ways are needed, and to what extent the accommodation of travel over one way must yield to the greater necessity for another. But if the stream is one over which the regulations of Congress extend, the question is somewhat complicated, and it becomes necessary to consider whether such bridge will interfere with the regulations or not. But the bridge is not necessarily unlawful, because of constituting, to some degree, an obstruction to commerce, if it is properly built, and upon a proper plan, and if the general traffic of the country will be aided rather

furtherance of commerce. People *v.* Baltimore, &c. R. R. Co., 117 N. Y. 150, 22 N. E. 1026.

[1] The improvement of a stream by State authority will give no right of action to an individual incidentally injured by the improvement. Zimmerman *v.* Union Canal Co., 1 W. & S. 346. See Thunder Bay, &c. Co. *v.* Speechley, 31 Mich. 336.

[2] Huse *v.* Glover, 119 U. S. 543, 7 Sup. Ct. Rep. 313; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 Sup. Ct. Rep. 113; Palmer *v.* Cuyahoga Co., 3 McLean, 226; Kellogg *v.* Union Co., 12 Conn. 7; Thames Bank *v.* Lovell, 18 Conn. 500; McReynolds *v.* Smallhouse, 8 Bush, 447; Illinois, &c. Co. *v.* Peoria Bridge, 38 Ill. 467; Benjamin *v.* Manistee, &c. Co., 42 Mich. 628, 4 N. W. 483; Nelson *v.* Cheboygan Nav. Co., 44 Mich. 7, 5 N. W. 998, 38 Am. Rep. 222; Morris *v.* State, 62 Tex. 728; Com'rs Sinking Fund *v.* Green, &c. Nav. Co., 79 Ky. 73.

[3] See Commonwealth *v.* Breed, 4 Pick. 460; Depew *v.* Trustees of W. and E. Canal, 5 Ind. 8; Dover *v.* Portsmouth Bridge, 17 N. H. 200; Illinois, &c. Co. *v.* Peoria Bridge, 38 Ill. 467. Under the Wisconsin Constitution a stream wholly within the State may not be completely obstructed: Sweeney *v.* Chicago, &c. Ry. Co., 60 Wis. 60, 18 N. W. 756; but one between it and Minnesota may be temporarily, by authority of the latter State. Keator L. Co. *v.* St. Croix B. Corp., 72 Wis. 62, 38 N. W. 529. [And a State may declare a bridge which obstructs navigation upon a river wholly within the State a nuisance, and order its removal or modification, although the approval of the Secretary of War may have been given, under authority of act of Congress, for the erection of the bridge. Lake Shore & M. S. R. Co. *v.* Ohio, 165 U. S. 365, 17 Sup. Ct. Rep. 357. But a State has no power to regulate tolls upon a bridge used solely for inter-state commerce. Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 Sup. Ct. Rep. 1087.]

than impeded by its construction. There are many cases where a bridge over a river may be vastly more important than the navigation; and there are other cases where, although the traffic upon the river is important, yet an inconvenience caused by a bridge with draws would be much less seriously felt by the public, and be a much lighter burden upon trade and travel, than a break in a line of railroad communications necessitating the employment of a ferry. In general terms it may be said that the State may authorize such constructions, provided they do not constitute material obstructions to navigation; but whether they are to be regarded as material obstructions or not is to be determined in each case upon its own circumstances. The character of the structure, the facility afforded for vessels to pass it, the relative amount of traffic likely to be done upon the stream and over the bridge, and whether the traffic by rail would be likely to be more incommoded by the want of the bridge than the traffic by water with it, are all circumstances to be taken into account in determining this question. It is quite evident that a structure might constitute a material obstruction on the Ohio or the Mississippi, where vessels are constantly passing, which would be unobjectionable on a stream which a boat only enters at intervals of weeks or months. The decision of the State legislature that the erection is not an obstruction is not conclusive; but the final determination will rest with the federal courts, who have jurisdiction to cause the structure to be abated, if it be found to obstruct unnecessarily the traffic upon the water. Parties constructing the bridge must be prepared to show, not only the State authority and that the plan and construction are proper, but also that it accommodates more than it impedes the general commerce.[1]

[1] See this subject fully considered in the Wheeling Bridge Case, 13 How. 518. See also Columbus Insurance Co. *v.* Peoria Bridge Co., 6 McLean, 70; Same *v.* Curtenius, 6 McLean, 209; Jolly *v.* Terre Haute Drawbridge Co., 6 McLean, 237; United States *v.* New Bedford Bridge, 1 W. & M. 401; Commissioners of St. Joseph Co. *v.* Pidge, 5 Ind. 13.

It is, perhaps, doubtful in view of late decisions of the same court whether the Wheeling Bridge Case, involving the Ohio River, is to be given as broad an effect as has sometimes been supposed. It has several times since its decision been held that, in the absence of federal regulation, a bridge may be built under State authority across a river wholly within it, though it be capable of use in inter-state commerce and such use is thereby materially obstructed. Cardwell *v.* Amer. Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423; Hamilton *v.* Vicksburg, &c. R. R. Co., 119 U. S. 280, 7 Sup. Ct. Rep. 206; Escanaba Co. *v.* Chicago, 107 U. S. 678, 2 Sup. Ct. Rep. 185; Willamette Iron B. Co. *v.* Hatch, 125 U. S. 1, 8 Sup. Ct. Rep. 811. In this last case, a quotation from which is on p. 864, *supra*, though the decision is carefully limited to the case involved, — a river wholly within the State of Oregon, but leading to a port of entry, — the ruling in the Wheeling Bridge Case is also closely limited to the facts arising in it, and the case at bar distinguished. In the Wheeling case, it is said the court applied principles of international law,

4. The States may lawfully establish ferries over navigable waters, and grant licenses for keeping the same, and forbid unlicensed persons from running boats or ferries without such license. This also is only the establishment of a public way, and it can make no difference whether or not the water is entirely within the State, or, on the other hand, is a highway for inter-state or foreign commerce.[1]

5. The States may also authorize the constructions of dams across navigable waters; and where no question of federal authority is involved, the legislative permission to erect a dam will exempt the structure from being considered a nuisance,[2] and it would seem also that it must exempt the party constructing it from liability to any private action for injury to navigation, so long as he keeps within the authority granted, and is guilty of no negligence.[3]

6. To the foregoing it may be added that the State has the same power of regulating the speed and general conduct of ships or other vessels navigating its water highways, that it has to regulate the speed and conduct of persons and vehicles upon the ordinary highway; subject always to the restriction that its

and passed on the force of a pre-constitutional compact of Virginia, and from the decision no inference is to be drawn that the courts of the United States claim authority to regulate all bridges below ports of entry, and to treat all State legislation in such cases as void.

[1] Conway *v.* Taylor's Ex'r, 1 Black, 603; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 Sup. Ct. Rep. 257; Chilvers *v.* People, 11 Mich. 43; Marshall *v.* Grimes, 41 Miss. 27; [Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.] In these cases the State license law was sustained as against a vessel enrolled and licensed under the laws of Congress. And see Fanning *v.* Gregorie, 16 How. 524. But the State may not tax the capital stock of a ferry company of another State, whose only business within the former State is discharging and receiving persons and property passing between the States. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826. Under a power to amend the charter of a ferry company, the legislature may regulate the tolls chargeable by it. Parker *v.* Metropolitan, &c. R. R. Co., 109 Mass. 506. [But not the tolls chargeable on inter-state commerce. See Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 Sup. Ct. Rep. 1087.] Ferry rights may be so regulated as to rates of ferriage, and ferry franchises and privileges so controlled in the hands of grantees and lessees, that they shall not be abused to the serious detriment or inconvenience of the public. Where this power is given to a municipality, it may be recalled at any time. People *v.* Mayor, &c. of New York, 32 Barb. 102.

[2] Willson *v.* Black Bird Creek Marsh Co., 2 Pet. 245; Brown *v.* Commonwealth, 3 S. & R. 273; Bacon *v.* Arthur, 4 Watts, 437; Hogg *v.* Zanesville Co., 5 Ohio, 410; Neaderhouser *v.* State, 28 Ind. 257. And see Flanagan *v.* Philadelphia, 42 Pa. St. 219; Depew *v.* Trustees of W. & E. Canal, 5 Ind. 8; Woodburn *v.* Kilbourne Manuf. Co., 1 Bissell, 516, 1 Abb. U. S. 158; Hinchman *v.* Patterson, &c. R. R., 17 N. J. Eq. 75; Stoughton *v.* State, 5 Wis. 291.

[3] See Bailey *v.* Philadelphia, &c. R. R. Co., 4 Harr. 389; Roush *v.* Walter, 10 Watts, 86; Parker *v.* Cutler Mill Dam Co., 21 Me. 353; Zimmerman *v.* Union Canal Co., 1 W. & S. 346; Depew *v.* Trustees of W. & E. Canal, 5 Ind. 8.

regulations must not come in conflict with any regulations established by Congress for foreign commerce or that between the States.[1]

Levees and Drains. Where, under legislative authority, the construction of levees and embankments is required, to protect from overflow and destruction considerable tracts of country, assessments are commonly levied for the purpose on the owners of lands lying on or near the streams or bodies of water from which the danger is anticipated. But if the construction should be imposed as a duty upon residents or property owners in the neighborhood, so that they should be compelled to turn out periodically or in emergencies, and give personal attention and labor to the construction of the necessary defences against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a regulation as one of police, or of resting it upon the same foundations which sustain the regulations in cities, by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own protection exclusively, but for the protection of the general public.[2] Laws imposing on the owners the duty of draining large tracts of land which in their natural condition are unproductive, and are a source of danger to health, may be enacted under the same power,[3] though in general the taxing power is employed for the purpose;[4] and sometimes land is appropriated under the eminent domain.[5]

[1] People *v.* Jenkins, 1 Hill, 469; People *v.* Roe, 1 Hill, 470. As to the right of regulation in general, see Harrigan *v.* Lumber Co., 129 Mass. 580, 37 Am. Rep. 387. As to the right to regulate fisheries in navigable waters, see Gentile *v.* State, 29 Ind. 409; Phipps *v.* State, 22 Md. 380; People *v.* Reed, 47 Barb. 235; Drew *v.* Hilliker, 56 Vt. 641; Chambers *v.* Church, 14 R. I. 398.

[2] Cooley on Taxation, 401, 402. See State *v.* Newark, 27 N. J. 185, 194, per *Elmer*, J.; Crowley *v.* Copley, 2 La. Ann. 329. In Pennsylvania it has been held that the State cannot, as a measure of police, compel the owner of lands bounded on inland tide-water to construct embankments to exclude the natural flow of the water, but that where the State constructs them at its own expense, and leaves them in possession of the owner, it may impose on him the duty of repair. Philadelphia *v.* Scott, 81 Pa. St. 80.

[3] See State *v.* City Council of Charleston, 12 Rich. 702, 733; Wurts *v.* Hoagland, 114 U. S. 606, 5 Sup. Ct. Rep. 1086. The taking of property for drainage purposes is in the exercise of this power. Winslow *v.* Winslow, 95 N. C. 24. Under it the cost of such an improvement made by the public authorities may be imposed upon the property benefited according to benefits. Bryant *v.* Robbins, 70 Wis. 258, 35 N. W. 545; Donnelly *v.* Decker, 58 Wis. 461, 17 N. W. 389. It is competent to require a lot-owner to fill up at his own expense a lot which otherwise would become a nuisance. Nickerson *v.* Boston, 131 Mass. 306.

[4] Reeves *v.* Treasurer of Wood Co., 8 Ohio St. 333; Sessions *v.* Crunkilton, 20 Ohio St. 349; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495; McGehee *v.* Mathis, 21 Ark. 40; Yeatman *v.* Crandall, 11 La. Ann. 220; Scuffletown Fence Co. *v.* McAllister, 12 Bush, 312; Davidson *v.* New Orleans, 96 U. S. 97.

[5] Commissioners who are empowered to straighten a river to protect a country against inundation are not liable person-

Regulations of Civil Rights and Privileges. Congress, to give full effect to the fourteenth amendment to the federal Constitution, passed an act in 1875, which provided that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[1] As the general power of police is in the States, and not in the federal government, the power of Congress to make so sweeping a provision may possibly be brought in question;[2] but as the States have undoubted right to legislate for the purpose of securing impartiality in the accommodations afforded by innkeepers and common carriers, and as the proprietors of theatres and other places of public amusement are always subject to the license and regulation of the law, a corresponding enactment by the State would seem to be competent, and has been sustained as a proper regulation of police.[3]

ally for incidental injuries to individuals. Neither is there any claim against the public. Green *v.* Swift, 47 Cal. 536; Green *v.* State, 73 Cal. 29, 11 Pac. 632, 14 Pac. 610.

[1] Laws of 1875, c. 114.

[2] In 1883 the act was held unconstitutional. The Fourteenth Amendment, says *Bradley*, J., does not "invest Congress with power to legislate upon subjects which are within the domain of State legislation, but to provide modes of relief against State legislation or State action of the kinds referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment." Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18.

[3] Donnell *v.* State, 48 Miss. 661. [A State may require railroads operating wholly within its borders to furnish separate passenger cars or separate compartments in a single passenger car for white persons and for negroes, and may make it a criminal offence for a person of one race to occupy the car or compartment set apart for the use of the other. Plessy *v.* Ferguson, 163 U. S. 537, 16 Sup. Ct. Rep. 1138, aff. 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639. And it seems that a railroad engaged in inter-state commerce may be compelled to comply with such regulations so far as its domestic traffic is concerned. Chesapeake & O. R. Co. *v.* Kentucky, 179 U. S. 388, 21 Sup. Ct. Rep. 101. That carriers of passengers may of their own motion make similar regulations, see Chilton *v.* St. Louis & I. M. R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269. See also Anderson *v.* Louisville & N. Ry. Co., 91 Tenn. 44, 17 S. W. 803. In Younger *v.* Judah, 111 Mo. 303, 19 S. W. 1109, 33 Am. St. 527, 16 L. R. A. 558, it was held that the proprietor of a theatre might, in the absence of a State statute forbidding, prohibit colored persons from attending his theatre, except they took seats in the balcony. The principle applied was that under the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. Rep. 18; the Fourteenth Amendment did not control the conduct of private persons, but the action of the State, and was not applicable to a regulation established by a private person for the conduct of his business though of a *quasi* public character. In Cisco *v.* School Board, 161 N. Y. 598,

Regulation of Business Charges. In the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country, and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty. It has nevertheless been conceded that in some cases this might be done, and the question of the bounds to legislative power has been made prominent in what are known as the Chicago Warehouse Cases. The legislature of Illinois, on the supposition that warehouse charges at Chicago were excessive and unfair, undertook to limit them to a maximum. They also required warehousemen to take out licenses and observe various regulations, which are not important here, and imposed certain penalties for a refusal to observe the statute. The validity of the legislation was affirmed by the State court, which overruled various objections made on constitutional grounds, among which was, that in effect it deprived warehousemen of their property without due process of law. The warehousemen denied wholly the right of the legislature to prescribe charges for private services, or for the use of private property, and it was urged by them that, if admitted at all, no bounds could be set to it. The court, in sustaining the power, placed it upon the same ground with the right to regulate the charges of hackmen, draymen, public ferrymen, and public millers.[1] The case being removed to the federal Supreme Court, the decision of the State court was affirmed, and the principle fully approved. The ground of the decision appears to be that the employment of these warehousemen is a public or *quasi* public employment; that their property in the business is "affected with a public interest," and thereby brought under that general power of control which the State possesses in the case of other public employments. Says Mr. Chief Justice *Waite*: "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial,

56 N. E. 81, it was held that the State may provide separate schools for white and black pupils.]

[1] Munn *v.* People, 69 Ill. 80. In this case, Justices *McAllister* and *Scott* dissented.

and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects, and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."[1] Some of the cases here referred to seem plain enough. Ferries are public highways, and when individuals are permitted to establish them, they are allowed the sovereign prerogative of charging and collecting tolls; and tolls can never be taken except by permission of the State, which generally ought to and does prescribe their limits. A hackman exercises a public employment in the public street; one which affords peculiar opportunities for impositions and frauds, and requires special supervision, insomuch that it is commonly thought necessary to prohibit one making himself such except with permission of the State, and the number is sometimes limited so as in effect to give special privileges. The rates of toll, when mills grind for toll, are usually fixed by law; (*a*) but there is nothing exclusive in this: the parties may make their own bargains, and the legislative rate only controls where the parties by implication have apparently acted in reference to it. In England, formerly, the lords of manors, as mill-owners, had exclusive rights; and where an exclusive right exists in one's favor, to compel the public to deal with him, there can be no doubt of the right in the State to compel him to deal fairly with the public. Such a right existed in the English warehouse case of Alnutt *v.* Inglis,[2] in which the Court of King's Bench denied the right of the warehousemen to fix their own charges at discretion, when the public, under exclusive privileges which the warehousemen possessed, were compelled to deal with them.[3]

[1] Munn *v.* Illinois, 94 U. S. 113, 125. In this case, Justices *Field* and *Strong* dissented. This case is followed in New York with reference to the grain elevators at Buffalo. People *v.* Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, and note, two judges dissenting. [Sustained in Budd *v.* New York, 143 U. S. 517, 12 Sup. Ct. Rep. 468. Principle reaffirmed in Brass *v.* North Dakota, 153 U. S. 391, 14 Sup. Ct. Rep. 857, aff. 2 N. D. 482, 52 N. W. 408.]

[2] 12 East, 527.

[3] In Munn *v.* People, 69 Ill. 89, 91, Chief Justice *Breese*, in speaking of the power to "make all needful rules and regulations respecting the use and enjoyment of property," speaks of familiar instances in which the exercise of it in the State has been unquestioned, and among them, "in delegating power to municipal bodies to regulate charges of hackmen and draymen, and the weight and price of bread." Regulating the weight of

(*a*) [See, *e. g.*, State *v.* Edwards, 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504.]

What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest

bread is common, and necessary to prevent imposition; but regulating the price of bread we should suppose would now meet with such resistance anywhere, as would require a distinct determination upon its constitutional rightfulness. How the baker can have the price of that which he sells prescribed for him, and not the merchant or the day-laborer, is not apparent. Indeed, to admit the power seems to render necessary the recognition of the principle that there is and can be no limit to legislative interference but such as legislative discretion from time to time may prescribe. [But all such regulations must not be unreasonable, — *i. e.* they must not amount to a taking of property without "due process," or to a deprival of the "equal protection of the laws." Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167, 20 Sup. Ct. Rep. 336, and especially the cases cited in note to 44 L. ed. U. S. 417. And see Reagan *v.* F. L., & Trust Co., 154 U. S. 362, 14 Sup. Ct. Rep. 1047; San Diego Water Co. *v.* San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, a very valuable opinion; Brymer *v.* Butler Water Co., 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260; Spring Valley Water Works *v.* San Francisco, 82 Cal. 286, 22 Pac. 910, 1046, 6 L. R. A. 756; Cedar Rapids Water Co. *v.* Cedar Rapids, — Iowa, —, 91 N. W. 1081; San Diego Water Co. *v.* San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. 297, and Mr. Freeman's note to this case in 62 Am. St. 297. See further, upon control of the rates of public service companies, 15 Harvard L. Rev. 249 and 353. In Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 22 Sup. Ct. Rep. 30, Justice *Brewer* discusses at some length the status of this law on the regulation of rates as established by the decisions of the Supreme Court of the United States, distinguishing between the business of a "public character" and that not strictly of a "public character" but in which "the public have an interest." He says, "The present scope of the decisions of this court in respect to the power of the legislature in regulating rates" is: "As to those individuals and corporations who have devoted their property to a use in which the public has an interest, although not engaged in a work of a confessedly public character, there has been no further ruling than that the State may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed." "As to parties engaged in performing a public service while the power to regulate has been sustained, negatively the court has held that the legislature may not prescribe rates which, if enforced, would amount to a confiscation of property. But it has not held affirmatively that the legislature may not enforce rates which stop only this side of confiscation and leave the property in the hands and under the care of the owners without any remuneration for its use." "It has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. It has also ruled that the determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in forcing unreasonable and unjust rates." See also note to 5 L. R. A. 559. What regulations are reasonable in a particular case must be determined from a consideration of the particular case. Hardly any general rule can be laid down, except that rates so low as not to cover running expenses are always unreasonably low. Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578, 17 Sup. Ct. Rep. 198. Nor can any such regulation prescribed by a State be made to apply to inter-state commerce. Gulf, C. & S. F. R. Co. *v.* Hefley & Lewis, 158 U. S. 98, 15 Sup. Ct. Rep. 802; upon State control over railroads, see Baltimore & O. R. Co. *v.* Maryland, 21 Wall. 456, 22 L. ed. U. S. 678, and note. The reasonableness of rates is to be determined by considering their effect upon the traffic of the entire system, and not merely upon some particular portion of it. St. Louis & S. F. R. Co. *v.* Gill, 156 U. S 649, 15 Sup. Ct. Rep. 484. The State's power to regulate rates which affect only internal commerce is not affected by the fact that the carrier

in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices. If one is permitted to take upon himself a public employment, with special privileges which only the State can confer upon him, the case is clear enough; and it seems to have been the view of both courts in this case, that the circumstances were such as to give the warehousemen in Chicago, who were the only persons affected by the legislation, a "virtual" monopoly of the business of receiving and forwarding the grain of the country to and from that important point, and by the very fact of monopoly to give their business a public character, affect the property in it with a public interest, and render regulation of charges indispensable.[1]

is chartered by Congress. Reagan *v.* Mercantile Trust Co., 154 U. S. 413, 14 Sup. Ct. Rep. 1060. The prescribed rates will not be pronounced unreasonable in a suit between friendly contestants upon an agreed statement of facts. Chicago & G. T. R. Co. *v.* Wellman, 143 U. S. 339, 12 Sup. Ct. Rep. 400. The determination of the rates to be charged is a legislative function and cannot be undertaken by the courts. Nebraska Telephone Co. *v.* State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113. But as the courts will not enforce a rate unreasonably low, neither will they enforce one that is unreasonably high, nor will any person carrying on a business affected with a public interest be allowed to make arbitrary discriminations in rates between patrons. Griffin *v.* Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240. Rates prescribed will not be pronounced unreasonably low where there is no proof that they will cause a diminution of dividends. Winchester & L. T. Road Co. *v.* Croxton, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177; and upon legislative power to control rates, see note thereto in L. R. A. Canals used for the distribution of irrigation waters for hire are subject to State regulation. White *v.* Farmers' Highline Canal & R. Co., 22 Col. 191, 43 Pac. 1023, 31 L. R. A. 828. Where rates are determined by earnings it is proper to include earnings from inter-state traffic, as the rates fixed apply only to State traffic. Osborn *v.* Wabash R. Co., 126 Mich. 113, 85 N. W. 466, s. c. 123 Mich. 669, 82 N. W. 526. For other cases upon regulation of rates, see Chicago, B. & Q. R. Co. *v.* Jones, 149 Ill. 361, 37 N. E 247, 24 L. R. A. 141; St. Louis & S. F. R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452, and note, aff. 156 U. S. 649, 15 Sup. Ct. Rep. 484; Steenerson *v.* Great Northern Ry. Co., 69 Minn. 353, 72 N. W. 713. For other cases upon powers of railroad commissions, see Atlantic Ex. Co. *v.* Wilmington & W. R. Co., 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393; Burlington, C. R. & N. R. Co. *v.* Dey, 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436, and note; Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702; Beardsley *v.* Erie Ry. Co., 162 N. Y. 230, 56 N. E. 488.]

[1] See what is said by *Breese*, Ch. J., in 69 Ill. 88–89, and by *Waite*, Ch. J., in 94 U. S. 131. In Attorney-General *v.* Chicago, &c. R. R. Co., 35 Wis. 425, 589, Chief Justice *Ryan*, in his very able opinion affirming the right to fix railroad charges by amendment to charters which reserved the power of amendment, intimated decided views in favor of the authority under the general power of police. That right would probably be claimed on the ground that railroads receive special privileges from the State; the emi-

The phrase "affected with a public interest" has been brought into recent discussions from the treatise *De Portibus Maris* of Lord

nent domain being always employed in their favor, and sometimes the power of taxation.

The question of the power of the State legislature to regulate the charges of common carriers for the transportation of persons and property within the State, is fully determined in the affirmative by the decisions of the federal Supreme Court. In Railroad Company *v.* Fuller, 17 Wall. 560, an act was sustained which provided, 1. That each railroad company should annually, in a month named, fix its rates for the transportation of passengers and freights: 2. That it should on the first day of the next month cause a printed copy of such rates to be put up in all its stations and depots, and to be kept up during the year; 3. That the failure to comply with these requirements, or the charging of a higher rate than was posted, should subject the offending company to penalties. In the warehouse case of Munn *v.* Illinois, 94 U. S. 113, the power to limit charges was directly involved, and was affirmed, as it was in Chicago, &c. R. R. Co. *v.* Iowa, 94 U. S. 155. The State may limit the amount of charges for transportation, provided such regulation does not amount to a taking of property by compelling carrying without reward, unless restrained by contract in the charter. But the charter power to fix rates does not forbid such regulation. Railroad Com. Cases, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191; Dow *v.* Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028; Georgia R. R. & B. Co. *v.* Smith, 128 U. S. 174, 9 Sup. Ct. Rep. 47; Pennsylvania R. R. Co. *v.* Miller, 132 U. S. 75, 10 Sup. Ct. Rep. 34. The charges for business done wholly within the State may thus be regulated although a road affected may run through several States. Railroad Com. Cases, *supra*. The reasonableness of charges is a judicial question. [And for its determination the cost of doing the business must be known as well as the gross earnings to be yielded under the rates in question. Chicago, M. & St. P. R. Co. *v.* Tompkins, 176 U. S. 167, 20 Sup. Ct. Rep. 336. The cases upon reasonableness of State limitation of railroad rates are collected in a note to 44 L. ed. U. S. 417. Courts should not interfere except in a perfectly clear case. San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 19 Sup. Ct. Rep. 804. See also Smyth *v.* Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418, mod. in 171 U. S. 361, 18 Sup. Ct. Rep. 888; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 14 Sup. Ct. Rep. 1047. State cannot require railway company to carry shipper of live stock free from transportation charges. Atchison, T. & S. F. Ry. Co. *v.* Campbell, 61 Kan. 439, 59 Pac. 1051, 78 Am. St. 328.] A State cannot empower a commission to fix rates finally without opportunity for a judicial hearing on the question or their reasonableness. Chicago, M. & St. Paul Ry. Co. *v.* Minnesota, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702. But in Camden, &c. R. R. Co. *v.* Briggs, 22 N. J. 623, and Phila., &c. R. R. Co. *v.* Bowers, 4 Houst. 506, it was held that there was no power to regulate rates where no such authority was reserved in the charter, and see cases at end of note. In these cases no question arose of the application of the power to contracts, for transportation through the State, or from or to points within a State and other points outside; but in Peik *v.* Chicago, &c. R. R. Co., 94 U. S. 164, it was decided that the State had power to prescribe a maximum of charges to be made by railroad companies, not only for transporting persons or property within the State, but also persons or property taken up outside the State and brought within it, or taken up inside and carried without. Note was made in the case that Congress had established no regulation with which the State statute would conflict. But this case is substantially overruled as to this point by Wabash, St. L. & P. Ry. Co. *v.* Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4, where the Illinois statute forbidding a greater charge for a shorter than for a longer haul in the same direction was held inapplicable to the case of a continuous voyage from a point within to a point without the State, as an interference with inter-state commerce. Like rulings have been made in several cases. Carton *v.* Ill. Cent. R. R. Co., 59 Iowa, 148, 13

Hale, where the important passage is as follows: "A man for his own private advantage may, in a port or town, set up a wharf or

N. W. 67; State *v.* Chicago, &c. Ry. Co., 70 Iowa, 162, 30 N. W. 398; Com. *v.* Housatonic R. R., 143 Mass. 264, 9 N. E. 547; Hardy *v.* Atchison, &c. R. R. Co., 32 Kan. 698, 5 Pac. 6. Nor may the State control rates between two points within it, if the transit is in part through another State. State *v.* Chicago, &c. Ry. Co., 40 Minn. 267, 41 N. W. 1047; Sternberger *v.* Railroad Co., — Ga. —, 7 S. E. 836. See Cotton Exchange *v.* Ry. Co., 2 I. S. C. R. 375. *Contra*, Com. *v.* Lehigh V. R. R. Co., — Pa. St. —, 17 Atl. 179; [Campbell *v.* Chicago, M. & St. P. R. Co., 86 Iowa, 587, 53 N. W. 351, 17 L. R. A. 443.] See Gulf, C. & S. F. Ry. Co. *v.* State, 72 Tex. 404, 10 S. W. 81. [State cannot regulate tolls upon interstate commerce. Covington & C. Bridge Co. *v.* Kentucky, 154 U. S. 204, 14 Sup. Ct. Rep. 1087.]

See further Providence Coal Co. *v.* Prov. & W. R. R. Co., 15 R. I. 303, 4 Atl. 394; Chicago, M. & St. P. Ry. Co. *v.* Becker, 32 Fed Rep. 849; Parker *v.* Metropolitan R. R. Co., 109 Mass. 506; People *v.* Boston, &c. R. R. Co., 70 N. Y. 569; Chicago, &c. R. R. Co. *v.* People, 67 Ill. 1; Ruggles *v.* People, 91 Ill. 256; Fuller *v.* Chicago, &c. R. R. Co., 31 Iowa, 188; Council Bluffs *v.* Kansas City, &c. R. R. Co., 45 Iowa, 338; Attorney-General *v.* Railroad Companies, 35 Wis. 425; Peik *v.* Chicago, &c. R. R. Co., 6 Biss. 177; Blake *v.* Winona, &c. R. R. Co., 19 Minn. 418, 18 Am. Rep. 345, s. c. in error, 94 U. S. 180; Chicago, &c. R. R. Co. *v.* Ackley, 94 U. S. 179. [While a State may restrict a railroad to reasonable rates, it cannot compel lower rates to one class of persons than another, nor can it fix in advance a period during which the prescribed rates shall be observed. Lake Shore & M. S. R. Co. *v.* Smith, 173 U. S. 684, 19 Sup. Ct. Rep. 565, rev. 114 Mich. 460, 72 N. W. 328. But where the railroad receives its franchises after the adoption of a statute requiring such companies to issue 1000 mile tickets at specified reduced rates, it is bound to obey. It cannot complain that it is thereby deprived of property without due process. Nor does such a law, where the tickets are good only within the State operate as a regulation of inter-state commerce, although the road is engaged in such commerce. Purdy *v.* Erie R. Co., 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; State *v.* Omaha & Council Bluffs Ry. & Bridge Co., 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315. An act of the New York legislature requiring railway companies to issue mileage tickets was held invalid, as being neither the exercise of the power to fix rates, or of the power of police regulation, in Beardsley *v.* N. Y., L. E. & W. Ry. Co., 162 N. Y. 230, 56 N. E. 488. A statute requiring one railway company to accept mileage issued by another is invalid for requiring one company to accept passengers on the credit of another. Attorney-General *v.* Boston & Albany Ry. Co., 160 Mass. 62, 35 N. E. 252. Reasonableness of rates must be determined upon consideration of facts existing at the time such rates are to be enforced. Smyth *v.* Ames, 171 U. S. 361, 18 Sup. Ct. Rep. 888, mod. decrees in 169 U. S. 466, 18 Sup. Ct. Rep. 418. Upon regulation of rates by statute see Winchester & L. T. Road Co. *v.* Croxton, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177, and note, and Louisville & N. R. Co. *v.* Kentucky, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, and note; also Cleveland, C. C. & I. R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, and note, and St. Louis & S. F. R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452, and note; aff. 156 U. S. 649, 15 Sup. Ct. Rep. 484. The reasonable value of the property at the time is to be considered rather than its original cost. San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 19 Sup. Ct. Rep. 804. Toll roads come under the same principles as railroads. Covington & L. Turnp. Road Co. *v.* Sandford, 164 U. S. 578, 17 Sup. Ct. Rep. 198. A State cannot, under its general power to prevent discrimination among shippers, compel a railroad to permit private persons to erect an elevator adjacent to its sidings and upon its lands, where such elevator would be used by these persons and others for the storage of their own grain, even though the railroad has granted such privilege to other shippers. Such action would be a taking of private

crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. If the king or subject have a public wharf unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharves only licensed by the queen, or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf, crane, and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land; it is now no longer bare private interest, but is affected by a public interest."

If the case of a street thrown open to the public is an apt illustration of the public interest Lord Hale had in mind, the interest is very manifest. It will be equally manifest in the case of the wharf, if it is borne in mind that the title to the soil under navigable water in England is in the Crown, and that wharves can only be erected by express or implied license, and can only be made available by making use of this public property in the soil. If, then, by public permission, one is making use of the public property, and he chances to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms.

In the following cases we should say that property in business was affected with a public interest: 1. Where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, &c., of

property for private uses. Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 130. Company having franchise to lay gas-pipes in street may be restricted to reasonable rates and compelled to abstain from discrimination among patrons. Rushville *v.* Rushville Nat. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321, and note. For various State cases passing upon question of inter-state commerce, see State *v.* Stripling, 113 Ala. 120, 21 So. 409, 36 L. R. A. 81; W. Union Tel. Co. Eubank, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711; State *v.* Scott, 98 Tenn. 254, 39 S. W. 1, 36 L. R. A. 461; Fuqua *v.* Pabst Brewing Co., 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; McCann *v.* Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110; aff. 170 U. S. 580, 19 Sup. Ct. Rep. 755. Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Lafarier *v.* Grand Trunk R. Co., 84 Me. 286, 24 Atl. 848, 17 L. R. A. 111; Mobile & O. R. Co. *v.* Dismukes, 94 Ala. 131, 10 So. 289, 19 L. R. A. 113; State *v.* Hicks, 44 La. Ann. 770, 11 So. 74.]

keeping billiard-tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll-bridges, &c. 2. Where the State, on public grounds, renders to the business special assistance, by taxation or otherwise. (*a*) 3. Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. 4. Where exclusive privileges are granted in consideration of some special return to be made to the public. Possibly there may be other cases.

Miscellaneous Cases. It would be quite impossible to enumerate all the instances in which the police power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in num-

(*a*) [As by granting the power of eminent domain. Where a corporation has such special privileges it must serve the public without discrimination. Inter-Ocean Publishing Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568; Haugen *v.* Albina Light & W. Co., 21 Oreg. 411, 28 Pac. 214, 14 L. R. A. 424; Richmond N. Gas Co. *v.* Clawson, 155 Ind. 659, 58 N. E. 1049, 51 L. R. A. 744. See also People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497. Where no especial privilege or aid is received, the corporation must be left free to contract as it pleases. State *v.* Associated Press, 159 Mo. 410, 60 S. W. 91. The legislature cannot fix by statute the measure of compensation to be paid by a city for labor or other services it may be compelled to employ. This principle applied in a case where the statute provided that the same rate of wages must be paid on city contracts as laborers in like occupation received in the same locality. People *ex rel.* Rodgers *v.* Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. 605. For other cases involving similar principles, see Com. *v.* Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. 533, declaring invalid an act forbidding withholding of wages for imperfection in work: Ramsey *v.* People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853, holding that an act relating to the payment of wages to miners upon basis of quantity of coal mined was invalid; Godcharles *v.* Wigeman, 113 Pa. 431, 6 Atl. 354; State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. 863, are cases in which acts to secure coal miners, and others laboring in certain factories, the payment of their wages at regular intervals and in lawful money only, were held void. *Contra*, Hancock *v.* Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576; Avent-Beattyville Coal Co. *v.* Comm., 96 Ky. 218, 28 S. W. 502, 28 L. R. A. 273; Agee *v.* Smith, 7 Wash. 471, 35 Pac. 370, and see note to State *v.* Goodwill, *supra*, 25 Am. St. 870, on the Fourteenth Amendment considered with relation to Special Privileges, Burdens and Restrictions. Other cases on the subject are, State *v.* Fire Creek, C. & C. Co., 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. 891; Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; Braceville Coal Co. *v.* People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206; State *v.* Loomis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. Rep. 1, aff. 103 Tenn. 421, 53 S. W. 955, 76 Am. St. 682. In this last case a statute of Tennessee requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages earned by employees is held to be constitutional. Followed in Dayton Coal and Iron Co. *v.* Barton, 183 U. S. 23, 22 Sup. Ct. Rep. 5. The case of People *ex rel.* Rodgers *v.* Coler, *supra*, is authority for the doctrine that a municipal corporation, as to matters affecting its property and private contracts, has the same status as private corporations and individuals. Clark *v.* State, 142 N. Y. 101, 36 N. E. 817, is distinguished.]

ber and in variety. (*a*) And there are other cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to their fellows and to the State, but where, nevertheless, some controlling public necessity demands the interference or destruction. A strong instance of this description is where it becomes necessary to take, use, or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity.[1] Here the individual is in no degree in fault, but his interest must yield to that "necessity" which "knows no law." The establishment of limits within the denser portions of cities and villages, within which buildings constructed of inflammable materials shall not be erected or repaired, may also, in some cases, be equivalent to a destruction of private property; but regulations for this purpose have been sustained notwithstanding this result.[2] Wharf lines may also be established for the general good, even though they prevent the owners of water-fronts from building out on soil which constitutes private property.[3] And, whenever the legisla-

[1] Saltpetre Case, 12 Coke, 13; Mayor, &c. of New York *v.* Lord, 18 Wend. 126; Russell *v.* Mayor, &c. of New York, 2 Denio, 461; Sorocco *v.* Geary, 3 Cal. 69; Hale *v.* Lawrence, 21 N. J. 714; American Print Works *v.* Lawrence, 21 N. J. 248; Meeker *v.* Van Rensselaer, 15 Wend. 397; McDonald *v.* Redwing, 13 Minn. 38; Philadelphia *v.* Scott, 81 Pa. St. 80; Dillon, Mun. Corp. §§ 756–759; [Aitken *v.* Wells River, 70 Vt. 308, 40 Atl. 829, 41 L. R. A. 566.] And see Jones *v.* Richmond, 18 Gratt. 517, for a case where the municipal authorities purchased and took possession of the liquor of a city about to be occupied by a capturing military force, and destroyed it to prevent the disorders that might be anticipated from free access to intoxicating drinks under the circumstances. [But this case is overruled in Wallace *v.* Richmond, 94 Va. 204, 26 S. E. 586, 36 L. R. A. 554.] And as to appropriation by military authorities, see Harmony *v.* Mitchell, 1 Blatch. 549; s. c. in error, 13 How. 115.

[2] Respublica *v.* Duquet, 2 Yeates, 493; Wadleigh *v.* Gilman, 12 Me. 403, 28 Am. Dec. 188; Brady *v.* Northwestern Ins. Co., 11 Mich. 425; Monroe *v.* Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345; King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Klingler *v.* Bickel, 117 Pa. St. 326, 11 Atl. 555; McCloskey *v.* Kreling, 76 Cal. 511, 18 Pac. 433. See cases, *ante*, p. 284, note. [Milch cows infected with tuberculosis may be destroyed without compensation to owner. Error on part of inspector and consequent destruction of healthy cows does not give owner any claim against *the State*. Houston *v.* State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39. Peach trees infected with yellows may be destroyed. State *v.* Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623. Milk of a quality below a prescribed standard may be destroyed. Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541.]

[3] Commonwealth *v.* Alger, 7 Cush. 53. See Hart *v.* Mayor, &c. of Albany, 9 Wend. 571, 24 Am. Dec. 165. [Height of buildings fronting on Copley Square, Boston, may be limited to ninety feet.

(*a*) [Compulsory education laws are upheld as within the police power of the State. State *v.* Jackson, — N. H. —, 53 Atl. 1021; State *v.* Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435.]

ture deem it necessary to the protection of a harbor to forbid the removal of stones, gravel, or sand from the beach, they may establish regulations to that effect under penalties, and make them applicable to the owners of the soil equally with other persons. Such regulations are only "a just restraint of an injurious use of property, which the legislature have authority" to impose.[1]

Atty.-Genl. *v.* Williams, 178 Mass. 330, 59 N. E. 812, aff. 18 — U. S. —, 23 Sup. Ct. Rep. 363.]

[1] Commonwealth *v.* Tewksbury, 11 Met. 55. A statute which prohibited the having in possession of game birds after a certain time, though killed within the lawful time, was sustained in Phelps *v.* Racey, 60 N. Y. 10. But such statute is held in Michigan not to cover a case where the birds were killed out of the State. People. *v.* O'Neil, 71 Mich. 325, 39 N. W. 1. That the State may prohibit the sale of arms to minors, see State *v.* Callicut, 1 Lea, 714. [Also the carrying of dangerous weapons, Miller *v.* Texas, 153 U. S. 535, 14 Sup. Ct. Rep. 874; State *v.* Workman, 35 W. Va. 367; 14 S. E. 9, 14 L. R. A. 600, and note; State may regulate the taking of fish, and may summarily confiscate nets and seines used in fishing in violation of its regulations. Lawton *v.* Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 499, aff. 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134. State control of fisheries in high seas extends one marine league from shore. Manchester *v.* Massachusetts, 139 U. S. 240, 11 Sup. Ct. Rep. 559. State may require guides in its woods and through its lakes to be licensed and to report upon condition of its game and forests. State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 50 L. R. A. 544, 80 Am. St. 380. Fact that game was lawfully killed on an Indian reservation and is to be shipped to another State does not exempt it from State police regulations after it leaves the reservation and before it passes out of the State. Selkirk *v.* Stevens, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759. Cold-storage of game lawfully killed and intended to be kept until next open season and then sold is a wrongful having in possession, and law punishing same is constitutional. Haggerty *v.* St. Louis Ice Mfg. & Storage Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151. Upon governmental control over right of fishery, see People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, and note. State may absolutely prohibit sale of specified game and fish within its borders during specified seasons of year. People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696. May control the taking of game by a person upon his own lands. Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114, People *v.* Van Pelt, 129 Mich. —, 90 N. W. 424. For other cases sustaining game laws, see State *v.* Chapel, 64 Minn. 130, 66 N. W. 205, 32 L. R. A. 131; State *v.* Mrozinski, 59 Minn. 405, 61 N. W. 560, 27 L. R. A. 76; Com. *v.* Gilbert, 160 Mass. 157, 35 N. E. 464, 22 L. R. A. 439; State *v.* Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52; People *v.* Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; State *v.* Geer, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804, and note; aff. 161 U. S. 519, 16 Sup. Ct. Rep. 600; Am. Exp. Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138; James *v.* Wood, 82 Me. 173, 19 Atl. 160, 8 L. R. A. 448, and note; Smith *v.* State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404; Com. *v.* Chase-Davidson Co., 22 Ky. L. 727, 58 S. W. 609; State *v.* Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314. Game laws cannot authorize seizure of carcasses or parts thereof in course of inter-state transportation. Bennett *v.* Am. Exp. Co., 83 Me. 236, 22 Atl. 159, 13 L. R. A. 33. Nor can they prohibit the exportation of fish while permitting commerce in them at home. Territory *v.* Evans, 2 Idaho, 627, 23 Pac. 232, 7 L. R. A. 288. Nor can they affect the right to import and deal in fish imported from foreign countries. People *v.* Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34, 52 L. R. A. 803. Ordinance making mere possession of a lottery ticket a misdemeanor is valid. *Ex parte* McClain, 134 Cal. 110, 66 Pac. 69, 54 L. R. A. 779. A statute making the herding of sheep within two miles of an inhabited dwelling unlawful is a valid exercise of the police power. Sifers *v.* Johnson, — Idaho —, 65 Pac. 709, 54 L. R. A. 785.

So a particular use [or disposition (*a*)] of property may sometimes be forbidden, where, by a change of circumstances, and without the fault of the owner, that which was once lawful, proper, and unobjectionable has now become a public nuisance, endangering the public health or the public safety. (*b*) Mill-dams are sometimes destroyed upon this ground;[1] and churchyards which

A statute prohibiting sale of game out of season is valid as applied to game imported into the State. *Ex parte* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. 129.

[1] Miller *v.* Craig, 11 N. J. Eq. 175. And offensive manufactures may be stopped. Coe *v.* Schultz, 47 Barb. 64. Public wells may be filled up. Ferrenbach *v.* Turner, 86 Mo. 416. [Deposit of sawdust in lake from which the water-supply of a city is derived may be prohibited, and a riparian owner who has long been accustomed to deposit therein sawdust from his mill cannot claim that by such regulation he is deprived of his property without compensation. State *v.* Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177; People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581.] See League *v.* Journeay, 26 Tex. 172; *ante*, p. 850, and cases cited in note.

(*a*) [The owners of lands may be prevented from allowing natural gas to waste or escape from wells which he has sunk for oil. Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, aff. 150 Ind. 698, 50 N. E. 1125. See note on "Property in petroleum oil or gas" in 44 L. ed. U. S. 729. See also State *v.* Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; Townsend *v.* State, 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294. Fish commissioners may place fish in streams flowing over private lands, and fishing therein may be prohibited for three years thereafter. State *v.* Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290. But a solvent debtor cannot be denied the right to transfer property to a preferred creditor. Third Nat. Bk. *v.* Divine Grocery Co., 97 Tenn. 603, 37 S. W. 300, 34 L. R. A. 445. Mine operator may be compelled to stop excavating five feet from boundary of his lands unless he secures written consent of adjoining proprietor. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800.]

(*b*) [Administrative boards may be empowered to exclude unvaccinated pupils from the public schools when there is reason to fear the outbreak of a small-pox epidemic. Blue *v.* Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64. May be authorized to require all persons to be vaccinated unless some rule of the Constitution forbids. State *v.* Hay, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. 691; Morris *v.* Columbus, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175; Bissell *v.* Davison, 65 Conn. 183, 32 Atl. 348, 29 L. R. A. 251. See Mathews *v.* Bd. of Education, 127 Mich. 530, 86 N. W. 1036, 54 L. R. A. 736, and State *v.* Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, where it is held that this requirement in the absence of imminent danger is void. Duffield *v.* School Dist., 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152. And a municipal corporation in enforcing compulsory vaccination is not liable for damage arising from the unintentional use of impure vaccine. Wyatt *v.* Rome, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180. State may compel placing and maintenance of water-closets in habitations capable of connection with sewer. Com. *v.* Roberts, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. Owners of tenement-houses may be compelled to furnish city water on each floor. Health Dept. *v.* Rector of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710. Operators of electric street-car lines may be compelled to provide screens for the protection of their motor-men. State *v.* Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317; State *v.* Hoskins, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, and note; State *v.* Whitaker, 160 Mo. 59, 60 S. W. 1068. Statute forbidding lodging house keepers to permit more than a specified number of persons from occupying the same room is void as discriminating against them and in favor of the keepers of other places of public entertainment. Bailey *v.* The People, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. 116.]

prove, in the advance of urban population, to be detrimental to the public health, or in danger of becoming so, are liable to be closed against further use for cemetery purposes.[1] The keeping of gunpowder in unsafe quantities in cities or villages;[2] the sale of poisonous drugs, unless labelled; allowing unmuzzled dogs to be at large when danger of hydrophobia is apprehended;[3] or the keeping for sale

[1] Brick Presbyterian Church *v.* Mayor, &c. of New York, 5 Cow. 538; Coates *v.* Mayor, &c. of New York, 7 Cow. 604; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377. As to the general power of regulation of places of burial, see Woodlawn Cemetery *v.* Everett, 118 Mass. 354; Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191; Upjohn *v.* Board of Health, 46 Mich. 542, 9 N. W. 845. And see *ante*, pp. 284, 851–855. notes. The legislature may authorize a municipal corporation to remove the dead from a cemetery within it. Craig *v.* First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417. [But if owners of cemetery lots are permitted to use them for burial purposes, other persons cannot be prohibited from purchasing such lots and using them for such purposes. Matter of Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618. Municipality may be prohibited further use of its lands for burial purposes. Newark *v.* Watson, 56 N. J. L. 667, 29 Atl. 487, 24 L. R. A. 843.]

[2] Foote *v.* Fire Department, 5 Hill, 99; Williams *v.* Augusta, 4 Ga. 509; Davenport *v.* Richmond, 81 Va. 636. And see License Cases, 5 How. 504, 589, per *McLean*, J.; Fisher *v.* McGirr, 1 Gray, 127, per *Shaw*, Ch. J.

[3] Morey *v.* Brown, 42 N. H. 373; Washington *v.* Meigs, 1 MacArthur, 53. Dogs are subject to such regulations as the legislature may prescribe, and it is not unconstitutional to authorize their destruction, without previous adjudication, when found at large without being licensed and collared according to the statutory regulation. Blair *v.* Forehand, 100 Mass. 136; [Walker *v.* Towle, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; Gibson *v.* Harrison, 69 Ark. 385, 63 S. W. 999, 54 L. R. A. 268;] State *v.* Topeka, 36 Kan. 76, 12 Pac. 310. And see Carter *v.* Dow, 16 Wis. 298; Morey *v.* Brown, 42 N. H. 373; *Ex parte* Cooper, 3 Tex. App. 469, 30 Am. Rep. 152. As a measure of internal police, the State has the power to encourage the keeping of sheep, and to discourage the keeping of dogs, by imimposing a penalty upon the owner of a dog for keeping the same. Mitchell *v.* Williams, 27 Ind. 62. Or by imposing a dog tax for a fund to indemnify sheep owners for losses suffered from dogs. Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246. [Or to limit the amount which can be recovered for injury to them or destruction of them to the amount at which they were returned for taxation in the last preceding annual assessment. Sentell *v.* N. O. & C. R. Co., 166 U. S. 698, 17 Sup. Ct. Rep. 693. An ordinance compelling a person to kill his dog on a finding of a justice of the peace that he "is satisfied that the dog has attacked a person and is dangerous" is void. People *ex rel.* Shand *v.* Tighe, 30 N. Y. Sup. 368.] A person may be forbidden to keep more than two cows within a certain part of a city. *In re* Linehan, 72 Cal. 114, 13 Pac. 170. A law prohibiting the bringing of Texas and Cherokee cattle into the State because of the tendency to communicate a dangerous and fatal disease to other cattle, was sustained in Yeazel *v.* Alexander, 58 Ill. 254. It has since, however, been questioned, and in Railroad Company *v.* Husen, 95 U. S. 465, such an act was held to be an invasion of the power of Congress over inter-state commerce. See also Hall *v.* De Cuir, 95 U. S. 485. But a statute is valid which makes one who has in his possession in Iowa Texas cattle, which have not wintered in the North, liable for damage done by them to other cattle. Kimmish *v.* Ball, 129 U. S. 217, 9 Sup. Ct. Rep. 277. See Missouri Pac. Ry. Co. *v.* Finley, 38 Kan. 550, 16 Pac. 951; [Grimes *v.* Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 628, and note upon validity and construction of statutes concerning infected animals. Idaho *v.* Rasmusson, — Idaho, —, 59 Pac. 933, 52 L. R. A. 78, aff. 181 U. S. 198, 21 Sup. Ct. Rep. 594. Peach trees infected with yellows may be destroyed. State *v.*

unwholesome provisions, or other deleterious substances, — are all subject to be forbidden under this power.[1] And, generally, it may be said that each State has complete authority to provide for the abatement of nuisances, whether they exist by the fault of individ-

Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623.]

[1] The manufacture and sale of any oleaginous substance designed to take the place of butter may be forbidden, though it is healthful and marked "oleomargarine butter." Such provision is a valid exercise of the police power. Powell *v.* Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, aff. 114 Pa. St. 265, 7 Atl. 913; Butler *v.* Chambers, 36 Minn. 69, 30 N. W. 308. So of the sale of oleomargarine colored to deceive. Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 604. In New York an act like the Pennsylvania statute was held bad as prohibiting an industry because it competed with another. People *v.* Marx, 99 N. Y. 377, 2 N. E. 29. But a later act was sustained, as aimed to prevent deception, which forbade the sale of a like product made in imitation or semblance, or designed to take the place of natural butter. People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277. Oleomargarine may be required to be stamped: Pierce *v.* Maryland, 63 Md. 592; or colored pink: State *v.* Marshall, 64 N. H. 549, 15 Atl. 210. [But not when brought from another State. Collins *v.* New Hampshire, 171 U. S. 30, 18 Sup. Ct. Rep. 768, rev. State *v.* Myers, 42 W. Va. 822, 26 S. E. 539. For many other cases on oleomargarine, see note, p. 847. See also State *v.* Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181, and cases cited in note.] The sale of milk below a certain standard of purity may be forbidden, though it be mixed with pure water. Com. *v.* Waite, 11 Allen, 264; People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107; State *v.* Campbell, 64 N. H. 402, 13 Atl. 585; State *v.* Smyth, 14 R. I. 100; [State *v.* Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360. And herds of cows supplying milk for public consumption may be compelled to be registered, and they and the premises whereon they are kept to be inspected and kept in a sanitary condition. State *v.* Broadbelt, 89 Md. 565, 43 Atl. 771, 45 L. R. A. 433. Milk offered for sale, if below a prescribed standard, may be summarily destroyed. Deems *v.* Baltimore, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541; see in this connection, State *v.* Du Paquier, 46 La. Ann. 577, 15 So. 502, 20 L. R. A. 162. The addition of any adulterant, even though it be harmless and be added to preserve the milk, may be prohibited. State *v.* Schlenker, 112 Iowa, 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. 360. Statute prohibiting sale of cream as cream which contains less than twenty per cent of fat, is valid. State *v.* Crescent City Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. 464. A statute prohibiting the manufacture and sale of "any substance or compound made in imitation of yellow butter" and not made "wholly of cream or milk," is constitutional. State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. 395; People *v.* Rotter, — Mich. —, 91 N. W. 167, seeming to overrule Northwestern Manufacturing Co. *v.* Judge, 58 Mich. 381, 25 N. W. 372, 55 Am. Rep. 693. The opinion in People *v.* Rotter collects the authorities on this question. See also People *v.* Biesecker, 169 N. Y. 53, 61 N. E. 990, 88 Am. St. 634, 57 L. R. A. 178. The legislature of the State may declare that a nuisance, which is such in fact, and may create a commission with power to determine whether the conditions defined by the act exist. Los Angeles County *v.* Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. 217.] The sale of fertilizers may be regulated to prevent deception. Steiner *v.* Ray, 84 Ala. 93, 4 So. 172. [And baking-powder manufacturers may be compelled to publish upon the labels of the cans in which they pack their powders a list of the ingredients of such powders. State *v.* Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660. Sale of alum baking-powders may be prohibited. State *v.* Layton, 160 Mo. 474, 61 S. W. 171. On "Summary Abatement of Nuisances by Boards of Health," see 2 Columbia L. Rev. 203.]

uals or not,[1] and even though in their origin they may have been permitted or licensed by law.[2]

[1] See Miller *v.* Craig, 11 N. J. Eq. 175; Weeks *v.* Milwaukee, 10 Wis. 242; Watertown *v.* Mayo, 109 Mass. 315. One of the powers most commonly conferred upon municipal corporations is that to declare and abate nuisances. The general authority is commonly given to the common council or other legislative body, but so far as the nuisances are supposed to be injurious to the public health, jurisdiction in respect to them is likely to be conferred upon boards of health. Where nuisances are spoken of in statutes delegating this authority, public nuisances must be understood as intended, and for whatever is merely a private nuisance individuals must seek their own remedy. The delegation of this authority over nuisances is very apt to raise troublesome questions, and the authority itself is likely to be taken to be broader than it is. It is first to be understood that nothing is a public nuisance which the law itself — either common or statute — authorizes. Pittsburgh, &c. R. R. Co. *v.* Brown, 67 Ind. 45, 33 Am. Rep. 73; Chicago, &c. R. R. Co. *v.* Joliet, 79 Ill. 25. And therefore if the municipal authority should assume to declare something which was entirely lawful by the law of the State to be a nuisance, the declaration would be a mere nullity because in conflict with the superior law. An illustration is found in a case where a city declared the occupation by a railroad company of certain grounds where it had been lawfully located to be a nuisance, and forbade its longer continuance. Chicago, &c. R. R. Co. *v.* Joliet, 79 Ill. 25. Whether any particular thing or act is or is not permitted by the law of the State must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to the local legislative or administrative boards. Yates *v.* Milwaukee, 10 Wall. 497; Wreford *v.* People, 14 Mich. 41; State *v.* Street Commissioners, 36 N. J. 283; Everett *v.* Council Bluffs, 46 Iowa, 66; Hutton *v.* Camden, 39 N. J. 122, 23 Am. Rep. 203; St. Louis *v.* Schnuckelberg, 7 Mo. App. 536. The local declaration that a nuisance exists is therefore not conclusive, and the party concerned may contest the fact in the courts. *Ex parte* O'Leary, 65 Miss. 80, 3 So. 144; Hennessy *v.* St. Paul, 37 Fed. Rep. 565; [Evansville *v.* Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161.] There being no charter power to declare a nuisance, an ordinance declaring dense smoke a nuisance is void. St. Paul *v.* Gilfillan, 36 Minn. 298, 31 N. W. 49; [St. Louis *v.* Heitzeberg P. & P. Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551.] So as to a prohibition of all lime-kilns in a city: State *v.* Mott, 61 Md. 297; and of all laundries. *In re* Sam Kee, 31 Fed. Rep. 680. All picnics cannot be made nuisances. Poyer *v.* Des Plaines, 18 Ill. App. 225. In Kennedy *v.* Board of Health, 2 Pa. St. 366, it was held competent for the legislature to make such local declaration conclusive; but this seems questionable. It is entirely competent, however, to confer upon the municipalities the authority to supersede the general law in respect to those matters which are found to be injurious in their locality, and to create as to them a new class of public offences. Thus, under proper legislation, a municipal council may make the selling of spirituous liquors within their jurisdiction a nuisance: Goddard *v.* Jacksonville, 15 Ill. 588; [McManus *v.* State, — Kan. —, 70 Pac. 700; Davis *v.* Auld, 96 Me. 559, 53 Atl. 118;] or the selling of goods on Sunday: McPherson *v.* Chebanse, 114 Ill. 46, 28 N. E. 454; or the keeping of a bowling alley for hire: Tanner *v.* Albion, 5 Hill, 121; or an offensive manufactory: Kennedy *v.* Phelps, 10 La. Ann. 227; or a slaughter-house within certain specified limits: Metropolitan Board of Health *v.* Heister, 37 N. Y. 661; [or the maintenance of a privy vault on premises adjoining a public sewer: Harrington *v.* Providence, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305;] or a private hospital: Milne *v.* Davidson, 5

[2] See Beer Company *v.* Massachusetts, 97 U. S. 25; Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; *ante*, p. 400, and note; Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Davenport *v.* Richmond, 81 Va. 636.

The State has also a right to determine what employments shall be permitted, and to forbid those which are deemed prejudicial to the public good. Under this right it forbids the keeping of gambling houses, and other places where games of chance or skill are played for money, the keeping for sale of indecent books and pictures, the keeping of houses of prostitution, (*a*) and the resort thereto, and in some States the sale of intoxicating drinks as a

Mart. N. s. 409, 16 Am. Dec. 189; or the erection of wooden buildings: King *v.* Davenport, 98 Ill. 305; or the running at large of swine: Roberts *v.* Ogle, 30 Ill. 459; Whitfield *v.* Longest, 6 Ired. 268; Crosby *v.* Warren, 1 Rich. 385; or the unreasonable occupation of public waters: Tourne *v.* Lee, 8 Mart. N. s. 548, 20 Am. Dec. 260; or the use of steam as motive power for cars in the streets: North Chicago C. R. Co. *v.* Lake View, 105 Ill. 207; or the emitting of dense smoke in the city: Harmon *v.* Chicago, 110 Ill. 400. And if in any of these cases there was doubt whether what was forbidden was a nuisance at the common law, the municipal declaration would, as to the future, resolve the doubt, but could not operate retrospectively. If a municipal corporation proceeds to abate a nuisance, it possesses for that purpose only the rights of any private person, and if injury results to an individual, it must justify its action by showing that a nuisance existed in fact. Wood on Nuisances, §§ 738, 739; Welch *v.* Stowell, 2 Doug. (Mich.) 332; Brightman *v.* Bristol, 65 Me. 426, 20 Am. Rep. 711; Mayor of Americus *v.* Mitchell, 79 Ga. 807, 5 S. E. 201. [Except as to such things as are nuisances *per se*, or in their very nature, a person charged with maintaining them is entitled to be heard upon the question of whether it be a nuisance. Western & A. Ry. Co. *v.* City of Atlanta, 113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294.] But a municipal corporation may order the removal of a nuisance at the expense of the person creating or responsible for it. Salem *v.* Eastern R. R. Co., 98 Mass. 431. And this is frequently done in the case of city lots which are a nuisance in their natural condition, or have become so by the act or neglect of the owner. The municipal order for removal is conclusive: Baker *v.* Boston, 12 Pick. 421, 22 Am. Dec. 421; though when it is to be done at the cost of the owner he is not concluded as to the cost by the action of the corporation, but has a right to be heard as to the items: Salem *v.* Eastern R. R. Co., 98 Mass. 431; and in Kentucky on the question of nuisance. Joyce *v.* Woods, 78 Ky. 386. If the corporation is itself chargeable with creating the nuisance, the cost of abating it cannot be imposed upon the owner. Weeks *v.* Milwaukee, 10 Wis. 242; Hannibal *v.* Richards, 82, Mo. 330. See Banning *v.* Commonwealth, 2 Duv. 95. If it has expressly permitted it, it can abate only after a judicial decision. Everett *v.* Marquette, 53 Mich. 450, 19 N. W. 140. The abatement must be made by the removal of that in which the nuisance consists. King *v.* Rosewell, 2 Salk. 459; Ely *v.* Supervisors of Niagara, 36 N. Y. 297; State *v.* Keenan, 5 R. I. 497; Miller *v.* Birch, 32 Tex. 208. And it must be done without inflicting unnecessary injury. Babcock *v.* Buffalo, 56 N. Y. 268; Weil *v.* Ricord, 24 N. J. Eq. 169. See Ferguson *v.* Selma, 43 Ala. 398; and on the subject in general, Fertilizing Co. *v.* Hyde Park, 97 U. S. 659. [Upon municipal power over nuisances affecting safety, health, and personal comfort, see note to 38 L. R. A. 305; over buildings and other structures as nuisances, note to 38 L. R. A. 161. To the effect that private persons may not abate a common nuisance, so declared by statute, see State *v.* Stark, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910.]

(*a*) [Prostitutes may be restricted to a limited area of a town. L'Hote *v.* New Orleans, 177 U. S. 587, 20 Sup. Ct. Rep. 788, aff. 51 La. Ann. 93, 44 L. R. A. 90, 24 So. 608. As to power of a city over houses of prostitution, see State *v.* Karstendiek, 49 La. Ann. 1621, 22 So. 845, 39 L. R. A. 520, and People *v.* Hanrahan, 75 Mich. 611, 42 N. W. 1124, 4 L. R. A. 751.]

beverage.[1] These several kinds of business have a tendency which is injurious and demoralizing; and this tendency is recognized even in States where they are not forbidden, and they are subjected to regulations with a view to reducing their evils to a minimum. The regulation is likely to take the form of a license, for which a fee is exacted to cover the expense of supervision, and the days and hours when the business shall be suffered will perhaps also be prescribed. (*a*) Where an occupation like gaming or the sale of demoralizing articles is altogether prohibited, it is not uncommon to provide that whatever is kept for use or sale in violation of the law shall be forfeited by the owner, and, after judicial hearing, condemned and destroyed.[2] And taxes are some-

[1] The sale of opium may be forbidden. State *v.* Ah Chew, 16 Nev. 50. Where sale of liquors is allowed, it is common to require closing of places of sale on Sunday; and it is held competent to enact that the lighting up of such a place on that day shall be *prima facie* evidence of guilt. Piqua *v.* Zimmerlin, 35 Ohio St. 507. Where a municipal ordinance permits sales, the license may be forfeited for violation of the ordinance. Ottumwa *v.* Schwab, 52 Iowa, 515, 3 N. W. 529. Municipal authorities empowered to close drinking places "temporarily" cannot order them closed "till further order," but must define the time. State *v.* Strauss, 49 Md. 288. The keeping open after hours cannot be made a breach of the peace allowing arrest without a warrant. People *v.* Haug, 68 Mich. 549, 37 N. W. 21. [A State has no power to bind itself to permit lotteries to be carried on. Douglas *v.* Kentucky, 168 U. S. 488, 18 Sup. Ct. Rep. 199, following Stone *v.* Mississippi, 101 U. S. 814. But it cannot prohibit a gift enterprise in connection with merchandising where there is no element of chance involved. Long *v.* State, 73 Md. 527, 21 Atl. 683, 12 L. R. A. 89, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425. For trading stamp legislation held constitutional, see State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. 818, 48 L. R. A. 775. Upon power to regulate liquor-selling, see Giozza *v.* Tiernan, 148 U. S. 657, 13 Sup. Ct. Rep. 1047; Crowley *v.* Christensen, 137 U. S. 86, 11 Sup. Ct. Rep. 13. State may forbid the making of options for the sale of commodities, even though the parties actually contemplate a transfer of the commodities. Booth *v.* People, 186 Ill. 43, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. 229, aff. 184 U. S. 425, 22 Sup. Ct. Rep. 425. Regulate sale of intoxicating liquors, and grant or refuse licenses therefor. De Walt's Appeal, 190 Pa. 577, 42 Atl. 1117, 45 L. R. A. 399. Prohibit keeping of a place where money is received to be bet on horse-races, even though place is kept by agent of inter-state telegraph company and money is transmitted by telegraph to another State. State *v.* Harbourne, 70 Conn. 484, 40 Atl. 179, 40 L. R. A. 607. Regulate horse-racing and the use of race-tracks therefor. State *v.* Roby, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213. Liquor-selling may be restricted to citizens of the United States, and applicants for license may be required to required to secure approval of specified commissioners. Tragesser *v.* Gray, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, and note. See further on control of liquor-traffic, Altenburgh *v.* Com., 120 Pa 602, 17 Atl. 799, 4 L. R A. 543.]

[2] *Ante*, p. 849, note. [Such machines may be summarily seized and destroyed. Bd. of Police Comm'rs *v.* Wagner, 93 Md. 182, 48 Atl. 455; and see Lawton *v.* Steele and other cases, in note 2, page 878.]

(*a*) [Where there is no regulation, the fee imposed is not a license-fee but a tax, and if it does not conform to the constitutional requirements for a tax the imposition is void. State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472. See also Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69.]

times imposed with a view to discourage occupations which are injurious in their tendency, but which the State does not venture to prohibit.[1]

So the most proper business may be regulated to prevent its becoming offensive to the public sense of decency,[2] or for any other reason injurious or dangerous;[3] and rules for the conduct of the

[1] Youngblood *v.* Sexton, 32 Mich. 406.

[2] Like the keeping and exhibition of stallions and bulls in public places. Nolin *v.* Franklin, 4 Yerg. 163.

[3] Watertown *v.* Mayo, 109 Mass. 315; Blydenburg *v.* Miles, 39 Conn. 484; Taylor *v.* State, 35 Wis. 298. The sale of any pistol except the navy pistol may be forbidden. Dabbs *v.* State, 39 Ark. 353. One operating a co-operative cheese factory may be required to give bonds. Hawthorn *v.* People, 109 Ill. 302. The sale of goods, except at one's regular place of business, near camp meeting grounds may be forbidden. Meyers *v.* Baker, 120 Ill. 567, 12 N. E. 70; Com. *v.* Bearse, 133 Mass. 542. An inn-keeper may be required to take out a license. Bostick *v.* State, 47 Ark. 126, 14 S. W. 476. But the manufacture of tobacco on any floor of a tenement house, if such floor is used as a residence, may not be forbidden. *In re* Jacobs, 98 N. Y. 98. [State may regulate the occupation or business of barbers, and may require barbers to pass an examination and pay a reasonable license-fee therefor, in order to insure proper degree of competency and to protect the health of their patrons. State *v.* Zeno, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88. But such regulations as limit the right of a citizen to contract with reference to his own property must have some recognizable tendency to promote the public welfare. They cannot be purely arbitrary. Dennis *v.* Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442. Manufacturers may be compelled to pay their employees their wages weekly in Massachusetts. *Re* House Bill No. 1230, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344; and upon power to regulate time of payment of wages, see note to this case in L. R. A., also upon requirement that wages be paid in lawful money, note to 28 L. R. A. 273, and Dixon *v.* Poe, — Ind. —, 65 N. E. 518. In Pennsylvania it is held that insurance business may be confined to corporations. Commonwealth *v.* Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250. State may provide that answer by applicant for insurance shall not bar recovery unless wilfully false, material, and made without agent's knowledge of falsity, and unless it induced the company to issue the policy. J. Hancock M. L. Ins. Co. *v.* Warren, 59 Ohio St. 45, 51 N. E. 546, aff. in 181 U. S. 73, 21 Sup. Ct. Rep. 535. Statute providing that if insurance company shall fail to pay loss when due it shall be liable for 12 per cent additional is held valid in Fidelity and Casualty Co. *v.* Allibone, 90 Tex. 660, 39 S. W. 632. But see Railway Co. *v.* Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255, where similar statute as to contracts between railway companies and their employees is held void. Upon power to regulate insurance, see State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, and Noble & W. *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238, and note. Ticket brokerage may be prohibited. Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, and note; State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; Com. *v.* Keary, 198 Pa. 500, 48 Atl. 472. But all regulations of business that is not in itself deleterious to the general good must be reasonable. They cannot be arbitrary, and if they are so the courts will set them aside. *Ex parte* Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727. An act forbidding one not a registered pharmacist to sell patent medicines is void as unreasonable. Noel *v.* People, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287. Plumbers may be required to procure a certificate of competency from a State board of examiners, and to be registered. Singer *v.* State, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; People *v.* Warden, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718.]

most necessary and common occupations are prescribed when from their nature they afford peculiar opportunities for imposition and fraud.[1] Cities commonly provide markets where provisions may be exposed for sale; and these are subjected to careful regulations, and furnished with official inspectors to whom every dealer may be required to exhibit his stock. (*a*) Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or taken away from a party detected in dishonest practices.[2] For dealings in the markets, weights

[1] *E. g.*, the business of insuring lives or property. Ward *v.* Farwell, 97 Ill. 593; Lothrop *v.* Steadman, 42 Conn. 583. [That of itinerant vendors. State *v.* Foster, 21 R. I. 251, 43 Atl. 66, 50 L. R. A. 339. State may require that coal mined shall be weighed before being screened, and that miners shall be paid according to weights thus determined, where the parties are left free to determine by contract the rate to be paid. State *v.* Wilson, 61 Kan. 32, 58 Pac. 981, 47 L. R. A. 71. See further on statutes requiring weighing of coal before screening, *Re* Preston, 63 Ohio, 428, 59 N. E. 101, 52 L. R. A. 523, 81 Am. St. 642, and cases cited in the opinion. Statute forbidding discharge of an employee because of membership in a labor organization is invalid. State *v.* Kreutzberg, 114 Wis. 530, 90 N. W. 1098; State *v.* Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. 443; Gillespie *v.* People, 188 Ill. 176, 58 N. E. 1007, 80 Am. St. 176. That commission merchants dealing in farm produce shall take out licenses, have their business inspected, give bonds for due performance of their duties to consignors, &c.; State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L. R. A. 442; *contra*, People *v.* Coolidge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493. State may regulate the practice of dentistry. State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119. But regulations of the practice of the professions cannot make arbitrary discriminations. State *v.* Pennoyer, 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709. General buyers of wheat at elevators situated on or alongside any railway may be required to take out licenses. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 Sup. Ct. Rep. 423, aff. 77 Minn. 223, 79 N. W. 962. Sale of railway tickets may be restricted to authorized agents of railway companies. Com. *v.* Keary, 198 Pa. 500, 48 Atl. 472; Burdick *v.* People, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, and note; State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498.]

[2] See, in general, Nightingale's Case, 11 Pick. 168; Buffalo *v.* Webster, 10 Wend. 99; Bush *v.* Seabury, 8 Johns. 418; Ash *v.* People, 11 Mich. 347; State *v.* Leiber, 11 Iowa, 407; Le Claire *v.* Davenport, 13 Iowa, 210; White *v.* Kent, 11 Ohio St. 550; Bowling Green *v.* Carson, 10 Bush, 64; New Orleans *v.* Stafford, 27 La. Ann. 417. [An act requiring peddlers in a certain county to take out a license and exempting from its operation merchants, persons selling to merchants, and persons selling property raised or manufactured by them, is held invalid in Com. *v.* Snyder, 182 Pa. St. 630, 38 Atl. 356; State *v.* Wagener, 69 Minn. 206, 72 N. W. 67, 38 L. R. A. 677. But see Rosenbloom *v.* State, — Neb. —, 89 N. W. 1053, 57 L. R. A. 922, and note, in which case it is held that a regulation requiring license from dealers in merchandise which exempted those selling their own productions is valid. A regulation limiting requirement for license to transients only is void; McGraw *v.* Marion, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593. See also Knisely *v.* Cotterel, 196 Pa. 614, 46 Atl. 861, 50

(*a*) [Upon police powers over markets, see Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 9 L. R. A. 69; State *v.* Sarradat, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584, and note; City of New Orleans *v.* Faber, 105 La. 208, 29 So. 507, 53 L. R. A. 165. Fresh meats may be required to be sold only in public markets. Newson *v.* Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797.]

and measures are established, and parties must conform to the fixed standards under penalty.[1] It is also common to require draymen, hackmen, pawnbrokers, and auctioneers to take out licenses, and to conform to such rules and regulations as seem important to the public convenience and protection.[2] So for the protection of youth in institutions of learning, and for the good discipline of schools, the sale of liquors in their vicinity may be prohibited when allowed generally,[3] and credit for livery to pupils, without the consent of the college authorities, may be subjected to penalty.[4] So, for the protection of laborers against the oppression of employers, it is held competent to forbid their being paid in anything else than legal-tender funds.[5] And under its general

L. R. A. 86, and note; Carrollton *v.* Bazette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; State *v.* Harrington, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100; Brownback *v.* North Wales, 194 Pa. 609, 45 Atl. 660, 49 L. R. A. 446; State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339.] The power is continuing, and markets once established may be changed at the option of the authorities, and they cannot even by contract deprive themselves of this power. Gale *v.* Kalamazoo, 23 Mich. 344; Gall *v.* Cincinnati, 18 Ohio St. 563; Cougot *v.* New Orleans, 16 La. Ann. 21. Sales outside of public markets may be prohibited. Gossigi *v.* New Orleans, 41 La. Ann. 522, 6 So. 534; *Ex parte* Byrd, 84 Ala. 17, 4 So. 397.

[1] Guillotte *v.* New Orleans, 12 La. Ann. 432; Page *v.* Fazackerly, 36 Barb. 392; Raleigh *v.* Sorrell, 1 Jones (N. C.), 49; Gaines *v.* Coats, 51 Miss. 335; Dillon, Mun. Corp. §§ 323, 324, and cases cited. Sales of food may not be forbidden merely because prizes or gifts are part of the inducement. People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343. As to market regulations in general, see Wartman *v.* Philadelphia, 33 Pa. St. 202; Spaulding *v.* Lowell, 23 Pick. 71; Gall *v.* Cincinnati, 18 Ohio St. 563; Municipality *v.* Cutting, 4 La. Ann. 336; State *v.* Fisher, 52 Mo. 174. [Upon powers of municipalities over markets, see State *v.* Sarradat, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584, and note; Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 9 L. R. 69. Ingredients of compound or adulterated lard may be required to be disclosed upon the wrapper of the package. State *v.* Snow, 81 Iowa, 642, 47 N. W. 777, 11 L. R. A. 355. Sale of certain classes of provisions may be restricted to public markets. New Orleans *v.* Faber, 105 La. 208, 29 So. 507, 53 L. R. A. 165.]

[2] Commonwealth *v.* Stodder, 2 Cush. 562; Morrell *v.* State, 38 Wis. 428; 20 Am. Rep. 12; Dillon, Mun. Corp. §§ 291–296. One who lets his horse and wagon for the hirer to use himself is not a drayman. State *v.* Robinson, 42 Minn. 107, 43 N. W. 833, 6 L. R. A. 339. As to license fees, and when they are taxes, see *ante*, pp. 283, 705; Mayor, &c. of Mobile *v.* Yuille, 3 Ala. 137.

[3] State *v.* Ranscher, 1 Lea, 96; Boyd *v.* Bryant, 35 Ark. 69, 37 Am. Rep. 6. See Bronson *v.* Oberlin, 41 Ohio St. 476.

[4] Soper *v.* Harvard College, 1 Pick. 177, 11 Am. Dec. 159. In Commonwealth *v.* Bacon, 13 Bush, 210, 26 Am. Rep. 189, it was held not competent to forbid any one carrying on stabling within a specified distance of a named agricultural society during its fairs.

[5] Shaffer *v.* Union Mining Co., 55 Md. 74. [And for the protection of the health of miners and the avoidance of unnecessary danger to their lives and limbs, the State may compel the ventilation of mines and the erection of structures to facilitate their escape in case of accident. The cost of the necessary inspections may be levied upon the owners of the mines. Chicago, W. & V. Coal Co. *v.* People, 181 Ill. 270, 54 N. E. 961; 48 L. R. A. 554; Consolidated Coal Co. *v.* People, 186 Ill. 134, 57 N. E. 880. And the State may require railway companies to compensate all employees for injuries caused by negligence of any of their servants in charge of particular branches of their

right to require merchandise to be submitted to public inspection and regulation, the State may prescribe the size of packages and place of inspection for the shipment of tobacco to foreign countries, and impose penalties for failure to conform to the regulations.[1]

The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way; not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them.[2] But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection.[3] The same is true of young children, whose employ-

service. Such legislation being justified upon the ground that it is for the protection of persons engaged in an extra-hazardous occupation. Indianapolis U. Ry. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787. See construction of statute forbidding the assignment of wages not due and declaring invalid agreements relieving an employer from paying wages weekly in International T. B. Co. *v.* Weissinger, — Ind. —, 65 N. E. 521.]

[1] Turner *v.* State, 55 Md. 240, aff. 107 U. S. 38, 2 Sup. Ct. Rep. 44.

[2] Baker *v.* Portland, 5 Sawyer, 566. [It is unlawful to require an applicant for a license to follow the occupation of a barber to be a citizen of the United States: Templar *v.* Examining Bd. of Barbers, — Mich. —, 90 N. W. 1058. See Tragresser *v.* Gray, 73 Md. 250, 20 Atl. 905, 9 L. R. A. 780, holding that liquor-selling may be restricted to citizens of the United States. Police regulations cannot be purely arbitrary nor purely for the promotion of private interests. It must appear that the general welfare is to be in some degree promoted. A statute requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after notice of its arrival, is unconstitutional. State *v.* Chicago, M. & St. P. R. Co., 68 Minn. 381, 71 N. W. 400, 38 L. R. A. 672. But in Pennsylvania it is held that the business of insurance may be confined to corporations. Com. *v.* Vrooman, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250. A gift enterprise carried on by a merchant in connection with his business and involving no element of chance cannot be prohibited. Long *v.* State, 73 Md. 527, 21 Atl. 683, 12 L. R. A. 527, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425. And see State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. 818, 48 L. R. A. 775.]

[3] It has been held that a constitutional provision forbidding the General Assembly granting "to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens," does not preclude restricting the licensing of the sale of intoxicating drinks to males. Blair *v.* Kilpatrick, 40 Ind. 312. The people of California deemed it wise to provide by their constitution that "no person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession;" and it has been held that the legislature is now deprived of the power to prohibit the employment

ment in mines and manufactories is commonly, and ought always, to be regulated.[1] And some employments in which integrity is of vital importance it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable.[2]

Whether the prohibited act or omission shall be made a criminal offence, punishable under the general laws, or subject to punishment under municipal by-laws, or, on the other hand, the party be deprived of all remedy for any right which, but for the regulation, he might have had against other persons, are questions which the legislature must decide. It is sufficient for us to have pointed out that, in addition to the power to punish misdemeanors and felonies, the State has also the authority to make extensive and varied regulations as to the time, mode, and circumstances in and under which parties shall assert, enjoy, or exercise their rights without coming in conflict with any of those constitutional principles which are established for the protection of private rights or private property.[3]

of females in drinking-cellars and other places where liquors are kept for sale. Matter of Maguire, 57 Cal. 604. [Sale of wines and liquors in dance-cellars and the like places frequented by women may be forbidden. *Ex parte* Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701.] That such employment might otherwise be prohibited on good reasons, few persons will doubt. See Matter of Quong Woo, 13 Fed. Rep. 229. And in Ohio this may be forbidden under power to regulate saloons. Bergman *v.* Cleveland, 39 Ohio St. 651.

[1] See Commonwealth *v.* Hamilton Manufacturing Co., 120 Mass. 383. [Employment of girls less than fourteen years old in public theatrical exhibitions, &c., may be forbidden under penalty. People *v.* Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, and note.]

[2] The legislature may prescribe the qualifications for the practice of dentistry: Wilkins *v.* State, 113 Ind. 514, 16 N. E. 192; State *v.* Vandersluis, 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119; Gosnell *v.* State, 52 Ark. 228, 12 S. W. 392; or medicine. State *v.* Dent, 25 W. Va. 1; aff. 120 U. S. 114, 9 Sup. Ct. Rep. 231; Eastman *v.* State, 109 Ind. 278, 10 N. E. 97; People *v.* Phippin, 70 Mich. 6, 37 N. W. 888. [And after license granted the State may revoke it for a cause existing at time of grant and then known, and it may make new regulations and provide penalties for breach thereof, even though such regulations amount under the circumstances to a deprival of the right to practise. Hawker *v.* New York, 170 U. S. 189, 18 Sup. Ct. Rep. 573. Upon validity of regulations of practice of medicine, see note to 14 L. R. A. 579. State may restrict practice of law to males. *Ex parte* Lockwood, 154 U. S. 116, 14 Sup. Ct. Rep. 1082. But it rests with the courts to determine what qualifications are necessary to admission to the bar. *Re* Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519. State may compel all practising physicians to take out new licenses, and to pass examinations therefor. State *v.* Webster, 150 Ind. 607, 50 N. E. 750; 41 L. R. A. 212.] The right to practise cannot be refused without giving the applicant an opportunity to be heard. State *v.* State Med. Ex. Board, 32 Minn. 324, 20 N. W. 238; Gage *v.* Censors, 63 N. H. 92. [See Reetz *v.* Michigan, — U. S. —, 23 Sup. Ct. Rep. 390.] Physicians may be required to report births and deaths. Robinson *v.* Hamilton, 60 Iowa, 134, 14 N. W. 202.

[3] Upon the general right of the State to regulate trades and occupations, see further, Pierce *v.* Kimball, 9 Me. 54, 23

Am. Dec. 537; Shepherd *v.* Commissioners, 59 Ga. 535; State *v.* Callicut, 1 Lea, 716; Fry *v.* State, 63 Ind. 552. [Where the constitution directs that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines," the legislature is competent to enact that "except in cases of emergency where life or property is in imminent danger" "the period of employment of workingmen in all underground mines or workings" and "in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day," and that the violation of any such provision by "any person, body corporate, agent, manager or employer," shall be a misdemeanor. Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383, aff. 14 Utah, 71, 96, 46 Pac. 756, 1105, 37 L. R. A. 103, 108. The case in the United States Supreme Court cites many cases bearing upon the subject, and discusses very thoroughly the effect of the Fourteenth Amendment upon the police powers of the States. See also Short *v.* Bullion, B. & C. Mining Co., 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603, where effect of this act upon contracts for pay for overtime is considered. That such regulation cannot be made under the ordinary constitution, see *Re* Morgan, 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. 269. In Fiske *v.* People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 201, it is held that an ordinance providing for provisions in city contracts limiting hours of labor upon city works to eight hours was unconstitutional as infringing freedom to contract. For other cases upon the right to limit or regulate hours of labor, see People *v.* Phyfe, 136 N. Y. 554, 32 N. E. 978, 19 L. R. A. 141; *Re* Dalton, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380; Seattle *v.* Smyth, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. 939; of females upheld in Wenham *v.* State, — Neb. —, 91 N. W. 421, 58 L. R. A. 825; Cleveland *v.* Clement Bros. Const. Co., — Ohio —, 65 N. E. 885, 59 L. R. A. 775; State *v.* Buchanan, — Wash. —, 70 Pac. 52, 59 L. R. A. 342 (forbidding employment of women more than ten hours a day). See further upon power of State to limit hours of labor, 53 Cent. L. Jour. 384. Upon protection of health of employees, see People *v.* Smith, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853, and note; protection of health within State, State *v.* Schlemmer, 42 La. An. 1166, 8 So. 307; 10 L. R. A. 135, and note; relation of States to general government in regard to police power, contracts, &c., note to Baldwin's View, 9 L. ed. U. S. 873. In Indianapolis U. Ry. Co. *v.* Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, a statute making railway companies liable to employees for injuries caused by negligence of other employees of specified grade, was upheld as valid exercise of police power.] Where a municipality is given power to license occupations which are proper in themselves and not subject to special evils — *e. g.* that of a laundry — the license cannot be made conditional on obtaining consent of residents of the neighborhood, as this in effect would be a delegation of its power to license. Matter of Quong Woo, 13 Fed. Rep. 229. The functions of a fertilizer inspector must, except by statutory permission, be exercised within the State. Hammond *v.* Wilcher, 79 Ga. 421, 5 S. E. 113.

CHAPTER XVII.

THE EXPRESSION OF THE POPULAR WILL.

ALTHOUGH by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government.[1]

[1] "The maxim which lies at the foundation of our government is that all political power originates with the people. But since the organization of government it cannot be claimed that either the legislative, executive, or judicial powers, either wholly or in part, can be exercised by them. By the institution of government the people surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who at least theoretically represent the supreme will of their constituents. Thus all power possessed by the people themselves is given and centred in their chosen representatives." *Davis*, Ch. J., in Gibson *v.* Mason, 5 Nev. 283, 291. See Luther *v.* Borden, 7 How. 1; Koehler *v.* Hill, 60 Iowa, 617, 14 N. W. 738, 15 N. W. 609; State *v.* Tufly, 19 Nev. 391, 12 Pac. 835.

There are a number of provisions in different State constitutions which require that certain specified propositions —such, for example, as the amendment of the constitution or the removal of a county seat — shall be carried only by a majority vote of the electors, or perhaps by a two-thirds majority. Whether by majority in these provisions is intended a majority of all who took part in the election, by voting on any proposition then submitted, or by voting for any officer then to be chosen, or only a majority of those who voted on the particular proposition, has sometimes been made to turn on the peculiar phraseology of the constitutional provision; but it must be confessed that it is impossible to harmonize the cases, and we give references to them without attempting it. Taylor *v.* Taylor, 10 Minn. 107; Bayard *v.* Klinge,

The authority of the people is exercised through *elections*, (*a*) by means of which they choose legislative, executive, and judicial

16 Minn. 249; Gillespie *v.* Palmer, 20 Wis. 544; State *v.* Winkelmeier, 35 Mo. 105; State *v.* Mayor, &c., 37 Mo. 270; State *v.* Binder, 38 Mo. 450; State *v.* Sutterfield, 54 Mo. 391; State *v.* Brassfield, 67 Mo. 331; State *v.* St. Louis, 73 Mo. 435; State *v.* Francis, 95 Mo. 44, 8 S. W. 1; People *v.* Brown, 11 Ill. 478; Donnovan *v.* Green, 57 Ill. 63; Chestnutwood *v.* Hood, 68 Ill. 132; State *v.* Swift, 69 Ind. 505; State *v.* Lancaster County, 6 Neb. 474; State *v.* Anderson, 26 Neb. 517, 42 N. W. 421; Prohibitory Amendment Cases, 24 Kan. 700; State *v.* Echols, 41 Kan. 115, 20 Pac. 523; Cass County *v.* Johnson, 95 U. S. 360; Walker *v.* Oswald, 68 Md. 146, 11 Atl. 711; Braden *v.* Stumph, 16 Lea, 581. [Bryan *v.* Stephenson, 50 Neb. 620, 70 N. W. 252, 35 L. R. A. 752; Zeiler *v.* Central R. Co., 84 Md. 304; 35 Atl. 932; 34 L. R. A. 469; Belknap *v.* Louisville, 99 Ky. 474, 36 S. W. 1118, 34 L. R. A. 256; State *v.* Langlie, 5 N. D. 594, 67 N. W. 958, 32 L. R. A. 723; People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838.] In respect to municipal and other corporate bodies the general rule is that if a quorum is present when an election is to be made, or other corporate action taken, and the minority for any reason refuse to vote, they must be deemed to acquiesce in the action of those who do vote. Oldknow *v.* Wainwright, or Rex *v.* Foxcroft, Burr. 1017; First Parish *v.* Stearns, 21 Pick. 148; Booker *v.* Young, 12 Gratt. 303; State *v.* Green, 37 Ohio St. 227. [Citizens & Taxpayers of De Soto Parish *v.* Williams, 49 La. Ann. 422, 21 So. 647, 37 L. R. A. 761. But see People *v.* Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838.]

(*a*) [Several States have recently enacted laws for the prevention of bribery, intimidation, fraud, and other corrupt practices at elections. Such are generally called Corrupt Practices Acts. In Mason *v.* State, 58 Ohio St. 30, 50 N. E. 6, 41 L. R. A. 291, M. was ousted from the office of probate judge for having attempted to influence the votes of sundry persons by promising that in case of his election he would use his influence to secure them various appointments to office, and the right to jury trial was denied since the action was merely one to try title to office. In State *v.* Bland, 144 Mo. 534, 46 S. W. 440, 41 L. R. A. 297, a somewhat similar statute, it was held, should be strictly construed; B. was charged with paying money and promising appointments to subordinate offices in order to secure the withdrawal of a rival candidate, to which charge he demurred, and the demurrer was sustained on the ground that the offence prohibited was the act of corruptly influencing the vote of any voter, and not that of securing the withdrawal of an opposing candidate. It must be confessed that in the present case where B. induces his opposing candidate N. to withdraw by promising that in case he is elected he will attempt to secure N.'s appointment to a lucrative position, the circumstances being such that his attempt is practically certain to succeed, the distinction between inducing N. to withdraw in favor of B. and attempting to induce N. to vote for B. seems more subtle than substantial. Where oath of office is prescribed with provision that no other oath or qualification shall ever be required, the candidate cannot be required to make oath as to expenditures. Bradley *v.* Clark, 133 Cal. 196, 65 Pac. 395. Where the Constitution prohibits more than one election a year, special elections cannot be held, but the special matters must be submitted at a general election. Belknap *v.* Louisville, 99 Ky. 474, 36 S. W. 1118, 34 L. R. A. 256. Where an appointment to fill a vacancy lasts until "the next election by the people," the appointee holds for the remainder of the regular term and not merely until the next general election. People *v.* Budd, 114 Cal. 168, 45 Pac. 1060, 34 L. R. A. 46. The provision that all the qualified electors in a city "shall have the right to vote for mayor and the other elective officers" does not prevent a division of the city into wards so that each elector in a ward is restricted to voting for an alderman from his ward. State *v.* McAllister, 88 Tex. 284, 31 S. W. 187, 28 L. R. A. 523. But where the members of assembly are to be elected "by the legal voters of the county respectively," and each assemblyman must be an inhabitant of "the county for which he shall be chosen,"

officers, to whom are to be entrusted the exercise of powers of government.[1] In some cases also they pass upon other questions

[1] [The act of voting is an exercise of sovereignty and cannot be compelled. Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295, 35 L. R. A. 747; but why not? It certainly is not an act of the sovereign, for there are many voters but there can be only one sovereign in any state. That a citizen properly qualified and selected may be compelled to serve as an officer, see People *v.* Williams, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 402, and note.] Where neither by constitution nor by statute are the qualifications for office prescribed, any one is eligible who possesses the elective franchise. It may happen, therefore, that one may be an officer who is not a citizen of the United States; for in a number of the States aliens who have declared their intention to become citizens, and have the qualification of residence are given the franchise. McCarthy *v.* Froelke, 63 Ind. 507. Whether the converse is true, — that one not an elector cannot hold office; — in the absence of written law on the subject, is possibly open to question. In Barker *v.* People, 3 Cow. 686, 703, the Chancellor said: "Eligibility to office belongs not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution." So, State *v.* George, 23 Fla. 585, 3 So. 81. [And see Steusoff *v.* State, 80 Tex. 428, 15 S. W. 1100, 12 L. R. A. 364.] But in Wisconsin it is held that only an elector can hold an office; State *v.* Smith, 14 Wis. 497; State *v.* Murray, 28 Wis. 96; and this is probably the general understanding. [So held in Oren *v.* Abbott, 121 Mich. 510, 80 N. W. 372, 47 L. R. A. 93, where the question arose whether a woman otherwise duly qualified and elected may hold the office of prosecuting attorney; also in State *v.* Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622.] The question is not very important, as State constitutions or statutes generally lay down that rule, in some cases adding further requirements. [Where it is required that judges be "learned in the law," this requires that they shall have been admitted to practise law in the courts of the State. Jamieson *v.* Wiggin, 12 S. D. 16, 80 N. W. 137, 46 L. R. A. 317.] One holding a consulate abroad does not cease to be a qualified elector. Wheat *v.* Smith, 5 Ark. 266, 7 S. W. 161. See Hannon *v.* Grizzard, 89 N. C. 115. A provision that only a qualified elector shall hold office does not prevent making payment of taxes a qualification for election as alderman. Darrow *v.* People, 8 Col. 417, 8 Pac. 661. It is sufficient if a disability is removed before taking office, though existing at the time of election. Privett *v.* Bickford, 26 Kan. 52; [Demaree *v.* Scates, 50 Kan. 275, 32 Pac. 1123, 20 L. R. A. 97; State *v.* Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 562. But see State *v.* Sullivan, 45 Minn. 309, 47 N. W. 802, 11 L. R. A. 272, and note; this case holds that the intention to become naturalized must be declared before *election*. Upon general subject of "Eligibility to Office, as of What Time Determined," see 1 Mich. Law Rev. 17, a paper by Floyd R. Mechem.] Under constitutional provisions that no other oath or test shall be required as a qualification for holding office than the oath of allegiance to the constitution, political ties cannot be made a prerequisite. Att'y-Gen. *v.* Detroit Com. Council, 58 Mich. 213, 24 N. W. 887; Evansville *v.* State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State *v.* Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65. *Contra*, as to election officers. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788. [See further Com. *v.* Plaisted, 148 Mass. 375, 19 N. E. 224, 12 Am. St. 566, 2 L. R. A. 142; Rogers *v.* Buffalo, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.] See *In re* Wortman, 2 N. Y. S. 324. There are some implied disqualifications. One of these is that a person shall not hold incompatible offices; if he accepts an office incompatible with one already held by him, the other is vacated: Milward *v.* Thatcher, 2 T. R. 81; The King *v.* Tizzard, 9 B. & C. 418; People *v.* Carrigue, 2 Hill, 93; People *v.* Nostrand, 46 N. Y. 375; People *v.* Hani-

the county cannot be divided into two or more single-membered districts. State *v.* Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548.]

specially submitted to them, and adopt or reject a measure according as a majority may vote for or against it. It is obviously

fan, 96 Ill. 420; State *v.* Hutt, 2 Ark. 282; Stubbs *v.* Lea, 64 Me. 95; but see De Turk *v.* Com., 129 Pa. St. 151, 18 Atl. 757; and if he is elected to both at the same time, he declines one when he accepts the other. Cotton *v.* Phillips, 56 N. H. 219. [But where his first office is such that he cannot resign it at will (*e. g.*, tax-collector), he is incapable of accepting an incompatible office until his resignation of the former has been accepted. Attorney-General *v.* Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670. Where an officer is prohibited from holding any other office during the term for which he is elected, his resignation does not remove the disability. State *v.* Sutton, 63 Minn. 147, 65 N. W. 262, 30 L. R. A. 630.] Incompatibility between two offices is an inconsistency in the functions of the two, — as judge and clerk of the same court; officer who presents his personal account for audit, and officer who passes upon it, &c.: People *v.* Green, 58 N. Y. 495; sheriff and justice of the peace: State Bank *v.* Curran, 10 Ark. 142; Stubbs *v.* Lea, 64 Me. 195; Wilson *v.* King, 3 Lit. 457, 14 Am. Dec. 84; State *v.* Goff, 15 R. I. 505, 9 Atl. 226; governor and member of the legislature; justice of the peace and judge of the appellate court, &c. See Commonwealth *v.* Binns, 17 S. & R. 221; State *v.* Clarke, 3 Nev. 566; State *v.* Feibleman, 28 Ark. 424; Mohan *v.* Jackson, 52 Ind. 599; State *v.* Weston, 4 Neb. 234; *Re* District Attorney, &c., 11 Phila. 695; Sublett *v.* Bidwell, 47 Miss. 266, 12 Am. Rep. 338; Barnum *v.* Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; McNeill *v.* Somers, 96 N. C. 467, 2 S. E. 161. [Attorney-General *v.* Common Council of Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211. See also Chambers *v.* State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613, and note.] In Indiana a judge is ineligible to a non-judicial office whose term begins before the judicial term expires. Vogel *v.* State, 107 Ind. 374, 8 N. E. 164. See Smith *v.* Moore, 90 Ind. 294. It is also sometimes provided that no person shall hold offices in two departments of the government at the same time, or two lucrative offices; as to which see Dailey *v.* State, 8 Blackf. 329; Creighton *v.* Piper, 14 Ind. 182; Kerr *v.* Jones, 19 Ind. 351; People *v.* Whitman, 10 Cal. 38; Crawford *v.* Dunbar, 52 Cal. 36; Howard *v.* Shoemaker, 35 Ind. 115; State *v.* Kirk, 44 Ind. 401; Foltz *v.* Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672; People *v.* Sanderson, 30 Cal. 160. Or hold both a federal and a State office. Rodman *v.* Harcourt, 4 B. Monr. 224, 499; Hoglan *v.* Carpenter, 4 Bush, 89; *Re* Corliss, 11 R. I. 638; State *v.* De Gress, 53 Tex. 387; Davenport *v.* Mayor, 67 N. Y. 456; People *v.* Brooklyn Common Council, 77 N. Y. 503, 33 Am. Rep. 659; State *v.* Clarke, 3 Nev. 566; People *v.* Leonard, 73 Cal. 230, 14 Pac. 853; but a federal watchman may be an alderman. Doyle *v.* Raleigh, 89 N. C. 133. Or be eligible to re-election to an office after holding it for a specified period. See Gonell *v.* Bier, 15 W. Va. 311; Carson *v.* McPheteridge, 15 Ind. 327; Horton *v.* Watson, 23 Kan. 229. Or be eligible while a public defaulter. See Hoskins *v.* Brantley, 57 Miss. 814; Cawley *v.* People, 95 Ill. 249. Or that he shall be disqualified for using money corruptly to procure election. Commonwealth *v.* Walter, 86 Pa. St. 15. Or for bribery at a nominating convention. Leonard *v.* Com., 112 Pa. St. 607, 4 Atl. 220. See *Re* Nomination of Public Officers, 9 Col. 629, 21 Pac. 474; though a mere promise to serve for less than lawful fees is not a disqualification, where one has not been convicted for it as for an offence against the law. State *v.* Humphreys, 74 Tex. 466, 12 S. W. 99. See also, Meredith *v.* Christy, 64 Cal. 95, 27 Pac. 803; People *v.* Goddard, 8 Col. 432, 7 Pac. 301. Or by or for being a party to a duel. Cochran *v.* Jones, 14 Am. Law Reg. 222.

As to who are "officers" within the meaning of that term in provisions examined, see Butler *v.* Board of Regents, 32 Wis. 124; Brown *v.* Turner, 70 N. C. 93; Eliason *v.* Coleman, 86 N. C. 235; State *v.* Wilson, 29 Ohio St. 347; Throop *v.* Langdon, 40 Mich. 673; State *v.* Wilmington City Council, 3 Harr. 294; Dickson *v.* People, 17 Ill. 191; Shurbun *v.* Hooper, 40 Mich. 503.

It was held in Olive *v.* Ingram, Strange,

impossible that any considerable people should in general meeting consider, mature, and adopt their own laws; but when a law has been perfected, and it is deemed desirable to take the expression of public sentiment upon it, or upon any other single question, the ordinary machinery of elections is adequate to the end, and the expression is easily and without confusion obtained by submitting such law or such question for an affirmative or negative vote. In this manner constitutions and amendments thereof are adopted or rejected, and matters of local importance in many cases, such as the location of a county seat,[1] the contracting of a local debt, the erection of a public building, the acceptance of a municipal charter, and the like, are passed upon and determined by the people whom they concern, under constitutional or statutory provisions which require or permit it.[2]

It is supposed when laws are framed for the conduct of elections that their requirements will be observed; that the persons chosen to perform official duties will possess the legal qualifications, and that they will take any oath and give any bond that may be required of them by law, and be regularly inducted into office. But from accident, mistake of law, forgetfulness, or other inadvertence, and sometimes for less excusable reasons, it often happens that some one is found in possession and performing the duties of a public office who cannot defend his incumbency by the strict letter of the law. The fact renders necessary a classification of officers as *de jure* and *de facto*. (*a*)

1114, that a woman, being a voter, at parish elections, might be chosen sexton. Women may by law be school officers in Massachusetts. Opinion of Judges, 115 Mass. 602. And in Iowa. Huff *v.* Cook, 44 Iowa, 639. Also in many other States. They are also appointed notaries public in several States, are State librarians in some, and members of State charitable boards. [But a woman cannot be notary public in Ohio. State *v.* Adams, 58 Ohio St. 612, 51 N. E. 135, 41 L. R. A. 727. Nor in Massachusetts. Opinion of Justices, 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350. She may be county clerk in Missouri. State *v.* Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208; see note to this case in L. R. A. upon right of woman to hold office.] In Illinois a woman may be master in chancery: Schuchardt *v.* People, 99 Ill. 501; and in Colorado, a deputy clerk. It is not an "office" which only a qualified elector may hold. Jeffries *v.* Harrington, 11 Col. 191, 17 Pac. 505. Infants as well as women may be appointed deputies to such ministerial officers as are entitled to act by deputy. [See Jamesville & W. R. Co. *v.* Fisher, 109 N. C. 1, 13 S. E. 698, 13 L. R. A. 721, and note.]

[1] Where the constitution leaves the location of a county seat to a local vote, the legislature has no power to decide upon it. Stuart *v.* Blair, 8 Bax. 141; Verner *v.* Simmons, 33 Ark. 212.

[2] It is not competent for the legislature to confer the selection of a public officer upon a voluntary association of private individuals. Therefore a statute giving to the members of a voluntary detective association the powers of constables is void. Abels *v.* Supervisors of Ingham, 42 Mich. 620, 4 N. W. 206.

(*a*) [Upon officers *de jure* and *de facto* and their relations, see State *v.* Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, and note. Where the governor *de jure* is present

An officer *de jure* is one who, possessing the legal qualifications, has been lawfully chosen to the office in question, and has fulfilled any conditions precedent to the performance of its duties. By being thus chosen and observing the precedent conditions, such a person becomes of right entitled to the possession and enjoyment of the office, and the public, in whose interest the office is created, is entitled of right to have him perform its duties. If he is excluded from it, the exclusion is both a public offence and a private injury.

An officer *de jure* may be excluded from his office by either an officer *de facto* or an intruder. An officer *de facto* is one who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact.[1] His color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it;[2] or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed;[3] or made in favor of a party not having the legal qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after

[1] One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Parker *v.* Hett, Ld. Raym. 658; King *v.* Bedford Level, 6 East, 356, 368. One who comes in by claim or color of right, or who exercises the office with such circumstances of acquiescence on the part of the public as at least afford a strong presumption of right, but by reason of some defect in his title, or of some informality, omission, or want of qualification, or by reason of the expiration of his term of service, is unable to maintain his possession when called upon by the government to show by what title he holds it. Blackwell on Tax Titles, 92, 93. One who exercises the duties of an office under color of election or appointment to that office. Plymouth *v.* Painter, 17 Conn. 585, 588. There can be no *de facto* incumbent of an office in the possession of an officer. Cohn *v.* Beal, 61 Miss. 398; State *v.* Blossom, 19 Nev. 312, 10 Pac. 430. One who is in hiding cannot be a *de facto* officer. Williams *v.* Clayton, 6 Utah, 86, 21 Pac. 398.

[2] As where the appointing body is acting under an unconstitutional law. Strang, *Ex parte*, 21 Ohio St. 610; Commonwealth *v.* McCombs, 56 Pa. St. 436; Cole *v.* Black River Falls, 57 Wis. 110, 14 N. W. 906; Yorty *v.* Paine, 62 Wis. 154, 22 N. W. 137. See Leach *v.* People, 122 Ill. 420, 12 N. E. 720. Compare Norton *v.* Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121.

[3] Watkins *v.* Inge, 24 Kan. 612. See Meade *v.* County Treasurer, 36 Mich. 416.

at the seat of government and attempting to exercise the powers of his office, he is also governor *de facto*, and no other person can be governor *de facto* at the same time. Powers *v.* Com., 22 Ky. L. 1807, 61 S. W. 735. An officer whose prescribed term has a stated duration and further until his successor is elected and qualified is *de jure* until such qualification, and where the time for election of his successor as prescribed in the Constitution has elapsed, the officer's term lasts until the recurrence of the regular time for election of his successor. State *v.* Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R. A. 657.]

his legal right has been terminated;[1] or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be.[2] An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void.[3] But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office *de jure*, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be.[4] In all other cases the acts of an officer *de facto* are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties.[5] This is an important principle, which finds concise

[1] As when one continues to perform the duties of judge after having accepted a seat in the legislature. Woodside *v.* Wagg, 71 Me. 207. Or a constable continues to act after removal from his town. Case *v.* State, 60 Ind. 46; Wilson *v.* King, 3 Litt. 457, 14 Am. Dec. 84.

[2] State *v.* Carroll, 38 Conn. 449, 471, 9 Am. Rep. 409; Petersilea *v.* Stone, 119 Mass. 465; People *v.* Terry, 108 N. Y. 1, 14 N. E. 815.

[3] Plymouth *v.* Painter, 17 Conn. 585; Peck *v.* Holcombe, 3 Port. 329; Petersilea *v.* Stone, 119 Mass. 465. There can be no officer *de facto* when there is no office. Carlton *v.* People, 10 Mich. 250; *In re* Hinkle, 31 Kan. 712, 3 Pac. 531. If there is by reason of the unconstitutionality of a law no office *de jure* to fill, there can be no officer *de facto*. Norton *v.* Shelby Co., 118 U. S. 425, 6 Sup. Ct. Rep. 1121; [*contra*, Parker *v.* State, 133 Ind. 178, 32 N. E. 186, 33 N. E. 119, 18 L. R. A. 567.] Compare Leach *v.* People, 122 Ill. 420, 12 N. E. 726.

[4] Thus a justice, sued for issuing process after his term has expired, must show his capacity *de jure*. Grace *v.* Teague, 81 Me. 559.

[5] Tucker *v.* Aiken, 7 N. H. 113; Taylor *v.* Skrine, 3 Brev. 516; Fowler *v.* Beebe, 9 Mass. 231, 6 Am. Dec. 62; Hildreth *v.* McIntyre, 1 J. J. Marsh. 206, 19 Am. Dec. 61; Wilcox *v.* Smith, 5 Wend. 231, 21 Am. Dec. 213; People *v.* Kane, 23 Wend. 414; *In re* Kendall, 85 N. Y. 302; Brown *v.* Lunt, 37 Me. 423; State *v.* Carroll, 38 Conn. 449; State *v.* Bloom, 17 Wis. 521; People *v.* Bangs, 24 Ill. 184; Sharp *v.* Thompson, 100 Ill. 447; Clark *v.* Commonwealth, 29 Pa. St. 129; Kimball *v.* Alcorn, 45 Miss. 151; Burke *v.* Elliott, 4 Ired. 355; Gibb *v.* Washington, 1 McAll. 430; Bailey *v.* Fisher, 38 Iowa, 229; *Ex parte* Norris, 8 S. C. 408; Threndgill *v.* Railroad Co., 73 N. C. 178; McLean *v.* State, 8 Heisk. 22; Kreidler *v.* State, 24 Ohio St. 22; Cocke *v.* Halsey, 16 Pet. 71. A *de facto* constable stands upon the same ground as one *de jure* as regards his liability for killing a person resisting arrest. State *v.* Dierberger, 90

expression in the legal maxim that the acts of officers *de facto* cannot be questioned collaterally.

The Right to Participate in Elections. (a)

In another place we have said that, though the sovereignty is in the people, as a practical fact it resides in those persons who

Mo. 369, 2 S. W. 286. [When the Constitution prohibits lengthening the term of a public officer, a statute deferring the time of election of his successor is not thereby made void, even though the Constitutional provision that officers shall hold office until their successors are elected and qualified operates to lengthen the time during which the incumbent occupies the office. State *v.* Menaugh, 151 Ind. 260, 278, 51 N. E. 117, 357, 43 L. R. A. 408, 418.]

(*a*) [The importance of regulating primary elections and nominations to office has of recent years become somewhat widely recognized. The right of a party to hold a nominating convention cannot be denied it on account of its smallness, nor can it be compelled to admit every voter who desires to attend its primaries without regard to his political beliefs. Britton *v.* Election Comm'rs, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115. Nominations by petition are now generally provided for. In State *v.* Poston, 59 Ohio St. 122, 52 N. E. 196, 43 L. R. A. 90, the requirement that such petition "shall contain a provision to the effect that each signer thereto pledges himself to support and vote for the candidate or candidates whose nominations are therein requested," was held valid as not interposing any unreasonable impediment to the exercise of the elective franchise. In Stephenson *v.* Bd. of Election Comm'rs, 118 Mich. 396, 76 N. W. 914, 42 L. R. A. 214, it was held that a political convention might organize itself and determine the rights of contesting delegations to seats, and that in case of nominations by rival factions, both sets of nominees must be listed on the official ballot under the party name and emblem. See also Mareum *v.* Ballot Comm'rs, 42 W. Va. 268, 26 S. E. 281, 36 L. R. A. 296; State *v.* Arms, 24 Mont. 447, 63 Pac. 401. In Phillips *v.* Gallagher, 73 Minn. 528, 76 N. W. 285, 42 L. R. A. 222, the power of a convention to control its own procedure was recognized, and the convention was permitted to reject a vote alleged to be erroneous, although the error was not sufficient to overcome the majority of a candidate, and thereafter to vote again upon the nomination for the particular office, which latter vote taken on a later day resulted in the nomination of a person not named in the first vote. Fraud or oppression was declared unnecessary to cause the court to intervene. White *v.* Sanderson, 74 Minn. 118, 76 N. W. 1021, 42 L. R. A. 231, recognizes the right of a convention to delegate to a committee power to name candidates and certify them to the proper public officer in order that their names may be printed upon the official ballot. Hutchinson *v.* Brown, 122 Cal. 180, 54 Pac. 738, 42 L. R. A. 232, recognizes the converse right to delegate to a committee power to withdraw candidates for the purpose of effecting a fusion. In Kearns *v.* Howley, 188 Pa. 110, 41 Atl. 273, 42 L. R. A. 235, an injunction against adding to or striking from a political party committee was refused on the ground that no property interests were involved, and that any irregularities could be corrected by the party itself. In State *v.* Poston, 58 Ohio St. 620, 51 N. E. 150, 42 L. R. A. 237, the statutory requirement that nominees of parties polling in the last preceding election less than one per cent of the total vote could be nominated only by petition was sustained. See also De Walt *v.* Bartley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, sustaining requirement of three per cent; State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769, five per cent. Statute prohibiting name of candidate nominated by two or more parties for same office from being entered more than once on the official ballot is valid. State *v.* Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239. Where the Secretary of State is required to arrange the party lists of candidates in the order of the average numbers of votes received by the candidates of the various parties in the preceding election, and in

by the constitution of the State are permitted to exercise the elec-

that election two parties "fused" upon the entire list, the Secretary will be allowed to exercise his best judgment in determining the order of the party lists, and in the absence of fraud, prejudice, and partiality, the courts will not interfere with his discretion. Higgins *v.* Berg, 74 Minn. 11, 76 N. W. 788, 42 L. R. A. 245. Where primary elections are regulated by law and conducted at public expense they are public elections, and the qualifications of any voter thereat must be those prescribed in the Constitution. Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196. In requiring an official ballot, the voter cannot be restricted to the candidates whose names are thereon printed. He must be allowed to vote for whom he pleases. State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124. *Contra*, State *v.* McElroy, 44 La. Ann. 796, 11 So. 133, 16 L. R. A. 278. An unauthorized vignette appearing upon all the ballots and printed thereon in the operation of printing the ballots is not a distinguishing mark. Lindstrom *v.* Bd. of Canvassers, 94 Mich. 467, 54 N. W. 280, 19 L. R A. 171. The State may make reasonable regulations concerning what names of candidates shall be printed upon the official ballot, *e.g.*, that each candidate whose name is to be printed shall be nominated by a certain number of petitioners, or by a party having at the last preceding election a specified strength. State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769; Murphy *v.* Curry, 137 Cal. 479, 70 Pac. 461; Todd *v.* Comm'rs, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330; State *v.* Bode, 55 Ohio, 224, 45 N. E. 195, 60 Am. St. 696, 34 L. R. A. 498; State *v.* Anderson, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 230; State *v.* Moore, — Minn. —, 92 N. W. 4. Courts will not go back of returns of authorities of the party as to who are its nominees. Moody *v.* Trimble, 22 Ky. L. 492, 58 S. W. 504; see also Davis *v.* Hambrick, 22 Ky. L. 815, 58 S. W. 779; also State *v.* Moran, 24 Mont. 433, 63 Pac. 300; Addle *v.* Davenport, — Idaho, —, 62 Pac. 681; State *v.* Hogan, 24 Mont. 397, 62 Pac. 683. For other cases arising under Australian Ballot Laws, see Sims *v.* Daniels, 57 Kan. 552, 46 Pac. 952, 35 L. R. A. 146, partially overruled in Miller *v.* Clark, 62 Kan. 278, 62 Pac. 664; McDonald *v.* Hinton, 114 Cal. 484, 46 Pac. 870, 35 L. R. A. 152; Breidenthal *v.* Edwards, 57 Kan. 332, 46 Pac. 469, 34 L. R. A. 146; State *v.* Johnson, 18 Mont. 548, 46 Pac. 533, 34 L. R. A. 313; State *v.* Tooker, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; State *v.* Burdick, 6 Wyo. 448, 46 Pac. 854, 34 L. R. A. 845; Phelps *v.* Piper, 48 Neb. 724, 67 N. W. 755, 33 L. R. A. 53; Cole *v.* Tucker, 164 Mass. 486, 41 N. E. 681, 29 L. R. A. 668; Moyer *v.* Van De Vanter, 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 670; Manston *v.* McIntosh, 58 Minn. 525, 60 N. W. 672, 28 L. R. A. 605; Stackpole *v.* Hallahan, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502; Taylor *v.* Bleakley, 55 Kan. 1, 39 Pac. 1045, 28 L. R. A. 683; *Re* Contested Election, 165 Pa. 233, 30 Atl. 955, 27 L. R. A. 234; Boyd *v.* Mills, 53 Kan. 591, 37 Pac. 16, 25 L. R. A. 486; Ellis *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124; Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; Eaton *v.* Brown, 96 Cal. 371, 31 Pac. 250, 17 L. R. A. 607; Bowers *v.* Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, and note; People *v.* Shaw, 133 N. Y. 493, 31 N. E. 512, 16 L. R. A. 600; De Walt *v.* Bartley, 146 Pa. 525, 529, 23 Atl. 448, 24 Atl. 185, 15 L. R. A. 771; Allen *v.* Glynn, 17 Col. 338, 29 Pac. 670, 15 L. R. A. 743; State *v.* Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740; Parvin *v.* Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775; People *v.* Bd. of Co. Canvassers, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624; Cook *v.* State, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183; Shields *v.* Jacob, 88 Mich. 164, 50 N. W. 105, 13 L. R. A. 760; Rutledge *v.* Crawford, 91 Cal. 520, 27 Pac. 779, 13 L. R. A. 761, and note; Fisher *v.* Dudley, 74 Md. 242, 22 Atl. 2, 12 L. R. A. 586; Fields *v.* Osborne, 60 Conn. 544, 21 Atl. 1070, 12 L. R. A. 551; Detroit *v.* Rush, 82 Mich. 532, 46 N. W. 951, 10 L. R. A. 171, note to 10 L. R. A. 150; Price *v.* Lush, 10 Mont. 61, 24 Pac. 749, 9 L. R. A. 467; *Re* Ballot Act, 16 R. I. 766, 19 Atl. 656, 6 L. R. A. 773; Morris *v.* Bd. of Canvassers, 49 W. Va. 251, 38 S. E. 500; Nicholls *v.* Barrick, 27 Col. 432, 62 Pac. 202; Beckwith *v.* Winters, 28 Col. 96, 62 Pac. 835; Beckwith *v.* Rucker, 28 Col. 31, 62 Pac. 836; and several cases following in same report; State *v.* Talley, 8 N. D. 90, 76 N. W. 996.]

tive franchise.[1] The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left by the national Constitution to the several States, except as it is provided by that instrument that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature,[2] and as the fifteenth amendment forbids denying to citizens the right to vote on account of race, color, or previous condition of servitude.[3] Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible consistent with the public safety. Aliens are generally excluded,[4] though in some States they are allowed to vote after residence for a specified period, provided they have declared their intention to become citizens in the manner prescribed by law. The fifteenth amendment, it will be seen, does not forbid denying the franchise to citizens except upon certain specified grounds, and it is matter of public history that its purpose was to prevent discriminations in this regard as against persons of African descent. Minors, who equally with adult persons are citizens, are still excluded, as are also women,[5] and sometimes persons who have been convicted of infamous crimes.[6] In some States laws will be found in existence

[1] *Ante*, p. 57. See article by Dr. Spear, in 16 Albany Law Journal, 272, in which, among other things, the force and scope of the new amendments to the federal Constitution in their relation to suffrage are considered. Until recently the regulation and control of all elections, including elections for members of Congress, and the punishment of offences against election laws, has been left to the States exclusively. Congress, however, has undoubted authority to make such regulations as shall seem needful to ensure a full and fair expression of opinion in the election of members of Congress, and also to guard and protect all rights conferred by the recent amendments to the federal Constitution. *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Clarke, 100 U. S. 399; *In re* Coy, 127 U. S. 731, 8 Sup. Ct. Rep. 1263; United States *v.* Goldman, 3 Woods, 187. [The power of Congress over State elections is in Lackey *v.* United States, 107 Fed. 114, 46 C. C. A. 180, 53 L. R. A. 660, held to be dependent upon the fifteenth amendment alone.]

[2] Art. 1, § 2.

[3] This amendment had the effect to abrogate all provisions in State laws and constitutions restricting the suffrage to white persons. Neal *v.* Delaware, 103 U. S. 370.

[4] An unnaturalized Indian, who has surrendered his tribal relations, is not a citizen nor entitled to vote, though born in the United States and a resident of a State. Elk *v.* Wilkins, 112 U. S. 94, 5 Sup. Ct. Rep. 41.

[5] See Opinions of Justices, 62 Me. 596; Rohrbacher *v.* Mayor of Jackson, 51 Miss. 735; Spencer *v.* Board of Registration, 1 MacArthur, 169; Van Valkenburg *v.* Brown, 43 Cal. 43; Minor *v.* Happersett, 21 Wall. 162; Bloomer *v.* Todd, 3 Wash. Ty. 599, 19 Pac. 135; [Gougar *v.* Timberlake, 148 Ind. 38, 46 N. E. 339, 37 L. R. A. 614; Coffin *v.* Thompson, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662, and note.] But in some States they may vote upon school matters only. Brown *v.* Phillips, 71 Wis. 239, 36 N. W. 242; State *v.* Cones, 15 Neb. 444, 19 N. W. 682; Belles *v.* Burr, 76 Mich. 1, 43 N. W. 21.

[6] Story on Const. (4th ed.) § 1972.

which, either generally or in particular cases, deny the right to vote to those persons who lack a specified property qualification, or who do not pay taxes. (*a*) In some States idiots and lunatics are also expressly excluded; and it has been supposed that these unfortunate classes, by the common political law of England and of this country, were excluded with women, minors, and aliens from exercising the right of suffrage, even though not prohibited therefrom by any express constitutional or statutory provision.[1] Wherever the constitution has prescribed the qualifications of electors, they cannot be changed or added to by the legislature,[2] or otherwise than by an amendment of the constitution.

One of the most common requirements is, that the party offering to vote shall reside within the district which is to be affected

[1] See Cushing's Legislative Assemblies, § 24; also § 27, and notes referring to legislative cases; McCrary, Law of Elections, §§ 50, 73; Clark *v.* Robinson, 88 Ill. 498. Drunkenness is regarded as temporary insanity. *Ibid.* Idiots and insane persons are excluded in Alabama, Arkansas, California, Delaware, Florida, Iowa, Kansas, Louisiana, Maryland (provided they are under guardianship as such), Minnesota, Nebraska, Nevada, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, Virginia, West Virginia, and Wisconsin. Convicted felons are excluded in Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, Texas, Virginia, West Virginia, and Wisconsin. Persons under guardianship are excluded in Florida, Kansas, Maine, Massachusetts, Minnesota, Rhode Island, and Wisconsin. Paupers are excluded in Delaware, Maine, Massachusetts (see Justices' Opinions, 124 Mass. 596), New Jersey, Rhode Island, and West Virginia. Persons kept in any poorhouse or other asylum at public expense are excluded in California, Colorado, Missouri, and South Carolina. Persons confined in public prisons are excluded in California, Colorado, Missouri, and South Carolina. Persons under interdiction are excluded in Louisiana; and persons excused from paying taxes at their own request, in New Hampshire. Capacity to read is required in Connecticut; and capacity to read and write, in Massachusetts.

[2] See Green *v.* Shumway, 39 N. Y. 418; Brown *v.* Grover, 6 Bush, 1; Quinn *v.* State, 35 Ind. 485; Huber *v.* Reiley, 53 Pa. St. 112, *ante*, p. 99, note; People *v.* Canaday, 73 N. C. 198; State *v.* Tuttle, 53 Wis. 45, 9 N. W. 791. Compare State *v.* Neal, 42 Mo. 119. Where a disqualification to vote is made to depend upon the commission of crime, the election officers cannot be made the triers of the offence. Huber *v.* Reiley, 53 Pa. St. 112; State *v.* Symonds, 59 Me. 151; Burkett *v.* McCarty, 10 Bush, 758. It is not competent for the legislature to discriminate between voters and require that one class of them shall be taxpayers, while not making the same requirement as to the others. Lyman *v.* Martin, 2 Utah, 136. But voters at municipal elections may be required to pay taxes before voting. Buckner *v.* Gordon, 81 Ky. 665. [State *v.* Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.] In Nevada every male citizen, except convicts and paupers, having the franchise, Mormons cannot be excluded by registration laws. State *v.* Findley, 20 Nev. 198, 19 Pac. 241. It is otherwise in the Territories. Murphy *v.* Ramsey, 114 U. S. 43, 5 Sup. Ct Rep. 747; Innis *v.* Bolton, 2 Idaho, 407, 17 Pac. 264.

(*a*) [See Frieszleben *v.* Shallcross, 9 Houst. (Del.) 1, 19 Atl. 576, 8 L. R. A. 337, and note.]

by the exercise of the right. If a State officer is to be chosen, the voter should be a resident of the State: and if a county, city, or township officer, he should reside within such county, city, or township. This is the general rule; and for the more convenient determination of the right to vote, and to prevent fraud, it is now generally required that the elector shall only exercise within the municipality where he has his residence his right to participate in either local or general elections. (*a*) Requiring him to vote among his neighbors, by whom he will be likely to be generally known, the opportunities for illegal or fraudulent voting will be less than if the voting were allowed to take place at a distance and among strangers. And wherever this is the requirement of the constitution, any statute permitting voters to deposit their ballots elsewhere must necessarily be void.[1]

A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom.[2] The words "inhabitant," "citizen," and

[1] Opinions of Judges, 30 Conn. 591; Hulseman *v.* Rems, 41 Pa. St. 396; Chase *v.* Miller, 41 Pa. St. 403; Opinions of Judges, 44 N. H. 633; Bourland *v.* Hildreth, 26 Cal. 161; People *v.* Blodgett, 13 Mich. 127; Opinions of Judges, 37 Vt. 665; Day *v.* Jones, 31 Cal. 261. The case of Morrison *v.* Springer, 15 Iowa, 304, is not in harmony with those above cited. So far as the election of representatives in Congress and electors of president and vice-president is concerned, the State constitutions cannot preclude the legislature from prescribing the "times, places, and manner of holding" the same, as allowed by the national Constitution, — art. 1, § 4, and art. 2, § 1, — and a statute permitting such election to be held out of the State would consequently not be invalid. Opinions of Justices, 45 N. H. 595; Opinions of Judges, 37 Vt. 665. There are now constitutional provisions in New York, Michigan, Missouri, Connecticut, Maryland, Kansas, Mississippi, Nevada, Rhode Island, and Pennsylvania, which permit soldiers in actual service to cast their votes where they may happen to be stationed at the time of voting. It may also be allowed in Ohio. Lehman *v.* McBride, 15 Ohio, N. S. 573.

[2] Putnam *v.* Johnson, 10 Mass. 488; Rue High's Case, 2 Doug. (Mich.) 515; Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698; Church *v.* Rowell, 49 Me. 367; Littlefield *v.* Brooks, 50 Me. 475; Parsons *v.* Bangor, 61 Me. 457; Arnold *v.* Davis, 8 R. I. 341; Hannon *v.* Grizzard, 89 N. C. 115; Dale *v.* Irwin, 78 Ill. 170; Clark *v.* Robinson, 88 Ill. 498; Sturgeon *v.* Korte, 34 Ohio St. 525; Story, Confl. Laws, § 43. As to what residence is sufficient, see Kellogg *v.* Hickman, 12 Col. 256, 21 Pac. 325; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232; [Langhammer *v.* Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.] That one should vote where he eats, not where he lodges, if at different places, see Warren *v.* Board of Registration, 72 Mich. 398, 40 N. W. 553.

(*a*) [The mere fact that one lives upon a steamer does not give him a voting residence at her home port, even though he has no voting residence elsewhere, and is unmarried. Howard *v.* Skinner, 87 Md. 556, 40 Atl. 379, 40 L. R. A. 753; Jones *v.* Skinner, 87 Md. 560, 40 Atl. 381, 40 L. R. A. 752. Residence is not changed by presence in and support at and by a state "soldiers' home." Wolcott *v.* Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L. R. A. 215, and note on residence and attendance or presence at public institutions; see also to same effect Powell *v.* Spackman, — Idaho, —, 65 Pac. 503.]

"resident," as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home.[1] Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place.[2] It has been held that a student in an institution of learning, who has residence there for purposes of instruction, may vote at such place, provided he is emancipated from his father's family, and for the time has no home elsewhere.[3]

[1] Cushing's Law and Practice of Legislative Assemblies, § 36; State *v.* Aldrich, 14 R. I. 171. [Where territory in which a voter has continuously resided up to the time of annexation to a municipality is annexed to or incorporated with it, his period of such residence is to be counted in determining his residential qualification for eligibility to office. Gibson *v.* Wood, 105 Ky. 740, 49 S. W. 768, 43 L. R. A. 699.]

[2] That it is not a necessary consequence of this doctrine that one must always be entitled to vote somewhere, see Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232.

[3] Putnam *v.* Johnson, 10 Mass. 488; Lincoln *v.* Hapgood, 11 Mass. 350; Wilbraham *v.* Ludlow, 99 Mass. 587; Perry *v.* Reynolds, 53 Conn. 527, 3 Atl. 555. Compare Dale *v.* Irwin, 78 Ill. 170. A different conclusion is arrived at in Pennsylvania. Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698. And in Iowa, Vanderpoel *v.* O'Hanlon, 53 Iowa, 246, 5 N. W. 119, 36 Am. Rep. 216. "The questions of residence, inhabitancy, or domicile, — for although not in all respects precisely the same, they are nearly so, and depend much upon the same evidence, — are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances; but, from the whole taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course it follows that his existing domicile continues until he acquires another; and *vice versa*, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place. If a seaman, without family or property, sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not by some actual residence or other means acquire a domicile elsewhere, he retains his domicile of origin." *Shaw*, Ch. J., Thorndike *v.* City of Boston, 1 Met. 242, 245. And see Alston *v.* Newcomer, 42 Miss. 186; Johnson *v.* People, 94 Ill. 505. In Inhabitants of Abington *v.* Inhabitants of North Bridgewater, 23 Pick. 170, it appeared that a town line ran through the house occupied by a party, leaving a portion on one side sufficient to form a habitation, and a portion on the other not sufficient for that purpose. Held, that the domicile must be deemed to be on the side first mentioned. It was intimated also that where a house was thus divided, and the party slept habitually on one side, that circumstance should be regarded as a preponderating one to fix his residence there, in the absence of other proof. And see Rex *v.* St. Olave's, 1 Strange, 51.

By the constitutions of several of the

Temporary absence from one's home, with continuous intention to return, will not deprive one of his residence, even though it extend through a series of years.[1]

Conditions to the Exercise of the Elective Franchise.

While it is true that the legislature cannot add to the constitutional qualifications of electors, it must nevertheless devolve upon that body to establish such regulations as will enable all persons entitled to the privilege to exercise it freely and securely, and exclude all who are not entitled from improper participation therein. For this purpose the times of holding elections, the manner of conducting them and of ascertaining the result, are prescribed, and heavy penalties are imposed upon those who shall vote illegally, or instigate others to do so, or who shall attempt to preclude a fair election or to falsify the result. The propriety, and indeed the necessity, of such regulations are undisputed. In some of the States it has also been regarded as important that lists of voters should be prepared before the day of election, in which should be registered the name of every person qualified to vote. Under such a regulation, the officers whose duty it is to administer the election laws are enabled to proceed with more deliberation in the discharge of their duties, and to avoid the haste and confusion that must attend the determination upon

States, it is provided, in substance, that no person shall be deemed to have gained or lost a residence by reason of his presence or absence, while employed in the service of the United States; nor while a student in any seminary of learning; nor while kept at any almshouse or asylum at public expense; nor while confined in any public prison. See Constitutions of New York, Illinois, Indiana, California, Michigan, Rhode Island, Minnesota, Missouri, Nevada, Oregon, and Wisconsin. A pauper inmate of a soldiers' home comes within such provision. Silvey *v.* Lindsay, 107 N. Y. 55, 13 N. E. 444. In several of the other States there are provisions covering some of these cases, but not all. A provision that no person shall be deemed to have gained or lost a residence by reason of his presence or absence in the service of the United States, does not preclude one from acquiring a residence in the place where, and in the time while, he is present in such service. People *v.* Holden, 28 Cal. 123; Mooar *v.* Harvey, 128 Mass. 219. If a man takes up his permanent abode at the place of an institution of learning, the fact of his entering it as a student will not preclude his acquiring a legal residence there: Sanders *v.* Getchell, 76 Me. 158; Pedigo *v.* Grimes, 113 Ind. 148, 13 N. E. 700; but if he is domiciled at the place for the purposes of instruction only, it is deemed proper and right that he should neither lose his former residence nor gain a new one in consequence thereof. Vanderpoel *v.* O'Hanlon, 53 Iowa, 246, 5 N. W. 119, 36 Am. Rep. 216.

That persons residing upon lands within a State, but set apart for some national purpose, and subjected to the exclusive jurisdiction of the United States, are not voters, see Opinions of Judges, 1 Met. 580; Sinks *v.* Reese, 19 Ohio St. 306; McCrary, Law of Elections, § 29.

[1] Harbaugh *v.* Cicott, 33 Mich. 241; Fry's Election Case, 71 Pa. St. 302, 10 Am. Rep. 698; Dennis *v.* State, 17 Fla. 389; Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161.

election day of the various and sometimes difficult questions concerning the right of individuals to exercise this important franchise. Electors, also, by means of this registry, are notified in advance what persons claim the right to vote, and are enabled to make the necessary examination to determine whether the claim is well founded, and to exercise the right of challenge if satisfied any person registered is unqualified. When the constitution has established no such rule, and is entirely silent on the subject, it has sometimes been claimed that the statute requiring voters to be registered before the day of election, and excluding from the right all whose names do not appear upon the list, was unconstitutional and void, as adding another test to the qualifications of electors which the constitution has prescribed, and as having the effect, where electors are not registered, to exclude from voting persons who have an absolute right to that franchise by the fundamental law.[1] This position, however, has not been generally accepted as sound by the courts. The provision for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised.[2] Such regulations must

[1] See Page *v.* Allen, 58 Pa. St. 338. And compare Clark *v.* Robinson, 88 Ill. 498; Dells *v.* Kennedy, 49 Wis. 555, 6 N. W. 246, 381, 35 Am. Rep. 786; White *v.* Multnomah Co., 13 Oreg. 317, 10 Pac. 484. In State *v.* Corner, 22 Neb. 265, 34 N. W. 499, it is said the voter has the right to prove himself an elector, register, and vote at any time before the polls close. The Supreme Court of Pennsylvania laid down a rule in conflict with these cases, in Patterson *v.* Barlow, 60 Pa. St. 54, which case is in harmony with those cited in the next note.

[2] Capen *v.* Foster, 12 Pick. 485, 23 Am. Dec. 632; People *v.* Kopplekom, 16 Mich. 342; State *v.* Bond, 38 Mo. 425; State *v.* Hilmantel, 21 Wis. 566; State *v.* Baker, 38 Wis. 71; Byler *v.* Asher, 47 Ill. 101; Monroe *v.* Collins, 17 Ohio St. 665; Edmonds *v.* Banbury, 28 Iowa, 267, 4 Am. Rep. 177; Ensworth *v.* Albin, 46 Mo. 450; Auld *v.* Walton, 12 La. Ann. 129; *In re* Polling Lists, 13 R. I. 729; State *v.* Butts, 31 Kan. 537, 2 Pac. 618. As to the conclusiveness of the registry, see Hyde *v.* Brush, 34 Conn. 454; Keenan *v.* Cook, 12 R. I. 52. A law closing registration three weeks before the election has been upheld. People *v.* Hoffman, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788. Otherwise as to one closing it five days before: Daggett *v.* Hudson, 43 Ohio St. 548, 3 N. E. 538; and ten days before. State *v.* Corner, 22 Neb. 265, 34 N. W. 499. Registration may be required at a city election when it is not by State law. McMahon *v.* Savannah, 66 Ga. 217. See Com. *v.* McClelland, 83 Ky. 686. [Voter may be required to exhibit his poll-tax receipt, or make affidavit that he has paid the tax and lost or misplaced the receipt. State *v.* Old, 95 Tenn. 723, 34 S. W. 690, 31 L. R. A. 837. But a law attempting to invalidate ballots upon which the inspectors have neglected to mark their initials is void where the constitution provides that all persons having certain qualifications "shall be entitled to vote at all elections." Moyer *v.* Van De Vanter, 12 Wash. 377, 41 Pac. 60, 29 L. R. A. 670. Where statute provides that upon voter's taking a specified oath "his vote shall be received," such provision is mandatory. Wolcott *v.* Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L. R. A. 215. An unregistered voter may be required to make affidavit as to his qualifications, stating them in full. Cusick's Appeal, 136 Pa. 459, 20 Atl. 574, 10 L. R. A. 228. Requirements in registration law must be reasonable. Owensboro *v.* Hickman, 90 Ky. 620, 14 S. W. 688, 10 L. R. A. 224, and note.

always have been within the power of the legislature, unless forbidden. Many resting upon the same principle are always prescribed, and have never been supposed to be open to objection. Although the constitution provides that all male citizens twenty-one years of age and upwards shall be entitled to vote, it would not be seriously contended that a statute which should require all such citizens to go to the established place for holding the polls, and there deposit their ballots, and not elsewhere, was a violation of the constitution, because prescribing an additional qualification, namely, the presence of the elector at the polls. All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot-box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential. And where the law requires such a registry, and forbids the reception of votes from any persons not registered, an election in a township where no such registry has ever been made will be void, and cannot be sustained by making proof that none in fact but duly qualified electors have voted. It is no answer that such a rule may enable the registry officers, by neglecting their duty, to disfranchise the electors altogether; the remedy of the electors is by proceedings to compel the performance of the duty; and the statute, being imperative and mandatory, cannot be disregarded.[1] The danger, however, of any such misconduct on the part of officers is comparatively small, when the duty is entrusted to those who are chosen in the locality where the registry is to be made, and who are consequently immediately responsible to those who are interested in being registered.

All regulations of the elective franchise, however, must be reasonable, uniform, and impartial; they must not have for their

[1] People *v.* Kopplekom, 16 Mich. 342; Zeiler *v.* Chapman, 54 Mo. 502; Nefzger *v.* Davenport, &c. R. R. Co., 36 Iowa, 642; Chicago, &c. R. R. Co. *v.* Mallory, 101 Ill. 583. It has nevertheless been held that if the ballots of unregistered voters are received, they should not be rejected in a contest. Dale *v.* Irwin, 78 Ill. 170; Kuykendall *v.* Harker, 89 Ill. 126. The law does not become unconstitutional because of the fact that, by the neglect of the officers to attend to the registry, voters may be disfranchised. *Ibid.* Ensworth *v.* Albin, 46 Mo. 450. But informalities in a registry will not vitiate it, and canvassers cannot reject votes because of them. State *v.* Baker, 38 Wis. 71. Compare Barnes *v.* Supervisors, 51 Miss. 305; Newson *v.* Earnheart, 86 N. C. 391; De Berry *v.* Nicholson, 102 N. C. 465, 9 S. E. 545. That a board of registration has judicial functions, see Fausler *v.* Parsons, 6 W. Va. 486, 20 Am. Rep. 431. Such board may be civilly liable for wrongful and malicious refusal to register a person. Murphy *v.* Ramsey, 114 U. S. 15, 5 Sup. Ct. Rep. 747.

purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.[1]

In some other cases preliminary action by the public authorities may be requisite before any legal election can be held. If an election is one which a municipality may hold or not at its option, and the proper municipal authority decides against holding it, it is evident that individual citizens must acquiesce, and that any votes which may be cast by them on the assumption of right must be altogether nugatory.[2] The same would be true of an election to be held after proclamation for that purpose, and which must fail if no such proclamation has been made.[3] Where, how-

[1] Capen *v.* Foster, 12 Pick. 485, 23 Am. Dec. 632; Monroe *v.* Collins, 17 Ohio St. 665. All male citizens resident in the State a year and the town six months being electors, an act is void which forbids to a naturalized person the right to be registered within thirty days of naturalization. Kinneen *v.* Wells, 144 Mass. 497, 11 N. E. 916. Under the Constitution of Ohio, the right of suffrage is guaranteed to "white male citizens," and by a long series of decisions it was settled that persons having a preponderance of white blood were "white" within its meaning. It was also settled that judges of election were liable to an action for refusing to receive the vote of a qualified elector. A legislature unfriendly to the construction of the constitution above stated passed an act which, while prescribing penalties against judges of election who should refuse to receive or sanction the rejection of a ballot from any person, knowing him to have the qualifications of an elector, concluded with a proviso that the act and the penalties thereto "shall not apply to clerks or judges of election for refusing to receive the votes of persons having a distinct and visible admixture of African blood, nor shall they be liable to damages by reason of such rejection." Other provisions of the act plainly discriminated against the class of voters mentioned, and it was held to be clearly unreasonable, partial, calculated to subvert or impede the exercise of the right of suffrage by this class, and therefore void. Monroe *v.* Collins, *supra*. [Where a minor becomes qualified between the completion of the preliminary registration and the final review, if he has offered his name at the preliminary for conditional registration, he can compel registration of his name at the review. Barret *v.* Taylor, 85 Md. 173, 36 Atl. 708, 36 L. R. A. 129; see also Drake *v.* Drewry, 112 Ga. 308, 37 S. E. 432. Requirement that every voter who has been six months absent from the State since last voting in it shall register with county clerk his claim to be a legal voter before he will be permitted to vote again is void for unreasonableness. Brewer *v.* McClelland, 144 Ind. 423, 32 N. E. 209, 17 L. R. A. 845; Morris *v.* Powell, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326. A law requiring registration in person, allowing but five days for registration, and making no provision for sickness and unavoidable absence on those days is void for unreasonableness. Attorney-General *v.* Detroit, 78 Mich. 545, 44 N. W. 338, 7 L. R. A. 99, and note. Registration for last preceding general election may be made sufficient for a special election. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.]

[2] Opinions of Judges, 7 Mass. 523; Opinions of Judges, 15 Mass. 537.

[3] People *v.* Porter, 6 Cal. 26; McKune *v.* Weller, 11 Cal. 49; People *v.* Martin, 12 Cal. 409; Jones *v.* State, 1 Kan. 273; Barry *v.* Lauck, 5 Cold. 588; Stephens *v.* People, 89 Ill. 337. So if notice is given but not as the law requires: State *v.* Echols, 41 Kan. 1, 20 Pac. 523: or if it fails to specify time and place. Morgan *v.* Gloucester, 44 N. J. L. 137. But such informalities will not vitiate, if as many vote as usual. Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161. [But where no notice was given and only ninety-four out of one thousand two hundred voters vote

ever, both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer, whose duty it is to give notice of the election, has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute, and not from the official notice. It has therefore been frequently held that when a vacancy exists in an office, which the law requires shall be filled at the next general election, the time and place of which are fixed, and that notice of the general election shall also specify the vacancy to be filled, an election at that time and place to fill the vacancy will be valid, notwithstanding the notice is not given; and such election cannot be defeated by showing that a small portion only of the electors were actually aware of the vacancy, or cast their votes to fill it.[1] But this would not be the case if either the time or the place were not fixed by law, so that notice became essential for that purpose.[2]

for candidates for the particular office, and then by means of pasters on the official ballots, the election is void. Wilson *v.* Brown, 22 Ky. L. 708, 58 S. W. 595.]

[1] People *v.* Cowles, 13 N. Y. 350; People *v.* Brenahm, 3 Cal. 477; State *v.* Jones, 19 Ind. 356; People *v.* Hartwell, 12 Mich. 508; Dishon *v.* Smith, 10 Iowa, 212; State *v.* Orvis, 20 Wis. 235; State *v.* Goetze, 22 Wis. 363; State *v.* Skirving, 19 Neb. 497, 27 N. W. 723; [Adsit *v.* Sec. of State, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534.] The case of Foster *v.* Scarff, 15 Ohio St. 532, would seem to be *contra*. A general election was to be held, at which by law an existing vacancy in the office of judge of probate was required to be filled. The sheriff, however, omitted all mention of this office in his notice of election, and the voters generally were not aware that a vacancy was to be filled. Nominations were made for the other offices, but none for this, but a candidate presented himself for whom less than a fourth of the voters taking part in the election cast ballots. It was held that the election to fill the vacancy was void. [When general election law requires all elections to be held at places specified or described therein, places need not be specified in a notice of election to pass upon question of issuing county bonds. Packwood *v.* Kittitas County, 15 Wash. 88, 45 Pac. 640, 33 L. R. A. 673.]

[2] State *v.* Young, 4 Iowa, 561. An act had been passed for the incorporation of the city of Washington, and by its terms it was to be submitted to the people on the 16th of the following February, for their acceptance or rejection, at an election to be called and holden in the same manner as township elections under the general law. The time of notice for the regular township elections was, by law, to be determined by the trustees, but for the first township meeting fifteen days' notice was made requisite. An election was holden, assumed to be under the act in question; but no notice was given of it, except by the circulation, on the morning of the election, of an extra newspaper containing a notice that an election would be held on that day at a specified place. It was held that the election was void. The act contemplated *some* notice before any legal vote could be taken, and that which was given could not be considered any notice at all. This case differs from all of those above cited, where vacancies were to be filled at a general election, and where the law itself would give to the electors all the information

The Manner of Exercising the Right.

The mode of voting in this country, at all general elections, is almost universally by ballot.[1] "A ballot may be defined to be a piece of paper or other suitable material, with the name written or printed upon it of the person to be voted for; and where the suffrages are given in this form, each of the electors in person deposits such a vote in the box, or other receptacle provided for the purpose, and kept by the proper officers."[2] The distinguishing feature of this mode of voting is, that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy in regard to the persons for whom he votes, and thus escape the influences which, under the system of oral suffrages, may be brought to bear upon him with a view to overbear and intimidate, and thus prevent the real expression of public sentiment.[3]

which was requisite. In this case, although the time was fixed, the place was not; and, if a notice thus circulated on the morning of election could be held sufficient, it might well happen that the electors generally would fail to be informed, so that their right to vote might be exercised. See also Barry *v.* Lauck, 5 Cold. 588; Secord *v.* Foutch, 44 Mich. 89, 6 N. W. 110. That where the law provides for holding an election and one is duly called, equity has no authority to enjoin it, see Walton *v.* Develing, 61 Ill. 201.

[1] The ballot was also adopted in England in 1872.

In municipal elections voting by ballot is lawful, but not so, as to illiterates, a provision requiring the voter to indicate by a mark the candidates he wishes to vote for, as it is contrary to the guaranty that all elections shall be free and equal. Rogers *v.* Jacob, 88 Ky. 502, 11 S. W. 513. [Use of voting machine sufficiently satisfies requirement of ballot. Opinion of Justices, 19 R. I. 729, 36 Atl. 716, 36 L. R. A. 547; *Re* House Bill No. 1291, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430, but see dissenting opinions in both cases for forcible objections.]

[2] Cush. Leg. Assemb. § 103.

[3] "In this country, and indeed in every country where officers are elective, different modes have been adopted for the electors to signify their choice. The most common modes have been either by voting *viva voce*, that is, by the elector openly naming the person he designates for the office, or by ballot, which is depositing in a box provided for the purpose a paper on which is the name of the person he intends for the office. The principal object of this last mode is to enable the elector to express his opinion secretly, without being subject to be overawed, or to any ill-will or persecution on account of his vote for either of the candidates who may be before the public. The method of voting by tablets in Rome was an example of this manner of voting. There certain officers appointed for that purpose, called Diribitores, delivered to each voter as many tablets as there were candidates, one of whose names was written upon every tablet. The voter put into a chest prepared for that purpose which of these tablets he pleased, and they were afterwards taken out and counted. Cicero defines tablets to be little *billets*, in which the people brought their suffrages. The clause in the constitution directing the election of the several State officers was undoubtedly intended to provide that the election should be made by this mode of voting to the exclusion of any other. In this mode the freemen can individually express their choice without being under the necessity of publicly declaring the object of their choice; their collective voice can be easily ascertained, and the evidence of it transmitted to the place

In order to secure as perfectly as possible the benefits anticipated from this system, statutes have been passed, in some of the States, which prohibit ballots being received or counted unless the same are written or printed upon white paper, without any marks or figures thereon intended to distinguish one ballot from another.[1] These statutes are simply declaratory of a constitutional

where their votes are to be counted, and the result declared with as little inconvenience as possible." Temple *v.* Mead, 4 Vt. 535, 541. In this case it was held that a *printed* ballot was within the meaning of the constitution which required all ballots for certain State officers to be "fairly written." To the same effect is Henshaw *v.* Foster, 9 Pick. 312. [A court has no power to require ballots voted at an election to be later submitted to the inspection of the grand jury. *Ex parte* Arnold, 128 Mo. 256, 30 S. W. 768, 1036, 33 L. R. A. 386; but see note thereto in L. R. A. upon power of courts to compel submission of ballot boxes to examination for other purposes than election contests, citing cases *contra* under substantially similar constitutional provisions, notably People *v.* Londoner, 13 Col. 303, 22 Pac. 764, 6 L. R. A. 444.]

[1] See People *v.* Kilduff, 15 Ill. 492. In this case it was held that the common lines on ruled paper did not render the ballots void. Otherwise as to dotted lines under the name of an office, for which no candidate is named. Steele *v.* Calhoun, 61 Miss. 556. See also Druliner *v.* State, 20 Ind. 308, in which it was decided that a caption to the ticket folded inside was unobjectionable. To the same effect is Millholland *v.* Bryant, 39 Ind. 363. A method different from the usual one of printing the names of offices will not avoid the ballot. Coffey *v.* Edmonds, 58 Cal. 521. See also Owens *v.* State, 64 Tex. 500. As to what headlines are designed to mislead within a prohibition of such, see Shields *v.* McGregor, 91 Mo. 534, 4 S. W. 266; Williams *v.* State, 69 Tex. 368, 6 S. W. 845. A ballot ought not to be rejected because it differs from the regulations prescribed by the code as to size, paper, type, &c., or because the office of sheriff is designated "sheriff and collector;" the sheriff being *ex officio* collector by law. State *v.* Watson, 9 Mo. App. 593; Kirk *v.* Rhoads, 46 Cal. 398. Making the ticket diamond shaped will not avoid it: State *v.* Phillips, 63 Tex. 390; nor will attaching slips to it. Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. 263. [*Contra*, under the Australian Ballot Law, Fletcher *v.* Wall, 172 Ill. 426, 50 N. E. 230, 40 L. R. A. 617.] The presiding officers of the election are the sole judges of what is a "distinguishing mark" on a ballot, where such a mark is forbidden; and ballots which they have received and counted cannot be rejected afterwards by the Governor and Council. Opinions of Judges, 45 Me. 602. In Colorado it is held that, if voted in good faith, a ticket with such mark must be counted. Kellogg *v.* Hickman, 12 Col. 256, 21 Pac. 325. A requirement that that there shall be a space of one-fifth of an inch between names of candidates is mandatory, and avoids the whole ticket if disobeyed. Perkins *v.* Carraway, 59 Miss. 222. [That statutory requirements concerning ballots in elections held for purpose of passing upon proposed municipal bond issues must be strictly observed, see Murphy *v.* San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444. Omission on part of officer in charge of ballot-box to tear off the strips bearing the numbers of the ballots before depositing them in the box does not invalidate them. Buckner *v.* Lynip, 22 Nev. 426, 41 Pac. 762, 30 L. R. A. 354. For a case involving a variety of marks upon ballots, some of which were held to invalidate the ballots and others not, see Parker *v.* Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; also Tebbe *v.* Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673; Dennis *v.* Caughlin, 22 Nev. 447, 41 Pac. 768, 29 L. R. A. 731; Sego *v.* Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468. Where through mistake of officers of election the colored sample ballots are used instead of the white ones prescribed by law, the error is harmless, as all voters used the colored ballots and secrecy is not violated. Boyd *v.* Mills, 53 Kan. 594, 37 Pac. 16, 25 L. R. A. 486.]

principle that inheres in the system of voting by ballot, and which ought to be inviolable whether declared or not. In the absence of such a statute, all devices by which party managers are enabled to distinguish ballots in the hand of the voter, and thus determine whether he is voting for or against them, are opposed to the spirit of the Constitution, inasmuch as they tend to defeat the design for which voting by ballot is established, and, though they may not render an election void, they are exceedingly reprehensible and ought to be discountenanced by all good citizens. The system of ballot-voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time.[1] The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it;[2] his ballot is absolutely privileged; and to allow evidence

[1] "The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station might be supposed to exercise. This object would be accomplished but very imperfectly if the privacy supposed to be secured was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured then and at all times thereafter against reproach or animadversion, or any other prejudice, on account of having voted according to his own unbiassed judgment; and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage." Per *Denio*, Ch. J., in People *v.* Pease, 27 N. Y. 45, 81.

In Williams *v.* Stein, 38 Ind. 90, the Supreme Court of Indiana declared to be void the following enactment: "It shall be the duty of the inspector of any election held in this State, on receiving the ballot of any voter, to have the same numbered with figures, on the outside or back thereof, to correspond with the number placed opposite the name of such voter on the poll lists kept by the clerks of said election." *Pettit*, J., delivering the opinion of the court, after quoting several authorities, among others Commonwealth *v.* Woelper, 3 S. & R. 29; People *v.* Pease, 27 N. Y. 45; People *v.* Cicott, 16 Mich. 283; Temple *v.* Mead, 4 Vt. 535; and the text above, says: "It is believed that these authorities establish, beyond doubt, that the ballot implies absolute and inviolable secrecy, and that the principle is founded in the highest considerations of public policy. When our present constitution was framed, voting by ballot was in vogue in nearly every State in the Union. That mode of voting had been known and understood for centuries. The term 'ballot,' as designating a mode of election, was then well ascertained and clearly defined.

[2] "The ballot," says Cicero, "is dear to the people, for it uncovers men's faces, and conceals their thoughts. It gives them the opportunity of doing what they like, and of promising all that they are asked." Speech in defence of Plancius, Forsyth's Cicero, Vol. I. p. 339.

of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public.[1]

The eminent framers of the constitution certainly employed this term with a full knowledge of its meaning. Many of the most distinguished members of the constitutional convention of 1850 were members of the legislature of 1852, the first that met under the present constitution. That they regarded the ballot system as securing inviolable secrecy is clearly shown by the following law, which they then helped to enact: 'If any judge, inspector, clerk, or other officer of an election, shall open or mark, by folding or otherwise, any ticket presented by such elector at such election, or attempt to find out the names thereon, or suffer the same to be done by any other person, before such ticket is deposited in the ballot-box, he shall be fined in any sum not exceeding one hundred dollars.' 2 G. & H. 473, sec. 60. If the constitution secures to the voter, in popular elections, the protection and immunity of secrecy, there can be no doubt that section 2 of the act of 1869, which authorized the inspector to number ballots, is clearly in conflict with it and is void. I am not unmindful of the rule that all doubts are to be solved in favor of the constitutionality of legislative enactments. This rule is well established, and is founded in the highest wisdom. But my convictions are clear that our constitution was intended to, and does, secure the absolute secrecy of a ballot, and that the act in question, which directs the numbering of tickets, to correspond with the numbers opposite the names of the electors on the poll lists, is in palpable conflict not only with the spirit, but with the substance, of the constitutional provision. This act was intended to, and does, clearly identify every man's ticket, and renders it easy to ascertain exactly how any particular person voted. That secrecy which is esteemed by all authority to be essential to the free exercise of suffrage is as much violated by this law as if it had declared that the election should be *viva voce*." A like ruling has been made in Minnesota. Brisbin *v.* Cleary, 26 Minn. 107, 1 N. W. 825. In several States, however, this numbering is required. See Hodge *v.* Linn, 100 Ill. 397. [And in Slaymaker *v.* Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842, it was held that the requirement that every ballot be officially stamped upon the back thereof and signed manually by one of the judges of election is not an undue restriction upon the right of suffrage, even though the failure of the judges of election to perform their duty in this regard makes the ballots void. Upon marking official ballot, see a valuable note to 47 L. R. A. 806, in which many cases arising under the "Australian" ballot laws of the several States are collected. Where the voter votes for a person whose name is not printed on the ballot, the addition of the party designation to the written name, after the manner of the printed names and designations, will not be considered a distinguishing mark in the absence of proof. Jennings *v.* Brown, 114 Cal. 307, 46 Pa. 77, 34 L. R. A. 45.]

[1] See this subject fully considered in People *v.* Cicott, 16 Mich. 283. And see also State *v.* Hilmantel, 23 Wis. 422; Brewer *v.* Weakley, 2 Overt. 99, 5 Am. Dec. 656. A very loose system prevails in the contests over legislative elections, and it has been held that when a voter refuses to disclose for whom he voted, evidence is admissible of the general reputation of the political character of the voter, and as to the party to which he belonged at the time of the election. Cong. Globe, XVI. App. 456. This is assuming that the voter adheres strictly to party, and always votes the "straight ticket;" an assumption which may not be a very violent one in the majority of cases, but which is scarcely creditable to the manly independence and self-reliance of any free people; and however strongly

Every ballot should be complete in itself, and ought not to require extrinsic evidence to enable the election officer to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is never required in any case. The cardinal rule is to give effect to the intention of the voter, whenever it is not left in uncertainty;[1] but if an ambiguity appears upon its face, the elector cannot be received as a witness to make it good by testifying for whom or for what office he intended to vote.[2]

disposed legislative bodies may be to act upon it, we are not prepared to see any such rule of evidence adopted by the courts. If a voter chooses voluntarily to exhibit his ballot publicly, perhaps there is no reason why those to whom it was shown should not testify to its contents; but in other cases the knowledge of its contents is his own exclusive property, and he can neither be compelled to part with it, nor, as we think, is any one else who accidentally or surreptitiously becomes possessed of it, or to whom the ballot has been shown with a view to information, advice, or alteration, at liberty to make the disclosure. Such third person might be guilty of no legal offence if he should do so; but he is certainly invading the constitutional privileges of his neighbor, and we are aware of no sound principle of law which will justify a court in compelling or even permitting him to testify to what he has seen. And as the law does not compel a voter to testify, "surely it cannot be so inconsistent with itself as to authorize a judicial inquiry upon a particular subject, and at the same time industriously provide for the concealment of the only material facts upon which the results of such an inquiry must depend." Per *Denio*, Ch. J., in People *v.* Pease, 27 N. Y. 45, 81. It was held in People *v.* Cicott, 16 Mich. 283, that until it was distinctly shown that the elector waived his privilege of secrecy, any evidence as to the charcter or contents of his ballot was inadmissible. It was also held that where a voter's qualification was in question, but his want of right to vote was not conceded, the privilege was and must be the same; as otherwise any person's ballot might be inquired into by simply asserting his want of qualification. In State *v.* Olin, 23 Wis. 319, it was decided that where persons who had voted at an election had declined to testify concerning their qualifications, and how they had voted, it was competent to prove their declarations that they were unnaturalized foreigners, and had voted a particular way. Compare State *v.* Hilmantel, 23 Wis. 422. In People *v.* Thacher, 55 N. Y. 525, the evidence of voters as to how they voted was received, and as they did not object to giving it, it was held proper. See on this subject McCrary's Law of Elections, §§ 194, 195. [The public are interested in preserving the secrecy of the ballot in order to make bribery ineffective, and a statutory requirement that before the voter can take any person into the booth with him to aid him in making out his ballot, he shall swear that he is unable to read English, is mandatory. Ellis *v.* May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325.]

[1] People *v.* Matteson, 17 Ill. 167; People *v.* Cook, 8 N. Y. 67; State *v.* Elwood, 12 Wis. 551; People *v.* Bates, 11 Mich. 362; Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346.

[2] People *v.* Seaman, 5 Denio, 409. The mental purpose of an elector is not provable; it must be determined by his acts. People *v.* Saxton, 22 N. Y. 309; Beardstown *v.* Virginia, 76 Ill. 34. But see McKinnon *v.* People, 110 Ill. 305; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59. And where the intent is to be gathered from the ballot, it is a question of law, and cannot be submitted to the jury as one of fact. People *v.* McManus, 34 Barb. 620. "In canvassing votes of electors their intentions must be ascertained from their ballots, which must be counted to accord with such intentions. If the ballots express such intentions beyond reasonable

The ballot in no case should contain more names than are authorized to be voted for, for any particular office, at that election; and, if it should, it must be rejected for the obvious impossibility of the canvassing officers choosing from among the names on the ballot, and applying the ballot to some to the exclusion of others. The choice must be made by the elector himself, and be expressed by the ballot. Accordingly, where only one supervisor was to be chosen, and a ballot was deposited having upon it the names of two persons for that office, it was held that it must be rejected for ambiguity.[1] It has been decided, however, that if a voter shall write a name upon a printed ballot, in connection with the title to an office, this is such a designation of the name written for that office as sufficiently to demonstrate his intention, even though he omit to strike off the printed name of the opposing candidate. The writing in such a case, it is held, ought to prevail as the highest evidence of the voter's intention, and the failure to strike off the printed name will be regarded as an accidental oversight.[2]

doubt, it is sufficient, without regard to technical inaccuracies, or the form adopted by the voter to express his intentions. Of course the language of a ballot is to be construed in the light of all facts connected with the election; thus, the office to be filled, the names of the candidates voted for, or the subject contemplated in the proposition submitted to the electors, and the like, may be considered to aid in discovering the intentions of the voter." *Beck*, J., in Hawes *v.* Miller, 56 Iowa, 395, 397, 9 N. W. 307. See Railroad Co. *v.* Bearss, 39 Ind. 598. If a voter marks out the name of a candidate for a certain office and writes opposite it the name of another person, the vote must be counted for the latter for that office; though in fact he is a candidate, not for it, but for some other office. The intention of the voter must be ascertained from the face of the ballot. Fenton *v.* Scott, 17 Oreg. 189, 20 Pac. 95.

[1] People *v.* Seaman, 5 Denio, 409. See also Attorney-General *v.* Ely, 4 Wis. 420; People *v.* Loomis, 8 Wend. 396; People *v.* Cook, 14 Barb. 259, and 8 N. Y. 67; State *v.* Griffey, 5 Neb. 161. Such a vote, however, could not be rejected as to candidates for other offices regularly named upon the ballot; it would be void only as to the particular office for which the duplicate ballot was cast. Attorney-General *v.* Ely, 4 Wis. 420; Perkins *v.* Carraway, 59 Miss. 222. If the name of a candidate for an office is given more than once, it is proper to count it as one ballot, instead of rejecting it as illegally thrown. People *v.* Holden, 28 Cal. 123; State *v.* Pierce, 35 Wis. 93.

[2] People *v.* Saxton, 22 N. Y. 309; Brown *v.* McCollum, 76 Iowa, 479, 41 N. W. 197. This ruling suggests this query: Suppose at an election where printed slips containing the names of candidates, with a designation of the office, are supplied to voters, to be pasted over the names of opposing candidates, — as is very common, — a ballot should be found in the box containing the names of a candidate for one office, — say the county clerk, — with a designation of the office pasted over the name of a candidate for some other office, — say coroner; so that the ballot would contain the names of two persons for county clerk, and of none for coroner. In such a case, is the slip the highest evidence of the intention of the voter as to who should receive his suffrage for county clerk, and must it be counted for that office? And if so, then does not the ballot also show the intention of the elector to cast his vote for the person for coroner whose name is thus accidentally pasted over, and

The name on the ballot should be clearly expressed, and ought to be given fully. Errors in spelling, however, will not defeat the ballot, if the sound is the same;[1] nor abbreviations,[2] if such as are in common use and generally understood, so that there can be no reasonable doubt of the intent. And it would seem that where a ballot is cast which contains only the initials of the Christian name of the candidate, it ought to be sufficient, as it designates the person voted for with the same certainty which is commonly met with in contracts and other private writings, and the intention of the voter cannot reasonably be open to any doubt.[3]

should it not be counted for that person? The case of People *v.* Saxton would seem to be opposed to People *v.* Seaman, 5 Denio, 409, where the court refused to allow evidence to be given to explain the ambiguity occasioned by the one name being placed upon the ticket, without the other being erased. "The intention of the elector cannot be thus inquired into, when it is opposed or hostile to the paper ballot which he has deposited in the ballot-box. We might with the same propriety permit it to be proved that he intended to vote for one man, when his ballot was cast for another; a species of proof not to be tolerated." Per *Whittlesey*, J. See also Newton *v.* Newell, 26 Minn. 529, 6 N. W. 346. The case of People *v.* Cicott, 16 Mich. 283, is also opposed to People *v.* Saxton. In the Michigan case, a slip for the office of sheriff was pasted over the name of the candidate for another county office, so that the ballot contained the names of two candidates for sheriff. It was argued that the slip should be counted as the best evidence of the voter's intention; but the court held that the ballot could be counted for neither candidate, because of its ambiguity. And a like rule is laid down as to a provision in the Illinois Constitution which requires that, if more persons are designated for any office than there are candidates to be elected, such part of the ticket shall not be counted for either. This provision is obligatory where only one name is printed on the ticket, and it remains unerased and another is written in. Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59.

[1] People *v.* Mayworm, 5 Mich. 146; Attorney-General *v.* Ely, 4 Wis. 420; Gumm *v.* Hubbard, 97 Mo. 311, 11 S. W. 61; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59.

[2] People *v.* Ferguson, 8 Cow. 102. See also, upon this subject, People *v.* Cook, 14 Barb. 259, and 8 N. Y. 67; and People *v.* Tisdale, 1 Doug. (Mich.) 59.

[3] In People *v.* Ferguson, 8 Cow. 102, it was held that, on the trial of a contested election case before a jury, ballots cast for H. F. Yates should be counted for Henry F. Yates, if, under the circumstances, the jury were of the opinion they were intended for him; and to arrive at that intention, it was competent to prove that he generally signed his name H. F. Yates; that he had before held the same office for which these votes were cast, and was then a candidate again; that the people generally would apply the abbreviation to him, and that no other person was known in the county to whom it would apply. This ruling was followed in People *v.* Seaman, 5 Denio, 409, and in People *v.* Cook, 14 Barb. 259, and 8 N. Y. 67. The courts also held, in these cases, that the elector voting the defective ballot might give evidence to enable the jury to apply it, and might testify that he intended it for the candidate the initials of whose name he had given. In Attorney-General *v.* Ely, 4 Wis. 420, 429, a rule somewhat different was laid down. In that case, Matthew H. Carpenter was candidate for the office of prosecuting attorney; and besides the perfect ballots there were others cast for "D. M. Carpenter," "M. D. Carpenter," "M. T. Carpenter," and "Carpenter." The jury found that there was no lawyer in the county by the name of D. M. Carpenter, M. D. Carpenter, M. T. Carpenter, or whose surname was Carpenter, except the relator, Matthew H. Carpenter; that the relator was

As the law knows only one Christian name, the giving of an initial to a middle name when the party has none, or the giving of a

a practising attorney of the county, and eligible to the office, and that the votes above mentioned were all given and intended by the electors for the relator. The court say: "How was the intention of the voter to be ascertained? By reading the name on the ballot, and ascertaining who was meant and intended by that name? Is no evidence admissible to show who was intended to be voted for under the various appellations, except such evidence as is contained in the ballot itself? Or may you gather the intention of the voter from the ballot, explained by the surrounding circumstances, from facts of a general public nature connected with the election and the different candidates, which may aid you in coming to the right conclusion? These facts and circumstances might, perhaps, be adduced so clear and strong as to lead irresistibly to the inference that a vote given for Carpenter was intended to be cast for Matthew H. Carpenter. A contract may be read by the light of the surrounding circumstances, not to contradict it, but in order more perfectly to understand the intent and meaning of the parties who made it. By analogous principles, we think that these facts, and others of like nature connected with the election, could be given in evidence, for the purpose of aiding the jury in determining who was intended to be voted for. In New York, courts have gone even farther than this, and held, that not only facts of public notoriety might be given in evidence to show the intention of the elector, but that the elector who cast the abbreviated ballot may be sworn as to who was intended by it. People *v.* Ferguson, 8 Cow. 102. But this is pushing the doctrine to a great extent; further, we think, than consideration of public policy and the well-being of society will warrant; and to restrict the rule, and say that the jury must determine from an inspection of the ballot itself, from the letters upon it, aside from all extraneous facts, who was intended to be designated by the ballot, is establishing a principle unnecessarily cautious and limited. In the present case, the jury, from the evidence before them, found that the votes [above described] were, when given and cast, intended, by the electors who gave and cast the same respectively, to be given and cast for Matthew H. Carpenter, the relator. Such being the case, it clearly follows that they should be counted for him." See also State *v.* Elwood, 12 Wis. 551; People *v.* Pease, 27 N. Y. 45, 84, per *Leslie*, Ch. J.; Talkington *v.* Turner, 71 Ill. 234; Clark *v.* Robinson, 88 Ill. 498; Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59; State *v.* Williams, 95 Mo. 159, 8 S. W. 415; State *v.* Gates, 43 Conn. 533. In Wimmer *v.* Eaton, 72 Iowa, 374, 34 N. W. 170; ballots for F. W. were counted for E. W., who was a regular candidate, there being no one eligible or running named F. W.

In Opinions of Judges, 38 Me. 559, it was held that votes could not be counted by the canvassers for a person of a different name from that expressed by the ballot, even though the only difference consisted in the initial to the middle name. See also Opinions of Justices, 64 Me 588. And in People *v.* Tisdale, 1 Doug. (Mich.) 59, followed in People *v.* Higgins, 3 Mich. 233, it was held that no extrinsic evidence was admissible on a trial in court in explanation or support of the ballot; and that, unless it showed upon its face for whom it was designed, it must be rejected. And it was also held, that a ballot for "J. A. Dyer" did not show, upon its face, that it was intended for the candidate James A. Dyer, and therefore could not be counted with the ballots cast for him by his full name. This rule is convenient of application, but it probably defeats the intention of the electors in every case to which it is applied, where the rejected votes could influence the result, — an intention, too, which we think is so apparent on the ballot itself, that no person would be in real doubt concerning it. In People *v.* Pease, 27 N. Y. 45, 64, in which Moses M. Smith was a candidate for country treasurer, *Selden*, J., says: "According to well-settled rules, the board of canvassers erred in refusing to allow to the relator the nineteen votes given for Moses Smith and M. M. Smith;" and although we think this doctrine correct, the cases he cites in support

wrong initial, will not render the ballot nugatory;[1] nor will a failure to give the addition to a name — such as "Junior" — render it void, as that is a mere matter of description, not constituting a part of the name, and if given erroneously may be treated as surplusage.[2] But where the name upon the ballot is

of it (8 Cow. 102, and 5 Denio, 409) would only warrant a *jury*, not the canvassers, in allowing them; or, at least, those cast for M. M. Smith. The case of People *v.* Tisdale was again followed in People *v.* Cicott, 16 Mich. 283; the majority of the court, however, expressing the opinion that it was erroneous in principle, but that it had been too long, (twenty-five years), the settled law of the State to be disturbed, unless by the legislature. In Massachusetts, it is held that votes cast for "L. Clark" cannot be counted by the canvassers for Leonard Clark, though it is intimated that on a trial in court it might be shown that he was entitled to them. Clark *v.* County Examiners, 126 Mass. 282.

[1] People *v.* Cook, 14 Barb. 259, 8 N. Y. 67; State *v.* Gates, 43 Conn. 533. But see Opinions of Judges, 38 Me. 597.

[2] People *v.* Cook, 14 Barb. 259 and 8 N. Y. 67. In this case, the jury found, as matter of fact, that ballots given for Benjamin Welch were intended for Benjamin Welch, Jr.; and the court held that, as a matter of law, they should have been counted for him. It was not decided, however, that the canvassers were at liberty to allow the votes to Benjamin Welch, Jr.; and the judge delivering the prevailing opinion in the Court of Appeals says (p. 81), that the State canvassers cannot be charged with error in refusing to add to the votes for Benjamin Welch, Jr., those which were given for Benjamin Welch, without the junior. "They had not the means which the court possessed, on the trial of this issue, of obtaining, by evidence *aliunde*, the several county returns, the intention of the voters, and the identity of the candidate with the name on the defective ballots. Their judicial power extends no further than to take notice of such facts of public notoriety as that certain well-known abbreviations are generally used to designate particular names, and the like." So far as this case holds that the canvassers are not chargeable with error in not counting the ballots with the name Benjamin Welch for Benjamin Welch, Jr., it is, doubtless, correct. But suppose the canvassers had seen fit to do so, could the court hold they were guilty of usurpation in thus counting and allowing them? Could not the canvassers take notice of such facts of general public notoriety as everybody else would take notice of? Or must they shut their eyes to facts which all other persons must see? The facts are these: Benjamin Welch, Jr., and James M. Cook are the candidates, and the only candidates, for State Treasurer. These facts are notorious, and the two political parties make determined efforts to elect one or the other. Certain votes are cast for Benjamin Welch, with the descriptive word "junior" omitted. The name is correct, but, as thus given, it *may* apply to some one else; but it would be to a person notoriously not a candidate. Under these circumstances, when the facts of which it would be necessary to take notice have occurred under their own supervision, and are universally known, so that the result of a contest in the courts could not be doubtful, is there any reason why the canvassers should not take notice of these facts, count the votes which a jury would subsequently be compelled to count, and thus save the delay, expense, vexation, and confusion of a contest? If their judicial power extends to a determination of what are common and well-known abbreviations, and what names spelled differently are *idem sonans*, why may it not also extend to the facts, of which there will commonly be quite as little doubt, as to who are the candidates at the election over which they preside? It seems to us that in every case where the name given on the ballot, though in some particulars imperfect, is not different from that of the candidate, and facts of general notoriety leave no doubt in the minds of canvassers that it was intended for him, the canvassers should be at liberty to do what a jury would afterwards

altogether different from that of a candidate, not the same in sound and not a mere abbreviation, the evidence of the voter cannot be received to show for whom it was intended.[1]

Upon the question how far extrinsic evidence is admissible by way of helping out any inperfections in the ballot, no rule can be laid down which can be said to have a preponderating weight of authority in its support. We think evidence of such facts as may be called the circumstances surrounding the election — such as who were the candidates brought forward by the nominating conventions; whether other persons of the same names resided in the district from which the officer was to be chosen, and if so whether they were eligible or had been named for the office; if a ballot was printed imperfectly, how it came to be so printed, and the like — is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself; or unless the ballot is so defective that it fails to show any intention whatever: in which cases it is not admissible.[2] And we also think that in any case to allow a voter to testify by way of explanation of a ballot otherwise fatally defective, that he voted the particular ballot, and intended it for a particular candidate, is exceedingly dangerous, invites corruption and fraud, and ought not to be suffered. Nothing is more easy than for reckless parties thus to testify to their intentions, without the possibility of their testimony being disproved if untrue; and if one falsely swears to having deposited a particular ballot, unless the party really depositing it sees fit to disclose his knowledge, the evidence must pass unchallenged, and the temptation to subornation of perjury, when public offices are at stake, and when it may be committed with impunity, is too great to allow such evidence to be sanctioned. While the law should seek to

be compelled to do, — count it for such candidate. See People *v.* Kennedy, 87 Mich. 67. Compare Clarke *v.* County Examiners, 126 Mass. 282.

[1] A vote for "Pence" cannot be shown to have been intended for "Spence." Hart *v.* Evans, 8 Pa. St. 13. Where, however, wrong initials were given to the Christian name, the ballots were allowed to the candidate; the facts of public notoriety being such as to show that they were intended for him. Attorney-General *v.* Ely, 4 Wis. 420. This case goes farther, in permitting mistakes in ballots to be corrected on parol evidence, than any other in the books. Mr. McCrary, in his Law of Elections, devotes his seventh chapter to a careful discussion of the general subject of imperfect ballots.

[2] The text is quoted with approval in Kreitz *v.* Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 24 L. R. A. 59, but in that case after a recount had been made and his ballot identified by its number, a voter was allowed to testify that a certain slip upon it was not there when it left his hands; and that in writing in a candidate's name, the name of the office was partly obliterated by accident, though, if the latter was wholly obliterated, the vote could not be counted.

give effect to the intention of the voter, whenever it can be fairly ascertained, yet this intention must be that which is expressed in due form of law, not that which remains hidden in the elector's breast; and where the ballot, in connection with such facts surrounding the election as would be provable if it were a case of contract, does not enable the proper officers to apply it to one of the candidates, policy, coinciding in this particular with the general rule of law as applicable to other transactions, requires that the ballot shall not be counted for such candidate.[1]

The ballot should also sufficiently show on its face for what office the person named upon it is designated: but here again technical accuracy is not essential, and the office is sufficiently named if it be so designated that no reasonable doubt can exist as to what is meant. A great constitutional privilege — the highest under the government — is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action wherever the application of the common-sense rules which are applied in other cases will enable us to understand and render it effectual.[2]

[1] This is substantially the New York rule as settled by the later decisions, if we may accept the opinion of *Denio*, Ch. J., in People *v.* Pease, 27 N. Y. 45, 84, as taking the correct view of those decisions. See People *v.* Cicott, 16 Mich. 283, for a discussion of this point. Also State *v.* Griffey, 5 Neb. 101; Clark *v.* County Examiners, 126 Mass. 282.

[2] In People *v.* Matteson, 17 Ill. 167, it was held that where "police magistrates" were to be chosen, votes cast for "police justices" should be counted, as they sufficiently showed upon their face the intention of the voters. So where the question was submitted to the people, whether a part of one county should be annexed to another, and the act of submission provided that the electors might express their choice by voting "for detaching R——," or "against detaching R——," it was held that votes cast for "R—— attached," and for "R—— detached," and "for division," and "against division," were properly counted by the canvassers, as the intention of the voters was clearly ascertainable from the ballots themselves with the aid of the extrinsic facts of a public nature connected with the election. State *v.* Elwood, 12 Wis. 551. So where trustees of common schools were to be voted for, it was held that votes for trustees of public schools should be counted; there being no trustees to be voted for at that election except trustees of common schools. People *v.* McManus, 34 Barb. 620. In Phelps *v.* Goldthwaite, 16 Wis. 146, where a city and also a county superintendent of schools were to be chosen at the same election, and ballots were cast for "superintendent of schools," without further designation, parol evidence of surrounding circumstances was admitted to enable the proper application to be made of the ballots to the respective candidates. In Peck *v.* Weddell, 17 Ohio St. 271, an act providing for an election on the question of the removal of a county seat to the "town" of Bowling Green, was held not invalid by reason of Bowling Green being in law not a "town," but an incorporated village. In voting for a county seat it was held proper to count votes cast for a town by its popular, which differed from its legal, name. State *v.* Cavers, 22 Iowa, 343. Ballots in all such cases should receive such a construction as will make them valid if they are capable of it. Cattell *v.* Lowry, 45 Iowa, 478; State

Where more than one office is to be filled at an election, the law may either require all the persons voted for, for the several offices, to be so voted for by each elector on the same ballot, or it may provide a different receptacle for the ballots for some one office or set of offices from that which is to receive the others. In such a case each elector will place upon the ballot to be deposited in each box the names of such persons as he desires to vote for, for the different offices to be filled at the election for which that box is provided. If, for instance, State and township officers are to be chosen at the same election, and the ballots are to be kept separate, the elector must have different ballots for each; and if he should designate persons for a township office on the State ballot, such ballot would, to that extent, be void, though the improper addition would not defeat the ballot altogether, but would be treated as surplusage, and the ballot be held good as a vote for the State officers designated upon it.[1] But an accidental error in depositing the ballot should not defeat it. If an elector should deliver the State and township ballots to the inspector of election, who by mistake should deposit them in the wrong boxes respectively, this mistake is capable of being corrected without confusion when the boxes are opened, and should not prevent the ballots being counted as intended. And it would seem that, in any case, the honest mistake, either of the officer or the elector, should not defeat the intention of the latter, where it was not left in doubt by his action.[2]

The elector is not under obligation to vote for every office to be filled at that election; nor where several persons are to be chosen to the same office is he required to vote for as many as are to be elected. He may vote for one or any greater number, not to exceed the whole number to be chosen. In most of the States a plurality of the votes cast determines the election; in others, as to some elections, a majority; but in determining upon a majority

v. Metzger, 26 Kan. 395. And the election should not be set aside when the will of the people is fairly ascertainable from it. Holland *v.* Davis, 36 Ark. 446, 450. An obvious misprint of "2" for "1" before "district" will not avoid counting the votes cast in the first district. Inglis *v.* Shepherd, 67 Cal. 469, 8 Pac. 5. [Where two or more offices are to be filled, the ballots must show for which offices the candidates named on the ballot are intended. Page *v.* Kuykendall, 161 Ill. 319, 43 N. E. 1114, 32 L. R. A. 656.]

[1] See People *v.* Cook, 14 Barb. 259 and 8 N. Y. 67.

[2] People *v.* Bates, 11 Mich. 362. See Lanier *v.* Gallatas, 13 La. Ann. 175; McKinney *v.* O'Connor, 26 Tex. 5. But inspectors of election have no authority, on the assertion of a voter that he has voted by mistake in the wrong precinct, to withdraw from the ballot-box and destroy a ballot which he professes to identify as the one cast by him. Harbaugh *v.* Cicott, 33 Mich. 241.

or plurality, the blank votes, if any, are not to be counted; and a candidate may therefore be chosen without receiving a plurality or majority of voices of those who actually participated in the election. Where, however, two offices of the same name were to be filled at the same election, but the notice of election specified one only, and the political parties each nominated one candidate, and, assuming that but one was to be chosen, no elector voted for more than one, it was held that the one having a majority was alone chosen; that the opposing candidate could not claim to be also elected, as having received the second highest number of votes, but as to the other office there had been a failure to hold an election.[1]

The Freedom of Elections.

To keep every election free of all the influences and surroundings which might bear improperly upon it, or might impel the electors to cast their suffrages otherwise than as their judgments would dictate, has always been a prominent object in American legislation.[2] We have referred to fundamental principles which protect the secrecy of the ballot, but in addition to these there are express constitutional and statutory provisions looking to the accomplishment of the same general purpose. It is provided by the constitutions of several of the States that bribery of an elector shall constitute a disqualification of the right to vote or to hold

[1] People *v.* Kent County Canvassers, 11 Mich. 111. Where officers, *e. g.* aldermen, one for a long term and one for a short term, are to be chosen, if there is no designation of the terms upon the ballot, it must be rejected. Milligan's App., 96 Pa. St. 222. [A statute providing for "cumulative" voting, giving the right to an elector of a district in which more than one representative to the State legislature is to be elected, to cast one vote for each, or to cast as many votes as there are representatives to be elected from the district, and distribute them as he chooses, was held void in Maynard *v.* Board of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332. The opinion in this case proceeds upon the theory that without express constitutional authority the legislature cannot authorize an elector to cast more than one ballot for the same person for a single office: that the history and traditions of the elective franchise as interpreted by the courts is opposed to such method of voting, and the constitution must clearly disclose such authority before such innovation in the exercise of the elective franchise is justified.]

[2] For decisions bearing upon the freedom of elections and disorder or intimidation to control it, see Commonwealth *v.* Hoxey, 16 Mass. 384; Commonwealth *v.* McHale, 97 Pa. St. 397; Respublica *v.* Gibbs, 3 Yeates, 429, 4 Dall. 253; State *v* Franks, 38 Tex. 640; State *v.* Mason, 14 La. Ann. 505; United States *v.* Cruikshank, 92 U. S. 542; Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127; Patton *v.* Coates, 41 Ark. 111; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935; Brassard *v.* Langevin, 1 Can. Sup. Ct. 145. [In Indiana the very remarkable device of giving the bribed elector the right to sue the briber for a penalty of three hundred dollars and attorney's fees was recently adopted, and was sustained in State *v.* Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767.]

office;[1] the treating of an elector, with a view to influence his vote, is in some States made an indictable offence;[2] courts are not allowed to be held, for the two reasons, that the electors ought to be left free to devote their attention to the exercise of this high trust, and that suits, if allowed on that day, might be used as a means of intimidation;[3] legal process in some States, and for the same reasons, is not permitted to be served on that day; intimidation of voters by threats or otherwise is made punishable;[4] and generally all such precautions as the people in framing their organic law, or the legislature afterwards, have thought might be made available for the purpose, have been provided with a view to secure the most completely free and unbiassed expression of opinion that shall be possible.

[1] See the Constitutions of Maryland, Missouri, New Jersey, West Virginia, Oregon, California, Kansas, Texas, Arkansas, Rhode Island, Alabama, Florida, New York, Massachusetts, New Hampshire, Vermont, Nevada, Tennessee, Connecticut, Louisiana, Mississippi, Ohio, Wisconsin. And it has been held on general principles that if an elector is induced to vote in a particular way by the payment or promise of any money or other valuable consideration for such vote, his vote should be rejected as illegal. State *v.* Olin, 23 Wis. 309. The power to reject for such a reason, however, is not in the inspectors, but in the court in which the right to try the title to the office is vested. State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485. In this case it was held to be a sufficient reason for the court to reject votes, that they were obtained by means of the candidate's promise to perform the duties of the office for less than the official salary. [It is frequently provided, in order to make bribery ineffective, that ballots bearing distinguishing marks are void. That imprints appearing upon all ballots and imprinted thereon at time of printing, even though unlawful, are not distinguishing marks, see State *v.* Saxon, 30 Fla. 668, 12 So. 218, 18 L. R. A. 721; see other cases in note on Australian Ballot Laws, *ante*, p. 899, n. a. Inscription "O. K." on back of a ballot is a distinguishing mark. State *v.* Ellis, 111 N. C. 124, 15 S. E. 938, 17 L. R. A. 382. For cases discussing a variety of distinguishing marks, see State *v.* Walsh, 62 Conn. 260, 25 Atl. 1, 17 L. R. A. 364; Rutledge *v.* Crawford, 91 Cal. 526, 27 Pac. 779, 13 L. R. A. 761, and note; State *v.* Barden, 77 Wis. 601, 46 N. W. 899, 10 L. R. A. 155; Talcott *v.* Philbrick, 59 Conn. 472, 20 Atl. 436, 10 L. R. A. 150.]

[2] State *v.* Rutledge, 8 Humph. 32. And see the provision in the Constitution of Vermont on this subject. A resort to this species of influence would generally, at the present time, prejudice the candidate's interests instead of advancing them, but such has not always been the case. Mr. Madison, after performing valuable service for the State in its legislature, was defeated when offering himself for re-election, in the very crisis of the Revolution, by the treating of his opponent. See his Life by Rives, Vol. I. p. 179. The Constitution of Louisiana [1879] requires the General Assembly to forbid by law the giving away or selling of intoxicating drinks on the day of election within one mile of any election precinct. Art. 190.

[3] But it was held in New York that the statute of that State forbidding the holding of courts on election days did not apply to the local elections. Matter of Election Law, 7 Hill, 194; Redfield *v.* Florence, 2 E. D. Smith, 339.

[4] As to what shall constitute intimidation, see Respublica *v.* Gibbs, 3 Yeates, 420, 4 Dall. 254, and cases, p. 922, note 2. [And a statute prohibiting electioneering within one hundred feet of any polling place on election day is valid. State *v.* Black, 54 N. J. L. 446, 24 Atl. 489, 1029, 16 L. R. A. 769.]

Betting upon elections is illegal at the common law, on grounds of public policy;[1] and all contracts entered into with a view improperly to influence an election would be void for the same reason.[2] And with a just sense of the danger of military inter-

[1] Bunn *v.* Riker, 4 Johns. 426; Lansing *v.* Lansing, 8 Johns. 454; Ball *v.* Gilbert, 12 Met. 397; Laval *v.* Myers, 1 Bailey, 486; Smyth *v.* McMasters, 2 Browne, 182; McAllister *v.* Hoffman, 16 S. & R. 147; Stoddard *v.* Martin, 1 R. I. 1; Wroth *v.* Johnson, 4 H. & M. 284; Tarleton *v.* Baker, 18 Vt. 9; Davis *v.* Holbrook, 1 La. Ann. 176; Foreman *v.* Hardwick, 10 Ala. 316; Wheeler *v.* Spencer, 15 Conn. 28; Russell *v.* Pyland, 2 Humph. 131; Porter *v.* Sawyer, 1 Harr. 517; Hickerson *v.* Benson, 8 Mo. 8; Machir *v.* Moore, 2 Gratt. 257; Rust *v.* Gott, 9 Cow. 169, 18 Am. Dec. 497; Brush *v.* Keeler, 5 Wend. 250; Fisher *v.* Hildreth, 117 Mass. 558; McCrary, Law of Elections, § 149. A statute punishing betting on elections does not cover nominating conventions. Com. *v.* Wells, 110 Pa. St. 463, 1 Atl. 310.

[2] In Jackson *v.* Walker, 5 Hill, 27, it was held that an agreement by the defendant to pay the plaintiff $1,000, in consideration that the latter, who had built a log-cabin, would keep it open for political meetings to further the success of certain persons nominated for members of Congress, &c., by one of the political parties, was illegal within the statute of New York, which prohibited contributions of money "for any other purpose intended to promote the election of any particular person or ticket, except for defraying the expenses of printing and the circulation of votes, hand-bills, and other papers." This case is criticised in Hurley *v.* Van Wagner, 28 Barb. 109, and it is possible that it went further than either the statute or public policy would require. In Nichols *v.* Mudgett, 32 Vt. 546, the defendant being indebted to the plaintiff, who was a candidate for town representative, the parties agreed that the former should use his influence for the plaintiff's election, and do what he could for that purpose, and that if the plaintiff was elected, that should be a satisfaction of his claim. Nothing was specifically said about the defendant's voting for the plaintiff, but he did vote for him, and would not have done so, nor favored his election, but for this agreement. The plaintiff was elected. *Held*, that the agreement was void, and constituted no bar to a recovery upon the demand. Where two are candidates, and one withdraws in consideration of an agreement that the other, if chosen, will divide the fees, the agreement is void. Gray *v.* Hook, 4 N. Y. 449. An agreement that one for a fixed sum may perform all the duties of an office and receive all the emoluments is illegal. Hall *v.* Gavitt, 18 Ind. 390. So is an agreement between two candidates to divide emoluments and that the defeated one shall be deputy. Glover *v.* Taylor, 38 La. Ann. 634. A note executed in consideration of the payee's agreement to resign public office in favor of the maker, and use influence in favor of the latter's appointment as his successor, is void. Meacham *v.* Dow, 32 Vt. 721. See also Duke *v.* Ashbee, 11 Ired. 112; Hunter *v.* Nolf, 71 Pa. St. 182; Ham *v.* Smith, 87 Pa. St. 63; Robinson *v.* Kalbfleish, 5 Thomp. & C. (N. Y.) 212; McCrary, Law of Elections, § 192. A contract to assist by money and influence to secure the election of a candidate to a public office in consideration of a share of its emoluments, in the event of election, is void as opposed to public policy, and if voluntarily rescinded by the parties a recovery cannot be had of the moneys advanced under it. Martin *v.* Wade, 37 Cal. 168. It has even been held that a public offer to the electors by a candidate for a public office, whereby he pledged himself, if elected, to perform the duties of the office for less than the legal salary or fees, would invalidate his election. State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485; Harvey *v.* Tama County, 53 Iowa, 228, 5 N. W. 130; Caruthers *v.* Russell, 53 Iowa, 346, 5 N. W. 499, 36 Am. Rep. 222; State *v.* Collier, 72 Mo. 13, 37 Am. Rep. 417. See Cardigan *v.* Page, 6 N. H. 182; Alvin *v.* Collin, 20 Pick. 418; State *v.* Church, 5 Oreg. 375, 20 Am. Rep. 746. A contract to resign an office that another may be appointed is void. Meguire *v.* Corwine,

ference, where a trust is to be exercised, the highest as well as the most delicate in the whole machinery of government, it has not been thought unwise to prohibit the militia being called out on election days, even though for no other purpose than for enrolling and organizing them.[1] The ordinary police is the peace force of the State, and its presence suggests order, individual safety, and public security; but when the military appear upon the stage, even though composed of citizen militia, the circumstances must be assumed to be extraordinary, and there is always an appearance of threatening and dangerous compulsion which might easily interfere seriously with that calm and unimpassioned discharge of the elector's duty which the law so justly favors. The soldier in organized ranks can know no law but such as is given him by his commanding officer; and when he appears at the polls, there is necessarily a suggestion of the presence of an enemy against whom he may be compelled to exercise the most extreme and destructive force; and that enemy must generally be the party out of power, while the authority that commands the force directed against them will be the executive authority of the State for the time being wielded by their opponents. It is consequently of the highest importance that the presence of a military force at the polls be not suffered except in serious emergencies, when disorders exist or are threatened for the suppression or prevention of which the ordinary peace force is insufficient; and any statute which should provide for or permit such presence as a usual occurrence or except in the last resort, though it might not be void, would nevertheless be a serious invasion of constitutional right, and should not be submitted to in a free government without vigorous remonstrance.[2]

3 MacArthur, 81. If one advances money to be used to further the election of a particular candidate irrespective of qualifications, and it is not so used, he cannot maintain a suit to recover it back. Liness *v.* Hesing, 44 Ill. 113. In Pratt *v.* People, 29 Ill. 54, it was held that an agreement between two electors that they should "pair off," and both abstain from voting, was illegal, and the inspectors could not refuse to receive a vote of one of the two, on the ground of his agreement. An election upon the question of the removal of a county seat is not invalidated by inducements held out by the several localities; such as the offer to erect the county buildings, &c. Dishon *v.* Smith, 10 Iowa, 212; Hawes *v.* Miller, 56 Iowa, 395, 9 N. W. 307; State *v.* Supervisors of Portage, 24 Wis. 49; Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255; Neal *v.* Shinn, 49 Ark. 227, 4 S. W. 774; State *v.* Elting, 29 Kan. 397; Hall *v.* Marshall, 80 Ky. 552; [State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1001, 14 L. R. A. 62, and note; *contra*, Ayres *v.* Moan, 34 Neb. 210, 51 N. W. 830, 15 L. R. A. 501. A promise by a citizen to pay part of the expense of opening a street will not invalidate an ordinance providing for such opening. State *v.* Orange, 54 N. J. L. 111, 22 Atl. 1004, 14 L. R. A. 62, and note on bribery by gift to public.] See State *v.* Purdy, 36 Wis. 213.

[1] See Hyde *v.* Melvin, 11 Johns. 521.

[2] The danger, and, we may say also, the folly, of military interference with the deliberations or action of electors, except

The Elector not to be deprived of his Vote.

That one entitled to vote shall not be deprived of the privilege by the action of the authorities is a fundamental principle. (*a*)

It has been held, on constitutional grounds, that a law creating a new county, but so framed as to leave a portion of its territory unorganized, so that the voters within such portion could not participate in the election of county officers, was inoperative and void.[1] So a law submitting to the voters of a county the question of removing the county seat is void if there is no mode under the law by which a city within the county can participate in the election.[2] And although the failure of one election precinct to hold an election, or to make a return of the votes cast, might not render the whole election a nullity, where the electors of that precinct were at liberty to vote had they so chosen, or where, having voted but failed to make return, it is not made to appear that the votes not returned would have changed the result,[3] yet if any action was required of the public authorities preliminary to the election, and that which was taken was not such as to give all the electors the opportuuity to participate, and

in the last necessity, was fearfully illustrated in the case of the "Manchester Massacre," which occurred in 1819. An immense meeting of radical parliamentary reformers, whose objects and purposes appeared threatening to the government, was charged upon by the military, with some loss of life, and with injury to the persons of several hundred people. As usual in such cases, the extremists of one party applauded the act and complimented the military, while the other party was exasperated in the last degree, by what seemed to them an unnecessary, arbitrary, and unconstitutional exercise of force. The most bitter and dangerous feeling was excited throughout the country by this occurrence, and it is not too much to say that if disorders were threatening before, the government had done nothing in this way to strengthen its authority, or to insure quiet or dispassionate action. No one had been conciliated; no one had been reduced to more calm and deliberate courses; but, on the other hand, even moderate men had been exasperated and inclined to opposition by this violent, reckless, and destructive display of coercive power. See Hansard's Debates, Vol. XLI. pp. 4, 51, 230.

[1] People *v.* Maynard, 15 Mich. 463. For similar reasons the act for the organization of Schuyler County was held invalid in Lanning *v.* Carpenter, 20 N. Y. 447.

[2] Attorney-General *v.* Supervisors of St. Clair, 11 Mich. 63. For a similar principle, see Foster *v.* Scarff, 15 Ohio St. 532.

[3] See *Ex parte* Heath, 3 Hill, 42; Louisville & Nashville R. R. Co. *v.* County Court of Davidson, 1 Sneed, 637; Marshall *v.* Kerns, 2 Swan, 68; Beardstown *v.* Virginia, 76 Ill. 34.

(*a*) [But it is held that he may be restricted to candidates whose names are printed on the official ballot. State *v.* McElroy, 44 La. Ann. 796, 11 So. 133, 16 L. R. A. 278, and note. Voter may lawfully vote for the same man as candidate for two or more incompatible offices. Misch *v.* Russell, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125, and note. A statute prohibiting the putting of the name of a candidate on a ballot as the candidate of more than party, was held void, in Murphy *v.* Curry, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97.]

no mode was open to the electors by which the officers might be compelled to act, it would seem that such neglect, constituting as it would the disfranchisement of the excluded electors *pro hac vice*, must on general principles render the whole election nugatory; for that cannot be called an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded.[1]

If the inspectors of elections refuse to receive the vote of an elector duly qualified, they may be liable both civilly and criminally for so doing: criminally, if they were actuated by improper and corrupt motives;[2] and civilly, it is held in some of the States, even though there may have been no malicious design in so doing;[3] but other cases hold that, where the inspectors are vested by the law with the power to pass upon the qualifications of electors, they exercise judicial functions in so doing, and are entitled to the same protection as other judicial officers in the discharge of their duty, and cannot be made liable except upon proof of express malice.[4] Where, however, by the law under which the election is held, the inspectors are to receive the voter's ballot, if he takes the oath

[1] See Fort Dodge *v.* District Township, 17 Iowa, 85; Barry *v.* Lauck, 5 Cold. 588. In People *v.* Salomon, 46 Ill. 415, it was held that where an act of the legislature, before it shall become operative, is required to be submitted to the vote of the legal electors of the district to be affected thereby, if the election which is attempted to be held is illegal within certain precincts containing a majority of the voters of the district, then the act will not be deemed to have been submitted to the required vote, and the result will not be declared upon the votes legally cast, adverse to what it would have been had no illegality intervened.

[2] As to common-law offences against election laws, see Commonwealth *v.* McHale, 97 Pa. St. 397. For an instance under a statute, see People *v.* Burns, 75 Cal. 627, 17 Pac. 646.

[3] Kilham *v.* Ward, 2 Mass. 236; Gardner *v.* Ward, 2 Mass. 244, note; Lincoln *v.* Hapgood, 11 Mass. 350; Capen *v.* Foster, 12 Pick. 485, 23 Am. Dec. 632; Gates *v.* Neal, 23 Pick. 308; Blanchard *v.* Stearns, 5 Met. 298; Larned *v.* Wheeler, 140 Mass. 390, 5 N. E. 290; Jeffries *v.* Ankeny, 11 Ohio, 372; Chrisman *v.* Bruce, 1 Duv. 63; Monroe *v.* Collins, 17 Ohio St. 665; Gillespie *v.* Palmer, 20 Wis. 544; Long *v.* Long, 57 Iowa, 497, 10 N. W. 875.

[4] Jenkins *v.* Waldron, 11 Johns. 114; Wecherley *v.* Guyer, 11 S. & R. 35; Gordon *v.* Farrar, 2 Doug. (Mich.) 411; Peavey *v.* Robbins, 3 Jones (N. C.), 339; Caulfield *v.* Bullock, 18 B. Mon. 494; Miller *v.* Rucker, 1 Bush, 135; Chrisman *v.* Bruce, 1 Duv. 63; Wheeler *v.* Patterson, 1 N. H. 88; Turnpike *v.* Champney, 2 N. H. 199; Rail *v.* Potts, 8 Humph. 225; Bevard *v.* Hoffman, 18 Md. 479; Elbin *v.* Wilson, 33 Md. 135; Friend *v.* Hamill, 34 Md. 298; Pike *v.* Magoun, 44 Mo. 492; Perry *v.* Reynolds, 53 Conn. 527, 3 Atl. 555; see State *v.* Daniels, 44 N. H. 383, and Goetcheus *v.* Matthewson, 61 N. Y. 420. In the last case the whole subject is fully and carefully examined, and the authorities analyzed. Compare Byler *v.* Asher, 47 Ill. 101; Elbin *v.* Wilson, 33 Md. 135; Murphy *v.* Ramsey, 114 U. S. 15, 5 Sup. Ct. Rep. 747. Under a statute rendering liable for unreasonable refusal, the refusal must be such as to seem unreasonable to reasonable, unprejudiced men. Sanders *v.* Getchell, 76 Me. 158; Pierce *v.* Getchell, *Id.* 216.

that he possesses the constitutional qualifications, the oath is the conclusive evidence on which the inspectors are to act, and they are not at liberty to refuse to administer the oath, or to refuse the vote after the oath has been taken. They are only ministerial officers in such a case, and have no discretion but to obey the law and receive the vote.[1]

The Conduct of the Election.

The statutes of the different States point out specifically the mode in which elections shall be conducted; but, although there are great diversities of detail, the same general principles govern them all. As the execution of these statutes must very often fall to the hands of men unacquainted with the law and unschooled in business, it is inevitable that mistakes shall sometimes occur, and that very often the law will fail of strict compliance. Where an election is thus rendered irregular, whether the irregularity shall avoid it or not must depend generally upon the effect the failure to comply strictly with the law may have had in obstructing the complete expression of the popular will, or the production of satisfactory evidence thereof. Election statutes are to be tested like other statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated and not otherwise, their provisions designed merely for the information and guidance of the officers must be regarded as directory only, and the election will not be defeated by a failure to comply with them, providing the irregularity has not hindered any who were entitled from exercising the right of suffrage, or rendered doubtful the evidences from which the result was to be declared. In a leading case the following irregularities were held not to vitiate the election: the accidental substitution of another book for the Holy Evangelists in the administration of an oath, both parties being ignorant of the error at the time; the holding of the election by persons who were not officers *de jure*, but who had colorable authority, and acted *de facto* in good faith;[2] the

[1] Spriggins *v.* Houghton, 3 Ill. 377; 9 Am. Rep. 409. Also to Fowler *v.* State *v.* Robb, 17 Ind. 536; People *v.* Beebe, 9 Mass. 231; Tucker *v.* Aiken, 7 Pease, 30 Barb. 588. And see People *v.* Gordon, 5 Cal. 235; Chrisman *v.* Bruce, 1 Duv. 63; Gillespie *v.* Palmer, 20 Wis. 544; Goetcheus *v.* Mathewson, 61 N. Y. 430; [Wolcott *v.* Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L. R. A. 215.]

[2] As to what constitutes an officer *de facto*, the reader is referred to the careful opinion in State *v.* Carroll, 38 Conn. 449, N. H. 113; Commonwealth *v.* McCombs, 56 Pa. St 436; Fenelon *v.* Butts, 49 Wis. 342; *Ex parte* Strang, 21 Ohio St. 610; Kimball *v.* Alcorn, 45 Miss. 151, and authorities referred to in these cases severally; and to cases, *supra*, pp. 896 898, notes. Also Cooley on Taxation, 184–186; McCrary's Law of Elections, §§ 75–79.

failure of the board of inspectors to appoint clerks of the election; the closing of the outer door of the room where the election was held at sundown, and then permitting the persons within the room to vote, — it not appearing that legal voters were excluded by closing the door, or illegal allowed to vote; and the failure of the inspectors or clerks to take the prescribed oath of office. And it was said, in the same case, that any irregularity in conducting an election which does not deprive a legal elector of his vote, or admit a disqualified person to vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, should be overlooked in a proceeding to try the right to an office depending on such election.[1] The rule is an eminently proper one, and it furnishes

[1] People *v.* Cook, 14 Barb. 259, and 8 N. Y. 67. To the same effect, see Clifton *v.* Cook, 7 Ala. 114; Truehart *v.* Addicks, 2 Tex. 217; Dishon *v.* Smith, 10 Iowa, 212; Attorney-General *v.* Ely, 4 Wis. 420; State *v.* Jones, 19 Ind. 356; People *v.* Higgins, 3 Mich. 233; Gorham *v.* Campbell, 2 Cal. 135; People *v.* Bates, 11 Mich. 362; Taylor *v.* Taylor, 10 Minn. 112; People *v.* McManus, 34 Barb. 620; Whipley *v.* McCune, 12 Cal. 352; Bourland *v.* Hildreth, 26 Cal. 161; Day *v.* Kent, 1 Oreg. 123; Piatt *v.* People, 29 Ill. 54; Du Page Co. *v.* People, 65 Ill. 360; Hodge *v.* Linn, 100 Ill. 397; Ewing *v.* Filley, 43 Pa. St. 384; Howard *v.* Shields, 16 Ohio St. 184; Fry *v.* Booth, 19 Ohio St. 25; State *v.* Stumpf, 21 Wis. 579; McKinney *v.* O'Connor, 26 Tex. 5; Sprague *v.* Norway, 31 Cal. 173; Sheppard's Election Case, 77 Pa. St. 295; Wheelock's Election Case, 82 Pa. St. 297; Barnes *v.* Pike Co., 51 Miss. 305; State *v.* O'Day, 69 Iowa, 368, 28 N. W. 642. In *Ex parte* Heath, 3 Hill, 42, it was held that where the statute required the inspectors to certify the result of the election on the next day thereafter, or sooner, the certificate made the second day thereafter was sufficient, the statute as to time being directory merely. In People *v.* McManus, 34 Barb. 620, it was held that an election was not made void by the fact that one of the three inspectors was by the statute disqualified from acting, by being a candidate at the election, the other two being qualified. In Sprague *v.* Norway, 31 Cal. 173, it was decided that where the judges of an election could not read, and for that reason a person who was not a member of the board took the ballots from the box, and read them to the tellers, at the request of the judges, the election was not affected by the irregularity. In several cases, and among others the following, the general principle is asserted that any irregularities or misconduct, not amounting to fraud, is not to be suffered to defeat an election unless it is made to appear that the result was thereby changed. Loomis *v.* Jackson, 6 W. Va. 613, 692; Morris *v.* Vanlaningham, 11 Kan. 269; Supervisors of Du Page *v.* People, 65 Ill. 360; Chicago *v.* People, 80 Ill. 496; People *v.* Wilson, 62 N. Y. 186; State *v.* Burbridge, 24 Fla. 112, 3 So. 869. [Baltes *v.* Farmers' Irr. District, 60 Neb. 310, 83 N. W. 83. But where the election officers took the ballot-box with them when they left the polling-place and went to dinner, this of itself invalidates the vote in that precinct. Tebbe *v.* Smith, 108 Cal. 101, 29 L. R. A. 673, 41 Pac. 454.] If the election is fair and the count honest, it is not fatal that the election officers were not properly qualified: Quinn *v.* Markoe, 37 Minn. 439, 35 N. W. 263; Swepston *v.* Barton, 39 Ark. 549; Wells *v.* Taylor, 5 Mont. 202, 3 Pac. 255; *contra*, Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424; nor that unauthorized persons helped in the counting. Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127. The failure to hold the poll open as long as the law requires may not be fatal if no one lost his vote in consequence. Cleland *v.* Porter, 74 Ill. 76; Swepston *v.* Barton, 39 Ark. 549. See Kuykendall *v.* Harker, 89 Ill. 126. And a candidate who participates in the

a very satisfactory test as to what is essential and what not in election laws.[1] And where a party contests an election on the ground of these or any similar irregularities, he ought to aver and be able to show that the result was affected by them.[2] Time and place, however, are of the substance of every election,[3] and a failure to comply with the law in these particulars is not generally to be treated as a mere irregularity.[4]

election actually held will not be allowed to question its validity on that ground. People *v.* Waite, 70 Ill. 25. But where the law gave three hours for an election and the polls were closed in forty minutes, the proceedings were held invalid. State *v.* Wollem, 37 Iowa, 131. All votes received after the polls should be closed are illegal. Varney *v.* Justice, 86 Ky. 596, 6 S. W. 457. And where the law required three judges and two clerks of an election, and only one of each was provided, it was held that this was not a mere irregularity and the election was void. Chicago, &c. R. R. Co. *v.* Mallory, 101 Ill. 583.

[1] This rule has certainly been applied with great liberality, in some cases. In People *v.* Higgins, 3 Mich. 233, it was held that the statute requiring ballots to be sealed up in a package, and then locked up in the ballot-box, with the orifice at the top sealed, was directory merely; and that ballots which had been kept in a locked box, but without the orifice closed or the ballots sealed up, were admissible in evidence in a contest for an office depending upon this election. This case was followed in People *v.* Cicott, 16 Mich. 283, and it was held that whether the ballots were more satisfactory evidence than the inspector's certificates, where a discrepancy appeared between them, was a question for the jury. See also Fowler *v.* State, 68 Tex. 30, 3 S. W. 255. In Morril *v.* Haines, 2 N. H. 246, the statute required State officers to be chosen by a check-list, and by delivery of the ballots to the moderator in person; and it was held that the requirement of a check-list was mandatory, and the election in the town was void if none was kept. The decision was put upon the ground that the check-list was provided as an important guard against indiscriminate and illegal voting, and the votes given by ballot without this protection were therefore as much void as if given *viva voce*.

[2] Lanier *v.* Gallatas, 13 La. Ann. 175; People *v.* Cicott, 16 Mich. 283; Taylor *v.* Taylor, 10 Minn. 107; Dobyns *v.* Weadon, 50 Ind. 298.

[3] Dickey *v.* Hurlburt, 5 Cal. 343; Knowles *v.* Yeates, 31 Cal. 82; Walker *v.* Sanford, 78 Ga. 165, 1 S. E. 424; Williams *v.* Potter, 114 Ill. 628, 3 N. E. 729. An election adjourned without warrant to another place, as well as an election held without the officers required by law, is void. Commonwealth *v.* County Commissioners, 5 Rawle, 75. An unauthorized adjournment of the election for dinner — it appearing to have been in good faith, and no one having been deprived of his vote thereby — will not defeat the election. Fry *v.* Booth, 19 Ohio St. 25. Adjourning an election in good faith to another polling place will not necessarily avoid it. Farrington *v.* Turner, 53 Mich. 27, 18 N. W. 544. Where voting had been done at a church, and the building was moved three-quarters of a mile, an election held at the new place is valid, no one being prevented from voting by the change. Steele *v.* Calhoun, 61 Miss. 556. So of a change of two hundred feet. Simons *v.* People, 119 Ill. 617, 9 N. E. 220. See also Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95, where a separate voting place from the township poll was, without authority of law but in good faith, kept in a village, and the vote was held legal. [Delay of an hour in opening polls, when not brought about through fraud, and in the absence of a showing that the number (one) of voters thereby prevented from voting could have changed the result, will not invalidate the election. Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764.]

[4] The statute of Michigan requires the clerks of election to keep lists of the persons voting, and that at the close of the polls the first duty of the inspectors shall be to compare the lists with the number

What is a Sufficient Election.

Unless the law under which the election is held expressly requires more, a plurality of the votes cast will be sufficient to elect, notwithstanding these may constitute but a small portion of those who are entitled to vote,[1] and notwithstanding the voters generally may have failed to take notice of the law requiring the election to be held.[2]

If several persons are to be chosen to the same office, the requisite number who shall stand highest on the list will be elected. But without such a plurality no one can be chosen to a public office; and it is held in many cases that if the person receiving the highest number of votes was ineligible, the votes cast for him will still be effectual so far as to prevent the opposing candidate

of votes in the box, and if the count of the latter exceeds the former, then to draw out unopened and destroy a sufficient number to make them correspond. In People *v.* Cicott, 16 Mich. 283, it appeared that the inspectors in two wards of Detroit, where a surplus of votes had been found, had neglected this duty, and had counted all the votes without drawing out and destroying any. The surplus in the two wards was sixteen. The actual majority of one of the candidates over the other on the count as it stood (if certain other disputed votes were rejected) would be four. It was held that this neglect of the inspectors did not invalidate the election; that had the votes been drawn out, the probability was that each candidate would lose a number proportioned to the whole number which he had in the box; and this being a probability which the statute providing for the drawing proceeded upon, the court should apply it afterwards, apportioning the excess of votes between the candidates in that proportion. [The requirements of law must be substantially complied with. An election held by a mere usurper is void, even though fairly and honestly conducted. State *v.* Taylor, 108 N. C. 196, 12 S. E. 1005, 12 L. R. A. 202.]

[1] Augustin *v.* Eggleston, 12 La. Ann. 366; Gillespie *v.* Palmer, 20 Wis. 544. See also State *v.* Mayor, &c. of St. Joseph, 37 Mo. 270; State *v.* Binder, 38 Mo. 450; *In re* Plurality Elections, 15 R. I. 617, 8 Atl. 881.

[2] People *v.* Hartwell, 12 Mich. 508. In a case a little different, where the people were in doubt if there were any vacancy to be filled, and only twenty-nine persons out of a poll of eight hundred cast their votes to fill the vacancy, it was held that these twenty-nine votes did not make an election. State *v.* Good, 41 N. J. 296. Even if the majority expressly dissent, yet if they do not vote, the election by the minority will be valid. Oldknow *v.* Wainwright, 1 W. Bl. 229; Rex *v.* Foxcroft, 2 Burr. 1017; Rex *v.* Withers, referred to in same case. Minority representation in certain cases has been introduced in New York, Pennsylvania, and Illinois, and the principle is likely to find favor elsewhere. But such representation has been held inconsistent with a constitutional provision that each elector shall be entitled to vote at all elections. State *v.* Constantine, 42 Ohio St. 437. [*Contra*, Commonwealth *v.* Reeder, 171 Pa. 505, 33 Atl. 67, 33 L. R. A. 141. Requirement that "members of assembly shall be appointed among the several counties of the State by the legislature as nearly as may be according to the number of their respective inhabitants" is mandatory, and any substantial noncompliance will be set aside. People *v.* Broom, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. For other cases in which gerrymanders have been set aside for gross unfairness and inequality, see Parker *v.* State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; State *v.* Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145; Giddings *v.* Blacker, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; Houghton Co. Supervisors *v.* Blacker, 92

being chosen, and the election must be considered as having failed.[1]

The admission of illegal votes at an election will not necessarily defeat it; but, to warrant its being set aside on that ground, it should appear that the result would have been different had they been excluded.[2] And the fact that unqualified persons are allowed to enter the room, and participate in an election, does not

Mich. 633, 52 N. W. 751, 16 L. R. A. 432; State *v.* Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561, and note. See also, in this connection, People *v.* Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 830. Law providing that presidential electors shall be elected, one from each congressional district and remainder at large, or from larger districts, is valid. McPherson *v.* Blacker, 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, aff. in 146 U. S. 1, 13 Sup. Ct. Rep. 3. Cumulative voting held unconstitutional in Maynard *v.* Bd. of Canvassers, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332.]

[1] State *v.* Giles, 1 Chand. 112; Opinions of Judges, 33 Me. 598; State *v.* Smith, 14 Wis. 497; Saunders *v.* Haynes, 13 Cal. 145; Fish *v.* Collens, 21 La. Ann. 289; Sublett *v.* Bedwell, 47 Miss. 266, 12 Am. Rep. 338; State *v.* Swearingen, 12 Ga. 24; Commonwealth *v.* Cluley, 56 Pa. St. 270; Matter of Corliss, 11 R. I. 638, 23 Am. Rep. 538; State *v.* Vail, 53 Mo. 97; Barnum *v.* Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; Dryden *v.* Swinburne, 20 W. Va. 89; Swepston *v.* Barton, 39 Ark. 549. In People *v.* Molliter, 23 Mich. 341, a minority candidate claimed the election on the ground that the votes cast for his opponent, though a majority, were ineffectual because the name was abbreviated. *Held*, that they were at least effectual to preclude the election of a candidate who received a less number. And see Crawford *v.* Dunbar, 52 Cal. 36; [State *v.* McGeary, 60 Vt. 431, 38 Atl. 165, 44 L. R. A. 446.] But it has been held that, if ineligibility is notorious, so that the electors must be deemed to have voted with full knowledge of it, the votes for an ineligible candidate must be declared void, and the next highest candidate is chosen. This is the English doctrine: King *v.* Hawkins, 10 East, 211; 2 Dow. P. C. 124; King *v.* Parry, 14 East, 549; Gosling *v.* Veley, 7 Q. B. 406; Rex *v.* Monday, 2 Cowp. 530; Rex *v.* Foxcroft, Burr. 1017, s. c. 1 Wm. Bl. 229; Reg. *v.* Coaks, 3 E. & B. 249; French *v.* Nolan, 2 Moak, 711. And see the following American cases: Price *v.* Baker, 41 Ind. 572; Hatcheson *v.* Tilder, 4 H. & McH. 279; Commonwealth *v.* Green, 4 Whart. 521; Gulick *v.* New, 14 Ind. 93; Carson *v.* McPhetridge, 15 Ind. 327; People *v.* Clute, 50 N. Y. 451, 10 Am. Rep. 508; State *v.* Johnson, 100 Ind. 489. Compare Barnum *v.* Gilman, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; [Gardner *v.* Burke, 61 Neb. 534, 85 N. W. 541, is *contra*.] It would seem that, if the law which creates the disqualification expressly declares all votes cast for the disqualified person *void*, they must be treated as mere blank votes, and cannot be counted for any purpose. Where, under the law creating it, the disability concerns the holding of the office merely, and it is not a disability to be elected, it is sufficient if the disability is removed before the term begins. State *v.* Murray, 28 Wis. 96; State *v.* Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512; Privett *v.* Bickford, 26 Kan. 52. Compare Searcy *v.* Grow, 15 Cal. 117; State *v.* Clarke, 3 Nev. 566. [See discussion by Floyd R. Mechem of the question of "Eligibility to Office — As of What Time Determined," in 1 Mich. Law Rev. 17.]

[2] *Ex parte* Murphy, 7 Cow. 153; First Parish in Sudbury *v.* Stearns, 21 Pick. 148; Blandford School District *v.* Gibbs, 2 Cush. 39; People *v.* Cicott, 16 Mich. 283; Judkins *v.* Hill, 50 N. H. 140; Deloach *v.* Rogers, 86 N. C. 357; Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 535; Sweptson *v.* Barton, 39 Ark. 549. See Shields *v.* McGregor, 91 Mo. 534, 4 S. W. 266. Votes received illegally will be rejected by the court in an action to try title to an office. State *v.* Hilmantel, 21 Wis. 566; Harbaugh *v.* Cicott, 33 Mich. 241; Clark *v.* Robinson, 88 Ill. 498.

justify legal voters in refusing to vote, and treating the election as void, but it will be held valid if the persons declared chosen had a plurality of the legal votes actually cast.[1] So it is held that an exclusion of legal votes — not fraudulently, but through error in judgment — will not defeat an election; notwithstanding the error in such a case is one which there was no mode of correcting, even by the aid of the courts, since it cannot be known with certainty afterwards how the excluded electors would have voted, and it would obviously be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have upon the result.[2] If, however, the inspectors of election shall exclude legal voters, not because of honest error in judgment, but wilfully and corruptly, and to an extent that affects the result, or if by riots or otherwise legal voters are intimated and prevented from voting, or for any other reasons the electors have not had opportunity for the expression of their sentiments through the ballot-box, the election should be set aside altogether, as having failed in the purpose for which it was called.[3] Errors of judgment are inevitable, but fraud, intimidation, and violence the law can and should protect against. A mere casual affray, however, or accidental disturbance, without any intention of overawing or intimidating the electors, cannot be considered as affecting the freedom of the election;[4] nor in any case would electors be justified in abandoning the ground for any light causes, or for improper interference by others, where the officers continue in the discharge of their functions, and there is opportunity for the electors to vote.[5] And, as we have already seen, a failure of an election in one precinct, or disorder or violence which prevent a return from that precinct, will not defeat the whole election, unless it appears that the votes which could not be returned in consequence of the violence would have changed the result.[6] It is a little difficult at times to adopt

[1] First Parish in Sudbury *v.* Stearns, 21 Pick. 148.

[2] Newcum *v.* Kirtley, 13 B. Monr. 515. See Burke *v.* Supervisors of Monroe, 4 W. Va. 371; [Pickett *v.* Russell, 42 Fla. 116, 28 So. 764.]

[3] Where one receives a majority of all the votes cast, the opposing candidate cannot be declared elected on evidence that legal voters sufficient to change the result offered to vote for him, but were erroneously denied the right; but the election may be declared to have failed, and a new election be ordered. Renner *v.* Bennett, 21 Ohio St. 431. See also Matter of Long Island R. R. Co., 19 Wend. 37; People *v.* Phillips, 1 Denio, 388; State *v.* McDaniel, 22 Ohio St. 354.

[4] Cush. Leg. Assemb. § 184; Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127.

[5] See First Parish in Sudbury *v.* Stearns, 21 Pick. 148. Enough voters to change the result must have been prevented from voting in order to vitiate the election. Tarbox *v.* Sughrue, 36 Kan. 225, 12 Pac. 935. And see cases, p. 922, note 2, *ante*.

[6] *Ex parte* Heath, 3 Hill, 42. See *ante*, p. 927, and note.

the true mean between those things which should and those which should not defeat an election; for while on the one hand the law should seek to secure the due expression of his will by every legal voter, and guard against any irregularities or misconduct that may tend to prevent it, so, on the other hand, it is to be borne in mind that charges of irregularity and misconduct are easily made, and that the dangers from throwing elections open to be set aside or controlled by oral evidence, are perhaps as great as any in our system. An election honestly conducted under the forms of law ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but as it is generally impossible to arrive at any greater certainty of result by resort to oral evidence, public policy is best subserved by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future.

The Canvass and the Return.

If the election is purely a local one, the inspectors who have had charge of it will be expected to proceed immediately on the closing of the poll to canvass the votes and declare the result. It is commonly made their duty also, or the duty of their clerk, to issue to the person or persons appearing to be chosen a certificate or notification of his or their election, which will be presumptive evidence of the fact. It is not in the power of the inspectors by neglecting or refusing to give the proper certificate to defeat the will of the people, for the ballots determine the election and not the certificate, and the person chosen, from whom the certificate is withheld, may nevertheless proceed to qualify and take possession of the office unless opposed by a *de facto* incumbent.[1] If the election district comprises several precincts, the inspectors of the polls in each will make return in writing of the canvass made by them to the proper board of canvassers for the whole district, and if the election is for State officers, this district board will transmit the result of the district canvass to the proper State board, who will declare the general result.[2] In all this, the several boards

[1] *Ex parte* Smith, 8 S. C. 495; Govan *v.* Jackson, 32 Ark. 553.

[2] Errors in certifying boxes, &c., and making the returns will not, in the absence of fraud or changes in the ballots, warrant throwing out the vote. Kellogg *v.* Hickman, 12 Col. 256, 21 Pac. 325; Fowler *v.* State, 68 Tex. 30, 3 S. W. 255. See People *v.* Higgins, 3 Mich. 233; State *v.* Berg, 76 Mo. 136; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774.

act for the most part in a ministerial capacity, and are not vested with judicial powers to correct the errors and mistakes that may have occurred with any officer who preceded them in the performance of any duty connected with the election, or to pass upon any disputed fact which may affect the result.[1] Each board is to receive the returns transmitted to it, if in due form, as correct, and is to ascertain and declare the result as it appears by such returns;[2] and if other matters are introduced into the return than those which the law provides, they are to that extent unofficial and unauthorized, and must be disregarded.[3] If a district or

[1] State *v.* Charleston, 1 S. C. N. S. 30. And see cases cited in the next note. While canvassers act in a ministerial capacity only, and must declare the result on the face of the returns, it does not follow that they are to insist upon technical accuracy in the returns, and reject those which do not comply with the very letter of the law, and that they are compelled to act upon returns which by mistake have been made inaccurate, without affording an opportunity for correction. If, for example, in a return transmitted to them, the name of one of the persons voted for is erroneously given, and the election judges are ready to correct it, a great wrong is done if this is not permitted. The purpose of the canvass is to determine, record, and declare the actual will of the electors; not to defeat it; and when technicalities and mistakes are seized upon and taken advantage of for party or personal ends, and without other object or necessity, the public injury is very manifest. It is of the utmost importance that the public shall have confidence in the administration of the election laws; and whatever undermines that confidence invites fraud and violence. It is true that errors which creep into the returns may be obviated on a judicial trial; but that is a slow and expensive process, and ought not to be forced upon the parties except in cases where the result upon the balloting is really in doubt. Errors which are immaterial should be overlooked, and those which are material ought to be corrected by the proper officers whenever it is practicable.

[2] *Ex parte* Heath, 3 Hill. 42; Brower *v.* O'Brien, 2 Ind. 423; People *v.* Hilliard, 29 Ill. 413; People *v.* Jones, 19 Ind. 357; Mayo *v.* Freeland, 10 Mo. 629; Thompson *v.* Circuit Judge, 9 Ala. 338; People *v.* Kilduff, 15 Ill. 492; O'Ferrell *v.* Colby, 2 Minn. 180; People *v.* Van Cleve, 1 Mich. 362; People *v.* Van Slyck, 4 Cow. 297; Morgan *v.* Quackenbush, 22 Barb. 72; Dishon *v.* Smith, 10 Iowa, 212; People *v.* Cook, 14 Barb. 259, and 8 N. Y. 67; Hartt *v.* Harvey, 32 Barb. 55; Attorney-General *v.* Barstow, 4 Wis. 567; Attorney-General *v.* Ely, 4 Wis. 420; State *v.* Governor, 25 N. J. 331; State *v.* Clerk of Passaic, 25 N. J. 354; Marshall *v.* Kerns, 2 Swan, 68; People *v.* Pease, 27 N. Y. 45; Phelps *v.* Schroder, 26 Ohio St. 549; State *v.* State Canvassers, 36 Wis. 498; Opinion of Justices, 53 N. H. 640; State *v.* Cavers, 22 Iowa, 343; State *v.* Harrison, 38 Mo. 540; State *v.* Rodman, 43 Mo. 256; State *v.* Steers, 44 Mo. 223; Bacon *v.* York Co., 26 Me. 491; Taylor *v.* Taylor, 10 Minn. 107; Opinion of Justices, 64 Me. 588; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; Peebles *v.* County Com'rs, 82 N. C. 385; Clark *v.* County Examiners, 126 Mass. 282; State *v.* County Canvassers, 17 Fla. 29; Hagge *v.* State, 10 Neb. 51, 4 N. W. 375; State *v.* Wilson, 24 Neb. 139, 38 N. W. 31; Moore *v.* Kessler, 59 Ind. 152; State *v.* Hayne, 8 S. C. 67. They may not refuse to canvass because a poll book is not returned as it should be. Patten *v.* Florence, 38 Kan. 501, 17 Pac. 174. They may and should correct an arithmetical blunder. State *v.* Hill, 20 Neb. 119, 29 N. W. 258. Legal returns received after the proper time should be counted. Cresap *v.* Gray, 10 Oreg. 345. [After the board has acted upon returns that are fair on their face, and has rendered its return, it is *functus officio* and cannot revise its work. Rosenthal *v.* State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157.]

[3] *Ex parte* Heath, 3 Hill, 42. Papers

State board of canvassers assumes to reject returns transmitted to it, on other grounds than those appearing upon its face, or to declare persons elected who are not shown by the returns to have received the requisite plurality, it is usurping functions, and its conduct will be reprehensible, if not even criminal.[1] The action of such boards is to be carefully confined to an examination of the papers before them, and a determination of the result therefrom, in the light of such facts of public notoriety connected with the election as every one takes notice of, and which may enable them to apply such ballots as are in any respect imperfect to the proper candidates or offices for which they are intended, provided the intent is sufficiently indicated by the ballot in connection with such facts, so that extraneous evidence is not necessary for this purpose.[2] If canvassers refuse or neglect to perform their duty, they may be compelled by *mandamus;*[3] though as these boards are created for a single purpose only, and are dissolved by an adjournment without day, it has been held that, after such adjournment *mandamus* would be inapplicable, inasmuch as there is no longer any board which can act.[4] But we should think the better doctrine to be, that if the board adjourn before a legal and complete performance of their duty, *mandamus* would lie to compel them to meet and perform it.[5] But when the board them-

in the poll book but not a part of the return cannot be considered. Simon *v.* Durham, 10 Oreg. 52. Returns void on their face may be rejected. State *v* State Canvassers, 36 Wis. 498. A certificate to be made by a justice and inspectors is void on its face if signed by the justice alone. Perry *v.* Whitaker, 71 N. C. 475.

[1] Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325. But if not void on their face, the election board to which they are returned have no jurisdiction to go behind them and inquire into questions of fraud in the election. Phelps *v.* Schroder, 26 Ohio St. 549; Leigh *v.* State, 69 Ala. 261; Brown *v.* Com'rs Rush Co., 38 Kan. 436, 17 Pac. 304; Opinion of Justices, 58 N. H. 621. So of judges of the Supreme Court sitting as canvassers. Osgood *v.* Jones, 60 N. H. 273, 282.

[2] State *v.* Foster, 38 Ohio St. 599.

[3] Clark *v.* McKenzie, 7 Bush, 523; Burke *v.* Supervisors of Monroe, 4 W. Va. 371; State *v.* County Judge, 7 Iowa, 186; Magee *v.* Supervisors, 10 Cal. 376; Kisler *v.* Cameron, 39 Ind. 488; Commonwealth *v.* Emminger, 74 Pa. St. 479.

[4] Clark *v.* Buchanan, 2 Minn. 346; People *v.* Supervisors, 12 Barb. 217; State *v.* Rodman, 43 Mo. 256.

[5] To this effect is State *v.* Gibbs, 13 Fla. 55; People *v.* Schiellein, 95 N. Y. 124. In the last case it is held that the board continues as such, in spite of adjournment, till its whole duty is performed. And see People *v.* Board of Registration, 17 Mich. 427; People *v.* Board, &c. of Nankin, 15 Mich. 156; Lewis *v.* Commissioners, 16 Kan. 102; Pacheco *v.* Beck, 52 Cal. 3; State *v.* Hill, 20 Neb. 119, 29 N. W. 258. And they may be compelled to make a legal and proper canvass after they have made one which was illegal and unwarranted. State *v.* County Com'rs, 23 Kan. 264; State *v.* Hill, 10 Neb. 58, 4 N. W. 514; Stewart *v.* Peyton, 77 Ga. 668; Simon *v.* Durham, 10 Oreg. 52. And if they have finished their work before the time allowed has elapsed, and while they still have the returns, they may be compelled to reconsider their action. State *v.* Berg, 76 Mo. 136. [Upon canvassing boards, their powers and duties, see People *v.* Rice, 129 N. Y. 449, 29 N. E. 355, 14 L. R. A. 643.]

selves have once performed and fully completed their duty, they have no power afterwards to reconsider their determination and come to a different conclusion.[1]

Contesting Elections.

As the election officers perform for the most part ministerial functions only, their returns, and the certificates of election which are issued upon them, are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts.[2] This is the general rule, and the exceptions are of those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with powers of final decision.[3] What-

[1] Hadley *v.* Mayor, &c., 33 N. Y. 603; State *v.* Warren, 1 Houston, 39; State *v.* Harrison, 38 Mo. 540; Swain *v.* McRae, 80 N. C. 111; State *v.* Lamberton, 37 Minn. 362, 34 N. W. 336; Myers *v.* Chalmers, 60 Miss. 772; People *v.* Reardon, 3 N. Y. Supp. 560; People *v.* Board Canvassers, 46 Hun, 390. Compare Alderson *v.* Com'rs, 32 W. Va. 454, 9 S. E. 863. If they recount and give the certificate to another, such action is a mere nullity. Bowen *v.* Hixon, 45 Mo. 340; People *v.* Robertson, 27 Mich. 116; Opinions of Justices, 117 Mass. 599; State *v.* Donewirth, 21 Ohio St. 216.

[2] State *v.* Justices of Middlesex, 1 N. J. 244; Hill *v.* Hill, 4 McCord, 277; Wammack *v.* Holloway, 2 Ala. 31; State *v.* Clerk of Passaic, 25 N. J. 354; Marshall *v.* Kerns, 2 Swan, 68; Attorney-General *v.* Barstow, 4 Wis. 567; Attorney-General *v.* Ely, 4 Wis. 420; People *v.* Van Cleve, 1 Mich. 362; People *v.* Higgins, 3 Mich. 233; Dishon *v.* Smith, 10 Iowa, 212; State *v.* Johnson, 17 Ark. 407; State *v.* Fetter, 12 Wis. 566; State *v.* Avery, 14 Wis. 122; People *v.* Jones, 20 Cal. 50; Newcum *v.* Kirtley, 13 B. Monr. 515; Commonwealth *v.* Jones, 10 Bush, 725; People *v.* Seaman, 5 Denio, 409; People *v.* Cook, 8 N. Y. 67; People *v.* Matteson, 17 Ill. 167; Taylor *v.* Taylor, 10 Minn. 107; Calaveras County *v.* Brockway, 30 Cal. 325; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; Echols *v.* State, 56 Ala. 131; Reynolds *v.* State, 61 Ind. 392; Winter *v.* Thistlewood, 101 Ill. 450; Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127. But see State *v.* Dortch, 41 La. 846, 6 So. 777. In Georgia the governor's decision upon the election of officers commissioned by him is conclusive. Corbett *v.* McDaniel, 77 Ga. 544. A chief justice cannot be empowered to decide, pending a legal determination of a contest, which claimant shall hold the office *ad interim*. If the power is executive it cannot be conferred on a judicial officer; if judicial, it belongs to a court. *In re* Cleveland, 51 N. J. L. 319, 18 Atl. 67. An illegal election may be contested and set aside, even though but one person was voted for. *Ex parte* Ellyson, 20 Gratt. 10. The customary remedy is by writ of *quo warranto*, issued either on the relation of some citizen who shows an interest of his own in the question involved, or on relation of the Attorney-General in the interest of the State. State *v.* Tuttle, 53 Wis. 45, 9 N. W. 791. Statutory provision for contesting elections does not abrogate the remedy by *quo warranto*. People *v.* Londoner, 13 Col. 303, 22 Pac. 764, differing from State *v.* Francis, 88 Mo. 557. [Upon election contests in Indiana, see English *v.* Dickery, 128 Ind. 174, 27 N. E. 495, 13 L. R. A. 40, and note. As to notice to contestee, see Bowler *v.* Eisenhood, 1 S. D. 577, 48 N. W. 136, 12 L. R. A. 705, and note.]

[3] See Grier *v.* Shackleford, Const. Rep. 642; Batman *v.* Megowan, 1 Met. (Ky.) 523; State *v.* Marlow, 15 Ohio St. 114; People *v.* Goodwin, 22 Mich. 496; Baxter *v.* Brooks, 29 Ark. 173, 11 Am. Law Rev. 531; Hipp *v.* Charlevoix Co. Supervisors, 62 Mich. 456, 29 N. W. 707. For the proceedings in the State of New York in the

ever may be the office, an election to it is only made by the candidate receiving the requisite majority or plurality of the legal votes cast;[1] and whoever, without such election, intrudes into an office, whether with or without the formal evidences of title, may be ousted on the proper judicial inquiry.[2] The general doctrine is here stated; but in one important case it was denied that it could apply to the office of chief executive of the State. The case was one in which the incumbent was a candidate for re-election, and a majority of votes was cast for his opponent. Certain spurious returns were, however, transmitted to the State canvassers, which, together with the legal returns, showed a plurality for the incumbent, and he was accordingly declared chosen. Proceedings being taken against him by *quo warranto* in the Supreme Court, he objected to the jurisdiction, on the ground that the three departments of the State government, the legislative, the executive, and the judicial, were equal, co-ordinate, and independent of each other, and that each department must be and is the ultimate judge of the election and qualification of its own member or members, subject only to impeachment and ap-

canvass of votes for Governor in 1792, where the election of John Jay to that office was defeated by the rejection of votes cast for him for certain irregularities, which, under the more recent judicial decisions, ought to have been overlooked, see Hammond's Political History of New York, ch. 3. The law then in force made the decision of the State canvassers final and conclusive. The Louisiana Returning Board cases will readily occur to the mind; but those must be regarded as standing by themselves, because the legislative provisions under which they were had were unlike any others known to our history, and assumed to confer extraordinary and irresponsible powers. [For the procedure in Nebraska where the legislature in joint session determines contests over election of officers of the executive department, see State *v.* Elder, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796, and re-election of executive officers, *Re* Re-Election of Executive Officers, 31 Neb. 262, 47 N. W. 923, 10 L. R. A. 803.]

[1] In some cases it is provided by law, that, if there is a tie vote, the two persons receiving an equal and the highest number shall cast lots, and the election shall be thereby determined. The drawing of lots, however, would not preclude an inquiry, at the suit of the State, into previous irregularities. People *v.* Robertson, 27 Mich. 116. [And where the Constitution provides a mode of procedure to be followed in case of tie votes for certain officers, but makes none for justices of the peace, and does not authorize the legislature to provide for such case, there is no election in case of tie vote for justice of the peace, and the old incumbent holds over. State *v.* Kramer, 150 Mo. 89, 51 S. W. 716, 47 L. R. A. 551.]

[2] Whether jury trial in the case of contested elections is matter of right, seems to be made a question. That it is, see State *v.* Burnett, 2 Ala. 140; People *v.* Cicott, 16 Mich. 283; *dictum*, People *v.* Albany, &c. R. R. Co., 57 N. Y. 161. That it is not, is held in Ewing *v.* Filley, 43 Pa. St. 384; Commonwealth *v.* Leech, 44 Pa. St. 332; State *v.* Johnson, 26 Ark. 281; Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; Williamson *v.* Lane, 52 Tex. 335; State *v.* Lewis, 51 Conn. 113. [State *v.* Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. 39.] It is, however, conceded in Pennsylvania that, in a proceeding to forfeit an office, jury trial is of right. See also cases, p. 590, note 2, *ante*.

peal to the people; that the question, who is rightfully entitled to the office of governor, could in no case become a judicial question; and that as the Constitution provides no means for ousting a successful usurper of either of the three departments of the government, that power rests exclusively with the people, to be exercised by them whenever they think the exigency requires it.[1] There is a basis of truth in this argument; the executive of the State cannot be subordinated to the judiciary, and may, in general, refuse obedience to writs by which this may be attempted.[2] But when the question is, who is the executive of the State, the judges have functions to perform, which are at least as important as those of any other citizens, and the fact that they are judges can never be a reason why they should submit to a usurpation. A successful usurpation of the executive office can only be accomplished with the acquiescence of the other departments; and the judges, for the determination of their own course, must, in some form, inquire into or take notice of the facts. In a controversy of such momentous import, the most formal and deliberate inquiry that the circumstances will admit of is alone excusable; and, when made and declared, the circumstances must be extraordinary in which it will not be effectual. In the case referred to, the usurper, though the candidate of a party embracing half the voters of the State, found himself utterly stripped of power by the decision of the court against him; public support fell away from him, and success in his usurpation became an impossibility. The decision guided and determined the popular sentiment, and perhaps saved the State from disorder, violence, and anarchy.[3]

Where, however, the question arises collaterally, and not in a direct proceeding to try the title to the office, the correctness of the decision of the canvassers cannot be called in question, but must be conclusively presumed to be correct;[4] and where the

[1] Attorney-General *v.* Barstow, 4 Wis. 567.

[2] See *ante*, p. 162.

[3] Some attention to conflicts between the several departments of government was given by the author in an essay on Checks and Balances in Government, published in the "International Review" for 1876. A question like that above mentioned could not arise in respect to the presidency, as Congress must canvass and declare the result. In some recent cases, in which the office of governor was in question, though the decision was placed by the constitution in the hands of the legislature, the final result was only determined by popular acquiescence. The difficulty was that the legislative authority was as much in dispute as the executive. The cases of South Carolina and Louisiana are here specially referred to.

[4] Morgan *v.* Quackenbush, 22 Barb. 72; Hadley *v.* Mayor, &c., 33 N. Y. 603; Howard *v.* McDiarmid, 26 Ark. 100. And see Hulseman *v.* Rens, 41 Pa. St. 396, where it was held that the court could not interfere summarily to set aside a certificate of election, where it did not appear that the officers had acted corruptly, notwithstanding it was shown to be based in part upon forged returns.

election was to a legislative office, the final decision, as well by parliamentary law as by constitutional provisions, rests with the legislative body itself, and the courts, as we have heretofore seen,[1] cannot interfere.[2]

The most important question which remains to be mentioned relates to the evidence which the courts are at liberty to receive, and the facts which it is proper to spread before the jury for their consideration when an issue is made upon an election for trial at law.

The questions involved in every case are, first, has there been an election? and second, was the party who has taken possession of the office the successful candidate at such election, by having received a majority of the legal votes cast?[3] These are questions which involve mixed considerations of law and fact, and the proper proceeding in which to try them in the courts is by *quo warranto*, when no special statutory tribunal is created for the purpose.[4]

Upon the first question, we shall not add to what we have already said. When the second is to be considered, it is to be constantly borne in mind that the point of inquiry is *the will of the electors as manifested by their ballots;* and to this should all the evidence be directed, and none that does not bear upon it should be admissible.

We have already seen that the certificates or determinations of the various canvassing boards, though conclusive in collateral inquiries, do not preclude an investigation by the courts into the facts which they certify. They are *prima facie* evidence, however, even in the courts;[5] and this is so, notwithstanding altera-

[1] See *ante*, p. 189, note 1. See also Commonwealth *v.* Meeser, 44 Pa. St. 341.

[2] In Maine, where there were two conflicting bodies, each claiming the right to exercise the legislative power, the judiciary asserted and enforced the right to decide between them. Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325. It is to be observed, however, that the governor had already recognized the same body in whose favor the court decided, and had approved the act whose validity came in question in the court.

[3] See cases cited, p. 935, note. Also State *v.* The Judge, 13 Ala. 805; People *v.* Robertson, 27 Mich. 116; Commonwealth *v.* Emminger, 74 Pa. St. 479; Dobyns *v.* Weadon, 50 Ind. 298. The right to the office comes from the ballots, and not from the commission. State *v.* Draper, 50 Mo. 353. Where the officers acted fraudulently in the conduct of an election, their returns may be rejected, and the result be arrived at from other proofs exclusively. Supervisors *v.* Davis, 63 Ill. 405. Where returns are lost or defective, parol evidence of what the vote was is admissible: Wheat *v.* Smith, 50 Ark. 266, 7 S. W. 161; Dixon *v.* Orr, 49 Ark. 238, 4 S. W. 774, if ballots cannot, from possible tampering, be admitted. Stemper *v.* Higgins, 38 Minn. 222, 37 N. W. 95.

[4] People *v.* Matteson, 17 Ill. 167; People *v.* Cover, 50 Ill. 100. If the proceeding is commenced before the term which is in contest has expired, it may be continued to a conclusion afterwards. State *v.* Pierce, 35 Wis. 73.

[5] Marshall *v.* Kerns, 2 Swan, 68; Mor-

tions appear; the question of their fairness in such a case being for the jury.[1] But back of this *prima facie* case the courts may go, and the determinations of the State board may be corrected by those of the district boards, and the latter by the ballots themselves when the ballots are still in existence, and have been kept as required by law.[2] If, however, the ballots have not been kept as required by law, and surrounded by such securities as the law has prescribed with a view to their safe preservation as the best evidence of the election, it would seem that they should not be received in evidence at all,[3] or, if received, that it should be left to the jury to determine, upon all the circumstances of the case, whether they constitute more reliable evidence than the inspectors' certificate,[4] which is usually prepared immediately on the close of the election, and upon actual count of the ballots as then made by the officers whose duty it is to do so.

Something has already been said regarding the evidence which can be received where the elector's ballot is less complete and perfect in its expression of intention than it should have been. There can be no doubt under the authorities that, whenever a question may arise as to the proper application of a ballot, any evidence is admissible with a view to explain and apply it which would be admissible under the general rules of evidence for the purpose of explaining and applying other written instruments. But the rule, as it appears to us, ought not to go further. The evidence ought to be confined to proof of the concomitant circumstances; such circumstances as may be proved in support or explanation of a contract, where the parties themselves would not be allowed to give testimony as to their actual intention, when unfortunately the intention was ineffectually expressed.[5]

gan *v.* Quackenbush, 22 Barb. 72; Calaveras County *v.* Brockway, 30 Cal. 325.

[1] State *v.* Adams, 2 Stew. 231. See State *v.* Hilmantel, 23 Wis. 422.

[2] People *v.* Van Cleve, 1 Mich. 362; People *v.* Higgins, 3 Mich. 233; State *v.* Clerk of Passaic, 25 N. J. 354; State *v.* Judge, &c., 13 Ala. 805; People *v.* Cook, 14 Barb. 259, 8 N. Y. 67; People *v.* Cicott, 16 Mich. 283; Attorney-General *v.* Ely, 4 Wis. 420; Owens *v.* State, 64 Tex. 500. Ballots which should have been destroyed under the law cannot be used on a recount. State *v.* Bate, 70 Wis. 409, 36 N. W. 17. The ballot is always the best evidence of the voter's action. Wheat *v.* Ragsdale, 27 Ind. 191; People *v.* Holden, 28 Cal. 123; Searle *v.* Clark, 34 Kan. 49, 7 Pac. 630.

[3] People *v.* Sackett, 14 Mich. 320. But see People *v.* Higgins, 3 Mich. 233. Burden of showing that ballots offered are genuine is on the party offering them. Powell *v.* Holman, 50 Ark. 85, 6 S. W. 505; Fenton *v.* Scott, 17 Oreg. 189, 20 Pac. 95; Coglan *v.* Beard, 67 Cal. 303, 7 Pac. 738, which see as to what is sufficient proof that they have not been tampered with.

[4] People *v.* Cicott, 16 Mich. 283; Duson *v.* Thompson, 32 La. Ann. 861; People *v.* Livingston, 79 N. Y. 279; People *v.* Robertson, 27 Mich. 116.

[5] People *v.* Pease, 27 N. Y. 45, 84, per *Denio*, Ch. J., commenting upon previous New York cases. See also Attorney-General *v.* Ely, 4 Wis. 420.

And we have seen that no evidence is admissible as to how parties intended to vote who were wrongfully prevented or excluded from so doing. Such a case is one of wrong without remedy, so far as candidates are concerned.[1] There is more difficulty, however, when the question arises whether votes which have been cast by incompetent persons, and which have been allowed in the canvass, can afterwards be inquired into and rejected because of the want of qualification.

If votes were taken *viva voce*, so that it could always be determined with absolute certainty how every person had voted, the objections to this species of scrutiny after an election had been held would not be very formidable. But when secret balloting is the policy of the law, and no one is at liberty to inquire how any elector has voted, except as he may voluntarily have waived his privilege, and when consequently the avenues to correct information concerning the votes cast are carefully guarded against judicial exploration, it seems exceedingly dangerous to permit any question to be raised upon this subject. For the evidence voluntarily given upon any such question will usually come from those least worthy of credit, who, if they have voted without legal right in order to elect particular candidates, will be equally ready to testify falsely, if their testimony can be made to help the same candidates; especially when, if they give evidence that they voted the opposing ticket, there can usually be no means, as they will well know, of showing the evidence to be untrue.[2] Moreover, to allow such scrutiny is to hold out strong temptation to usurpation of office, without pretence or color of right; since the nature of the case, and the forms and proceedings necessary to a trial, are such that, if an issue may be made on the right of every individual voter, it will be easy, in the case of important elections, to prolong a contest for the major part if not the whole of an official term, and to keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls.[3]

[1] See *ante*, p. 933.

[2] It has been decided in Wisconsin that where an unqualified person is called to prove that he voted at an election, and declines to testify, the fact of his having voted may be proved, and then his declarations may be put in evidence to show how he voted. State *v.* Olin, 23 Wis. 309. This may give the incompetent voter a double vote. First, he votes for the ticket of his choice, and then, on a contest, he declares he voted the other way, and a deduction is made from the opposite vote accordingly. See Beardstown *v.* Virginia, 76 Ill. 34.

[3] This is one reason, perhaps, why in the case of State officers a statutory tribunal is sometimes provided with powers of summary and final decision.

Upon this subject there is very little judicial authority, though legislative bodies, deriving their precedents from England, where the system of open voting prevailed, have always been accustomed to receive such evidence, and have indeed allowed a latitude of inquiry which makes more to depend upon the conscience of the witnesses, and of legislative committees, in some cases, than upon the legitimate action of the voters. The question of the right to inquire into the qualifications of those who had voted at an election, on a proceeding in the nature of a *quo warranto*, was directly presented in one case to the Supreme Court of New York, and the court was equally divided upon it.[1] On error to the Court of Appeals, a decision in favor of the right was rendered with the concurrence of five judges, against three dissentients.[2] The same question afterwards came before the Supreme Court of Michigan, and was decided the same way, though it appears from the opinions that the court were equally divided in their views.[3] To these cases we must refer for the full discussion of the reasons influencing the several judges; but future decisions alone can give the question authoritative settlement.[4]

[1] People *v.* Pease, 30 Barb. 588.

[2] People *v.* Pease, 29 N. Y. 45.

[3] People *v.* Cicott, 16 Mich. 283. See further the case of State *v.* Hilmantel, 23 Wis. 422, where it was decided that those who had voted illegally might be compelled to testify for whom they voted. The question was discussed but briefly, and as one of privilege merely.

[4] Considerable stress was laid by the majority of the New York Court of Appeals on the legislative practice, which, as it seems to us, is quite too loose in these cases to constitute a safe guide. Some other rulings in that case also seem more latitudinarian than is warranted by sound principle and a due regard to the secret ballot system which we justly esteem so important. Thus, *Selden*, J., says: "When a voter refuses to disclose or fails to remember for whom he voted, I think it is competent to resort to circumstantial evidence to raise a presumption in regard to that fact. Such is the established rule in election cases before legislative committees, which assume to be governed by legal rules of evidence (Cush. Leg. Assem. §§ 199 and 200); and within that rule it was proper, in connection with the other circumstances stated by the witness Loftis, to ask him for whom he intended to vote; not, however, on the ground that his intention, as an independent fact, could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote." Now as, in the absence of fraud or mistake, you have arrived at a knowledge of how the man voted, when you have ascertained how, at the time, he intended to vote, it is difficult to discover much value in the elector's privilege of secrecy under this ruling. And if "circumstances" may be shown to determine how he probably voted, in cases where he insists upon his constitutional right to secrecy, then, as it appears to us, it would be better to abolish altogether the secret ballot than to continue longer a system which falsely promises secrecy, at the same time that it gives to party spies and informers full license to invade the voter's privilege in secret and surreptitious ways, and which leaves jurors, in the absence of any definite information, to act upon their guesses, surmises, and vague conjectures as to the contents of a ballot.

Upon the right to inquire into the qualifications of those who have voted, in a proceeding by *quo warranto* to test the right to a public office, reference is made to the very full discussions by Justices *Christiancy* and *Campbell*, taking different

views, in People *v.* Cicott, 16 Mich. 283, 294, 311. [The question of the effect of votes cast by unqualified voters arose in Rasmussen *v.* Baker, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773. The Constitution of Wyoming provides that "no person shall have the right to vote who shall not be able to read the Constitution of this State." At an election held Nov. 3, 1896, to elect a county treasurer, fifty-four votes in one precinct and fifty in another were cast for the defendant B, by naturalized citizens of Finnish birth. These voters were incapable of reading the Constitution in English, but could read a Finnish translation of it. *Held*, that they were unqualified, and that their votes were void.]

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