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, 1883, number of the "Harvard Law Review." 7 Harv. L. Rev. 129. Other views of this subject are presented by Mr. Richard C. McMurrick in 33 Am. Law Register, n. s. 506; by Governor Pennoyer in 29 Am. Law Review, 850 and 858, 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

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\(^3\) 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 1789—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 supplied 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, 1812. 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 Huntington. ... 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 writ 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. Huntington 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 Huntington, 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 23rd 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 decline 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.  

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 Otaniel Tooker. ... 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 1806, 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.”

2 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. Orman 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 disposition 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?"


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. On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. 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. 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.”

IV. Nor can a court declare a statute unconstitutional and

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 unreasonable ness 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 legisla tive 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. 516, 34 L. R. A. 100; Com. v. Moir, 150 Pa. 531, 19 Atl. 351, 53 L. R. A. 837, 85 Am. St. 501. 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, 48. "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 Godchaux v. Wigeman, 113 Pa. St. 431, 6 Atl. 351, 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.
² Goshen v. Stonington, 4 Conn. 209, 10 Barb. 223, 244.
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 laudanumian 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 obnoxious statutes is to chasten their harshness 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, 523; per Stuart, J. And see Johnston v. Commonwealth, 1 Bibb, 603; Flint River Steamboat Co. v. Foster, 5 Ga. 194; State v. Kruutschmitt, 4 Nev. 178; Walker v. Cincinnati, 21 Ohio St. 11; Hills v. Chicago, 60 Ill. 86; Ballentine v. Mayor, &c., 15 Lea, 633; State v. Traders' Bank, 41 La. Ann. 329, 8 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 intention. 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. Any legislative act which does not encroach upon the powers appurtenant 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.

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-

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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. 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. 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,
convenience, and protection are subserved thereby. 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.

VI. Nor are the courts at liberty to declare an act void, because

1 People v. Draper, 15 N. Y. 532. See post, pp. 201-206.
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 in general, 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 Wynhamer v. People, 13 N. Y. 378, per Selden, J.; Benson v. Mayor &c. of Albany, 21 Barb. 248 et seq.; Baltimore v. State, 15 Md. 370; 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. Middle- ton, 54 N. J. Eq. 692, 35 Atl. 1065, 55 Am. St. 602, 30 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. Moor, 199 Pa. 554, 49 Atl. 351, 85 Am. St. 801, 53 L. R. A. 837, the text upon the ques- tion 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. Dow- ling, 127 Ala. 1, 28 So. 701, 85 Am. St. 68. For the purpose of determining ques- tions of constitutionality courts will not consider questions of the justice, advisa- bility, or policy of the act. State ex rel. Smith v. McLellan, 138 Ind. 396, 37 N. E. 790. For a valuable discussion of the power of courts to declare a law uncon- stitutional 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


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

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2 Sill v. Corning, 16 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. 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. 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. 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. 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.
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

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\(^1\) Bowman v. Middleton, 1 Day, 252; Wilkinson v. Leland, 2 Pet. 627; Terrett v. Taylor, 9 Cranch, 43; Ervins's Appeal, 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 plentitude 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 ecclesiastical 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.]
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 \textit{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 \textit{v.} Murphy, 6 Ky. L. Rep. 750, 63 S. W. 755, 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, yet not connected with or dependent upon 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, etc. of Charleston, 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;Thorson v. Grand Gulf Railroad Co., 3 How. (Miss.) 240; Campbell v. Union Bank, 7 Miss. 625; Mobile & Ohio Railroad Co. v. State, 20 Ala. 573; South & N. Ala. T. R. Co. v. Morris, 65 Ala. 193; Santo v. State, 2 Iowa, 165; State v. Cox, 3 Eng. 438;
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. 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. 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 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.


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. Dombough, 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 exposed 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. Moore, 62 Neb. —, 88 N. W. 243, 55 L. R. A. 740.]

\(^2\) Warren v. Mayor, &c. of Charleston, 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. 298; 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 intimate 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

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\(^1\) 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. 393, followed in State v. Dousman, 28 Wis. 541.

the decision in Prigg v. Pennsylvania, 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.

A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. 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. In any such case the unconstitutional law must operate as far as it can, 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. Where a constitutional provision is designed for the protec-

1 18 Pet. 530.
2 Willard v. People, 5 Ill. 401; Eells v. People, 5 Ill. 498. See Hagerstown v. Dechert, 32 Md. 369.
3 Moore v. New Orleans, 32 La. Ann. 728. 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. 98; Cargill v. Power, 1 Mich. 308. In People v. Rochester, 59 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. 195. 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.


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. 313. 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, 408. See Lee v. Tilton, 24 Wend. 337.

is entitled; and where this is the case, the exemption cannot be forced upon him if he declines or neglects to claim it. 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 exclude himself from claiming them as against judgments obtained for such debt; 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. 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.

**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

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1 See Barton v. Brown, 68 Cal. 11, 8 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. 233; Ross v. Lister, 14 Tex. 403; Vanderhurst v. Bacon, 28 Mich. 664, 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. 300, 52 N. W. 916.


3 Maxwell v. Reed, 7 Wis. 582; Kneettle v. Newcomb, 22 N. Y. 249; Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Moxley v. Ragun, 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. 598; Cleughorn 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. 515.

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. 460, 22 Sup. Ct. Rep. 364.]
reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.

"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." 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 Shatt, Ch. J. Alexander v. People, 7 Colo. 155, 2 Pac. 85; Crowley v. State, 11 Oreg. 512, 5 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. 389; 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.


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.
Vt. 356, 359; Slack v. Jacob, 8 W. Va.
612.
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, 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.

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 transactions 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,"

(a) Sun Mutual Insurance Co. v. New Wend. 599; Baltimore v. State, 15 Md. York, 5 Sandf. 10; Clark v. People, 26 370.

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."  

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."  

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."  

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.  

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

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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. 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. 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. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special find-

1 Meshmeier v. State, 11 Ind. 432; 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. 60; Tims v. State, 20 Ala. 155; Sullivan v. Adams, 3 Gray, 470; Deroy v. Mayor, &c. of New York, 35 Barb. 264; Campan v. Detroit, 14 Mich. 270; Childs v. Shower, 18 Iowa, 261; Harbeck v. New York, 10 Bosw. 396; People v. Fleming, 7 Col. 230, 8 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. 370; Goddin v. Cramp, 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. 345, 315, 12 Sup. Ct. Rep. 400, aff. 83 Mich. 692, 47 N. W. 692, 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 

Congressional limitations, if they seem 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. 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. 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-reaching 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, 16 Ind. 98; Hendrickson v. Hendrickson, 7 Ind. 13.

2 Sumbury & Erie Railroad Co. v. Cooper, 33 Pa. St. 278; Ex parte Newman, 9 Cal. 592; Baltimore v. State, 15 Md. 376; Johnson v. Higgins, 3 Met. (Ky.) 506. "The courts cannot impugn to the legislature any act other than public motives for their acts." People v. Draper, 16 N. Y. 552, 556, 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." Shanks, 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 Godkins, 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 McCord, 7 Wall. 506, 514. The same doctrine is restated by Mr. Justice Hurd, 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 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, 63 L. R. A. 837, 55 Am. St. 801.] The rule applies to the legislation of municipalities. Brown v. Cape Girardeau, 90 Mo. 377, 2 S. W. 392. And see McCulloch v. State, 11 Ind. 421; Bradshaw v. Omaha, 1 Neb. 16; Lyon v. Morris, 15 Ga. 450; People v. Flagg, 46 N. Y. 401; Slack v. Jacob, 8 W. Va. 612, 625; 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, 32 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. 283, 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, 168 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. 208. 2 Strong v. Daniel, 5 Ind. 316; Sumner v. Beecher, 50 Ind. 341; Armstrong v. Hammond, 3 McLean, 107; Woolsey v. Commercial Bank, 6 McLean, 142; Detroit v. Martin, 34 Mich. 170; Kelly v. Dennis, 4 Gray, 83; Hower v. Barkhouse, 44 N. Y. 113; Clark v. Miller, 44 N. Y. 528; Moegher v. Storby Co., 5 Nev. 244; Ex parte Rosenblatt, 10 Nev. 439, 14 Pac. 238. 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. Sessions v. Botts, 34 Tex. 385. 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, 66 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, 56 Pac. 809; but see Re Rahrer, 43 Fed. 556, 10 L. R. A. 444; and this case in the Supreme Court, Wilterson v. Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep. 865; Re Spickler, 43 Fed. 553, 10 L. R. A. 440; 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.]