CHAPTER IX.

PROTECTION TO PERSON AND PROPERTY UNDER THE CONSTITUTION OF THE UNITED STATES.

As the government of the United States was to be one of enumerated powers, it was not deemed important by the framers of the Constitution that a bill of rights should be incorporated among its provisions. If, among the powers conferred, there was none which would authorize or empower the government to deprive the citizen of any of those fundamental rights which it is the object and the duty of government to protect and defend, and to insure which is the sole purpose of bills of rights, it was thought to be at least unimportant to insert negative clauses in that instrument, inhibiting the government from assuming any such powers, since the mere failure to confer them would leave all such powers beyond the sphere of its constitutional authority. And, as Mr. Hamilton argued, it might seem even dangerous to do so. "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights."¹

It was also thought that bills of rights, however important under a monarchical government, were of no moment in a constitution of government framed by the people for themselves, and under which public affairs were to be managed by means of agen-

¹ Federalist, No. 84.
cies selected by the popular choice, and subject to frequent change by popular action. "It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of pr:ilege, reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right, assented to by Charles the First, in the beginning of his reign. Such also was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament, called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations. "We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." 1

Reasoning like this was specious, but it was not satisfactory to many of the leading statesmen of that day, who believed that "the purposes of society do not require a surrender of all our rights to our ordinary governors; that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove." 2 And these governing powers will be no less disposed to be aggressive when chosen by majorities than when selected by the accident of birth, or at the will of privileged classes. Indeed if, during the long struggle for constitutional liberty in England, covering the whole of the seventeenth century, importance was justly attached to a distinct declaration and enumeration of individual rights on the part of the government,

1 Federalist, No. 84, by Hamilton.  
when it was still in the power of the governing authorities to infringe upon or to abrogate them at any time, and when, consequently, the declaration could possess only a moral force, a similar declaration would appear to be of even more value in the Constitution of the United States, where it would constitute authoritative law, and be subject to no modification or repeal, except by the people themselves whose rights it was designed to protect, nor even by them except in the manner by the Constitution provided.\footnote{1}

The want of a bill of rights was, therefore, made the ground of a decided, earnest, and formidable opposition to the confirmation of the national Constitution by the people; and its adoption was

\footnote{1 Mr. Jefferson sums up the objections to a bill of rights in the Constitution of the United States, and answers them as follows: "1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer: A constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration, as far as it goes; and if it goes to all material points, nothing more is wanting. In the draft of a constitution which I had once a thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed; but the deficiencies would have been supplied by others in the course of discussion. But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal Constitution. This instrument forms us into one State, as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power, within the field submitted to them. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer: Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can. 3. The limited powers of the federal government, and jealousy of the subordinate governments, afford a security, which exists in no other instance. Answer: The first member of this seems resolvable into the first objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also; as by the same text they may try the opposition of the subordinate governments. 4. Experience proves the inefficacy of a bill of rights. True. But though it is not absolutely efficacious, under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate, and repairable. The inconveniences of the want of a declaration are permanent, afflicting, and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislature is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period." Letter to Madison, March 16, 1789, Jefferson's Works, Vol. II. p. 4. See also same volume, pp. 13 and 101; Vol. II. pp. 329, 355.}
only secured in some of the leading States in connection with the recommendation of amendments which should cover the ground.\footnote{1}

The clauses inserted in the original instrument, for the protection of person and property, had reference mainly to the action of the State governments, and were made limitations upon their power. The exceptions embraced a few cases only, in respect to which the experience of both English and American history had forcibly demonstrated the tendency of power to abuse, not when wielded by a prince only, but also when administered by the agencies of the people themselves.

\textit{Bills of attainder} were prohibited to be passed, either by the Congress\footnote{2} or by the legislatures of the several States.\footnote{3} Attainder, in a strict sense, means an extinction of civil and political rights and capacities; and at the common law it followed, as of course, on conviction and sentence to death for treason; and, in greater or less degree, on conviction and sentence for the different classes of felony.

A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime. For some time before the American Revolution, however, no one had attempted to defend it as a legitimate exercise of power; and if it would be unjustifiable anywhere, there were many reasons why it would be specially obnoxious under a free government, and why consequently its prohibition, under the existing circumstances of our country, would be a matter of more than ordinary importance. Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode. And although it would be conceded that, if such bills were allowable, they should properly be presented only for offences against the general laws

\footnote{1} For the various recommendations by Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island, see 1 Elliott's Debates, 322-334.\footnote{2} Constitution of United States, art. 1, § 9.\footnote{3} Constitution of United States, art. 1, § 10.
of the land, and be proceeded with on the same full opportunity for investigation and defence which is afforded in the courts of the common law; yet it was remembered that in practice they were often resorted to because an obnoxious person was not subject to punishment under the general law; or because, in proceeding against him by this mode, some rule of the common law requiring a particular species or degree of evidence might be evaded, and a conviction secured on proofs that a jury would not be suffered to accept as overcoming the legal presumption of innocence. Whether the accused should necessarily be served with process; what degree or species of evidence should be required; whether the rules of law should be followed, either in determining what constituted a crime, or in dealing with the accused after conviction,—were all questions which would necessarily address themselves to the legislative discretion and sense of justice; and the very qualities which are essential in a court to protect individuals on trial before them against popular clamor, or the hate of those in power, were precisely those which were likely to prove weak or wanting in the legislative body at such a time. And what could be more obnoxious in a free government than the exercise of such a power by a popular body, controlled by a mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?

Nor were legislative punishments of this severe character the only ones known to parliamentary history; there were others of a milder form, which were only less obnoxious in that the consequences were less terrible. Those legislative convictions which

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1 Cases of this description were most numerous during the reign of Henry VIII., and among the victims was Cromwell, who is said to have first advised that monarch to resort to this objectionable proceeding. Even the dead were attained, as in the case of Richard III., and later, of the heroes of the Commonwealth. The most atrocious instance in history, however, only relieved by its weakness and futility, was the great act of attainder passed in 1688 by the Parliament of James II., assembled in Dublin, by which between two and three thousand persons were attained, their property confiscated, and themselves sentenced to death if they failed to appear at a time named. And, to render the whole proceeding as horrible in barbarity as possible, the list of the proscribed was carefully kept secret until after the time fixed for their appearance! Macaulay's History of England, c. 12.

2 This was equally true, whether the attainder was at the command of the king, as in the case of Cardinal Pole's mother, or at the instigation of the populace, as in the case of Wentworth, Earl of Strafford. The last infliction of capital punishment in England under a bill of attainder was upon Sir John Fenwick, in the reign of William and Mary. It is worthy of note that in the preceding reign Sir John had been prominent in the attainder of the unhappy Monmouth. Macaulay's History of England, c. 5.
imposed punishments less than that of death were called bills of pains and penalties, as distinguished from bills of attainder; but the constitutional provisions we have referred to were undoubtedly aimed at any and every species of legislative punishment for criminal or supposed criminal offences; and the term "bill of attainder" is used in a generic sense, which would include bills of pains and penalties also.1

The thoughtful reader will not fail to discover, in the acts of the American States during the Revolutionary period, sufficient reason for this constitutional provision, even if the still more monitory history of the English attainers had not been so freshly remembered. Some of these acts provided for the forfeiture of the estates, within the Commonwealth, of those British subjects who had withdrawn from the jurisdiction because not satisfied that grievances existed sufficiently serious to justify the last resort of an oppressed people, or because of other reasons not satisfactory to the existing authorities; and the only investigation provided for was an inquiry into the desertion. Others mentioned particular persons by name, adjudged them guilty of adhering to the enemies of the State, and proceeded to inflict punishment upon them, so far as the presence of property within the Commonwealth would enable the government to do so.2 These were the resorts of a time of extreme peril; and if possible to justify them in a period of revolution, when everything was staked on success, and when the public safety would not permit too much weight to

1 Fletcher v. Peck, 6 Cranch, 87; Story on Constitution, § 1344; Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 393; Drehman v. Stife, 8 Wall. 595, 601. "I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned [which was that they declared certain persons attainted and their blood corrupted, so that it had lost all heritable property], which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government: 1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial. 2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. 3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry." Per Miller, J., in Ex parte Garland, 4 Wall. 393, 398.

2 See Belknap's History of New Hampshire, c. 28; 2 Ramsey's History of South Carolina, 351; 6 Rhode Island Colonial Records, 600; 2 Arnold's History of Rhode Island, 300, 440; Thompson v. Carr, 6 N. H. 510; Sleigh v. Kane, 2 Johns. Cas. 290; Story on Const. (4th ed.) § 1344, note. On the general subject of bills of attainder, one would do well to consult, in addition to the cases in 4 Wallace, those of Blair v. Ridgeley, 41 Mo. 63 (where it was very elaborately examined by able counsel); State v. Staten, 6 Cold. 233; Randolph v. Good, 3 W. Va. 551; Ex parte Law, decided by Judge Erskine, in the United States District Court of Georgia, May Term, 1800; State v. Adams, 44 Mo. 570; Beirne v. Brown, 4 W. Va. 72; Peerce v. Carskadon, 4 W. Va. 234.
scrapes concerning the private rights of those who were not aiding the popular cause, the power to repeat such acts under any conceivable circumstances in which the country could be placed again was felt to be too dangerous to be left in the legislative hands. So far as proceedings had been completed under those acts, before the treaty of 1788, by the actual transfer of property, they remained valid and effectual afterwards; but so far as they were then incomplete, they were put an end to by that treaty.1

The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere. Nevertheless, cases have recently arisen, growing out of the attempt to break up and destroy the government of the United States, in which the Supreme Court of the United States has adjudged certain action of Congress to be in violation of this provision and consequently void.2 The action

1 Jackson v. Munson, 3 Caines, 137.
2 On the 2d of July, 1862, Congress, by "an act to prescribe an oath of office, and for other purposes," enacted that "hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office, take and subscribe the following oath or affirmation: I, A B, do solemnly swear or affirm that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear or affirm that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God." On the 24th of January, 1865, Congress passed a supplementary act as follows: "No person after the date of this act shall be admitted to the bar of the Supreme Court of the United States, or at any time after the 4th of March next shall be admitted to the bar of any Circuit or District Court of the United States, or of the Court of Claims, as an attorney or counselor of such court, or shall be allowed to appear and to be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath" aforesaid. False swearing, under each of the acts, was made perjury. See 12 Statutes at Large, 502; 13 Statutes at Large, 424. In Ex parte Garland, 4 Wall. 333, a majority of the court held the second of these acts void, as partaking of the nature of a bill of pains and penalties, and also as being an ex post facto law. The act was looked upon as inflicting a punishment for past conduct; the exaction of the oath being the mode provided for ascertaining the parties upon whom the act was intended to operate. See Drehman v. Stifle, 8 Wall, 505. The conclusion declared by the Supreme Court of the United States in Ex parte Garland had been previously reached by Judge Trigg, of the United States Circuit Court, in Matter of Baxter; by Judge Bostock, of the District Court of Alabama, in Matter of Shorter et al.; and by Judge Erskine, of the Dis-
referred to was designed to exclude from practice in the United States courts all persons who had taken up arms against the government during the recent rebellion, or who had voluntarily given aid and encouragement to its enemies; and the mode adopted to effect the exclusion was to require of all persons, before they should be admitted to the bar or allowed to practise, an oath negating any such disloyal action. This decision was not at first universally accepted as sound; and the Supreme Courts of West Virginia and of the District of Columbia declined to follow it, insisting that permission to practise in the courts is not a right, but a privilege, and that the withholding it for any reason of State policy or personal unfitness could not be regarded as the infliction of criminal punishment. 1

The Supreme Court of the United States has also, upon the same reasoning, held a clause in the Constitution of Missouri, which, among other things, excluded all priests and clergymen from practising or teaching unless they should first take a similar oath of loyalty, to be void, overruling in so doing a decision of the Supreme Court of that State. 2

Ex post facto laws are also, by the same provisions of the national Constitution already cited, 3 forbidden to be passed, either by the States or by Congress.

district Court of Georgia, in Ex parte Law. An elector cannot be excluded from the right to vote on the ground of being a deserter who has never been tried and convicted as such. Huber v. Reily, 53 Pa. St. 112; McCafferty v. Guyer, 59 Pa. St. 109, State v. Symonds, 57 Me. 148. Seeinfra, p. 39, note.

1 See the cases Ex parte Magruder, American Law Register, Vol. VI. s. s. p. 292; and Ex parte Hunter, American Law Register, Vol. VI. s. s. 410; 2 W. Va. 122; Ex parte Quarrier, 4 W. Va. 210. See also Cohen v. Wright, 22 Cal. 293.

2 Cummings v. Missouri, 4 Wall. 277. See also the case of State v. Adams, 44 Mo. 570, in which it was held that a legislative act declaring that the board of curators of St. Charles College had forfeited their office, was of the nature of a bill of attainder and void. The Missouri oath of loyalty was a very stringent one, and applied to electors, State, county, city and town officers, officers in any corporation, public or private, professors and teachers in educational institutions, attorneys and counsellors, bishops, priests, deacons, ministers, elders, or other clergymen of any denomination. The Supreme Court of Missouri had held this provision valid in the following cases: State v. Garresche, 36 Mo. 256, case of an attorney; State v. Cummings, 36 Mo. 263, case of a minister, reversed as above stated; State v. Hernoudy, 30 Mo. 279, case of the recorder of St. Louis; State v. Medall, 30 Mo. 452, where it is held that a certificate of election issued to one who failed to take the oath as required by the constitution was void. In Beirne v. Brown, 4 W. Va. 72, and Pegrate v. Carskadon, 4 W. Va. 234, an act excluding persons from the privilege of sustaining suits in the courts of the State, or from proceedings for a rehearing, except upon their taking an oath that they had never been engaged in hostile measures against the government, was sustained. And see State v. Neall, 42 Mo. 119. Contra, Kyle v. Jenkins, 6 W. Va. 371; Lynch v. Hoffman, 7 W. Va. 553. The case of Peeree v. Carskadon was reversed in 10 Wall. 291, being held covered by the case of Cummings v. Missouri.

3 Constitution of United States, art. 1, §§ 9 and 10.
At an early day it was settled by authoritative decision, in opposition to what might seem the more natural and obvious meaning of the term *ex post facto*, that in their scope and purpose these provisions were confined to laws respecting criminal punishments, and had no relation whatever to retrospective legislation of any other description. And it has, therefore, been repeatedly held, that retrospective laws, when not of a criminal nature, do not come in conflict with the national Constitution, unless obnoxious to its provisions on other grounds than their retrospective character.

"The prohibition in the letter," says *Chase, J.*, in the leading case,1 "is not to pass any law concerning or after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several States shall not pass laws after a fact done by a subject or citizen, which shall have relation to such fact, and punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

"I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar

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1 *Calder v. Bull*, 3 Dall. 386, 390.
laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective and is generally unjust, and may be oppressive; and there is a good general rule, that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto*, within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions *ex post facto* laws are technical; they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors.”

Assuming this construction of the constitutional provision to be correct,—and it has been accepted and followed as correct by the courts ever since,—it would seem that little need be said relative to the first, second, and fourth classes of *ex post facto* laws, as enumerated in the opinion quoted. It is not essential, however, in order to render a law invalid on these grounds, that it should expressly assume the action to which it relates to be criminal, or provide for its punishment on that ground. If it shall subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility, or if it deprives a party of any valuable right,—like the right to follow a lawful


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1 See Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. Rep. 443. A constitutional amendment changed the judicial rule that conviction of one grade of murder bars a subsequent conviction of a higher grade. Before it took effect a crime had been committed. After it on a plea of guilty the prisoner was convicted of murder in the second degree, but the conviction was reversed, and on new trial he was convicted in the first degree. A bare majority of the court held the act *ex post facto* as to him, as altering the rules of evidence and the punishment. The majority considered the change one in procedure, and as the evidence in question, viz., his conviction in the second degree, of the effect of which he was deprived, came into existence after the amendment, held the act good.

calling — for acts which were innocent, or at least not punishable by law when committed, the law will be *ex post facto* in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal. But how far a law may change the punishment for a criminal offence, and make the change applicable to past offences, is certainly a question of great difficulty, which has been increased by the decisions made concerning it. As the constitutional provision is enacted for the protection and security of accused parties against arbitrary and oppressive legislative action, it is evident that any change in the law which goes in mitigation of the punishment is not liable to this objection. But what does go in mitigation of the punishment? If the law makes a fine less in amount, or imprisonment shorter in point of duration, or relieves it from some oppressive incident, or if it dispenses with some severable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion that the law was favorable to the accused, and therefore not *ex post facto*. But who shall say, when the nature of the punishment is altogether changed, and a fine is substituted for the pillory, or imprisonment for whipping, or imprisonment at hard labor for life for the death penalty, that the punishment is diminished, or at least not increased by the change made? What test of severity does the law or reason furnish in these cases? and must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment? or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case,

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Cummings v. Missouri, 4 Wall. 277; *Ex parte* Garland, 4 Wall. 333. But a divorce is not a punishment, and it may therefore be authorized for causes happening previous to the passage of the divorce act. Jones v. Jones, 2 Overt, 2, 5 Am. Dec. 645; Carson v. Carson, 40 Miss. 249. An act providing for destruction of liquor as a means of abating an existing liquor nuisance does not authorize a criminal proceeding, and is not *ex post facto*. McLane v. Bonn, 70 Iowa, 752, 30 N. W. 478. See Drake v. Jordan, 73 Iowa, 797, 36 N. W. 653. [A statute providing that one who has been convicted of crime is ineligible as a medical practitioner is not invalid as to a case where the conviction was prior to the enactment of the statute. People v. Hawker, 182 N. Y. 294, 46 N. E. 607, aff. 170 U. S. 189, 18 Sup. Ct. Rep. 573. See also Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 231, distinguishing Cummings v. Missouri, 4 Wall. 277, and explaining *Ex parte* Garland, 4 Wall. 333.]

*2* The repeal of an amnesty law by a constitutional convention was held in State v. Keith, 63 N. C. 140, to be *ex post facto* as to the cases covered by the law. An act to validate an invalid conviction would be *ex post facto*. In re Murphy, 1 Woolw. 141.

the punishment prescribed by the new law is or is not more severe than that under the old.

In State v. Arlin, the respondent was charged with a robbery, which, under the law as it existed at the time it was committed, was subject to be punished by solitary imprisonment not exceeding six months, and confinement for life at hard labor in the State prison. As incident to this severe punishment, he was entitled by the same law to have counsel assigned him by the government, to process to compel the attendance of witness, to a copy of his indictment, a list of the jurors who were to try him, &c. Before he was brought to trial, the punishment for the offence was reduced to solitary imprisonment not exceeding six months, and confinement at hard labor in the State prison for not less than seven nor more than thirty years. By the new act, the court, if they thought proper, were to assign the respondent counsel, and furnish him with process to compel the attendance of witnesses in his behalf; and, acting under this discretion, the court assigned the respondent counsel, but declined to do more; while the respondent insisted that he was entitled to all the privileges to which he would have been entitled had the law remained unchanged. The court held this claim to be unfounded in the law. "It is contended," they say, "that, notwithstanding the severity of the respondent's punishment was mitigated by the alteration of the statute, he is entitled to the privileges demanded, as incidents to the offence with which he is charged, at the date of its commission; in other words, it seems to be claimed, that, by committing the alleged offence, the respondent acquired a vested right to have counsel assigned him, to be furnished with process to procure the attendance of witnesses, and to enjoy all the other privileges to which he would have been entitled if tried under laws subjecting him to imprisonment for life upon conviction. This position appears to us wholly untenable. We have no doubt the privileges the respondent claims were designed and created solely as incidents of the severe punishment to which his offence formerly subjected him, and not as incidents of the offence. When the punishment was abolished, its incidents fell with it; and he might as well claim the right to be punished under the former law as to be entitled to the privileges connected with a trial under it."  

1 29 N. II. 179.

2 With great deference it may be suggested whether this case does not overlook the important circumstance, that the new law, by taking from the accused that absolute right to defence by counsel, and to the other privileges by which the old law surrounded the trial,—all of which were designed as securities against unjust convictions,—was directly calculated to increase the party's peril, and was in consequence brought within the reason of the
In Strong v. State, the plaintiff in error was indicted and convicted of perjury, which, under the law as it existed at the time it was committed, was punishable by not exceeding one hundred stripes. Before the trial, this punishment was changed to imprisonment in the penitentiary not exceeding seven years. The court held this amendatory law not to be *ex post facto*, as applied to the case. "The words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to retract the rules of evidence so as to make conviction more easy." "Apply this definition to the act under consideration. Does this statute make a new offence? It does not. Does it increase the malignity of that which was an offence before? It does not. Does it so change the rules of evidence as to make conviction more easy? This cannot be alleged. Does it then increase the punishment of that which was criminal before its enactment? We think not." 

So in Texas it has been held that the infliction of stripes, from the peculiarly degrading character of the punishment, was worse than the death penalty. "Among all nations of civilized man, from the earliest ages, the infliction of stripes has been considered more degrading than death itself." While, on the other hand, in South Carolina, where, at the time of the commission of a forgery, the punishment was death, but it was changed before final judgment to fine, whipping, and imprisonment, the new law was applied to the case in passing the sentence. These cases

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1. 1 Blackf. 193.
2. Mr. Bishop says of this decision: "But certainly the court went far in this case." 1 Bishop, Crim. Law, § 219 (108).
4. State v. Williams, 2 Rich. 418. In Clark v. State, 23 Miss. 201, defendant was convicted of a mayhem. Between the commission of the act and his conviction, a statute had been passed, changing the punishment for this offence from the pillory and a fine to imprisonment in the penitentiary, but providing further, that "no offence committed, and no penalty and forfeiture incurred previous to the
illustrate the difficulty of laying down any rule which will be readily and universally accepted as to what is a mitigation of punishment, when its character is changed, and when from the very nature of the case there can be no common standard, by which all minds, however educated, can measure the relative severity and ignominy.

In Hartung v. People, 1 the law providing for the infliction of capital punishment had been so changed as to require the party liable to this penalty to be sentenced to confinement at hard labor in the State prison until the punishment of death should be inflicted; and it further provided that such punishment should not be inflicted under one year, nor until the governor should issue his warrant for the purpose. The act was evidently designed for the benefit of parties convicted, and, among other things, to enable advantage to be taken, for their benefit, of any circumstances subsequently coming to light which might show the injustice of the judgment, or throw any more favorable light on the action of the accused. Nevertheless, the court held the act inoperative as to offenses before committed. "In my opinion," says Denio, J., "it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offenses; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished, in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offenses; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the

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1 22 N. Y. 96, 105.
severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the Act of 1860, in the punishment of existing offences of murder, does not fall within either of these exceptions. If it is to be construed to vest in the governor a discretion to determine whether the convict should be executed or remain a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon, the convict is executed according to sentence. If he grants it, his jurisdiction of the case ends. The act in question places the convict at the mercy of the governor in office at the expiration of one year from the time of the conviction, and of all of his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice, or without notice. Under one of the repealed sections of the Revised Statutes, it was required that a period should intervene between the sentence and execution of not less than four, nor more than eight weeks. If we stop here, the change effected by the statute is between an execution within a limited time, to be prescribed by the court, or a pardon or commutation of the sentence during that period, on the one hand, and the placing the convict at the mercy of the executive magistrate for the time, and his successors, to be executed at his pleasure at any time after one year, on the other. The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, even if that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. The law, moreover, prescribes one year's imprisonment, at hard labor in the State prison, in addition to the punishment of death. In every case of the execution of a capital sentence, it must be preceded by the year's imprisonment at hard labor. True, the concluding part of the judgment cannot be executed unless the governor concurs by ordering the execution. But: both parts may, in any given case, be inflicted, and as the convict is consequently, under this law, exposed to the double infliction, it is, within both the definitions which have been mentioned, an *ex post facto* law. It
changes the punishment, and inflicts a greater punishment than that which the law annexed to the crime when committed. It is enough, in my opinion, that it changes it in any manner except by suspending with divisible portions of it; but upon the other definition announced by Judge Chase, where it is implied that the change must be from a less to a greater punishment, this act cannot be sustained.” This decision has since been several times followed in the State of New York,1 and it must now be regarded as the settled law of that State, that “a law changing the punishment for offences committed before its passage is ex post facto and void, under the Constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or it is referable to prison discipline or penal administration as its primary object.”2 And this rule seems to us a sound and sensible one, with perhaps this single qualification,—that the substitution of any other punishment for that of death must be regarded as a mitigation of the penalty.3

But so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.4 Statutes giving the gov-

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2 Per Davies, J., in Ratlacy v. People, 29 N. Y. 124. See Miles v. State, 40 Ala. 39. If when the act was committed one could escape the death penalty by pleading guilty and a law changes this before trial, it is bad. Garvey v. People, 6 Col. 559. So if the option of a jury to inflict death or life imprisonment is taken away, and the former is made the only penalty. Marion v. State, 16 Neb. 349, 20 N. W. 283. See Lindsey v. State, 65 Miss. 542, 5 So. 29. Otherwise, of an act which allows a prisoner to elect between death and imprisonment. McInturf v. State, 20 Tex. App. 335. An act passed after the offence is not ex post facto which in a capital case directs that the imprisonment after sentence, and the execution shall be in a penitentiary instead of a jail. In re Tyson, 13 Col. 482, 22 Pec. Rep. 810.
ernment additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right.

And a law is not objectionable as *ex post facto* which, in providing for the punishment of future offences, authorizes the offender’s conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties power to judge of the law is a matter of procedure. Marion v. State, 20 Neb. 233, 29 N. W. 911.


2 State v. Manning, 14 Tex. 402; Lasure v. State, 19 Ohio St. 43; Sullivan v. Oneida, 61 Ill. 242. See State v. Corson, 69 Me. 137. The defendant in any case must be proceeded against and punished under the law in force when the proceeding is had. State v. Williams, 2 Rich. 418; Keene v. State, 3 Chand. 109; People v. Phelps, 5 Wend. 9; Rand v. Commonwealth, 9 Grat. 783. A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of variances which do not prejudice him. Commonwealth v. Hall, 97 Mass. 510; Lasure v. State, 19 Ohio St. 43. Nor one which reduces the number of the prisoner’s peremptory challenges. Dowling v. State, 13 Miss. 664. Nor one which, though passed after the commission of the offence, authorizes a change of venue to another county of the judicial district. Gut v. State, 9 Wall. 35. Nor one which modifies the grounds of challenge. Stokes v. People, 59 N. Y. 104. Nor one which merely modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offence. State v. Learned, 47 Me. 420; State v. Corson, 59 Me. 137. And see People v. Mortimer, 46 Cal. 114. In the absence of statutory permission, if a court allows an indictment to be amended by striking out words as surplusage, it must be resubmitted to the jury. *Ex parte* Bain, 121 U. S. 1, 7 Sup. Ct. Rep. 781. But a statute providing that the rule of law precluding a conviction on the uncorroborated testimony of an accomplice should not apply to cases of misdemeanor, it was held could not have retrospective operation. Hart v. State, 40 Ala. 32.

3 But the legislature can have no power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of the offence. McLaughlin v. State, 45 Ind. 328; Brown v. People, 29 Mich. 282; People v. Olmstead, 30 Mich. 431; State v. O’Flaherty, 7 Nev. 153. [A State may be beyond the time of commission of an offence and the time of trial modify the rules of evidence regarding the proof of handwriting. Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. Rep. 922; aff. 132 Mc. 301, 34 S. W. 31. Upon *ex post facto* laws, see notes to 1 L. ed. U. S. 618, and 4 L. ed. U. S. 629. May enact that jurors shall be selected from “persons of good intelligence, sound judgment, and fair character.” Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. Rep. 904. May change mode of accusation from indictment to information. *Re* Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. 94. In Mallett v. North Carolina, 181 U. S. 589, 21 Sup. Ct. Rep. 730, it is held that a provision for an appeal by the State from an order granting a new trial is not *ex post facto* as applied to a criminal case tried before the statute was passed, the order for a new trial having been made after the enactment of the statute. The opinion cites the principal cases on the constitutional prohibition of *ex post facto* laws in the Federal Supreme Court.]
are often provided by law for a second or any subsequent offence than for the first; and it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account may have taken place before the law was passed. In such case, it is the second or subsequent offence that is punished, not the first; and the statute would be void if the offence to be actually punished under it had been committed before it had taken effect, even though it was after its passage.

**Laws impairing the Obligation of Contracts.**

The Constitution of the United States also forbids the States passing any law impairing the obligation of contracts. It is

1 Rand v. Commonwealth, 9 Gratt. 738; Ross's Case, 2 Pick. 165; People v. Butler, 3 Cow. 347; Ex parte Gutierrez, 45 Cal. 429. Extradition treaties may provide for the surrender of persons charged with offences previously committed. In re De Giacomo, 12 Blatch. 391.

2 Rand v. Commonwealth, 9 Gratt. 738.

3 Riley's Case, 2 Pick. 171.


The law which impairs must be one passed after the formation of the contract. Lehigh Water Co. v. Easton, 121 U. S. 358, 7 Sup. Ct. Rep. 910. A New York law prohibiting the sale of lottery tickets is not invalid because a lottery, the tickets in which are sold, is legal in Louisiana. People v. Noelke, 94 N. Y. 137. That the prohibition does not apply to Congress, see Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. Rep. 170, 312. [See on what laws are void as impairing the obligation of contracts, note to 3 L. ed. U. S. 162; on what contracts are within the rule, note to 10 L. R. A. 405. A city in granting to a water company power to lay pipe in the streets and to supply the citizens with water at reasonable rates, &c., has power to bind itself for a limited period not to erect any competing water-works. Subsequent ordinance providing for the erection of a system of water-works by the city within the limited period is invalid, and its execution may be enjoined. Walla Walla v. W. W. Water Co., 172 U. S. 1, 19 Sup. Ct. Rep. 77. Ordinances of a city are laws of the State within the meaning of this provision of the Con-
remarkable that this very important clause was passed over almost without comment during the discussions preceding the adoption of that instrument, though since its adoption no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy. It is but twice alluded to in the papers of the Federalist; and though its great importance is assumed, it is evident that the writer had no conception of the prominence it was afterwards to hold in constitutional discussions, or of the very numerous cases to which it was to be applied in practice.

The first question that arises under this provision is, What is a contract in the sense in which the word is here employed? In the leading case upon this subject, it appeared that the legislature of Georgia had made a grant of land, but afterwards, on an allegation that the grant had been obtained by fraud, a subsequent legislature had passed another act annulling and rescinding the first conveyance, and asserting the right of the State to the land it covered. "A contract," says Ch. J. Marshall, "is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. Such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A

1 Federalist, Nos. 7 and 44.
party is, therefore, always estopped by his own grant. Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the Constitution, grants are comprehended under the term 'contracts,' is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operations, the exception must arise from the character of the contracting party, not from the words which are employed.” And the court proceed to give reasons for their decision, that violence should not “be done to the natural meaning of words, for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate.”1

It will be seen that this leading decision settles two important points: first, that an executed contract is within the provision, and, second, that it protects from violation the contracts of States equally with those entered into between private individuals.2

1 Fletcher v. Peck, 6 Cranch, 78, 136.
2 This decision has been repeatedly followed. In the founding of the Colony of Virginia the religious establishment of England was adopted, and before the Revolution the churches of that denomination had become vested, by grants of the crown or colony, with large properties, which continued in their possession after the constitution of the State had forbidden the creation or continuance of any religious establishment possessed of exclusive rights or privileges, or the compelling the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. By statute in 1801, the legislature asserted their right to all the property of the Episcopal churches in the respective parishes of the State; and, among other things, directed and authorized the overseers of the poor and their successors in each parish, wherein any glebe land was vacant or should become so, to sell the same and appropriate the proceeds to the use of the poor of the parish. By this act, it will be seen, the State sought in
And it has since been held that compacts between two States are in like manner protected. These decisions, however, do not effect to resume grants made by the sovereignty, — a practice which had been common enough in English history, and of which precedents were not wanting in the History of the American Colonies. The Supreme Court of the United States held the grant not revocable, and that the legislative act was therefore unconstitutional and void. Terrett v. Taylor, 9 Cranch, 43. See also Town of Pawlet v. Clark, 9 Cranch, 292; Davis v. Gray, 16 Wall. 203; Hall v. Wisconsin, 103 U. S. 5; People v. Platt, 17 Johns. 165; Montgomery v. Kasson, 16 Cal. 189; Grogan v. San Francisco, 18 Cal. 580; Rel Foundation v. Hunt, 1 Pick. 224; Lowry v. Francis, 2 Yerg. 531; University of North Carolina v. Foy, 2 Hayw. 310; State v. Barker, 4 Kan. 379 and 435. When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded pro hac vice as a private person itself, and is bound accordingly. Davis v. Gray, 15 Wall. 203; Georgia Pen. Co. v. Nelms, 71 Ga. 391. The lien of a bondholder, who has loaned money to the State on a pledge of property by legislative act, cannot be divested or postponed by a subsequent legislative act. Wabash & Co. v. Beers, 2 Black, 443. An agreement to receive coupons of State bonds in payment for State taxes is binding. Hartman v. Greenhow, 102 U. S. 672; Poindexter v. Greenhow, 114 U. S. 279, 6 Sup. Ct. Rep. 903, 902. See Keith v. Clark, 97 U. S. 451. When State officers acting under authority of a statute have received in payment of obligations due to the State warrants drawn on the State treasury, there is an executed contract, and the obligation is discharged, even though the warrants were illegal and void, as being issued with the intention that they circulate as money or as bills of credit or in aid of rebellion. For the courts of the State to place upon a statute thereafter passed a construction which will treat such payments as void and revive the obligation is to impair the obligation of the contract, and therefore to violate the Federal Constitution. Houston & T. C. R. Co. v. Texas, 177 U. S. 96, 20 Sup. Ct Rep. 545, rev. 11 S. W. 157. But where the statute under which a State grants permission to a foreign corporation to do business within its borders provides that such permission may be revoked upon violation of the statute by the corporation, a forfeiture of the permission because of such violation does not impair the obligation of any contract. Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. Rep. 618, aff. 19 Tex. Civ. App. 1, 44 S. W. 936. A contract authorized under the interpretation and construction put upon the State constitution by the highest court of the State at the time the contract is entered into cannot be impaired by any subsequent amendment of the constitution or by any change in its construction by the courts of the State. Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. Rep. 736. Upon impairment of obligation of contract by State constitution, see note to 10 L. R. A. 405; by change in interpretation of constitution, note to 16 L. R. A. 674, and one to 44 L. ed. U. S. 886. In this connection, see New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. Rep. 44; and s. c. 107 U. S. 467, 17 Sup. Ct. Rep. 892. A railroad company was organized under general statutes which provided for the alteration, amendment, or repeal of corporate charters. Filling a map of a proposed route does not vest in it any right to condemn lands upon the proposed route, such that the State is precluded from taking these lands for other purposes without impairing, to the damage of the company, the obligation of a contract. Adironack R. Co. v. N. Y., 176 U. S. 335, 20 Sup. Ct. Rep. 466, aff. 169 N. Y. 225, 54 N. E. 659. An appeal bond is a contract hereunder. Schuster v. Weiss, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182.] 1

1 On the separation of Kentucky from Virginia, a compact was entered into between the proposed new and the old State, by which it was agreed "that all private grants and interests of lands, within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." After the ad-
fully determine what under all circumstances is to be regarded as a contract. (a) A grant of land by a State is a contract, because in making it the State deals with the purchaser precisely as any other vendor might; and if its mode of conveyance is any different, it is only because, by virtue of its sovereignty, it has power to convey by other modes than those which the general law opens to private individuals. But many things done by the State may seem to hold out promises to individuals which after all cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions. The State creates offices, and appoints persons to fill them; it establishes municipal corporations with large and valuable privileges for its citizens;

mission of the new State to the Union, "occupying claimant" laws were passed by its legislature, such as were not in existence in Virginia, and by the force of which, under certain circumstances, the owner might be deprived of his title to land, unless he would pay the value of lasting improvements made upon it by an adverse claimant. These acts were also held void; the compact was held inviolable under the Constitution, and it was deemed no objection to its binding character, that its effect was to restrict, in some directions, the legislative power of the State entering into it. Green v. Biddle, 8 Wheat. 1. See also Hawkins v. Barney's Lessee, 5 Pet. 467. After a State has granted lands to a company, and the grantee has fulfilled the conditions of the grant and earned the lands, a further enactment, that the lands shall not be transferred to the company till its debts of a certain class are paid, is void. De Groff v. St. Paul, &c. R. R. Co., 23 Minn. 144; Robertson v. Land Commissioner, 44 Mich. 274, 6 N. W. 659. After a contract made by a city with a company allowing it to build a railroad in certain streets, has been partly completed, the legislature cannot make the right to finish it conditional on the consent of property owners. Norellman v. Kansas City Ry. Co., 79 Mo. 632. The power to withdraw a franchise does not give a legislature power to authorize a city to require a horse railroad company to pave outside its rails, when the city had contracted with it to pave only inside the rails. Coast Line R. Co. v. Savannah, 80 Fed. Rep. 646. See New Orleans v. Great South Tel. Co., 40 La. Ann. 41, 3 So. 533; McGee v. San Jose, 68 Cal. 91, 8 Pac. 641; [Chicago Union Tr. Co. v. Chicago, — Ill. —, 65 N. E. 243.]

(a) Authority to construct and maintain a dam for the purpose of improving a water-power is only a license and may be revoked at any time. St. Anthony Falls W. P. Co. v. Bd. of Water Com'r's, 108 U. S. 849, 18 Sup. Ct. Rep. 157. Rate of interest allowed upon an unpaid judgment is not contractual unless the judgment is upon a contract to pay interest at a given rate until the debt is paid, and in all other cases it may be charged at any time by the State, and such changed rate will be operative thenceforth. Morley v. L. S. & M. S. R. Co., 146 U. S. 162, 13 Sup. Ct. Rep. 54, aff. 95 N. Y. 667, and following O'Brien v. Young, 95 N. Y. 428; 47 Am. Rep. 64. Contra, Butler v. Rockwell, 17 Col. 290, 29 Pac. 458, 17 L. R. A. 611, and note; Wyoming Nat. Bk. v. Brown, 7 Wyo. 494, 63 Pac. 201, 9 Wyo. 153, 61 Pac. 465, on rehearing (June 20, 1900), holds that contract is merged in judgment, and rate of interest on judgment is not contractual. Judgment upon a tort is not a contract, and power to levy taxes may be so restricted as to make such judgment against a city practically worthless. Sherman v. Langham, 92 Tex. 15, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258; Louisiana v. New Orleans, 100 U. S. 285, 3 Sup. Ct. Rep. 211; Louisiana v. Police Jury, 111 U. S. 716, 4 Sup. Ct. Rep. 648.]
by its general laws it holds out inducements to immigration; it passes exemption laws, and laws for the encouragement of trade and agriculture; and under all these laws a greater or less number of citizens expect to derive profit and emolument. But can these laws be regarded as contracts between the State and the officers and corporations who are, or the citizens of the State who expect to be benefited by their passage, so as to preclude their being repealed?

On these points it would seem that there could be no difficulty. When the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government." 1 They may, therefore, discontinue offices or change the salary or other compensation, or abolish or change the organization of municipal corporations at any time, according to the existing legislative view of State policy, unless forbidden by their own constitutions from doing so. 2 And although municipal corporations, as respects the

1 Dartmouth College v. Woodward, 4 Wheat. 518-629, per Marshall, Ch. J.
2 Butler v. Pennsylvania, 10 How. 402; United States v. Hartwell, 6 Wall. 385; Newton v. Commissioners, 100 U.S. 559; Warner v. People, 2 Denio, 272; Conner v. New York, 2 Sandf. 355, and 5 N.Y. 285; People v. G. en, 58 N.Y. 295; State v. Van Baumaicher, 12 Wis. 310; Coffin v. State, 7 Ind. 157; Benford v. Gibson, 16 Ala. 521; Perkins v. Corbin, 45 Ala. 103; Evans v. Populous, 22 La. Ann. 121; Commonwealth v. Bacon, 6 S. & R. 322; Commonwealth v. Mann, 5 W. & S. 403, 418; Koontz v. Franklin Co., 76 Pa. St. 154; French v. Commonwealth, 78 Pa. St. 339; Augusta v. Swee- ney, 44 Ga. 463; County Commissioners v. Jones, 18 Minn. 199; People v. Lippincott, 67 Ill. 333; In re Bulger, 45 Cal. 533; Opinions of Justices, 117 Mass. 603; Kendall v. Canton, 53 Miss. 626; Williams v. Newport, 12 Bush, 438; State v. Douglass, 26 Wis. 428; State v. Kalb, 50 Wis. 176, 6 N.W. 557; Robinson v. White, 26 Ark. 139; Alexander v. McKenzie, 2 S. C. 81; Harvey v. Comrs' Rush Co., 52 Kan. 150, 4 Pac. 153; Com. v. Bailey, 81 Ky. 395. Compare People v. Bull, 46 N.Y. 57, 7 Am. Rep. 302; Wyandotte v. Drennan, 46 Mich. 478, 9 N.W. 500. "Where an office is created by statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. Such extreme legislation is not to be deemed probable in any case. But we are now discussing the legislative power, not its expediency or propriety. Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference." Per Sandford, J., 2 Sandf. 355, 390. "The selection of officers who are nothing more than public agents for the effectuating of public purposes is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular
property which they hold, control, and manage, for the benefit of their citizens, are governed by the same rules and subject to the same liabilities as individuals, yet this property, so far as it has been derived from the State, or obtained by the exercise of the ordinary powers of government, must be held subject to control by the State, but under the restriction only, that it is not to be appropriated to uses foreign to those for which it has been ac-

agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this upon the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense." Daniel, J., in Butler v. Pennsylvania, 10 How. 402, 410. "But after services have been rendered under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law gives for its enforcement," and cannot be impaired by a change in the State constitution. Fisk v. Jefferson Police Jury, 110 U. S. 315, 6 Sup. Ct. Rep. 320. See also Barker v. Pittsburgh, 4 Pa. St. 49; Standiford v. Wingate, 2 Duv. 423; Taft v. Adams, 3 Gray, 126; Walker v. Pecull, 18 Ind. 204; People v. Haskell, 5 Cal. 387; Dart v. Houston, 22 Ga. 506; Williams v. Newport, 12 Bush, 438; Territory v. Fyke, 1 Oreg. 149; Bryan v. Cuttell, 16 Iowa, 538. If the term of an office is fixed by the Constitution, the legislature cannot remove the officer,—except as that instrument may allow,—either directly, or indirectly by abolishing the office. People v. Dubois, 23 Ill. 547; State v. Messmore, 14 Wis. 163; Commonwealth v. Gamble, 62 Pa. St. 348, 1 Am. Rep. 422; Lowe v. Commonwealth, 3 Met. (Ky.) 240; State v. Wilitz, 11 La. Ann. 489; Goodin v. Thomas, 10 Kan. 101; State v. Draper, 50 Mo. 532. Or by shortening the constitutional term. Brewer v. Davis, 9 Humph. 212. Compare Christy v. Commissioners, 30 Cal. 3. But if after the election of a justice, his town becomes part of a city, his office ceases. Gertum v. Board, 109 N. Y. 170, 16 N. E. 328. Nor can the legislature take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them upon an office of its own creation. State v. Brunst, 26 Wis. 413, 7 Am. Rep. 84, disapproving State v. Dewa, R. M. Char. 397. [See also People v. Howland, 156 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838. Cameron v. Parker, 2 Okla. 277, 38 Pac. 14.] Compare Warner v. People, 2 Denio, 272; People v. Albertson, 55 N. Y. 50; People v. Raymond, 37 N. Y. 428; King v. Hunter, 65 N. C. 608, 6 Am. Rep. 754. Nor, where the office is elective, can the legislature fill it, either directly, or by extending the term of the incumbent. People v. Bull, 46 N. Y. 57; People v. McKinney, 52 N. Y. 374. Where the constitution prohibits the removal of an officer during his term except for cause, it equally prohibits the transfer of the duties and emoluments of the office. State Prison v. Day, 124 N. C. 362, 23 S. E. 748, 40 L. R. A. 295.] See also on these points cases, p. 90, supra. Compare People v. Flanagan, 66 N. Y. 237. As to control of municipal corporations, see further Marietta v. Fearing, 4 Ohio, 427; Bradford v. Cary, 5 Me. 320; Bush v. Shipman, 5 Ill. 166; Trustees, &c. v. Tatman, 13 Ill. 27; People v. Morris, 13 Wend. 825; Mills v. Williams, 11 Ired. 558; People v. Banvard, 27 Cal. 470; ante, ch. viii. But where the State contracts as an individual, it is bound as an individual would be: Davis v. Gray, 16 Wall. 203; even though the contract creates an official relation. Hall v. Wisconsin, 103 U. S. 5. [A public office is not property, and a provision that "no person shall be deprived of . . . property without . . . the judgment of his peers" is not applicable to a lawful removal from office upon a charge of gross immorality. Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. That notice is necessary to a valid removal of an elected officer, see Jacques v. Little, 51 Kan. 300, 33 Pac. 106, 20 L. R. A. 391.]
quired. And the franchises conferred upon such a corporation, for the benefit of its citizens, must be liable to be resumed at any time by that authority which may mould the corporate powers at its will, or even revoke them altogether. The greater power will comprehend the less.\footnote{1} If, however, a grant is made to a munici-

\footnote{1} In East Hartford v. Hartford Bridge Co., 10 How. 511, 533, Mr. Justice Woolbury, in speaking of the grant of a ferry franchise to a municipal corporation, says: "Our opinion is . . . that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as these interests demanded. The grantees, likewise the towns, being mere organizations for public purposes, were liable to have their public powers, rights, and duties, modified or abolished at any moment by the legislature. They are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders nor joint partners in any corporate estate which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes. It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies." A different doctrine was advanced by Mr. Justice Barculo, in Benson v. Mayor, &c. of New York, 10 Barb. 234, who cites in support of his opinion, that ferry grants to the city of New York could not be taken away by the legislature, what is said by Chancellor Kent, (2 Kent's Com. 275), that "public corporations . . . may be empowered to take and hold private property for municipal uses; and such property is invested with the security of other private rights. So corporate franchises attached to public corporations are legal estates, coupled with an interest, and are protected as private property." This is true in a general sense, and it is also true that, in respect to such property and franchises, the same rules of responsibility are to be applied as in the case of individuals. Bailey v. Mayor, &c. of New York, 3 Hill, 531. But it does not follow that the legislature, under its power to administer the government, of which these agencies are a part, and for the purposes of which the grant has been made, may not at any time modify the municipal powers and privileges, by transferring the grant to some other agency, or revoking it when it seems to have become unimportant. A power to tax is not private property or a vested right which when once conferred upon a municipality by legislative act cannot be subsequently modified or repealed. The grant of such power is not a contract. Williamson v. New Jersey, 130 U. S. 189, 9 Sup. Ct. Rep. 453; Richmond v. Richmond, &c. R. K. Co., 21 Gratt. 604, 611. See post, p. 355, note 1. In People v. Power, 25 Ill. 187, 191, Breese, J., in speaking of a law which provided that three-fourths of the taxes collected in the county of Sangamon, with certain deductions, should be paid over to the city of Springfield, which is situated therein, says: "While private corporations are regarded as contracts upon which the legislature cannot constitutionally impair, as the trustee of the public interests it has the exclusive and unrestrained control over public corporations; and as it may
pal corporation charged with a trust in favor of an individual, private corporation, or charity, the interest which the cestui que trust has under the grant may sustain it against legislative revocation; a vested equitable interest being property in the same sense and entitled to the same protection as a legal.  

Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting create, so it may modify or destroy, as public exigency requires or the public interests demand. Coles v. Madison County, Breese, 115. Their whole capacities, powers, and duties are derived from the legislature, and subordinate to that power. If, then, the legislature can destroy a county, they can destroy any of its parts, and take from it any one of its powers. The revenues of a county are not the property of the county, in the sense in which revenue of a private person or corporation is regarded. The whole State has an interest in the revenue of a county; and for the public good the legislature must have the power to direct its application. The power conferred upon a county to raise a revenue by taxation is a political power, and its application when collected must necessarily be within the control of the legislature for political purposes. This act of the legislature nowhere provides to take from the county of Sangamon, and give to the city of Springfield, any property belonging to the county, or revenue collected for the use of the county. But if it did it would not be objectionable. But, on the contrary, it proposes alone to appropriate the revenue which may be collected by the county, by taxes levied on property both in the city and county, in certain proportions ratably to the city and county." It is held in People v. Ingersoll, 56 N. Y. 1, that the franchise to levy taxes by a county for county purposes was not exercised by the county as agent for the State, but as principal. And see Bush v. Shipman, 5 Ill. 180; Rich- land County v. Lawrence County, 12 Ill. 1; Sangamon Co. v. Springfield, 65 Ill. 66; Borough of Dunmore's Appeal, 52 Pa. St. 374; Guilford v. Supervisors of Chenango, 18 Barb. 616, and 13 N. Y. 145; ante, pp. 842, 847, and cases cited. [Statute exempting city's waterworks from taxation is not irrepealable. Covington v. Kentucky, 173 U. S. 231, 10 Sup. Ct. Rep. 383.]

1 See Town of Pawlet v. Clark, 9 Cranch, 202, and Terrett v. Taylor, 9 Cranch, 43. The municipal corporation holding property or rights in trust might even be abolished without affecting the grant; but the Court of Chancery might be empowered to appoint a new trustee to take charge of the property, and to execute the trust. Montpellier v. East Montpellier, 29 Vt. 12. Power to repeal a charter cannot be exercised so as to injure creditors already entitled to payment. Morris v. State, 62 Tex. 728. A municipal corporation, like the State, may enter into contracts by legislative action. Where, for example, a village by ordinance grants to a railroad company permission to use the streets of the village for its road-bed, on condition of grading and graveling them at its own expense, the ordinance when accepted constitutes a contract from which neither party can withdraw. Cincinnati, &c. R. R. Co. v. Carthage, 90 Ohio St. 631. See also Hovelman v. Kansas City Ry. Co., 79 Mo. 692; Coast Line Ry. Co. v. Savannah, 30 Fed. Rep. 646; Los Angeles v. Water Co., 61 Cal. 65; Chicago, Ill., &c. Co. v. Lake, 130 Ill. 42, 22 N. E. 616. [Grant to a public corporation of all moneys received by a certain county from fines and penalties may be revoked at pleasure of legislature. Watson Seminary v. Co. Ct. of Pike Co., 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 676.]
them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.\footnote{1}

As the power to grant unamendable and irrepealable

\footnote{1} Dartmouth College \textit{v.} Woodward, 4 Wheat. 518; Trustees of Vincennes University \textit{v.} Indiana, 14 How. 308; Planters' Bank \textit{v.} Sharp, 6 How. 301; Piqua Bank \textit{v.} Knoop, 16 How. 399; Binghamton Bridge Case, 3 Wall. 51; Norris \textit{v.} Trustees of Abingdon Academy, 7 G. & J. 7; Grammar School \textit{v.} Burt, 11 Vt. 632; Brown \textit{v.} Hummel, 6 Pa. St. 86; State \textit{v.} Heyward, 3 Rich. 389; People \textit{v.} Manhattan Co., 9 Wend. 351; Commonwealth \textit{v.} Cullen, 13 Pa. St. 132; Commercial Bank of Natchez \textit{v.} State, 14 Miss. 599; Backus \textit{v.} Lebanon, 11 N. H. 19; Michigan State Bank \textit{v.} Hastings, 1 Doug. (Mich.) 225; Bridge Co. \textit{v.} Nobaken Co., 13 N. J. Eq. 81; Miners' Bank \textit{v.} United States, 1 Greene (Iowa), 553; Edwards \textit{v.} Jagers, 19 Ind. 407; State \textit{v.} Noyes, 47 Me. 189; Braffet \textit{v.} G. W. R. R. Co., 25 Ill. 353; People \textit{v.} Jackson & Michigan Plank Road Co., 9 Mich. 259; Bank of the State \textit{v.} Bank of Cape Fear, 18 Ired. 75; Mills \textit{v.} Williams, 11 Ired. 598; Haw-thorne \textit{v.} Calof, 2 Wall. 10; Wales \textit{v.} Stetson, 2 Mass. 143; Nichols \textit{v.} Bertram, 3 Pick. 342; King \textit{v.} Dedham Bank, 15 Mass. 447; State \textit{v.} Tombeckalee Bank, 2 Stew. 30; Central Bridge \textit{v.} Lowell, 16 Gray, 100; Bank of the Dominion \textit{v.} McVeigh, 20 Gratt. 467; Sloan \textit{v.} Pacific R. R. Co., 61 Mo. 24; State \textit{v.} Richmond, &c. R. R. Co., 73 N. C. 527; Turnpike Co. \textit{v.} Davidson Co., 3 Tenn. Ch. 397; Detroit \textit{v.} Plank Road Co., 43 Mich. 149, 5 N. W. 275; Penn. R. R. Co. \textit{v.} Baltimore, &c. R. R. Co., 60 Md. 263; Com. v. Erie & W. Tr. Co., 107 Pa. St. 112; Houston & T. C. Ry. Co. \textit{v.} Texas & P. Ry. Co., 70 Tex. 619, 8 S. W. 498; \textit{City R. Co. v. Citizens' Street R. Co.}, 160 U. S. 557, 17 Sup. Ct. Rep. 653; Mich. Tel. Co. \textit{v.} St. Joseph, 121 Mich. 602, 80 N. W. 383, 47 L. R. A. 87; Ingersoll \textit{v.} Necessar Electric R. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236; Franklin Co. Grammar School \textit{v.} Bailey, 62 Vt. 467, 20 Atl. 829, 10 L. R. A. 305, and note; Nashville, M., \& S. Turnp. Co. \textit{v.} Davidson County, 105 Tenn. 258, 61 S. W. 68; State \textit{v.} Lebanon \& N. Turnp. Co., — Tenn. —, 01 S. W. 1000 (Nov. 27, 1900).] The mere passage of an act of incorporation, however, does not make the contract; and it may be repealed prior to a full acceptance by the corporators. Mississippi Society \textit{v.} Musgrove, 44 Miss. 820, 7 Am. Rep. 723. Or amended, Cincinnati, H. & I. R. R. Co. \textit{v.} Clifford, 113 Ind. 460, 15 N. E. 524. See, further, Chincledamouche L. & B. Co. \textit{v.} Com., 100 Pa. St. 438. After the adoption of a constitutional amendment allowing amendment and repeal of charters, a corporation, previously chartered, accepted acts of the legislature. Held that its charter thereby became subject to alteration under the amendment, and that it was affected by a constitutional amendment passed thereafter. Penn. R. R. Co. \textit{v.} Duncan, 111 Pa. St. 352. In affirming this it is held that the corporation took its charter subject to changes in the constitution and general laws of the State. Penn. R. R. Co. \textit{v.} Miller, 132 U. S. 75, 10 Sup. Ct. Rep. 341. An act, passed after the granting of a charter, allowing the corporation in a proper case to be wound up, is valid. A corporation is subject to such reasonable regulation as the legislature may prescribe short of a material interference with its privileges. Chicago Life Ins. Co \textit{v.} Needles, 113 U. S. 574, 5 Sup. Ct. Rep. 681. [Until the corporation has entered upon the execution of a general power granted to it (\textit{e. g.} to mortgage its property) the legislature may modify at will the conditions under which that power may be exercised (\textit{e. g.} may enact that subsequent judgments against the corporation shall be prior liens upon its property). East Tenn., V. & G. R. Co. \textit{v.} Frazier, 139 U. S. 285, 11 Sup. Ct. Rep. 817.] The provision in a railroad charter prescribing the manner in which it may take lands for its purposes, only gives a remedy which may be altered. Mississippi R. R. Co. \textit{v.} McDonald, 12 Heisk. 54. Giving the right of cumulative voting to stockholders in a corporation with an irrepealable charter,
charters is one readily susceptible of being greatly abused, to the prejudice of important public interests, and has been greatly abused in the past, the people in a majority of the States, in framing or amending their constitutions, have prudently guarded

which provides that each share shall have one vote, is a violation of contract. State v. Greer, 78 Mo. 188. It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred — no matter by what means or on what pretense — being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.

And as to the right to regulate charges for transportation of persons and property, see post, p. 870.

In Mills v. Williams, 11 Ired. 558, 561, Pearson, J., states the difference between the acts of incorporation of public and private corporations as follows: "The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this party a portion of the power of the legislature is delegated, to be exercised for the general good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of contract. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. It is a contract, and therefore cannot be modified, changed, or annulled, without the consent of both parties." An incorporated academy, whose endowment comes exclusively from the public, is a public corporation. Dart v. Houston, 22 Ga. 506. Compare State v. Adams, 44 Mo. 570. [In Skaneateles Water Works Co. v. Skaneateles, 161 N. Y. 154, 55 N. E. 662, the municipality gave to the water company a franchise to maintain and operate within its corporate limits a system of water-works for furnishing to the municipality and its inhabitants water. Later the municipality took appropriate action for the construction of a system of water-works of its own. The action was enjoined as in violation of the provision of the Federal Constitution against the impairment of contracts. This case differs from Syracuse Water Co. v. Syracuse, 116 N. Y. 107, 22 N. E. 381, 5 L. R. A. 516, and Re Brooklyn, 143 N. Y. 596, 38 N. E. 983, 29 L. R. A. 270, in that in those cases it was a question of whether, where the franchise did not purport to be exclusive, a franchise might be given to a competing company. The Brooklyn case is affirmed in 106 U. S. 655, 17 Sup. Ct. Rep. 718, sub nom., Long Island Water Supply Co. v. Brooklyn. The Skaneateles Case affirms the rule of these cases that such second franchises might be granted, but holds that the municipality itself cannot enter such competition without being open to the constitutional objection. See also Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, — Sup. Ct. Rep. —. Westerly Water Works v. Westerly, 75 Fed. Rep. 181. See also additional cases cited ante, p. 387, note a. A statute relieving street railway company from the obligation to repair any portion of the streets over which its tracks are laid, does not impair the obligation of contract. Springfield v. Springfield St. Ry. Co., — Mass., —, 64 N. E. 577 (July 15, 1902); Worcester v. Worcester St. Ry. Co., — Mass., —, 64 N. E. 681 (July 15, 1902).]
against it by reserving the right to alter, amend, or repeal all laws that may be passed, conferring corporate powers. These provisions give protection from the time of their adoption, but the improvident grants theretofore made are beyond their reach.\(^1\) In many States the constitutions also prohibit special charters, and all corporations are formed by the voluntary association of individuals under general laws.\(^2\)

\(^1\) Respecting the power to amend or repeal corporate grants, some troublesome questions are likely to arise which have only as yet been hinted at in the decided cases. Corporations usually acquire property under their grants; and any property or any rights which become vested under a legitimate exercise of the powers granted, no legislative act can take away. Commonwealth v. Essex Co., 13 Gray, 239; Railroad Co. v. Maine, 96 U. S. 490; Sinking Fund Cases, 90 U. S. 700; Attorney-General v. Railroad Companies, 35 Wis. 425; Detroit v. Detroit & Inland P. R. Co., 43 Mich. 140, 5 N. W. 275. See post, pp. 837–839. But a legislature may grant to another corporation the franchises of an existing one, and may authorize the taking of its property upon compensation made. Greenwood v. Freight Co., 105 U. S. 13. A new constitution may allow water rates to be fixed by a public board, although the company had under the law of its organization the right of representation upon the board. Spring Valley Water Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 46. In many cases the property itself becomes valueless unless its employment in the manner contemplated in the corporate grant may be continued; as in the case, for instance, of railroad property; and whatever individual owners of such property might do without corporate powers, it must be competent for the stockholders to do after their franchises are taken away. Without speculating on the difficulties likely to arise, reference is made to the following cases, in which the reserved power to alter or repeal corporate grants has been considered or touched upon: Worcester v. Norwich, &c. R. R. Co., 109 Mass. 103; Railroad Commissioners v. Portland, &c. R. R. Co., 63 Me. 263, 18 Am. Rep. 208; State v. Maine Cent. R. R. Co., 60 Me. 488; Ames v. Lake Superior R. R. Co., 21 Minn. 201; Sprigg v. Telegraph Co., 46 Md. 67; State v. Com'rs of R. R. Taxation, 37 N. J. 228; State v. Mayor of Newark, 35 N. J. 157; West Wis. R. R. Co. v. Supervisors, 32 Wis. 257; Union Improvement Co. v. Commonwealth, 69 Pa. St. 140; Hl. Cent. R. R. Co. v. People, 95 Ill. 318, 1 Am. & Eng. R. R. Cas. 189; Rodemacher v. Milwaukee, &c. R. R. Co., 41 Iowa, 237, 20 Am. Rep. 592; Gorman v. Pacific R. R. Co., 20 Mo. 441; Gardner v. Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238; Yeaton v. Bank of Old Dom., 21 Gratt. 592; Tomlinson v. Jesup, 15 Wall. 464; Tomlinson v. Branch, 15 Wall. 460; Miller v. State, 15 Wall. 478; Holyoke Co. v. Lyman, 15 Wall. 500; Detroit v. Detroit & H. P. R. Co., 43 Mich. 140, 5 N. W. 275; Ashuelot R. R. Co. v. Elliott, 58 N. H. 451; [Hamilton Gaslight & Coke Co. v. Hamilton, 140 U. S. 258, 13 Sup. Ct. Rep. 90. After subscribers to stock have paid for it in full, the legislature cannot increase their liabilities. Enterprise Ditch Co. v. Muffit, 58 Neb. 642, 79 N. W. 560, 45 L. R. A. 647.]

Where no power to amend a charter has been reserved, amendments may nevertheless be made with the consent of the corporation, but the corporation cannot bind its shareholders by the acceptance of amendments which affect fundamental changes in its character or purpose. See Gray v. Navigation Co., 2 W. & S. 159, 37 Am. Dec. 500; Stevens v. Rutland, &c. R. R. Co., 20 Vt. 515. [Where such power has been reserved, the mode of electing directors may be so modified as to permit cumulative voting in order to secure proportional representation on the board of directors. Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. Rep. 21.]

\(^2\) Where corporations are thus formed, the articles of association, taken in connection with the General Statute under which they are entered into, constitute the charter.
Perhaps the most interesting question which arises in this discussion is, whether it is competent for the legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the power of taxation, or the police power of the State, or the right of eminent domain, as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle that the legislature cannot diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself. If the legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to abuse, and may possibly come in time to make the constitutional provision in question as prolific of evil as it ever has been, or is likely to be, of good.

So far as the power of taxation is concerned, it has been so often decided by the Supreme Court of the United States, though not without remonstrance on the part of State courts,\(^1\) that an agreement by a State, for a consideration received or supposed to be received, that certain property, rights, or franchises shall be exempt from taxation, or be taxed only at a certain agreed rate, is a contract protected by the Constitution, that the question can no longer be considered an open one.\(^2\) In any case, however,

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there must be a consideration, so that the State can be supposed to have received a beneficial equivalent; for it is conceded on all sides that, if the exemption is made as a privilege only, it may be revoked at any time.¹ And it is but reasonable that the exemption be construed with strictness.²


The power of the legislature to preclude itself in any case from exercising the power of eminent domain is not so plainly decided. It must be conceded, under the authorities, that the State may grant exclusive franchises,—like the right to construct the only

railroad which shall be built between certain termini; or the only bridge which shall be permitted over a river between specified limits; or to own the only ferry which shall be allowed at a certain point,—but the grant of an exclusive privilege will not prevent the legislature from exercising the power of eminent domain in respect thereto. Franchises, like every other thing of value, and in the nature of property, within the State, are subject to this power; and any of their incidents may be taken away, or themselves altogether annihilated, by means of its exercise. And it is believed that an express agreement in the charter, that the power of eminent domain should not be so exercised as to impair or affect the franchise granted, if not void as an agreement beyond the power of the legislature to make, must be considered as only a valuable portion of the privilege secured by the grant, and as such liable to be appropriated under the power of eminent domain. The exclusiveness of the grant, and the agreement against interference with it, if valid, constitute elements in its value to be taken into account in assessing compensation; but appropriating the franchise in such a case no more violates the obligation of the contract than does the appropriation of land which the State has granted under an express or implied agreement for quiet enjoyment by the grantee, but which nevertheless may be taken when the public need requires. All grants are subject to this implied condition; and it may well be worthy of inquiry, whether the agreement that a franchise granted shall not afterwards be appropriated can have any other or greater force than words which would make it an exclusive franchise, but which, notwithstanding, would not preclude a subsequent grant.


2 Matter of Kerr, 42 Barb. 119; Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co., 17 Conn. 40, 454; West River Bridge Co. v. Dix, 16 Vt. 446, and 6 Haw. 607; Philadelphia & Gray's Ferry Co.'s Appeal, 102 Pa. St. 123.

on making compensation.\(^1\) The words of the grant are as much in the way of the grant of a conflicting franchise in the one case as in the other.

It has also been intimated in a very able opinion that the police power of the State could not be alienated even by express grant.\(^2\) And this opinion is supported by those cases where it

\(^1\) Mr. Greenleaf, in a note to his edition of Cruise on Real Property, Vol. II. p. 67, says upon this subject: "In regard to the position that the grant of the franchise of a ferry, bridge, turnpike, or railroad is in its nature exclusive, so that the State cannot interfere with it by the creation of another similar franchise tending materially to impair its value, it is with great deference submitted that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like. And those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist; and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant that it will not, under any circumstances, open another avenue for the public travel within certain limits, or in a certain term of time; such covenant being an alienation of sovereign powers, and a violation of public duty." See also Redfield on Railways (3d. ed.), Vol. I. p. 258. That

\(^2\) "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is perhaps no more than the enunciation of a general principle applicable to all free States; and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the policy of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads, to be carried into effect by their by-laws and other regulations, it is, of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would." Thorpe v. R. & B. R. R. Co., 27 Vt. 140, 149, per Redfield, Ch. J. The legislature cannot make an irrepealable contract as to that which affects public morals or public health, so as to limit the exercise of the police power over the subject-matter. Butcher's Union Co. v. Crescent City Co., 111 U.S. 746, 4 Sup. Ct. Rep. 652. See also Indianapolis, &c. R. R. Co. v. Kercheval, 19 Ind. 84; Ohio, &c. R. R. Co. v. McClelland, 25 Ill. 140. See State v. Noyes, 47 Me. 189, on the same subject. In Bradley v. McAtee, 7 Bush, 607, 3 Am. Rep. 390, it was decided that a provision in a city
has been held that licenses to make use of property in certain modes may be revoked by the State, notwithstanding they may be connected with grants and based upon a consideration. But this subject we shall recur to hereafter.

It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national Constitution now under consideration. If the tax cases are to be regarded as an exception to this statement, the exception is perhaps to be considered a nominal rather than a charter that, after the first improvement of a street, repairs should be made at the expense of the city, was not a contract; and on its repeal a lot-owner, who had paid for the improvement, might have his lot assessed for the repairs. Compare Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as contracts in these cases have been supposed to be based upon consideration, by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode.

Exclusive Privileges. Under the rulings of the federal Supreme Court, the grant of any exclusive privilege by a State, if lawfully made, is a contract, and not subject to be recalled. As every exclusive privilege is in the nature of a monopoly, it may at some time become a question of interest, whether there are any, and if so what, limits to the power of the State to grant them. In former times, such grants were a favorite resort in England, not only to raise money for the personal uses of the monarch, but to reward favorites; and the abuse grew to such enormous magnitude that Parliament in the time of Elizabeth, and again in the times of James I., interfered and prohibited them. What is more important to us is, that in 1602 they were judicially declared to be illegal. These, however, were monopolies in the ordinary occupations of life; and the decision upon them would not affect the special privileges most commonly granted. Where the grant is of a franchise which would not otherwise exist, no question can be made of the right of the State to make it exclusive, unless the constitution of the State forbids it; because, in contemplation of law, no one is wronged when he is only excluded from that to which he never had any right. An exclusive right to build and maintain a toll bridge or to set up a ferry may therefore be granted; and the State may doubtless limit, by the requirement of a license, the number of persons who shall be allowed to engage in employments the entering upon which is not a matter of common right, and which, because of their liability to abuse, may require special and extraordinary police supervision. The business of selling intoxicating drinks and of setting up a lottery are illustrations of such employments. But the grant of a monopoly in one of the ordinary and necessary occupations of life must be as clearly illegal in this country as in England; and it would be impossible to defend and sustain it, except upon the broad ground that the legislature may control and regulate the ordinary employments, even to the extent of fixing the prices of labor and of commodities. As no one pretends that the legislature possesses such a power, and as its existence would be wholly inconsistent with regulated liberty, it must follow that lawful grants

1 *ante*, p. 395, and cases cited; Slaughter-House Cases, 16 Wall. 36, 74.
of special privileges must be confined to cases where they will take from citizens generally nothing which before pertained to them as of common right.¹

Changes in the General Laws. We have said in another place that citizens have no vested right in the existing general laws of the State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes in the law. Nevertheless there may be laws which amount to propositions on the part of the State, which, if accepted by individuals, will become binding contracts. Of this class are perhaps to be considered bounty laws, by which the State promises the payment of a gratuity to any one who will do any particular, act supposed to be for the State interest. Unquestionably the State may repeal such a law at any time;² but when the proposition has been accepted by the performance of the act before the law is repealed, the contract would seem to be complete, and the promised gratuity becomes a legal debt.³ And where a State was owner of the stock of a bank, and by the law its bills and notes were to be received in payment of all debts due to the State, it was properly held that this law constituted a contract with those who should receive the bills before its repeal and that a repeal of the law could not deprive these holders of the right which it assured. Such a law, with the acceptance of the bills under it, "comes within the definition of a contract. It is a contract founded upon a good and valuable consideration,—a consideration beneficial to the State; as its profits are increased by sustaining the credit,


and consequently extending the circulation, of the paper of the bank." 1

That laws permitting the dissolution of the contract of marriage are not within the intention of the clause of the Constitution under discussion, has been many times affirmed. 2 It has been intimated, however, that, so far as property rights are concerned, the contract must stand on the same footing as any other, and that a law passed after the marriage, vesting the property in the wife for her sole use, would be void, as impairing the obligation of contracts. 3 But certainly there is no such contract embraced in the marriage as would prevent the legislature changing the law, and vesting in the wife solely all property which she should acquire thereafter; and if the property had already become vested in the husband, it would be protected in him, against legislative transfer to the wife, on other grounds than the one here indicated.

"The obligation of a contract," it is said, "consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning: when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other;
hence any law which in its operations amounts to a denial or
obstruction of the rights accruing by a contract, though profess-
ing to act only on the remedy, is directly obnoxious to the pro-
hibition of the Constitution." 1 "It is the civil obligation of con-
tracts which [the Constitution] is designed to reach; that is, the
obligation which is recognized by, and results from, the law of
the State in which it is made. If, therefore, a contract when

1 McCracken v. Hayward, 2 How. 608, 612. "The obligation of a contract ... is the law which binds the parties to per-
form their agreement. The law, then, which has this binding obligation must
govern and control the contract, in every shape in which it is intended to bear upon
it, whether it affects its validity, con-
struction, or discharge. It is, then, the
municipal law of the State whether that be
written or unwritten, which is emphatic-
ally the law of the contract made within the
State, and must govern it throughout,
whenever its performance is sought to be
enforced." Washington, J., in Ogden r.
Saunders, 12 Wheat. 213, 257, 259. "As I
understand it, the law of the contract forms its obligation." Thompson, J., ibid. 392.
"The obligation of the contract consists in the power and efficacy of the
law which applies to, and enforces per-
formance of, the contract, or the payment of
an equivalent for non-performance. The
obligation does not inhere and sub-
sist in the contract itself, proprius vigore,
but in the law applicable to the contract.
This is the sense, I think, in which the
Constitution uses the term 'obligation.'"
Trumbull, J., ibid. 318. And see Van
Baunabach v. Bade, 9 Wis. 550; Johnson
v. Higgins, 3 Met. (Ky.) 556; People v.
Ingersoll, 58 N. Y. 1. Requirement of
a license tax for permission to do what a
contract with the city gives authori-
ity to do, without "let, molestation, or hin-
drance," is void. Stein v. Mobile, 49 Ala.
302, 29 Am. Rep. 258. But licenses in
general are subject to the taxing power.
Home Ins. Co. v. Augusta, 33 U. S. 116;
Reed v. Beall, 42 Miss. 472; Cooley on
Taxation, 386, and cases cited. A law
taxing a debt to the debtor and making
him pay the tax and deduct the amount
from the debt is valid. Lehig V. R. R.
410. So where the debtor, a foreign cor-
poration, has paid for the privilege of
being exempt from taxation. New York,
St. 483, 18 Atl. 412. A law giving in-
terest on debts, which bore none when
contracted, was held void in Goggans v.
Turnipseed, 1 S. C. (s. s.) 40, 7 Am. Rep.
23. The legislature cannot authorize the
compulsory extinction of ground rents,
on payment of a sum in gross. Pabst's
A State law, discontinuing a public work,
does not impair the obligation of con-
tracts, the contractor having his just
claim for damages. Lord v. Thomas, 64
N. Y. 107. A law giving an abuter a
right to damages when a railroad is laid
in the street is valid as to changes there-
after made by a railroad, though a city
ordinance had given it the right to use
the street. Drady v. Des Moines, &c., Co.,
57 Iowa, 393, 10 N. W. 751. See also
Mulholland v. Des Moines, &c., Co., 60
Iowa, 710, 13 N. W. 726. A statute pro-
viding for reversion of land condemned
for railroad purposes if work on the road
has ceased for eight years is valid. The
property right does not attach to the land
independent of its use for public purposes.
Skillman v. Chicago, &c., Ry. Co., 78 Iowa,
404, 43 N. W. 276. [Where at the
time a contract was made a judgment for
damages for breach thereof was renew-
able indefinitely, a later enacted statute
limiting absolutely the life of the judg-
ment is void with regard to this contract.
Bettman v. Cowley, 19 Wash. 207, 63
Pac. 53, 40 L. R. A. 815, and see also
Palmer v. Lohrke, 23 Wash. 409, 63 Pac.
216. Warrant of attorney to holder of
note to enter judgment against maker
upon default of payment, and issue exe-
cution, etc., valid when note was made
cannot be invalidated by subsequent
Schracke, 97 Wis. 250, 73 N. W. 31, 39
L. R. A. 659.]
made is by the law of the place declared to be illegal, or deemed to be a nullity, or a *nudo pacto*, it has no civil obligation; because the law in such cases forbids its having any binding efficacy or force. It confers no legal right on the one party, and no corresponding legal duty on the other. There is no means allowed or recognized to enforce it; for the maxim is *ex nudo pacto non oritur actio*. But when it does not fall within the predicament of being either illegal or void, its obligatory force is coextensive with its stipulations."

Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude. "There are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds, and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts?" But the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs merely to the remedy may

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1 Story on Const. § 1380. Slave contracts, which were legal when made, are not rendered invalid by the abolition of slavery; nor can the States make them void by their constitutions, or deny remedies for their enforcement. White v. Hart, 13 Wall. 646; Osborn v. Nicholson, 13 Wall. 654; Jocoway v. Denton, 25 Ark. 641. An act of indemnity held not to relieve a sheriff from his obligation on his official bond to account for moneys which had been paid away under military compulsion. State v. Gatzweiler, 49 Mo. 17, 8 Am. Rep. 110. The settled judicial construction of a statute, so far as contract rights are thereunder acquired, is to be deemed a part of the statute itself, and enters into and becomes a part of the obligation of the contract; and no subsequent change in construction can be suffered to defeat or impair the contracts already entered into. Douglass v. Pike County, 101 U. S. 677, and cases cited. Lery v. Hitzche, 40 La. Ann. 500, 4 So. 472; [Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 20 Sup. Ct. Rep. 750.] But such construction is not "settled" by a single decision. McLane v. Melton, 24 S. C. 550. The same rule applies to the settled construction of a constitution. Louisiana v. Pillsbury, 105 U. S. 278. [An ordinance which in effect denies any contract obligation is not a law impairing the obligation of contract though the obligation does exist. The contract may still be enforced if found to exist notwithstanding such denial. St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 21 Sup. Ct. Rep. 575, aff. 78 Minn. 39, 80 N. W. 774, 877.]

2 Washington, J., in Odgen v. Saunders, 12 Wheat. 215, 250. As to the indirect modification of contracts by the operation of police laws, see ante, pp. 399, 400, notes; post, pp. 831-851.
be altered according to the will of the State, provided the alteration does not impair the obligation of the contract; and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.\(^2\)

**Changes in Remedies.** It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy.\(^3\)

"Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall

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1 Bronson v. Kinzie, 1 How. 311, 316, per Taney, Ch. J. [Whether impairing remedy impairs obligation of contract, see note to 25 L. ed. U. S. 132.]


direct. 1 To take a strong instance: although the law at the
time the contract is made permits the creditor to take the body
of his debtor in execution, there can be no doubt of the right to
abolish all laws for this purpose, leaving the creditor to his
remedy against property alone. "Confinement of the debtor
may be a punishment for not performing his contract, or may be
allowed as a means of inducing him to perform it. But the State
may refuse to inflict this punishment, or may withhold this means,
and leave the contract in full force. Imprisonment is no part of
the contract, and simply to release the prisoner does not impair
the obligation." 2 Nor is there any constitutional objection to

1 Sturges v. Crowninshield, 4 Wheat. 122, 200, per Marshall, Ch. J.; Ward v.
Farwell, 97 Ill. 693. A statute allowing the defence of want of consideration in a
sealed instrument previously given does not violate the obligation of contracts.
Williams v. Haines, 27 Iowa, 251. See further Persons v. Casey, 28 Iowa, 431;
Curtis v. Whitney, 13 Wall. 68; Cook v. Gregg, 46 N. Y. 439. Right accruing
under stipulation in a note to waive process and confess judgment may be taken
away. Worsham v. Stevens, 66 Tex. 80, 17 S. W. 404. A statutory judgment lien
may be taken away. Watson v. New York Central R. R. Co., 47 N. Y. 157;
Woodbury v. Grimes, 1 Col. 100. Contra, Gunn v. Barry, 16 Wall. 610. The law
may be so changed that a judgment lien shall not attach before a levy. Moore v.
Holland, 16 S. C. 15. It may be extended before it has expired. Ellis v.
Jones, 51 Mo. 180. The mode of perfecting a lien may be changed before it
has actually attached. Whitehead v. Latham, 83 N. C. 232. The value of a
mechanic's lien may not be materially affected by a statute making consummate
a previously inchoate right of dower. Buser v. Shepard, 107 Ind. 417, 8 N. E. 280.
The obligation of the contract is not impaired if a substantial remedy remains. Richmond v. Rich-
Edwards v. Kearzy, 96 U. S. 605; Bald-
win v. Newark, 38 N. J. 168; Augusta
Bank v. Augusta, 49 Me. 607; Thistle v.
Frostbury Coal Co., 10 Md. 129. It is
competent to provide by law that all
mortgages not recorded by a day speci-
fied shall be void. Vance v. Vance, 32
Ct. Rep. 854. See Gillilan v. Union
304; Gurne v. Speer, 68 Ga. 711.
Where the individual liability of offi-
cers or stockholders in a corporation is a
part of the contract itself, it cannot be
changed or abrogated as to existing debts.
Hawthorne v. Culef, 2 Wall. 10; Corning
v. McCullough, 1 N. Y. 47; Story v.
Furnum, 25 N. Y. 214; Norris v. Wren-
shall, 34 Md. 494; Brown v. Hitchcock,
36 Ohio St. 607; Providence Savings In-
stitute v. Skating Ring, 52 Mo. 462; St.
134. But where it is imposed as a pen-
alty for failure to perform some corpo-
rate or statutory duty, it stands on the
footing of all other penalties, and may
be revoked in the discretion of the legis-
lature. Union Iron Co. v. Pierce, 4 Biss.
327; Bay City, &c. Co. v. Austin, 21
Mich. 390; Breitung v. Lindauer, 37
Mich. 217; Gregory v. Denver Bank,
3 Col. 322. See Coffin v. Rich, 45 Me.
507; Weidenger v. Spruance, 101 Ill.
278. [Where formerly when building
subject to mechanic's lien stood upon
mortgaged premises, it had upon fore-
closure of lien to be sold and removed
from premises, provision may be made
by statute that the court when deeming
it to be for best interests of parties may
order land and building sold at the same
time, giving mortgage priority of claim
upon proceeds of land and lienor priority
upon those of buildings. Red Riv. V. Nat.
Rep. 703.]
such a modification of those laws which exempt certain portions of a debtor's property from execution as shall increase the exemptions to any such extent as shall not take away or substantially impair the remedy, nor to the modifications being made applicable to contracts previously entered into. The State "may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing-apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community."  

But a homestead exemption law, where none existed before, cannot be applied to contracts entered into before its enactment; and in several recent cases the authority to increase exemptions and make them applicable to existing contracts has been altogether denied, on the ground that, while professably

[29; Penniman's Case, 103 U. S. 714; Sommers v. Johnson, 4 Vt. 278, 24 Am. Dec. 694; Ware v. Miller, 9 S. C. 13; Bronson v. Newberry, 2 Doug. (Mich.) 33; Maxey v. Loyal, 38 Ga. 631. A special act admitting a party imprisoned on a judgment for tort to take the poor debtor's oath was sustained in Matter of Nichols, 8 R. I. 50. In Alabama, where imprisonment for fraud is not permitted, a law making receipt of deposits by an insolvent banker a crime was held invalid. Carr v. State, 106 Ala. 35, 34 L. R. A. 931, 54 Am. St. 17, 17 So. 350; see note to this case in L. R. A. upon constitutionality of imprisonment for debt. Guest who defrauds inn-keeper may be imprisoned. State v. Yardley, 96 Tenn. 516, 32 S. W. 481, 34 L. R. A. 650.]

2 Gunn v. Barry, 15 Wall. 610; Edward v. Kearney, 66 U. S. 506; Homestead Cases, 22 Gratt. 206; Lessley v. Phipps, 49 Miss. 769; Foster v. Byrne, 76 Iowa, 293, 35 N. W. 513, 41 N. W. 22; Squire v. Mugford, 61 N. H. 149. It may, however, be made applicable to previous rights of action for torts. Parker v. Savage, 6 Lea, 406; McAfee v. Covington, 71 Ga. 272. [Statute providing that general assignment for benefit of creditors shall dissolve all attachments made within ten days prior thereto, is invalid as applied to contracts made when right of attachment was absolute. Peninsular Lead & C. Wks. v. Union Oil & P. Co., 109 Wis. 488, 76 N. W. 359, 42 L. R. A. 331, 69 Am. St. 984.]

operating upon the remedy only, they in effect impair the obligation of the contract. 1

And laws which change the rules of evidence relate to the remedy only; and while, as we have elsewhere shown, such laws may, on general principles, be applied to existing causes of action, so, too, it is plain that they are not precluded from such application by the constitutional clause we are considering. 2 And it has been held that the legislature may even take away a common-law remedy altogether, without substituting any in its place, if another and efficient remedy remains. Thus, a law abolishing distress for rent has been sustained as applicable to leases in force at its passage; 3 and it was also held that an express stipulation in the lease, that the lessor should have this remedy, would not prevent the legislature from abolishing it, because this was a subject concerning which it was not competent for the parties to contract in such manner as to bind the hands of the State. In the language of the court: "If this is a subject on which parties can contract, and if their contracts when made become by virtue of the Constitution of the United States superior to the power of the legislature, then it follows that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated, if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the Constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious. Every such stipulation is in its

Harris v. Austell, 2 Bax. 148; Wright v. Straub, 64 Tex. 64; Cochran v. Miller, 74 Ala. 50; Colm v. Hoffman, 45 Ark. 376. [Re Estate of Heilbron, 14 Wash. 536, 46 Pac. 153, 35 L. R. A. 602. See also Canadian & A. M. & Trust Co. v. Blake, 21 Wash. 102, 65 Pac. 1100.]

1 "Statutes pertaining to the remedy are merely such as relate to the course and form of proceedings, but do not affect the substance of a judgment when pronounced." Per Merrick, Ch. J., in Morton v. Valentine, 15 La. Ann. 150. See Watson v. N. Y. Central R. R. Co., 47 N. Y. 157; Edwards v. Kearsey, 95 U. S. 595. But if after the debt is contracted and before judgment upon it, the debtor marries, it is held in Tennessee that he is thereby entitled to the exemption in land owned by him before. Dye v. Cook, 88 Tenn. 276, 12 S. W. 631.

2 Neas v. Mercer, 15 Barb. 318; Rich v. Flanders, 39 N. H. 304; Howard v. Moot, 61 N. Y. 292; Henry v. Henry, 31 S. C. 1, 9 S. E. 720; post, pp. 633-537. On this subject see the discussions in the federal courts. Sturges v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 218; Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; Curtis v. Whitney, 13 Wall. 68. An act declaring that no policy of life insurance shall be received in evidence, when the application is referred to it, unless a copy thereof is attached to it, is valid. New Era Life Ass. v. Musser, 120 Pa. St. 384, 14 Atl. 155. But the rule that failure to register evidences of titles shall not render them inadmissible in evidence, cannot be changed by a new constitution. This is put on the ground that the only means to establish and enforce the contract would be thus destroyed. Texas Mex. Ry. Co. v. Locke, 74 Tex. 370, 12 S. W. 80.

3 Van Rensselaer v. Snyder, 9 Barb. 302, and 13 N. Y. 299; Guild v. Rogers, 8 Barb. 602; Conkey v. Hart, 14 N. Y. 22.
own nature conditional upon the lawful continuance of the process. The State is no party to their contract. It is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the supreme power to prescribe; and their continuance is not the subject of contract between private parties. In truth, it is not at all probable that the parties made their agreement with reference to the possible abolition of distress for rent. The first clause of this special provision is, that the lessor may distrain, sue, re-enter, or resort to any other legal remedy, and the second is, that in cases of distress the lessee waive the exemption of certain property from the process, which by law was exempted. This waiver of exemption was undoubtedly the substantial thing which the parties had in view; but yet perhaps their language cannot be confined to this object, and it may therefore be proper to consider the contract as if it had been their clear purpose to preserve their legal remedy, even if the legislature should think fit to abolish it. In that aspect of it the contract was a subject over which they had no control."1

But a law which deprives a party of all legal remedy must necessarily be void. "If the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the Constitution."2 This has been held in regard to those cases in which it was sought to deprive certain classes of persons of the right to maintain suits because of their having participated in rebellion against the gov-

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2 Call v. Haggler, 8 Mass. 439. See Osborn v. Nicholson, 13 Wall. 692; U. S. v. Conway, Hempst. 318; Johnson v. Bond, Hempst. 533; West v. Sansom, 44 Ga. 295. See Griffin v. Wilcox, 21 Ind. 370; Penrose v. Erie Canal Co., 56 Pa. St. 46; Thompson v. Commonwealth, 51 Pa. St. 314; post, p. 517. An act withdrawing all the property of a debtor from the operation of legal process, leaving only a barren right to sue, is void. State v. Bank of South Carolina, 1 S. C. 63. As the States are not liable except at their own option, the laws which they may pass for the purpose they may repeal at discretion. Railroad Co. v. Tennessee, 101 U. S. 337; Railroad Co. v. Alabama, 101 U. S. 832; State v. Bank, 3 Bax. 395; and this even after suit has been instituted. Horne v. State, 84 N. C. 392; Railroad Co. v. Tennessee, supra.

[The more so where the judgment of the court is only recommendatory. Baltzer v. North Carolina, 161 U. S. 240, 16 Sup. Ct. Rep. 600.]
ernment. And where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void, because a substantial denial of right. But a judgment for a tort is not a contract, since it is not based upon the assent of parties.

It has also been held where a statute dividing a town and incorporating a new one enacted that the new town should pay its proportion towards the support of paupers then constituting a charge against the old town, that a subsequent statute exonerating the new town from this liability was void, as impairing the contract created by the first-mentioned statute; but there are cases which have reached a different conclusion, reasoning from the general and almost unlimited control which the State retains over its municipalities. In any case the lawful repeal of a statute cannot constitutionally be made to destroy contracts which have been entered into under it; these being legal when made, they remain valid notwithstanding the repeal.

1 Rison v. Farr, 24 Ark. 611; McFarland v. Butler, 8 Minn. 116; Jackson v. Butler, 8 Minn. 117. But there is nothing to preclude the people of a State, in an amendment to their constitution, taking away rights of action, or other rights, so long as they abstain from impairing the obligation of contracts, and from imposing punishments. The power to do so has been exercised with a view to the quieting of controversies and the restoration of domestic peace after the late civil war. Thus, in Missouri and some other States, all rights of action for anything done by the State or Federal military authorities during the war were taken away by constitutional provision; and the authority to do this was fully supported. Drehn v. Strife, 41 Mo. 164, in error, 8 Wall. 595. And see Hess v. Johnson, 3 W. Va. 646. A remedy also may be denied to a party until he has performed his duty to the State in respect to the demand in suit; e.g. paid the tax upon the debt sued for. Walker v. Whitehead, 43 Ga. 538; Garrett v. Cordell, 43 Ga. 360; Welborn v. Akin, 44 Ga. 420. But this is denied as regards contracts entered into before the passage of the law. Walker v. Whitehead, 16 Wall. 814.

2 Oatman v. Bond, 16 Wis. 20. As to control of remedies, see post, p. 615.


4 Bowdoinham v. Richmond, 6 Me. 112.

5 See ante, pp. 268, 269, and cases cited in notes.

So where, by its terms, a contract provides for the payment of money by one party to another, and, by the law then in force, property would be liable to be seized, and sold on execution to the highest bidder, to satisfy any judgment recovered on such contract, a subsequent law, forbidding property from being sold on execution for less than two-thirds the valuation made by appraisers, pursuant to the directions contained in the law, though proceeding to act only on the remedy, amounts to a denial or obstruction of the rights accruing by the contract, and is directly obnoxious to the prohibition of the Constitution.\(^1\) So a law which takes away from mortgagees the right to possession under their mortgages until after foreclosure, is void, because depriving them of the right to the rents and profits, which was a valuable portion of the right secured by the contract. "By this act the mortgagee is required to incur the additional expense of a foreclosure, before obtaining possession, and is deprived of the right to add to his security, by the perception of the rents and profits of the premises, during the time required to accomplish this and the time of redemption, and during that time the rents and profits are given to another, who may or may not appropriate them to the payment of the debt, as he chooses, and the mortgagee in the mean time is subjected to the risk, often considerable, of the depreciation in the value of the security."\(^2\) So a law is void which extends the

\(^1\) McCracken v. Hayward, 2 How. 608; Willard v. Longstreet, 2 Doug. (Mich.) 172; Rawley v. Hooker, 21 Ind. 144. So a law which, as to existing mortgages foreclosureable by sale, prohibits the sale for less than half the appraised value of the land, is void for the same reason. Gantly's case, see Ewing, 3 How. 707; Bronson v. Kinzie, 1 Nev. 311. See to like effect, Robards v. Brown, 40 Ark. 423; Collins v. Collins, 79 Ky. 88. So one which takes away the power of sale. O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458. And a law authorizing property to be turned out in satisfaction of a contract is void. Abercrombie v. Baxter, 41 Ga. 36. The "scaling laws," so called, under which contracts made while Confederate notes were the only currency, are allowed to be satisfied on payment of a sum equal to what the sum called for by them in Confederate notes was worth when they were made, have been sustained, but this is on the assumption that the contracts are enforced as near as possible according to the actual intent. Harmon v. Wallace, 2 S. C. 208; Robeson v. Brown, 63 N. C. 554; Hilliard v. Moore, 65 N. C. 540; Pharis v. Dice, 21 Gratt. 303; Thornton v. Smith, 8 Wall. 1. A statute is bad which permits in such case a recovery of what a jury may think is the fair value of the property sold. Eflinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. Rep. 170.

\(^2\) Mundy v. Monroe, 1 Mich. 68, 78; Blackwood v. Vanvellet, 11 Mich. 252. Compare Dikeman v. Pilkeman, 11 Paige, 484; James v. Stull, 9 Barb. 482; Cook v. Gray, 2 Houst. 455. In the last case it was held that a statute shortening the notice to be given on foreclosure of a mortgage under the power of sale, from twenty-four to twelve weeks, was valid as affecting the remedy only; and that a stipulation in a mortgage that on default being made in payment the mortgagee might sell "according to law," meant according to the law as it should be when sale was made. But see Ashuelot R. R. Co. v. Eliot, 62 N. H. 387, and what is said on the general subject in Cochran v. Darcy, 5 Rich. 125. A redemption law cannot take from the mortgagee the right
time for the redemption of lands sold on execution, or for delinquent taxes, after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is, that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note. 1 So a law which shortens the time for redemption from a mortgage, after a foreclosure sale has taken place, is void; the rights of the party being fixed by the foreclosure and the law then in force, and the mortgagee being entitled, under the law, to possession of the land until the time for redemption expires. 2 And where by statute a

to recover rents from the owner in possession after foreclosure sale. Travellers Ins. Co. v. Brouse, 83 Ind. 62. But the debtor’s tenant in possession may be made primarily liable to the mortgagee instead of to the debtor. Edwards v. Johnson, 105 Ind. 594, 5 N. E. 716. In Bertheul v. Fox, 13 Minn. 601, it was decided that in the case of a mortgage given while the law allowed the mortgagee possession during the period allowed for redemption after foreclosure, such law might be so changed as to take away this right. But this seems doubtful. In Baldwin v. Flagg, 43 N. J. 495, it was held that bond and mortgage had been given, it was not competent to provide by subsequent legislation that the mortgage should be first foreclosed, and resort to the bond only had in case of deficiency. Nor that the foreclosure sale should be opened if a judgment is had upon the bond. Coddington v. Bipham, 26 N. J. Eq. 574. See Morris v. Carter, 46 N. J. L. 200; Toffey v. Atcheson, 42 N. J. Eq. 182, 6 Atl. 885. A stipulation in a chattel mortgage that the mortgagee may take possession whenever he deems himself insecure, is not to be impaired by subsequent legislation forbidding him to do so without just cause. Boice v. Boice, 27 Minn. 371, 7 N. W. 587. Reducing the rate of interest payable on redemption to the foreclosure purchaser violates no contract with the mortgagee. Conn. Mut. Ins. Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. Rep. 236.

1 Robinson v. Howe, 13 Wis. 341; Dike- man v. Dikeman, 11 Paige, 384; Goenen v. Schroeder, 8 Minn. 357; January v. January, 7 T. B. Monr. 542, 18 Am. Dec. 211; Greenfield v. Dorris, 1 Sneed, 550. [Barnitz v. Beverly, 163 U. S. 118, 10 Sup. Ct. Rep. 1042, rev. 55 Kan. 400, 42 Pac. 725, 81 L. R. A. 74.] But see Stone v. Basset, 4 Minn. 293; Heyward v. Judd, 4 Minn. 483; Freeborn v. Pettibone, 5 Minn. 277; Davis v. Rupe, 114 Ind. 558, 17 N. E. 163. A provision that the right to redeem from a pre-existing mortgage shall not expire if a creditor of the mortgagee comes into equity and gets a decree to enable him to fulfill the conditions of the mortgage and hold the property, is void as against the mortgagee. Phinney v. Phinney, 81 Me. 450. So, on the other hand, a law is void which takes away an existing right of a creditor of the mortgagee to redeem from the sale. O’Brien v. Krenz, 39 Minn. 136, 30 N. W. 458.

2 Cargill v. Power, 1 Mich. 369. The contrary ruling was made in Butler v. Palmier, 1 Illil, 824, by analogy to the Statute of Limitations. The statute, it was said, was no more in effect than saying: “Unless you redeem within the shorter time prescribed, you shall have no action for a recovery of the land, nor shall your defense against an action be allowed, provided you get possession.” And in Robinson v. Howe, 13 Wis. 341, 346, the court, speaking of a similar right in a party, say: “So far as his right of redemption was concerned, it was not derived from any contract, but was given by the law only; and the time within which he might exercise it might be shortened by the legislature, provided a reasonable time was left in which to exercise it, without impairing the obligation of any contract. And see Smith v. Pack-
purchaser of lands from the State had the right, upon the forfeiture of his contract of purchase for the non-payment of the sum due upon it, to revive it at any time before a public sale of the lands, by the payment of all sums due upon the contract, with a penalty of five per cent, it was held that this right could not be taken away by a subsequent change in the law which subjected the forfeited lands to private entry and sale.\(^1\) And a statute which authorizes stay of execution, for an unreasonable or indefinite period, on judgments rendered on pre-existing contracts, is void, as postponing payment, and taking away all remedy during the continuance of the stay.\(^2\) And a law is void on this ground which declares a forfeiture of the charter of a corporation for acts or omissions which constituted no cause of forfeiture at the time they occurred.\(^3\) And it has been held that where a statute au-

1 State v. Commissioners of School and University Lands, 4 Wis. 414. A right to reimbursement if a tax purchase is set aside cannot by subsequent legislation be taken away from the purchaser of a tax title. State v. Foley, 39 Minn. 356, 15 N. W. 375.

2 Chadwick v. Moore, 8 W. & S. 49; Dunn v. Gorgas, 41 Pa. St. 441; Townsend v. Townsend, Peck, 1, 14 Am. Dec. 722; Stevens v. Andrews, 31 Mo. 255. Hasbrouck v. Shipman, 16 Wis. 206; Jacobs v. Smallwood, 63 N. C. 112; Webster v. Rose, 0 Heisk. 93; Edwards v. Kearnzy, 96 U. S. 695. In Breitenbach v. Bush, 44 Pa. St. 313, and Cox v. Martin, 44 Pa. St. 322, it was held that an act staying all civil process against volunteers who had enlisted in the national service for three years or during the war was valid,—"during the war" being construed to mean unless the war should sooner terminate. See also State v. Carrew, 13 Rich. 498. A general law that all suits pending should be continued until peace between the Confederate States and the United States, was held void in Burt v. Williams, 24 Ark. 94. See also Taylor v. Sterne, 18 Grant. 244; Hudspeth v. Davis, 41 Ala. 380; Aycock v. Martin, 37 Ga. 124; Coffman v. Bank of Kentucky, 49 Miss. 29; Jacobs v. Smallwood, 63 N. C. 112; Cutts v. Hardlee, 38 Ga. 390; Sequestration Cases, 30 Tex. 688. A law permitting a year's stay upon judgments where security is given was held valid in Farnsworth v. Vance, 2 Cold. 108; but this decision was overruled in Webster v. Rose, 6 Heisk. 93, 19 Am. Rep. 683. A statute was held void which stayed all proceedings against volunteers who had enlisted "during the war," this period being indefinite. Clark v. Martin, 3 Grant's Cas. 393. In Johnson v. Higgins, 3 Met. (Ky.) 506, it was held that the act of the Kentucky legislature of May 24, 1861, which forbade the rendition in all the courts of the State, of any judgment from date till January 1st, 1862, was valid. It related, it was said, not to the remedy for enforcing a contract, but to the courts which administer the remedy; and those courts, in a legal sense, constitute no part of the remedy. A law exempting soldiers from civil process until thirty days after their discharge from military service was held valid as to all contracts subsequently entered into, in Burns v. Crawford, 31 Mo. 330. And see McCormick v. Rusch, 15 Iowa, 127. A statute suspending limitation laws during the existence of civil war, and until the State was restored to her proper relations to the Union, was sustained in Bender v. Crawford, 33 Tex. 746. Compare Bradford v. Shine, 13 Fla. 393.

authorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, and persons bought and paid value for bonds issued accordingly, this power of taxation is part of the contract, and cannot be withdrawn until the bonds are satisfied; that an attempt to repeal or restrict it by statute is void; and that unless the corporation imposes and collects the tax in all respects as if the subsequent statute had not been passed, it will be compelled to do so by *mandamus*.

And it has also been held that a statute repealing a former statute, which made the stock of stockholders in a corporation liable for its debts, was, in respect to creditors existing at the time of the repeal, a law impairing the obligation of contracts. In each of these cases it is evident that substantial rights were affected; and so far as the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was assured to him by the law in force when the contract was made. In Pennsylvania it has been held that a statute authorizing a stay of execution on contracts in which the debtor had waived the right was unconstitutional; but it seems to us that an agreement to waive a legal privilege which the law gives as a matter of State policy cannot be binding upon a party, unless the law itself provides for the waiver.

Where, however, by the operation of existing laws, a contract cannot be enforced without some new action of a party to fix his liability, it is as competent to prescribe by statute the requisites to the legal validity of such action as it would be in any case to prescribe the legal requisites of a contract to be thereafter made. Thus, though a verbal promise is sufficient to revive a debt barred by the Statute of Limitations or by bankruptcy, yet this rule may be changed by a statute making all such future promises void un-


2 Haughton v. Calef, 2 Wall. 10. [Upon individual liability of stockholders for debts of corporation, see note to 40 L. ed. U. S. 751.]


4 See Conkly v. Hart, 14 N. Y. 22; Handy v. Chatfield, 23 Wend. 35.
less in writing. It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it. And for similar reasons the obligation of contracts is not impaired by continuing the charter of a corporation for a certain period, in order to the proper closing of its business.

**State Insolvent Laws.** In this connection some notice may seem requisite of the power of the States to pass insolvent laws, and the classes of contracts to which they may be made to apply. As this whole subject has been gone over very often and very fully by the Supreme Court of the United States, and the important questions seem at last to be finally set at rest, and moreover as it is comparatively unimportant whenever a federal bankrupt law exists, we content ourselves with giving what we understand to be the conclusions of the court.

1. The several States have power to legislate on the subject of bankrupt and insolvent laws, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy, which authority, when exercised, is paramount, and State enactments in conflict with those of Congress upon the subject must give way.

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1 Joy v. Thompson, 1 Doug. (Mich.) 373; Kingley v. Cousins, 47 Me. 91.
2 As where the defence of usury to a contract is taken away by statute, Welsh v. Walkworth, 20 Conn. 143; Curtis v. Lenovit, 15 N. Y. 9. And see Wood v. Kennedy, 19 Ind. 68, and the cases cited, post, pp. 535-537. [But the validation, of an invalid contract cannot be made to relate back so as to take precedence of a lien which attached after the invalid contract was created, but before it was validated. Merchants' Bank of Danville v. Ballou, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 390.]

3 Foster v. Essex Bank, 16 Mass. 245. [Upon the protection of contracts by the constitution, see article in 36 Am. L. Rev. 70.]

(a) ["After an adjudication in bankruptcy, an action in replevin in a State court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun;" and if under such attempted action in replevin, any such property is seized, "the district court sitting in bankruptcy" has "jurisdiction by summary proceedings to compel the return of the property seized." Per Gray, J., in White v. Schoeb, 178 U. S. 542, 20 Sup. Ct. Rep. 1007. Bankruptcy law merely suspends State insolveney laws, so that when it is repealed they revive. Butler v. Gorely, 116]
2. Such State laws, however, discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debts, cannot constitutionally be made to apply to contracts entered into before they were passed, but they may be made applicable to such future contracts as can be considered as having been made in reference to them.\(^1\)

3. Contracts made within a State where an insolvent law exists, between citizens of that State, are to be considered as made in reference to the law, and are subject to its provisions. But the law cannot apply to a contract made in one State between a citizen thereof and a citizen of another State,\(^2\) nor to contracts not made within the State, even though made between citizens of the same State, except, perhaps, where they are citizens of the State passing the law.\(^3\) And where the contract is made between a citizen of one State and a citizen of another, the circumstance that the contract is made payable in the State where the insolvent law exists will not render such contract subject to be discharged under the law.\(^4\) If, however, the creditor in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the Constitution from the reach of the law.\(^5\)

The New Amendments to the Federal Constitution. New provisions for personal liberty, and for the protection of the right to life, liberty, and property, are made by the thirteenth and fourteenth amendments to the Constitution of the United States; and

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\(^3\) McMillan v. McNeill, 4 Wheat. 209.

\(^4\) Marsh v. Putnam, 3 Gray, 551.

\(^5\) Baldwin v. Hale, 1 Wall. 223; Baldwin v. Bank of Newbury, 1 Wall. 224; Gilman v. Lockwood, 4 Wall. 400. See also Norris v. Atkinson, 64 N. H. 87, 5 Atl. 710.

\(^6\) Clay v. Smith, 3 Pet. 411; Baldwin v. Hale, 1 Wall. 223; Gilman v. Lockwood, 4 Wall. 409; Perley v. Mason, 64 N. H. 6, 3 Atl. 629.

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U. S. 303, 13 Sup. Ct. Rep. 84, aff. 147 Mass. 8, 10 N. E. 734. And upon effect of removal of a Federal bar to operation of a State statute, see Blair v. Ostrander, 109 Iowa, 204, 80 N. W. 370, 47 L. R. A. 469. That supersession of State insolvency law may be only partial, see State v. Superior Court for King Co., 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, and upon relation of bankruptcy law to State laws upon insolvency and assignments, see note to this case in L. R. A.}
these will be referred to in the two succeeding chapters. The most important clause in the fourteenth amendment is that part of section one which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. This provision very properly puts an end to any question of the title of the freedmen and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions; though, as a principle of State constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in that court on appeal.

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1 See ante, pp. 14–17; post, pp. 423, 607.

2 The complete text of this section is as follows: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3 See ante, pp. 24–36. Notwithstanding this section, the protection of all citizens in their privileges and immunities, and in their right to an impartial administration of the laws, is just as much the business of the individual State as it was before. This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall "abridge the privileges or immunities of citizens of the United States," or "deprive any person of life, liberty, or property without due process of law," or "deny to any person within its jurisdiction the equal protection of the laws;" and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual. This amendment has received a very full examination at the hands of the Supreme Court of the United States in the Slaughter-House Case, 16 Wall. 36, and in United States v. Cruikshank, 92 U. S. 542, with the conclusion above stated. See Story on Const. (4th ed.) App. to Vol. II.