CHAPTER XI.

OF THE PROTECTION TO PROPERTY BY "THE LAW OF THE LAND."

The protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the twenty-ninth chapter of Magna Charta, "which alone," says Sir William Blackstone, "would have merited the title that it bears of the Great Charter." ¹ The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of the State constitutions;² and though verbal differences

¹ 4 Bl. Com. 424. The chapter, as it stood in the original charter of John, was: "Ne corpus liberii hominis capiatur nec imprisonetur nec disceisiatur nec utulgetur nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per judicium parium suorum, vel per legem terrae." No freeman shall be taken or imprisoned or disceised or outlawed or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land. In the charter of Henry III. it was varied slightly, as follows: "Nullus liber homo capiatur vel imprisonetur, aut disceisiatur de libero tenemento suo vel libertatis vel liberis consuetudinibus suis, aut utulgetur aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae." See Blackstone's Charters. The Petition of Right — 1 Car. I. c. 1 — prayed, among other things, "that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent, by act of Parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command, without any charge." The Bill of Rights — 1 Wm. and Mary, § 2, c. 2 — was confined to an enumeration and condemnation of the illegal acts of the preceding reign; but the Great Charter of Henry III. was then, and is still, in force.

² The following are the constitutional provisions in the several States:

Alabama: "That, in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, or be deprived of his life, liberty, or property, but by due course of law." Art. 1, § 7.— Arkansas: "That no person shall . . . be deprived of his life, liberty, or property, without due process of law." Art. 1, § 9.— California: Similar to that of Alabama. Art. 1, § 8.— Connecticut:
appear in the several provisions, no change in language, it is thought, has in any case been made with a view to essential

Same as Alabama. Art. 1, § 9. — Delaware: Like that of Alabama, substituting for "course of law," "the judgment of his peers, or the law of the land." Art. 1, § 7. — Florida: Similar to that of Alabama. Art. 1, § 9. — Georgia: "No person shall be deprived of life, liberty, or property, except by due process of law." Art. 1, § 3. — Illinois: "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1, § 2. — Colorado: The same. Art. 1, § 25. — Iowa: The same. Art. 1, § 9. — Kentucky: "Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." Art. 13, § 12. — Maine: "Nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers, or by the law of the land." Art. 1, § 6. — Maryland: "That no man ought to be taken or imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, § 23. — Massachusetts: "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, Art. 12. — Michigan: "No person shall ... be deprived of life, liberty, or property, without due process of law." Art. 6, § 32. — Minnesota: Like that of Michigan. Art. 1, § 7. — Mississippi: The same. Art. 1, § 2. — Missouri: Same as Delaware. Art. 1, § 18. — Nevada: "Nor be deprived of life, liberty, or property, without due process of law." Art. 1, § 8. — New Hampshire: Same as Massachusetts Bill of Rights, Art. 15. — New York: Same as Nevada. Art. 1, § 6. — North Carolina: "That no person ought to be taken, imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his liberty, liberty, or property, by the law of the land." Declaration of Rights, § 17. — Pennsylvania: Like Delaware. Art. 1, § 9. — Rhode Island: Like Delaware. Art. 1, § 10. — South Carolina: Like that of Massachusetts, substituting "person" for "subject." Art. 1, § 14. — Tennessee: "That no man shall be taken or imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 1, § 8. — Texas: "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Art. 1, § 16. — West Virginia: "No person, in time of peace, shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 6. Under each of the remaining constitutions, equivalent protection to that which these provisions give is believed to be afforded by fundamental principles recognized and enforced by the courts. [A corporation is within the term "person" and "man" as used in the various constitutional provisions as to "Law of the Land" and "Due Process." Knoxville & Ohio Ry. Co. v. Harris, 90 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 333. A corporation is not, however, a "citizen" within the meaning of that term as used in section 2 of article 4, of the federal constitution, nor within the meaning of that term as used in section 1 of article 14 of the amendments referring to privileges and immunities of citizens of the several States, and of the United States respectively. Hawley v. Hurd, 72 Vt. 122, 47 Atl. 401, 82 Am. St. 922; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281. "Property" within the meaning of the term as used in the federal constitution involves the right to acquire and dispose of the subject of the right. Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S. W. 956, 76 Am. St. 683. "Liberty" in the constitutional sense involves the right to use one's faculties in all lawful ways, to live and work where he chooses, to pursue any lawful calling, vocation, trade, or profession, and to enjoy the
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change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process [or course] of law" is sometimes used, sometimes "the law of the land," and in some cases both; but the meaning is the same in every case.1 And, by the fourteenth amendment, the guaranty is now incorporated in the Constitution of the United States.2

If now we shall ascertain the sense in which the phrases "due process of law" and "the law of the land" are employed in the several constitutional provisions which we have referred to, when the protection of rights in property is had in view, we shall be able, perhaps, to indicate the rule, by which the proper conclusion may be reached in those cases in which legislative action is objected to, as not being "the law of the land;" or judicial or ministerial action is contested as not being "due process of law," within the meaning of these terms as the Constitution employs them.

If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."3


2 See ante, p. 15.

3 Dartmouth College v. Woodward, 4 Wheat. 610; Works of Webster, Vol. V.
The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" 1

When the law

p. 487. And he proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely ineffectual and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. There would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

1 Per Bronson, J., in Taylor v. Porter, 4 Hill, 140, 145. See also Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430; Ervine's Appeal, 10 Pa. St. 256; Arrowsmith v. Burlingin, 4 McLean, 489; Lane v. Dorman, 4 Ill., 238; Reed v. Wright, 2 Greene (Iowa), 15; Woodcock v. Bennett, 1 Cow. 711; Kinney v. Beverley, 2 H. & M. 530; Commonwealth v. Byrne, 20 Grant. 185; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559. "Those terms, 'law of the land,' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, dispossessed of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life, without crime? Yet all this he may suffer if an act of the assembly simply denouncing those penalties upon particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution; for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and divesting the rights of property, it has been repeatedly held in this State, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for these purposes." Hoke v. Henderson, 4 Dev. 15, 23 Am. Dec. 677. In Bank of Michigan v. Williams, 5 Wend. 478, 488, Mr. Justice Sutherland says, vested rights "are protected under general principles of paramount, and, in this country, of universal authority." Mr. Broom says: "It is indeed an essential principle of the law of England, 'that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no
of the land is spoken of, "undoubtedly a pre-existing rule of conduct" is intended, "not an ex post facto rescript or decree made for the occasion. The design" is "to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute." There are nevertheless many cases in which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called; and in preceding pages it has been shown that special legislative acts designed to accomplish the like end, are allowable in some cases. The necessity for "general rules," therefore, is not such as to preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in court.

On the other hand, we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land. Mr. Justice Edwards has said in one case: "Due process of law undoubtedly means, in the due course of legal proceedings, accord-

more industry, no more justice, no more valor; for who will labor? who will hazard his person in the day of battle for that which is not his own? The Banker's Case, by Turner, 10. And therefore our customary law is not more solicitous about anything than 'to preserve the property of the subject from the invasion of the prerogative.' Ibid." Broom's Const. Law, 228.

1 Gilson, Ch. J., in Norman v. Heist, 5 W. & S. 171, 173. There is no power which can authorize the dispossession by force of an owner whose property has been sold for taxes, without giving him opportunity for trial. Calhoun v. Fletcher, 63 Ala. 574.

2 See Wycheamer v. People, 13 N. Y. 378, 432, per Selden, J. In James v. Reynolds, 2 Tex. 250, Chief Justice Hemphill says: "The terms 'law of the land' ... are now, in their most usual acceptance, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." And see Vanzant v. Waddell, 2 Yerg. 290, per Peck, J.; Hard v. Nearing, 44 Barb. 472. Nevertheless there are many cases, as we have shown, ante, pp. 140, 152, in which private laws may be passed in entire accord with the general public rules which govern the State; and we shall refer to more cases further on.
ing to those rules and forms which have been established for the protection of private rights. 1 And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following, from an opinion by Mr. Justice Johnson of the Supreme Court of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." 2

The principles, then, upon which the process is based are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen. 3 When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have


2 Bank of Columbia v. Okely, 4 Wheat. 235, 244. "What is meant by 'the law of the land'? In this State, taking as our guide Zylstra's Case, 1 Bay, 382; White v. Kendrick, 1 Bre. 469; State v. Coleman & Maxey, 1 McMull. 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to be considered amenable for all time to come." Per O'Neill, J., in State v. Simons, 2 Speers, 701, 707. See, also, State v. Doherty, 60 Me. 503. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied, and which protected private rights, were not departed from.

become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession;"¹ but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.²

¹ Vanzant v. Waddell, 2 Yerg. 260; Lenz v. Charlton, 23 Wis. 478; Pennoyer v. Neff, 96 U. S. 714.
² See Wyeth v. People, 15 N. Y. 378, 432, per Selden, J.; Kailoch v. Superior Court, 56 Cal. 229; Baltimore v. Scharf, 54 Md. 499. In State v. Allen, 2 McCord, 50, the court, in speaking of process for the collection of taxes, says: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" To the same effect are In re Hackett, 53 Vt. 354; Weimer v. Bunbury, 30 Mich. 201. And see Hard v. Nearing, 44 Barb. 472; New Orleans v. Cannon, 10 La. Ann. 784; McCarroll v. Weeks, 5 Hayw. 246; Sears v. Cottrell, 5 Mich. 250; Gibson v. Mason, 6 Nev. 283. The fourteenth amendment has not enlarged the meaning of the words "due process of law." Whatever was such in a State before that amendment, is so still. Hence, a statute is good which allows execution on judgments against a town to be levied on the goods of individual inhabitants. Eames v. Savage, 77 Me. 212. Taking property under the taxing power is due process of law. Davidson v. New Orleans, 96 U. S. 97; Kelly v. Pittsburgh, 104 U. S. 78; High v. Shoemaker, 22 Cal. 363. [Weyerhaeuser v. Minnesota, 176 U. S. 550, 20 Sup. Ct. Rep. 485. Upon sufficiency of opportunity for hearing upon assessment, see Pittsburgh C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 10 Sup. Ct. Rep. 90.] See, also, Cruikshanks v. Charleston, 1 McCord, 390; State v. Mayhew, 2 Gill, 487; Harper v. Commissioners, 23 Ga. 556; Myers v. Park, 8 Heisk. 550. So is the seizure and sale under proceedings prescribed by law, of stray beasts. Knoxville v. King, 7 Lc. 411; Hamlin v. Mack, 33 Mich. 103; Stewart v. Hunter, 16 Oreg. 92, 16 Pac. 576. That the owner should have notice of the sale, see Varden v. Mount, 78 Ky. 86. [A collateral-inheritance tax-law which makes no provision for notice to heirs, legatees, and devisees, and affords no opportunity for them to be heard in the matter of appraisal, is void. Ferry v. Campbell, 110 Iowa. 290, 81 N. W. 604, 60 L. R. A. 92.] An act allowing an agent of a humane society to condemn and kill an animal and fix its value conclusively without notice is not due process of law. King v. Hayes, 80 Me. 206, 13 Atl. 852. But a health officer may be empowered to kill a diseased beast, if the owner may afterwards contest the existence of conditions which made the beast a nuisance, and obtain redress, if such conditions are not shown to have existed. Newark & S. O. Co. v. Hunt, 50 N. J. L. 308, 12 Atl. 697. [Where such officer seizes and kills healthy animals, the owner does not thereby acquire any claim against the State.] Houston v. State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.] It is
Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department in every instance must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action. Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions divesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment. 1 The purpose must be public, and must have

no violation of this principle to exclude from the State debauched women who are being imported for improper purposes. Matter of Ah Fook, 49 Cal. 403. [Upon what constitutes "due process of law," see valuable notes to 42 L. ed. U. S. 865, and 24 L. ed. U. S. 439, and see cases cited in note 1, page 505, ante. Issuance and record of writ of error in court of first instance may be made sufficient notice to adverse party that suit is to be continued in the higher court. State v. Canfield, 40 Fla. 32, 23 So. 591, 42 L. R. A. 72. Expulsion from benevolent society under proper by-laws is, though it deprives of property rights. Moore v. Natl. Com. of K. & L. of S.,—Kan.—, 70 Pac. 352.] 1 Lebanon Sch. Dist. v. Female Sem., 12 Atl. 887 (Pa.); People v. O'Brien, 111 N. Y. 1, 18 N. E. 692. The latter case is with reference to the transfer to a receiver of the assets of a dissolved corporation. It is not competent to provide that the claimant or purchaser of property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer, and confined to his action on the bond as his only remedy. Foule v. Mann, 53 Iowa, 42, 3 N. W. 814; Sunberg v. Babcock, 61 Iowa, 601, 16 N. W. 716. See, also, Elders v. Stoeckle, 37 Mich. 291. Contra, Hein v. Davidson, 96 N. Y. 175. Compare Dodd v. Thomas, 69 Mo. 304. A lien may be created by statute in favor of a laborer for a contractor, as against the owner of logs, between whom and the laborer there is no privity of contract. Reilly v. Stephenson, 62 Mich. 509, 29 N. W. 99. But
reference to the needs or convenience of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights.\(^1\)

Nevertheless, in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even divest legal titles in favor of substantial equities where the legal and equitable rights do not chance to concur in the same persons.

The chief restriction upon this class of legislation is, that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions, and charters, but it was the

such laborer may not enforce a lien in spite of any contract between the contractor and owner, or of payment by the latter. John Spry Lumber Co. v. Sault Sav. Bank, 77 Mich. 109, 43 N. W. 778. Nor can the owner's failure to enjoin the labor be made conclusive evidence of his assent to it. Meyer v. Berlandi, 39 Minn. 418, 40 N. W. 513. A mechanic's lien may be made applicable to buildings in process of erection. Colpetzer v. Trinity Church, 24 Neb. 113, 37 N. W. 981. [The one in possession of property may be taxed therefore, even though the property belongs to another. Such taxation is not a taking of the property of one person for the benefit of another, for the taxpayer has a lien upon the property for the tax he has paid. Minneapolis & N. E. R. Co. v. Traill Co., 9 N. D. 213, 82 N. W. 727, 50 L. R. A. 269. One electric light company cannot be authorized to use poles of another unless provision is made for compensation and for regulation of joint use. Citizens' El. Light & P. Co. v. Sands, 95 Mich. 561, 55 N. W. 462, 20 L. R. A. 411. Statutes inaugurating the so-called "Torrens System" for registration of land titles have been before the courts and attacked for violation of the rule of "due process," but have been usually upheld. Tyler v. Registration Court Judges, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 493; People ex rel. Deneen v. Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. 175, 44 L. R. A. 891; State ex rel. Douglas v. School District, 85 Minn. 250, 88 N. W. 751, 57 L. R. A. 297. The validity of such act was denied in State ex rel. Monnett v. Gulbert, 56 Ohio St. 576, 47 N. E. 551, 36 L. R. A. 519, 60 Am. St. 756. And see the Massachusetts case in the Supreme Court of the United States, 170 U. S. 405, 21 Sup. Ct. Rep. 200.]

\(^1\) Taylor v. Porter, 4 Hill, 140; Osborn v. Hart, 24 Wis. 69, 91, 1 Am. Rep. 101. In Matter of Albany Street, 11 Wend. 140, 25 Am. Dec. 618, it is intimated that the clause in the Constitution of New York, withholding private property from public use except upon compensation made, of itself implies that it is not to be taken in invitum for individual use. And see Matter of John & Cherry Streets, 19 Wend. 659. A different opinion seems to have been held by the Supreme Court of Pennsylvania, when they decided in Harvey v. Thomas, 10 Watts, 63, that the legislature might authorize the laying out of private ways over the lands of unwilling parties, to connect the coalbeds with the works of public improvement, the constitution not in terms prohibiting it. See note to p. 705, post.
old fundamental law, springing from the original frame and constitutional of the realm."\(^1\)

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.\(^2\)

And it may be well at this point to examine in the light of the reported cases the question, What is a vested right in the constitutional sense? and when we have solved that question, we may be the better able to judge under what circumstances one may be justified in resisting a change in the general laws of the State affecting his interests, and how far special legislation may control his rights without coming under legal condemnation. In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws;\(^3\) but as changes of circumstances and of public opinion,

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2 The evidences of a man’s rights—the deeds, bills of sale, promissory notes, and the like—are protected equally with his lands and chattels, or rights and franchises of any kind; and the certificate of registration and right to vote may be properly included in the category. State v. Stanton, 6 Cold. 293. See Davies v. McKeeby, 5 Nov. 309.

3 The interest acquired in the practice of learned professions, that is, “the right to continue their prosecution,” is property which cannot be arbitrarily taken away. Field, J., in Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. Rep. 213. The office of an attorney is property, and he cannot be deprived of it except for professional misconduct or proved unfitness. The public discussion of the official conduct of a judge is not professional misconduct, unless it is designed to acquire an influence over the conduct of the judge in the exercise of his judicial functions by the instrumentality of popular prejudice. Ex parte Stephenson, 95 Pa. St. 220. But see State v. McConaghey, 33 W. Va. 250, 10 S. E. 407. Right of property involves right to dispose of same, and statute prescribing who shall and who shall not sell the common proprietary medicines and restricting such sale to registered pharmacists is taking property without due process. Noel v. State, 187 Ill. 587, 58 N. E. 616, 79 Am. St. 233, 52 L. R. A. 297. Property in the constitutional sense is said, in Harrison v. Knoxville Iron Co., 105 Tenn. 421, 52 S. W. 955, 76 Am. St. 682, to include everything having an exchangeable value and as well the right to acquire and dispose of the thing which is the subject of property rights. The office of Governor of a State is not “property.” Taylor v. Beckham, 178 U. S. 648, 20 Sup. Ct. Rep. 890, 1009. It is held in Hoover v. Meschesney, 81 Fed. Rep. 473, that the right to use the mails is “property” in the sense that one cannot be deprived of it without
as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense. 1 In many cases the courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with "the law of the land;" and the right of one man is divested by way of enforcing a higher and better right in another. Of these cases we do not propose to speak: constitutional questions cannot well arise concerning them, unless they are attended by circumstances of irregularity which are supposed to

Tyroer v. Warden, etc., 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 281, 08 Am. St. 763."

1 "A person has no property, no vested interest, in any rule of the common law . . . Rights of property which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations." Wait, Ch. J., in Munn v. Illinois, 94 U. S. 113, 134. See Railroad Co. v. Richmond, 90 U. S. 521; Transportation Co. v. Chicago, 99 U. S. 635; Newton v. Commissioners, 100 U. S. 648; post, 648, note. The State may take away rights in a public fishery by appropriating the water to some other use. Howes v. Grush, 131 Mass. 207. [But not the previously acquired right of a co-tenant to enter and extract ores without accounting therefor. Butte & B. Consol. Min. Co. v. Mont. Ore P. Co., 25 Mont. 41, 63 Pac. 325. The rights of a stockholder as the owner of stock cannot be taken through the re- tirement of stock by conversion into bonds. Berger v. United States Steel Corporation, 63 N. J. Eq. 509, 63 Atl. 68, rev. 63 N. J. Eq. 505, 53 Atl. 14.]
take them out of the general rule. All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become divested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order. What we desire to reach in this connection is the true meaning of the term "vested rights" when employed for the purpose of indicating the interests of which one cannot be deprived by the mere force of legislative enactment, or by any other than the recognized modes of transferring title against the consent of the owner, to which we have alluded.

**Interests in Expectancy.**

First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.¹ Acts of the legislature, as has been well said by Mr. Justice Woodbury, cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."² And Chancellor Kent, in speaking of retrospective statutes, says that while such a statute, "affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general

welfare, even though they might operate in a degree upon existing rights. 1

And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent (a) are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession, — a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor’s death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise. 2

If this be so, the nature of estates must, to a certain extent, be subject to legislative control and modification. 3 In this country estates tail have been very generally changed into estates in fee simple, by statutes the validity of which is not disputed. 4 Such

2 In re Lawrence, 1 Redfield, Sur. Rep. 310. [See also Bass v. Roanoke Nav. & W. P. Co., 111 N. C. 430, 16 S. E. 402, 19 L. R. A. 247, and note on power to defeat contingent interests; McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 290, and note on power to change or destroy dower, curtesy, &c.]

But after property has once vested under the laws of descent, it cannot be divested by any change in those laws. Norman v. Heist, 5 W. & S. 171. And the right to change the law of descents in the case of the estate of a person named without his consent being had, was denied in Beall v. Beall, 8 Ga. 210. See post, pp. 518, 540, 541, and notes.

4 De Mill v. Lockwood, 3 Blatch. 56

The legislature may by special act confirm a conveyance in fee simple by a

a [These rules do not control succession to land among the members of Indian tribes. Such succession, so long as the tribal organization is still recognized by the Federal government, is according to the laws, usages and customs of the tribe. Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. Rep. 1.]
statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not therefore open to objection by him.¹ But no other person in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases.²

The cases of rights in property to result from the marriage relation must be referred to the same principle. At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent utteration in the law could not take them away.³ But other interests were merely in expectancy. He could have a right as tenant by the courtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely,—that is to say, until it becomes initiate,—the legislature must have full right to modify or even to abolish it.⁴ And the same rule will


¹ On the same ground it has been held in Massachusetts that statutes converting existing estates in joint tenancy into estates in common were objectionable. They did not impair vested rights, but rendered the tenure more beneficial. Holbrook v. Finney, 4 Mass. 505, 3 Am. Dec. 243; Miller v. Miller, 16 Mass. 59; Annable v. Patch, 3 Pick. 300; Burghardt v. Turner, 12 Pick. 533. Moreover, such statutes do no more than either tenant at the common law has a right to do, by conveying his interest to a stranger. See Bombaugh v. Bombaugh, 11 S. & R. 192; Wildes v. Vanvoorhis, 15 Gray. 130.

² See 1 Wash. Real Pr. 81-84, and notes. The exception to this statement, if any, must be the case of tenant in tail after possibility of issue extinct; where the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested.

³ Westervelt v. Gregg, 12 N. Y. 202. See Mr. Bishop's criticism of this case—

which, however, does not reach the general principle above stated—in 2 Bishop, Law of Married Women, § 86, and note. Rights under an ante-nuptial contract, which become vested by the marriage, cannot be impaired by subsequent legislation. Desnoyer v. Jordan, 27 Minn. 295, 7 N. W. 140. [Where at the time community property is acquired, power to dispose of it rests entirely in the husband, subsequent legislation requiring the assent of the wife to its disposition is invalid with regard to such property. Spreckels v. Spreckels, 110 Cal. 339, 48 Pac. 228, 30 L. R. A. 497, 58 Am. St. 170. An act taking away a statutory right of the husband in the wife's land which existed at the time of the marriage, is void as to such right. Rose v. Rose, 104 Ky. 48, 46 S. W. 534, 81 Am. St. 430.]

⁴ Hathon v. Lyon, 2 Mich. 95; Tong v. Marvin, 15 Mich. 60. And see the cases cited in the next note. The right of a tenant by the courtesy initiate is vested, and it cannot be taken away to the injury of the husband's creditors.
apply to the case of dower; though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or anything more than a mere expectancy at any time before it is consummated by the husband's death. In neither of these cases does the marriage alone give a


1 When dower is duly assigned it becomes a right not to be divested by subsequent legislation. Talbot v. Talbot, 14 R. I. 57. The law in force at the death of the husband is the measure of the right of the widow to dower. Noel v. Ewing, 9 Ind. 37; May v. Fletcher, 40 Ind. 575; Lucas v. Sawyer, 17 Iowa, 617; Stardevant v. Norris, 39 Iowa, 65; Meltzer's Appeal, 17 Pa. St. 449; Barbour v. Barbour, 46 Mo. 9; Magee v. Young, 40 Miss. 164; Bates v. McDowell, 58 Miss. 815; Walker v. Deaver, 5 Mo. App. 139; Guerin v. Moore, 25 Minn. 462; Morrison v. Rice, 35 Minn. 438, 29 N. W. 108; Ware v. Owens, 42 Ala. 212; Pratt v. Toft, 14 Mich. 101; Bennett v. Harms, 51 Wis. 251, 8 N. W. 222. But if we apply this rule universally, we shall run into some absurdities, and most certainly in some cases encounter difficulties which will prove insurmountable. Suppose the land has been sold by the husband without relinquishment of dower, and the dower right is afterwards by statute enlarged, will the wife obtain the enlarged dower at the expense of the purchaser? Or suppose it is diminished; will the purchaser thereby acquire an enlarged estate which he never bought or paid for? These are important questions, and the authorities furnish very uncertain and unsatisfactory answers to them. In Illinois it is held that though the estate is contingent, the right to dower, when marriage and seisin unite, is vested and absolute, and is as completely beyond legislative control as is the principal estate. Russell v. Rumsey, 35 Ill. 302; Steele v. Gelbudy, 41 Ill. 39. See Lawrence v. Miller, 2 N. Y. 241. But it is also held that after marriage a new right corresponding to dower may be conferred upon the husband, and that his homestead right depends on the law in force at the wife's death. Henson v. Moore, 104 Ill. 403. In North Carolina before 1807, the wife had dower only in the lands of which the husband died seized; the statute then restored the common-law right to dower held to be inapplicable to lands which the husband had previously acquired. Sutton v. Askew, 66 N. C. 172, 8 Am. Rep. 599; Hunting v. Johnson, 66 N. C. 189; Jenkins v. Jenkins, 82 N. C. 209; O'Kelly v. Williams, 84 N. C. 281. In Iowa it is held that when the law of dower is changed after the husband has conveyed lands subject to the inchoate right, the dower is to be measured by the law in force when the conveyance was made. Davis v. O'Ferrall, 4 Greene (Iowa), 168; Young v. Wolcott, 1 Iowa, 174; O'Ferrall v. Simplot, 4 Iowa, 881; Moore v. Kent, 37 Iowa, 20; Craven v. Winter, 38 Iowa, 471. In Indiana, on the other hand, a statute enlarging the right of dower to one-third of the land in fee simple was so applied as to deprive the widow, in cases where the husband had previously conveyed, of both the statutory dower and the dower at the common law, thereby enlarging the estate of the purchaser. Strong v. Clem, 12 Ind. 37; Logan v. Walton, 12 Ind. 839; Bowen v. Preston, 48 Ind. 307; Taylor v. Sample, 51 Ind. 423. See May v. Fletcher, 40 Ind. 575. A provision that upon a judicial sale of the husband's property the inchoate dower right shall vest does not apply to a mechanic's lien resting on the whole property before the act passed. Buser v. Shepard, 107 Ind. 417, 8 N. E. 250. In Missouri it is held that the widow takes dower according to the law in force at the husband's death, except as against those who had previously acquired specific rights in the estate, and as to them her right must depend on the law in force at the time their rights originated. Kennedy v. Insurance Co., 11 Mo. 204. In Williams v. Courtney, 77 Mo. 587, it is held that, marriage and seisin concurring, dower cannot be barred by a guardian's sale of the husband's property. In Massachusetts
vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personality of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition.\textsuperscript{1}

\textit{Change of Remedies.}

\textit{Again: the right to a particular remedy is not a vested right.} This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself.\textsuperscript{2} As a general rule, every State has complete control over the remedies which it offers to suitors in its courts.\textsuperscript{3} It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence.\textsuperscript{4} And it may doubt is expressed of the right of the legislature to cut off the inchoate right of dower. Dunn v. Sargent, 101 Mass. 536, 340. But in Hamilton v. Hirsch, 3 Wash. Terr. 228, 5 Pac. 216, such power is affirmed.

\textsuperscript{1} Westervelt v. Gregg, 12 N. Y. 202; Norris v. Beyen, 13 N. Y. 273; Kelly v. McCarthy, 3 Bradf. 7. And see Plumb v. Sawyer, 21 Conn. 351; Clark v. McCready, 12 S. & M. 247; Jackson v. Lyon, 9 Cow. 601; ante, pp. 406-415. On the point whether the husband can be regarded as having an interest in the wife's choses in action, before he has reduced them to possession, see Bishop, \textit{Law of Married Women}, Vol. II. §§ 45, 46. If the wife has a right to personal property subject to a contingency, the husband's contingent interest therein cannot be taken away by a repeal of the statute. See \textit{ante}, 407, note 1.


\textsuperscript{3} Hope v. Johnson, 2 Yerg. 125; Foster v. Essex Bank, 10 Mass. 245, 9 Am. Dec. 108; Pascall v. Whitlet, 11 Ala. 472; Commonwealth v. Commissioners, \&c., 6 Pick. 501; Whipple v. Farrar, 3 Mich. 436; United States v. Sampuryac, 1 Hemp. 118; Sutherland v. De Leon, 1 Tex. 250; Anonymous, 2 Stew. 208. See also Lewis v. McKlvan, 16 Ohio, 347; Trustees, \&c., v. McCaughley, 2 Ohio St. 152; Hepburn v. Curtis, 7 Watts, 300; Schenley v. Commonwealth, 36 Pa. St. 20; Bacon v. Callender, 6 Mass. 303; Brackett v. Nercroes, 1 Me. 92; Iralton v. Loathin, 18 Ind. 303; White School House v. Post, 31 Conn. 241; Van Rensselaer v. Hayes, 19 N. Y. 63; Van Rensselaer v. Ball, 19 N. Y. 100; Sedgwick Co. v. Bunker, 16 Kan. 498; Danville v. Pace, 25 Ga. 1. Thus it may give a legal remedy where before there was only one in equity. Bartlett v. Lang, 2 Ala. 401.

\textsuperscript{4} In Bolton v. Johns, 5 Pa. St. 146, the extreme ground was taken that the legislature might give a lien on property for a prior debt, where no contract would be
abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains.\(^1\) If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide;\(^2\) and if it be amended instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.\(^3\) And any rule or regu-

violated in doing so. In Towie v. Eastern Railroad, 18 N. II 540, the power of the legislature to give retrospectively a remedy for consequential damages caused by the taking of property for a public use was denied. On the ground that the remedy only is affected, a judgment against a principal on an existing bond, may be made conclusive on the surety. Pickett v. Boyd, 11 Len. 498. So a resale on mortgage foreclosure, if the purchase price is inadequate, may be allowed as to an existing mortgage. \(^\text{Chaffe v. Aaron, 02 Miss. 29.}\) And a foreclosure of a tax lien, if the title fails. Schoenheit v. Nelson, 16 Neb. 235, 20 N. W. 205. [A lien for the whole value of labor or material furnished may be made to take precedence of any mortgage or other contract, lien, or conveyance arising subsequent to the beginning of the labor or of the supply of the material, but prior to the completion thereof, upon condition that notice of such lien shall be filed prior to filing of mortgage, &c. Hightower v. Bailey & Koerner, 22 Ky. L. 88, 56 S. W. 147, 49 L. R. A. 555.\(^\text{1}\)]


But it is well said in Pennsylvania that before a statute should be construed to take away the remedy for a prior injury, it should clearly appear that it embraces the very case. Chalker v. Ives, 55 Pa. St. 81. And see Newsom v. Greenwood, 4 Ore. 119.

\(^3\) See cases cited in last note. Also Commonwealth v. Dunne, 1 Binney, 601, 2 Am. Dec. 407; United States v. Passmore, 4 Dall. 372; Patterson v. Philbrook, 9 Mass. 151; Commonwealth v. Marshall, 11 Pick. 350; Commonwealth v. Kimball, 21 Pick. 373; Hartung v. People, 22 N. Y. 95; State v. Daley, 29 Conn. 272; Rathburn v. Wheeler, 29 Ind. 601; State v. Norwood, 12 Md. 195; Bristol v. Supervisors, &c., 20 Mich. 95; Summer v. Miller, 64 N. C. 698. [Pending the decision upon an appeal, the constitution was so amended that whereas under the old rule the appeal had been upon questions of law alone, it was under the new to be upon questions of fact also. The case was thereupon remanded, in order that the evidence might be incorporated in the record upon a new trial, and the whole brought up again if either party were dissatisfied. Cassard v. Tracy, 52 La. Ann. 835, 27 So. 368, 49 L. R. A. 272. A mechanic's lien, which is a security given by statute and is in the nature of a remedy, rather than a right springing from contract or the rules of the common law, may be abolished by general statute without disturbing vested rights. Wilson v. Simon, 93 Md. 1, 45 Atl. 1032, 80 Am. St. 427. But a statute taking away the lien of a judgment having effect by operation of law upon the recovery of the judgment, is void as to judgments on contracts made before the enactment of the statute. Merchants' Bank v. Ballou, 98 Va. 112, 32 S. E. 451, 81 Am. St. 715, 44 L. R. A. 306. A statute exempting the earnings of a married man from compulsory process for the collection of debt is
lation in regard to the remedy which does not, under pretence of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.

But a vested right of action is property in the same sense in which tangible things are property; and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away. And every man is entitled to a certain remedy in the law for all wrongs against his person or his valid as going to the remedy only. Kirkman v. Bird, 22 Utah, 100, 61 Pac. 338, 83 Am. St. 77d. 1

1 See ante, pp. 406-410; Lennon v. New York, 56 N.Y. 301. The right to a particular mode of procedure is not a vested right. A statute allowing attorney's fees may affect pending causes. Drake v. Jordan, 73 Iowa, 707, 36 N.W. 655.

2 It is not incompetent, however, to compel the party instituting a suit to pay taxes on the legal process as a condition. Harrison v. Willis, 7 Heisk. 35, 10 Am. Rep. 604. [That right of action is property and cannot be made worthless by legislative grant of property of one corporation to another, see Angle v. Chicago, M. & St. P. R. Co., 161 U.S. 1, 14 Sup. Ct. Rep. 240.]

property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it.\(^1\) Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law.\(^2\) Even Congress, it has been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested by them of all redress in the courts.\(^3\) And if the legislature cannot confiscate

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1 Thus, a person cannot be precluded by test oaths from maintaining suits. McFarland v. Butler, 8 Minn. 116; Bute, p. 410, note. Before attacking a tax deed, payment of taxes and value of improvements may be required. Coats v. Hill, 41 Ark. 149. See Coor at v. Myers, 31 Kan. 30, 2 Pac. 858; Lombard v. Antioch College, 60 Wis. 459, 10 N. W. 367. But free recourse to the courts is denied, if a deposit of double the amount of the purchase-money and all taxes, &c., is required before suit. Lassiter v. Lee, 68 Ala. 287. See post, pp. 529, 527, note.

2 Griffin v. Mixon, 38 Miss. 424. See next note. Also Rison v. Farr, 24 Ark. 101; Woodruff v. Scroggs, 27 Ark. 20; Hodgson v. Millward, 3 Grant's Cas. 406; Hock v. Anderson, 57 Cal. 251, a case of forfeiting nets for illegal fishing; Boorman v. Santa Barbara, 55 Cal. 313, 3 Pac. 31, a case of assessing benefits upon lands for improvements without notice. But no constitutional principle is violated by a statute which allows judgment to be entered up against a defendant who has been served with process, unless within a certain number of days he files an affidavit of merit. Hunt v. Lucas, 97 Mass. 404. Nor by an ordinance allowing a city, on default of the owner, to build a sidewalk and charge the property with the expense, if when sued on the tax bill, he has his day in court. Kansas City v. Huling, 87 Mo. 263. An act subjecting a prisoner's property from the time of his arrest to a lien for the fine and costs, is valid. Silver Bow Co. v. Strombaugh, 9 Mont. 81, 22 Pac. 453.

3 Griffin v. Wilcox, 21 Ind. 370. In this case the act of Congress of March 3, 1803, which provided "that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress," was held to be unconstitutional. The same decision was made in Johnson v. Jones, 44 Ill. 142. It was said in the first of these cases that "this act was passed to deprive the citizens of all redress for illegal arrests and imprisonment; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments." And it may be added that those acts which are justified by military or martial law are equally legal with those justified by the common law. So in Hubbard v. Brainerd, 35 Conn. 663, it was decided that Congress could not take away a vested right to sue for and recover back an illegal tax which had been paid under protest to a collector of the national revenue. See also Bryan v. Walker, 61 N. C. 141. Nor can the right to have a void tax sale set aside be made conditional on the payment of the illegal tax. Wilson v. McKenna, 52 Ill. 43, and other cases cited, post, p. 528, note. The case of Norris v. Doniphan, 4 Met. (Ky.) 835, may properly be cited in this connection. It was there held that the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of
property or rights, neither can it authorize individuals to assume at their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners.\(^1\) And a statute which authorizes a party

rebels, and for other purposes," in so far as it undertook to authorize the confiscation of the property of citizens as a punishment for treason and other crimes, by proceedings in rem in any district in which the property might be, without presentment and indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt only as would be proof of any fact in admiralty or revenue cases, was unconstitutional and void, and therefore that Congress had no power to prohibit the State courts from giving the owners of property seized the relief they would be entitled to under the State laws. A statute which makes a constitutional right to vote depend upon an impossible condition is void. Davies v. McKeeby, 5 Nev. 309. See further, State v. Staten, 6 Cold. 233; Rison v. Farr, 24 Ark. 101; Hodgson v. Millward, 3 Grant, 406.

Where no express power of removal is conferred on the executive, he cannot declare an office forfeited for misbehavior; but the forfeiture must be declared in judicial proceedings. Page v. Hardin, 8 B. Monr. 648; State v. Prichard, 30 N. J. 101. The legislature cannot declare the forfeiture of an official salary for misconduct. Ex parte Tully, 4 Ark. 220, 38 Am. Dec. 33.

1 The log-driving and booming corporations, which were authorized to be formed under a general law in Michigan, were empowered, whenever logs or lumber were put into navigable streams without adequate force and means provided for preventing obstructions, to take charge of the same, and cause it to be run, driven, boomed, &c., at the owner's expense; and it gave them a lien on the same to satisfy all just and reasonable charges, with power to sell the property for those charges and for the expenses of sale, on notice, either served personally on the owner, or posted as therein provided. In Ames v. Port Huron Log-Driving and Booming Co., 11 Mich. 139, 147, it was held that the power which this law assumed to confer was in the nature of a public office; and Campbell, J., says: "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parcelled out by the Constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property. And it is plain that the exercise of such a power is an act in its nature public, and not private. The case, however, involves more than the assumption of control. The corporation, or rather its various agents, must of necessity determine when the case arises justifying interference; and having assumed possession it assesses its own charges; and having assessed them, proceeds to sell the property seized to pay them, with the added expense of such sale. These proceedings are all ex parte, and are all proceedings in invitum. Their validity must therefore be determined by the rules applicable to such cases. Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be divested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and he allowed to meet it on the law and the facts. When his property is wanted in specie, for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt or penalty or forfeiture may be set up against him, the
to seize the property of another, without process or warrant, and to sell it without notification to the owner, for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the Constitution.  

Limitation Laws.

Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or laches. If one who is dispossessed "be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect (nam leges vigilantibus, non dormientibus subveniunt), and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would sooner have been sued."  

Statutes of limitation are passed which fix upon a determination of his liability becomes a judicial question; and all judicial functions are required by the Constitution to be exercised by courts of justice, or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination."

A statute of New York authorized any person to take into his custody and possession any animal which might be trespassing upon his lands, and give notice of the seizure to a justice or commissioner of highways of the town, who should proceed to sell the animal after posting notice. From the proceeds of the sale, the officer was to retain his fees, pay the person taking up the animal five cents, and also compensation for keeping it, and the balance to the owner, if he should claim it within a year. In Rockwell v. Nearing, 35 N. Y. 307, 308, Porter, J., says of this statute: "The legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by persons other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the owner, the proceedings it authorizes have not even the meaking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution." And he distinguishes these proceedings from those in distraining cattle (damagia feasant), which are always remedial, and under which the party is authorized to detain the property in pledge for the payment of his damages. See also opinion by Morgan, J., in the same case, pp. 314-317, and the opinions of the several judges in Wyuchamer v. People, 13 N. Y. 305, 419, 484, and 468. Compare Campbell v. Evans, 45 N. Y. 356; Cook v. Gregg, 46 N. Y. 439; Grover v. Huckins, 26 Mich. 476; Campum v. Langley, 39 Mich. 451, 33 Am. Rep. 414.

2 3 Bl. Com. 188; Broom, Legal Maxims, 857.
reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose. 1 Every government is under obligation to its citizens to afford them all needful legal remedies; 2 but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time. 3

When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. 4 It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance. 5

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1 Such a statute was formerly construed with strictness, and the defence under it was looked upon as unconscionable, and not favored; but Mr. Justice Story has well said, it has often been matter of regret in modern times that the decisions had not proceeded upon principles better adopted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. Bell v. Morrison, 1 Pet. 351, 300. See Leffingwell v. Warren, 2 Black, 599; Toll v. Wright, 37 Mich. 93.

2 Call 'v. Wagrier, 8 Mass. 423.


4 Brent v. Chapman, 5 Cranch, 358; Newby's Adm'r v. Blakey, 3 H. & M. 67; Parish v. Eager, 15 Wis. 532; Bagg's Appeal, 43 Pa. St. 512; Leffingwell v. Warren, 2 Black, 599; Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. Rep. 399. See cases cited in next note. [A statute extending the time for filing a bill of exceptions is held to be invalid as applied to cases in which judgment was rendered before its enactment. Johnson v. Gehraner, — Ind. —, 64 N. E. 855.]

5 Although there is controversy on this point, we consider the text fully warranted by the following cases: Holden v. James, 11 Mass. 390; Wright v. Oakley, 5 Met. 400; Lewis v. Webb, 3 Me. 320; Atkinson v. Dunlap, 50 Me. 111; Davis v. Minor, 2 Miss. 183, 28 Am. Dec. 325; Hicks v. Steigleman, 49 Miss. 377; Knox v. Cleveland, 13 Wis. 245; Sprecker v. Wakeley, 11 Wis. 492; Pleasants v. Rohrer, 17 Wis. 577; Moor v. Luce, 29 Pa. St. 260; Morton v. Sharkey, McCallum (Kan.), 113; McKinney v. Springer, 8 Blackf. 500; Bradford v. Brooks, 2 Ark. 284, 16 Am. Dec. 715; Stipp v. Brown, 2 Ind. 617;
CONSTITUTIONAL LIMITATIONS.

All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law. Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession; but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently as a defence to a promise to pay a debt, and that such bar may be removed by a statute in such case after it has become complete. But this last-mentioned doctrine is rejected in an opinion of much force by Dixon, Ch. J., in Brown v. Parker, 28 Wis. 21, 28. To like effect is McCracken Co. v. Merc. Trust Co., 54 Ky. 344, 1 S. W. 585. And see Rockport v. Walden, 54 N. H. 167, 20 Am. Rep. 131; McMechery v. Morrison, 62 Mo. 140; Good- man v. Munks, 8 Port. (Ala.) 84; Harris v. Stacy, 6 Rob. (Ia.) 15; Baker v. Stonebraker's Ad'm'r, 36 Mo. 538; Shelby v. Guy, 11 Wheat. 361. The law of the forum governs as to limitations. Barbour v. Erwin, 14 Lea, 716; Stirling v. Winter, 80 Mo. 141. See Chevrier v. Robert, 6 Mont. 319, 12 Pac. 703; Thompson v. Reed, 75 Mo. 404. But the statute of limitations may be suspended for a period as to demands not already barred. Wardlaw v. Buzzard, 16 Rich. 159; Caperton v. Martin, 4 W. Va. 138, 6 Am. Rep. 270; Bender v. Crawford, 33 Tex. 745, 7 Am. Rep. 270; Pearsall v. Kenan, 79 N. C. 472, 28 Am. Rep. 335. A class of cases may be excepted from the operation of the statute, though barred when such excepting act was passed. Sturm v. Fleming, 31 W. Va. 701, 8 S. E. 263. [And see a peculiar case in Bates v. Cullum, 177 Pa. 633, 35 Atl. 361, 31 L. R. A. 440, 65 Am. St. 733.] The legislature may compel a county to pay a claim barred by the general statute. Caldwell Co. v. Harbert, 69 Tex. 321, 4 S. W. 607.


2 Stearns v. Gittings, 23 Ill. 387; Hill v. Kriech, 11 Wis. 442.
been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.¹

All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so, it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;² though what shall be considered

¹ Groesbeck v. Seeley, 13 Mich. 329. In Case v. Dean, 10 Mich. 12, it was held that this statute could not be enforced as a limitation law in favor of the party in possession, inasmuch as it did not proceed on the idea of limiting the time for bringing suit, but by a conclusive rule of evidence sought to pass over the property to the claimant under the statutory sale in all cases, irrespective of possession. See also Baker v. Kelly, 11 Minn. 180; Eldridge v. Kuehl, 27 Iowa. 160, 173; Monk v. Corbin, 68 Iowa, 603, 12 N. W. 571; Farrar v. Clark, 85 Ind. 410; Dingey v. Paxton, 60 Miss. 1038. The case of Leffingwell v. Warren, 2 Black, 560, is contra. That case follows Wisconsin decisions. In the leading case of Hill v. Krcke, 11 Wis. 442, the holder of the original title was not in possession; and what was decided was that it was not necessary for the holder of the tax title to be in possession in order to claim the benefit of the statute; ejectment against a claimant being permitted by law when the lands were unoccupied. See also Barrett v. Holmes, 102 U. S. 651. To stop the running of the statute it is not necessary that the owner should be in continuous possession. Smith v. Sherry, 54 Wis. 114, 11 N. W. 465. This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of inches in not asserting claims to property, when he already possesses and enjoys the property? The old maxim is, “That which was originally void cannot by mere lapse of time be made valid;” and if a void claim by force of an act of limitation can ripen into a conclusive title as against the owner in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed.

² So held of a statute which took effect some months after its passage, and which, in its operation upon certain classes of cases, would have extinguished adverse claims unless asserted by suit before the act took effect. Price v. Hopkins, 13 Mich. 318. See also Koshikomn v. Burton, 104 U. S. 668; King v. Belcher, 30 S. C. 381, 9 S. E. 360; People v. Turner, 117 N. Y. 227, 22 N. E. 1022; Call v. Hagger, 8 Miss. 423; Proprietors, &c. v. Laboroe, 2 Me. 294; Society, &c. v. Wheeler, 2 Gall. 141; Blackford v. Pelletier, 1 Blackf. 80; Thornton v. Turner, 11 Minn. 336; State v. Messenger, 27 Minn. 119, 6 N. W. 457; Osborn v. Jaines, 17 Wis. 573; Morton v. Sharkey, McCafoon (Kan.), 113; Berry v. Ransdell, 4 Met. (Ky.) 292; Ludwig v. Stewart, 32 Mich. 27; Hart v. Hestwick, 14 Fla. 162. In the case last cited it was held that a statute which only allowed thirty days in which to bring action on an existing demand was unreasonable and void. And see what is said in Auld v. Butcher, 2 Kan. 125. Compare Davidson v. Lawrence, 40 Ga. 335; Kimbro v. Bank of Fulton, 49 Ga. 410. In Terry v. Ander-
a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. ¹

Alterations in the Rules of Evidence.

It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the State provides for its citizens, 95 U. S. 628, a statute which as to the demand sued upon limited the time to ten and a half months was held not unreasonable. In Krone v. Krone, 37 Mich. 538, the limitation which was supported was to one year where the general law gave six. In Pereless v. Watertown, 6 Biss. 79, Judge Hopkins, U. S. District Judge, decided that a limitation of one year for bringing suits on municipal securities of a class generally sold abroad was unreasonable and void. But a statute giving a new remedy against a railroad company for an injury, may limit to a short time, e. g. six months, the time for bringing suit. O'Bannon v. Louisville, &c. R. R. Co., 3 Bush. 318. So the remedy by suit against stockholders for corporate debts, it is held, may be limited to one year. Adamson v. Davis, 47 Mo. 208. [Six months is not an unreasonably short time to which to limit the assertion of all then existing claims to lands hitherto sold for non-payment of taxes. Turner v. New York, 108 U. S. 90, 18 Sup. Ct. Rep. 38. Nine months is not an unreasonably short time to allow for bringing suit upon a judgment rendered nearly twelve years before. Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 716. That statute must expressly provide a reasonable time to be open, after it goes into effect, and not merely after it is enacted, see Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 755, 45 L. R. A. 118; contra, Osborne v. Lindstrom, above.] It is always competent to extend the time for bringing suit before it has expired. Keith v. Keith, 26 Kan. 27. [Lawton v. Waite, 103 Wis. 214, 79 N. W. 321, 45 L. R. A. 610.] A statute fixing a time for taking out a sheriff's deed after sale applies to a prior sale if a reasonable time is left. Rybiner v. Frank, 105 Ill. 326.


zens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties in suits to testify, might lawfully apply to existing causes of action. So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract; and a statute making the protest of a promissory note evidence of the facts therein stated.

These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice.

A strong instance in illustration of legislative control over evidence will be found in the laws of some of the States in regard to conveyances of lands upon sales to satisfy delinquent taxes. Independent of special statutory rule on the subject, such conveyances would not be evidence of title. They are executed under a statutory power; and it devolves upon the claimant under them to show that the successive steps which under the statute lead to such conveyance have been taken. But it cannot be doubted that this rule may be so changed as to make a tax-deed prima facie evi-


2 Rich v. Flanders, 39 N. H. 304. A very full and satisfactory examination of the whole subject will be found in this case. To the same effect is Southwick v. Southwick, 40 N. Y. 510. And see Cowan v. McCutcheon, 43 Miss. 207; Carbrough v. Hurly, 41 Miss. 71. The right to testify existing when a contract is made may be taken away. Goodlett v. Kelly, 74 Ala. 213.

3 Gibbs v. Gale, 7 Md. 76.

4 Fales v. Wadsworth, 23 Me. 553.

dence that all the proceedings have been regular, and that the pur-
chaser has acquired under them a complete title. The burden of
proof is thereby changed from one party to the other; the legal
presumption which the statute creates in favor of the purchaser
being sufficient, in connection with the deed, to establish his case,
unless it is overcome by countervailing testimony. Statutes mak-
ing defective records evidence of valid conveyances are of a simi-
lar nature; and these usually, perhaps always, have reference to
records before made, and provide for making them competent evi-
dence where before they were merely void. But they divest no
title, and are not even retrospective in character. They merely
establish what the legislature regards as a reasonable and just
rule for the presentation by the parties of their rights before the
courts in the future.

But there are fixed bounds to the power of the legislature over
this subject which cannot be exceeded. As to what shall be evi-
dence, and which party shall assume the burden of proof in civil
cases, (a) its authority is practically unrestricted, so long as its
regulations are impartial and uniform; but it has no power to es-
establish rules which, under pretence of regulating the presenta-
education, go so far as altogether to preclude a party from exhibit-
his rights. Except in those cases which fall within the famil-
lar doctrine of estoppel at the common law, or other cases resting
upon the like reasons, it would not, we apprehend, be in the power
of the legislature to declare that a particular item of evidence
should preclude a party from establishing his rights in opposition
to it. In judicial investigations the law of the land requires an
opportunity for a trial; and there can be no trial if only one
party is suffered to produce his proofs. The most formal convey-
ance may be a fraud or a forgery; public officers may connive with
rogues to rob the citizen of his property; witnesses may testify or
officers certify falsely, and records may be collusively manufac-
tured for dishonest purposes; and that legislation which would

1 Hand v. Ballou, 12 N. Y. 541; Forbes
v. Halsey, 20 N. Y. 53; Deplaine v. Cook,
7 Wis. 44; Allen v. Armstrong, 16 Iowa,
508; Adams v. Beale, 19 Iowa, 61; An-
berg v. Rogers, 9 Mich. 322; Luensgen
v. Cross, 10 Wis. 282; Lacey v. Davis, 4
Mich. 140; Wright v. Dunham, 13 Mich.
414; Abbott v. Lendenower, 42 Mo. 102,
40 Mo. 291. [Marx v. Hauthorn, 148
rule once established may be abolished,
even as to existing deeds. Hickox v.
Tallman, 38 Barb. 608; Strome v. Washer,
17 Oreg. 50, 16 Pac. 926; Gage v. Caraher,
125 Ill. 447, 17 N. E. 777.


3 Tift v. Griffin, 5 Ga. 185; Lenz v.
Charlton, 23 Wis. 478; Conway v. Cable,
37 Ill. 82; ante, p. 623, note; post, pp.
575-585, and notes.

(a) [And in criminal cases the doing of a certain act may be made prima-facie
evidence of criminal intent. Meadowcroft v. People, 163 Ill. 50, 45 N. E. 303, 35
L. R. A. 175, 54 Am. St. 447.]
preclude the fraud or wrong being shown, and deprive the party
wronged of all remedy, has no justification in the principles of
natural justice or of constitutional law. A statute, therefore,
which should make a tax-deed conclusive evidence of a complete
title, and preclude the owner of the original title from showing its
invalidity, would be void, because being not a law regulating evi-
dence, but an unconstitutional confiscation of property. ¹ And a
statute which should make the certificate or opinion of an officer
conclusive evidence of the illegality of an existing contract would
be equally nugatory; ² though perhaps if parties should enter into

Flyn, 23 Ind. 46; Corbin v. Hill, 21 Iowa, 70; Abbott v. Lindenbower, 42 Mo. 162,
40 Mo. 291; Dinge v. Paxton, 60 Miss. 1038. [Wilson v. Wood, 10 Okla. 279, 01
Pac. 1045.] And see the well-reasoned case of McCready v. Sexton, 29 Iowa,
366; Little Rock, &c. R. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55. Also Wright
v. Cradlebaugh, 3 Nev. 341. As to how
far the legislature may make the tax-
deed conclusive evidence that mere ir-
regularities have not intervened in the
proceedings, see Smith v. Cleveland, 17
Wis. 500; Allen v. Armstrong, 16 Iowa,
503. It may be conclusive as to matters
not essential and jurisdictional. Matter
of Lake, 40 La. Ann. 142, 5 So. 479;
Easign v. Barse, 107 N. Y. 329, 14 N. E.
400, 15 N. E. 401. Undoubtedly the leg-
sislature may dispense with mere matters
of form in the proceedings as well after
they have taken place as before; but
this is quite a different thing from mak-
ing tax-deeds conclusive on points ma-
terial to the interest of the property owner.
See further, Wantan v. White, 19 Ind.
470; People v. Mitchell, 46 Barb. 212;
McCready v. Sexton, supra. It is not
competent for the legislature to compel
an owner of land to redeem it from a void
tax sale as a condition on which he shall be
allowed to assert his title against it.
Colwau v. Cable, 37 Ill. 82; Hart v. Hen-
derson, 17 Mich. 218; Wilson v. McKenna,
53 Ill. 43; Reed v. Tyler, 56 Ill. 288; Donn
v. Borchsenius, 30 Wis. 230. But it seems
that if the tax purchaser has paid taxes
and made improvements, the payment for
these may be a condition precedent to a suit in ejectment against him. Pope
v. Macon, 23 Ark. 644. See cases ante,
518, note 1. In Wright v. Cradlebaugh,
3 Nev. 341, 349, Beatty, C. J., says:
"We apprehend that it is beyond the
power of the legislature to restrain a
defendant in any suit from setting up a
good defence to an action against him.
The legislature could not directly take
the property of A. to pay the taxes of B.
Neither can it indirectly do so by depri-
ving A. of the right of setting up in his
answer that his separate property has
been jointly assessed with that of B., and
asserting his right to pay his own taxes
without being encumbered with those of
B. . . ." Due process of law not only
requires that a party shall be properly
brought into court, but that he shall
have the opportunity when in court to
establish any fact which, according to
the usages of the common law or the pro-
visions of the constitution, would be a
protection to him or his property." See
553. [Certificate of a public weigh-
master cannot be made conclusive. Vega
Steamship Co. v. Cons. Elevator Co., 75
Minn. 308, 77 N. W. 973, 43 L. R. A.
843.] ²

² Young v. Beardsley, 11 Paige, 93.
See also Howard Co. v. State, 120 Ind.
282, 22 N. E. 255. But a provision that
six months after the passage of the act
certain tax-deeds made on past sales
should be conclusive evidence, has been
upheld. People v. Turner, 117 N. Y. 227,
22 N. E. 1022. An act to authorize per-
sons whose sheep are killed by dogs, to
present their claim to the selectmen of
the town for allowance and payment by
the town, and giving the town after pay-
ment an action against the owner of the
dog for the amount so paid, is void, as
taking away trial by jury, and as author-
a contract in view of such a statute then existing, its provisions might properly be regarded as assented to and incorporated in their contract, and therefore binding upon them.  

Retrospective Laws. (a)

Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties,—a thing quite beyond the power of legislation. So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment. But there are many cases in which, by existing laws, defences based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defence if it possesses the power to do so.

1 See post, p. 681, note.
2 Ante, p. 521, note, and cases cited.
3 Albertson v. Landon, 42 Conn. 209.
4 In Meadford v. Learned, 16 Mass. 215, it was held that where a pauper had received support from the parish, to which by law he was entitled, a subsequent legislative act could not make him liable by suit to refund the cost of the support. This case was approved and followed in People v. Supervisors of Columbia, 43 N. Y. 150. See ante, p. 618, and note; Towle v. Eastern R. R., 18 N. H. 647. A right of action may not be given against a husband to a creditor of the wife upon her contract. Addams v. Marx, 50 N. J. L. 238, 12 Atl. 909. A railroad company cannot be made responsible for the coroner's inquest and burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, &c., irrespective of any v. long or negligence of the company or its servants. Ohio & M. R. R. Co. v. Lackey, 78 Ill. 55. Absolute liability, irrespective of negligence, cannot be imposed on a railroad company for stock killing. Caterer v. Union Pac. Ry. Co., 2 Idaho, 640, 21 Pac. 416, Bielenberg v. Montana N. Ry. Co., 2 Mont. 271, 20 Pac. 314. In Atchison, &c. R. C. v. Baty, 6 Neb. 37, 29 Am. Rep. 356, it is held incompetent to make a railroad company liable to double the value of stock accidentally injured or destroyed on the railroad track. But the contrary was held in Missouri Pac. Ry. Co. v. Humes, 115 U. S. 515, 6 Sup. Ct. Rep. 110. In such cases attorney's fees may be allowed. Pearsia, D. & E. Ry. Co. v. Duggan, 103 Ill. 575. But see Wilder v. Chicago & W. M. Ry. Co., 70 Mich. 392, 48 N. W. 289. See cases on above points, post, 841, note 1.

(a) [Upon retroactive laws, vested rights, &c., see note to 41 L. ed. 94. An inheritance-tax law, void for lack of provision for notice, may be corrected in this regard, and is then applicable to property not yet distributed, although the testator died before the law was amended. Ferry v. Campbell, 110 Iowa, 300, 81 N. W. 694, 30 L. R. A. 92.]
In regard to these cases, we think investigation of the authorities will show that a party has no vested right in a defence based upon an informality not affecting his substantial equities. (a) And this brings us to a particular examination of a class of statutes which is constantly coming under the consideration of the courts, and which are known as retrospective laws, by reason of their reaching back to and giving to a previous transaction some different legal effect from that which it had under the law when it took place.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, co nomine, by the State constitution, and provided that no other objection exists to them than their retrospective character. (1) Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. (2) And some of the States have


deemed it just and wise to forbid such laws altogether by their constitutions. 1

A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon; 2 irregularities in the


1 See the provision in the Constitution of New Hampshire, considered in Waart v. Winnick, 3 N. H. 473, 14 Am. Dec. 384; Clark v. Clark, 10 N. H. 380; Willard v. Harvey, 21 N. H. 314; Rich v. Flanders, 39 N. H. 304; and Simpson v. Savings Bank, 60 N. H. 466; and that in the Constitution of Texas, in De Cordova v. Galveston, 4 Tex. 470; and that in the Constitution of Missouri, in State v. Herrman, 70 Mo. 441; State v. Greer, 78 Mo. 188. The provision covers only civil, not criminal cases. State v. Johnson, 51 Mo. 60. A statute, passed after a municipality has levied a tax, may annul it before it becomes due and put the right to levy it in another body. State v. St. Louis, &c. Ry. Co., 79 Mo. 420. The Constitution of Ohio provides that "the General Assembly shall have no power to pass retrospective laws, or laws impairing the obligation of contracts; provided, however, that the General Assembly may, by general laws, authorize the courts to carry into effect the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of 'his State, and upon such terms as shall be just and equitable." Under this clause it was held competent for the General Assembly to pass an act authorizing the courts to correct mistakes in deeds of married women previously executed, whereby they were rendered ineffectual. Gushorn v. Purcell, 11 Ohio St. 641. An act for the payment of bounties for past services was held not retrospective, in State v. Richmond, 20 Ohio St. 390. [An act "for refunding taxes erroneously paid" is bad as applied to past transactions. Hamilton Co. Comm'n v. Rasche, 50 Ohio St. 103, 33 N. E. 408, 19 L. R. A. 584.] Under a provision in the Constitution of Tennessee that no retrospective law shall be passed, it has been held that a statute passed after a death cannot allow for the first time a recovery for the loss suffered by the children of deceased from the death. Railroad v. Pounds, 11 L. R. 127. But a law authorizing a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases which arose before its passage, was held not a retrospective law within the meaning of this clause. Fisher's N. gros v. Dobbs, 5 Yerg. 119. So of a law making a judgment against the principal conclusive upon the surety. Pickett v. Boyd, 11 L. 408. See further, Society v. Wheeler, 2 Gall. 105; Officer v. Young, 5 Yerg. 320, 26 Am. Dec. 208. Under like provision in the Colorado Constitution a statute is void which allows a writ of error on a judgment in respect to which an appeal was barred. Willoughby v. George, 6 Col. 80. Legislation may be ordered to take immediate effect notwithstanding retrospective laws are forbidden. Thomas v. Scott, 23 La. Ann. 650.

That the legislature cannot retrospectively construe statutes and bind parties thereby, see ante, p. 134 et seq.

2 Butler v. Toledo, 5 Ohio St. 225; Strauch v. Shoemaker, 1 W. & S. 166;
organization or elections of corporations; irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause; irregular proceedings in court, &c.

The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. (a)


SYRACUSE BANK v. DAVIS, 16 N. Y. 188; Mitchell v. Deeds, 49 Ill. 416; Peoples v. Plank Road Co., 86 N. Y. 1.


(a) [But this rule must be applied with discretion; e.g., the legislature could not provide, after a sale had been made under notice not sufficiently long to satisfy the
A few of the decided cases will illustrate this principle. In Kearney v. Taylor, a sale of real estate belonging to infant tenants in common had been made by order of court in a partition suit, and the land bid off by a company of persons, who proposed subdividing and selling it in parcels. The sale was confirmed in their names, but by mutual arrangement the deed was made to one only, for convenience in selling and conveying. This deed failed to convey the title, because not following the sale. The legislature afterwards passed an act providing that, on proof being made to the satisfaction of the court or jury before which such deed was offered in evidence that the land was sold fairly and without fraud, and the deed executed in good faith and for a sufficient consideration, and with the consent of the persons reported as purchasers, the deed should have the same effect as though it had been made to the purchasers. That this act was unequivocal in principle was not denied; and it cannot be doubted that a prior statute, authorizing the deed to be made to one for the benefit of all and with their assent, would have been open to no valid objection.

In certain Connecticut cases it was insisted that sales made of real estate on execution were void, because the officer had included in the amount due, several small items of fees not allowed by law. It appeared, however, that, after the sales were made, the legislature had passed an act providing that no levy should be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, should be valid and effectual to transmit the title of the real estate levied upon. The liability of the officer sales by guardians and executors. In many of the States, general laws will be found providing that such sales shall not be defeated by certain specified defects and irregularities.


2 See Davis v. State Bank, 7 Ind. 316; and Lucas v. Tucker, 17 Ind. 41, for decisions under statutes curing irregularity then in existence, that the shorter notice should be sufficient, though it might originally have made the shorter period sufficient. See Finlayson v. Peterson, 5 N. D. 587, 47 N. W. 553, 35 L. R. A. 592, 57 Am. St. 584; also Lowe v. Harris, 112 N. C. 472, 17 S. E. 589, 22 L. R. A. 379, and note. Nor can the legislature supersede the necessity for allowing a party a hearing before decreeing a sale of his property. Roche v. Waters, 72 Md. 264, 19 Atl. 533, 7 L. R. A. 583. While the legislature may validate a levy of taxes void for same irregularity, as insufficient notice, etc., it cannot validate a sale and tax deed based upon such void levy. Dever v. Cornwell, 10 N. D. 123, 64 N. W. 227. Where an election was void for lack of authority to hold it, the legislature cannot subsequently empower a board of education to borrow money with the assent of two-thirds of the voters voting at an election, and declare the preceding election sufficient, although that precise proposition was the one submitted. Berkley v. Bd. of Education, 22 Ky. 618, 53 S. W. 506.]
for receiving more than his legal fees was at the same time left unaffected. In the leading case the court say: "The law, undoubtedly, is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable, and for necessary services in the performance of his duty; of consequence they are eminently just, and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced." ¹

In another Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not empowered by the State law to perform that ceremony, and that the marriages were therefore invalid. The legislature had afterwards passed an act declaring all such marriages valid, and the court sustained the act. It was assailed as an exercise of the judicial power; but this it clearly was not, as it purported to settle no controversies, and merely sought to give effect to the desire of the parties, which they had ineffectually attempted to carry out by means of the ceremony which proved insufficient. And while it was not claimed that the act was void in so far as it made effectual the legal relation of matrimony between the parties, it was nevertheless insisted that rights of property dependent upon that relation could not be affected by it, inasmuch as, in order to give such rights, it must operate retrospectively. The court in disposing of the case are understood to express the opinion that, if the legislature possesses the power to validate an imperfect marriage, still more clearly does it have power to affect incidental rights. "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy, or contract marriage with any other persons at pleasure. It is a strong exercise of power to compel two persons to marry without their consent, and a palpable perversion of strict legal right. At the same time the retrospective law thus far directly operating on vested rights is admitted to be unquestionably valid, because it is manifestly just." ²

¹ Beach v. Walker, 6 Conn. 190, 197. See Booth v. Booth, 7 Conn. 359; Mather v. Chapman, 6 Conn. 64; Norton v. Pettibone, 7 Conn. 319; Welch v. Wadsworth, 30 Conn. 149; Smith v. Merchand's Ex'rs, 7 S. & R. 260; Underwood v. Lilly, 10 S. & R. 97; Bleakney v. Bank of Greenecastle, 17 S. & R. 64; Menges v. Wertman, 1 Pa. St. 218; Weister v. Hilde, 52 Pa. St. 474; Ahl v. Gleim, 52 Pa. St. 432; Selsby v. Reddon, 19 Wis. 17; Parmelee v. Lawrence, 48 Ill. 381. [A statute giving a bona fide occupant of lands the right to allowance for the value of improvements made on the lands is valid as to improvements made before the enactment of the statute. So held in Lay v. Sheppard, 112 Ga. 111, 37 S. E. 132.]

² Goshen v. Stonington, 4 Conn. 209, 221, 10 Am. Dec. 121, per Hosmer, J. And
It is not to be inferred from this language that the court understood the legislature to possess power to select individual members of the community, and force them into a relation of marriage with each other against their will. That complete control which the legislature is supposed to possess over the domestic relations can hardly extend so far. The legislature may perhaps divorce parties, with or without cause, according to its own view of justice or public policy; but for the legislature to marry parties against their consent, we conceive to be decidedly against "the law of the land." The learned court must be understood as speaking here with exclusive reference to the case at bar, in which the legislature, by the retrospective act, were merely removing a formal defect in certain marriages which the parties had assented to, and which they had attempted to form. Such an act, unless special circumstances conspired to make it otherwise, would certainly be "manifestly just," and therefore might well be held "unquestionably valid." And if the marriage was rendered valid, the legal incidents would follow of course. In a Pennsylvania case the validity of certain grading and paving assessments was involved, and it was argued that they were invalid for the reason that the city ordinance under which they had been made was inoperative, because not recorded as required by law. But the legislature had passed an act to validate this ordinance, and had declared therein that the omission to record the ordinance should not affect or impair the lien of the assessments against the lot owners. In passing upon the validity of this act, the court express the following views: "Whenever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In Hepburn v. Curtis, it was said, 'The legislature, provided it does not violate the constitutional provisions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.' What more has been done in this case? . . . While (the ordinance) was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered

see State v. Adams, 65 N. C. 637, where it was held that the act validating the previous marriages of slaves was effectual, and a subsequent marriage in disregard of it would be bigamy. The legislature may remove after a marriage a disability created by its former action. Baily v. Cranfill, 91 N. C. 293. That the legislature may legitimize children, see Andrews v. Page, 3 Heisk. 663. The power to validate void marriages held not to exist in the legislature where, by the constitution, the whole subject was referred to the courts. White v. White, 105 Mass. 325.

1 7 Watts, 300.
to become of no effect by the failure to record it. Notwithstanding this, the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is at most but a formal defect in the remedy provided,—an oversight. That such defects may be cured by retroactive legislation need not be argued."

On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power. (a)

By statute of Ohio, all bonds, notes, bills, or contracts negotiable or payable at any unauthorized bank, or made for the purpose of being discounted at any such bank, were declared to be void. While this statute was in force a note was made for the purpose of being discounted at one of these institutions, and was actually discounted by it. Afterwards the legislature passed an act, reciting that many persons were indebted to such bank, by bonds, bills, notes, &c., and that owing, among other things, to doubts of its right to recover its debts, it was unable to meet its own obligations, and had ceased business, and for the purpose of winding up its affairs had made an assignment to a trustee; therefore the said act authorized the said trustee to bring suits on the said bonds, bills, notes, &c., and declared it should not be lawful for the defendants in such suits "to plead, set up, or insist upon, in defence, that the notes, bonds, bills, or other written evidences of such indebtedness are void on account of being contracts against or in violation of any statute law of this State, or on account of their being contrary to public policy." This law was sustained as a law "that contracts may be enforced," and as in furtherance of equity and good morals. (b) The original invalid-

1 Schenley v. Commonwealth, 36 Pa. St. 29, 57. See also State v. Newark, 27 N. J. 185; Den v. Downum, 13 N. J. 135; People v. Seymour, 16 Cal. 332; Grim v. Weissenburg School District, 57 Pa. St. 433; State v. Union, 33 N. J. 350. The legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one. Mitchell v. Deeds, 49 Ill. 419.

2 Lewis v. McElvain, 16 Ohio. 347. But where an act is forbidden by statute under penalty, and therefore illegal, the mere repeal of the statute will not legal-

ity was only because of the statute, and that statute was founded upon reasons of public policy which had either ceased to be of force, or which the legislature regarded as overborne by countervailing reasons. Under these circumstances it was reasonable and just that the makers of such paper should be precluded from relying upon such invalidity.¹

By a statute of Connecticut, where loans of money were made, and a bonus was paid by the borrower over and beyond the interest and bonus permitted by law, the demand was subject to a deduction from the principal of all the interest and bonus paid. A construction appears to have been put upon this statute by business men which was different from that afterwards given by the courts, and a large number of contracts of loan were in consequence subject to the deduction. The legislature then passed a "healing act," which provided that such loans theretofore made should not be held, by reason of the taking of such bonus, to be usurious, illegal, or in any respect void; but that, if otherwise legal, they were thereby confirmed, and declared to be valid, as to principal, interest, and bonus. The case of Goshen v. Stonington² was regarded as sufficient authority in support of this act; and the principle to be derived from that case was stated to be "that where a statute is expressly retroactive, and the object and


¹ Trustees v. McCaughey, 2 Ohio St. 152; Johnson v. Bendle, 16 Ohio, 97. See also Syracuse Bank v. Davis, 10 Barb. 188. By statute, notes issued by unincorporated banking associations were declared void. This statute was afterwards repealed, and action was brought against bankers on notes previously issued. Objection being taken that the legislature could not validate the void contracts, the judge says: "I will consider this case on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihiliated. The object of the [original] act was not to vest any right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers they were violators of the law, and objects not of protection but of punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the legislature pardon the crime, without consulting those who committed it? ... How can the defendants say there was no contract, when the plaintiff produces their written engagement for the performance of a duty, binding in conscience if not in law? Although the contract, for reasons of policy, was so far void that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained; and it would be going very far to say that the legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction." Hess v. Werts, 4 S. & R. 356, 361. See also Bleankey v. Bank of Greensville, 17 S. & R. 64; Menges v. Wertman, 1 Pa. St. 218; Boyce v. Sinclair, 3 Bush, 264.

² 4 Conn. 209. 224, 10 Am. Dec. 121. See ante, pp. 532-534.
effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."

After the courts of the State of Pennsylvania had decided that the relation of landlord and tenant could not exist in that State under a Connecticut title, a statute was passed which provided that the relation of landlord and tenant "shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth, on the trial of any case now pending or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding." In a suit which was pending and had been once tried before the statute was passed, the statute was sustained by the Supreme Court of that State, and afterwards by the Supreme Court of the United States, into which last-mentioned court it had been removed on the allegation that it violated the obligation of contracts. As its purpose and effect was to remove from contracts which the parties had made a legal impediment to their enforcement, there would seem to be no doubt, in the light of the other authorities we have referred to, that the conclusion reached was the only just and proper one.

In the State of Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, by reason of the omission on the part of the officer taking the acknowledgment to state in his certificate that, before and at the time of the grantor making the acknowledgment, he made the contents known to her by reading or otherwise. An act was afterwards passed which provided that "any deed heretofore exe-

1 Savings Bank v. Allen, 28 Conn. 67, 102. See also Savings Bank v. Bates, 8 Conn. 695; Andrews v. Russell, 7 Blackf. 474; Grimes v. Doe, 8 Blackf. 371; Thompson v. Morgan, 6 Minn. 292; Parmelee v. Lawrence, 48 Ill. 331. In Curtis v. Leavitt, 17 Barb. 390, and 15 N. Y. 9, and in Woodruff v. Scruggs, 27 Ark. 20, 11 Am. Rep. 777, a statute forbidding the interposition of the defence of usury was treated as a statute repealing a penalty. See further, Lewis v. Foster, 1 N. II. 61; Wilson v. Hardesty, 1 Md. Ch. 66; Welch v. Walsworth, 30 Conn. 149; Wood v. Kennedy, 19 Ind. 65; Washburn v. Franklin, 25 Barb. 593; Parmelee v. Lawrence, 48 Ill. 341; Dunville v. Pace, 25 Grat. 1. The case of Gilliland v. Phillips, 1 S. C. 152, is contra; but it discusses the point but little, and makes no reference to these cases. The legislature may impose interest at an increased rate on a debt past due, when the act takes effect. Cummings v. Howard, 63 Cal. 508. [Building and loan associations may be exempted from the operation of usury laws. Iowa Savings & L. Assn. v. Heidt, 107 Iowa, 207, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. 197.]

cuted pursuant to law, by husband and wife, shall be received in evidence in any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." This statute, though with some hesitation at first, was held to be unobjectionable. The deeds with the defective acknowledgments were regarded by the legislature and by the court as being sufficient for the purpose of conveying at least the grantor's equitable estate; and if sufficient for this purpose, no vested rights would be disturbed, or wrong be done, by making them receivable in evidence as conveyances.1

Other cases go much farther than this, and hold that, although the deed was originally ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties by giving it effect.2 At first sight these cases may seem

1 Chestnut v. Shane's Lessee, 16 Ohio, 569, overruling Connell v. Connell, 6 Ohio, 368; Good v. Zercher, 12 Ohio, 364; Medlock v. Williams, 12 Ohio, 377; and Stillman v. Cummins, 13 Ohio, 116. Of the dissenting opinion in the last case, which the court approve in 16 Ohio, 609-610, they say: "That opinion stands upon the ground that the act operates only upon that class of deeds where enough had been done to show that a court of chancery ought, in each case, to render a decree for a conveyance, assuming that the certificate was not such as the law required. And where the title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of minor essay litigation." See also Lessee of Dunyee v. Tllghman, 6 G. & J. 461; Journeav v. Gibson, 65 Pa. St. 57; Grove v. Todd, 41 Md. 593, 20 Am. Rep. 76; Montgomery v. Holson, Meigs, 437. [May validate a defective acknowledgment. Summer v. Mitchell, 20 Fla. 179, 10 So. 502, 14 N. R. A. 815, 30 Am. St. 106.] But the legislature, it has been declared, has no power to legalize and make valid the deed of an insane person, Rountsong v. Wolf, 35 Mo. 174. In Illinois it has been decided that a deed of release of dower executed by a married woman, but not so acknowledged as to be effectual, cannot be validated by retrospective statute, because to do so would be to take from the woman a vested right. Russell v. Runsey, 35 Ill. 362.

2 Lessee of Walton v. Bailey, 1 Pick. 470; Underwood v. Lilly, 10 S. & R. 97; Barnet v. Barnet, 16 S. & R. 72, 76 Am. Dec. 516; Tute v. Stootsfos, 10 S. & R. 55, 16 Am. Dec. 540; Watson v. Mercer, 8 Pet. 88; Carpenter v. Pennsylvania, 17 How. 457; Davis v. State Bank, 7 Ind. 315; Estate of Sticknoth, 7 Neav. 227; Ferguson v. Williams, 59 Iowa, 717, 13 N. W. 49; Johnson v. Taylor, 61 Tex. 369; Johnson v. Richardson, 44 Ark. 305; Gosborn v. Purcell, 11 Ohio St. 641. In the last case the court say: "The act of the married woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of that mistake; and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of
to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property without an opportunity for trial, inasmuch as they proceed upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of divesting him of it, and passing it over to the grantee.\footnote{1} Apparently, therefore, there would seem to be some force to the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away in such a case is the right in the party to avoid his contract, — a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.\footnote{2} As the point is put by Chief Justice Parker of Massachusetts, a party cannot have a vested right to do wrong;\footnote{3} or, as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."\footnote{4}

The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other

justice." Similar language is employed in the Pennsylvania cases. See further, Dentzel v. Waldie, 30 Cal. 138; Skel- lenger v. Smith, 1 Wash. Ter. 369.

\footnote{1} This view has been taken in some similar cases. See Russell v. Rumsey, 35 Ill. 362; Alabama &c. Ins. Co. v. Boykin, 38 Ala. 510; Orton v. Noonan, 23 Wis. 102; Dale v. Medcalf, 9 Pa. St. 108.

\footnote{2} In Gibson v. Hibbard, 13 Mich. 214, a check, void at the time it was given for want of a revenue stamp, was held valid after being stamped as permitted by a subsequent act of Congress. A similar ruling was made in Harris v. Rutledge, 19 Iowa, 387. The case of State v. Norwood, 12 Md. 195, is still stronger. The curative statute was passed after judgment had been rendered against the right claimed under the defective instrument, and it was held that it must be applied by the appellate court. See post, p. 644.

\footnote{3} Foster v. Essex Bank, 10 Mass. 245. See also Lycoming v. Union, 16 Pa. St. 100, 170. There is no vested right in the statutory defence that a contract was made on Sunday. Berry v. Clary, 77 Me. 492, 1 Atl. 350.

\footnote{4} State v. Newark, 26 N. J. 186, 197. Compare Blount v. Janesville, 31 Wis. 648; Brown v. New York, 63 N. Y. 230; Hughes v. Cannon, 2 Humph. 694. A law merely taking away an unconscionable defence is valid. Read v. Platts- worth, 107 U. S. 568, 2 Sup. Ct. Rep. 108. In New York, &c. R. R. Co. v. Van Horn, 57 N. Y. 473, the right of the legislature to validate a void contract was denied on the ground that to validate it would be to take the property of the contracting party without due process of law. The cases which are contra are not examined in the opinion, or even referred to.
persons as may have succeeded to their rights with no greater equities. A subsequent bona fide purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he held when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests. 1

If, however, a grantor undertakes to convey more than he possesses, or contrary to the conditions or qualifications which, for the benefit of others, are imposed upon his title, or in fraud of the rights of others whose representative or agent he is, so that the defect in his conveyance consists not in any want of due formality, nor in any disability imposed by law, it is not in the power of the legislature to validate it retrospectively; and we may add, also, that it would not have been competent to authorize it in advance. In such case the rights of others intervene, and they are entitled to protection on the same grounds, though for still stronger reasons, which exist in the case of the bona fide purchasers above referred to. 2


2 In Shonk v. Brown, 61 Pa. St. 327,
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We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized, the case falls within the principle above laid down, and the right of the legislature to confirm it must be recognized.\footnote{See Shaw v. Norfolk R. R. Co., 5 Gray, 128, in which it was held that the legislature might validate an unauthorized assignment of a franchise. Also May v. Holdridge, 23 Wis. 93, and cases cited, in which statutes authorizing the reassessment of irregular taxes were sustained. In this case, Paine, J., says: "This rule must of course be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the in-

the facts were that a married woman held property under a devise, with an express restraint on her power to alienate. She nevertheless gave a deed of the same, and a legislative act was afterwards obtained to validate this deed. Held void.  \textit{Apgar, J.:} "Many cases have been cited to prove that this legislation is merely confirmatory and valid, beginning with Barnet v. Barnet, 15 S. & R. 72, and ending with Journess v. Gibson, 50 Pa. St. 57. The most of them are cases of the defective acknowledgments of deeds of married women. There is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature intervenes to do justice. But the case before us is different. [The grantor] had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift, which the donor impressed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the legislature to enforce. Her heirs have a right to say, \ldots \ldots \"The legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.\" \"The true principle on which retrospective laws are supported was stated long ago. 57 Dunning, J., in Underwood v. Lilly, 10 S. & R. 101; to wit, where they impair no contract, or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted.\" In White Mountains R. R. Co. v. White Mountains R. R. Co. of N. H., 50 N. H. 50, it was decided that the legislature had no power, as against non-assenting parties, to validate a fraudulent sale of corporate property. In Alter's Appeal, 57 Pa. St. 541, 5 Am. Rep. 433, the Supreme Court of Pennsylvania declared it incompetent for the legislature, after the death of a party, to empower the courts to correct a mistake in his will which rendered it ineffectual, — the title having already passed to his heirs. But where it was not known that the decedent left heirs, it was held competent, as against the State, to cure defects in a will after the death, and thus prevent an escheat. Estate of Steckmuth, 7 Nev. 223.
This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law, and the authority given was conferred by statute retrospectively.\footnote{1}

It has not usually been regarded as a circumstance of importance in these cases, whether the enabling act was before or after the corporation had entered into the contract in question; and if the legislature possesses that complete control over the subject of taxation by municipal corporations which has been declared in many cases, it is difficult to perceive how such a corporation can successfully contest the validity of a special statute, which only sanctions a contract previously made by the corporation, and which, though at the time \textit{ultra vires}, was nevertheless for a public and local object, and compels its performance through an exercise of the power of taxation.\footnote{2}

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\textit{propris ruris}, and without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the city. The court say, per \textit{Dixon}, Ch. J.: "The question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the legislature, in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that, the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled right of property, and to take the property of one individual or corporation and transfer it to another." This reasoning is of course to be understood in the light of the particular case before the court; that is to say, a case in which the contract was to do something not within the ordinary functions of local government. See the case explained and defended by the same eminent judge in Mills \textit{v. Charlton}, 20 Wis. 400. Compare Fisk \textit{v. Kenoshia}, 26 Wis. 23, 33; Knapp \textit{v. Grant}, 27 Wis. 147; and Single \textit{v. Supervisors of Marathon}, 38 Wis. 363, in which the right to validate a contract which might originally have been author-}

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Nor is it important in any of the cases to which we have referred, that the legislative act which cured the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. It has been held that a statute allowing amended was fully affirmed. And see Marshall v. Silliman, 61 Ill. 218, 226, opinion by Chief Justice Lawrence, in which, after referring to Harward v. St. Clair, &c. Drainage Co., 61 Ill. 130; People v. Mayor of Chicago, 61 Ill. 17; Hessler v. Drainage Commrs., 53 Ill. 105; and Lovington v. Wider, 53 Ill. 202, it is said, "These cases show it to be the settled doctrine of this court, that, under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already remarked, has received the sanction of express enactment in our existing constitution. That was the effect of the curative act under consideration, and it was therefore void." The cases of Guilford v. Supervisors of Chenango, 18 Barb. 616, and 13 N. Y. 143; Brewster v. Syracuse, 19 N. Y. 110; and Thomas v. Leland, 24 Wend. 63, especially, go much further than is necessary to sustain the text. See also Bartholomew v. Harwinton, 33 Conn. 408; People v. Mitchell, 35 N. Y. 551; Barbour v. Camden, 51 Me. 608; Weister v. Huddle, 52 Pa. St. 474; State v. Sullivan, 43 Ill. 412; Johnson v. Campbell, 49 Ill. 310. In Brewster v. Syracuse, parties had constructed a sewer for the city at a stipulated price which had been fully paid to them. The charter of the city forbade the payment of extra compensation to contractors in any case. The legislature afterwards passed an act empowering the Common Council of Syracuse to assess, collect, and pay over the further sum of $800 in addition to the contract price; and this act was held constitutional. In Thomas v. Leland, certain parties had given bond to the State, conditioned to pay into the treasury a certain sum of money as an inducement to the State to connect the Chenango Canal with the Erie at Utica, instead of at Whitestown as originally contemplated, —the sum mentioned being the increased expense in consequence of the change. Afterwards the legislature, deeming the debt thus contracted by individuals unreasonably partial and onerous, passed an act, the object of which was to levy the amount on the owners of real estate in Utica. This act seemed to the court unobjectionable. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had before been given securing the same money can detract from its validity. Should an individual volunteer to secure a sum of money, in itself properly leviable, by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily and more justly liable. Even should he pay the money, what is there in the constitution to preclude him from being reimbursed by a tax?" Here, it will be perceived, the corporation was compelled to assume an obligation which it had not even attempted to incur, but which private persons, for considerations which seemed to them sufficient, had taken upon their own shoulders. We have expressed doubts of the correctness of this decision, ante, p. 398, note, where a number of cases are cited, bearing upon the point.

1 Bacon v. Callender, 6 Mass. 303; Butler v. Palmer, 1 Hill, 324; Cowgill v. Long, 16 Ill. 322; Miller v. Graham, 17 Ohio St. 1; State v. Squires, 26 Iowa, 340; Patterson v. Philbrook, 9 Mass. 151.

2 Watson v. Mercer, 8 Pet. 88; Mathier v. Chapman, 6 Conn. 54; People v. Su-
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ments to indictments in criminal cases might constitutionally be applied to pending suits; and even in those States in which retrospective laws are forbidden, a cause must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced. And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it

pervisors, &c., 20 Mich. 95; Satterlee v. Matthews, 16 S. & R. 169, and 2 Pet. 589; Excelsior Mfg. Co. v. Keyser, 62 Miss. 155; Phenix Ins. Co. v. Pollard, 63 Miss. 641; M'Lane v. Boun, 70 Iowa, 762, 80 N. W. 478; Johnson v. Richardson, 44 Ark. 365. See cases, p. 539, note 1, ante. A statute giving a wife a right to recover in her own name for personal injury, may apply to a pending action. McMinn v. Lancaster, 64 Wis. 506, 23 N. W. 689, following Weldon v. Winslow, L. R. 13 Q. B. D. 784. But an act which is penal as to a plaintiff cannot apply to a pending suit. Powers v. Wright, 62 Miss. 55. After an appeal bond was signed by an attorney, the court held such bonds void, and then the legislature attempted to validate all existing bonds so signed. This was held had as against the appellee in the case. Andrews v. Beane, 15 R. I. 451, 8 Atl. 540. See Threatt v. Bank, 81 Ky. 1. [Judgment correct when rendered on account of invalidity of law under which action was brought, may be reversed upon appeal when in the interim the statute has been corrected by amendment providing for proper notice to parties interested. Ferry v. Campbell, 110 Iowa, 290, 81 N. W. 664, 50 L. R. A. 92.]

1 State v. Manning, 14 Tex. 402.
2 Rich v. Flanders, 30 N. H. 304.
3 State v. Norwood, 12 Md. 195, Contw, Wright v. Graham, 42 Ark. 140. In Yeaton v. United States, 5 Cranch, 281, a vessel had been condemned in admiralty, and pending an appeal the act under which the condemnation was declared was repealed. The court held that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some special provision of statute was made for that purpose. See also Schooner Rachel v. United States, 6 Cranch, 329; Commonwealth v. Duane, 1 Binney, 601; United States v. Passmore, 4 Gall. 572; Commonwealth v. Marshall, 11 Pick. 355; Commonwealth v. Kimball, 21 Pick. 373; Hartung v. People, 22 N. Y. 59; Union Iron Co. v. Pierce, 4 Biss. 327; Norris v. Crocker, 13 How. 429; Insurance Co. v. Ritchie, 5 Wall. 541; Ex parte McCordall, 7 Wall. 506; United States v. Tyren, 11 Wall. 88; Engle v. Shurtle, 1 Mich. 150. In the McCordall Case the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending. Per Chase, Ch. J.: “Jurisdiction is power to declare the law; and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.” But where a State has jurisdiction of a subject, e.g. piloting, until Congress establishes regulations, and penalties are incurred under a State act, and afterwards Congress legislates on the subject, this does not repeal, but only suspends the State law; and a penalty previously incurred may still be collected. Sturgis v. Spofford, 45 N. Y. 445. And see People v. Hobson, 48 Mich. 27, 11 N. W. 771. [Refusal to pay alimony may be by statute made a contempt of court, punishable by imprisonment, and as this affects the remedy only it may operate retrospectively. Judd v. Judd, 125 Mich. 228, 81 N. W. 184.]
had and could have no power to permit or sanction in advance.\footnote{Kimball v. Rosendale, 42 Wis. 407; Maxwell v. Goeschius, 40 N. J. 383, 29 Am. Rep. 242.}

There lies before us at this time a volume of statutes of one of the States, in which are contained acts declaring certain tax-rolls valid and effectual, notwithstanding the following irregularities and imperfections: a failure in the supervisor to carry out separately, opposite each parcel of land on the roll, the taxes charged upon such parcel, as required by law; a failure in the supervisor to sign the certificate attached to the roll; a failure in the voters of the township to designate, as required by law, in a certain vote by which they had assumed the payment of bounty money, whether they should be raised by tax or loan; corrections made in the roll by the supervisor after it had been delivered to the collector; the including by the supervisor of a sum to be raised for township purposes without the previous vote of the township, as required by law; adding to the roll a sum to be raised which could not lawfully be levied by taxation without legislative authority; the failure of the supervisor to make out the roll within the time required by law; and the accidental omission of a parcel of land which should have been embraced by the roll. In each of these cases, except the last, the act required by law, and which failed to be performed, might by previous legislation have been dispensed with; and perhaps in the last case there might be question whether the roll was rendered invalid by the omission referred to, and, if it was, whether the subsequent act could legalize it.\footnote{See Weeks v. Milwaukee, 10 Wis. 212; Dean v. Gleason, 16 Wis. 1; post, p. 712, note.}

But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good. If, for instance, a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be beyond the reach of curative legislation.\footnote{This is clearly shown by McKinstry, J. in People v. Lynch, 51 Cal. 15. And see Hillings v. Deiten, 15 Ill. 218, Conway v. Cable, 37 Ill. 82, and Thames Manufacturing Co. v. Lathrop, 7 Conn. 550, for cases where curative statutes were held not effectual to reach defects in tax proceedings. As to what defects may or may not be cured by subsequent legislation, see Allen v. Armstrong, 16 Iowa, 508; Smith v. Cleveland, 17 Wis. 556, and Abbott v. Lindenbauer, 42 Mo. 162. In Tallman v. Janesville, 17 Wis. 71, the constitutional authority of the legislature to cause an irregular tax to be reassessed in a subsequent year, where the rights of bona fide purchasers had intervened, was disputed; but the court sustained the authority as "a salutary and highly beneficial feature of our system of taxation," and "not to be abandoned because in some instances it produces individual hardships." Certainly bona fide purchasers, as between themselves and the State,} And if persons or property
should be assessed for taxation in a district which did not include them, not only would the assessment be invalid, but a healing statute would be ineffectual to charge them with the burden. In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.

Statutory Privileges and Exemptions.

The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned,—exemptions from the performance of public duties upon juries, or in the militia, and the like; exemptions of property or person from assessment for the purposes of taxation; exemptions of property from being seized on attachment, or execution, or for the payment of taxes; exemption from highway labor, and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require. The State demands the performance of military duty by those persons only who are within certain specified ages; but if, in the opinion of the legislature, the public exigencies should demand military service from all other persons capable of bearing arms, the privilege of exemption might be recalled, without violation of any constitutional principle.

must take their purchases subject to all public burdens justly resting upon them. The case of Conway v. Cable is instructive. It was there held, among other things,—and very justly, as we think,—that the legislature could not make good a tax sale effected by fraudulent combination between the officers and the purchasers. The general rule is undoubted, that a sale for illegal taxes cannot be validated. Silsbee v. Stockel, 44 Mich. 561, 7 N.W. 106, 367; Brady v. King, 53 Cal. 44; Harper v. Rowe, 53 Cal. 238. In Miller v. Graham, 17 Ohio St. 1, a statute validating certain ditch assessments was sustained, notwithstanding the defects covered by it were not more irregularities; but that statute gave the parties an opportunity to be heard as to these defects.

1 See Wells v. Weston, 22 Mo. 384; People v. Supervisors of Chennango, 11 N.Y. 562; Hughey's Lessee v. Horrel, 2 Ohio, 231; Covingston v. Southgate, 18 B. Monr. 491; Morford v. Unger, 8 Iowa, 82; post, pp. 718-721.

2 So held in McDaniel v. Correll, 19 Ill. 226, where a statute came under consideration which assumed to make valid certain proceedings in court which were void for want of jurisdiction of the persons concerned. A void appeal bond cannot be validated so as to give to an appellate court jurisdiction which has failed by reason of such defective bond. Andrews v. Beane, 16 R.I. 451, 8 Atl. 540. See also Israel v. Arthur, 7 Col. 5, 1 Pac. 488; Yentman v. Day, 70 Ky. 185; Roche v. Waters, 72 Md. 264, 19 Atl. 535; Denny v. Matton, 2 Allen, 381; Nelson v. Rountree, 23 Wis. 367; Griffin's Ex'r v. Cunningham, 20 Grat. 31, 109, per Juges, J.; Richards v. Rote, 81 Pa. St. 218; State v. Doherty, 60 Me. 501; Prior v. Downey, 50 Cal. 388; 19 Am. Rep. 656. If land is assessed for taxation in a town where it does not lie, it is not competent to make the tax-deed evidence of title. Smith v. Sherry, 54 Wis. 114, 11 N.W. 465. Compare Walpole v. Elliott, 18 Ind. 258, in which there was not a failure of jurisdiction, but an irregular exercise of it.
The fact that a party had passed the legal age under an existing law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require them. In like manner, exemptions from taxation are always subject to recall, when they have been granted merely as a privilege, and not for a consideration received by the public; as in the case of exemption of buildings for religious or educational purposes, and the like. So, also, are exemptions of property from execution. So, a license to carry on a particular trade for a specified period, may be recalled before the period has elapsed. So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered. So, an offered bounty may be recalled, except as to so much as was actually earned while the offer was a continuing one; and the fact that a party has purchased property or incurred expenses in preparation for earning the bounty cannot preclude the recall. A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon

1 Commonwealth v. Bird, 12 Mass. 443; Swindle v. Brooks, 34 Ga. 67; Mayer, Ex parte, 27 Tex. 710; Bragg v. People, 78 Ill. 328; Moore v. Cass, 10 Kan. 288; Murphy v. People, 37 Ill. 447; State v. Miller, 2 Blackf. 36; State v. Quimby, 51 Me. 305; State v. Wright, 53 Me. 328; State v. Forschner, 43 N. II. 92; Dunlap v. State, 73 Ala. 460; Ex parte Thompson, 20 Fla. 887. And see Dale v. The Governor, 3 Stew. 387.

2 See ante, pp. 335, 390, and notes. All the cases concede the right in the legislature to recall an exemption from taxation, when not resting upon contract. The subject was considered in People v. Roper, 35 N. Y. 629, in which it was decided that a limited immunity from taxation, tendered to the members of voluntary military companies, might be recalled at any time. It was held not to be a contract, but "only an expression of the legislative will for the time being, in a matter of mere municipal regulation." And see Christ Church v. Philadelphia, 21 How. 300; Lord v. Litchfield, 36 Conn. 116; East Saginaw Salt Mfg. Co. v. East Saginaw, 19 Mich. 259; s. c. in error, 13 Wall. 373. [Citizens' Saving Bank v. Owensborn, 173 U. S. 636, 19 Sup. Ct. Rep. 590, 571.]

3 Bull v. Conroe, 13 Wis. 233.

4 See ante, pp. 399-401, notes.

5 Oriental Bank v. Freeze, 18 Me. 100. The statute authorized the plaintiff, suing for a breach of a prison bond, to recover the amount of his judgment and costs. This was regarded by the court as in the nature of a penalty; and it was therefore held competent for the legislature, even after breach, to so modify the law as to limit the plaintiff's recovery to his actual damages. See ante, p. 516, note 2, and cases cited.

6 East Saginaw Salt Mfg. Co. v. East Saginaw, 19 Mich. 259, 2 Am. Rep. 82, and 13 Wall. 373. But as to so much of the bounty as was actually earned before the change in the law, the party earning it has a vested right which cannot be taken away. People v. Auditor-General, 9 Mich. 327. And it has been held competent in changing a country seat to provide by law for compensation, through taxation, to the residents of the old site. Wilkinson v. Cheatham, 43 Ga. 238.
the faith of the sovereign grantor.\(^1\) A statutory right to have cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed.\(^2\) A mill-dam act which confers upon the person erecting a dam the right to maintain it, and flow the lands of private owners on paying such compensation as should be assessed for the injury done, may be repealed even as to dams previously erected.\(^3\) These illustrations must suffice under the present head.

**Consequential Injuries.**

It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others.\(^4\) This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public.\(^5\) The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment.\(^6\) The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can con-

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2 Ex parte McCullough, 7 Wall. 506. See State v. Slevin, 16 Mo. App. 541. And that the right to an appeal, if not expressly given by constitution, need not be provided for. Kindinger v. Saginaw, 59 Mich. 325, 26 N. W. 634; Minneapolis v. Wilkin, 30 Minn. 110, 14 N. W. 581; La Croix v. Co. Comrs, 50 Conn. 321. Time may be shortened during a period of disability, in which one may bring an appeal after such disability is removed. Rupert v. Maritz, 116 Ind. 72, 18 N. E. 381.
3 Pratt v. Brown, 3 Wis. 603. But if the party maintaining the dam had paid to the other party for the permanent flowing of his land a compensation assessed under the statute, it might be otherwise.
4 For the doctrine damnum absque injuria, see Broom's Maxims, 185; Selzwick on Damages, 30, 112; Cooley on Torts, 99.
stitute no obstacle.¹ But indeed it seems idle to specify instances, inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

We have now endeavored to indicate what are and what are not to be regarded as vested rights, and to classify the cases in which individual interests, in possession or expectancy, are protected against being divested by the direct interposition of legislative authority. Some other cases may now be considered, in which legislation has endeavored to control parties as to the manner in which they should make use of their property, or has permitted claims to be created against it through the action of other parties against the will of the owners. We do not allude now to the control which the State may possess through an exercise of the police power,—a power which is merely one of regulation with a view to the best interests and the most complete enjoyment of rights by all,—but to that which, under a claim of State policy, and without any reference to wrongful act or omission by the owner, would exercise a supervision over his enjoyment of undoubted rights, or which, in some cases, would compel him to recognize and satisfy demands upon his property which have been created without his assent.²

In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government.² But the ideas which

¹ The State of Massachusetts granted to a corporation the right to construct a toll-bridge across the Charles River, under a charter which was to continue for forty years, afterwards extended to seventy, at the end of which period the bridge was to become the property of the Commonwealth. During the term the corporation was to pay 200 annually to Harvard College. Forty-two years after the bridge was opened for passengers, the State incorporated a company for the purpose of erecting another bridge over the same river, a short distance only from the first, and which would accommodate the same passengers. The necessary effect would be to decrease greatly the value of the first franchise, if not to render it altogether worthless. But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury. Charles River Bridge v. Warren Bridge, 7 Pick. 344; and 11 Pet. 420. See also Turnpike Co. v. State, 3 Wall. 210; Pisgahaud Bridge v. New Hampshire Bridge, 7 N. H. 35; Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 59; English v. New Haven, &c. Co., 32 Conn. 240; Binghamton Bridge Case, 27 N. Y. 87, and 3 Wall. 51; Lehigh Valley Water Co.'s App., 102 Pa. St. 513; Rockland Water Co. v. Camden & R. W. Co., 60 Me. 514, 15 Atl. 785; Montjoy v. Pillow, 64 Miss. 705, 2 So. 108. See cases cited ante, p. 226, note 1.

² Montesquieu's Spirit of the Laws,
suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the State of Kentucky at an early day an act was passed to compel the owners of wild lands to make certain improvements upon them within a specified time, and it declared them forfeited to the State in case the statute was not complied with. It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property, if he failed to improve it according to a standard which the legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion; and if defensible on principle, then a law which should authorize the officer to enter a man's dwelling and seize and confiscate his furniture if it fell below, or his food if it exceeded an established legal standard, would be equally so. But in a free country such laws when mentioned are condemned instinctively. 1

But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought on grounds of strict

B. T. Such laws, though common in some countries, have never been numerous in England. See references to the legislation of this character, 4 Bl. Com. 170. Some of these statutes prescribed the number of courses permissible at dinner or other meal, while others were directed to restraining extravagance in dress. See Hallam, Hist. Ages, c. 9, pt. II.; and as to Roman sumptuary laws, Encyc. Metrop. Vol. X. p. 110. Adam Smith said of such laws, "It is the highest impertinence and presumption in kings and ministers to pretend to watch over the economy of private people, and to restrain their expense, either by sumptuary laws, or by prohibiting the importation of foreign luxuries." Wealth of Nations, B. 2, c. 3. As to prohibitory Liquor Laws, see post, pp. 845-851.

1 The Kentucky statute referred to was declared unconstitutional in Gaines v. Idaho, 1 Dana, 484. See also Violett v. Violett, 2 Dana, 325.
equity to constitute a charge upon the land improved. If they have been made in good faith, and under a reasonable expectation on the part of the person making them, that he was to reap the benefit of them, and if the owner has stood by and suffered them to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures, and perhaps no sufficient reason why provision should not be made by law for their recovery.

Accordingly in the several States statutes will be found which undertake to provide for these equitable claims. These statutes are commonly known as betterment laws; and as an illustration of the whole class, we give the substance of that adopted in Vermont. It provided that after recovery in ejectment, where he or those through whom he claimed had purchased or taken a lease of the land, supposing at the time that the title purchased was good, or the lease valid to convey and secure the title and interest therein expressed, the defendant should be entitled to recover of the plaintiff the full value of the improvements made by him or by those through whom he claimed, to be assessed by jury, and to be enforced against the land, and not otherwise. The value was ascertained by estimating the increased value of the land in consequence of the improvements; but the plaintiff at his election might have the value of the land without the improvements assessed, and the defendant should purchase the same at that price within four years, or lose the benefit of his claim for improvements. But the benefit of the law was not given to one who had entered on land by virtue of a contract with the owner, unless it should appear that the owner had failed to fulfil such contract on his part. 1

This statute, and similar ones which preceded it, have been adjudged constitutional by the Supreme Court of Vermont, and have frequently been enforced. In an early case the court explained the principle of these statutes as follows: "The action for betterments, as they are termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the defendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been if no labor had been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken

1 Revised Statutes of Vermont of 1830, p. 216.
from the civil law, where ample provision was made for reimbursing to the bona fide possessor the expense of his improvements, if he was removed from his possession by the legal owner. It gives to the possessor not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterments thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it, and the value if no improvement had been made. If the owner takes the land together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the bona fide possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."¹

The last circumstance stated in this opinion — the negligence of the owner in asserting his claim — is evidently deemed important in some States, whose statutes only allow a recovery for improvements by one who has been in possession a certain number of years. But a later Vermont case dismisses it from consideration as not being a necessary ground on which to base the right of recovery. "The right of the occupant to recover the value of his improvements," say the court, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity; viz., that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money; is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements without compensation to him who made them. This principle of natural justice has been very widely — we may say universally — recognized."²

¹ Brown v. Storr, 4 Vt. 37. This class of legislation was also elaborately examined and defended by Trentwalt, J., in Ross v. Irving, 14 Ill. 171, and in some of the other cases referred to in the preceding note. See also Bright v. Boyd, 1 Story, 478, 2 Story, 605.
² Whitney v. Richardson, 31 Vt. 390.
Betterment laws, then, recognize the existence of an equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed in statu quo, and the statute accomplishes justice as nearly as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as nearly as possible according to natural justice.

306. For other cases in which similar laws have been held constitutional, see Armstrong v. Jackson, 1 Blackf. 374; Fowler v. Halbert, 4 Bluh. 54; Withington v. Carey, 2 N. H. 115; Bacon v. Callender, 6 Mass. 303; Paquette v. Fickness, 19 Wis. 219; Childs v. Shower, 15 Iowa, 281; Scott v. Mather, 14 Tex. 235; Sanders v. Wilson, 10 Tex. 104; Brackett v. Norcross, 1 Me. 89; Hunt’s Lessee v. McMahan, 5 Ohio, 132; Longworth v. Worthington, 6 Ohio, 9; Stump v. Hornback, 94 Mo. 206, 6 S. W. 356. See further, Jones v. Carter, 12 Mass. 314; Coney v. Owen, 6 Watts, 435; Steele v. Sprumance, 22 Pa. St. 250; Lynch v. Bradle, 63 Pa. St. 206; Dothage v. Stuart, 35 Mo. 251; Fenwick v. Gill, 38 Mo. 510; Howard v. Zeyer, 18 La. Ann. 407; Pope v. Macom, 23 Ark. 614; Marlow v. Adams, 24 Ark. 109; Ormond v. Martin, 37 Ala. 598; Love v. Shartzer, 31 Cal. 487; Griswold v. Bragg, 48 Conn. 577, 18 Blatch. 202; Gould v. Kidd, 48 Mich. 307, 12 N. W. 158. [Lay v. Sheppard, 112 Ga. 111, 47 S. E. 152.] For a contrary ruling, see Nelson v. Allen, 1 Yerg. 399, in which, however, Judge Caton in a note says the question was really not involved. Mr. Justice Story held in Society, &c. v. Wheeler, 2 Gall. 105, that such a law could not constitutionally be made to apply to improvements made before its passage; but this decision was made under the New Hampshire Constitution, which forbade retrospective laws. The principles of equity upon which such legislation is sustained would seem not to depend upon the time when the improvements were made. See Davis’s Lessee v. Powell, 13 Ohio, 308. In Childs v. Shower, 18 Iowa, 281, it was held that the legislature could not constitutionally make the value of the improvements a personal charge against the owner of the land, and authorized a personal judgment against him. The same ruling was had in McCoy v. Grandy, 3 Ohio St. 463. A statute had been passed authorizing the occupying claimant at his option, after judgment rendered against him for the recovery of the land, to demand payment from the successful claimant of the full value of his lasting and valuable improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. The court says: “The occupying claimant acts, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, goes to the utmost stretch of the legislative power touching this subject. And the statute . . . providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the Constitution.”

1 In Harris v. Inhabitants of Marblehead, 19 Gray. 40, it was held that the betterment law did not apply to a town
In the course of our discussion of this subject, it has been seen that some statutes are void though general in their scope, while others are valid though establishing rules for single cases only. An enactment may therefore be the law of the land without being a general law. And this being so, it may be important to consider in what cases constitutional principles will require a statute to be general in its operation, and in what cases, on the other hand, it may be valid without being general. We speak now in reference to general constitutional principles, and not to any peculiar rules which may have become established by special provisions in the constitutions of individual States.

The cases relating to municipal corporations stand upon peculiar grounds from the fact that those corporations are agencies of government, and as such are subject to complete legislative control. Statutes authorizing the sale of property of minors and other persons under disability are also exceptional, in that they are applied for by the parties representing the interests of the owners, and are remedial in their character. Such statutes are supported by the presumption that the parties in interest would consent if capable of doing so; and in law they are to be considered as assenting in the person of the guardians or trustees of their rights. And perhaps in any other case, if a party petitions for legislation and avails himself of it, he may justly be held estopped from disputing its validity; ¹ so that the great bulk of private legislation which is adopted from year to year may at once be dismissed from this discussion.

Laws public in their objects may, unless express constitutional provision forbids, ² be either general or local in their application;

which had appropriated private property for the purposes of a school-house, and erected the house thereon. The law, it was said, did not apply “where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house, or any other building erected upon it.” But as a matter of constitutional authority, we see no reason to doubt that the legislature might extend such a law even to the cases of this description.

¹ This doctrine was applied in Ferguson v. Landrum, 5 Bush, 250, to parties who had obtained a statute for the levy of a tax to refund bounty moneys, which statute was held void as to other persons. And see Motz v. Detroit, 18 Mich. 495; Dewhurst v. Allegheny, 95 Pa. St. 337; Andrus v. Board of Police, 41 La. Ann. 697, 6 So. 603. A man may be bound by his assent to an act changing the rules of descent in his particular case, though it would be void if not assented to. Beall v. Beall, 8 Ga. 210.

² See ante, pp. 176-181, notes, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all per-
they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. 1 The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid. 2 These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. 3 The business of common carriers, for instance, 


2 The constitutional requirement of equal protection of the laws does not make necessary the same local regulations, municipal powers, or judicial organization or jurisdiction. Missouri v. Lewis, 101 U. S. 25. See Stradner v. W. Virginia, 100 U. S. 303; Virginia v. Rives, 100 U. S. 319; Ex parte Virginia, 100 U. S. 339.

3 The prohibition of special legislation for the benefit of individuals does not preclude laws for the benefit of particular classes; as, for example, mechanics and other laborers. Davis v. State, 3 Lea, 279. But under it peculiar provisions as to liens cannot be made applicable to but two counties. WOodard v. Brien, 14 Lea, 520. [When the laws already provide for the inspection of grain, live-stock, and dressed meats, an exception of dealers in such products from the provisions of an act requiring commission merchants in cities of specified size to take out licenses is not void on account of arbitrariness. Lusker v. People, 189 Ill. 226, 50 N. E. 663, 47 L. R. A. 698, 75 Am. St. 103.] A statute exempting from taxation property to the amount of $500 of widows and maids
or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. \( \sigma \) If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge. \( \theta \)

But a statute would not be constitutional which should prescribe a class or a party for opinion's sake, \( \delta \) or which should

held unconstitutional because unequal. State v. Indianapolis, 69 Ind. 375, 35 Am. Rep. 228; Warner v. Curran, 75 Ind. 303. \[ A statute forbidding contracts between railway companies and their employees, an? exempting such companies from liability for damages for personal injuries, is void as class legislation and as an unreasonable restraint upon freedom of contract. Shaver v. Pennsylvania Ry. Co., 71 Fed. Rep. 931. \]

It is not competent to except from right to recover for injury from defective sidewalk all who do not reside in States where similar injuries constitute right of action. Pearson v. Portland, 69 Me. 278, 31 Am. Rep. 276. The rule of non-liability of the master to a servant for injury suffered through a fellow-servant's negligence may be abrogated as to railroad companies. Missouri Pac. Ry. Co. v. Mackey, 33 Kan. 298, 6 Pac. 291. A police regulation, affecting all railroads, to enforce a quicker delivery of freight is valid. Little Rock, &c. Ry. Co. v. Hannaford, 49 Ark. 291, 5 S. W. 294. \[ A statute rendering telegraph companies liable for mental anguish caused by failure to promptly transmit and deliver messages does not deprive them of property without due process of law or deny them the equal protection of the law. Simmons v. West U. Tel. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607. \]


\( 1 \) The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indisposer or supporter of the Helper book, shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introducing into legislation the princi-

(a) \[ The classification underlying such legislation must be a reasonable one. If arbitrary or unreasonable, the courts do not hesitate to declare the legislation void. Sutton v. State, 56 Tenn. 696, 30 S. W. 697, 33 L. R. A. 589. A statute providing for the treatment of inmates at the expense of the county, and limiting the operation of such legislation to counties having a population of fifty thousand or more, is void as being unreasonable to so restrict its application. Murray v. Board of Co. Com'rs, 81 Minn. 530, 81 N. W. 103, 83 Am. St. 379, 51 L. R. A. 828. \]

(b) \[ But see People v. Coolidge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493, apparently contra. \]
select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt.  

ple of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the provision, and therefore cannot express a judicial opinion on the question." Baltimore v. State, 15 Md. 356, 408, 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of these facts of general notoriety, which, like the names of political parties, are a part of the public history of the times. A statute requiring causes in which the venue has been changed to be remanded on the affidavit of three uncommitted Union men, that justice may be had in the courts where it originated, held void, on the principles stated in the text, in Brown v. Haywood, 4 Heisk. 357.  

It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution. State v. Jackson, 80 Mo. 175; State v. Gibson, 36 Ind. 289, 10 Am. Rep. 42; State v. Hairston, 63 N. C. 451; State v. Kenny, 76 N. C. 251, 22 Am. Rep. 683; Ellis v. State, 42 Ala. 525; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Kinney's Case, 30 Grat. 568; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; Louis v. State, 3 Heisk. 287, 1 Green, Cr. R. 422; Ex rel. Hobbs & Johnson, 1 Woods, 527; Ex parte Kinney, 3 Hughes, 9; Ex parte Francois, 3 Woods, 367. The exclusion of colored persons from a jury on account of color violates the constitutional provision for the protection of civil rights. State v. Peoples, 131 N. C. 784, 42 S. E. 814. It is also said colored children may be required to attend separate schools, if impartial provision is made for their instruction. State v. Duffy, 7 Nev. 312, 8 Am. Rep. 713; Cory v. Carter, 14 Ind. 327; Ward v. Flood, 48 Cal. 36; State v. McCann, 21 Ohio St. 198; People v. Gallagher, 93 N. Y. 483; Ber- tonneau v. School Directors, 3 Woods, 177. But some States forbid this. People v. Board of Education, 18 Mich. 400; Clark v. Board of Directors, 24 Iowa, 266; Dove v. School District, 41 Iowa, 689; Chase v. Stephenson, 71 Ill. 383; People v. Board of Education of Quincy, 101 Ill. 308; Board of Education v. Tinnin, 26 Kan. 1; Pierce v. Union Dist., 40 N. J. L. 70; Kaine v. Com., 101 Pa. St. 490. See Dawson v. Lee, 83 Ky. 49. And when separate schools are not established for colored children, they are entitled to admission to the other public schools. State v. Duffy, supra. Where separate schools are allowed, property of whites cannot be taxed for white schools alone, and of negroes for negro schools. Puitt v. Com'r's, 94 N. C. 709; Claybrook v. Owensboro, 16 Fed. Rep. 207.  

1 Lin Sing v. Washburn, 20 Cal. 534; Brown v. Haywood, 4 Heisk. 357. A San Francisco ordinance required every male person imprisoned in the county jail to have his hair cut to an uniform length of one inch. This was held invalid, as being directed specially against the Chinese. Ah Kow v. Nunan, 5 Sawyer, 352. See Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1004. [A statute defining a "tramp" and prescribing a heavier punishment for certain criminal conduct
CONSTITUTIONAL LIMITATIONS. [CH. XI.

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.\(^1\) Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabili-
ties may be removed; the legislature as \textit{pares patriae}, when not for-
bidden, may grant authority to the guardians or trustees of incompe-
tent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the dis-

of such persons than is attached to simi-
lar conduct of others is not invalid for
that reason. It is uniform in its appli-
cation to all within the class. \textit{State v.
Hogan,} 63 Ohio, 202, 68 N. E. 572, 62
L. R. A. 283. See \textit{post,} 837, a. Upon
question of special legislation see \textit{Arms
v. Ayer,} 192 Ill. 601, 61 N. E. 851, 55
Am. St. 357.\(^1\) In Louisiana an ordi-
nance forbidding the sale of goods on
Sunday, but excepting from its opera-
tion those keeping their places of business
closed on Saturday, was held partial and
therefore unconstitutional. \textit{Shreveport
553. A Sunday closing law is not une-
quial because it excepts certain business
401, 42 N. W. 419. A liquor seller may
not be forbidden to sign the bond of an-
other liquor seller. \textit{Kahn v. Common
Council,} 70 Mich. 534, 38 N. W. 470.
Nor may the right to sell liquor, where a
lawful business, be made dependent on
the caprice or private judgment of the
board which approves the sellers' bond.
\textit{People v. Haug,} 68 Mich. 549, 37 N. W.
21. Keeping open after legal hours can-
not be declared a breach of the peace for
which an arrest may be made without a
warrant. \textit{Id.} There is no reason, how-
ever, why the law should not take notice of
peculiar views held by some classes of
people, which unfit them for certain pub-
lic duties, and excuse them from the per-
formance of such duties; as Quakers are
excused from military duty, and per-
sons denying the right to inflict capital
punishment are excluded from juries in
capital cases. These, however, are in
the nature of exemptions, and they rest
upon considerations of obvious necessity.
\[A fire tax upon property is void as to
railroads unless their property is accorded
equality of opportunity with other prop-
erty taxed to be protected by the meas-
ures provided out of the proceeds of such
taxes. \textit{Atchison, T. & S. F. R. Co. v.
Clark,} 60 Kan. 820, 68 Pac. 477, 47 L. R.
A. 77. The recent "department store" legis-
lation enacted in some form in several of
the States has been before the courts in
several cases, and has generally been
overturned as an arbitrary and unreason-
able restraint upon the freedom to con-
tract, as an attempt to use the police
power of the State where there is no
occasion for its exercise, and as denying
property rights to one class in the com-

\(^1\) The statute of limitations cannot be

suspended in particular cases while al-

lowed to remain in force generally. \textit{Hol-
Johannot,} 7 Mt. 388. \textit{See ante, p. 521,}

note. The general exemption laws can-
not be varied for particular cases or local-
ities. \textit{Bull v. Corcora,} 13 Wis. 283, 214.
The legislature, when forbidden to grant
divorces, cannot pass special acts author-
zizing the courts to grant divorces in par-
ticular cases for causes not recognized in
See, for the same principle, \textit{Alter's Ap-
pell,} 67 Pa. St. 341. The authority in
emergencies to suspend the civil laws in
a part of the State only, by a declara-
tion of martial law, we do not call in
question by anything here stated. Nor
in what we have here said do we have
any reference to suspensions of the laws
generally, or of any particular law, under
the extraordinary circumstances of re-
bellion or war.
charge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough." 1 This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments. 2

1 Locke on Civil Government, § 142; State v. Duffy, 7 Nev. 349; Strauder v. W. Virginia, 100 U. S. 393; Bernier v. Russell, 81 Ill. 60. [This principle is not to be carried so far as to put all persons on an equality as to rights which are not natural rights. So though there be a statute providing that the masculine shall include all genders, a woman is not entitled to admission to the bar under a statute providing "any male citizen," possessing certain qualifications, shall be admitted, and such statute is valid. In Mathlox, 93 Md. 727, 50 Atl. 487, 55 L. R. A. 298, and cases cited in note.]

2 In Lewis v. Webb, 3 Me. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never lie within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." See also Durham v. Lewis, 4 Me. 140; Holcomb v. James, 11 Mass. 306; Piquet, Appellant, 5 Pick. 65; Budd v. State, 3 Humph. 483; Van Zant v. Whitesell, 2 Vay. 200; People v. Frishie, 26 Cal. 135; Davis v. Menasha, 21 Wis. 491; Lancaster v. Barr, 25 Wis. 500; Brown v. Haywood, 4 Heisk. 357; Wally's Heirs v. Kennedy, 2 Vay. 554, 24 Am. Dec. 511. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law, by another; whereas the like general law affecting the whole community equally could not have been passed." Special burdens cannot be laid upon a particular class in the community. Millet v. People, 117 Ill. 294, 7 N. E. 631. Miners and manufacturers alone cannot be forbidden to pay in store orders. State v. Goodwill, 33 W. Va. 179, 10 S. E. 285. See, also, Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 364; State v. Fire Creek, &c. Co.,
CONSTITUTIONAL LIMITATIONS.

Special courts cannot be created for the trial of the rights and obligations of particular parties; and those cases in which legislative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend general laws in special cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its

32 W. Va. 188, 10 S. E. 288. [Statute attempting to give laborers, employed by any corporation that fails to pay their laborers monthly, “a lien on all the property of said corporation ... which lien shall take preference over all other liens except duly recorded mortgages or deeds of trust,” and in addition “a reasonable attorney’s fee” upon suit brought thereunder, is void as involving an unconstitutional discrimination. Johnson v. Goodyear Mining Co., 127 Cal. 4, 59 Pac. 301, 47 L. R. A. 358; and see other cases pro and con in notes on equal protection on pp. 15 and 560, ante and post. A statute making it unlawful to prevent or attempt to prevent an employee from joining any lawful labor organization, or to discharge a laborer because of his connection with such organization, is void as violating the constitutional guarantee against depriving any person of life, liberty, or property without due process of law. Gillespie v. People, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283; State v. Julow, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. 443.] Recovery against newspaper publishers for libel cannot be limited to actual damage, provided a retraction is published and the libel was published in good faith. Park v. Detroit Free Press Co., 72 Mich. 568, 40 N. W. 731. Otherwise in Minnesota. Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936. See further, Officer v. Young, 5 Yerg. 320; Griffin v. Cunningham, 20 Grat. 31 (an instructive case); Dorsey v. Dorsey, 37 Md. 64, 11 Am. Rep. 528; Trustees v. Bailey, 10 Fla. 238; Lawson v. Jeffries, 47 Miss. 886, 12 Am. Rep. 342; Arnold v. Kelley, 5 W. Va. 416; ante, pp. 137-139. But an act was sustained in Minnesota which gave one individual a right of appeal from the legal tribunal and denied it to others. Dike v. State, 38 Minn. 396, 38 N. W. 93. [The legislature cannot restrict the power of the courts to determine whether the facts in a case coming before the court amount to negligence or not, nor can it make the failure of a railroad commissioner to require a flagman to be stationed at a railway crossing conclusive that a failure of the railroad company to station one there is not negligence. Grand Trunk R. Co. v. Ives, 144 U. S. 406, 12 Sup. Ct. Rep. 670.] And physicians who have not a diploma and have not practised a certain time in the State may be required to take out a license. State v. Green, 112 Ind. 462, 14 N. E. 352; People v. Whipple, 70 Mich. 6, 57 N. W. 888. Conti in New Hampshire, State v. Penney, 65 N. H. 113, 18 Atl. 875; State v. Himman, 65 N. H. 103, 18 Atl. 194. See further cases, p. 890, note 2, post.

3 As, for instance, the debtors of a particular bank. Bank of the State v. Cooper, 2 Yerg. 593, 24 Am. Dec. 517. Compare Durkee v. Janesville, 28 Wis. 401, in which it was declared that a special exception of the city of Janesville from the payment of costs in any proceeding against it to set aside a tax or tax sale was void. And see Memphis v. Fisher, 9 Bax. 240. In Matter of Nichols, 8 R. I. 50, a special act admitting a tort debtor committed to jail to take the poor debtor’s oath and be discharged, was held void. The legislature cannot confer upon a corporation privileges or exemptions which it could not confer constitutionally upon a private person. Gordon v. Building Association, 12 Bush, 110. As to what is not a violation of this principle, see United States v. Union Pac. R. R. Co., 98 U. S. 569.
generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. (a) To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their "pursuit of happiness;" 1 and those who should claim a right to do so ought to be able to show a specific authority there-

1 Burlamaqui (Politie. Law, c. 3, § 15) defines natural liberty as the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and as not to interfere with an equal exercise of the same rights by other men. See 1 Bl. Com. 125. Lieber says: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." Civil Liberty and Self-Government. "Legal Liberty," says Mackintosh, in his essay on the Study of the Law of Nature and of Nations, "consists in every man's security against wrong."

(a) [Act requiring commission-merchants engaged in the sale of farm produce to give bonds in specified sum conditioned upon faithful performance of contracts, held bad in People v. Coolidge, 124 Mich. 664, 82 N. W. 604, 50 L. R. A. 493, 83 Am. St. 332. On the other hand, such legislation was sustained in State v. Wagenor, 77 Minn. 493, 80 N. W. 635, 778, 1104, 49 L. R. A. 442, 77 Am. St. 691, and in Lasher v. People, 183 Ill. 226, 55 N. E. 693, 75 Am. St. 103, 47 L. R. A. 862. The exemption of real estate dealers and contractors whose business does not amount to $1,000 per annum, from the operation of an ordinance imposing a license tax for the transaction of business, is unconstitutional. Comm. v. Clark, 135 Pa. 634, 40 Atl. 296, 57 L. R. A. 348. A statute providing for the inspection of coal mines is not void for exempting mines not employing more than five men. Consol. Coal Co. v. Illinois, 185 U. S. 203, 22 Sup. Ct. Rep. 616; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431; Brown & Allen v. Jacobs Pharmacy Co., 115 Ga. 429, 41 So. 553, 57 L. R. A. 547. An ordinance giving a monopoly to union labor by providing that all city contracts shall provide that none but union labor shall be employed, is unconstitutional as class legislation. Fiske v. State, 188 Ill. 290, 55 N. E. 965, 52 L. R. A. 291. A statute requiring persons before practising osteopathy to study four years, and pass certain examinations, while not requiring equivalent preparation of those practising according to other schools of medicine, is unconstitutional. State v. Gravette, 6 Ohio, 269, 62 N. E. 325, 87 Am. St. 605, 55 L. R. A. 791. See also Cook v. Marshall Co., — Iowa, —, 92 N. W. 372; Verges v. Milwaukee Co., — Wis. —, 92 N. W. 44.]
for, instead of calling upon others to show how and where the authority is negativé.

Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.1

1 In the Case of Monopolies, Darcy v. Allnutt, 11 Rep. 84, the grant of an exclusive privilege of making playing cards was adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; for the end of all these monopolies is for the private gain of the patentees." And see Norwich Gas Light Co. v. Norwich City Gas Co., 23 Conn. 19; State v. Cincinnati, &c. Gas Co., 18 Ohio St. 262. Compare with these, State v. Milwaukee Gas Light Co., 29 Wis. 454. On this ground it has been denied that the State can exercise the power of taxation on behalf of corporations who undertake to make or to improve the thoroughfares of trade and travel for their own benefit. The State, it is said, can no more tax the community to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build and own railroads in consideration of expected incidental benefits, than it can make them to the men who build stores or manufactories in consideration of similar expected benefits. People v. Township Board of Salem, 20 Mich. 452. See further, as to monopolies, Chicago v. Rumpf, 45 Ill. 90; Gale v. Kalamazoom, 23 Mich. 314. In State v. Mayor, &c. of Newark, 35 N. J. 157, 10 Am. Rep. 223, the doctrine of the tax was applied to a case in which by statute the property of a society had been exempted from "taxes and assessments:" and it was held that only the ordinary public taxes were meant, and the property might be subjected to local assessments for municipal purposes. State grants are not exclusive unless made so in express terms. Tuckahoe Canal Co. v. Railroad Co., 11 Leigh, 42, 36 Am. Dec. 374; Gaines v. Canton, 51 Mass. 355; Wright v. Nagle, 101 U. S. 791. Where monopolies are forbidden, it is nevertheless competent to give exclusive rights to a water company to supply a city for a term of years. Memphis v. Water Co., 5 Heisk. 455. A corporation formed under a general law allowing formation of gas companies cannot as part of its corporate purposes include the purchase and holding of shares of existing gas companies, thus creating a monopoly. People v. Chicago Gas Trust Co., 130 Ill. 263, 22 N. E. 705. See People v. Refining Co., 7 N. Y. Supp. 406. [City council's grant of exclusive right to remove garbage from all places within city limits, was sustained in Walker v. Jameson, 140 Ind. 591, 30 N. E. 869, 28 L. R. A. 679, 49 Am. St. 222; and in Smiley v. McDonald, 42 Neb. 5, 50 N. W. 355, 27 L. R. A. 540, 47 Am. St. 684; but not in Re Lowe, 54 Kan. 757, 39 Pac. 710, 27 L. R. A. 515; upon such contracts, see note in 27 L. R. A. 540. The question of equality of protection and privilege under the Constitution was before the Supreme Court of the United States in Connolly v. Union Sewer-Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 431, and in speaking of an anti-trust statute of Illinois which exempted from its operation producers of agricultural products and raisers of live stock, that court said: "The difficulty is not met by saying that generally speaking the State, when enacting laws, may, in its discretion, make a classification of firms, corporations, and associations in order to subserve public objects. For this court has held that classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the
The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or designed. It has been held that a statute requiring attorneys to render services in suits for poor persons without fee or reward, was to be confined strictly to the cases therein prescribed, and if by its terms it expressly covered civil cases only, it could not be extended to embrace defences of criminal prosecutions. 1 So enforcement of those constitutional provisions intended to secure that equality of rights which is the security of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." The Connolly case is followed in People v. Butler St. P. & L. Co.,—Ill. —60 N. E. 349. The prior cases on the validity of legislation affecting different classes differently are cited in the opinion, and certain of them distinguished, particularly Magoun v. Illinois Trust & S. B. Co., 170 U. S. 283, 18 Sup. Ct. Rep. 504, and American Sugar R. Co. v. Louisiana, 179 U. S. 80, 21 Sup. Ct. Rep. 43. See also Iowa Life Ins. Co. v. Lewis, —U. S. —23 Sup. Ct. Rep. 126, upon the right of a State to provide for the recovery of damages and attorney's fees against life and health insurance companies for failure to pay losses when they mature, against the objection of class legislation. In the opinion, Fidelity Mut. L. Ins. Asso. v. Mettler, 185 U. S. 308, 22 Sup. Ct. Rep. 602, is relied upon and followed, the court holding the act valid. In Magoun v. Illinois, etc., supra, the court made the following declaration of the principles applicable to the determination of questions of classification of objects for purposes of legislation: "The State may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion, and this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid, because not depending on scientific or marked differences in things or persons or their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." In Boorum v. Connelly, 60 N. J. L. 197, 48 Atl. 355, 88 Am. St. 409, it is held, upon the authority of Van Riper v. Parsons, 40 N. J. L. 123, and Rutgers v. Mayor of Brunswick, 42 N. J. L. 51, that "a law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law, without regard to the consideration that, within this State, there happens to be but one individual of that class, or one place where it produces effect." 1

1 Webb v. Baird, 0 Ind. 13. [Legislation cannot confine the use of low-test petroleum oil for lighting purposes to apparatus of one maker, where there are others adapted to the same use. State v. Santee, 111 Iowa, 1, 82 N. W. 445, 53 L. R. A. 763, 82 Am. St. 489. It may be noted that this case is not authority for the doctrine that a State may not under any circumstances create a monopoly. A statute requiring a longer course of study as a condition to the obtaining of a limited certificate for the practice of "osteopathy" than is required of those contemplating the regular practice of medicine, is void for inequality. State v. Gravett, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791, 87 Am. St. 603; a statute for the regulation of the practice of medicine excluded from its operation,
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where a constitutional provision confined the elective franchise to “white male citizens,” and it appeared that the legislation of the State had always treated of negroes, mulattoes, and other colored persons in contradistinction to white, it was held that although quadroons, being a recognized class of colored persons, must be excluded, yet that the rule of exclusion would not be carried further. So a statute making parties witnesses against themselves cannot be construed to compel them to disclose facts which would subject them to criminal punishment. And a statute which authorizes summary process in favor of a bank against debtors who have by express contract made their obligations payable at such bank, being in derogation of the ordinary principles of private right, must be subject to strict construction. These cases are only illustrations of a rule of general acceptance.

There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all; and if it is important that they should exist, the proper State authority must be left to select the grantees. Of this class are grants of the franchise to be a corporation. Such grants, however, which con-


3 People v. Dean, 11 Mich. 466. See Bailey v. Fiske, 31 Me. 77; Monroe v. Collins, 17 Ohio St. 655. The decisions in Ohio were still more liberal, and ranked as white persons all who had a preponderance of white blood. Gray v. State. 4 Ohio, 353; Jeffress v. Ankeny, 11 Ohio, 572; Thacker v. Hawk, 11 Ohio, 370; Anderson v. Millikin, 9 Ohio St. 568. But see Van Camp v. Board of Education, 9 Ohio St. 406. Happily all such questions are now disposed of by constitutional amendments. It seems, however, in the opinion of the Supreme Court of California, that these amendments do not preclude a State denying to a race, e.g. the Chinese, the right to testify against other persons. People v. Brady, 40 Cal. 198; 6 Am. Rep. 604.


4 See 1 Bl. Com. 89, and note.

5 Mason v. Bridge Co., 17 W. Va. 305. But a franchise is not necessarily exclusive so long as there is nothing to prevent granting like power to another corporation. Matter of Union Ferry Co., 98 N. Y. 139.

6 In Gordon v. Building Association, 12 Bush, 110, it is decided that a special privilege granted to a particular corporation to take an interest on its loans greater than the regular interest allowed by law is void; it not being granted in consideration of any obligation assumed by the corporation to serve the public.

7 That proper grants of this sort are not to be regarded as partial legislation, see Tipton v. Locomotive Works, 165 U. S. 523; 1 Am. & Eng. R. R. Co. — 517; North and S. Ala. R. R. Co. v. Morris, 65 Ala. 193.
fer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators. The just presumption in every such case is, that the State has granted in express terms all that it designed to grant at all. "When a State," says the Supreme Court of Pennsylvania, "means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. . . In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending [its privileges], let the legislature see to it, but let it be remembered that nothing but plain English words will do it." This is sound doctrine, and should be vigilantly observed and enforced.


2 Pennsylvania R. R. Co. v. Canal Commissioners, 21 Pa. St. 0, 22. And see Commonwealth v. Pittsburgh, &c. R. R. Co., 21 Pa. St. 159; Chenango Bridge Co. v. Binghamton Bridge Co., 27 N. Y. 87, 93, per Wright, J.; Baltimore v. Baltimore, &c. R. R. Co., 21 Md. 50; Tuckahoe Canal Co. v. Railroad Co., 11 Leigh, 42, 36 Am. Dec. 374; Richmond v. Richmond & Danville R. R. Co., 21 Gratt. 604; Holyoke Co. v. Lyman, 16 Wall. 500; Delancey v. Insurance Co., 62 N. H. 581; Spring Valley Water Works v. San Francisco, 52 Cal. 111; Gaines v. Coates, 51 Miss. 335. We quote from the Supreme Court of Connecticut in Bradley v. N. Y. & N. H. R. R. Co., 21 Conn. 294, 300: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expanded largely and beneficially for the purposes for which they were enacted, the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled. Acts of the former kind,
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And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate. "Private statutes," says Parsons, Ch. J., "made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication." And the grant of ferry rights, or the right to erect a toll-bridge, and the like, is not only to be being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that their interests might be promoted at the sacrifice or to the injury of those of others whose interests should be equally regarded. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others."

1 Coolidge v. Williams, 4 Mass. 140. See also Dyer v. Tuscaloosa Bridge Co., 2 Port. (Ala.) 286, 27 Am. Dec. 655; Grant v. Leach, 20 La. Ann. 329. In Sprague v. Birdsell, 2 Cow. 419, it was held that one embarking upon the Cayuga Lake six miles from the bridge of the Cayuga Bridge Co., and crossing the lake in an oblique direction, so as to land within sixty rods of the bridge, was not liable to pay toll under a provision in the charter of said company which made it unlawful for any person to cross within three miles of the bridge without paying toll. In another case arising under the same charter, which authorized the company to build a bridge across the lake or the outlet thereof, and to rebuild in case it should be destroyed or carried away by the ice, and prohibited all other persons from erecting a bridge within three miles of the place where a bridge should be erected by the company, it was held, after the company had erected a bridge across the lake and it had been carried away by the ice, that they had no authority afterwards to rebuild across the outlet of the lake, two miles from the place where the first bridge was built, and that the restricted limits were to be measured from the place where the first bridge was erected. Cayuga Bridge Co. v. Magee, 2 Paige, 116, 6 Wend. 85. In Chapin v. The Paper Works, 30 Conn. 461, it was held that statutes giving a preference to certain creditors over others should be construed with reasonable strictness, as the law favored equality. In People v. Lambier, 6 Denio, 9, it appeared that an act of the legislature had authorized a proprietor of lands lying in the East River, which is an arm of the sea, to construct wharves and bulkheads in the river, in front of his land, and there was at the time a public highway through the land, terminating at the river. Held, that the proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the street was, by operation of law, extended from the former terminus over the newly made land to the water. Compare Commissioners of Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 418, 6 Am. Rep. 247; Kingsland v. Mayor, &c., 35 Hun, 458; Backus v. Detroit, 49 Mich. 110, 13 N. W. 380.
construed strictly against the grantees, but it will not be held to exclude the grant of a similar and competing privilege to others, unless the terms of the grant render such construction imperative.  

The Constitution of the United States contains provisions which are important in this connection. One of these is, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States, and all persons born or naturalized in the United States, and subject to its jurisdiction, are declared to be citizens thereof, and of the State wherein they reside. The States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, or to deprive any person of life, liberty, 


2 Const. of United States, art. 4, § 2. See ante, pp. 57, 58.  

3 Const. of United States, 14th Amendment.  

4 "The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of the respective governments. A citizen of the United States, as such, has the right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws. Story on Const. 4th ed. § 1067. These, therefore, are among the privileges of citizens of the United States. So every citizen may petition the federal authorities which are set over him, in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege: Crandall v. Nevada, 6 Wall. 55; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas or within the jurisdiction of a foreign government. Slaughter House Cases, 16 Wall. 36. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship.  

One very plain and unquestionable immunity is exemption from any tax, burden, or imposition under State laws, as a condition to the enjoyment of any right or privilege under the laws of the United States. A State, therefore, cannot require one to pay a tax as importer, under the laws of Congress, of foreign merchandise: Ward v. Maryland, 12 Wall. 103; nor impose a tax upon travellers passing by public conveyances out of the State: Crandall v. Nevada, 6 Wall. 55; nor impose conditions to the right of citizens of other States to sue its citizens in the federal courts. Insurance Co. v. Morse, 20 Wall. 445. These instances sufficiently indicate the general rule. Whatever one may claim as of right
under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. Slaughter House Cases, 16 Wall. 36. And such a right or privilege is abridged whenever the State law interferes with any legitimate operation of the federal authority which concern his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal Constitution or Laws." Cooley, Principles of Const. Law, 216. See United States v. Reese, 92 U. S. 214; United States v. Cruikshank, 92 U. S. 542; Hall v. De Cuir, 95 U. S. 455; Kirkland v. Hottenkiss, 100 U. S. 491. [It is a privilege of a citizen of the United States to inform the proper United States officer of any infraction of the laws of the United States, and any conspiracy to prevent the exercise of this privilege is a crime. Re Quarles, 158 U. S. 522, 15 Sup. Ct. Rep. 659. But no to practice law before a State Court. Ex parte Lockwood, 151 U. S. 116, 14 Sup. Ct. Rep. 1082. A citizen of the United States while in custody of a Federal marshal is entitled as such citizen to protection from unlawful violence. Logan v. United States, 144 U. S. 263, 12 Sup. Ct. Rep. 617. Right to vote for a United States representative is a privilege of a properly qualified citizen. Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17. So, to use the United States flag in any way not prohibited by Congress. Rubenstain v. People, 185 III. 153, 57 N. E. 41, 49 L. R. A. 1st, 76 Am. St. 50. But not the right to purchase or receive as gift, intoxicating liquors. People v. Bray, 105 Cal. 341, 38 Pac. 731, 27 L. R. A. 123.] 1

1 Const. of United States, 14th Amendment. See cases pp. 14-18, ante. The fourteenth amendment is violated by a statute which allows the overseers of the poor to commit paupers and vagrants to the work-house without trial. Portland v. Bangor, 66 Me. 129; Dunn v. Burleigh, 62 Me. 21. It does not confer the right of suffrage upon females. Van Valkenburgh v. Brown, 43 Cal. 43; Bradwell v. State, 16 Wall. 130; Minor v. Happersett, 21 Wall. 162. See ante, pp. 550, 557, notes. Granting licenses for the sale of intoxicating drinks to males only does not violate a constitutional provision which forbids the grant of special privileges or immunities. Blair v. Kilpatrick, 40 Ind. 315. [State may require a licensed pharmacist to procure from the county officers a druggist's license for the sale of spiritual liquors before he can use them in the preparation of pharmacists' compounds. Gray v. Connecticut, 150 U. S. 74, 15 Sup. Ct. Rep. 685. Upon constitutionality of laws regulating sale of liquors, see note 28 L. ed. U. S. 696. State may compel one person to submit his property to inspection of another for purpose of procuring evidence to aid that other in enforcing his rights. Montana Co. v. St. Louis Mining and Milling Co., 152 U. S. 160, 14 Sup. Ct. Rep. 590; but a court cannot. Martin v. Elliott, 106 Mich. 139, 62 N. W. 998, 21 L. R. A. 160. With regard to inspection of persons to procure evidence, see note 4, page 428, ante. But a State cannot deny the right of a seller of merchandise to give with the thing sold a trading-stamp which entitles the purchaser to something of value upon presentation to a third person. State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775. Though it may impose a license tax upon dealers using trading stamps, and so may a city, authorized to require licenses for any lawful purpose. Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 265. An act prohibiting payment of laborers in scrip, truck, &c., and made applicable only to trusts and corporations employing ten or more persons is void as denying the equal protection of the laws. State v. Haun, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 329. But see State v. Brown & S. Mfg. Co., 18 R. I. 16, 25 Atl. 236, 1 L. R. A. 856, and Com. v. Hillside Coal Co., 22 Ky. L. 659, 68 S. W. 411 (Sept. 27, 1900), both of which are cont'd. A statute which requires railroads to transport cattle in car-load lots at the usual rates, and in addition to furnish the shipper free transportation to and from the point of destination of the
though the precise meaning of "privileges and immunities" is not very conclusive. As yet, it appears to be conceded
cattle, is void as denying the equal protection of the laws. Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 430, 50 Pac. 1054, 48 L. R. A. 251. The defendant cannot claim that he is denied the equal protection of the laws simply because he is one of a class expressly excepted from the shield of a statute of limitations. Narron v. Wilmington & W. R. Co., 122 N. C. 856, 29 S. E. 366, 40 L. R. A. 415. Statute providing that where corporation neglects to file list of officers upon whom process against it may be served, copies of such process may be left with register of deeds of county in which is the principal office of corporation, is invalid as not providing due process. Pinney v. Providence L. & Inv. Co., 108 Wis. 396, 82 N. W. 308, 59 L. R. A. 577, and note. Where defendant in a divorce suit denies that plaintiff is his wife, no decree for temporary alimony can issue against him until this question has been determined adversely to him. Hite v. Hite, 124 Cal. 390, 57 Pac. 227, 45 L. R. A. 783, 71 Am. St. 82. Due process of law is satisfied where persons yet unborn are represented by a guardian ad litem. Loring v. Hildreth, 170 Mass. 328, 40 N. E. 652, 40 L. R. A. 127, 64 Am. St. 301. Prohibition to sell trout, or to have them for purpose of sale, does not deprive of property without due process, so long as owner is permitted to eat them or give them away. State v. Schuman, 30 Ore. 16, 58 Pac. 661, 47 L. R. A. 153. Commission merchants dealing in farm produce may be compelled to take out licenses, and submit their business to inspection, and give bonds to secure the faithful performance of their duties to their consignors. State v. Wagener, 77 Minn. 483, 89 N. W. 933, 778, 1134, 46 L. R. A. 442, 76 Am. St. 681; contra, People v. Berrien Circuit Judge, 124 Mich. 604, 83 N. W. 594, 50 L. R. A. 493, 83 Am. St. 302. See other cases, note 551, note a. Statute prohibiting officers of railroad and mining corporations from having any interest in mercantile business in a certain county, but not prohibiting those of other corporations, is void. Luman v. Hitchins Bros. Co., 90 Md. 14, 44 Atl. 1061, 46 L. R. A. 293. An act requiring employers of unnaturalized foreign-born persons to pay a per-diem tax for each such employee, and deduct the same from his wages, is a denial of the equal protection of the laws. Junius Limestone Co. v. Engley, 187 Pa. 193, 40 Atl. 977, 42 L. R. A. 442. A creditor whose debt is secured by mortgage cannot be restricted in his remedy to the property mortgaged. Such a restriction imposed upon freedom of contract is an arbitrary and unwarranted infringement of the liberty of the citizen. Dennis v. Moses, 18 Wash. 597, 52 Pac. 338, 40 L. R. A. 302. Nor can the right to contract for payment in gold coin be taken away by State statute. Ib. Temporary confinement of a person duly alleged to be insane, made during pendency of remission of question of insanity, is an unwarranted deprivation of liberty. Porter v. Ritch, 70 Conn. 235, 39 Atl. 169, 39 L. R. A. 351. Denial of right to make defence in contempt proceedings is a denial of due process. McClatchy v. Superior Court of Sacramento Co., 119 Cal. 418, 51 Pac. 696, 30 L. R. A. 601; and striking out defendant's answer in proceedings for contempt renders void any judgment thereafter entered against him, in the action. Howe v. Elliott, 145 N. Y. 126, 39 N. E. 541, 39 L. R. A. 449, aff'd in 167 U. S. 409, 17 Sup. Ct. Rep. 841. Employer is not unlawfully deprived of his property when he has entrusted it to his travelling salesman, and an innkeeper seizes it from such salesman to enforce payment of hotel bill. Brown Shoe Co. v. Hunt, 103 Iowa, 390, 72 N. W. 765, 39 L. R. A. 291, 64 Am. St. 198. Non-residents may be partially or wholly exempted from penalties for allowing stock to run at large within the limits of the city. Broadfoot v. Fayetteville, 121 N. C. 418, 28 S. E. 615, 39 L. R. A. 245, 61 Am. St. 605; Jones v. Duncan, 127 N. C. 118, 57 S. E. 155. An act for the registration of land titles, making such registration conclusive evidence in certain cases, was held void because it did not provide for actual notice to claimants within the State, attempting to make a constructive notice sufficient. State v. Guilbert, 56 Ohio. 575, 47 N. E. 551, 38 L. R. A. 519, 69 Am. St. 766. Service
that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business

upon the highest officer or agent within the jurisdiction, where the party is a non-resident joint-stock association, is sufficient. State v. Adams Express Co., 50 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225. Equal protection of the laws is denied by a statute requiring citizens of all other counties to secure licenses before fishing in two specified counties, none being required of citizens of those counties. State v. Higgins, 51 S. C. 61, 28 S. E. 15, 38 L. R. A. 591. Warrant of arrest not supported either by oath or affirmation is void. In a State may limit the liability of a railroad company for fires caused by sparks from its locomotives, in the entire absence of negligence, to the uninsured value of the property burned, and the insurer whose contract subrogated him to the rights of the insured against the tortfeasor cannot complain that he is denied the equal protection of the law or deprived of property without due process. Leavitt v. Canadian P. R. Co., 30 Me. 163, 37 Atl. 886, 38 L. R. A. 152. A statute abolishing the fellow-servant rule as to railway employees, held constitutional in Callahan v. St. Louis M. B. T. Co.—Mo.—, 71 S. W. 208, following Tullis v. Railway Co., 175 U. S. 318, 20 Sup. Ct. Rep. 130. Statute authorizing administration of property of person who has disappeared and not been heard of for seven years is void. Carr v. Brown, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294. So is a statute providing for an ante-mortem probate of a will. Lloyd v. Chambers, 50 Mich. 206, 23 N. W. 28. After verdict of guilty, due process will not prevent denial of request for investigation of sanity of prisoner. Baugh v. State, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577; upon insanity after commission of criminal act, see note to this case in L. R. A. Law prescribing eight hour day for work in underground mines is valid. Holden v. Hardy, 14 Utah, 71, 40 Pac. 756, 57 L. R. A. 103; see this case in Supreme Court of the United States, 169 U. S. 366, 18 Sup. Ct. Rep. 383, where the judgment of the State Court is affirmed. Contra, Re Morgan, 26 Col. 415, 58 Pac. 1074, 17 L. R. A. 62, and see Ritchie v. People, 155 Ill. 98, 40 N. E. 451, 462, 29 L. R. A. 79, 46 Am. St. 215, denying validity of an act providing that no woman should be employed in any clothing manufactory more than eight hours per day. See also Low v. Rees Fitting Co., 41 Neb. 127, 50 N. W. 392, 24 L. R. A. 702, 43 Am. St. 670. Wages cannot be required to be computed upon weight of coal as it comes from mine before it is sorted. Ramsey v. People, 142 Ill. 380, 52 N. E. 364, 17 L. R. A. 853; Re Preston, 63 Ohio St. 428, 50 N. E. 101; Contra, Peel Splint Coal Co. v. State, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385. Statute forbidding payment of employees in anything but money is void. State v. Hahn, Gi Kan. 146, 59 Pac. 741. In People v. Hill, 163 Ill. 186, 46 N. E. 795, 30 L. R. A. 634, a law compelling a person financially able, to support his pauper sister was sustained. It is not clear, however, upon what ground such a law can be sustained. The support of a pauper is either a public or a private purpose. If the former, it would seem that moneys to be used therefor should be raised by taxation, and to saddle the support of such pauper upon a person of whose family he is not a member, and who is by no act or neglect of his own chargeable with her creation and existence, is to violate the uniformity and equality necessary to legitimate taxation. If the purpose is private, the case against the validity of the law is still stronger. That service of process by publication may be made sufficient in case no officers or agents of a domestic corporation can be found within the State, see Bernhardt v. Brown, 118 N. C. 709, 119 N. C. 506, 24 S. E. 527, 715, 26 S. E. 102, 36 L. R. A. 402. Statute permitting certain agents of humane societies to kill neglected, abandoned, or diseased animals without notice to owner, is void. Loesch v. Kocher, 144 Ind. 278, 41 N. E. 316, 35 L. R. A. 652. Where State's lien for taxes had expired by limitation, the State cannot arbitrarily seize the property. Owner must have notice and opportunity to defend. Kipp v. Elwell, 66 Minn. 555, 68 N. W. 105, 33 L. R. A. 435. Parties to be affected by location of section-corners must have notice of the time at which such location is to be determined.
therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to

Davis v. St. Louis County Comr's, 65 Minh. 310, 67 N. W. 997, 33 L. R. A. 492. Private property cannot be taken for private use, nor can fishermen be authorized by law to cross private property against the will of the owner in order to reach public fishing grounds. New England Tr. & S. Club v. Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569. See also Priewe v. Wisconsin State L. & Imp. Co., 48 Wis. 534, 67 N. W. 918, 33 L. R. A. 615. Denial of drainpipe license to a person who does not bring petition signed by requisite number of residents is not denial of equal protection, &c. Swift v. People, 102 Ill. 534, 44 N. E. 628, 33 L. R. A. 470. Arbitrarily to single out a certain class of men (e. g. barbers) and deny to them the right to pursue their ordinary vocation upon Sunday deprives them of property without due process. Eden v. People, 101 Ill. 299, 42 N. E. 1108, 32 L. R. A. 599, 52 Am. St. 305. Granting the right of appeal to resident landholders in annexation proceedings, and not to non-resident landholders, is not a denial of the equal protection of the laws. Taggart v. Claypole, 145 Ind. 500, 44 N. E. 18, 32 L. R. A. 656. Nor is a discrimination between different localities and between different kinds of fish in game laws. Nor is a summary seizure and destruction of nets, used in violation of such laws. Bittenhaus v. Johnston, 92 Wis. 558, 66 N. W. 806, 32 L. R. A. 380. Statute may allow successful plaintiff in certain cases reasonable attorney's fees, without allowing successful defendant in same cases his attorney's fees. Cameron v. Chicago, M. & St. P. R. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 503; Vogel v. Pekoe, 167 Ill. 350, 42 N. E. 386; 30 L. R. A. 491; see also Union C. Life Ins. Co. v. Chowning, 86 Tex. 654, 26 S. W. 952, 24 L. R. A. 604; Perkins v. St. Louis, I. & S. R. Co., 103 Mo. 62, 15 S. W. 320, 11 L. R. A. 425, contra, Hocking Valley Coal Co. v. Rossor, 59 Ohio St. 12, 41 N. E. 253, 29 L. R. A. 386; Phenix Ins. Co. v. Hert, 112 Ga. 765, 38 S. E. 67, and see also Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 160, 17 Sup. Ct. Rep. 255; Atchison, T., etc. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. Rep. 609. Railroads cannot arbitrarily be required to haul freight over long lines connecting certain points at same rates as are charged for hauling over short lines connecting those points. State v. Sioux City, O. & W. R. Co., 40 Neb. 682, 65 N. W. 765, 791, 31 L. T. 47. Notice by letter and by publication is sufficient when the defendant cannot be found and that fact is established by affidavit. Bickerdtke v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782. Making any person who drives a herd of animals over a hillside road liable for all damage done by them, does not discriminate against him. Brin v. Jones, 11 Utah, 200, 39 Pac. 825, 29 L. R. A. 97; aff. in 105 U. S. 150, 17 Sup. Ct. Rep. 282. Refractory witnesses before grand jury may be summarily imprisoned by justice of peace upon complaint of the grand jury. Re Clark, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 212. Statute authorizing a probate judge to declare a turnpike road abandoned and vacated, no provision being made for jury trial or for right of appeal, is void. Salt Creek V. T. Co. v. Parks, 60 Ohio St. 508, 35 N. E. 304, 28 L. R. A. 760. Statute authorizing execution against members of limited partnership to extent of unpaid subscriptions in satisfaction of debts of partnership is valid if amount unpaid is subject to judicial ascertainment. Rouse, H. & Co. v. Donovan, 104 Mich. 234, 62 N. W. 869, 27 L. R. A. 577, 53 Am. St. 457. Where tenement-house owner is entitled to trial before any penalty can be assessed against him, he is not entitled to be heard before board of health can issue order requiring him to furnish city water on each floor of tenement house. Health Dept. v. Rector of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710, 45 Am. St. 578. Held, that a statute authorizing a road supervisor to enter without notice upon private lands, and take therefrom gravel needed in repairing highways, is valid so long as it contains provisions whereby land-owner is permitted to sue and recover from the county his damages. Branson v. Geo, 25 Ore. 462, 26 Pac. 527, 21 L. R. A. 355. State may compel corporations to pay employees at time of discharge, although
the usual remedies for the collection of debts and the enforcement

regular pay day has not yet arrived, but cannot prevent deduction for damages caused by employee's breach of contract resulting in his discharge. Leep v. St. Louis, I. M. & S. R. Co., 58 Ark. 407, 25 S. W. 75, 41 Am. St. 109, 23 L. R. A. 264. Where property receives no benefit whatever from a local improvement, collection of an assessment thereon would amount to a taking without due process, and will be enjoined. Oregon & C. R. Co. v. Portland, 25 Ore. 229, 35 Pac. 482, 22 L. R. A. 713. A statute attempting to compel the issue of interchangeable railway mileage tickets, and their acceptance by other roads in payment of fare, without giving any lien on tangible property, or providing any fund for their redemption, is void. Att.-Gen. v. Old Colony R. Co., 160 Mass. 62, 35 N. E. 253, 22 L. R. A. 118. Attempted vacation of portion of street solely for private benefit is void. Smith v. McDowell, 148 Ill. 51, 55 N. E. 141, 22 L. R. A. 393. Statute attempting to deprive lot-owners of right to build out to street line, without providing compensation for such deprivation, is void. St. Louis v. Hill, 116 Mo. 527, 22 S. W. 801, 21 L. R. A. 226. Scrip and truck act sustained. Peel Splt Coal Co. v. State, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; Hancock v. Yaden, 121 Ind. 306, 25 N. E. 263, 6 L. R. A. 576, 16 Am. St. 396; contra, Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; State v. Goodwill, 33 W. Va. 170, 10 S. E. 286, 6 L. R. A. 621, 23 Am. St. 863; State v. Fire Creek C. & C. Co., 33 W. Va. 188, 10 S. E. 286, 6 L. R. A. 393, 25 Am. St. 891. Statute restricting right of banking to corporations is bad. State v. Scongal, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, and note, 44 Am. St. 756; contra, State v. Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 429. So is one forbidding employer to levy fine upon employee for defective work. Com. v. Perry, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, and note, 31 Am. St. 533. So in one requiring judgment debtor, at whose suit execution sale is set aside, to repay to purchaser in such sale the money paid by purchaser. Gilman v. Tucker, 128 N. Y. 100, 28 N. E. 1040, 13 L. R. A. 304, 26 Am. St. 494. Except as expressly provided in the Constitution, the right to appeal is subject to legislative regulation. Sullivan v. Hang, 82 Mich. 618, 46 N. W. 795, 10 L. R. A. 263. State may absolutely prohibit the taking of opium into the human body. Territory v. Ah Lim, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395. In Clayannes v. Priestley, 80 Iowa, 316, 45 N. W. 768, 9 L. R. A. 193, it was held that a person may be adjudged insane without notice to him, and thenupon may be confined as an insane person; — certainly a most unusual declaration; contra, Re Gannon, 10 R. I. 726, 19 Atl. 331, 6 L. R. A. 339, and note. But where a writ of capias issues, directing the sheriff to seize the body of the alleged lunatic, give him notice of the inquisition about to be held, and have him before the court at the trial, if not inconsistent with his health and safety, and a guardian ad litem is duly appointed and acts, the proceedings will not, merely because the sheriff returns that it is inconsistent with the health and safety of the alleged lunatic to have him before the court, be adjudged void in the absence of allegation and proof that he requested to be permitted to appear at the trial, and was denied that right. Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. Rep. 385, aff. 118 Ala. 625, 24 So. 380. See also Bumpus v. French, 170 Mass. 131, 60 N. E. 414; State v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 635. Col- linus, J., speaking for the court, says: "To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence. The question here is not whether the tribunal may proceed in and with some regard to the rights of the person before it, but rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld
of other personal rights; and the right to be exempt, in property

unless this right is secured, for the object may be attained in defiance of the Constitution, and without due process of law."

See extended note to this case in 43 Am. St. 531-541, on "due process of law," as applied to lunatics. Service of summons upon resident defendants who can be found within the State is insufficient, if made by publication only. Bardwell v. Anderson, 41 Minn. 97, 98 N. W. 315, 9 L. R. A. 152. Ordinance authorizing arrest and incarceration without warrant or hearing, upon mere refusal to "move on," when so commanded by police officer, is void. State v. Hunter, 106 N. C. 793, 11 S. E. 360, 2 L. R. A. 520, and note. Statute penalizing the sending or taking of any note, bond, account, or chose in action out of the State for the purpose of suing and issuing garnishment or like process therein, against any resident of the State, is void as depriving creditor of property without due process of law. Re Flukes, 157 Mo. 125, 57 S. W. 545, 51 L. R. A. 170. Statute restricting the number of persons a lodging-house keeper may allow to sleep in a single room, but making no provision concerning innkeepers, is void for arbitrary discrimination. Bailey v. People, 199 Ill. 38, 60 N. E. 98. New lien cannot be made superior to an older lien without opportunity to older lienor to be heard. Fisher v. Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 199. In Gillespie v. People, 183 Ill. 176, 58 N. E. 1007, it was held that a statute which made it a criminal offence to intimidate by discharge or threats of discharge any employee from joining a labor union, was void as being a deprivation of liberty without due process of law. And in People v. Coler, 106 N. Y. 1, 59 N. E. 714, 82 Am. St. 695, it was held that an act requiring that contracts therefor entered into for the construction of public works should bind the contractor to pay his laborers the prevailing rates of wages, was void as an undue deprivation of his liberty. See also, in this connection, People v. Coler, 106 N. Y. 1, 58 N. E. 776. No distinction can be made between aliens and citizens in regard to occupations which may be carried on of common right. State v. Montgomery, 94 Me. 192, 47 Atl. 165. Determination of insufficiency of a pauper's support cannot be made by a commission which has no power to administer oaths nor to examine witnesses. Church v. South Kingston, 22 R. I. 331, 48 Atl. 3. Taxing holders of mortgages issued by individuals, and exempting those of mortgages issued by quasi-public corporations, is a denial of equal protection. Russell v. Croy, 161 Mo. 69, 67 S. W. 810. A statute of Nebraska making combinations in restraint of trade illegal, and exempting labor unions, is held valid in Cleland v. Anderson, — Neb., —, 92 N. W. 365. The same statute is declared of no validity for violation of the rule of equal privileges and equal protection in Niagara Ins. Co. v. Cornell, 110 Fed. Rep. 810. The sale, by the State, of ice accumulating on navigable waters, violates the 14th Amendment guaranty of equal protection and privileges. Rossmiller v. State, 114 Wis. 169, 89 N. W. 830, 58 L. R. A. 93. In Comolli v. Union Sewer-Pipe Co., 184 U. S. 540, 22 Sup. Ct. Rep. 481, the court says: "As the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the State to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of the police powers, must yield to that law. . . . The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law of the land." The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety, but if by their necessary operation its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void." In Otis & Gassman v. Parker, — U. S. —, 23 Sup. Ct. Rep. 168, a provision of the Constitution of California was before the court upon the objection that it violated the 14th Amendment. The provision reads: "All contracts for the sales of shares of the capital stock of any corporation or association on margin or to be delivered at a future day shall be void," and further that any money paid
and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to. To this extent, at least, discriminations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident. The protection by due process of law has already been considered. It was not within the power

on such contracts may be recovered back. It was held by a divided court that the provision was not in conflict with the Federal Constitution, against the contentions, that it destroyed the values of this class of property without due process of law, and that it unduly discriminated against this class of property while other familiar objects of speculation, such as cotton or grain, were not touched. It would seem that the prohibition, unless the contract provides for immediate delivery, of sales of such property as the law recognizes, is certainly carrying the police power to its boundary line. For other cases upon due process, equal protection, &c., see Wadsworth v. Union P. R. Co., 13 Col. 600, 32 Pac. 515, 23 L. R. A. 812, 36 Am. St. 509; People v. Yonkers, 110 N. Y. 1, 25 N. E. 329, 23 L. R. A. 481; Attorney-General v. Jochn, 90 Mich. 256, 58 N. W. 611, 23 L. R. A. 629, 41 Am. St. 606; Braceville Coal Co. v. People, 147 Ill. 60, 35 N. E. 62, 22 L. R. A. 310, 37 Am. St. 206; Morton v. New York, 140 N. Y. 207, 35 N. E. 400, 22 L. R. A. 241; Schiltz v. Roenitz, 80 Wis. 31, 55 N. W. 194, 21 L. R. A. 483, 39 Am. St. 878; State v. Loonis, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; State v. Wolfer, 59 Minn. 155, 51 N. W. 1065, 19 L. R. A. 783, 39 Am. St. 532; Jenkins v. Ballantyne, 8 Utah, 245, 32 Pac. 760, 16 L. R. A. 689; Anderson v. Milwaukee, 82 Wis. 270, 52 N. W. 95, 15 L. R. A. 830; Louisville Safety Vault & T. Co. v. Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 570, and extensive note on constitutional equality of privileges, immunities, and protection; Burdett v. Allen, 35 W. Va. 317, 13 S. E. 1012, 11 L. R. A. 337; State v. Burgdoerfer, 107 Mo. 1, 17 S. W. 616, 14 L. R. A. 846; Re Bonds Madera Irrigation District, 92 Cal. 296, 341, 28 Pac. 272, 675, 15 L. R. A. 756, 27 Am. St. 106; Grand Rapids v. Powers, 89 Mich. 94, 56 N. W. 601, 14 L. R. A. 498, and note on establishment of dock lines, 23 Am. St. 270; Re Clayton, 59 Conn. 510, 21 Atl. 1005, 13 L. R. A. 66, 21 Am. St. 128; Leclere v. Drummond, 103 Mo. 540, 15 S. W. 765, 11 L. R. A. 826, 23 Am. St. 895; Louisiane, N. A. & C. R. Co. v. Wallace, 136 Ill. 87, 26 N. E. 493, 11 L. R. A. 757 (short-cause calendar); State v. Robbins, 124 Ind. 508, 24 N. E. 978, 8 L. R. A. 488; State v. Santee, 111 Iowa, 1, 52 N. W. 445; State v. Warren, 113 N. C. 603, 18 S. E. 498; Attorney General v. Boston & A. Ry. Co., 100 Mass. 62, 55 N. E. 252, 22 L. R. A. 112; State v. Eby, Mo.—, 71 S. W. 52; State v. Mitchell, Mo.—, 53 Atl. 897. In which last case a hawker's and peddler's act requiring those paying less than $25.00 in taxes on stock to pay a license fee, and exempting those paying that amount or more of taxes on stock, was held invalid as violating the right of equal protection.]
of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.

Judicial Proceedings.

Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, arises as often when judicial action is in question as in any other cases. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of the judicial authority are much better defined than those of the legislative, and each case can generally be brought to the test of definite and well-settled rules of law.

The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. (a) Jurisdiction is, first, of the subject-matter; and, second, of the persons whose rights are to be passed upon.¹

A court has jurisdiction of any subject-matter, if, e. g. the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.

It is a maxim in the law that consent can never confer jurisdiction: ² by which is meant that the consent of parties cannot

¹ "Jurisdiction is a power constitutionally conferred upon a court, a single judge, or a magistrate, to take cognizance and decide causes according to law, and to carry their sentence into execution. The tract of land within which a court, judge, or magistrate has jurisdiction is called his territory; and his power in relation to his territory is called his territorial jurisdiction." 3 Bouv. Inst. 71.

² Coffin v. Tracy, 3 Caines, 129; Blin v. Campbell, 14 Johns. 432; Cuyler v. Rochester, 12 Wend. 155; Dudley v. Mayhew, 3 N. Y. 9; Preston v. Boston, 12 Pick. 7; Chapman v. Morgan, 2 Greene (Iowa), 374; Thompson v. Steamboat Morton, 2 Ohio St. 25; Gilliland v. Administrator of Sellers, 2 Ohio St. 223; Dicks v. Hatch, 10 Iowa, 380; McCall v. Peachev, 1 Call, 55; Bents v. Graves, 3 McCord, 280; Overstreet v. Brown, 4 McCord, 79; Green v. Collins, 6 Irel. 139; Boswick v. Perkins, 4 Ga. 47; Georgia R. & R. & e. v. Harris, 5 Ga. 527; State v. Bonney, 34

(a) [Any action taken by a court in the absence of the facts upon which its jurisdiction rightfully rests is void, and may be collaterally impeached. Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. Rep. 1108, rev. 5 Wash. 390, 31 Pac. 873, 31 Am. St. 863.]
empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory.

In regard to private controversies, the law always encourages voluntary arrangements; and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award; and a mere neglect by either party to object to the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an

Mc. 223; Little v. Fitto, 33 Ala. 313; Ginn v. Rogers, 9 Ill. 131; Neill v. Reese, 6 Tex. 23; Ames v. Boland, 1 Minn. 365; Brady v. Richardson, 18 Ind. 1 White v. Buchanan, 6 Cald. 52; Andrews v. Wheaton, 28 Conn. 112; Collamer v. Page, 35 Vt. 387.


individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented or not. Those cases in which it has been held that the constitutional right of trial by jury cannot be waived are strongly illustrative of the legal view of this subject.  

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purposes of the hearing.

Sometimes jurisdiction of the subject-matter will depend upon considerations of locality, either of the thing in dispute or of the parties. At law certain actions are local, and others are transitory. The first can only be tried where the property which is the subject of the controversy, or in respect to which the controversy has arisen, is situated. The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different States or countries. The question of jurisdiction in these cases is sometimes determined by the common law, and sometimes is matter of statutory regulation. But there is a class of cases in respect to which the courts of the several States of the Union are constantly being called upon to exercise authority, and in which, while the jurisdiction is conceded to rest on considerations of locality, there has not, unfortunately, at all times been entire harmony of decision as to what shall confer jurisdiction. We refer now to suits for divorce from the bonds of matrimony.

The courts of one State or country have no general authority to grant divorce, unless for some reason they have control over the particular marriage contract which is sought to be annulled. But what circumstance gives such control? Is it the fact that the marriage was entered into in such country or State? Or that

1 Brown v. State, 8 Blackf. 531; Work v. Ohio, 2 Ohio St. 296; Canzani v. People, 18 N. Y. 128; People v. Smith, 9 Mich. 193; Hill v. People, 16 Mich. 351; Whorton v. Morange, 22 Ala. 201; Fleishman v. Walker, 91 Ill. 348; Shissler v. People, 93 Ill. 472. See also State v. Turner, 1 Wright, 29.

2 Winchester v. Ayres, 4 Greene (Iowa), 101. See post, 580, note.

3 See a case where a judgment of a United States court was treated as of no force, because the court had not jurisdiction in respect to the plaintiff. Vose v. Morton, 4 Cush. 27. As to third persons, a judgment against an individual may sometimes be treated as void, when he was not amenable in that court or in that manner, notwithstanding he may have so submitted himself to the jurisdiction as to be personally bound. See Georgia R. R. & c. v. Harris, 5 Ga. 527; Hinchman v. Town, 10 Mich. 508.
the alleged breach of the marriage bond was within that jurisdiction? Or that the parties resided within it either at the time of the marriage or at the time of the offence? Or that the parties now reside in such State or country, though both marriage and offence may have taken place elsewhere? Or must marriage, offence, and residence, all or any two of them, combine to confer the authority? These are questions which have frequently demanded the thoughtful attention of the courts, who have sought to establish a rule at once sound in principle, and that shall protect as far as possible the rights of the parties, one or the other of whom, unfortunately, under the operation of any rule which can be established, it will frequently be found has been the victim of gross injustice.

We conceive the true rule to be that the actual, bona fide residence of either husband or wife within a State will give to that State authority to determine the status of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offence; and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not bona fide, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.1

1 There are a number of cases in which this subject has been considered. In Inhabitants of Hanover v. Turner, 14 Mass. 227, instructions to a jury were sustained, that if they were satisfied the husband, who had been a citizen of Massachusetts, removed to Vermont merely for the purpose of procuring a divorce, and that the pretended cause for divorce arose, if it ever did arise, in Massachusetts, and that the wife was never within the jurisdiction of the court of Vermont, then and in such case the decree of divorce which the husband had obtained in Vermont must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage between the parties. See also Vischer v. Vischer, 12 Barb. 640; and McGiffert v. McGiffert, 31 Barb. 60. In Chase v. Chase, 6 Gray, 157, the same ruling was had as to a foreign divorce, notwithstanding the wife appeared in and defended the foreign suit. In Clark v. Clark, 8 N. H. 21, the court refused a divorce on the ground that the alleged cause of divorce (adultery), though committed within the State, was so committed while the parties had their domicile abroad. This decision was followed in Greenlaw v. Greenlaw, 12 N. H. 200. The court says: "If the defendant never had any domicile in this State, the libellant could not come here bringing with her a cause of divorce which this court had jurisdiction, if at the time of the [alleged offence] the domicile of the parties was in Maine, and the facts furnished no cause for a divorce there, she could not come here and allege those matters which had already
But to render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or the parties in-occurred, as a ground for a divorce under the laws of this State. Should she under such circumstances obtain a decree of divorce here, it must be regarded as a mere nullity elsewhere." In Frary v. Frary, 10 N. H. 61, importance was attached to the fact that the marriage took place in New Hampshire; and it was held that the court had jurisdiction of the wife's application for a divorce, notwithstanding the offence was committed in Vermont, but during the time of the wife's residence in New Hampshire. See also Kimball v. Kimball, 13 N. H. 222; Batchelder v. Batchelder, 14 N. H. 380; Payson v. Payson, 34 N. H. 518; Hopkins v. Hopkins, 33 N. H. 474; Foss v. Foss, 35 N. H. 283; Norris v. Norris, 64 N. H. 529, 15 Atl. 19. See Trevino v. Trevino, 54 Tex. 261. In Wilcox v. Wilcox, 10 Ind. 436, it was held that the residence of the libellant at the time of the application for a divorce was sufficient to confer jurisdiction, and a decree dismissing the bill because the cause for divorce arose out of the State was reversed. And see Tolon v. Tolon, 2 Blackf. 407. Compare Jackson v. Jackson, 1 Johns. 421; Barber v. Root, 10 Mass. 250; Borden v. Fitch, 15 Johns. 121; Braddock v. Heath, 13 Wend. 407. In any of these cases the question of actual residence will be open to inquiry whenever it becomes important, notwithstanding the record of proceedings is in due form, and contains the affidavit of residence required by the practice. Leith v. Leith, 89 N. H. 20. And see McGiffert v. McGiffert, 31 Barb. 69; Todd v. Kerr, 42 Barb. 317; Huffman v. Hoffman, 46 N. Y. 39; People v. Dawell, 25 Mich. 247; Reed v. Reed, 52 Mich. 117, 17 N. W. 729; Gregory v. Gregory, 78 Mo. 187, 3 Atl. 280; Nye v. Beauchamp, 74 Iowa, 32, 36 N. W. 605; Chaney v. Bryan, 15 Iowa, 560. [A recital in proceedings for divorce of the facts necessary to give jurisdiction may be contradicted in a suit in another State between the same parties. Bell v. Bell, 181 U. S. 175; 21 Sup. Ct. Rep. 551; Andrews v. Andrews, 21 U. S., 22 Sup. Ct. Rep. 237. An injunction may issue against setting up a pretended judgment fraudulently ob-tained in another State in bar of divorce proceedings. Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. Rep. 553.] In a purely collateral civil action, jurisdiction is conclusively presumed. Waldo v. Waldo, 62 Mich. 94, 17 N. W. 709. And see Van Orsdal v. Van Orsdal, 67 Iowa, 35, 21 N. W. 570. The Pennsylvania cases agree with those of New Hampshire, in holding that a divorce should not be granted unless the cause alleged occurred while the complainant had domicile within the State. Dorsey v. Dorsey, 7 Watts, 349; Hollister v. Hollis-ter, 6 Pa. St. 449; McDermott's Appeal, 8 W. & S. 251. And they hold also that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the common domicile of both. Calvin v. Reed, 35 Pa. St. 375; Elder v. Reel, 62 Pa. St. 308, 1 Am. Rep. 414. If a divorce is procured on publication in another State from that of the husband's domicile, where the offence was committed, it is a nullity in the latter State. Flower v. Flower, 42 N. J. Eq. 152. See Cook v. Cook, 56 Wis. 103, 41 N. W. 33, 448. If one is in good faith a resident, his motive in coming to the State is immaterial. Colburn v. Colburn, 70 Mich. 617, 38 N. W. 607; Gregory v. Gregory, 76 Mo. 535. But residence must be actual, not merely legal. Tipton v. Tipton, 87 Ky. 213, 8 S. W. 410. For cases supporting to a greater or less extent the doctrine stated in the text, see Harding v. Alden, 9 Green. 140; Ditson v. Ditson, 4 R. I. 87; Pawling v. Bird's Ex'ts, 13 Johns. 192; Kerr v. Kerr, 41 N. Y. 272; Harrison v. Harrison, 10 Ala. 490; Thompson v. State, 28 Ala. 12; Cooper v. Cooper, 7 Ohio, 594; Mansfield v. McIntyre, 10 Ohio, 28; Smith v. Smith, 4 Greene (Iowa), 396; Yates v. Yates, 15 N. J. Eq. 289; Maguire v. Maguire, 7 Dane, 181; Waltz v. Waltz, 18 Ind. 449; Hull v. Hull, 2 Srob. Eq. 174; Manley v. Manley, 4 Chand. 97; Hubbell v. Hubbell, 3 Wis. 632; Gleason v. Gleason, 4 Wis. 64; Hare v. Hare, 10 Tex. 555; D'Auvilliers v. De Livaudais, 32 La. Ann. 606; Gettys v. Gettys, 3
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interested, be subjected to the process of the court. Certain cases are said to proceed in rem, because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. Of the first class, admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing


Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of Ditson v. Ditson, 4 R. I. 87, which reviews and comments upon a number of the cases cited, and particularly upon the Massachusetts cases of Barber v. Root, 10 Mass. 390; Inhabitants of Hanover v. Turner, 14 Mass. 227; Harteau v. Harteau, 14 Pick. 181; and Lyon v. Lyon, 2 Gray, 367. The divorce of one party divorses both. Cooper v. Cooper, 7 Ohio, 594. And will leave both at liberty to enter into new marriage relations, unless the local statute expressly forbids the guilty party from contracting a second marriage. See Commonwealth v. Putnam, 1 Pick. 139; Baker v. People, 2 Hill, 325. [A divorce was decreed and prohibited marriage within a limited period. A marriage was consummated in another State within the period of prohibition, and this marriage upheld in In re Wood's Estate, — Cal. —, 69 Pac. 950.] A party who has gone into another State and procured a divorce will not be heard to allege his own fraud to impeach it. Elliott v. Wohlfart, 55 Cal. 384. A divorce good at the place of domicile will be sustained in England though the cause would not sustain a divorce there. Harvey v. Farmie, 2 R. 8 App. Cas. 43; Turner v. Thompson, 2 R. 13 P. D. 37.
to which the controversy relates. In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to render judgment. ¹ Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear. ² Some cases also partake of the nature both of proceedings in rem and of personal actions, since, although they proceed by seizing property, they also contemplate the service of process on defendant parties. Of this class are the proceedings by foreign attachment, in which the property of a non-resident or concealed debtor is seized and retained by the officer as security for the satisfaction of any judgment that may be recovered against him, but at the same time process is issued to be served upon the defendant, and which must be served, or some substitute for service had, before judgment can be rendered.

In such cases, as well as in divorce suits, it will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any


² Jack v. Thompson, 41 Miss. 49. As to the right of an attorney to notice of proceedings to disturb him, see notes to pp. 481, 482, and 683. "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." See Bragg's Case, 11 Coke, 90 a; Rex v. Chancellor of Cambridge, 1 Str. 567; Cooper v. Board of Works, 14 C. B. s. s. 191; Meade v. Deputy Marshal, 1 Brock. 324; Gooch v. Mathewson, 61 N. Y. 420; Underwood v. McVeigh, 23 Gratt. 409; McVeigh v. United States, 11 Wall. 259; Littleton v. Richardson, 21 N. H. 170; Black v. Black, 4 Blvd. Sur. Rep. 174, 205; Mead v. Larkin, 60 Ala. 87; Succession of Townsend, 36 La. Ann. 417. [A statute permitting commitment to a hospital for the insane without any provision for notice to the person alleged to be insane, is unconstitutional. Re Lambert, 134 Cal. 629, 66 Pac. 851, 65 L. R. A. 850; see, a statute contemplating proceedings in lunacy in the absence of the alleged lunatic, construed in Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. Rep. 830.] Where, however, a statute provides for the taking of a certain security, and authorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment. Lewis v. Garrett's Adm'r, 6 Miss. 431; People v. Van Eps, 4 Wend. 387; Chappell v. Thomas, 5 Mich. 54; Gildersleeve v. People, 10 Barb. 95; People v. Lott, 21 Barb. 130; Pratt v. Donovan, 10 Wis. 378; Murray v. Hoboken Land Co., 18 How. 272; Philadelphia v. Commonwealth, 52 Pa. St. 451; Whitehurst v. Coleen, 53 Ill. 247. [Decree based upon constructive service of summons against a dead man is absolutely void. Greenstreet v. Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735.]
such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless a substituted service is admissible. A substituted service is provided by statute for many such cases; generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it home, if possible, to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon.¹

¹ "It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon purely ex parte proceedings, without a pretense of notice, or any provision for defending, would be a violation of the constitution, and be void; but where the legislature has presented a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal." Doolin, J., in Matter of Empire City Bank, 18 N. Y. 190, 215. See also, per Morgan, J., in Rockwell v. Nearing, 55 N. Y. 392, 394; Nations v. Johnson, 24 How. 196; Beard v. Beard, 21 Ind. 321; Mason v. Messenger, 17 Iowa, 261; Cupp v. Commissioners of Seneca Co., 19 Ohio St. 173; Campbell v. Evans, 45 N. Y. 356; Happy v. Mosher, 48 N. Y. 313; Jones v. Driskell, 94 Mo. 190, 7 S. W. 111; Palmer v. McCormick, 28 Fed. Rep. 541; Traylor v. Lide, 7 S. W. 58 (Tex.). If an absent defendant returns pending publication, he need not be personally served. Duché v. Voisin, 18 Abb. N. C. 358. Jurisdiction cannot be acquired by ordering goods of a non-resident for the mere purpose of attaching them. Copas v. Anglo-Am. Prov. Co., 73 Mich. 541, 41 N. W. 590. In Burnham v. Commonwealth, 1 Div. 210, a personal judgment against the abounding officers of the provisional government was sustained. But in the case of constructive notice, if the party appears, he has a right to be heard, and this cannot be denied him, even though he be a rebel. McVeigh v. United States, 11 Wall. 259, 267. So a court cannot deprive a party of the right to be heard upon an application for an injunction because guilty of a previous contempt. Harby v. Montana O. P. Co., — Mont. —, 71 Pac. 407 (Jan. 26, 1903). There is no valid service upon a foreign corporation where the service is merely upon the president, and he is in the State purely upon private business, and the corporation is not and has not been doing business within the State. Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. Rep. 36; but if thereafter the corporation appears in court by its attorneys, and goes to the trial of the case upon its merits, the invalidity of service is waived. Ib. A statute providing for service upon the agent of a non-resident doing business in the State, is void. Cabbage v. Graf. — Minn. —, 92 N. W. 461. Upon the sufficiency of notice by registered letter to last known address of party, in proceedings to determine priority of water rights, see Farm Ins. Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 256, 50 L. R. A. 747; in determining title to lands under the Torrens Land Registration system, Tyler v. Bd. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433. A judgment creating a preference for a labor debt over pre-existing lien without notice and opportunity to be heard given.
But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one in rem, but when the res is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings.¹ Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due

process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered. (a)

The same rule applies in divorce cases. The courts of the State where the complaining party resides have jurisdiction of the subject-matter; and if the other party is a non-resident, they must be authorized to proceed without personal service of process. The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the status of the complaining party, and thereby terminating the marriage; and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject could only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there. (b)

But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the State, it would be competent to provide by law for the seizure and appropriation of such property, under the


It is immaterial in those cases whether notice was actually brought home to the defendant or not. And see Heirs of Holman v. Bank of Norfolk, 12 Ala. 339. But see contra, People v. Baker, 76 N.Y. 78; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Magurn v. Magurn, 11 Ont. App. 178; Flower v. Flower, 32 N. J. Eq. 152, 7 Atl. 669.

2 This must be so on general principles, as the appointment of guardians for minors is of local force only. See Morrell v. Dickey, 1 Johns. Ch. 153; Woodworth v. Spring, 4 Allen, 321; Potter v. Hiscox, 30 Conn. 508; Kraft v. Wickey, 4 G. & J. 322, 23 Am. Dec. 569. In Kline v. Kline, 57 Iowa, 336, 10 N. W. 825, an order awarding custody of children was held imperative when at the time the children were in another State; and in People v. Allen, 40 Hun, 611, an order made where all parties resided was held binding in another State. The case of Townsend v. Kendall, 4 Nunn. 412, appears to be contra, but some reliance is placed by the court on the statute of the State which allows the foreign appointment to be recognized for the purposes of a sale of the real estate of a ward.

(a) [Statute providing for service by publication in actions in rem is due process. See note, 87 Am. St. Rep. 360.]
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decree of the court, to the use of the complainant; but the legal
tribunals elsewhere would not recognize a decree for alimony or
for costs not based on personal service or appearance. The
remedy of the complainant must generally, in these cases, be
confined to a dissolution of the marriage, with the incidental
benefits springing therefrom, and to an order for the custody of
the children, if within the State. 1

When the question is raised whether the proceedings of a court
may not be void for want of jurisdiction, it will sometimes be
important to note the grade of the court, and the extent of its
authority. Some courts are of general jurisdiction, by which is
meant that their authority extends to a great variety of matters;
while others are only of special and limited jurisdiction, by which
it is understood that they have authority extending only to certain
specified cases. The want of jurisdiction is equally fatal in the
proceedings of each; but different rules prevail in showing it.
It is not to be assumed that a court of general jurisdiction has in
every case proceeded to adjudge upon matters over which it had no
authority; and its jurisdiction is to be presumed, whether there
are recitals in its records to show it or not. On the other hand,
no such intention is made in favor of the judgment of a court
of limited jurisdiction, but the recitals contained in the minutes
of proceedings must be sufficient to show that the case was one
which the law permitted the court to take cognizance of, and that
the parties were subjected to its jurisdiction by proper process. 2

There is also another difference between these two classes of

1 See Jackson v. Jackson, 1 Johns. 424; Hardin v. Alden, 9 Me. 149, 23
Am. Dec. 549; Holmes v. Holmes, 4 Barb. 295; Crane v. Megginson, 1 Gill & J. 493;
440; Sowders v. Edmunds, 76 Ind. 123.
In Beard v. Beard, 21 Ind. 321; Perkins, J., after a learned and somewhat elaborate
examination of the subject, expresses the
opinion that the State may permit a personal
judgment for alimony in the case of a resident defendant, on service by
publication only, though he conceded that there would be no such power in the
case of non-residents. Upon a California
divorce a wife is not entitled to dower
in Oregon lands, which in such case is
allowed in Oregon, although the Cali-

2 See Dakin v. Hudson, 6 Cow. 221; Cleveland v. Rogers, 5 Wend. 432; Peo-
ple v. Kocher, 7 Hill, 39; Sheldon v. Wright, 5 N. Y. 437; Clark v. Holmes,
1 Doug. (Mich.) 330; Cooper v. Sunderland, 3 Iowa, 114; Wall v. Trumbull, 10
Mich. 228; Denning v. Corwin, 11 Wend.
417; Bridge v. Ford, 4 Mass. 641; Smith
v. Rice, 11 Mass. 507; Barrett v. Crane,
16 Vt. 246; Tift v. Griffin, 4 Ga. 185;
Jennings v. Stafford, 1 Ired. 404; Per-
rine v. Farr, 22 N. J. 356; State v. Metz-
ger, 26 Mo. 65; Owen v. Jordan, 27 Ala.
608; Hill v. Pride, 4 Cal. 107; Sullivan
v. Blackwell, 28 Miss. 757. If without
the aid of a transcript evidence a justice's judg-
ment is void, it cannot be aided by filing
a transcript of it in a court of general
73. If a court of general jurisdiction ex-
ercises special powers in a proceeding
not after the course of the common law,
the essential jurisdictional facts must
Pa. 812 (Oreg.).
tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect. But in the case of a court of special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record. This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions.

1 See this subject considered at some length in Wilcox v. Kassick, 2 Mich. 109. The record cannot be contradicted by parol. Littleton v. Smith, 110 Ind. 230, 21 N. E. 886; Turner v. Malone, 24 S. C. 398; Boyd v. Roane, 49 Ark. 397, 5 S. W. 704; Harris v. McLachan, 11 Lea, 181. General recitals may be contradicted by more specific ones in the same record. Cloud v. Pierce City, 80 Mo. 457. And see Adams v. Cowles, 95 Mo. 501, 8 S. W. 711; Rape v. Heaton, 9 Wis. 329; Bineler v. Dawson, 5 Ill. 536; Webster v. Reid, 11 How. 437.

2 Sheldon v. Wright, 5 N. Y. 497; Dyckman v. Mayor, &c. of N. Y., 5 N. Y. 431; Clark v. Holmes, 1 Doug. (Mich.) 390; Cooper v. Sunderland, 3 Iowa, 114; Sears v. Terry, 26 Conn. 273; Brown v. Foster, 6 R. I. 504; Fawcett v. Fowlis, 1 Man. & R. 102. But see Facey v. Fuller, 13 Mich. 527, where it was held that the entry in the docket of a justice that the parties appeared and proceeded to trial was conclusive. And see Selin v. Snyder, 7 S. & R. 172.

3 Britain v. Kinnaird, 1 B & B. 482. Conviction under the Bumbout Act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the fact. Dallas, Ch. J.: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear, on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree, that if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel, ...ill, it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person, place, and subject-matter is stunted in its nature, and cannot be lawfully exceeded. I agree: but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? Does not the place, does not the subject-
When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void. An action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged, in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present we are not to look to the inconvenience, but at the law; but surely if the magistrate acts bona fide, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a mandamus to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged."

See also Bosten v. Carew, 3 B. & C. 648; Fawcett v. Powlis, 7 B. & C. 391; Ashley v. Bourne, 3 B. & Ad. 681; Mather v. Hodli, 8 Johns. 44; Mackaboy v. Commonwealth, 2 Virg. Cas. 270; Ex parte Kellogg, 6 Vt. 509; State v. Scott, 1 Bailey, 294; Fackey v. Fuller, 13 Mich. 527; Wall v. Trumbull, 16 Mich. 229; Sheeldon v. Wright, 5 N. Y. 497; Wanzer v. Howland, 10 Wis. 10; Ricketts v. Spraker, 77 Ind. 371; Fanning v. Krapfi, 68 Iowa, 244. 26 N. W. 133; Schee v. La Grange, 78 Iowa, 101, 42 N. W. 616; Sims v. Gay, 109 Ind. 501, 9 N. E. 120; Epping v. Robinson, 21 Fla. 35; Freeman on Judgments, § 529, and cases cited.

1 Ex parte Kellogg, 6 Vt. 509; Edgerton v. Hart, 8 Vt. 208; Carter v. Walker, 2 Ohio St. 339; White v. Crow, 110 U. S.
irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case; 1 and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it. 2

We have thus briefly indicated the cases in which judicial action may be treated as void because not in accordance with the law of the land. The design of the present work does not permit an enlarged discussion of the topics which suggest themselves in this connection, and which, however interesting and important, do not specially pertain to the subject of constitutional law.


A judge cannot perform any judicial act when he is beyond the limits of his State; nor even the granting of a certiorari. Buchanan v. Jones, 12 Ga. 612.

1 "The doing or not doing that in the conduct of a suit at law, which, conformably to the practice of the court, ought or ought not to be done." Bov. Law Dig. See Dick v. Mclaurin, 63 N. C. 185.

2 Robinson v. West, 1 Sandh. 19; Malone v. Clark, 2 Hill, 657; Wood v. Randall, 4 Hill, 264; Baker v. Kerr, 13 Iowa, 321; Loomis v. Wadams, 8 Gray, 557; Warren v. Glynn, 37 N. II. 340. A strong instance of waiver is where, an appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Randolph Co. v. Railz, 18 Ill. 29; Wells v. Scott, 4 Mich. 317; Tower v. Lamb, 6 Mich. 392. If an objection to proceeding with a jury of less than twelve is overruled, it is not waived by moving for judgment on the findings of such jury. Eshelman v. Chicago, &c. Ry. Co., 67 Iowa, 206, 25 N. W. 251.
But a party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers. Proceeding in any such case would be void; but they must be carefully distinguished from those cases in which the court has itself acted, though irregularly. All the State constitutions preserve the right of trial by jury, (a) for civil

1 Hall v. Marks, 24 Ill. 358; Chandler v. Nash, 5 Mich. 409. It is not competent to provide by statute that the judge may call a member of the bar to sit in his place in a special case. "The legislature has no power to authorize a district judge to place his judicial robe upon the shoulders of any man." Winchester v. Ayres, 4 Greene (Iowa), 191. See Wright v. Boom, 2 Greene (Iowa), 458; Michales v. Hine, 3 Greene (Iowa), 470; Smith v. Frisbie, 7 Iowa, 486. To allow it would be to provide a mode for choosing judges different from that prescribed by the Constitution. State v. Phillips, 27 La. Ann. 663; State v. Fritz, 27 La. Ann. 680. Even the consent of parties would not give the judge this authority. Hoagland v. Creed, 81 Ill. 596; Andrews v. Beck, 23 Tex. 455; Haverly L. M. Co. v. Hawsett, 6 Col. 574. In Missouri there is statutory provision for a special judge. State v. Hosmer, 85 Mo. 653. Under the Tennessee statute a special judge can act only in civil cases. Neil v. State, 2 Lea, 674. It is competent to send a case to referees or to a master for investigation of accounts. Underwood v. McDuffee, 15 Mich. 351; Hard v. Burton, 79 Ill. 501. All the issues in a case involving accounts may be referred. Huston v. Wadsworth, 5 Col. 213. But it is not competent to give the referee powers of final decision. Johnson v. Wallace, 7 Ohio, 342; King v. Hopkins, 57 N. Y. 324; St. Paul &c. R. R. Co. v. Gardner, 19 Minn. 122, 18 Am. Rep. 331. A decree for the payment of money must specify the precise amount to be paid, and not leave it to subsequent computation. Aldrich v. Sharp, 4 Ill. 281; Smith v. Trimble, 27 Ill. 152. For the general principle that judicial power cannot be delegated, see further, Gough v. Dorsey, 27 Wis. 119; Milwaukee Industrial School v. Supervisors, 40 Wis. 323; Allor v. County Auditors, 43 Mich. 76, 4 N. W. 422; Ward v. Farwell, 97 Ill. 593. [The indeterminate sentence law giving authority to the prison board to determine the term of imprisonment within limits fixed by the judgment of the court is not in violation of the rule against the delegation of judicial power. Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 193. Dreyer v. People, 188 Ill. 40, 58 N. E. 629. Contra, in Michigan, People v. Cummings, 88 Mich. 249, 50 N. W. 310. See also, 9 Yale Law Jour. 17.] A justice having power to issue writs as the commencement of suit, cannot issue them in blank to be filled up by parties or by ministerial officers. Pierce v. Hubbard, 10 Johns. 405; Craighead v. Martin, 25 Minn. 41. But a writ will not necessarily be quashed because filled up by an unauthorize] person. Kinne v. Hinman, 58 N. Y. 363. The clerk of a court of record may be authorized to enter up judgment in vacation against a defendant whose indebtedness is admitted of record: Lathrop v. Snyder, 17 Wis. 110; but not in other cases. See Grattan v. Matteson, 54 Iowa, 229, 6 N. W. 298; Keith v. Kellogg, 97 Ill. 147. Such an entry not authorized or approved by the court is void. Balm v. Kumm, 63 Iowa, 641, 19 N. W. 810; Mitchell v. St. John, 28 Ind. 558. For the distinction between judicial and ministerial action, see Flournoy v. Jellisonville, 17 Ind. 169; People v. Bennett, 29 Mich. 431. [Statute providing for charging a town with maintenance of a pauper report of a commission whose members are not required to take an oath, or to administer oaths to witnesses, or to pronounce judgment, violates provision for due process of law. Church v. South Kingston, 22 R. I. 381, 48 Atl. 3, 53 L. R. A. 730.]

(a) [Upon extent of this right, see note to 41 L. ed. U. S. 113.]
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as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before.¹ But in doing this, they preserve the historical jury of twelve men,² with all its incidents, unless a contrary purpose clearly appears. The party is therefore entitled to examine into the qualifications and im-


partiality of jurors; 1 and to have the proceedings public; 2 and no conditions can be imposed upon the exercise of the right that shall impair its value and usefulness. 3 It has been held, however, in many cases, that it is competent to deny to parties the privilege of a trial in a court of first instance, provided the right is allowed on appeal. 4 It is undoubtedly competent to create new tribunals without common-law powers, and to authorize them to proceed without a jury; but a change in the forms of action will not authorize submitting common-law rights to a tribunal in which no jury is allowed. 5 In any case, we suppose a failure to award

2 Waterf ord Bank, &c. v. Mix, 51 N. Y. 568.
3 Greene v. Briggs, 1 Curt. C. C. 311; Lincoln v. Smith, 27 Vt. 328; Norristown, &c. Co. v. Burkett, 20 Ind. 59; State v. Ourney, 27 Me. 196; Copp v. Henninger, 25 N. Y. 179. It is not inadmissible, however, to require of a party demanding a jury that he shall pay the jury fee.
a jury on proper demand would be an irregularity merely, rendering the proceedings liable to reversal, but not making them void.

There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own case; and so inflexible and so manifestly just in this rule, that Lord Coke has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for jurur naturae sunt immutabilia, and they are leges legitum." 1

This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. 2 Nor is it essential that the judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named. 3

N. Y. 161; Royal v. Thomas, 28 Grat. 130; 26 Am. Rep. 338; and cases, p. 338, note 2, post.

1 Co. Lit. § 212. See Day v. Savadge, Hobart, 85. We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act of Parliament void; though they would never find such an intent in the statute, if any other could possibly be made consistent with the words.


If the property of a judge from its situation will be affected like complainant's by his ruling he cannot sit. North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315. [Owner of property subject to tax to pay bonded indebtedness of city cannot sit as judge in a case in which validity of such indebtedness is involved. Meyer v. San Diego, 121 Cal. 102, 113, 53 Pac. 434, 1128; 41 L. R. A. 792, 66 Am. St. 22. Nor can one who has theretofore been an attorney in the case, although the relation of attorney and client has ceased. State v. Hoeker, 34 Fla. 25, 15 So. 581, 25 L. R. A. 114, and note. Nor if he is a vestryman can he act in a case involving the interests of his church. State v. Young, 31 Fla. 594, 12 So. 673, 19 L. R. A. 630, 34 Am. St. 41.] As to disqualification by relationship, see Russell v. Belcher, 76 Me. 501; Patterson v. Collier, 75 Ga. 410; Jordan v. Moore, 65 Tex. 362; Hume v. Commercial Bank, 10 Lea, 1.
Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence." 1

It is matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy. The maxim itself, it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act; 2 but we prefer the opinion of Chancellor Sanford of New York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights, or his own wrongs. 3

It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be, that the principal creditor was held void. And see People v. Gies, 25 Mich. 83. [In Florida a judge is disqualified to sit in a cause in which the husband of a niece of the judge is a party. State v. Wall, 41 Fla. 463, 28 So. 1029, 49 L. R. A. 548. A judge whose wife is a stockholder in a corporation cannot sit in the trial of a cause to which it is party. First Nat. Bank v. McGuire, 12 S. D. 226, 80 N. W. 1074, 47 L. R. A. 413, 76 Am. St. 598.]

1 Dimes v. Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759, 793.
2 Ranger v. Great Western R., 6 House of Lords Cases, 72, 88; Stuart v. Mechanics' & Farmers' Bank, 19 Johns. 496.
3 Washington Insurance Co. v. Price, Hopkins. Ch. 1. This subject was considered in Hall v. Thayer, 105 Mass. 219, and an appointment by a judge of probate of his wife's brother as administrator of an estate of which her father was a principal creditor was held void. And see People v. Gies, 25 Mich. 83. [In Florida a judge is disqualified to sit in a cause in which the husband of a niece of the judge is a party. State v. Wall, 41 Fla. 463, 28 So. 1029, 49 L. R. A. 548. A judge whose wife is a stockholder in a corporation cannot sit in the trial of a cause to which it is party. First Nat. Bank v. McGuire, 12 S. D. 226, 80 N. W. 1074, 47 L. R. A. 413, 76 Am. St. 598.]
interest is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual. And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest. And it is very common, in a certain class of cases, for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the State, which passes the law, or the municipalities, which are its component parts and subject to its control, can be regarded as such.

But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.

1 Commonwealth v. Reed, 1 Gray, 475; Justices v. Fennimore, 1 N. J. 190; Commissioners v. Little, 3 Ohio, 289; Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581. See Foreman v. Mariana, 43 Ark. 324, case of annexing territory; Sauls v. Freeman, 24 Fla. 209, 225, 4 So. 625, 577, case of changing county seat.

2 And a judge who is member of a State bar association may pass upon disbarment proceedings brought by the association, although, if the proceedings fail, costs will go against the association. Ex parte Bar Association, 92 Ala. 113, 8 So. 768, 12 L. R. A. 194.

3 Matter of Leefe, 2 Barb. Ch. 39. Even this must be deemed doubtful since the adoption of the fourteenth article of the amendments to the Federal Constitution, which denies to the State the right to deprive one of life, liberty, or property, without due process of law.

Nor do we see how the objection of interest can be waived by
the other party. If not taken before the decision is rendered, it
will avail in an appellate court; and the suit may there be dis-
missed on that ground. The judge acting in such a case is not
simply proceeding irregularly, but he is acting without juris-
diction. And if one of the judges constituting a court is disquali-
fied on this ground, the judgment will be void, even though the
proper number may have concurred in the result, not reckoning
the interested party.

More formal acts necessary to enable the case to be brought
before a proper tribunal for adjudication, an interested judge may
do; but that is the extent of his power.

1 Richardson v. Welcome, 6 Cush. 332; Dimes v. Proprietors of Grand Junction
Canal, 3 H. L. Cas. 759. And see Siggins v. Sibley, 21 Pick. 101; Oakley v.
Aspinwall, 3 N. Y. 517. But it is held in Pettigrew v. Washington Co., 43 Ark. 33,
that after judgment it is too late to ob-
ject that relationship to a party disquali-
fied a judge. But see succeeding note.

2 In Queen v. Justices of Hertford-
shire, 6 Q. B. 753, it was decided that, if
any one of the magistrate hearing a case
at sessions was interested, the court was
improperly constituted, and an order made
in the case should be quashed. It was
also decided that it was no answer to the
objection that there was a majority in
favor of the decision without reckoning
the interested party, nor that the inter-
ested party withdrew before the decision,
if he appeared to have joined in discuss-
ing the matter with the other magis-
trates. See also the Queen v. Justices
of Suffolk, 18 Q. B. 418; The Queen v.
Justices of London, 18 Q. B. 421; Pe-

3 Richardson v. Boston, 1 Curtis, C. C.
250; Washington Insurance Co. v. Price,
Hopk. Ch. 1; Buckingham v. Davis, 9
Md. 324; Heydenfeldt v. Towns, 27 Ala.
If the judge who renders judgment in a
case had previously been attorney in
it, the judgment is a nullity. Reams v.
Kearns, 6 Cold. 217; Slaven v. Wheeler,
68 Tex. 23. [Or if he has advised one
of the parties upon his rights in regard
to any fact involved in the case. Tampa
St. R. & P. Co. v. Tampa Suburban R.
Co., 30 Fla. 595, 11 So. 692, 17 L. R. A.
681.] So though the case in suit is not
precisely the one in which he has been
consulted. Newcome v. Light, 68 Tex.
141.